

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA MUSSMANN
Claimant

APPEAL NO: 09A-UI-18654-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER'S SERVICE BUREAU INC
Employer

OC: 09/13/09
Claimant: Appellant (1)

Iowa Code § 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Linda Mussmann (claimant) appealed an unemployment insurance decision dated December 9, 2009, reference 01, which held that she was not eligible for unemployment insurance benefits because she is still working at the same contract of hire with Employer's Service Bureau, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 26, 2010. The claimant participated in the hearing. The employer participated through John Rausenberger, Vice-President. Based on the evidence, the arguments of the parties, 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 is working the same hours and wages as in her original contract of hire with this employer?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time packager on September 22, 2000 and continues to work in that same capacity with no change in her hours or wages. The employer is a contract labor company with over 200 employees. It provides labor for Nestle Purina who runs three shifts per day, seven days per week. Oftentimes the employer has enough employees for a particular shift and has to turn away employees, but just as likely is the fact that the employer will not have enough employees for a particular shift. Some employees call what the claimant characterized as the "gate game" where they wait until the last possible minute to sign in with the hopes that they will be sent home and can then collect unemployment. Some employees wait down the road until they see employees leaving and then the employee drives to the gate, attempts to sign in, and is also sent home.

The Nestle Purina plant has a small entrance lane that can only accommodate approximately 17 cars and since there can sometimes be up to 60 cars trying to get into the plant at the same time, the start times had to be staggered. This was put into place after an employee was hurt while riding his bicycle in the plant's entrance lane. Consequently, some employees start at

5:50 a.m. while others start at 6:00 a.m. While the employer does not guarantee employees a certain number of hours, employees are also not limited to working only 40 hours per week.

The claimant works first shift and feels she is being discriminated against since she is not on the list to start work at 5:50 a.m. She contends she is not getting her full-time hours. If the claimant is turned away for a shift, she has two more days in the week to make up that time. The employer reported the claimant has never requested to come in early or to stay after her shift. If an employee is not getting sufficient hours, the employee can request to work an alternate shift but the claimant has not done this either.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

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(23) provides:

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

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The claimant is and has been working under the same work conditions since her date of hire and there are sufficient hours available if she wants to work 40 hours per week. Her full-time employment removes her from the labor market and she therefore does not meet the availability requirements of the law. There has been no separation from her employment and the claimant is disqualified from receiving unemployment insurance benefits.

DECISION:

The unemployment insurance decision dated December 9, 2009, reference 01, is affirmed. Benefits are denied as the claimant does not meet the availability requirements of the law.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css