

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KAREN J WATKINS
Claimant

HY-VEE INC
Employer

APPEAL 15A-UI-12941-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/18/15
Claimant: Respondent (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
871 IAC 24.23(26) – Same Hours and Wages
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

The employer filed an appeal from the November 13, 2015, (reference 01) unemployment insurance decision that allowed benefits beginning October 18, 2015. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2015. Claimant participated. Employer participated through representative, Sabrina Bentler and assistant manager of perishables Jon Patton. Employer Exhibit One was admitted into evidence over claimant's objection. Claimant objected to the document as irrelevant. Claimant's objection was overruled.

ISSUES:

Is the claimant able to and available for work?

Is the claimant still employed at same hours and wages?

Is the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a dishwasher from August 25, 1997, and was separated from employment on November 4, 2015.

The employer never promises part-time employees, like claimant, a set number of hours. Claimant most recent hours she worked in 2015 were as follows: July 27 through August 2, 24.2 hours; August 3 through August 9, 22.6 hours; August 10 through August 16, 22.3 hours; August 17 through August 23, 31.9 hours; August 24 through August 30, 23.1 hours; August 31 through September 6, 24.2 hours; September 7 through September 13, claimant did not work; September 6 through September 27, 37.6 hours; September 28 through October 4, 23.4 hours; October 5 through October 11, 19.8 hours; October 12 through October 18, 21.4 hours;

October 19 through October 25, 14.0 hours; and October 26 through November 1, 13.0 hours. Claimant requested time off on September 7, 9, 10, 11, 12, 13, 14, and 16 for personal reasons.

The week of October 19, claimant was scheduled was scheduled for 16 hours. The week of October 26, claimant was scheduled for 16 hours. Claimant was scheduled to work 16 hours starting November 2, 2015. The employer tries to set the schedule a week in advance. Claimant's pay rate was not reduced from July 27, 2015 through November 1, 2015.

Claimant was able and available to work. Claimant does work part time for another company, but that did not prevent her from working for the employer. Claimant had worked the same schedule for that company for the past year. Prior to October 19, 2015, claimant had been scheduled three days a week with the employer, but starting with the October 19, 2015 schedule, she was reduced to two days a week. Claimant did not ask for any time off October 19, 2015 through November 1, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is partially unemployed and this part-time employer is not relieved of benefit charges.

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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 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, 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.

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 § 96.7(2)a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the 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. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and § 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under § 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under § 85.33, § 85.34, subsection 1, or § 85A.17, or responsible for paying indemnity insurance benefits.

From July 27, 2015 through October 18, 2015, claimant worked more than two days a week and averaged 23.66 hours a week (not including the time period from September 6 through September 27 when claimant requested multiple days of time off. Starting on October 19, 2015, claimant was only scheduled two days, instead of the three days she had been normally scheduled for and as a result her hours were reduced to sixteen per week. This is a significant reduction in hours (claimant lost one third of the days she worked). Because claimant was not employed under the same hours and wages from October 19, 2015 through November 1, 2015 as she had been typically scheduled since July 27, 2015, she is considered partially unemployed. Benefits may be allowed based upon reporting of weekly earnings. For whatever period the employer is not offering the same wages and hours as contemplated in the contract or terms of hire, it may be liable for benefit charges to its account.

DECISION:

The November 13, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant is partially unemployed and benefits are allowed, provided she is otherwise eligible. The account of the current part-time employer HY-VEE INC (account number 006858-000) shall be charged. The benefits withheld shall be paid to claimant, provided she is otherwise eligible. Claimant should report gross wages for the week in which they are earned for the purpose of establishing continuing eligibility for partial unemployment benefits.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css