

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK C MIRR
Claimant

WALMART INC
Employer

APPEAL 21A-UI-05941-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/06/20
Claimant: Appellant (2R)

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

STATEMENT OF THE CASE:

Mark Mirr (claimant) appealed an Iowa Workforce Development February 22, 2021, decision (reference 02) that denied benefits based on his continued employment with Walmart (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 5, 2021. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. The administrative law judge took official notice of the administrative file.

ISSUES:

The issue is whether the claimant is eligible for total or partial unemployment benefits, still employed at the same hours and wages, whether the claimant is able and available for work and/or whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for the employer from May 15, 2018, to December 4, 2020, as a full-time food associate. The employer terminated the claimant on December 4, 2020. The employer wanted the claimant to accept a janitorial position working a later shift and handling human waste/byproducts. When he would not accept the position, the employer issued him three warnings and terminated him. The claimant was able and available for work.

REASONING AND CONCLUSIONS OF LAW:

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.

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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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".

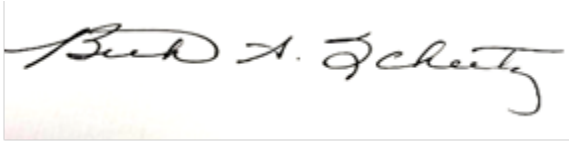
The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). There was evidence offered that the claimant is not able and available for work as of December 6, 2020. Benefits are allowed, provided the claimant is otherwise eligible.

The issue of the claimant's separation from employment is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

DECISION:

The February 22, 2021, (reference 02) unemployment insurance decision is reversed. The claimant was able to work and available for work effective December 6, 2020. Benefits are allowed, provided the claimant is otherwise eligible.

The issue of the claimant's separation from employment is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

A handwritten signature in black ink, reading "Beth A. Scheetz", is positioned above a horizontal line.

Beth A. Scheetz
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

May 13, 2021
Decision Dated and Mailed

bas/kmj