

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SHERISE R HENNING**  
Claimant

**HCSG CENTRAL LLC**  
Employer

**APPEAL 17A-UI-04450-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/26/17  
Claimant: Appellant (1)**

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Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Code § 96.19(38) b – Partial Unemployment  
Iowa Admin. Code r. 871-24.23(26) – Same Hours Same Wages

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the April 21, 2017, (reference 01) unemployment insurance decision that denied benefits on the basis that she was still employed at the same wages and hours contemplated in the contract for hire. The parties were properly notified of the hearing. A telephone hearing was held on May 15, 2017. The claimant participated and testified. The employer participated through District Manager Jason Burmeister. Claimant's Exhibits A through F were received into evidence. Official notice was taken of the administrative record, specifically in regards to claimant's wage history.

**ISSUES:**

Is the claimant able to and available for work?

Is the claimant still employed at the same hours and wages?

Does the claimant meet the definition of being considered partially unemployed?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed part time as a housekeeper/laundry worker. When claimant was first hired in January 2016 she was working nearly full time hours and was guaranteed between 35 and 38 hours per week. Beginning September 1, 2016, claimant requested to go to a more part-time schedule in order to accommodate another job she was starting, but has since been separated from. When she went to a more part-time schedule claimant was told she would not be guaranteed a set number of hours each week.

On March 13, 2017, claimant learned the employer was combining some positions and cutting hours. (Exhibit C). Prior to this change claimant was working between 20 and 26 hours per week, but following the change her schedule was closer to 12 hours per week. (Exhibit D).

Additional hours were available for claimant to work on weekend evening shifts, but she was not able to take these additional hours due to lack of childcare. Claimant had made it clear from the beginning of her employment that she would not be available in the evening on weekends. Beginning April 27, 2017, claimant has been and is currently unable to work at all due to a medical condition. Claimant's wage record indicates this employer was claimant's regular, but part-time, employer through her base period.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant is not partially unemployed.

Iowa Code § 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 Code § 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 Admin. Code r. 871-24.23(26) provides:

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.

At the time of hire claimant was working nearly full-time hours with a guaranteed 35-38 hours per week. Beginning September 1, 2016, at claimant's request, her hours were reduced to more part-time hours. Claimant understood at this time that she was no longer guaranteed a set number of hours. A contract of hire can be altered by the agreement, express or implied, of the parties. *Woods v. Iowa Dept. of Job Service*, 315 N.W. 2d 838 (Iowa Ct. App. 1981); *Olson v. Employment Appeal Board*, 460 N.W. 2d 865 (Iowa Ct. App. 1990). The claimant's request to work more part-time, which was granted by the employer, altered the contract of hire. It is this that should be considered when deciding if the claimant is partially unemployed.

Because claimant was hired to work only part-time hours and was not guaranteed full-time hours, and the wage history consists of only part-time wages, the claimant is not considered to be unemployed within the meaning of the law. When an individual is hired to work part-time or in a temporary assignment, the implied agreement is that full-time work will not be regularly available. Here, the claimant was specifically told she could not be guaranteed a set number of hours. Thus since the employer continues to provide regular part-time hours and the claimant is currently employed under the same conditions contemplated at hire, she is not considered partially unemployed.

During the hearing claimant indicated she has not worked at all since April 27, 2017, due to a medical condition.

Iowa Admin. Code r. 871-24.22(1)a 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Claimant testified she has been restricted from any type of work by her doctor since May 2, 2017 and those restrictions were still in place at the time of the hearing. Claimant has not been separated from employment, but is not currently working. Inasmuch as claimant is currently not working, but is not able to work due to medical restrictions placed on her by her treating physician, she has not established her ability to work. For all of the reasons outlined above, claimant is not entitled to benefits.

**DECISION:**

The April 21, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant is not partially unemployed and benefits are denied.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs