

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISY L SHOFE
Claimant

APPEAL NO. 12A-UI-00170-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**DANIAL HOSPITALITY INC
BEST WESTERN/SUPER 8**
Employer

**OC: 11/27/11
Claimant: Respondent (4)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 30, 2011, reference 02, decision that allowed benefits based on Agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on February 2, 2012. Claimant participated. Karen Evans represented the employer and presented additional testimony through Julie Voss. The administrative law judge took official notice of the Agency's administrative record (DBRO) of benefits disbursed to the claimant and wages reported by or for the claimant.

ISSUES:

Whether the claimant has been able to work and available for work since establishing his/her claim for benefits.

Whether the claimant was partially unemployed from his/her employment.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates the Best Western/Super 8 motel in Williamsburg. Chrisy Shofe began working for the employer in August 2011 and continued in the employment as of the February 2, 2012 appeal hearing. Julie Voss, Head Housekeeper, is Ms. Shofe's immediate supervisor. The way Ms. Shofe's employment worked from the start is that the employer would schedule Ms. Shofe to work five out of seven days per week. Ms. Shofe could expect those days to include three out of four weekends. Though the employer would *schedule* Ms. Shofe to work beginning at 9:00 a.m. five days a week, the employer might call her by 7:15 a.m. to tell her not to come in if she was not needed. Whether the employer would actually have Ms. Shofe come in and work would be contingent upon the number or guest rooms that needed to be cleaned.

The employer had provided a record of Ms. Shofe's work hours for the period of October 9, 2011 through January 28, 2012. The record consists of two-week pay periods. During the two-week period of October 9-22, Ms. Shofe worked 41.25 hours. During the two-week period of October 23 through November 5, Ms. Shofe worked 36.5 hours. During the two-week period of November 6-19, Ms. Shofe worked 43 hours. During the two-week period of November 20 through December 3, Ms. Shofe's work hours dropped to 24. The drop was attributable to a slowing of business. During the two-week period of December 4-17, Ms. Shofe worked 19.25 hours. During the two-week period of December 18-31, Ms. Shofe worked 14.5 hours. During the two-week period of January 1-14, 2012, Ms. Shofe worked 12.5 hours. During the two-week period of January 15-28, Ms. Shofe worked 3.75 hours. Ms. Shofe's hourly wage is \$7.25.

Ms. Shofe established a claim for unemployment insurance benefits that was effective November 27, 2011 in response to the drop in hours the employer made available to her. Ms. Shofe's weekly benefit amount has been set at \$136.00. Ms. Shofe's weekly reported wages and unemployment insurance benefits have been as follows:

| <u>Benefit week end date</u> | <u>Reported Wages</u> | <u>Benefits Disbursed</u> |
|------------------------------|-----------------------|---------------------------|
| 12/03/11 | 65.00 | 105.00 |
| 12/10/11 | 116.00 | 54.00 |
| 12/17/11 | 29.00 | 136.00 |
| 12/24/11 | 32.00 | 136.00 |
| 12/31/11 | 72.00 | 98.00 |
| 01/07/12 | 29.00 | 136.00 |
| 01/14/12 | 59.00 | 111.00 |
| 01/21/12 | 28.00 | 136.00 |
| 01/28/12. | 00 00 | 136.00 |
| 02/04/12 | 67.00 | 103.00 |
| 02/11/12 | 30.00 | 136.00 |
| 02/18/12 | 33.00 | 136.00 |

When Ms. Shofe started the employment, she placed no restrictions on her availability. At the beginning of January 2012, Ms. Shofe began part-time college coursework at Kirkwood Community College. Ms. Shofe attends a satellite campus in Williamsburg. Ms. Shofe takes three classes total, one of which is an on-line course. One class meets from 11:00-11:50 a.m., Monday, Wednesday, Friday. Another class meets 2:00-2:50 p.m., Monday, Wednesday, Friday. As Ms. Shofe was planning to start her studies, she notified Ms. Voss that she would no longer be available to work Monday, Wednesday, and Friday, but would be willing to work every weekend. The schedule for January 2012 was already posted at the time. Ms. Voss told Ms. Shofe she was not sure how the change in availability would work out. Ms. Shofe was able to successfully trade *scheduled* work days with other housekeepers in January to coordinate her work and school schedule.

Ms. Shofe's unavailability for work on Mondays, Wednesdays, and Fridays only became an issue on Wednesday, February 1, 2012. This was the day before the appeal hearing. On that day, Ms. Voss initially notified Ms. Shofe that she was not needed. Shortly thereafter Ms. Voss called Ms. Shofe back and said she was indeed needed to work that morning. Ms. Shofe indicated she could not come to work that day because she could not miss school.

The employer expects Ms. Shofe to maintain *full-time* availability for *part-time* work, with no guarantee of work hours.

Ms. Shofe's average weekly wage during the highest earning quarter of her base period was \$221.23. This employer is not a base period employer. In other words, Ms. Shofe did not work for this employer during the third or fourth quarter of 2010 or the first or second quarter of 2011.

REASONING AND CONCLUSIONS OF LAW:

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".

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. Iowa Code section 96.19(38)(b).

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. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.
2. Contribution rates based on benefit experience.
 - a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.
 - (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.

(a) 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 section 96.8, subsection 5.

[Emphasis added.]

The weight of the evidence in the record establishes that Ms. Shofe has indeed been partially unemployed since she established the claim for benefits that was effective November 27, 2011. Since Ms. Shofe filed her claim for benefits the employer had not had the same work available for Ms. Shofe that it had for her prior to the claim. Indeed, the available work hours decreased substantially and this is what prompted the claim for benefits. At no time since she established the claim for benefits has Ms. Shofe earned wages amounting to her weekly benefit amount plus \$15.00. Prior to February 1, 2012, Ms. Shofe had appeared for all work the employer had available to her. In other words, she continued to be available for work. Indeed, despite declining work on Wednesday, February 1, 2012, Ms. Shofe was otherwise available the majority of the week for the work the employer actually had available to her. The employer's expectation that Ms. Shofe will maintain availability for full-time work, but only receive part-time hours is unreasonable and should not serve as a basis for disqualifying her for unemployment insurance benefits.

This employer is not a base period employer and will not be charged for benefits paid to the claimant during the claim year that started November 27, 2011 and that will end November 24, 2012. In the event, Ms. Shofe establishes a new claim on or after November 25, 2012, the employer's liability in connection with that claim will need to be determined.

DECISION:

The Agency representative's December 30, 2011, reference 02, is modified as follows. The claimant has been able and available for work, and partially unemployed, since she established her claim for benefits. The claimant is eligible for benefits, provided she meets all other eligibility requirements. This employer is not a base period employer and will not be charged for benefits paid to the claimant during the claim year that started November 27, 2011 and that will end November 24, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs