

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ARLENE R BETHUNE
Claimant

APPEAL NO. 21A-UI-07673-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DRIVELINE RETAIL MERCHANDISING INC
Employer

OC: 04/05/20
Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.19(38) – Temporary and Partial Unemployment

STATEMENT OF THE CASE:

Arlene Bethune filed a timely appeal from the March 12, 2021, reference 05, decision that denied benefits effective April 5, 2020, based on the deputy's conclusion that Ms. Bethune requested and was granted a leave of absence, was voluntarily unemployed, and was unavailable for work. After due notice was issued, a hearing was held on May 25, 2021. Ms. Bethune participated. Erica Phillips, Human Resources Generalist with Trion Solutions II, Inc. represented the employer. There were four appeal numbers for a consolidated hearing: 21A-UI-07673-JTT, 21A-UI-08490-JTT, 21A-UI-08492-JTT and 21A-UI-08493-JTT. Exhibits 1 through 9, A, B and C were received into evidence. The administrative law judge took official notice of the complete hearing record in Appeal Number-13462-JTT. The administrative law judge took official notice of WAGE-A, DBRO, KCCO, NMRO, EMP1, and the October 16, 2020, reference 04, decision (amended by reference 05).

ISSUES:

Whether the claimant was able to work and available for work for the period beginning April 5, 2020.

Whether the claimant was partially and/or temporarily unemployed for the period beginning April 5, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Arlene Bethune is currently employed by Trion Solutions II, Inc. (employer account number 519652). Trion is a professional employer organization (PEO). Ms. Bethune works as a part-time merchandiser. Ms. Bethune performs merchandising work on behalf of Driveline Retail Merchandising (employer account number 292867). Ms. Bethune was directly employed by Driveline as a part-time merchandiser from 2013 until December 15, 2019, at which time the relationship between Driveline and Trion changed and Trion became Ms. Bethune's employer in name. Driveline reported quarterly wages for Ms. Bethune for the fourth quarter of 2019. Trion commenced reporting quarterly wages for Ms. Bethune when it made a wage report for the first quarter of 2020. Wages were again reported under Driveline's employer account number for

the third and fourth quarters of 2020. For purposes of this decision, the two employer entities are the same employer.

Ms. Bethune's merchandising work duties involve traveling to Dollar General stores to set up plan-a-gram displays, to display coupons, to affix security tags, and to inventory merchandise. The work hours, before and after the COVID-19 pandemic became a factor in March 2020, have ranged from five to 30 hours per week. Ms. Bethune's wage has at all relevant times been \$11.50 per hour.

Effective March 20, 2020, Ms. Bethune commenced an approved leave of absence. The Driveline leave department, on behalf of Driveline and Trion, handled and approved the leave request. Driveline had previously invited workers to request a leave of absence if they were concerned about reporting for work in the context of COVID-19. Neither Driveline nor Trion took any steps to implement social distancing, to provide personal protective equipment, or to otherwise protect workers, such as Ms. Bethune, in the context of the COVID-19 pandemic. Nor had Dollar General taken any such steps at the time Ms. Bethune commenced her leave. Driveline and Trion left such protective measures to the workers to resolve on their own. While Ms. Bethune performed her merchandising duties at the Dollar General stores, customers would mistake Ms. Bethune for a Dollar General employee and approach to ask questions about merchandise. Ms. Bethune's duties involved touching merchandise that others may have recently handled. Ms. Bethune's primary concern about the threat of COVID-19 was the risk the illness posed to her husband, who suffers from chronic obstructive pulmonary disease (COPD). Ms. Bethune's husband also worked for Trion and Driveline as a merchandiser and commenced a leave of absence at the same time. Ms. Bethune's work duties included performing merchandising at a Dollar General located near the Tyson plant in Waterloo. While Ms. Bethune continued on her leave of absence Trion and Driveline continued to have her same work duties available.

In May 2020, Driveline notified workers, including Ms. Bethune, that they were expected to return to work by June 1, 2020. Ms. Bethune responded by requesting an extension of her leave of absence, based on her continued concern about COVID-19 and also based on her husband's need to undergo and recover from a hernia operation. The hernia procedure occurred on June 24, 2020. Trion and Driveline approved extension of the leave through June 30, 2020. Driveline required that Ms. Bethune provide a medical release that released her to return to her work duties. Ms. Bethune provided the release and returned to work on July 6, 2020. By the time Ms. Bethune returned from her leave, Dollar General had implemented a number of CDC-recommended steps to hinder the spread of COVID-19. Since Ms. Bethune returned from her leave of absence, she has accepted and performed all of the work Trion and Driveline had available for her.

Ms. Bethune established an original claim for benefits that was effective April 5, 2020. The claim for benefits was, in part, in response to being temporarily laid off by a second part-time employer, FGX International, Inc. The temporary layoff was effective March 23, 2020. A month later, FGX notified Ms. Bethune that the layoff was permanent. Ms. Bethune had performed similar merchandising work for FGX with a similar range in work hours week to week.

At the time Ms. Bethune established her original claim, Iowa Workforce Development set her weekly benefit amount at \$242.00. Ms. Bethune's base period consists of the four quarters of 2019. FGX and Driveline are the base period employers. Trion is not a base period employer. After Ms. Bethune established her original claim for benefits, she made weekly claims for each of the weeks between April 5, 2020 and November 21, 2020. During the period of April 5, 2020 through the benefit week that ended July 4, 2020, Ms. Bethune earned no wages and reported

zero wages. Once Ms. Bethune returned to work with Trion and Driveline in July 6, 2020, she commenced reporting her weekly wages as they were earned. In October 2020, Ms. Bethune accepted new part-time employment with Star that provides only three to four hours of work per month for \$12.00 per hour. Ms. Bethune received regular benefits for the period of April 5, 2020 through November 21, 2020. She received Federal Pandemic Unemployment Compensation (FPUC) for the period of April 5, 2020 through July 25, 2020 and received Lost Wages Assistance (LWA) for the period of July 26, 2020 through September 5, 2020.

FGX did not protest Ms. Bethune's claim for benefits in response to the notice of claim that Iowa Workforce Development mailed to that employer on April 7, 2020 and did not notify IWD when the employer made the layoff permanent. Because Ms. Bethune was attached to both part-time employer's at the time she established her claim for benefits, and because Ms. Bethune asserted a COVID-19 basis for the claim, IWD did not notify Ms. Bethune of a job search requirement prior to the December 23, 2020 appeal hearing.

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(10) and(26) provides:

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

(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 96.19(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.

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).

Ms. Bethune was not available for work within the meaning of the law during the period of April 5, 2020 through the benefit week that ended July 4, 2020 and is not eligible for benefits for that period. Throughout that period, Ms. Bethune was voluntarily unavailable for work in connection with a leave of absence that she requested and that the employer approved. Throughout that period, the employer in name, Trion Solutions II, Inc., continued to have the same work available for Ms. Bethune at Driveline as existed earlier in that employment.

Effective the benefit week that began July 5, 2020 through the benefit week that ended November 21, 2020, the claimant was able to work, available for work, and receiving the same employment from Trion/Driveline as existed from the time she became a Trion employee effective December 15, 2019 until she commenced her leave of absence effective March 12, 2020. Once the claimant became available for work effective July 5 2020, her continuation in the Trion/Driveline employment did not prevent her from being eligible for benefits under a theory of partial unemployment, based on the layoff from FGX. The employer accounts of Trion/Driveline will not be charged for benefits for this period.

DECISION:

The March 12, 2021, reference 05, decision is modified in favor of the claimant/appellant as follows. From April 5, 2020 through July 4, 2020, the claimant was not available for work and was not eligible for unemployment insurance benefits. During the period of July 5, 2020 through November 21, 2020, the claimant was able to work, available for work, and continued in the Trion/Driveline employment under the same conditions as existed earlier in the employment. The continuation in the Trion employment during the period of July 5, 2020 through November 21, 2020 did not prevent the claimant from being eligible for benefits for that period under a theory of partial unemployment, based on the layoff from FGX. The claimant remained subject to all other eligibility requirements. The employer accounts of Trion/Driveline shall not be charged for benefits for the period of April 5, 2020 through November 21, 2020.



James E. Timberland
Administrative Law Judge

June 04, 2021
Decision Dated and Mailed

jet/ol

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 or continue to be 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>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.

ATTENTION: On May 11, 2021, Governor Reynolds announced that Iowa will end its participation in federal pandemic-related unemployment benefit programs effective June 12, 2021. The last payable week for PUA in Iowa will be the week ending June 12, 2021. Additional information can be found in the press release at <https://www.iowaworkforcedevelopment.gov/iowa-end-participation-federal-unemployment-benefit-programs-citing-strong-labor-market-and>.