

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROXANE DEMAIO

Claimant

MARTIN LUTHER HOME CORPORATION

Employer

APPEAL 21A-UI-22634-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/12/21

Claimant: Respondent (2)

Iowa Code § 96.19(38) – Total and Partial Unemployment
Iowa Admin. Code r. 871-24.23(26) – Same Hours and Wages
Iowa Code § 96.4(3) – Able to and Available for Work
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

Martin Luther Home Corporation, the employer/appellant, filed an appeal from the September 29, 2021, (reference 01) unemployment insurance (UI) decision that allowed benefits as of September 12, 2021 because Ms. Demaio is able to and available for work. The parties were properly notified of the hearing. A telephone hearing was held on December 20, 2021. The employer participated through Janet Warren, executive director, Kimberly Appelling, Equifax representative and witness, and Dennis Mollan, Equifax hearing representative. Ms. Demaio did not participate in the hearing. The administrative law judge took official notice of the administrative record.

ISSUES:

Is Ms. DeMaio able to and available for work?
Is Ms. DeMaio temporarily or partially unemployed?
If so, is the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. DeMaio began working for the employer, a based period employer, and a nursing home, on November 2, 2015. She works as a full-time utility aide, in which she provides support to the nursing staff. She works a set schedule Monday – Friday plus every other weekend. She is paid \$13.11 per hour. She has no other based period wages.

In September 2021, Ms. DeMaio was approved for Family Medical Leave Act (FMLA) leave. On September 14, Ms. DeMaio called in sick with COVID-19 symptoms. The employer's policy provides that employees who have COVID-19 symptoms may not return to work until they show a negative COVID-19 test result. Ms. DeMaio tested negative for COVID-19 and returned to work on September 16. Ms. DeMaio took FMLA leave on September 22. Ms. DeMaio called in

sick on September 23 with COVID-19 symptoms. She returned to work on September 29 having tested negative for COVID-19.

Ms. DeMaio took FMLA leave on Oct 7 and 8. Ms. DeMaio called in sick on October 14 with COVID-19 symptoms. She returned to work on October 16 having tested negative for COVID-19. Ms. DeMaio called in sick on October 19 with COVID-19 symptoms. She returned to work on October 27 having tested negative for COVID-19. Ms. DeMaio took FMLA leave on October 27.

Ms. DeMaio called in sick on November 3 with COVID-19 symptoms. She returned to work on November 8 having tested negative for COVID-19. Ms. DeMaio called in sick on November 12 with COVID-19 symptoms. She returned to work on November 17 having tested negative for COVID-19. Ms. DeMaio called in sick on November 18 with COVID-19 symptoms. She returned to work on November 24 having tested negative for COVID-19.

Ms. DeMaio took FMLA leave on December 1. Ms. DeMaio called in sick on December 7 with COVID-19 symptoms. She returned to work on December 11 having tested negative for COVID-19. The employer had work continuously available for Ms. DeMaio under the same terms and conditions as contemplated at hire.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that Ms. DeMaio is not available for work as of September 12, 2021.

Iowa Code § 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 96.1A, subsection 37, 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 Code § 96.19(38) 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.

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.

(1) An individual who is ill and presently not able to perform work due to illness.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

(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 96.7(2)a(2)(a) provides:

2. Contribution rates based on benefit experience.

a. (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.

Ms. DeMaio was either ill and not able to work, or on a leave of absence from work, each time she was absent starting September 12, 2021. It is understandable that Ms. DeMaio would want to figure out a way to receive wages when she was not working. However, she was available for work. Since Ms. DeMaio was not able to work during this time period, benefits are denied as of September 12, 2021.

DECISION:

The September 29, 2021, (reference 01) unemployment insurance decision is reversed. Ms. DeMaio is not available for work effective September 12, 2021. Benefits are denied.



Daniel Zeno
Administrative Law Judge
Iowa Workforce Development
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

January 20, 2022
Decision Dated and Mailed

dz/scn