

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRACY M RIPPERGER
Claimant

CITY OF WAUKEE
Employer

APPEAL 21A-UI-18876-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.19(38) – Total, Partial, and Temporarily Unemployment
Iowa Admin. Code r. 871-24.23(26) – Same Hours and Wages
Iowa Admin. Code r. 871-24.23(10) – Leave of Absence
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On August 24, 2021, claimant Tracy M. Ripperger filed an appeal from the August 21, 2020 (reference 03) unemployment insurance decision that denied benefits based on a determination that claimant was employed at the same hours and wages and was not available for work due to employment with employer City of Waukee. The parties were properly notified of the hearing. A telephonic hearing was held at 11:05 a.m. on Wednesday, October 20, 2021. Appeal numbers 21A-UI-18875-LJ-T, 21A-UI-18876-LJ-T, 21A-UI-18877-LJ-T, 21A-UI-18878-LJ-T, 21A-UI-18879-LJ-T, 21A-UI-18881-LJ-T, 21A-UI-18882-LJ-T, and 21A-UI-18883-LJ-T were heard together and created one record. The claimant, Tracy M. Ripperger, participated. The employer, City of Waukee, participated through Michelle Lindsay, HR Director; and Toni Coughlin, HR Specialist. No exhibits were offered or admitted into the record. The administrative law judge took official notice of the administrative record.

ISSUES:

Is the appeal timely?
Is the claimant able to and available for work?
Is the claimant totally, partially, or temporarily unemployed?
Is the claimant still employed at the same hours and wages?
Is the claimant on a leave of absence?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for the City of Waukee on September 3, 2007. Claimant has worked for the employer as a seasonal part-time clubhouse assistant each golf season since her date of hire.

Claimant began working for the employer for the 2020 golf season on March 7, 2020. Her work – and the golf course's scheduled opening – was soon interrupted by the COVID-19 global

pandemic. The employer decided to delay opening of the golf course, and it sent claimant and other seasonal employees home until opening day was scheduled.

Subsequently, the employer scheduled opening day for May 18, 2020. Claimant's supervisor, Jodi, contacted claimant on May 14 to let her know the golf course was reopening and to recall her to work effective May 18, 2020. Claimant responded that she was not comfortable returning due to COVID-19. Following this conversation, Jodi came to Coughlin, who was responsible for recruiting, and asked her to continue recruiting for the golf course, as claimant would not be returning.

The employer experienced one of its busiest golf seasons on record during 2020, and it struggled to maintain appropriate staffing. Jodi contacted claimant later during the season and implored her to return, and claimant agreed to come back and assist the employer. Claimant returned to work on August 12, 2020. She worked 7.5 hours on August 12, and she worked 7.5 hours on August 14.

Claimant worked at the golf course through the week ending September 12, 2020. On September 14, claimant contacted the employer and reported that she would not be returning to work, due to the rising COVID-19 numbers. The employer had work available for the claimant, had she not removed herself from employment. The employer's golf course remained open through early November 2020.

Two disqualification decisions were mailed to claimant's last known address of record in Des Moines on August 21, 2020. The first sentence of each decision states, "If this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay." Each decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by August 31, 2020. The appeal was not filed until August 24, 2021, which is after the date noticed on the disqualification decision.

The administrative record reflects that claimant last filed a weekly continued claim for benefits for the week ending August 15, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer extended an offer of suitable work to the claimant when it recalled her to work. The claimant declined this offer as she was not available for work.

As an initial matter, the administrative law judge believes claimant failed to file a timely appeal. Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision."

Iowa Admin. Code r. 871-24.35(1) provides:

1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

(a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

(b) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

(c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. IDJS*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott* 319 N.W.2d 244, 247 (Iowa 1982).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact above demonstrate how the credibility issues were resolved regarding the sequence of events in 2020. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than the claimant's testimony. Claimant's denial that she received either of the disqualification decisions in August 2020 is not believable, considering she was having no difficulty receiving her mail and no explanation for how the decisions were mailed out and successfully made it to the employer and not to her.

Here, the claimant received the decision in the mail and, therefore, had an opportunity to file an appeal prior to the appeal deadline. Claimant's delay was not due to an error or misinformation

from the Department or due to delay or other action of the United States Postal Service. No other good cause reason has been established for the delay. Claimant's appeal was not filed on time and the administrative law judge lacks jurisdiction (authority) to decide the other issue in this matter.

Even if the claimant's appeal is deemed timely, the administrative law judge finds claimant is ineligible for benefits. 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 Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, 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 Admin. Code r. 871-24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Under Iowa Employment Security Law, an individual must be totally or partially unemployed to be eligible for benefits. Iowa Code § 96.19(38). Total unemployment is when someone has received no wages and performed no services during any given week. *Id.* In this case, the claimant performed services and earned wages through the week ending September 12, 2020. She is not totally unemployed for those weeks.

The next question is whether she is partially unemployed. In order to be partially unemployed, an individual must be laid off from full-time employment or working less than his or her regular full-time work week. *Id.* If an individual is employed in a part-time position working the same hours and wages as contemplated at hire, he or she cannot be considered partially unemployed. Iowa Admin. Code r. 871-24.23(26). The claimant was hired into and requested a part-time position. She has worked part-time hours during her entire employment. Her hours have fluctuated as was the expectation when she was hired. She continues to work for the employer. As the claimant is working in a part-time job in the same hours and wages contemplated at hire, the claimant is not partially unemployed and is not eligible for benefits through the week ending September 12, 2020.

The final question is whether claimant is eligible for benefits effective September 13, 2020.

Iowa Code section 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. 871-24.23(10) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(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.

In this case, the employer had work available for claimant from September 13, 2020, through the first week of November, when the golf course closed. Claimant declined to accept this work because she was not comfortable working due to the COVID-19 pandemic. The administrative

law judge finds claimant was not available for work effective September 13, 2020, through November 7, 2020. Benefits are withheld.

DECISION:

The August 21, 2020 (reference 03) unemployment insurance decision is affirmed. Claimant is neither totally nor partially unemployed. Benefits are withheld for the weeks ending September 12, 2020.

Effective September 13, 2020, claimant resumed a leave of absence and was not available for work. Benefits are withheld through the week ending November 7, 2020.



Elizabeth A. Johnson
Administrative Law Judge
Unemployment Insurance Appeals Bureau

November 1, 2021
Decision Dated and Mailed

lj/scn