

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHLEEN M LUENSMANN
Claimant

APPEAL NO: 06A-UI-10235-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF WEBSTER CITY
Employer

**OC: 06/11/06 R: 01
Claimant: Appellant (1)**

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

Kathleen M. Luensmann (claimant) appealed a representative's October 13, 2006 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits in connection with her employment with the City of Webster City (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 6, 2006. The claimant participated in the hearing. Beth Chelesvig appeared on the employer's behalf and presented testimony from two other witnesses, Mike McConell and Peggy Arends. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on July 22, 2002. She had worked full time as a police dispatcher. As a result of a transfer of emergency functions to a centralized county facility, as of June 11, 2005 the claimant went to part time status working weekend shifts. From then through March 2006 she worked primarily on her preferred shift, the 4:00 p.m. to 12:00 a.m. shift, or her second choice of shifts, the 12:00 a.m. to 8:00 a.m. shift; she seldom worked the 8:00 a.m. to 4:00 p.m. shift. In the first quarter 2006 (January 1 through March 31, 2006) the claimant worked 24 shifts, 12 of which were the 4:00 p.m. to 12:00 a.m. and 12 of which were the 12:00 a.m. to 8:00 a.m. shift.

The claimant took herself off the schedule for availability for shifts for several of the weekends in April 2006 due to her husband being on military leave from Iraq. She returned to the schedule in May, but in about mid-May learned she was pregnant. She had some related illness, and on May 17 inquired of her supervisor, Ms. Arends, if she could be off work on May 20 and May 21 as she was scheduled for night shifts those nights and she felt she needed to get more regular sleep at that time; Ms. Arends agreed. The claimant did continue to work some hours at

another employer as those were day hours; however, when the employer learned the claimant had worked at that other employer on May 20 or May 21, the employer became concerned the claimant was not wishing to continue in her employment with the employer.

The claimant was summoned for a meeting with Ms. Arends on May 26. The claimant maintained that she did still wish to stay in her employment with the employer; however, at that time the claimant's doctor was also recommending that the claimant work days only, as evidenced by a doctor's note provided to the employer on or about June 30. The employer was initially uncertain as to whether this meant the claimant was only being allowed to work the 8:00 a.m. to 4:00 p.m. schedule, the shift she had worked the least, and therefore did not place her on the schedule after May 26 awaiting clarification and any openings in the schedule from those employees who had more routinely worked the day shift. On August 19 the claimant clarified that the doctor was only excluding the 12:00 a.m. to 8:00 a.m. shift, that she could work the 4:00 p.m. to 12:00 a.m. shift she had routinely worked most in the past.

The claimant was returned to the schedule beginning about September 7, 2006, but has not been scheduled for as many shifts as she had been scheduled prior to April 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

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".

While a claimant generally does not have to be available for a particular shift in order to be "able and available" for work, the claimant must first be "available for work on the same basis on which the individual's wage credits were earned." 871 IAC 24.22(2)a. By eliminating her availability for the 12:00 a.m. to 8:00 a.m. shift, the claimant has effectively cut the time she is normally able to work by approximately fifty percent from her base period availability. While she has sought to compensate by making herself more available to work the 8:00 a.m. to 4:00 p.m. shift, this was not substantially the same availability as she had during her base period. While it would be decent for the employer to make some minor modifications to its scheduling to accommodate the claimant, it is not legally compelled to do so. However, if it declines to do so, unemployment insurance benefits cannot be used to fill the gap between what the claimant is scheduled to work and her prior earnings. White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992). Benefits are denied.

DECISION:

The representative's October 13, 2006 decision (reference 01) is affirmed. The claimant is not able to work and available for work on the same basis under which her wage credits were earned effective June 11, 2006. The claimant is not qualified to receive unemployment insurance benefits unless or until that status changes, if she is then otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs