

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRENDA TORRES
Claimant

WILLIAM RIEKEN
Employer

APPEAL 16A-UI-09277-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/31/16
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 23, 2016, (reference 03) unemployment insurance decision that denied benefits based upon her unduly limiting her availability for work. The parties were properly notified of the hearing. A telephone hearing was held on October 4, 2016. The claimant Brenda Torres participated and testified. Claimant's husband, Salvador Torres was also present for the hearing but did not testify. The employer William Rieken participated through Owner William Rieken and witnesses Tori Johnson and Al Holton.

ISSUE:

Is the claimant able to work and available for work effective July 31, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a temporary employee doing CNA work from April 13, 2015, until her last assignment ended on January 30, 2016.

The employer is a temporary staffing firm. While working for the employer, claimant was assigned to various clients as a CNA on an as-needed basis, though most of her work was done at a facility called Regency. Claimant testified on or around January 30, 2016, she was told by Regency employees that they would no longer be using CNAs from temporary employment firms. The employer denied this was the case and stated it has had work available to claimant at this facility on an ongoing basis since January 30, 2016. The employer further testified it has offered claimant work since January 30 at Regency and at other facilities both in South Sioux City and nearby cities. Claimant denied being offered any work at Regency after January 30. Claimant testified she was offered work at another facility in South Sioux City but she preferred not to work at that facility due to lack of cleanliness and inadequate supplies. Claimant further testified she cannot work outside of South Sioux City because her transportation is not reliable. Claimant has not accepted work from this employer since January 30, 2016. The employer

testified claimant stopped responding to all communication with them after January 2016, though she has been offered work as recently as last month.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was able to work and available for work for the weeks beginning July 31, but not for the remainder of the period in question.

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(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 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.

...

(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

...

(20) Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer or waiting to go to work for a specific employer and will not consider suitable work with other employers.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

An individual claiming benefits must be able to work, available for work, and actively and earnestly seeking work. Claimant has been offered jobs through the employer as recently as last month, but has failed to respond to those offers. Based on claimant's testimony, she prefers to work for one specific client of the employer, Regency. The employer presented credible evidence that claimant has been offered work at Regency, but has not taken this work. Even if claimant had not been offered work at Regency she admitted she has been offered other assignments in South Sioux City or surrounding communities. Claimant did not take this other work because she preferred not to work at the other facility in South Sioux City and did not have reliable transportation to travel outside of town. Waiting for work to become available at claimant's preferred facility unduly limits her availability for work. Because claimant was unduly limiting her availability, she does not meet the requirements of the law and benefits are denied.

DECISION:

The August 23, 2016, (reference 03) unemployment insurance decision is affirmed. The claimant is not able to work and available for work effective July 31, 2016. Benefits are denied.

REMAND:

The evidence presented indicates claimant may have separated from the employer following the end of her last assignment on January 30, 2016. The issue of claimant's separation from this employer is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/