

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER RICHEY
Claimant

APPEAL NO: 09A-UI-18768-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TREMONT ON MAIN
Employer

OC: 02/15/09
Claimant: Respondent (4/R)

Iowa Code § 96.4-3 - Able and Available for Work
Iowa Code § 96.5-1-a - Voluntary Leaving - Other Employment
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Tremont on Main (employer) appealed an unemployment insurance decision dated December 14, 2009, reference 05, which held that Jennifer Richey (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 27, 2010. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through owner Jennifer Howard. The employer waived formal notice so the separation issues could be addressed in this hearing. Consequently, the issues of whether the claimant was discharged for misconduct and whether she voluntarily left for good cause attributable to the employer were also covered. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was able and available for work, and whether her voluntary separation from employment qualifies her to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer comprises three restaurants and a small inn. The claimant worked as a part-time housekeeper from July 1, 2009 through December 3, 2009. Due to lack of business, the claimant did not work from November 4, 2009 through November 8, 2009. She worked seven hours the next week and only four hours on the following week, although the employer had up to 20 hours available. The claimant's availability was limited due to personal reasons. The employer had a hard time getting the claimant scheduled but advised the claimant she could work up to 40 hours if she wanted to do so but the claimant did not. The claimant reported she found another job and submitted her resignation on December 3, 2009. Continued work was available.

The claimant filed a claim for unemployment insurance benefits effective February 15, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is whether the claimant was able and available to work.

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".

871 IAC 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The claimant has the burden of proof in establishing her ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). She was available for work from November 4, 2009 through November 8, 2009 but the employer had no work available. Consequently, the claimant is eligible for benefits for the one-week period ending November 7, 2009.

There was continuing work available after that but the claimant's availability was limited due to personal reasons. The employer was able to offer the claimant 40 hours a week but the claimant was not interested. She submitted her resignation on December 3, 2009 when she quit for another job. Benefits are denied for the four-week period ending December 5, 2009 because the claimant does not meet the availability requirements of the law.

The next issue to be determined is whether the reasons for the claimant's separation from employment after December 3, 2009 qualify her to receive unemployment insurance benefits. For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment to accept employment elsewhere.

Iowa Code § 96.5-1-a 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. But the individual shall not be disqualified if the department finds that:

a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

871 IAC 24.28(5) provides:

Voluntary quit requalifications and previously adjudicated voluntary quit issues.

(5) The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment.

871 IAC 23.43(5) provides:

(5) Sole purpose. The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. No charge shall accrue to the account of the former voluntarily quit employer.

An individual who leaves employment voluntarily is disqualified from receiving job insurance benefits unless the quit was for good cause attributable to the employer. Iowa Code § 96.5(1). An exception is if the individual left in good faith for the sole purpose of accepting other employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. Although the claimant did not participate in the hearing, her Iowa Workforce records show continued employment after her separation from the employer. Accordingly, benefits are allowed and the employer's account shall not be charged.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development

determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits for a period of time, any benefits the claimant received during this time could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated December 14, 2009, reference 05, is modified in favor of the appellant. The claimant qualifies for benefits for the one-week period ending November 7, 2009 but is denied benefits for the four-week period ending December 5, 2009. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. Since the claimant voluntarily left her employment after that date in order to accept other employment, benefits are allowed, provided she is otherwise eligible. The employer's account shall only be charged for benefits for the one-week period ending November 7, 2009.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs