

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VERONICA BENITEZ-RICO

Claimant

APPEAL NO: 09A-UI-11536-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM LTD/SERVICEMASTER GREEN

Employer

OC: 05/17/09

Claimant: Respondent (4/R)

Iowa Code § 96.4-3 - Able and Available for Work

Iowa Code § 96.5-1 - Voluntary Quit

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

ServiceMaster Green (employer) appealed an unemployment insurance decision dated August 10, 2009, reference 01, which held that Veronica Benitez-Rico (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 26, 2009. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Gregg Stearns, Human Resources Manager; Donarene Grenell, Director of Operations; and Tara Swackhammer, Client Relations Manager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was available to work, and whether her subsequent voluntary separation from employment was disqualifying.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time day porter from June 2, 2008 through August 4, 2009 when she voluntarily quit for personal reasons. Prior to her separation, she requested unpaid time off from October 16, 2008 through October 23, 2008 and from April 23, 2009 through May 18, 2009. The employer had to put another employee in the claimant's place while she was gone so she did not have an assignment when she returned.

She filled in for other employees while they were on vacation from May 29, 2009 through June 19, 2009 but the regular employees returned on June 20, 2009. The employer did not have work available for the claimant until July 22, 2009 but the claimant did not return the telephone calls until July 24, 2009. Consequently, she returned to work on July 27, 2009 and

worked through July 31, 2009. The claimant called in sick on August 3, 2009 and voluntarily quit on the following day.

The claimant filed a claim for unemployment insurance benefits effective May 17, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is whether the claimant was able 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".

871 IAC 24.23(10) provides:

(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.

871 IAC 24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The claimant has the burden of proof in establishing her ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). The claimant requested time off work without pay from April 23, 2009 through May 18, 2009. Her position had to be filled while she was gone and when she returned to work, she had to fill in for other employees while they were on vacation. The claimant was unavailable from May 23, 2009 through June 20, 2009 because she was working in her part-time job at the same hours and wages as in her original contract of hire.

The claimant was available from June 27, 2009 through July 18, 2009 but no work was available. Consequently, the claimant qualifies for unemployment insurance benefits for the four-week period ending July 18, 2009. The employer had work for the claimant on July 22,

2009 but the claimant did not return the employer's call until July 24, 2009. Consequently, she does not meet the availability requirements of the law for the week ending July 25, 2009 and is not entitled to benefits that week. The claimant again worked her regular part-time hours for the week ending August 1, 2009 and is disqualified from receiving benefits.

The next issue to be determined in this case is whether the claimant's voluntary separation from employment qualifies her to receive unemployment insurance benefits. She is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer. Iowa Code § 96.5-1.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Bd., 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant demonstrated her intent to quit and acted to carry it out by telling the employer she had to quit for family reasons.

It is the claimant's burden to prove that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. She has not satisfied that burden and benefits are denied as of August 8, 2009.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 10, 2009, reference 01, is modified in favor of the appellant. The claimant meets the availability requirements for the four-week period ending July 18, 2009 and qualifies for benefits for that same time frame. Subsequently, she

voluntarily quit without good cause attributable to the employer. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Benefits are denied as of July 25, 2009.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs