

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JUSTINO MURGUIA JR
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CURLYS FOODS
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Appeal Number: 05A-UI-02944-RT
OC: 05-16-04 R: 01
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.7-2-a(2) – Employer Contributions and Reimbursements
(Same Employment – Benefits Not Charged)

STATEMENT OF THE CASE:

The claimant, Justino Murguia, Jr., filed a timely appeal from an unemployment insurance decision dated February 25, 2005, reference 02, denying unemployment insurance benefits to him as of January 23, 2005. After due notice was issued, a telephone hearing was held on April 7, 2005 with the claimant participating. Kathy Peterson, Human Resources Manager, participated in the hearing for the employer, Curlys Foods. This appeal was consolidated with appeal number 05A-UI-02945-RT for the purposes of the hearing with the consent of the

parties. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time trimmer from September 12, 2003 until he separated from his employment on February 8, 2005. The claimant requires a work authorization card in order to allow him to work in the United States. The claimant's work authorization card was to expire January 15, 2005. On that date the claimant had not obtained a new work authorization card. The employer and the claimant agreed to place the claimant on a leave of absence beginning January 17, 2005 for him to get his work authorization card. Originally, the claimant was to return to work on January 19, 2005. However, the claimant encountered problems getting his work authorization card and he called the employer and informed the employer that it was going to take a couple of weeks. The employer extended the leave of absence through January 28, 2005 with the claimant to return to work on January 31, 2005. The claimant came in on January 31, 2005 to see the employer and stated that he still did not have his work authorization card. The claimant said he had an appointment yet that day. The claimant then called the employer later that day and indicated that he still did not have his work authorization card. The employer extended the leave of absence to February 4, 2005 with the claimant to return to work on February 7, 2005. On February 7, 2005, the claimant called the employer and again indicated that he did not have a work authorization card. The claimant said something about not having an alien number. The claimant was specifically told to come in to work on February 8, 2005. The claimant did not do so or call the employer. Several weeks thereafter, on or about February 21, or 22, 2005, the claimant called and left a voice mail message that he still did not have his work authorization card because someone was using his name. Finally, the claimant called and left a message for the employer on February 28, 2005 indicating that he did then have his work authorization and could start work. However, when the employer had not heard from the claimant for so long, it had filled his position and the employer no longer had a position for the claimant.

Pursuant to his claim for unemployment insurance benefits filed effective May 16, 2004 and reopened effective January 23, 2005 and February 6, 2005, the claimant has received no unemployment insurance benefits since going on the leave of absence on January 17, 2005 and since separating from the employer on or about February 8, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for those reasons.
2. Whether the claimant was employed at the same hours and wages as in his base period and, therefore, the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled. The claimant was at all material times hereto employed at the same hours and wages, at least employment was offered to the claimant at the same hours and wages if he was available and able to work those hours and, therefore, any unemployment insurance benefits to which the claimant may become entitled shall not be charged to the account of the employer herein.

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 24.23(10) provides:

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

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence either that he is and was at relevant times able, available, and earnestly and actively seeking work or that he is excused from such provisions. There is no evidence that the claimant is either partially unemployed or temporarily unemployed as defined in Iowa Code section 96.19(38)(b) and (c), so as to excuse the claimant from the provisions requiring him to be able, available, and earnestly and actively seeking work. The administrative law judge further concludes that the claimant is not able and available for work. The evidence establishes that the claimant's authorization card permitting him to work in the United States expired on January 15, 2005 and at least was not renewed until February 2005 but the date is uncertain. The claimant kept informing the employer that he was going to get a work authorization card but kept informing the employer that the card was being delayed. The employer placed the claimant on a leave of absence with the claimant's consent from January 17, 2005 through February 4, 2005 with the claimant to return to work on February 7, 2005. Being on a leave of absence is deemed to be a period of voluntary unemployment and the claimant is ineligible for benefits for such period. The administrative law judge also concludes that the claimant has not been able to work because he has not had the work authorization card. Accordingly, the administrative law judge concludes that the claimant is and was not able and available for work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he clearly demonstrates that he is able and available for work by, among other things, demonstrating that he has a valid and proper work authorization card.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge does not believe that it is now necessary to decide whether the employer should be charged for any unemployment insurance benefits to which the claimant is entitled because the administrative law judge has concluded herein that the claimant is not entitled to receive unemployment insurance benefits. However, the administrative law judge would note that the claimant was employed at the same hours and wages and was receiving the same employment as he was during his base period or at least the same hours and wages and the same employment was offered to the claimant if he had been able and available for work. Accordingly, the administrative law judge would conclude, if necessary, that any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the employer herein.

DECISION:

The representative's decision of February 25, 2005, reference 02, is affirmed. The claimant, Justino Murguia, Jr., is not entitled to receive unemployment insurance benefits, until or unless he demonstrates that he is able, available, and earnestly and actively seeking work and in particular has a work authorization card that is valid for his employment in the United States.

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