

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LISHA L BURCH
Claimant

APPEAL NO. 18A-UI-08807-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OLYMPIC STEEL IOWA INC
Employer

OC: 07/22/18
Claimant: Appellant (1)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Lisha Burch filed a timely appeal from the August 16, 2018, reference 03, decision that denied benefits for the three-week period of July 22, 2018 through August 11, 2018, based on the Benefits Bureau deputy's conclusion that Ms. Burch was not available for work within the meaning of the law due to a lack of adequate child care that was unduly restricting her availability for work. After due notice was issued, a hearing was held on September 6, 2018. Ms. Burch participated. Chelsea Coleman, Corporate Human Resources Manager, represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-08806-JTT. Exhibits A and B were received into evidence. The administrative law judge took official notice of the Agency's administrative record of Ms. Burch's weekly claims (KCCO) and of the database readout (DBRO).

ISSUES:

Whether Ms. Burch was able to work and available for work within the meaning of the law during the three-week period of July 22, 2018 through August 11, 2018.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lisha Burch is employed by Olympic Steel Iowa, Inc. as a full-time machine operator. Ms. Burch began her employment in January 2018. Prior to commencing the employment, the employer provided Ms. Burch with an offer letter wherein the employer offered a third-shift position with work hours of 11:00 p.m. to 7:00 a.m., Monday through Friday. Ms. Burch was specifically interested in third-shift work due to her family circumstances. Ms. Burch spent her first week of employment in training during the first shift and then moved to the third shift hours. Ms. Burch is a single parent. Ms. Burch's 18-year-old daughter and Ms. Burch's five-year-old grandson reside with Ms. Burch. Ms. Burch is her grandson's legal guardian. The overnight work hours allowed Ms. Burch to attend to her family's needs during the remaining hours of the day. When Ms. Burch was at work during the overnight hours, her teenage daughter was at the family home and available as needed to care for Ms. Burch's sleeping grandson. Ms. Burch's regular work week on the third shift ran from Sunday evening to Friday morning. The employer required overtime work as needed.

Effective April 2, 2018, the employer moved Ms. Burch to the second shift as part of the employer's decision to move Ms. Burch's entire department to the second shift. Ms. Burch's work hours on the second shift were 3:00 p.m. to 11:00 p.m., Monday through Friday. Ms. Burch did not wish to move to the second shift, but acquiesced in the change in shift in order to continue in the employment. The second shift hours conflicted with Ms. Burch's need to collect her young grandson from the school bus at 3:00 p.m. Ms. Burch's daughter did not get home from school until 3:30 p.m. and was not always available to care for the grandson during the afternoon and evening hours. Ms. Burch's mother lived nearby and, when she was available, assisted with caring for Ms. Burch's grandchild during Ms. Burch's second shift work hours. Ms. Burch's childcare situation became no less challenging when her grandson's school year ended.

On or about July 10, 2018, Ms. Burch's work area went into a temporary shut-down. The employer continued to have alternative work available to Ms. Burch during the same second-shift work hours. The alternative work included assisting with inventory and using a fork truck to move materials. Ms. Burch found the alternative work suitable, but continued to struggle with the second-shift work hours. At about the same time Ms. Burch started on the alternative second-shift work, Ms. Burch's mother went on vacation and was no longer available to assist with childcare for Ms. Burch's young grandson. Ms. Burch called in absences due to a lack of childcare on July 11, 12 and 13, Wednesday through Friday. On Monday, July 16, Ms. Burch reported for work late and left work early due to a lack of child care. Ms. Burch then was absent during the remainder of that work week, July 17-20, Tuesday through Friday, due to a lack of child care. Ms. Burch thereafter called in absences on July 23 and 24, Monday and Tuesday, due to a lack of childcare. During 10 consecutive absence dates, Ms. Burch accrued attendance points and exceeded the number of allowable attendance points under the employer's attendance policy. Ms. Burch was aware of her accrual of attendance points beyond the allowable 10 points and assumed she would be discharged from the employment. With that in mind, Ms. Burch established an original claim for unemployment insurance benefits that Iowa Workforce Development deemed effective July 22, 2018. The employer had not said anything to Ms. Burch about separating from the employment at the time Ms. Burch took steps to establish her unemployment insurance claim.

On Wednesday, July 25, 2018, Chelsea Coleman, Corporate Human Resources Manager, telephoned Ms. Burch and spoke to Ms. Burch regarding the ongoing attendance issue. Ms. Coleman told Ms. Burch that the employer intended to move forward with discharging Ms. Burch from the employment. Ms. Burch explained her family circumstances, explained how she had struggled with the second shift hours, and asked whether she could continue in the employment, but move to a different position with third-shift hours. Ms. Coleman agreed to forego discharging Ms. Burch for the moment and agreed to contact Tracy Delathouwer, Operations Manager, to discuss Ms. Burch's proposal. In the meantime, Ms. Burch continued to be unavailable for second shift work. As of July 25, Ms. Coleman was not inclined to allow Ms. Burch to return to work unless or until Ms. Delathouwer authorized a return to work on a different shift.

Ms. Coleman promptly spoke with Ms. Delathouwer and Ms. Delathouwer agreed to meet with Ms. Burch on Thursday, July 26. At the July 26 meeting, Ms. Delathouwer acquiesced in allowing Ms. Burch to complete an internal application to transfer to a new position on the third shift. Both parties understood that any move to the third shift would be preceded by a period of training that would occur during the first shift. On July 26, Ms. Burch completed an internal application for a press break position on the third shift. Ms. Burch remained unavailable for second shift work.

During the week of July 29 through August 4, 2018, Ms. Burch received word from the employer that she had not been selected for the third-shift press break position. However, on Wednesday, August 1, Ms. Delathouwer contacted Ms. Burch and asked whether Ms. Burch would be interested in training to operate the oxy machine on the third shift. Ms. Delathouwer stated that the training would take place on the first shift. Ms. Burch asked when she would be expected to start and Ms. Delathouwer said Monday morning, meaning August 6, 2018. Ms. Burch did not indicate acceptance of the position at that time. Ms. Delathouwer asked Ms. Burch to think about it and get back to her. Ms. Burch did not get back to Ms. Delathouwer. Ms. Burch was preoccupied with her child care issues in light of her grandson being on summer break from school and her daughter being out of town.

On Friday, August 3, Ms. Coleman called Ms. Burch and asked whether Ms. Burch wanted the position that Ms. Delathouwer had offered on August 1. Ms. Burch said she wanted the job, but asked if she could start on August 13, due to her lack of child care. Ms. Burch began her training for the new full-time position on Monday, August 13 and continued in that training at the time of the September 6, 2018 appeal hearing.

Ms. Burch filed weekly unemployment insurance claims for the weeks that ended July 28, August 4, and August 11, 2018. During each of these three weeks, Ms. Burch made two or more job contacts. Ms. Burch's job contacts included contacts in Mississippi. Ms. Burch was contemplating a move to Mississippi, where she has extended family. After the week that ended August 11, 2018, Ms. Burch discontinued her claim in connection with her return to the employment on Monday, August 13, 2018.

On August 9, 2018, an Iowa Workforce Development Benefits Bureau deputy entered the reference 01 decision from which Ms. Burch appeals in the present matter. That decision denied benefits effective July 22, 2018, based on the deputy's conclusion that Ms. Burch was not available for work within the meaning of the law due to a lack of adequate child care that was unduly restricting her availability for work. A Benefits Bureau deputy subsequently entered an August 16, 2018, reference 03, decision that effectively amended August 9, 2018, reference 01, decision to the three-week period of July 22, 2018 through August 11, 2018. The deputy concluded that Ms. Burch lacked adequate child care arrangements and that the lack of child care was unduly restricting Ms. Burch's availability for work. Ms. Burch filed an appeal from both decisions that concluded she was not available for work within the meaning of the law.

REASONING AND CONCLUSIONS OF LAW:

Because Ms. Burch's unemployment insurance claim was only active during the three-week period of July 22, 2018 through August 11, 2018, the administrative law judge need only rule on her availability for work and her ability to work during that three-week period.

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".

Ms. Burch was physically and mentally able to perform work throughout the three-week period.

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.

Iowa Admin. Code r. 871-24.23(16) provides:

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

(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.

Iowa Administrative Code rule 871-24.23(8) provides that where a claimant's availability for work is unduly limited because of not having made adequate arrangements for child care, the claimant will be deemed unavailable for work and disqualified for unemployment insurance benefits.

Ms. Burch concedes, and the evidence establishes, that Ms. Burch was not available for work during the week of August 5-11, 2018. Ms. Burch had asked the employer to defer her return to work from August 6 to August 13 due to Ms. Burch's lack of child care. Ms. Burch was not available for work on any shift that week due to her lack of child care for her grandson. Ms. Burch is not eligible for benefits for the benefit week that ended August 11, 2018.

The weight of the evidence in the record establishes that Ms. Burch was also not available for work within the meaning of the law during the two-week period of July 22, 2018 to August 4, 2018. Ms. Burch concedes that she was not available for second-shift work during that two-week period. The weight of the evidence establishes that Ms. Burch remained attached to the employer during this two-week period. Ms. Burch's established work hours had become second-shift hours effective the beginning of April 2018. An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner in response to

the changed conditions. See *Olson v. Employment Appeal Board*, 460 N.W.2d 865 (Iowa Ct. App. 1990). Unless and until Ms. Burch and the employer agreed to a further change in the work hours, Ms. Burch was obligated to be available for second-shift work hours in order to meet the unemployment insurance availability requirement. While Ms. Burch asserts that she was available for work during other shifts during that two-week period, the weight of the evidence does not support the assertion. Ms. Burch's grandson was out of school for the summer break. Ms. Burch's teenage daughter was not a reliable source of child care and Ms. Burch lacked an alternative.

Because the evidence establishes that Ms. Burch was not available for work within the meaning of the law during that three-week period of July 22, 2018 through August 11, 2018, she is not eligible for benefits for that period.

DECISION:

The August 16, 2018, reference 03, decision is affirmed. The claimant was not available for work within the meaning of the law during the three-week period of July 22, 2018 through August 12, 2018, when her unemployment insurance claim was active, and is not eligible for benefits for that period.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs