

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHNNY E HOPKINS
Claimant

TRIPLE T LEASING INC
Employer

APPEAL 15A-UI-09825-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/02/15
Claimant: Appellant (1-R)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 26, 2015, (reference 01) unemployment insurance decision that denied benefits based upon not being able to or available for work. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2015. Claimant participated. Employer participated through owner, Bruce Thies, and manager/dispatcher, Shawn Hemmestad. Employer's Exhibit 1 was received.

ISSUE:

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired to work full-time as a delivery driver from Tuesday through Friday and at least one Saturday per month for the Fort Dodge route through FedEx contractor Triple T Leasing from October 8, 2011. In early spring 2012, he told the employer he needed a couple of weekends off for his personal business and they were able to work around it with other drivers covering for him. This continued on and off with increased frequency through early 2015. Hemmestad became his supervisor in 2014. Claimant was off work due to a work-related injury from February 16 through 20, 2015, and returned to full duty on March 10, 2015. In early May 2015, Phies told claimant that given his full-time route schedule the employer could not grant his request for the month of July as vacation to use for his personal business of children's rodeo entertainment. Phies offered him a Tuesday through Friday route outside of Fort Dodge and that would make it easier to find replacements for Friday only rather than his Friday and Saturday personal business conflicts. Claimant rejected that offer of accommodation and wanted to stay with the full-time Fort Dodge route because it pays more.

On May 15, 2015, he texted Hemmestad that he would be absent the next two Saturdays for his personal business. Full-time drivers accumulate one week of vacation after the first year of employment and one additional day each year thereafter. Hemmestad told him the employer needed him to work the weekends because of vacation schedules for graduations and it would

not be possible to find coverage for the entire month of July. On June 8 claimant contacted Hemmestad to inform him he would be absent Friday and Saturday of that week. On Saturday, June 19 claimant reminded Hemmestad he would be absent the following day. On June 22 claimant texted Hemmestad it would be his last week for awhile due to his busy schedule in July. On June 26 the employer hired someone to work full-time on the Fort Dodge route since claimant was not available to work. On July 6 claimant wrote Hemmestad he would not return to work until between August 4 and 6, 2015, and that he would only be able to work on August 11, 12, 18 through 20 and 25 through 27. Hemmestad told him he was scheduled to work July 15 but claimant replied he would be working for his personal business in Wisconsin that day. On July 30 Hemmestad notified claimant that because of his absences for his personal business the employer had to make changes to his route and claimant would need to contact him before returning to work. On August 3 claimant asked Hemmestad what time he should report and which route he would take. Hemmestad replied the employer would not be able to work around his rodeo schedule in August but might be able to do so in September. Claimant filed his claim for unemployment insurance benefits effective August 2, 2015, after having returned from vacation during the entire month of July when he was travelling for his personal business. The employer then received the notice that claimant had filed a claim for unemployment insurance benefits. On August 13 Hemmestad offered him work for August 14 and 15 but claimant said he was in Minnesota with his personal business. The separation from employment has not been addressed by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work.

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 Admin. Code r. 871-24.22(2)c 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.

c. Intermittent employment. An individual cannot restrict employability to only temporary or intermittent work until recalled by a regular employer.

Iowa Admin. Code r. 871-24.23(3) provides:

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

(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code § 96.4(3).

Iowa Admin. Code r. 871-24.23(7), (16), (18), (23), (25) and (29) provides:

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

(7) Where an individual devotes time and effort to becoming self-employed.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

Since claimant limits the number of hours and days he will work due to his personal business that overlap significantly with the hours and days expected in the delivery business, he is not considered available for work.

DECISION:

The August 26, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant is not able to work and available for work effective August 2, 2015. Benefits are denied.

REMAND:

The separation issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs