

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELENA GOMEZ**  
Claimant

**APPEAL NO. 09A-UI-15030-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/30/09**  
**Claimant: Appellant (1-R)**

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:**

Elena Gomez filed a timely appeal from the September 30, 2009, reference 01, decision that denied benefits based on an Agency conclusion that she was unduly limiting her work availability. After due notice was issued, a hearing was held on November 5, 2009. Ms. Gomez participated. Tim Speir of Unemployment Insurance Services represented the employer and presented testimony through Kim Burrell, Kitchen Manager. Spanish-English interpreter Ike Rocha assisted with the hearing.

**ISSUES:**

Whether Ms. Gomez has been able to work and available for work since she established her claim for benefits.

Whether Ms. Gomez has been partially unemployed from her part-time employment since she established her claim for benefits.

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Elena Gomez is employed by Hy-Vee as a part-time dish room/dining room clerk. Ms. Gomez is a Spanish-speaking person. Ms. Gomez started the employment in March 2008 and continues in the employment. Kim Burrell, Kitchen Manager, is Ms. Gomez's immediate supervisor. Toward the beginning of the employment, Ms. Gomez worked 28 to 36 hours per week. Ms. Gomez's part-time hours declined to 14 to 22 hours per week at the beginning of 2009 when business slowed after the holiday season. Ms. Gomez continued in the employment despite the reduction in hours after the holiday season. Ms. Burrell would generally schedule Ms. Gomez to work six hours on Saturday, seven hours on Sunday, and four hours on Tuesday.

On July 18, 2009, Ms. Gomez notified Ms. Burrell that she would only be available to work on weekends. Ms. Gomez was disappointed that she was not receiving more hours on the schedule and the employer had hired another clerk rather than increasing Ms. Gomez's work hours back to the 2008 level. Ms. Gomez had decided to look for new employment. Because Ms. Gomez was only available for her weekend shifts, she worked fewer hours—about 13 per week. Within a few weeks prior to the appeal hearing, Ms. Gomez notified the employer that she was again available to work additional hours and the employer increased the work hours during some weeks.

## 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 indicates that the most significant change in Ms. Gomez's work hours occurred at the beginning of 2009, when her hours reduced due to a slowing of business after the busy holiday season. Ms. Gomez did not file a claim for benefits at that time, continues in the employment, and the post-holiday number of hours became an established condition of the employment. This all transpired during the base period of employment, that is during the first five calendar quarters that preceded the calendar quarter in which Ms. Gomez filed her claim for benefits. The next change, in July 2009, occurred as a result of Ms. Gomez's restriction of her work availability. Where a worker's availability for work is unduly limited because the worker is not willing to work during the hours in which suitable work is available, the worker is not eligible for unemployment insurance benefits. See 871 IAC 24.23(16).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gomez has not met the work availability of Iowa Code section 96.4(3) and has not been partially unemployed since she established her claim for benefits. Accordingly, benefits are denied effective August 30, 2009.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This

subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Workforce Development records indicate that Ms. Gomez received benefits for the first three weeks of her claim. Any benefits Ms. Gomez received for a period when she was ineligible for benefits would constitute an overpayment that Ms. Gomez must repay to Iowa Workforce Development. Because the overpayment issue was not set for hearing as part of the appeal proceedings, the administrative law judge will remand the matter to the Claims Division for entry of an overpayment decision in light of the present decision.

**DECISION:**

The Agency representative's September 30, 2009, reference 01, is affirmed. The claimant has not met the availability requirements of Iowa Code section 96.4(3) and has not been partially unemployed since she established her claim for benefits. Benefits are denied effective August 30, 2009.

This matter is remanded to the Claim Division for entry of an overpayment decision in light of the present decision.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs