

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BARBARA A HANSEN
Claimant

THE BON-TON DEPARTMENT STORES INC
Employer

APPEAL 15A-UI-12559-SC
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/22/15
Claimant: Appellant (2)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Administrative Code r. 871-24.23(10) – Leave of Absence
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

Barbara Hansen (claimant) filed an appeal from the November 2, 2015, (reference 10) unemployment insurance decision that denied benefits based upon the determination she had requested and was granted a leave of absence making her voluntarily unemployed and not available for work. The parties were properly notified about the hearing. A hearing was held on December 16, 2015 at the Iowa Workforce Development office located at 1000 East Grand Avenue in Des Moines, Iowa. The claimant participated through Attorney Marlon Mormann. The employer did not participate. Claimant's Exhibit A was received. Department's Exhibits D-1 and D-2 were received.

ISSUES:

Is the appeal timely?

Is the claimant able to and available for work?

Is the claimant partially unemployed?

If so, is the employer's account liable for potential charges?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a Sales Associate beginning on December 26, 2013, and her last day worked was at the end of April 2015. This employer did not guarantee a certain number of hours during the claimant's employment. During her base period, the claimant was also employed with Eye Care of Iowa, PC in a full-time position until March 24, 2015.

At the end of April 2015, the claimant reported a work-related injury. She was still able to perform work for the employer. She contacted the employer each week to check what she was scheduled. The employer kept her name on the schedule, but informed her that it did not have any hours for her. The claimant ultimately quit her part-time employment on August 25, 2015.

The claimant received four Unemployment Insurance Decisions, two were received at the end of October and two were received at the beginning of November 2015. She provided the decisions to the attorney who was handling another employment related matter upon receipt. The administrative record shows between the receipt of the two sets of decisions, the appeals for the first set of decisions were scheduled. The claimant received this decision dated November 2, 2015 (reference 10) on or about November 6, 2015. (Exhibit D-2.) She provided it to her attorney at that time. The administrative law judge had a recorded discussion with the attorney regarding the two hearings scheduled for the first appeal that had been filed.¹ There was confusion at that time as to what decisions had been issued and appealed or scheduled for appeal. The attorney indicated intent to appeal all of the decisions his client had provided him; however, there was a miscommunication between the administrative law judge and the attorney regarding the number of appeals and number of decisions. The appeal for this case was not received by the Appeals Bureau until November 13, 2015, one day after the deadline identified on the Unemployment Insurance Decision dated November 2, 2015 (reference 10). (Exhibit D-1.)

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the

¹ That recording is found with appeal number 15A-UI-12036.

administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant's failure to file an appeal within the appeal period was due to a miscommunication between an attorney and an IWD representative. See, Iowa Admin. Code r. 871-24.35(2). The error was discovered and corrected at its earliest convenience. The claimant timely appealed the other cases indicating her intent to appeal the decisions in this string of interrelated cases. Therefore, the appeal shall be accepted as timely.

The next issues are whether the claimant was voluntarily unemployed and unavailable for benefits. For the reasons that follow, the administrative law judge concludes the claimant was partially unemployed between March 22, 2015, and August 22, 2015, and the part-time employer is relieved of benefit charges.

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, 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.

An individual shall be deemed partially unemployed in any week in which 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 Code § 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 § 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 § 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 § 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 § 85.33, § 85.34, subsection 1, or § 85A.17, or responsible for paying indemnity insurance benefits.

Iowa Admin. Code r. 871-23.43(4)a provides in part:

(4) Supplemental employment.

a. An individual, who has been separated with cause attributable to the regular employer and who remains in the employ of the individual's part-time, base period employer, continues to be eligible for benefits as long as the individual is receiving the same employment from the part-time employer that the individual received during the base period. The part-time employer's account, including the reimbursable employer's account, may be relieved of benefit charges....

Iowa Admin. Code r. 871-24.22(2)f 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.

f. Part-time worker, student--other. Part-time worker shall mean any individual who has been in the employ of an employing unit and has established a pattern of part-time regular employment which is subject to the employment security tax, and has accrued wage credits while working in a part-time job. If such part-time worker becomes separated from this employment for no disqualifiable reason, and providing such worker has reasonable expectation of securing other employment during the same hours and for the same number of hours worked, no disqualification shall be imposed under Iowa Code section 96.4(3). In other words, if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law.

Because the claimant has other base-period wages and was employed part-time during that period, she may be considered partially unemployed. Partial benefits may be allowed if she is otherwise eligible. Inasmuch as the part-time employer was offering the same wages and hours as in the base period and as contemplated at hire, no benefit charges shall be made to its account.

Effective March 22, 2015, the administrative law judge concludes that the claimant is able to work and available for work.

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.

An individual claiming benefits must be able to work, available for work, and actively and earnestly seeking work. The claimant was able, available, and actively seeking work. She had not been guaranteed any hours and the employer did not have any hours to give her when she called to inquire. As the claimant had not separated from her employment, she was still on the schedule and considered to be an employee, the issue of her separation from the employer is moot. Accordingly, benefits are allowed.

DECISION:

The November 2, 2015, (reference 10) unemployment insurance decision is reversed. The claimant is able to work and available for work effective March 22, 2015. Benefits are allowed provided she is otherwise eligible. The account of the employer (account number 358669) shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs