

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JENNIFER DRAGUSICA**

Claimant

**MERCY HEALTH SERVICES IOWA CORP**

Employer

**APPEAL 21A-UI-03354-ED-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 3/29/20**

**Claimant: Respondent (1)**

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IAC 871-24.10

Iowa Code § 96.7(2)(a)(2)

Iowa Code § 96.3(7) - Recovery of Overpayment of Benefits

Iowa Code § 96.4(3) – Ability to and Availability for Work

Iowa Code § 96.6(2) - Timeliness

**STATEMENT OF THE CASE:**

The employer filed an appeal from the January 7, 2021 (reference 01) unemployment insurance decision that awarded benefits determining claimant was able and available. The parties were properly notified about the hearing. A telephone hearing was held on March 23, 2021. Claimant participated and testified. Employer did not participate. No exhibits were received into evidence.

**ISSUE:**

Is the appeal timely?

Is claimant able to and available for work?

Was the claimant overpaid benefits?

Did the employer participate in the fact finding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for the employer as a Certified Nurse Assistant (CNA) on November 3, 2014. Due to COVID 19 the employer was forced to limit elective surgeries, and staff in that area including the claimant were put on a low census temporary layoff. Claimant's last day worked was March 24, 2020. On April 29, 2020, the employer sent a text to claimant indicating that the census was picking up. At noon on May 7, 2020 employer's charge nurse called claimant to ask her to come in the next morning at 5:30 a.m. and got no answer. At 12:50 p.m. employer sent claimant a text message saying that she should report for her shift at 5:30 a.m. on May 8, 2020. Claimant replied that it was not enough notice for her to find daycare for her children. Claimant's daycare did not have space for her children due to COVID, and was not open at that hour of the day. Claimant told her supervisor Jessica Severson that she could not work on such short notice. Ms. Severson told her that if she was quitting that she would send her a resignation statement. Claimant never returned a resignation statement. Although the employer apparently

had work available, no one ever scheduled claimant for additional shifts or attempted to recall claimant again.

### **REASONING AND CONCLUSIONS OF LAW:**

As a preliminary matter, I find that the appeal was timely. The decision was dated January 7, 2021, and the decision letter indicated that an appeal must be postmarked or received by January 17, 2021, which was a Sunday so the appeal period is extended to the next day. January 18, 2021 was Martin Luther King Day, a holiday so the appeal period is extended to the next day. The employer appealed on that day, January 19, 2021. The appeal is timely.

For the reasons that follow, the administrative law judge concludes that the claimant is able and available for work, and had good cause for refusing the recall on less than 24 hours notice. Benefits are approved.

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".

Iowa Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. 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 Admin. Code r. 871-24.22 provides, in relevant part:

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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

...

(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.

...

(3) Earnestly and actively seeking work. Mere registration at a workforce development center does not establish that the individual is earnestly and actively seeking work. It is essential that the individual personally and diligently search for work. It is difficult to establish definite criteria for defining the words earnestly and actively. Much depends on the estimate of the employment opportunities in the area. The number of employer contacts which might be appropriate in an area of limited opportunity might be totally unacceptable in other areas. When employment opportunities are high an individual may be expected to make more than the usual number of contacts. Unreasonable limitations by an individual as to salary, hours or conditions of work can indicate that the individual is not earnestly seeking work. The department expects each individual claiming benefits to conduct themselves as would any normal, prudent individual who is out of work.

a. Basic requirements. An individual shall be ineligible for benefits for any period for which the department finds that the individual has failed to make an earnest and active search for work. The circumstances in each case are considered in determining whether an earnest and active search for work has been made. Subject to the foregoing, applicable actions of the following kind are considered

an earnest and active search for work if found by the department to constitute a reasonable means of securing work by the individual, under the facts and circumstances of the individual's particular situation:

- (1) Making application with employers as may reasonably be expected to have openings suitable to the individual.
- (2) Registering with a placement facility of a school, college, or university if one is available in the individual's occupation or profession.
- (3) Making application or taking examination for openings in the civil service of a governmental entity with reasonable prospects of suitable work for the individual.
- (4) Responding to appropriate "want ads" for work which appears suitable to the individual if the response is made in writing or in person or electronically.
- (5) Any other action which the department finds to constitute an effective means of securing work suitable to the individual.
- (6) No individual, however, is denied benefits solely on the ground that the individual has failed or refused to register with a private employment agency or at any other placement facility which charges the job-seeker a fee for its services. However, an individual may count as one of the work contacts required for the week an in-person contact with a private employment agency.
- (7) An individual is considered to have failed to make an effort to secure work if the department finds that the individual has followed a course of action designed to discourage prospective employers from hiring the individual in suitable work.

An employee is totally unemployed in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

Here, claimant was totally unemployed from March 25, 2020 through May 8, 2020 when she was recalled. The employer gave claimant a little more than sixteen hours-notice requiring her to return to work suddenly at 5:30 a.m. the next day. Claimant refused the recall on May 8, 2020 for good cause. The employer never scheduled her for another shift or attempted to recall her again.

As claimant had been receiving benefits, pending a determination on his appeals, the next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code § 96.3(7) provides, in pertinent part:

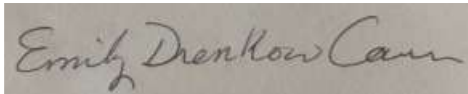
7. Recovery of overpayment of benefits.

- 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.

Since this decision awarded benefits the claimant was not overpaid unemployment insurance benefits.

**DECISION:**

The January 7, 2021 (reference 01) unemployment insurance decision is affirmed. The claimant was able and available for work but refused the recall for good reason. The employer never scheduled claimant or attempted to recall her again. Benefits are approved.

A rectangular box containing a handwritten signature in cursive script that reads "Emily Drenkow Carr".

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Emily Drenkow Carr  
Administrative Law Judge

March 30, 2021  
Decision Dated and Mailed

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