

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON B ESSARY

Claimant

APPEAL NO. 09A-UI-06304-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABF FREIGHT SYSTEMS INC

Employer

OC: 03/08/09

Claimant: Respondent (4-R)

Iowa Code Section 96.4(3) – Able & Available
871 IAC 24.1(113) – Layoff
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 9, 2009, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 20, 2009. Claimant Jason Essary participated. Terry Johnson, Branch Manager, represented the employer. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

ISSUE:

Whether the temporary separation from the employment was for a reason that would disqualify Mr. Essary for unemployment insurance benefits.

Whether Mr. Essary has been available for work from the time he established his claim for unemployment insurance benefits.

Whether Mr. Essary refused a suitable offer of employment.

Whether Mr. Essary had been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jason Essary established a claim for unemployment insurance benefits that was effective March 8, 2009. Mr. Essary has received weekly benefits of \$409.00 during the 10-week period that started March 8, 2009 and ended on May 16, 2009. The total amount of benefits disbursed to date is \$4,090.00.

Mr. Essary started working for ABF Freight Systems, Inc., in 2004. Mr. Essary initially worked as a "casual, on-call" driver/checker. In 2006, Mr. Essary became a regular full-time driver/checker.

On February 6, 2009, the employer notified Mr. Essary by certified letter that he was laid off effective February 7, 2009, pursuant to the terms of the collective bargaining agreement.

Despite the formal lay-off notice concerning the regular full-time work, the employer continued to make work available to Mr. Essary on a day-by-day basis. In other words, the employer would notify Mr. Essary whether there would be work for him the next day. The employer would not assure there would be work beyond the next day. Mr. Essary continued to work full-time hours under this day-to-day arrangement until March 9, 2009.

On March 9, Terry Johnson, Branch Manager, left a message on Mr. Essary's telephone about work that would be available on March 10. Mr. Essary returned the call on March 10. At that time, Mr. Johnson told Mr. Essary that the employer expected to have steady work for him because the employer was down one or two driver/checkers. The steady work would be performed under the same terms as had existed since the February 6 lay-off letter. That is, the employer would let Mr. Essary know day-by-day whether work would be available for him the next day. Mr. Essary told the employer that he had decided to collect unemployment insurance benefits instead continuing to perform work under the day-by-day arrangement. Despite the employer's representation that steady work was available, Mr. Essary questioned how the employer could make steady work available when a major customer was closing for several weeks. Mr. Essary decided the offered work was not suitable because the employer could not guarantee his full-time hours under the terms that existed prior to the February 6, lay-off letter. The employer ended up using a more junior driver to perform the work the employer had available to Mr. Essary. The junior driver continued to perform work on a full-time basis.

On March 19, Mr. Essary contacted a supervisor to cancel the vacation time he had requested for the week ending March 28, 2009. Mr. Essary did not want to use personal days or vacation time while he was receiving unemployment insurance benefits.

On April 2, Mr. Johnson contacted Mr. Essary. Mr. Johnson told Mr. Essary that the employer intended to challenge Mr. Essary's claim for unemployment insurance benefits because the employer had work available for Mr. Essary. Mr. Johnson told Mr. Essary that he should consider working. Mr. Essary indicated that perhaps he should. Mr. Johnson told Mr. Essary that the employer had work for Mr. Essary the next day, Friday, April 3. Mr. Essary declined the work offered for April 3.

Mr. Johnson left a message for Mr. Essary late in the week. Mr. Johnson indicated in the message that the employer had work for Mr. Essary the following week. Mr. Essary did not respond to the message.

On Friday, May 8, Mr. Essary contacted the employer. Mr. Essary said that he was available for work as needed. Mr. Essary had heard that business had picked up. The employer had work available for Mr. Essary three days during the week of May 10-16. Mr. Essary performed the work, which amounted to 32-33 hours. During the current week, May 17-23, Mr. Essary has so far worked eight hours on May 18 and 12.5 hours on May 19. The employer did not have work available for Mr. Essary on the date of the hearing, Wednesday, May 20, 2009.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

- a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
- b. Quits. A quit is 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.
- c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
- d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Code section 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.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The evidence indicates that Mr. Essary was laid off from his regular full-time duties effective February 7, 2009. The lay-off would not disqualify Mr. Essary for benefits. Mr. Essary would be eligible for benefits in connection with the lay-off, provided he was otherwise eligible.

When a person refuses an offer of suitable employment without good cause, that person is disqualified for benefits until he has earned 10 times his weekly benefit amount, provided he is otherwise eligible. See Iowa Code section 96.5(3)(a). But if the refusal occurs at a time when the person does not meet the work availability requirements of Iowa Code section 96.4(3), the work refusal disqualification does not apply. Instead, the person's availability for work must be determined. See 871 IAC 24.24(4)

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".

An individual shall be deemed *partially unemployed* in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b). An individual shall be deemed *temporarily unemployed* if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed *due to a plant shutdown, vacation, inventory, lack of work or emergency* from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).

871 IAC 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.

871 IAC 24.23(41) provides as follows:

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

24.23(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

The work offered by the former employer will be deemed reasonably suitable if the work is comparable to the work previously performed by the worker, is within the usual occupation of the worker, is not open due to a labor dispute, and would not require the worker to join or refrain from joining a labor organization. See Iowa Code section 96.5(3)(b) and 871 IAC 24.24(14).

The evidence indicates that between Mr. Essary's March 10, 2009 announcement that he was no longer available to perform work for the employer and Mr. Essary's May 8, 2009

announcement that he was once again available to perform work for the employer, the employer at all relevant times had suitable work available for Mr. Essary. The work was the same work Mr. Essary had previously performed for the employer. The available work did not result from a labor dispute. The work would not require Mr. Essary to join or refrain from joining a labor organization.

The evidence indicates that between March 10, 2009 and May 8, 2009, Mr. Essary was not available to perform suitable work for the employer to which he was still attached, but from which he had been temporarily unemployed. Because Mr. Essary was not available to perform work for the employer, Mr. Essary was not eligible for unemployment insurance benefits. Benefits are denied effective March 8, 2009 through the benefit week that ended May 9, 2009.

The evidence indicates that effective May 10, 2009, Mr. Essary is partially unemployed. That is, he remains employed by the employer, but is working less than his regular full-time hours. Effective May 10, 2009, Mr. Essary is eligible for benefits, provided he is otherwise eligible. However, Mr. Essary is required to report his wages to Workforce Development each week he claims unemployment insurance benefits. This would include the week ending May 16, 2009, for which Mr. Essary has received \$409.00 in benefits, but had reported no wages despite testimony indicating he was back to work that week.

Iowa Code section 96.3-7, as amended in 2008, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The evidence indicates that Mr. Essary is overpaid \$3,681.00 in benefits for the nine-week period of March 8, 2009 through May 9, 2009.

This matter will be remanded to the Claims Division for determination of whether--in light of the present decision—Mr. Essary has been overpaid benefits for the week that ended May 16, 2009. This should include a determination of whether Mr. Essary has properly reported his wages for that week to the Agency.

DECISION:

The Agency representative's April 9, 2009, reference 02, decision is modified as follows. The claimant was temporarily laid off from his regular full-time work effective February 7, 2009. The layoff would not prevent the claimant from being eligible for benefits. From March 8, 2009 through the benefit week that ended May 9, 2009, the claimant was not available for work with the employer and was not eligible for benefits. The claimant is overpaid \$3,681.00 in benefits for the nine-week period of March 8, 2009 through May 9, 2009. Effective May 10, 2009, the claimant was once again available for work, but partially unemployed. Effective May 10, 2009, the claimant was eligible for benefits, provided he was otherwise eligible. The claimant shall continue to report his wages to Workforce Development on a weekly basis each week he claims unemployment insurance benefits.

This matter is remanded to the Claims Division for determination of whether--in light of the present decision—the claimant has been overpaid benefits for the week that ended May 16, 2009. This should include a determination of whether the claimant has properly reported his wages to the Agency.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs