

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEMARCO M JEFFRIES

Claimant

APPEAL 20A-UI-06607-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KARPINSKE ENTERPRISES LLC

Employer

OC: 05/10/20

Claimant: Respondent (4)

Iowa Code § 96.4(3) – Able to and Available for Work
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
PL 116-136 Section 2104(B) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the June 11, 2020 (reference 01) unemployment insurance decision that allowed benefits to the claimant based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on July 27, 2020. The claimant, Demarco M. Jeffries, participated personally. Leniece Jeffries participated as a witness for the claimant. The employer, Karpinske Enterprises LLC, participated through witnesses Daniel Neumann and Elisa Reifsteck. Employer's Exhibits 1 through 5 were admitted. Claimant waived due notice of the issue of whether he was able to and available for work pursuant to Iowa Code § 96.4(3). The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Is the claimant able to and available for work?

Was the claimant discharged for disqualifying job-related misconduct or did the claimant voluntarily quit without good cause attributable to the employer?

Has the claimant been overpaid any unemployment insurance benefits?

Has the claimant been overpaid Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a crew person at the employer's fast food restaurant. He was employed from December 12, 2019 until February 24, 2020. Claimant's job duties consisted of cooking, cleaning, stocking and other various tasks at the restaurant. Claimant typically worked 3:00 p.m. to 11:00 p.m. but the days of the week varied. The schedule was posted at the restaurant and online for employees to review each week.

Claimant returned to work from a medical leave due to a personal injury to his back and shoulder on February 24, 2020. His medical issues continued throughout his shift and he asked his supervisor, Flora Rector, if he could leave early because of it. She told him that he would have to find a replacement. Claimant then told Bryan Frazee, another manager, to ask Elisa Reifsteck, the General Manager, to take him off the schedule for a while because of his medical

issues he was having. Claimant then left during his shift without finding a replacement because of the pain to his back he was having. Claimant received a message on his phone from the scheduling app that he had been taken off of the schedule for the rest of the week. Claimant visited the restaurant a few days later to ask about his schedule and Ms. Reifsteck told him he was terminated for the No Call No Shows he did after February 25, 2020. Claimant believed that he had been taken off the schedule after February 24, 2020 due to his medical issues. Claimant had no previous discipline during the course of his employment.

Claimant has been receiving medical treatment for his back and shoulder. Both claimant and Mrs. Jeffries testified that he has been unable to work since February 24, 2020. He is still currently treating with his physician and has not fully recovered or been released back to work.

Claimant received unemployment insurance benefits of \$1,639.00 from May 10, 2020 through July 25, 2020. The claimant has also received \$6,000.00 in Federal Pandemic Unemployment Compensation benefits from May 10, 2020 through July 18, 2020. The employer participated by telephone in the fact-finding interview and provided information about the claimant's separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Generally, the employer bears the burden of proving disqualification of a claimant who voluntarily quits. Iowa Code § 96.6(2). The employer also bears the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Employment Appeal Bd.*, 883 N.W.2d 179, 210 (Iowa 2016). If a claimant has voluntarily quit, the claimant has "the burden of proving that a voluntary quit pursuant to Iowa Code § 96.5(1) was for good cause attributable to the employer." Iowa Code § 96.6(2). Since the employer has the burden of proving disqualification and the claimant only has the burden of proving the justification for a quit, the employer has the burden of proving that a particular separation is a quit.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Iowa Admin. Code r. 871-24.1(113)(b).

Iowa Admin. Code r. 871-24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), see also *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

In this case, the claimant asked a manager to take him off of the schedule due to his continuing back and shoulder injury. He left work on February 24, 2020 because he was unable to work, not because he had an intention to terminate the employment. He then spoke to Ms. Reifsteck a few days later about his schedule and was told at that time that he was terminated due to No Call No Shows after February 25, 2020. Just like in *Peck*, while claimant left work without permission, his conversations with management that he wanted to be taken off the schedule due to his medical conditions and his inquiry a few days later about the schedule undermine the thought that he intended to permanently sever the employment relationship. The greater weight of evidence fails to establish that the claimant intended to quit. Thus, he cannot be found to have quit under Iowa Admin. Code r. 871-24.25.

This is a case of a separation by mutual mistake. The employer thought the claimant was quitting and the claimant thought he had been terminated. A separation by mutual mistake is a "termination of employment" and falls within the definition of a "separation." It is also clear that a separation by mistake does not fall within the definition of a quit or a discharge. As such, the claimant is not disqualified by the separation from employment under the circumstances of this case. See Iowa Admin. Code r. 871-24.1.

However, in order to be eligible for unemployment insurance benefits funded by the State of Iowa, the claimant must establish that he is able to and available for work. He is not.

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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1) 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

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(34) provides:

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

(34) Where the claimant is not able to work due to personal injury.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *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); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment

benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The burden is on the claimant to establish that he is able to work and available for work within the meaning of the statute. Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22. Claimant and Mrs. Jeffries credibly testified that the claimant is not able to work at this time due to his back and shoulder injuries. As such, benefits are denied effective May 10, 2020. Because benefits are denied, the issues of overpayment of benefits must be addressed.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

In this case, the claimant has received benefits but was not eligible for those benefits because he was not able to and available for work. As such, the claimant is overpaid regular unemployment insurance benefits funded by the State of Iowa in the amount of \$1,639.00 from May 10, 2020 through July 25, 2020.

The next issue is whether the claimant was eligible for Federal Pandemic Unemployment Compensation ("FPUC") benefits and whether he was overpaid those benefits. The administrative law judge finds that he was not eligible for those benefits and is overpaid FPUC benefits.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment. -- In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

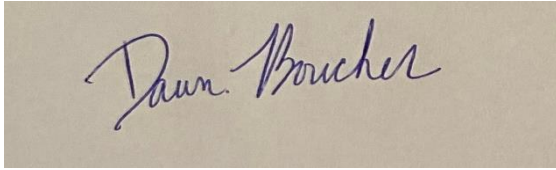
Because claimant is disqualified from receiving regular unemployment insurance benefits funded by the State of Iowa, he is also disqualified from receiving FPUC. The administrative law judge concludes that claimant has been overpaid FPUC in the gross amount of \$6,000.00 from May 10, 2020 through July 18, 2020. Claimant must repay the FPUC benefits he received.

DECISION:

The June 11, 2020 (reference 01) unemployment insurance decision is modified in favor of the appellant. Claimant's separation from employment is not disqualifying. Claimant is not able to and available for work effective May 10, 2020. Benefits are denied effective May 10, 2020 due to the claimant's inability to work.

The claimant has been overpaid regular unemployment insurance benefits funded by the State of Iowa in the amount of \$1,639.00 between May 10, 2020 and July 25, 2020 and is obligated to repay the agency those benefits received. The claimant has also been overpaid FPUC benefits of \$6,000.00 from May 10, 2020 through July 18, 2020 and he is required to repay the agency those benefits he received. Those benefits may be recovered in accordance with Iowa law.

This decision denies unemployment insurance benefits funded by the State of Iowa. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits. See Note to Claimant below.



Dawn Boucher
Administrative Law Judge

August 4, 2020
Decision Dated and Mailed

db/sam

Note to Claimant

- This decision determines you are not eligible for regular unemployment insurance benefits funded by the State of Iowa under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- If you do not qualify for regular unemployment insurance benefits funded by the State of Iowa under state law, you may qualify for benefits under the Federal Pandemic Unemployment Assistance ("PUA") section of the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act") that discusses eligibility for claimants who are unemployed due to the Coronavirus.
- **You will need to apply for PUA to determine your eligibility under the program.**
For additional information on how to apply for PUA go to:
<https://www.iowaworkforcedevelopment.gov/pua-information>.

If you are denied regular unemployment insurance benefits funded by the State of Iowa and wish to apply for PUA, please visit:
<https://www.iowaworkforcedevelopment.gov/pua-information> and scroll down to "Submit Proof Here." You will fill out the questionnaire regarding the reason you are not working and upload a picture or copy of your fact-finding decision. Your claim will be reviewed for PUA eligibility. If you are eligible for PUA, you will also be eligible for Federal Pandemic Unemployment Compensation (FPUC) until the program expires. Back payments PUA benefits may automatically be used to repay any overpayment of state benefits. If this does not occur on your claim, you may repay any overpayment by visiting:
<https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>.
- If you have applied and have been approved for PUA benefits, this decision will **not** negatively affect your entitlement to PUA benefits.