

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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NANETTE A FEULING

Claimant

and

HY-VEE INC

Employer

HEARING NUMBER: 20BUI-09723

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

**A REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.4-3, 96.19-38B

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board modifies the Reasoning and Conclusions of Law by substituting the following analysis:

Iowa Code §96.19(38) states:

b. An individual shall be deemed partially unemployed in any week in which, 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.

An individual shall be deemed partially unemployed in any week in which 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.

09723

This code section refers to “regular job.” That phrase is not defined but here we have only two candidates. The Claimant filed for benefits after she lost her job at Kwik Trip which was her only base period employer, and she still works for Hy Vee. We consider each.

If Kwik Trip is taken as her regular job she is clearly separated from her regular job. She thus may not claim for benefits under the first paragraph of §96.19(38)(b) based on being partially unemployed while working for Kwik Trip. This leaves the second paragraph. Under that one she can collect if she is separated from her regular job, and if during the ensuing period of unemployment she earns money in an “odd job.” The requirements for earnings to qualify as “odd job earnings” include that the earnings are “a result of temporary work...” 871 IAC 24.1(86). The job with Hy Vee is not temporary, and thus the earnings are not “at odd jobs.” So, the Claimant is not partially unemployed under paragraph two of §96.19(38) either, if we treat Kwik Trip as the regular job.

Turning to Hy Vee, the situation is flipped. If we treat Hy Vee as the “regular job” then the Claimant is not separated from her “regular job.” This means she does not meet the definition of partial unemployment set out in the *second* paragraph because that paragraph specifies that the worker has “been separated from the individual's regular job...” Iowa Code §96.19(38)(b). The Claimant is working less than a regular full-time work for Hy Vee, and remains employed at Hy Vee. This means that so long as she earns less than the earnings cap, she at first glance seems to meet the requirement of the *first* paragraph. The problem is the regulation cited by the Administrative Law Judge.

The Department regulations address the situation:

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

....

(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.

871 IAC 24.23(26). Thus if the part-time worker experiences a downturn in hours, but that downturn is consistent with the contract of hire then the worker is not considered partially unemployed from the part-time job. The ineligibility is based on the idea that worker is getting the same level as work as usual and that she is not unemployed. *Powell v. EAB.*, 861 N.W.2d 279 (Iowa App. 2014). As found by the Administrative Law Judge, the Claimant's hours here are consistent with her contract of hire at Hy Vee and so she is not partially unemployed if we treat Hy Vee as the regular job. This means she is not partially unemployed under either paragraph, no matter which employer is treated as the regular job.

Critical in this determination is that the job with Hy Vee is *not* temporary. The only way the Claimant can be allowed partial benefits would be if we treated Hy Vee as the regular job, and thus find that she is still employed at her regular job and look to the first paragraph of §96.19(38)(b). But only if we treat the “contract of hire” as being the one with *Kwik Trip*, could we possibly conclude she was earning less than contemplated in the original contract of hire. We thus end up calling the regular job one thing in one part of the analysis, and then switch in the middle. We find that were the current job is a non-temporary one then is not a reasonable construction of those provisions. This is made clear by considering the odd job situation. The Code allows collection of benefits while separated from the

regular job in weeks where the worker has odd job (temporary) earnings. If we allowed the Claimant to take a regular part-time job and still collect benefits based on the Kwik Trip credits, this would effectively eliminate the “odd job” requirement altogether. This we cannot do. So this means that a part-time

09723

worker who experiences a downturn in hours at a *nontemporary part-time job* may not collect benefits if the downturn is consistent with the contract of hire. This is because the earnings are not at an odd job so the worker cannot rely on the second paragraph, and on the other hand the worker is not partially unemployed under the first paragraph because of rule 24.23(26).

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Ashley R. Koopmans

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James M. Strohman

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Kim D. Schmett

RRA/fnv