IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JULIE A JORDAN
Claimant

DMS #615 INC
BONANZA FAMILY RESTAURANT
Employer

APPEAL NO. 12A-UI-11209-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/05/12
Claimant: Appellant (4-R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.19(38)(b) – Partial Unemployment
Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

Julie Jordan filed a timely appeal from the September 10, 2012, reference 04, decision that denied benefits effective August 5, 2012 based on an agency conclusion that she was unduly restricting her availability. After due notice was issued, a hearing was held on October 11, 2012. Ms. Jordan participated. Tim Whistler, Manager, represented the employer. The administrative law judge took official notice of the Agency's record of wages reported by or for the claimant and benefits disbursed to the claimant (DBRO). Exhibits A through D were received into evidence. The parties waived formal notice on the issues of whether the claimant was discharged for misconduct in connection with the employment or voluntarily quit for good cause attributable to the employer.

ISSUES:

Whether the claimant has been able and available for work since she established her claim for benefits.

Whether the claimant has been partially unemployed since she established her claim for benefits.

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Julie Jordan establish a claim for unemployment insurance benefits that was effective August 5, 2012. At that time, the agency set Ms. Jordan's weekly benefit amount at $122.00.

Ms. Jordan became employed with Bonanza Family Restaurant in August 2011 and last performed work for the employer on August 23, 2012. Ms. Jordan was a part-time server.

Ms. Jordan's food service duties required that she do substantial walking, carrying of some entrees, and removing dirty dishes from tables. Prior to commencing a leave of absence on June 2, 2012 to undergo surgery, Ms. Jordan had consistently worked 28-30 hours per week. Ms. Jordan was required to work that amount to maintain her eligibility for state-subsidized childcare. Ms. Jordan's 28-30 weekly work hours included cashiering four to six hours per week during the 11:00a.m. to 4:00 p.m. lunch shift. Ms. Jordan's work hours were 11:00 a.m. to 4:00 p.m., Monday through Friday. Ms. Jordan worked an additional 4:00 p.m. to 8:00 p.m. on Friday evenings. Once a month, Ms. Jordan worked the Sunday lunch shift, 11:00 a.m. to 4:00 p.m. When Ms. Jordan worked as a food server, her pay consisted of a $4.35 hour wage plus tips. When Ms. Jordan cashiered, her wage was $7.50 per hour.

Ms. Jordan underwent surgery for plantar fasciitis on June 3, 2012. The surgeon released a tendon in Ms. Jordan's left foot. Ms. Jordan underwent a second surgery on her foot on June 19, 2012. The second surgery was necessary because stitches had come loose after the first surgery.

On July 30, 2012, Ms. Jordan's doctor released her to return to work effective July 31, 2012 with restrictions that included no weight bearing. The restrictions indicated that Ms. Jordan was released only to cashier part time, two to three days per week, and no longer than four hours at a time. The restrictions indicated that Ms. Jordan would need to be able to sit as needed. Ms. Jordan was not released at that time to return to her primary duties as a food and beverage server. Ms. Jordan at that time was wearing an orthotic boot. Ms. Jordan presented her release with restrictions to one of the business owners, Henry Anderson. Mr. Anderson did not put Ms. Jordan back on the schedule. Mr. Anderson told Ms. Jordan that she needed to stay home until she was released fully to return to work.

On August 3, 2012, Ms. Jordan was seen by Broadlawns Medical Center and was, interestingly, released to return to work with no restrictions. The same note indicates that Ms. Jordan was complaining of severe foot and ankle pain at the time of the injury.

Ms. Jordan subsequently obtained another doctor's note that said she was released to return to full-time work without restrictions effective August 10, 2012. This second note did not include any reference to complaints of pain.

On August 10, Ms. Jordan contacted Mr. Anderson. Ms. Jordan advised Mr. Anderson that she was no longer required to wear the orthotic boot. Mr. Anderson told Ms. Jordan that he wanted her to come in and speak with her. Mr. Anderson told Ms. Jordan that he could only give her one day a week on the schedule because he had hired several servers over the summer. Mr. Anderson told Ms. Jordan that if she wanted to find another job, he would give her a good reference. Mr. Anderson told Ms. Jordan that she would need to find another job if she wanted more hours. Mr. Anderson directed Ms. Jordan to telephone him every Friday to check to see whether the employer had any hours for her. The schedule was usually posted on Fridays.

Ms. Jordan contacted the employer as directed. During the weeks that ended August 11 and 18, the employer had no work for her. During the week ending August 25, Ms. Jordan cashiered on August 20, from 11:00 a.m. to 2:00 p.m., On August 22, from 11:00 a.m. to 1:00 p.m., and on August 23, 2012, from 11:00 a.m. to 1:00 p.m. Ms. Jordan was scheduled to work 11:00 a.m. to 2:00 p.m., but had to miss that day to go to a medical appointment related to her foot. Ms. Jordan notified a supervisor at 9:45 a.m. that she would need to be absent that day and would provide a doctor's note.

Ms. Jordan contacted the employer as directed during the weeks that ended September 1, 8, 15, 22, and 29, but the employer had no hours available for her.

On September 6, Ms. Jordan and Mr. Anderson participated in a fact-finding interview concerning Ms. Jordan's claim for partial unemployment insurance benefits. During the fact-finding interview, at 3:20 p.m., Mr. Anderson told Workforce Development and Ms. Jordan that she could report for work at 4:00 p.m. for a *one*-hour shift if she wanted to. Ms. Jordan and the employer both knew that Ms. Jordan needed to pick up her children from daycare at 3:45 p.m. and would be unable to appear for a shift on such short notice.

On September 11, Ms. Jordan sent a text message to Mr. Anderson asking for a return call. Mr. Anderson responded that he was out of town for meetings and could not help her.

On October 1, 2012, Ms. Jordan spoke to Mr. Anderson. Ms. Jordan asked whether she could meet with Mr. Anderson to discuss getting back on the schedule. Mr. Anderson told Ms. Jordan that he would not meet with her. Mr. Anderson added that he believed Ms. Jordan was trying to "milk the system" because she had filed a claim for partial unemployment insurance benefits. Ms. Jordan had established a claim for benefits that was effective August 5, 2012. Mr. Anderson told Ms. Jordan he had nothing else to say to her and hung up on her. Ms. Jordan continued to call in search of work hours during the weeks that ended October 6 and 13, but the employer had no work for her.

Ms. Jordan had secured a second job on September 26, 2012. The second job was a part-time food server position at Beaverdale Estates Retirement Center. Ms. Jordan was able to get 24 hours per week of consistent work through that job. Ms. Jordan reports that her work hours at the new job are 7:55 a.m. to 9:30 a.m., 12:55 p.m. to 2:00 p.m. and 5:25 p.m. to 8:00 p.m. These three shifts total five hours and 10 minutes per day. Ms. Jordan reports that she has been working seven days per week. Thus, the total number of hours Ms. Jordan would be working under the seven-day per week arrangement would be 36 hours and 10 minutes. Since starting the second employment, the new employer has consistently made 24 hours per week available to Ms. Jordan. The hourly wage for the new employment is $8.00. During the week that ended September 29, Ms. Jordan worked 12 hours at the new job and grossed $96.00. During the week that ended October 6, Ms. Jordan worked 24 hours in the new job and grossed $192.00. During the week that ended October 13, Ms. Jordan only worked 14 hours and only grossed $112.00 because she took time off to participate in someone else's wedding.

The wages Ms. Jordan has reported to Workforce Development do not match the wages she should be reporting if she has been getting the hours she says she has been getting. Ms. Jordan's gross wages, as she has been reporting to Workforce Development, are as follows:

Week ending date	Gross Wages
09/29/12	40.00
10/06/12	64.00
10/13/12	.00

In other words, Ms. Jordan's reporting of her wages Workforce Development is not reliable and merits closer scrutiny by the agency for the weeks referenced above and for subsequent weeks.

REASONING AND CONCLUSIONS OF LAW:

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 24.22(1)a and (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.
>
> (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.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.
>
> (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.

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).

The weight of the evidence indicates that Ms. Jordan was on an approved leave of absence from June 2, 2012 until Friday, August 10, 2012, when she was released to return to full-time

work without restrictions. A person who is on an approved leave of absence that she requested is deemed to be voluntarily unemployed during the period of the leave and not eligible for unemployment insurance benefits. See Iowa Admin. Code section 871 IAC 24.23(10).

Ms. Jordan did not meet the definition of able and available for work, or the definition of being partially unemployed, during the first week her claim was active, the week that ended August 11, 2012. This is because the weight of the evidence indicates Ms. Jordan was still on an approved medical leave of absence and was dealing with medical issues that week, pain in her foot and ankle, that prevented her from being available for work. The weight of the evidence indicates that a bonafide full medical release to return to work was not issued until August 10, 2012.

At the end of the approved leave of absence, Ms. Jordan contacted the employer about returning to her previous work duties and schedule, but the employer refused to return her to the previous duties and schedule. The employer cited that fact that the employer had other employees. The employer encouraged Ms. Jordan to seek other employment. Thereafter, the employer made minimal hours available to Ms. Jordan, as if to prompt her to quit the employment.

The weight of the evidence indicates that Ms. Jordan was able and available for work, but partially unemployed from Bonanza Family restaurant from August 10, 2012 until October 1, 2012, when Mr. Anderson made it clear he had no further work for her. The evidence indicates that Ms. Jordan was able to work and available for work during that time frame. Ms. Jordan is eligible for benefits under a theory of partial unemployment from the week that ended August 18, 2012 through the week that ended September 29, 2012. The employer's account may be charged.

The evidence indicates that Ms. Jordan was able to work and available for work during the weeks that ended October 6, 2012, but not for the week that ended October 13, 2012, when she substantially and voluntarily reduced her available work hours to participate in someone else's wedding. Ms. Jordan is eligible for benefits for the week that ended October 6, 2012, provided she is otherwise eligible. Ms. Jordan is not eligible for benefits for the week ending October 13, 2012.

This matter will be remanded to the Claims Division for determination of Ms. Jordan's work availability for the period beginning October 14, 2012.

This matter will be remanded to the Claims Division for determination of the weekly benefit eligibility amount, in light of Ms. Jordan's erroneous and unreliable reporting of her gross wages to the agency. It appears that Ms. Jordan's new employment has offered gross weekly wages well above those reported by Ms. Jordan and in an amount that would exceed her $122.00 weekly unemployment insurance benefit amount.

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.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that the employer discharged Ms. Jordan from the employment effective October 1, 2012. The basis for the discharge was Ms. Jordan's prior claim for partial unemployment insurance benefits. The discharge was not based on misconduct and would not disqualify Ms. Jordan for unemployment insurance benefits. Based on the separation from employment, Ms. Jordan is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's September 10, 2012, reference 04, decision is modified as follows. The claimant was on a leave of absence and not able and available for work during the week that ended August 11, 2012. The claimant is not eligible for benefits for that week. The claimant was able and available for work, but partially unemployed, from the week that ended August 18, 2012 through the week that ended September 29, 2012. The claimant was eligible for benefits for that period. The claimant was able and available for work and eligible for benefits for the week that ended October 6, 2012, provided she is otherwise eligible. The claimant did not meet the work availability requirement during the week that ended October 13, 2012 and is not eligible for benefits for that week.

Effective October 1, 2012, the claimant was discharged from the employment for no disqualifying reason. The discharge did not disqualify the claimant for benefits. The claimant is eligible for benefits, provided she is otherwise eligible.

The employer's account may be charged for benefits paid to the claimant.

This matter is remanded to the Claims Division for determination of the claimant's work availability for the period beginning October 14, 2012.

This matter is remanded to the Claims Division for determination of the weekly benefit eligibility amount for each claim week, in light of the claimant's erroneous and unreliable reporting of her gross wages to the agency.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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