

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ZISMER, KIRK, A**  
Claimant

**APPEAL NO. 13A-UI-03164-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BIAGGI'S RISTORANTE ITALIANO LLC**  
Employer

**OC: 01/27/13**  
**Claimant: Appellant (1)**

Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Kirk Zismer filed a timely appeal from the March 7, 2013, reference 01, decision that denied benefits effective January 27, 2013 based on an agency conclusion that Mr. Zismer was unduly restricting his work availability. After due notice was issued, a hearing was held on April 15, 2013. Mr. Zismer participated and presented additional testimony through Matthew Millard. Mark Evoy represented the employer.

**ISSUE:**

Whether Mr. Zismer has met the work availability requirement since he established the original claim for benefits that was effective January 27, 2013. He has not.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kirk Zismer established an original claim for benefits that was effective January 27, 2013. That day was the start of the third claim year after Mr. Zismer separated from employer Chicago Speakeasy, Ltd., in January 2011. At the time Mr. Zismer separated from Chicago Speakeasy, he was also employed by Biaggi's Ristorante Italiano, L.L.C. Mr. Zismer had started up Biaggi's in 2008 as a part-time food and beverage server. When Mr. Zismer still worked for both employers, he worked the lunch shift at Biaggi's Monday through Friday, from 10:00 a.m. or 11:00 a.m. to 2:30 p.m.

After Mr. Zismer separated from Chicago Speakeasy he increased his work hours at Biaggi's until July 2011, when he started a full-time, two-year program with Iowa Health in Des Moines to become certified as a Radiological Technologist. After Mr. Zismer started the Radiological Technologist program, he amended his availability for work at Biaggi's two working only Fridays and Saturdays. On Fridays, he would make himself available for work from 5:30 to 10:30 p.m. On Saturdays he would make himself available for a single shift or a double shift, for a maximum of 11 hours.

Mr. Zismer's time obligation to the Iowa Health Radiological Technologist program is easily the equivalent of a full-time job. Mr. Zismer has clinical hours from 7:30 a.m. to 3:30 p.m. on

Mondays, Wednesdays and Fridays, and from 7:30 a.m. to 11:00 a.m. on Thursdays. Mr. Zismer has classes from 7:30 a.m. to 3:30 p.m. on Tuesdays and on Thursday afternoons. In addition, Mr. Zismer has evening Radiological Technologist program obligations at Iowa Health that require him to be there from 1:00 to 9:00 p.m. on Mondays, 3:00 to 11:00 p.m. on Wednesdays, 4:00 to 8:00 p.m. on Thursdays, and/or 3:00 to 11:00 p.m. on Fridays. In addition, Mr. Zismer is expected to spend 20 to 40 hours per week on homework and class preparation.

Mr. Zismer's Friday Radiological Technologist program has at times eliminated his availability to work at Biaggi's on Fridays. Since establishing the new original claim for benefits that was effective January 27, 2013, Mr. Zismer has asked Biaggi's not to schedule him on Friday, February 22 and on Friday, April 5, 2013. At the beginning of February 2013, Mr. Zismer told Biaggi's he wanted to back down from his server position hours and responsibilities and step into another position that would require less time and effort. Mr. Zismer cited his stress level and obligation to the Radiological Technologist program. Mr. Zismer is in his last semester, and most intensive term of the Radiological Technologist program. Mr. Zismer is preparing to graduate from the program and is preparing to take mock board exams.

Biaggi's has not reduced the hours of work it has available to Mr. Zismer. Instead, Biaggi's has accommodated the restrictions that Mr. Zismer has placed on his availability. The employer continues to have more hours available for Mr. Zismer than Mr. Zismer is available to work. Biaggi's is Mr. Zismer's sole base period employer for purposes of the new original claim for benefits that was effective January 27, 2013.

#### **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".

871 IAC 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 Administrative Code rule 871 – 24.23 provides, in relevant part, as follows:

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

24.23(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.

24.23(17) Work is unduly limited because the claimant is not willing to work the number of hours required to work in the claimant's occupation.

24.23(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.

The weight of the evidence indicates that since Mr. Zismer established the original claim for benefit that was effective January 27, 2013, he has not met the work availability requirements and is not eligible for unemployment insurance benefits. Since Mr. Zismer established the most recent original claim, the employer had continued to have the same work, and more, available for him that the employer previously made available to him. Since Mr. Zismer established the most recent original claim, Mr. Zismer has severely restricted his availability for work due to his participation in the Radiological Technologist program. Mr. Zismer is neither working all the hours the employer had available to him or working the number of hours a food server would usually work. Benefits are denied effective January 27, 2013. The disqualification continues at this time.

**DECISION:**

The Agency representative's March 7, 2013, reference 01 is affirmed. The claimant has not met the work availability requirement, and has not been partially unemployed, since he established the original claim for benefits that was effective January 27, 2013. The claimant is not eligible for benefits. Benefits are denied effective January 27, 2013. The disqualification continues.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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