

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

Appeal Number: 12IWDUI495-496

OC: 3/11/12

Claimant: Appellant (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

GiGi Johnson
644 7th Street
West Des Moines, IA 50265

Iowa Workforce Development
Investigations and Recovery
Irma Lewis

Joe Walsh, IWD

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed Notice of Appeal, directly to the **Employment Appeal Board, 4TH Floor Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

January 15, 2013

(Decision Dated & Mailed)

STATEMENT OF THE CASE

GiGi Johnson filed an appeal from decisions issued by Iowa Workforce Development (IWD) dated September 21, 2012 and September 27, 2012. The first decision concerns the denial of unemployment benefits for an alleged failure to be willing to work the number of hours required of her occupation, which was found to unduly limit her availability for work. The second decision is related to the first, but seeks an overpayment of benefits due to being able and available to work. IWD seeks repayment of \$4,346.18 in overpaid benefits.

The case was transmitted from IWD to the Administrative Hearings Division (AHD) on October 12, 2012 to schedule a contested case hearing. My office issued a notice of hearing setting a hearing for December 6, 2012, before Administrative Law Judge Jeffrey D. Farrell. Investigator Irma Lewis represented IWD and presented testimony.

IWD called Teresa Glick as a witness. IWD's exhibit A was admitted into the record. Appellant GiGi Johnson appeared and presented testimony. She called her husband, Keith Johnson, as a witness.

ISSUES

1. Whether IWD correctly determined that appellant is ineligible to receive unemployment insurance benefits.
2. Whether IWD correctly determined that appellant was overpaid unemployment insurance benefits and, if so, whether the overpayment was correctly calculated.

FINDINGS OF FACT

Appellant GiGi Johnson has received unemployment benefits through IWD after being laid off from Sodexo on March 17, 2011, due to a reduction in force. Sodexo is a cafeteria vender. Appellant was assigned to the kitchen at GuideOne Insurance at the time of the lay-off. She worked for Sodexo for 18 years. (G. Johnson, K. Johnson testimony).

IWD issued a notice for appellant to attend a meeting to discuss re-employment eligibility on August 24, 2012. Appellant appeared and met with Teresa Glick of IWD. Appellant identified several medical problems that were impacting her job search, including spinal stenosis, asthma, and arthritis. According to Ms. Glick, appellant claimed she could not do kitchen work like she had done in the past. She also claimed she could not do office work because she could not sit for long periods of time due to back and leg pain. (Exhibit 1, Glick email; Glick testimony).

On September 7, 2012, IWD sent a notice to appellant directing her to provide information to IWD regarding her work searches. The notice also included two forms: a work search history form, and a request for medical report to be completed by appellant's physician. The notice stated that the failure to provide the information requested may impact her benefits, and that there may be an overpayment of unemployment benefits. (Exhibit 1, September 7, 2012 notice to report).

On or around September 11, 2012, appellant filed a work search history form showing employer contacts between May 6, 2012, and September 1, 2012. On or around the same day, appellant filed the completed medical report. The report stated that appellant has chronic neck, shoulder, and low back pain. He stated her first treatment for these conditions was in 1996. The doctor stated she has a lift restriction and is not able to lift or carry pans of food. He did not list a set weight limit. The report stated that appellant could not perform her occupation, although it was vague what he considered her occupation to be. (Exhibit 1).

Irma Lewis reviewed the information provided. Ms. Lewis had two concerns. First, appellant applied for a number of jobs that appeared to violate her medical restrictions. Appellant applied at locations such as Joe's Crab Shack, Cracker Barrel, Tuesday Morning, and others. Some other applications were at big-box stores that would raise similar work restriction issues. Second, she applied for a number of part-time jobs,

which are not comparable to the full-time job she had with Sodexo. Ms. Lewis stated that appellant was unduly limiting her job options to part-time, and not making herself available for work that she was capable of doing under her restrictions. (Lewis testimony).

Appellant testified that she applied for some jobs that were part-time because they might lead to full-time work within the company. She feels it would be better to get part-time employment than no employment. Appellant testified that she can do more work than stated in the doctor's report. She pointed to a letter dated June 4, 2007 from a doctor stating that she has multiple back conditions that have caused back and leg pain. She continued to work with Sodexo after that date until laid off in 2011, so medical conditions have not prevented her from doing work. She described her lift restriction is 40 pounds or 20 pounds over the head or away from her body. However, she did not submit any medical documents to support her statement. She told potential employers about her restrictions so they could openly discuss whether she would be a fit for a position. Many of the later jobs were cashier jobs that should not require a great deal of lifting. (G. Johnson testimony).

Appellant denied telling Ms. Glick that she could not work restaurant jobs. She admitted she "got off on the wrong foot" with Ms. Glick, which may have led to some misunderstandings during their conversation. Appellant proved to be combative during the hearing and frequently did not listen to my direction. I find it more likely that Ms. Glick's rendition of the conversation is more accurate than that given by appellant. (Glick, G. Johnson testimony; Exhibit A, G. Johnson letter to Lewis).

As stated above, IWD cancelled appellant's unemployment and filed a claim for repayment of benefits received. IWD went back to May 1, 2012, which was the start of the evaluation period. (Lewis testimony).

REASONING AND CONCLUSIONS OF LAW

A. Eligibility

Iowa law requires that in order to receive unemployment an insurance benefits an individual must be able to work, available for work, and be earnestly and actively seeking work.¹ "Able to work" is defined as:

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.²

Each case must be decided on an individual basis. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required.

¹ Iowa Code § 96.4(3) (2011).

² 871 IAC 24.22(1).

Additionally, a person may be disqualified from benefits for failing to accept work, which is defined broadly as failing to apply for “available, suitable work when directed by [IWD.]”³ In determining whether work is suitable, IWD shall consider:

the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph.

The claimant bears the burden of proving her ability to work for the purposes of receiving unemployment compensation.⁴

The *Sierra* case provides a useful comparison for the evaluation of the present case. In *Sierra*, the court considered whether a person who had had epilepsy that resulted in several seizures was able to perform work. The court noted that the claimant satisfactorily performed her duties at her prior employer, and never interfered in any other occupation she undertook. The claimant’s doctor placed several restrictions on her employment opportunities, but there was no evidence that any of these restrictions impacted her last employment. The court found that the claimant met her burden of proof to show she was qualified and presently able to perform work, with some accommodations.

Appellant likewise has medical conditions that limit her ability to perform some job duties. However, she has had her back condition for a number of years and was able to work. Her doctor documented treatment back to 1996, and appellant submitted a 2007 letter from a doctor discussing her ailments. Still, she worked at Sodexo for 18 years in the kitchen until March of 2011. She only lost that job due to a lay-off, and not because she could not perform her job duties. Her 18 year job history speaks directly to her ability to work notwithstanding her medication conditions.

Appellant’s job application strategy has been reasonable. She has applied for restaurant jobs which are consistent with her work history, but she has primarily sought out cashier positions that would not require as much lifting. She has discussed the need for some accommodations when talking to potential employers. She has applied for cashier jobs with other types of retail employers as well. There is no indication she has applied for jobs that are otherwise outside her training or ability to perform.

IWD’s action is understandable based on the medical report signed by appellant’s doctor on September 10, 2012, and her actions during her meeting with Ms. Glick. The medical report is somewhat vague as to appellant’s lift restrictions. If the doctor had prescribed a 40 pound or 20 pound restriction, IWD could have better evaluated her ability to work. The medical report can be interpreted to mean that she cannot lift anything or

³ Iowa Code section 96.5(3).

⁴ *Sierra v. Employment Appeal Bd.*, 508 N.W.2d 719, 723 -724 (Iowa 1993).

cannot work in a kitchen at all. I do not find this to be true based on the record as a whole, but I can understand why IWD made such a finding based on the face of the document. Second, appellant likely muddied the waters during her meeting with Ms. Glick by turning the meeting into an adversarial setting. She admitted she “got off on the wrong foot,” and if her demeanor was anything like it was at hearing, I can see why. However, I must view the evidence as a whole as presented at the hearing. I believe appellant has proven she was able to work and applied for suitable employment. The decision to cancel benefits on this ground was in error.

Additionally, it was reasonable for appellant to apply for part-time employment. Work is suitable if the work meets all the other criteria of the statute and if the gross weekly wages for the work equal or exceed 65 percent of the employee’s prior weekly wage, if the work is offered after the eighteenth week of unemployment.⁵ Appellant applied for jobs offering 30 to 35 hours of work per week. There was no indication the pay would fall under the 65 percent threshold. Further, it was certainly reasonable to seek out part-time work with the hope it could turn full-time, or continue to job search during non-work hours.

B. Overpayment and Misrepresentation

Under Iowa law, if an individual receives unemployment insurance benefits for which he or she is subsequently determined to be ineligible, IWD must recover those benefits even if the individual acted in good faith and is not otherwise at fault. IWD may recover the overpayment of benefits by requesting payment from the individual directly or by deducting the overpayment from any future benefits payable to the overpaid claimant.⁶ If a claimant is overpaid benefits as a result of misrepresentation, IWD may – in addition to recovering the overpayment through direct payment or deduction from future benefits – file a lien for the overpayment amount in favor of the state on the claimant’s real or personal property and rights to property.⁷

The alleged overpayment in this case was directly tied to IWD’s determination that appellant was ineligible for benefits from May 1 through September of 2012, for reasons discussed above. As noted above, IWD erred in finding appellant ineligible for benefits during that time period. Consequently, there is no overpayment of benefits.

DECISION

Iowa Workforce Development’s decisions dated August 20, 2012 and August 23, 2012 are reversed. IWD shall take any action necessary to implement this decision.

⁵ Iowa Code section 96.5(3).

⁶ Iowa Code § 96.3(7)(a) (2011).

⁷ 871 IAC 24.18.