

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHIRLEY E MUIR

Claimant

APPEAL NO: 08A-UI-07009-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LIEBE CARE CENTER INC

Employer

**OC: 06/08/08 R: 02
Claimant: Appellant (4/R)**

Section 96.4-3 - Able and Available
871 IAC 26.8(1) - Withdrawal of Appeal

STATEMENT OF THE CASE:

Shirley E. Muir (claimant) appealed a representative's July 28, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits in conjunction with her employment with Liebe Care Center, Inc. (employer) because of a conclusion that the claimant was still employed with the employer on call and was therefore not able and available for work. Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held on August 18, 2008. Prior to the hearing being held, claimant filed a statement still challenging the correctness of the decision but seeking to withdraw the appeal. The administrative law judge reviewed the request and the file to determine whether the withdrawal should be accepted and concluded that the representative's decision appeared to be incorrect given the information previously provided for the fact-finding interview. However, when the administrative law judge sought to contact the claimant at the scheduled time for the hearing, the claimant was not available. The employer responded to the hearing notice and indicated that Tara Hillegas would participate as the employer's representative. When the administrative law judge contacted Ms. Hillegas for the hearing, she agreed that the administrative law judge's interpretation of the information provided for the fact-finding interview was correct and that the representative's decision should at least be modified based upon a review of the information in the administrative file. Based on a review of the information in the administrative file and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the claimant's statement indicating a decision to withdraw her appeal be approved?

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

FINDINGS OF FACT:

While the claimant did not participate in the fact-finding interview leading to the representative's decision, from the available information it is apparent that the claimant had originally worked for

the employer full time, but as of about March 21, 2008, at her initiation, her status was changed to PRN (*Pro re nata* – commonly used in medicine to mean "as needed"). She continued to work for the employer on that "on-call" basis until approximately June 1. On June 2 the employer received a resignation from the claimant effective immediately. The claimant advised the employer that she was quitting because she had not been getting enough of the open night shifts so she was opting to accept another employment opportunity which was to begin June 2. Agency wage records reflect that the claimant did in fact have some wages from another employer in the quarter ending June 30, 2008.

The claimant established an unemployment insurance benefit year effective June 8, 2008; a preliminary Agency review categorized the claimant as unemployed as a result of flooding. There was no information available to the administrative law judge as to what the claimant's status was with her new employment in conjunction with the flooding, as to whether her personal circumstances precluded her from any work from any employer or whether she was simply unable to attend any work for her new employer due to lack of work or transportation issues caused by the flooding. The claimant indicated in her attempted withdrawal that she had been given some advice from a FEMA representative that she might be eligible for emergency unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

Rule 871 IAC 26.8(1) provides that an appeal can be withdrawn at the request of the appellant with the approval of the administrative law judge. In approving such a request, the administrative law judge would in essence be concurring that there is some reading of the available information which would support the representative's decision at hand. 871 IAC 26.8(5); Iowa Code § 17A.12-3. In this case, a review of the available information indicates a flaw in the analysis under which the representative's decision was issued. The representative's decision was that the claimant was not able and available because she was "still employed" in restricted "on-call" employment with the employer. This conclusion is clearly incorrect, as it is uncontroverted that prior to the establishment of her claim for unemployment insurance benefits she was no longer "still employed" with the employer. While it is not clear whether the ultimate outcome will be altered by application of a different analysis, the administrative law judge cannot conclude that the available information is sufficient to support the representative's decision as issued. The claimant's request to withdraw her appeal is not approved.

Turning to the substantive issue, with respect to any week in which unemployment insurance benefits are sought, in order to be eligible a person who is unemployed must be able to work, available for work, and earnestly and actively seeking work. Iowa Code § 96.4-3. While a person whose wage credits are solely from "on-call" employment is not deemed to be "able and available" for work, and an individual who is willing to accept only "on-call" work is not considered to be available for work, the claimant did have wages from employment other than "on-call" employment, and by resigning her employment as of June 2 to apparently accept employment elsewhere, she demonstrated she was not willing to accept only "on-call" employment in general. Where a separation has occurred, being "able and available" is to be judged not in comparison to how available a claimant was when attached to that prior employer, but in comparison to the employment market generally or with her new employer. Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The availability determination in this case was based upon the claimant's prior employment arrangement; however, since there had been a separation from employment from this employer as of June 2, her availability must be

redetermined in comparison to her general availability in the market place or in comparison such new employment as she apparently entered into as of June 2.

There has been no prior determination as to the claimant's apparent June 2, 2008 separation from her employment with this employer or her availability after June 8 in comparison with the labor market in general or her new employer. As part of this review, it may be necessary to determine if the claimant was "temporarily unemployed" from her new employer as defined in Iowa Code § 96.19-38-c and therefore exempt from the general able and available requirements. Iowa Code § 96.4-1. The case will be remanded for investigation and preliminary determinations on those issues. The claimant is strongly advised to participate in any resulting fact-finding interviews so the Claim Section representative has access to the necessary facts. Also, an issue as to whether the claimant might be eligible for special disaster unemployment insurance benefits arose as a consequence of the appeal. There has not been a prior review or determination on this issue, and the matter will be referred to the Agency's Disaster Assistance Unit for a review on that issue. 871 IAC 26.14(5).

DECISION:

The representative's July 28, 2008 decision (reference 01) is modified in favor of the claimant. The claimant's availability for work effective June 8, 2008 is not determined by the terms of her prior employment with this employer, as that employment ended prior to the establishment of the claimant's claim for unemployment insurance benefits and as of June 2 the claimant had demonstrated she was no longer restricting herself to that "on-call" employment. The matter is remanded to the Claims Section for investigation and determination of the separation issue and her availability other than in the context of this employer. The matter is also referred to the Disaster Assistance Unit for a review of the emergency assistance eligibility issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs