

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

COLLEEN S MERTZ

Claimant

and

WILLIAM EDWARD STROHMAN

Employer

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HEARING NUMBER: 15B-UI-04903

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Colleen Mertz (Claimant) was hired by William Edward Strohman (Employer) on September 11, 2013 as a dental hygienist. She was hired to work only when the regular dental hygienist needed a day off. The Claimant worked her last day July 7, 2014. The employer did not have any other work for her. She moved away from the area in January 2015. She worked for another employer since July, 2014 and has been adjudicated to have earned ten times her benefit amount since her December 2014 separation from that subsequent employer.

REASONING AND CONCLUSIONS OF LAW:

As an initial matter it appears that the Department somehow overlooked the remand from the Administrative Law Judge on the issue of the separation. We have notified the Benefits Bureau of this oversight and understand that the remand will now be activated. In any event we cannot today deal with the separation issue, but rather take up the issue of availability which is the issue appealed to us.

Iowa Code section 96.4(3) (2015) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871—24.22 Benefit 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.

24.22(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.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

The availability regulation provides:

24.22(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.**

871 IAC 24.22(emphasis added). The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. 871 IAC 24.22; *Davoren v. Iowa Employment Sec. Comm'n*, 277 N.W.2d 602, 603 (Iowa 1979). To be found able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

The Administrative Law Judge ruled that the Claimant is not able and available for *this* employer. Naturally, this is so. She either quit or was laid off from Mr. Strohman, so she is not available to work for Mr. Strohman unless rehired. Since she hasn't been rehired she remains unavailable to work for Mr. Strohman, just as we would expect. We take official notice of the fact that IWD has adjudicated that the Claimant has requalified since her quit from a *subsequent* employer, and so this necessarily means she has requalified since her *prior* separation from Mr. Strohman. But even assuming the Claimant quit Mr. Strohman, something not yet adjudicated, the Claimant has requalified and so we would not continue her disqualification based on this *effect* of quitting (not being available to the place where you quit) past the time of requalification. The point of this discussion is to make clear that there is no "able and available to work for the employer who you no longer work for" requirement that we are aware of.

As for availability more generally, as the quoted laws make clear one need only be available by offering services "generally performed in the geographical area in which the individual is offering the services." 871 IAC 24.22(2). Again, there is no requirement of being available for a certain employer, at least where there has been a separation from that employer. Further one need only be available at the time of applying for benefits. If we applied the Administrative Law Judge's approach a person who quit one job to take another job in a distant county, would not get benefits if laid off from the second job because she had become "unavailable" to work the first. This is not the law as we understand it. Finally, there is no issue of the Claimant being "still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire..." as set out in rule 871 IAC 24.23(26). Even ignoring that the rule only applies to applications for *partial* benefits, it is clear that at the time of applying for benefits the Claimant had separated (and requalified) from William Edward Strohman's employ and so clearly was not receiving the "same hours and wages" – she wasn't employed there anymore, so of course she was not getting the same hours and wages. But all this means is that at the time she applied for benefits she was indeed "unemployed" and was not rendered ineligible just because she used to work an on-call job that she was separated from and moved away from.

DECISION:

The administrative law judge's decision dated May 15, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not rendered ineligible for benefits based on her failure to no longer be employed by the Employer. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the

Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside. The issue of disqualification for quitting remains open on remand, but we do note that the Claimant has requalified *assuming* that her separation date is found to be July 7, 2014.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv