

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

JULIE M IBUZAYAYO  
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DES MOINES IA 50305-1384

IOWA JEWISH SENIOR LIFE CENTER  
900 POLK BLVD  
DES MOINES IA 50312

Appeal Number: 06A-UI-00067-RT  
OC: 11-20-05 R: 02  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)  
Section 96.5-3 – Failure to Accept Work  
Section 96.3-7 – Recovery of Overpayment of Benefits  
Section 96.7-2-a-2 – Employer Contributions and Reimbursements (Same Employment-Benefits not Charged)

STATEMENT OF THE CASE:

The employer, Iowa Jewish Senior Life Center, filed a timely appeal from an unemployment insurance decision dated December 23, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Julie M. Ibuzayayo. After due notice was issued, a telephone hearing was held on January 19, 2006, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her

witnesses could be reached for the hearing, as instructed in the Notice of Appeal. Nora Cable, Nursing Secretary and Scheduler, and Amy Limyao, Director of Nursing, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The hearing was scheduled for 3:00 p.m. but did not start until 3:35 p.m. because the administrative law judge was involved in a prior hearing which went over long. In any event, at no time did the claimant call in a telephone number where she could be reached for the hearing. The administrative law judge apologizes to the employer's witnesses for starting the hearing late.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant is, and at all material times hereto, was, employed by the employer as a Certified Nurses' Aid part-time working PRN, every other weekend and on-call whenever necessary, since July 23, 2003. The claimant's employment has never changed. Iowa Workforce Development records show earnings from the employer as follows: For the third quarter of 2005, \$5,473.37; for the second quarter of 2005, \$3,991.00; for the first quarter of 2005, \$4,165.38; for the fourth quarter of 2004, \$5,479.12; and for the third quarter of 2004, \$4,093.61. The claimant's earnings vary from approximately \$4,000.00 per quarter to \$5,500.00 per quarter. The hours that the claimant works vary. The claimant has placed restrictions on her availability for work. The claimant often refuses to accept work when called. Sometimes the claimant gives reasons that she is not feeling well or that she is in school. Other times the claimant simply gives no reasons. The claimant had placed physical restrictions on her ability to work of lifting no more than 20 pounds for two months from August 18, 2005. This restriction was lifted after two months. The employer was able to accommodate this restriction and placed the claimant on light duty. The employer offered the claimant full time employment on several occasions but none after November 20, 2005. Pursuant to her claim for unemployment insurance benefits filed effective November 20, 2005, the claimant has received no unemployment insurance benefits. Workforce Development records show no weekly claims and no payments.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she was not able, available, and earnestly and actively seeking work and was not excused from such provisions. The claimant is ineligible to receive unemployment insurance benefits for those reasons.
2. Whether the claimant is disqualified to receive unemployment insurance benefits because she refused to accept suitable work. The claimant is not disqualified to receive unemployment insurance benefits for that reason.
3. Whether the claimant is overpaid unemployment insurance benefits. The claimant is not overpaid any unemployment insurance benefits because she has received none.
4. Whether the claimant is receiving the same employment from the employer that she received during her base period and therefore any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer. The administrative law judge concludes that the claimant is receiving the same employment from

the employer that she received during her base period and any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the employer herein.

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".

871 IAC 24.23(3)(5)(16) & (26) provides:

(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code section 96.4(3).

(5) Full-time students devoting the major portion of their time and efforts to their studies are deemed to have no reasonable expectancy of securing employment except if the students are available to the same degree and to the same extent as they accrued wage credits they will meet the eligibility requirements of the law.

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.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she is and was, at relevant times, able, available, and earnestly and actively seeking work or that she is excused from such requirements. The claimant did not participate in the hearing and provide sufficient evidence that she is able, available, and earnestly and actively seeking work or, in the alternative, is either temporarily unemployed or partially unemployed so as to be excused from the provisions that require her to be available for work and earnestly and actively seeking work.

The evidence establishes that the claimant is not partially unemployed or temporarily unemployed as defined by Iowa Code section 96.19 (38) (b) (c) so as to be excused from the requirement that she be available for work and earnestly and actively seeking work. The administrative law judge specifically notes that when a claimant is still employed at a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced work week basis different from the contract of hire such claimant cannot be considered partially unemployed. The evidence establishes here that at least in so far as the employer is concerned, the claimant is not working on a reduced work week basis different from that of her contract of hire. At all material times hereto the claimant's work was part-time. Further, the claimant did not participate in the hearing and provide sufficient evidence that she is able, available, and earnestly and actively seeking work. The evidence establishes that at all material times hereto the claimant was working part-time, PRN, every other weekend and on-call whenever necessary. This has never changed throughout her employment. This is confirmed by the earnings reported by the employer and Iowa Workforce Development records as set out in the Findings of Fact.

The evidence establishes that the claimant frequently refuses to work, sometimes giving reasons and sometimes not giving reasons. Among the reasons given by the claimant are that she is not feeling well or she is in school. However, students devoting the major portion of their time and efforts to their studies are deemed to have no reasonable expectancy of securing employment and they will not meet the eligibility requirements of the law. Since the claimant occasionally gives as a reason for refusing work that she is in school the administrative law judge must conclude that this provision applies to the claimant. There is also evidence that the claimant places restrictions on her employability as to the wages and type of work and such restrictions indicate that the claimant has no reasonable expectation of actually securing work and therefore she is deemed not to have met the availability requirement. The evidence here indicates that this provision is also applicable to the claimant. More compelling, it appears that the claimant's availability for work is unduly limited because the claimant is not willing to work during the hours in which suitable work for the claimant is available or is not willing to work the number of hours required to work in the claimant's occupation. See 24.23 (17). These are reasons also to be disqualified for being unavailable for work. Accordingly, the administrative law judge is constrained to conclude that the claimant is not available for work. The administrative law judge does conclude that the claimant is able to work based upon the evidence here. Although the claimant had a physical restriction of lifting no more than 20 pounds for two months beginning August `18, 2005, the employer's witnesses credibly testified that the employer was able to accommodate this restriction by placing the claimant on light duty and, in any event, that restriction has now been removed. The administrative law judge concludes that there is no evidence that the claimant is earnestly and actively seeking work.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant is not available for work and earnestly and actively seeking work and is not excused from those provisions and therefore the claimant is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she demonstrates that she is truly able, available, and earnestly and actively seeking work and is otherwise entitled to benefits.

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work and as a consequence she should be disqualified to receive unemployment insurance benefits. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant should be disqualified to receive unemployment insurance benefits because she refused to accept suitable work. The evidence does indicate that the claimant was offered suitable full time work and refused it several times. However, none of those offers occurred after November 20, 2005. Both the offer of work and the claimant's refusal must occur within the claimant's benefit year before a disqualification can be imposed for refusing to accept suitable work. There is no evidence here that the offer of work and the claimant's refusal occurred within her benefit year. The claimant's benefit year began effective November 20, 2005. Further, before a disqualification for a failure to accept work can be imposed, an individual must satisfy the benefit eligibility conditions of being able to work and available for work. As noted above, the administrative law judge concluded the claimant is not available for work. For these two reasons, a disqualification cannot be imposed upon the claimant for a refusal to accept suitable work. Accordingly, the administrative law judge concludes that although the claimant may have refused to accept suitable work, she cannot be disqualified for such a refusal and therefore the claimant is not disqualified to receive unemployment insurance benefits. However, as noted above, the claimant is ineligible to receive unemployment insurance benefits because she was not available for work and earnestly and actively seeking work.

Iowa Code Section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes on the record here that the claimant is receiving the same employment from the employer that she received during her base period and therefore any unemployment insurance benefits to which the claimant shall be entitled shall not be charged against the account of the employer herein and the account of the employer herein shall be relieved of any such charges. Although the administrative law judge has already concluded that the claimant is not entitled to any benefits, should this change, any such benefits to which the claimant is entitled shall not be charged to the account of the employer herein unless there is additional evidence demonstrated at the time that the claimant is not receiving the same employment or could receive the same employment as she did in her base period.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 administrative law judge concludes that the claimant has received no unemployment insurance benefits since filing for such benefits effective November 20, 2005. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

#### DECISION:

The representative's decision of December 23, 2005, reference 01, is reversed. The claimant, Julie M. Ibuzayayo, is not entitled to receive unemployment insurance benefits, until or unless she demonstrates that she is able, available, and earnestly and actively seeking work and is otherwise entitled to such benefits, because she is not presently available for work and

earnestly and actively seeking work. The claimant cannot be disqualified as a result of a refusal to accept suitable work because the claimant is not available for work and no offer of work was made to the claimant and refused within the claimant's benefit year. Nevertheless, any unemployment insurance benefits to which the claimant may be entitled shall not be charged against the account of the employer herein because the claimant is receiving the same employment as she did during her base period. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

kkf/tjc