

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

COREY E RUBY
Claimant

APPEAL NO. 18A-UI-10985-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VENUWORKS OF DAVENPORT LLC
Employer

OC: 10/21/18
Claimant: Respondent (4R)

Iowa Code section 96.4(3) – Able & Available
Iowa Code section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 1, 2018, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be assessed for benefits, based on the deputy's conclusion that the claimant was able to work, available for work, but partially unemployed. After due notice was issued, a hearing was held on November 26, 2018. Claimant Corey Ruby did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Latanya Mosley represented the employer and presented additional testimony through Holly Kapler. Exhibit 1 was received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO, KCCO, WAGE-A, and the November 6, 2018, reference 01, decision.

ISSUES:

Whether the claimant has been able to work and available for work since he established the original claim for benefits that was effective October 21, 2018.

Whether the claimant has been partially unemployed since he established the original claim for benefits that was effective October 21, 2018.

Whether the employer's account may be assessed for benefits paid to the claimant...

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Corey Ruby established an original claim for benefits that Iowa Workforce Development deemed effective October 21, 2018. Iowa Workforce Development set Mr. Ruby's weekly benefit amount at \$305.00. VenuWorks of Davenport, L.L.C. is a base period employer in connection with the claim. The claim for benefits was in response to Mr. Ruby's October 23, 2018 discharge from full-time employment with Aramark Campus, L.L.C. Iowa Workforce Development concluded that the discharge did not disqualify Mr. Ruby for unemployment insurance benefits and allowed benefits to Mr. Ruby provided he met all other eligibility requirements. See November 6, 2018, reference 01, decision.

In June 2018, VenuWorks of Davenport, L.L.C., hired Mr. Ruby to perform on-call stage hand work at River Center Adler Theatre in Davenport. The employer provided Mr. Ruby with just one day's work on June 10, 2018 and has not had any additional work for Mr. Ruby. At the time Mr. Ruby accepted the employment on June 9, 2018, the employer had Mr. Ruby sign a document that stated as follows:

Work schedules will vary throughout the season. Supervisors will advise employees of their individual work schedules. Staffing needs and operational demands may dictate the variations in starting and ending times, as well as variations in the total hours that may be scheduled each day and week.

Traditionally, this industry has a season that begins in late summer or early fall and lasts until late spring or early summer. There are no guarantees of the amount of hours you will work. There may be several months where you will not work at all, due to the lack of scheduled events.

By signing below, you acknowledge that you understand that there are no guarantees of the amount of hours you will work.

*Please note that this letter is not an express or implied contract of employment. Your employment with VenuWorks of Davenport is at-will. This means either party can terminate the employment relationship at any time with or without cause and with or without notice.

Since Mr. Ruby established the original claim for benefits that was effective October 21, 2018, he has made weekly unemployment insurance claims in which he reported making two job contacts per week, that he was able to work and available for work, and that he had not refused any offers of employment. The most recent claim was for the week that ended November 24, 2018. Mr. Ruby reported \$30.00 in wages for the week that ended October 27, 2018, but has reported zero wages for the other weeks in the claim.

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".

Iowa Admin. Code r. 871-24.22(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.

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. Iowa Code Section 96.19(38)(b).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(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.

(a) *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 section 96.8, subsection 5.

[Emphasis added.]

The employer used Mr. Ruby's services for one day during the off-season in June 2018, but then has not offered work to Mr. Ruby in the subsequent five months. Almost all of the time during which the employer has not had further work for Mr. Ruby falls within what the employer identified in the June 9 document as the employer's busy season. The weight of the evidence establishes that Mr. Ruby performed day-labor for the employer on June 10, 2018 and that the employer then effectively ended the employment the same day. To conclude that this employment has continued beyond June 10, 2018 would be to enable the employer to make an end-run around the substance and intent of Iowa Code Chapter 96, the Iowa Employment Security Law. The evidence does not support the conclusion that Mr. Ruby has been partially unemployed from VenuWorks of Davenport, L.L.C. because the evidence indicates he has not been attached to that employer since June 11, 2018. Though the employer cannot be deemed liable for benefits under a theory of partial unemployment, that would not relieve the employer of liability for benefits in connection with the separation that occurred on June 10, 2018. This matter will be remanded to the Benefits Bureau for adjudication of the claimant's eligibility for benefits and the employer liability for benefits in connection with the June 10, 2018 separation.

The broader issue set for hearing was whether Ms. Ruby has been able to work and available for work since he established his claim for benefits. On that issue, Iowa Code section 96.4(3) assigned to Mr. Ruby the burden of proving that he was mentally and physically able to work, that he was available for work and work referrals, and that he was actively and earnestly engaged in a search for new employment each week of the unemployment insurance claim. Mr. Ruby did not participate in the appeal hearing and presented no evidence to meet his burden of proving that he met the able and available requirements for any week of the claim. For that reason, benefits are denied for the period of October 21, 2018 through the benefit week that ended November 24, 2018. This matter will be remanded to the Benefits Bureau for determination of whether Mr. Ruby has been able to work and available for work for the period beginning November 25, 2018 and for entry of an overpayment decision for the benefits Mr. Ruby received for the period of October 21, 2018 through November 24, 2018.

DECISION:

The November 1, 2018, reference 02, decision is modified as follows. The claimant separated from the employment effective June 10, 2018 and, therefore, has not been *partially unemployed* since he established the claim for benefits that was effective October 21, 2018. The claimant is not eligible for benefits *under a theory of partial unemployment* and the employer's account may not be charged *under a theory of partial unemployment*. The claimant failed to demonstrate that he has met the able and available requirements since he established the claim for benefits. Therefore, benefits are denied for the period of October 21, 2018 through the benefit week that ended November 24, 2018.

This matter is remanded to the Benefits Bureau for entry of an overpayment decision regarding the benefits the claimant received for the period of October 21, 2018 through November 24, 2018, based on the able and available determination in this decision regarding that period.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since November 25, 2018, assuming the claimant continues to file weekly claims.

This matter is remanded to the Benefits Bureau for adjudication of the separation that occurred on June 10, 2018, consistent with this decision that finds there was indeed a separation on that date.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs