

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RICHARD E MUSUMHI
Claimant

DRM INC
Employer

APPEAL NO. 21A-UI-09344-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/31/21
Claimant: Appellant (5)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.1A(37) – Partial Unemployment
Iowa Code Section 96.7(2)(a)(2)(a) – Employer Liability

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 25, 2021, reference 01, decision that denied benefits effective January 31, 2021, based on the deputy's conclusion that the claimant was still employed for the same hours and wages as in the original contract of hire and cannot be deemed partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on June 17, 2021. Claimant participated. The employer did not provide a telephone number for the appeal hearing and did not participate. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, KPYX and WAGE-A.

ISSUES:

Whether the claimant was able to work and available for work for the period beginning January 31, 2021.

Whether the claimant was partially and/or temporarily unemployed for the period beginning January 31, 2021.

Whether the employer's account may be charged for benefits for the period beginning January 31, 2021 to the end of the employment in April 2021.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by DRM, Inc., doing business as Arby's, as a part-time kitchen worker at the employer's south Ames restaurant. The claimant began his employment in April 2020 and last performed work for the employer on or about April 25, 2021. The claimant's wage throughout the employment was \$9.50 an hour. At the time of hire, the claimant and the general manager spoke casually about the possibility of the claimant moving into a full-time position. A new general manager commenced operating the restaurant about two months into the claimant's employment. The claimant continued as a part-time employee. There was no guaranteed number of work hours. The claimant's work hours varied substantially from week to week. The claimant maintained a 9:00 a.m. to 9:00 p.m. availability, which meant he was not

available at 7:00 a.m. when the employer commenced daily operations or during the later evening when the employer continued to operate. The employer would open to customers at 10:00 a.m. and close to customers at 10:00 p.m. The morning shift staff worked 7:00 a.m. to 3:00 p.m. The evening staff started at 3:00 p.m. and worked to sometime between 10:30 p.m. and midnight. The claimant would usually start his shift a 10:00 or 11:00 a.m. and conclude his shift at 3:00 or 4:00 p.m. The claimant advises that he usually worked five or six shift per week, but the claimant's reported wages and pay stubs indicate a greater degree of variability in the weekly hours. The claimant was not a student during the employment. Until April 19, 2021, the claimant had no other employment during the period of this part-time employment. The claimant did not request time off and did not decline shifts with Arby's prior to starting the new full-time employment on April 19, 2021.

The claimant accepted the new full-time employment with Capitol Fruit on April 19, 2021. The claimant thereafter restricted his Arby's availability to only weekends, but did not tell the employer why he was restricting his availability. The claimant last worked for Arby's on or about April 25, 2021. The claimant thereafter did not return for additional shifts with Arby's. The claimant continued in the full-time employment with Capitol Fruit.

The claimant had an open unemployment insurance claim throughout the period of the Arby's employment. The weekly claims were initially under a February 2, 2020 original claim. That claim year expired on January 30, 2020. The claimant established a new claim year that was effective January 31, 2021. Iowa Workforce Development set the new weekly benefit amount at \$225.00. The base period for the new claim year consisted of the fourth quarter of 2019 and the first, second and third quarters of 2020. DRM is a base period employer for purposes of the new claim year. DRM reported quarter wages as follows.

<u>Quarter</u>	<u>Wages</u>
2020/2	1,651.34
2020/3	2,091.67
2020/4	2,194.13
2021/1	1,366.61

Quarterly wage reports may be used to calculate quarterly average weekly wages as follows:

<u>Quarter</u>	<u>Average Weekly Wages</u>
2020/2	\$157.00 (\$1,651.34 divided by 10.5 weeks)
2020/3	\$160.85 (\$2,091.67 divided by 13 weeks)
2020/4	\$168.77 (\$2,194.13 divided by 13 weeks)
2021/1	\$105.08 (\$1,366.61 divided by 13 week)

The claimant reported his weekly wages as follows. The wages represent his hours worked multiplied by his \$9.50 hour wage. The work hours in the chart below are based on that testimony and the wage report.

<u>Benefit Week End Date</u>	<u>Reported Wages</u>	<u>Weekly Hours</u>
04/25/20	95.00	10.0
05/02/20	190.00	20.0
05/09/20	238.00	25.0
05/16/20	190.00	20.0
05/23/20	152.00	16.0
05/30/20	180.00	18.9
06/06/20	247.00	26.0
06/13/20	180.00	18.9

06/20/20	60.00	6.3
06/27/20	228.00	24.0
07/04/20	105.00	11.0
07/11/20	152.00	16.0
07/18/20	114.00	12.0
07/25/20	114.00	12.0
08/01/20	190.00	20.0
08/08/20	190.00	20.0
08/15/20	85.00	8.9
08/22/20	209.00	22.0
08/29/20	190.00	20.0
09/05/20	190.00	20.0
09/12/20	180.00	18.9
09/19/20	494.00	52.0
09/26/20	314.00	33.0
10/03/20	209.00	22.0
10/10/20	219.00	23.0
10/17/20	290.00	30.5
10/24/20	171.00	18.0
10/31/20	157.00	16.5
11/07/20	48.00	5.0
11/14/20	76.00	8.0
11/21/20	133.00	14.0
11/28/20	76.00	8.0
12/05/20	121.00	12.7
12/12/20	123.00	12.9
12/19/20	134.00	14.1
12/26/20	116.00	12.1
01/02/21	157.00	16.5
01/09/21	60.00	6.3
01/16/21	86.00	9.0
01/23/21	136.00	14.3
01/30/21	57.00	6.0
02/06/21	100.00	10.5
02/13/21	120.00	12.6
02/20/21	121.00	12.7
02/27/21	82.00	8.6
03/06/21	110.00	11.6
03/13/21	98.00	10.3
03/20/21	175.00	18.4
03/27/21	155.00	16.3
04/03/21	163.00	17.2
04/10/21	145.00	15.3
04/17/21	168.00	17.7
04/24/21	598.00	FT
05/01/21	747.00	FT
05/08/21	661.00	FT
05/15/21	545.00	FT
05/29/21	1198.00	FT
06/05/21	1120.00	FT
06/12/21	1113.00	FT

The claimant provided pay stubs from his Arby's employment for the period of April 16, 2020 through March 15, 2021. The chart below summarizes the information contained in the pay stubs. Because the employer's pay periods are twice-monthly (1st through 15th and 16th to end of month), the weekly hours and wages set forth in the summary chart are approximations.

<u>Pay Period</u>	<u>P.P. Hrs.</u>	<u>Wkly Hrs.</u>	<u>P.P. Wages</u>	<u>Wkly. Wages</u>
4/16 - 4/30 (Thurs. - Thurs.)	27.97	13.98	265.68	132.84
5/1 - 5/15 (Fri. - Fri.)	50.62	25.31	480.86	240.43
5/16 - 5/31 (Sat. - Sun.)	37.72	18.86	358.29	179.14
6/1 - 6/15 (Mon. - Mon.)	49.63	24.81	471.51	235.75
6/16 - 6/30 (Tues. - Tues.)	34.32	17.16	326.08	163.04
7/1 - 7/15 (Wed. - Wed.)	29.29	14.64	278.26	139.13
7/16 - 7/31 (Thurs. - Fri.)	34.70	17.35	329.60	164.80
8/1 - 8/15 (Sat. - Sat.)	33.65	16.82	319.71	159.85
8/16 - 8/31 (Sun. - Mon.)	48.01	24.0	456.09	228.04
9/1 - 9/15 (Tues. - Tues.)	40.20	20.1	381.93	190.96
9/16 - 9/30 (Wed. - Wed.)	62.52	31.26	593.91	296.95
10/1 - 10/15 (Thurs. - Thurs.)	54.88	27.44	521.37	260.68
10/16 - 10/31 (Fri. - Sat.)	43.07	21.53	409.18	204.59
11/1 - 11/15 (Sun. - Sun.)	16.66	8.33	158.22	79.11
11/16 - 11/30 (Mon. - Mon.)	27.08	13.54	257.26	128.63
12/1 - 12/15 (Tues. - Tues.)	26.76	13.38	254.19	127.09
12/16 - 12/31 (Wed. - Thurs.)	32.05	16.0	304.51	152.25
1/1 - 1/15 (Fri. - Fri.)	20.77	10.38	197.35	98.67
1/16 - 1/31 (Sat. - Sun.)	22.10	11.0	209.97	104.98
2/1 - 2/15 (Mon. - Mon.)	26.38	13.19	250.65	125.32
2/16 - 2/28 (Tues. - Sun.)	18.44	9.22	175.22	87.61
3/1 - 3/15 (Mon. - Mon.)	24.10	12.05	228.91	114.45

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".

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(26) provides:

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

...

(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.

Iowa Code section 96.1A(37) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

If a claimant 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. Iowa Code section 96.7(2)(a)(2)(a).

The evidence indicates the claimant was able to work and available for work during the period of January 31, 2021 through the week that ended April 17, 2021, but does not indicate the claimant was partially unemployed from this employer during that time. The evidence indicates instead that there was guarantee of hours, that there was variability in the weekly work hours throughout the employment, and that the same variability continued during the period of January 31, 2021 through April 17, 2021. The claimant is not eligible for benefits for the period of January 31, 2021 through April 17, 2021 under a theory of partial unemployment. The claimant did not meet the availability requirement for the period beginning April 18, 2021 because he was thereafter employed full-time and not unemployed within the meaning of the law. Benefits are denied for the period beginning January 31, 2021. The disqualification continued at the time of the appeal hearing.

DECISION:

The March 25, 2021, reference 01, decision is modified as follows. The claimant was able to work and available for work during the period of January 31, 2021 through the week that ended April 17, 2021. However, the claimant was not partially unemployed during the period of January 31, 2021 through April 17, 2021 and is not eligible for benefits for the period of January 31, 2021 through April 17, 2021 under a theory of partial unemployment. The claimant did not meet the availability requirement for the period beginning April 18, 2021 because he was thereafter employed full-time and not unemployed within the meaning of the law. Benefits are denied for the period beginning January 31, 2021. The disqualification continued at the time of the appeal hearing.



James E. Timberland
Administrative Law Judge

September 29, 2021
Decision Dated and Mailed

jet/scn