

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DANYALE D BOARDMAN
Claimant

KELLNER-NELSON LAW FIRM PC
Employer

APPEAL NO. 21A-UI-22614-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (1R)

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

STATEMENT OF THE CASE:

The claimant, Danyale Boardman, filed a timely appeal from the October 5, 2021, reference 02, decision that denied benefits effective June 28, 2020, based on the deputy's conclusion that the claimant was not partially unemployed. After due notice was issued, a hearing was held on December 6, 2021. Claimant participated. Elizabeth Kellner-Nelson represented the employer. There were three matters set for a consolidated hearing: 21A-UI-22613-JTT, 21A-UI-22614-JTT, and 21A-UI-23019-JTT. Exhibits 1, 2 and 3 were received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO, DBIN, KCCO, and WAGE-A. The parties waived the potential defect in the 21A-UI-22613-JTT hearing notice that was based on omission of Iowa Code section 96.1A(37) and the issue of whether the claimant was totally, partially, or temporarily unemployed.

The claimant made an untimely request for discovery. The claimant received the November 17, 2021 hearing notice in a timely manner on November 20, 2021. Claimant delayed serving her request for production and interrogatories on the employer until November 30, 2021. Claimant concedes she did not have a reason for the delay in serving the materials on the employer. The claimant emailed her request to the employer on November 30, 2021. The employer received the request on December 1, 2021. The request for discovery was initiated less than 10 days prior to the date of the hearing. There was not good cause for the delay in initiating discovery. The employer objected to the late attempt at discovery. The administrative law judge found the discovery request untimely pursuant to Iowa Admin. Code rule 871-26.9(9). The administrative law judge denied discovery and held the appeal hearing as scheduled.

ISSUES:

Whether the claimant was able to work and available for work during the period of June 28, 2020 through March 13, 2021.

Whether the claimant was partially and/or temporarily unemployed work during the period of June 28, 2020 through March 13, 2021.

Whether the employer's account may be charged for benefits for the period of June 28, 2020 through March 13, 2021.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant, Danyale Boardman, began her part-time employment with Kellner-Nelson Law Firm, P.C. in 2012. Elizabeth Kellner-Nelson owns the firm and was the claimant's supervisor.

Until the COVID-19 pandemic became a factor in the employment in March 2020, the claimant worked three days a week—Monday, Wednesday and Thursday, from 8:30 a.m. to 12:30 p.m.—for a total of 12 hours per week. At the time COVID-19 became a factor in March 2020, the claimant's hourly wage was \$12.00 or \$12.50 an hour.

Until the time when COVID-19 became a factor in this employment, the claimant also engaged in part-time self-employment as a hair stylist. Prior to COVID-19 becoming a factor in the employment, the claimant dedicated about eight hours a week to the self-employment venture.

The claimant has school-age children. The claimant's husband or the children's grandmother generally cared for the children while the claimant was working. The claimant had on occasion brought her youngest child to work with her at the law firm.

On March 19, 2020, the employer notified the claimant that the employer was temporarily closing the workplace in response to the COVID-19 pandemic. The employer directed the claimant to file for unemployment insurance benefits. During the week of March 15, 2020, the claimant was off work due to planned international vacation. The claimant returned home on Thursday March 19, 2020. The employer contacted the claimant while the claimant was in the midst of her journey home.

At some point between March 1, 2020 and March 21, 2020, the claimant established an original claim for benefits that Iowa Workforce Development deemed effective March 15, 2020. IWD set the weekly benefit amount for regular benefits at \$108.00. The claimant made weekly claims for each of the weeks between March 15, 2020 and the March 13, 2021 benefit year end date and received benefits for each week of the claim.

On May 13, 2020, the employer contacted the claimant via text message regarding the claimant's anticipated return to the employment. The employer told the claimant that pursuant to the terms of the employer's Payroll Protection Program (PPP) loan, the employer needed the claimant to return to the employment by June 29 or 30, 2020. The employer told the claimant that if the claimant lost unemployment insurance benefits prior to that date, the employer would reopen her office sooner. The claimant told the employer that she was receiving unemployment insurance benefits totaling \$703.00 per week. The claimant further stated, "I would really like to catch up some of my salon money so if you want me earlier you can pay me cash or later too." In other words, the claimant wanted the employer to delay recalling her to the employment so that the claimant could maximize the unemployment insurance benefits prior to returning to the employment. The employer replied that the employer could not pay the claimant in cash and the employer needed the claimant to return by June 30, 2020.

While the claimant remained off work from the law firm, the employer hired the employer's daughter to assist with the employer's office operations. The employer's daughter continued to assist with office operations until the claimant returned to work on Monday, June 29, 2020.

In connection with the claimant's return to work, the employer increased the claimant's wage to \$13.00 an hour.

When the claimant returned to work on June 29, 2020, she returned to work on only Mondays and Wednesdays. The employer had the claimant's usual 12 hours, three-days per week available, but the claimant elected not to work Thursdays. The claimant's decision to work just two days per week, rather than all three, allowed the claimant to keep her weekly wages under an amount that would prompt Iowa Workforce Development to deny unemployment insurance benefits. When the claimant return to the employment at the end of June 2020, the employer was under the impression that the claimant had discontinued her unemployment insurance claim. However, the claimant continued to make weekly claims. The claimant's wages for the eight hours she worked per week totaled \$104.00. If the claimant had worked all three days, all 12 hours per week, that the employer had available, the weekly wages would have totaled \$156.00. This amount would be more than \$15.00 over the claimant's \$108.00 weekly benefit amount and would trigger Iowa Workforce Development to deny unemployment insurance benefits.

The claimant consistently underreported her weekly wages when making her weekly claims. For the period of June 28, 2020 through October 3, 2020, the claimant reported just \$48.00 in wages per week, rather than the \$104.00 in actual wages. During the week of October 4-10, 2020, the claimant commenced under-reporting her weekly wages as \$96.00, rather than the \$104.00 in actual wages. The claimant continued this pattern through the week that ended March 6, 2021. During the week that ended March 13, 2021, the claimant under-reported her weekly wages as \$84.00.

The claimant had begun online coursework through DMACC at the end of October or beginning of November 2020. Though the claimant's classes were scheduled for afternoons, when the claimant would not ordinarily be working for the law firm, on at least one occasion, the claimant logged onto the DMACC site for non-work related purposes while at work.

The claimant established a new original claim and a new benefit year that was effective March 14, 2021. IWD set the new weekly benefit amount at \$113.00. The claimant continued to make weekly claims through the benefit week that ended June 12, 2021, the last week for which Iowa Workforce Development participated in federal benefit programs enacted as part of the CARES Act, Public Law 116-136. In connection with the new benefit year, the claimant continued to under-report her weekly wages. For all but the week that ended June 5, 2021, the claimant reported \$96.00 in wages, rather than \$104.00. For the week that ended June 5, 2021, the claimant reported \$50.00 in wages. During the new benefit year, the employer continued to have the 12 hours of work, three days per week of work, for the claimant, but the claimant continued to elect to work only two days per week. If the claimant had worked all three days, all 12 hours per week, that the employer had available, the weekly wages would have totaled \$156.00. This amount would be more than \$15.00 over the claimant's \$113.00 weekly benefit amount and would trigger Iowa Workforce Development to deny unemployment insurance benefits.

In May 2021, the employer learned that the employer's account was being assessed for benefits paid to the claimant. The employer advised the claimant that she needed the claimant to return to working the 12-hour per week schedule. Instead, the claimant submitted her resignation on June 7, 2021 and provided a June 16, 2021 effective quit date. The claimant reported for work on June 9, 2021. The employer elected to end the employment on that date, but paid the claimant's wages through June 16, 2021.

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(16) and (26) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

...

(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 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 weight of the evidence establishes that the claimant did not meet the availability requirement during the period of June 28, 2020 through March 13, 2021. Nor was the claimant temporarily or partially unemployed during that period. The weight of the evidence establishes that the employer had the same 12 hours of week available to the claimant during the period of work during the period of June 28, 2020 through March 13, 2021 as the employer had available during the base period and as existed in the original contract of hire. The employer had better wages available during that period than during the base period and in the original contract of hire. The weight of the evidence establishes that the elected to unduly limit her availability for work during this period, and elected to under-report her wages during this period, in order to manipulate the unemployment insurance system into paying unemployment insurance benefits. The claimant is not eligible for benefits for the period of June 28, 2020 through March 13, 2021. The employer's account will not be charged for benefits for that period.

DECISION:

The October 5, 2021, reference 02, decision is affirmed. The claimant was not available for work, and was not temporarily or partially unemployed, during the period of June 28, 2020 through March 13, 2021. The claimant is not eligible for benefits for that period. The employer's account shall not be charged for benefits for that period.

This matter is **remanded** to the Investigations & Recovery Unit of the Integrity Bureau for further action as the Unit deems appropriate.



James E. Timberland
Administrative Law Judge

January 7, 2022
Decision Dated and Mailed

jet/mh

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are unemployed for reasons related to COVID-19, may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.