

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER A BURCO
Claimant

APPEAL NO. 11A-UI-06996-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HILLCREST REST HOME INC
Employer

OC: 04/24/11
Claimant: Respondent (1)

Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

Hillcrest Rest Home, Inc. (Hillcrest) filed an appeal from a representative's decision dated May 19, 2011, reference 02, which allowed benefits to Jennifer Burco but denied the employer relief from benefit charges. After due notice was issued, a hearing was held by telephone on June 21, 2011. Ms. Burco participated personally. The employer participated by Linda Niedert, Office Manager, and Elizabeth Diers, Dietary Manager. Exhibits One through Ten were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Burco has satisfied the availability requirements of the law since filing her claim for benefits effective April 24, 2011.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Burco began working for Hillcrest on July 13, 2007 as a part-time dietary aide. In December of either 2008 or 2009, she assumed duties as a cook. At that point, she was working 72 hours per two-week pay period as a cook and dietary aide.

On January 28, 2011, Ms. Burco was relieved of her duties as a cook due to tardiness and what the employer felt were unsafe food-handling incidents. On May 4, 2010, her supervisor met with her to go over a list of expectations regarding her job performance and conduct. On May 27, 2010, she received a written warning for attendance and for failing to unplug a piece of equipment before cleaning it. The dates on which she had been absent or late prior to the warning are unknown. Ms. Burco's second warning was on November 1, 2010 and was due to the fact that she had made menu substitutions on two occasions without prior authorization. She was suspended from cooking duties from November 2 through November 9. She was advised that the next violation would result in a one-week suspension without pay. Her evaluation of November 2, 2010 was "marginal."

On January 18, 2011, the dietician noted that the soup was lukewarm. It was to be at 185 degrees but was only 155 degrees. Ms. Burco indicated she believed there was a problem

with the heating element on the serving table but it was determined to be functioning properly. No disciplinary action was taken at that time. On January 28, she was notified that her cooking hours were being revoked indefinitely and that she was being suspended for one week without pay. The action was taken as a result of her failure to report for work on January 27. With the removal of the cook's hours, she was reduced to working 16 hours per two-week pay period.

Ms. Burco filed a claim for job insurance benefits effective April 24, 2011. She remains available to work the same number of hours for the employer as she has worked in the past.

REASONING AND CONCLUSIONS OF LAW:

Ms. Burco's hours have been reduced at the employer's initiative. She remains available to work the same number of hours she had been working prior to the reduction. As such, she satisfies the availability requirements of Iowa Code § 96.4(3). It was the employer's contention that Ms. Burco's own misconduct resulted in the reduction and, therefore, she should not be entitled to job insurance benefits.

Although the evidence established that Ms. Burco was an unsatisfactory employee, it did not establish a deliberate and intentional disregard of the employer's standards. For the most part, the problems were corrected with warnings. The employer did not provide sufficient evidence to establish that her attendance constituted excessive unexcused absenteeism. For the above reasons, the employer's complaints would not result in a misconduct disqualification had the separation been a discharge rather than a reduction. As such, there is no basis for disqualification.

DECISION:

The representative's decision dated May 19, 2011, reference 02, is hereby affirmed. Ms. Burco is allowed benefits effective April 24, 2011 as she satisfied the availability requirements of the law. Because the reduction in hours was at the employer's initiative, the employer is not entitled to relief from charges.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs