

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

FRANK J VIOLA
Claimant

APPEAL NO. 15A-UI-01952-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JCG CATERING LLC
MEZZODIS
Employer

OC: 12/21/14
Claimant: Appellant (1)

Iowa Code Section 96.4(3) – Able & Available
Iowa Administrative Code rule 871-24.23(10) – Leave of Absence

STATEMENT OF THE CASE:

Frank Viola filed a timely appeal from the February 4, 2015, reference 01, decision that denied benefits effective January 4, 2015, based on an Agency conclusion that he had requested and been granted a leave of absence from Mezzodis, was voluntarily unemployed from that employment, and did not meet the work availability requirement. After due notice was issued, a hearing was held on March 17, 2015. Mr. Viola participated. Sam Campero, General Manager, represented the employer. The administrative law judge took official notice of the Agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant.

ISSUES:

Whether the claimant requested and was granted a leave of absence.

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Frank Viola established an additional claim for benefits that was effective December 7, 2014 in response to being temporarily laid off from his full-time employment with Larry's Window Service, Inc., effective December 8, 2014. The additional claim was based on an original claim that was effective December 22, 2013. Mr. Viola's weekly benefit amount on the claim was set at \$215.00. That claim year expired on December 20, 2014 and Mr. Frank established a new claim that was effective December 21, 2014. Mr. Viola's weekly benefit in connection with the

new claim was set at \$390.00. Mr. Viola reported wages, and received benefits, for the four-week period of December 7, 2014 through January 3, 2015 as follows:

<u>Benefit week end date</u>	<u>Wages reported</u>	<u>Benefits paid</u>
12/13/14	150.00	118.00
12/20/14	150.00	118.00
12/27/14	175.00	312.00
01/03/15	200.00	287.00

Mr. Viola continued his claim for another 10 weeks, through the week that ended March 14, 2015. He reported zero wages for the nine-week period of January 4-March 7, 2015. He reported \$95.00 in wages for the week that ended March 14, 2015.

At the same time Mr. Viola worked for Larry's Window Service, he was also employed on a part-time basis as a food expeditor with JCG Catering, L.L.C., d/b/a Mezzodis, a restaurant. The wages reported for December 7, 2014 through January 3, 2015, were wages from Mezzodis. The employment with Mezzodis paid \$9.50 per hour and usually provided 15 hours of work per week. At about the time Mr. Viola was laid off from Larry's Window Service, he notified Sam Campero, General Manager at Mezzodis, that he wanted to take a leave of absence from that employment. Mr. Viola told the employer that he wanted to be off work from Mezzodis from January 5, 2015 and return to work on February 2, 2015. The employer approved the request for the leave of absence. When Mr. Viola requested to extend the leave of absence, the employer approved that request. The employer had work available for Mr. Viola during the leave period, but fewer hours than usual. While Mr. Viola was on the leave of absence, he focused on personal business, including a home remodeling project and working on his car.

Mr. Viola returned to the part-time employment at Mezzodis on March 13, 2015. On March 16, 2015, he returned to full-time employment at Larry's Window Service.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Mr. Viola was indeed on a leave of absence from Mezzodis from Monday, January 5, 2015 through Thursday, March 12, 2015. Mr. Viola requested the leave of absence and the employer approved the leave of absence.

Mr. Viola argues that his leave of absence from the part-time employment should make no difference in his unemployment insurance benefit eligibility because he was temporarily unemployed from his full-time employment with Larry's Window Service.

An individual shall be deemed *temporarily unemployed* if for a period, *not to exceed four consecutive weeks*, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code Section 96.19(38)(c).

Note that the statute limited "temporary unemployment" to four consecutive weeks. Though Workforce Development's practices may be more generous than the statute requires, that does not provide a sound basis for an argument that Mr. Viola can take a leave of absence from a second, ongoing employment without having it impact his benefit eligibility.

Mr. Viola's unemployment insurance benefits, including the weekly benefit and the maximum benefit amounts are based on wages earned from *both* employments, not just the full-time employment. Thus a decision to voluntarily eliminate availability for work with Mezzodis does impact Mr. Viola's benefit eligibility. This would have been made clear to Mr. Viola during the first four weeks of his most recent claim period when he reported wages from Mezzodis and those wages reduced his weekly benefit eligibility. This would also have been made clear to Mr. Viola during the prior claim year, when the wages from Mezzodis consistently impacted his benefit eligibility.

Mr. Viola was not eligible for benefits for the period of January 5, 2015 through the benefit week that ended March 14, 2015, because he was on an leave of absence and was not available for work within the meaning of the law. Mr. Viola was not eligible for benefits for the week that

ended March 14, 2015 because he was not available for work with Mezzodis for the majority of that week. Mr. Viola was not eligible for benefits thereafter because he had returned to both employments.

DECISION:

The February 4, 2015, reference 01, decision affirmed. The claimant is not eligible for benefits for the period of January 5, 2015 through the benefit week that ended March 14, 2015, because he was on an approved leave of absence and was not available for work within the meaning of the law. The claimant was not eligible for benefits for the week that ended March 14, 2015 because he was not available for work with Mezzodis for the majority of that week. The claimant was not eligible for benefits thereafter because he had returned to both employments.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs