

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES A BRATTI
Claimant

APPEAL NO. 14A-UI-01711-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAZOLI'S RESTAURANTS LLC
Employer

OC: 04/07/13
Claimant: Respondent (2-R)

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 February 5, 2014, reference 04, decision that allowed benefits to the claimant effective January 5, 2014, and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on March 6, 2014. Claimant Charles Bratti participated. Jennifer Whittington represented the employer and presented additional testimony through Jonathan Bain. Department Exhibits D-1 and D-2 were received into evidence. The administrative law judge took official notice of the agency's administrative record of quarterly wages reported by the employer (WAGEA).

ISSUES:

Whether Mr. Bratti has been able to work and available for work since establishing the additional claim for benefits that was effective January 5, 2014.

Whether Mr. Bratti has been partially unemployed from Fazoli's Restaurants since establishing the additional claim for benefits that was effective January 5, 2014.

Whether the employer's account may be assessed for benefits paid to the claimant under the theory that the claimant has been partially unemployed.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Charles Bratti began his employment with Fazoli's Restaurants in about four and a half years ago and is still employed by Fazoli's Restaurants as a part-time cook at the employer's Merle Hay location. Mr. Bratti's hourly wage is \$8.00. Mr. Bratti transferred to the employer's Merle Hay location effective November 15, 2013, due to a lack of transportation. The Merle Hay location was closer to Mr. Bratti's home than the South East 14th location where Mr. Bratti had previously performed work for the employer. Jennifer Whittington is the General Manager of the Merle Hay restaurant.

When Mr. Bratti began working at the Fazoli's Restaurant located at Merle Hay, he told the employer that he was available to work until 3:00 p.m., Monday through Friday and that he desired to work 20 to 25 hours per week. Mr. Bratti's was not available to work for the employer during the evening or on weekends. Since October 2013, Mr. Bratti has been a full-time student at ITT Tech. Mr. Bratti's class schedule since then has been Monday and Wednesdays, 6:00 p.m. to 10:00 p.m. and Saturdays, 9:00 a.m. to 1:00 or 2:00 p.m. In addition, for the last few months, Mr. Bratti has had a second, part-time, on-call job as an events security worker. The second job only offers occasional work and that work is always on a Saturday.

The employer's work week, for scheduling purposes, runs from Thursday through Wednesday. At the time of the appeal hearing, the employer only had partial records of Mr. Bratti's scheduled work hours and actual hours worked. The earliest record the employer had was for Thursday, December 12, 2013.

Because Workforce Development benefit weeks are calendar weeks, and because the issue of whether Mr. Bratti is able and available for work and/or partially unemployed must be determined for each of those calendar weeks, the administrative law judge will place Mr. Bratti's work history information in the context of the benefit week whenever possible in this finding of facts.

During the week of December 8-14, 2013, Mr. Bratti worked on Friday, December 13, Mr. Bratti worked from 8:30 a.m. to 3:00 p.m., 6.5 hours. Mr. Bratti had additional hours earlier in the calendar week.

During the week of December 15-21, 2013, Mr. Bratti was scheduled to work 24 hours that week, but only worked 17.5. Mr. Bratti worked on Monday, December 16, 8:30 a.m. to 3:00 p.m. and Tuesday, December 17, 8:30 to 3:00 p.m. Mr. Bratti was scheduled to work a similar shift on Wednesday, December 18, but notified the employer he would be absent due to illness. On Friday, December 20, Mr. Bratti worked 8:30 a.m. to 1:00 p.m. Mr. Bratti had notified the employer on or about December 12 that he would no longer be available beyond 2:30 p.m.

During the week of December 22-28, 2013, Mr. Bratti was scheduled to work 22 hours, but only worked 12 hours. Mr. Bratti worked on Monday, December 23, from 8:30 a.m. to 2:00 p.m., 5.5 hours. Mr. Bratti worked on Tuesday, December 24, from 8:30 a.m. to 3:00 p.m., 6.5 hours. The restaurant was closed on Wednesday, December 25. On Thursday, December 26, Mr. Bratti was scheduled to work 8:30 a.m. to 2:00 p.m., 5.5 hours, but called in an absence. On Friday, December 27, Mr. Bratti was scheduled to work 8:30 a.m. to 1:00 p.m., 4.5 hours, but called in an absence. Mr. Bratti had hurt his knee while away from work.

During the week of December 29, 2013 through January 4, 2014, Mr. Bratti was scheduled to work 14 hours, but only worked three hours. On Monday, December 30, Mr. Bratti called in an absence from his 8:30 a.m. to 2:00 p.m. shift, 5.5 hours. On Tuesday, December 31, Mr. Bratti called in an absence from his 8:30 a.m. to 1:30 p.m. shift, 5.5 hours. On Thursday, January 2, Mr. Bratti worked his 11:00 a.m. to 2:00 p.m. shift, three hours.

On January 2, 2014, Ms. Whittington met with Mr. Bratti to discuss his ongoing availability for work and his need for intermittent FMLA leave. At that time, Ms. Whittington and Mr. Bratti agreed that he would commit to working three days a week between Monday through Friday and that he would work no later than 2:00 p.m. Mr. Bratti at that time indicated that he was available for 12 to 18 hours per week.

During the week of January 5-11, Mr. Bratti was scheduled to work 15 hours and worked 15 hours. On Monday, January 6, Mr. Bratti worked 8:30 a.m. to 1:00 p.m., 4.5 hours. On Tuesday, January 7, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. On Thursday, January 9, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. It was during this week that Mr. Bratti established his additional claim for unemployment insurance benefits. Mr. Bratti reported \$92.00 in wages for the week, but his actual gross wages were \$120.00 (\$8.00 x 15 hours).

During the week of January 12-18, Mr. Bratti was scheduled to work 21 hours and worked 21 hours. On Monday, January 13, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. On Tuesday, January 14, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. On Wednesday, January 15, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. On Thursday, January 16, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. Mr. Bratti reported to Workforce Development that he had zero wages for the week, but his actual gross wages for the week were \$168.00 (\$8.00 x 21).

During the week of January 19-25, Mr. Bratti was scheduled to work 21 hours and worked 21 hours. On Monday, January 20, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. On Tuesday, January 21, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. On Wednesday, January 22, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. On Thursday, January 23, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. Mr. Bratti reported to Workforce Development that he had \$136.00 in wages for the week, but his actual gross wages for the week were \$168.00 (\$8.00 x 21).

At the time of the appeal hearing, the employer had only partial records concerning Mr. Bratti's work during the week of January 26 through February 1, 2014. On Monday, January 27, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. On Tuesday, January 28, Mr. Bratti worked 8:30 a.m. to 1:30 p.m., 5.0 hours. On Wednesday, January 29, Mr. Bratti worked 8:30 a.m. to 2:00 p.m., 5.5 hours. Thus, there are 16 hours of work during the week that ended February 1, 2014, for which the employer had documentation available. Mr. Bratti reported to Workforce Development that he had \$136.00 in wages for the week. The 16 hours of document would indicate at least \$128.00 in actual gross wages for the week.

The employer did not have records available for the benefit weeks that ended February 8, 15, and 22, 2014. Mr. Bratti reported to Workforce Development that he had \$100.00 in wages for the week that ended February 8, 2014. If that figure is accurate, it would indicate that Mr. Bratti worked 12.5 hours that week (\$100.00 divided by \$8.00).

Mr. Bratti reported to Workforce Development that he had \$96.00 in wages for the week that ended February 15, 2014. If that figure is accurate, it would indicate that Mr. Bratti worked 12 hours that week (\$96.00 divided by \$8.00). On Tuesday, February 11, 2014, Mr. Bratti had asked the employer whether it would be possible to get more hours. The employer added a Friday, February 14, 8:30 a.m. to 2:00 p.m. shift, 5.5 hours to Mr. Bratti's work schedule for that week, but Mr. Bratti did not appear for that shift.

Ms. Whittington was gone from the workplace from February 13, 2014 through March 5, 2014. In her absence, Jonathan Bain, Assistant General Manager, dealt with Mr. Bratti and Mr. Bratti's work availability issues.

For the week of February 16-22, Mr. Bratti reported to Workforce Development that he had \$88.00 in wages, which would indicate that he worked 11 hours that week (\$88.00 divided by

\$8.00). However, Mr. Bratti was absent due to illness from his Friday, February 21, 8:30 a.m. to 1:30 p.m. shift, 5.0 hours.

For the week of February 23 through March 1, 2014, the most recent week for which Workforce Development claim records were available at the time of the hearing, Mr. Bratti reported \$80.00 in wages, which would indicate that he worked 10 hours (\$80.00 divided by \$8.00). However, Mr. Bratti was absent from a Friday, February 28 shift. Mr. Bratti thought he had requested the day off, but he had actually submitted a request for January 28 off. At the time of the appeal hearing, the employer had partial work records for the week that ended March 1, 2014. According to those records, Mr. Bratti was scheduled to work on Thursday, February 27, 8:30 a.m. to 1:30 a.m., 5.0 hours and also scheduled to work a similar shift on Friday, February 28.

The available partial employer records for the week that ended March 8, 2014, indicate Mr. Bratti was scheduled to work Monday, March 3, 8:30 a.m. to 1:00 p.m., 4.5 hours. Those same records indicate that Mr. Bratti was scheduled to work Tuesday, March 4, 8:30 a.m. to 1:30 p.m., 5.0 hours. Those same records indicate that Mr. Bratti was scheduled to work Wednesday, March 5, 8:30 a.m. to 2:00 p.m., 5.5 hours. However, Mr. Bratti requested Wednesday, March 5, 2014 off.

This employer is Mr. Bratti's sole base period employer. Mr. Bratti's base period consists of the four calendar quarters of 2012. Mr. Bratti's average weekly wage for 2012 was \$258.38, which would correspond to a 32.3-hour average work week. Mr. Bratti's average weekly wage during 2013 was \$216.00, which would correspond to a 27-hour average work week.

Since Mr. Bratti established his additional claim for benefits, he has received \$1,121.00 in benefits for the period of January 5, 2014 through March 1, 2014. Mr. Bratti's weekly benefit amount is set at \$190.00. The benefits disbursed week-by-week have been based upon the wages Mr. Bratti has reported and are as follows:

<u>Benefit week end date</u>	<u>Wages reported</u>	<u>Benefits paid</u>
01/11/14	92.00	145.00
01/18/14	0.00	190.00
01/25/14	136.00	101.00
02/01/14	136.00	101.00
02/08/14	100.00	137.00
02/15/14	96.00	141.00
02/22/14	88.00	149.00
03/01/14	80.00	157.00

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".

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).

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). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

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.]

Both parties have provided incomplete information. Mr. Bratti bears the burden of proving that he has been able and available for work and partially unemployed. See Iowa Code section 96.4(3). Mr. Bratti has provided weekly wage information to Workforce Development that is inaccurate. During the hearing, Mr. Bratti made reference to the employer cutting his working hours in connection with implementation of the federal Affordable Care Act. Those changes occurred no later than the start of 2013. By continuing in the employment for a substantial period after that, Mr. Bratti acquiesced in those changes and they became the established conditions of his employment. See Olson v. Employment Appeal Board, 460

N.W.2d 865 (Iowa Ct. App. 1990). Those changed conditions included a 27 hour average work week during 2013.

The weight of the evidence indicates that Mr. Bratti further changed the conditions of the employment by electing to transfer to the Merle Hay restaurant and by indicating to the employer at that time that he was only available for work before 3:00 p.m., Monday through Friday. Mr. Bratti subsequently restricted his availability to no later than 2:30 p.m.

At the beginning of January 2014, the employer met with Mr. Bratti to discuss his availability because he had missed several shifts, apparently due to his knee injury. The employer was at that time looking to get a commitment from Mr. Bratti to work at least three shifts per week. The employer's approach at the time was not the approach of an employer looking to cut an employee's work hours. Instead, the employer accommodated the further restrictions that Mr. Bratti made to his availability and scheduled Mr. Bratti accordingly.

In February 2014, Mr. Bratti made a request for additional hours and the employer added back in a Friday shift. That conduct is not indicative of an employer looking to restrict or cut work hours. Despite the request for additional hours, Mr. Bratti continued to make regular requests for time off or failed to appear for shifts.

Based on the weight of evidence, the administrative law judge cannot find Mr. Bratti's circumstances to meet the definition of partial unemployment. Nor can the administrative law judge find that Mr. Bratti's availability for work equals the availability he had in 2013 or during his 2012 base period. Benefits are denied effective January 5, 2014. The disqualification continued as of the March 6, 2014 appeal hearing.

DECISION:

The Claims Deputy's February 5, 2014, reference 04, is reversed. The claimant has not been available for work within the meaning of the law or partially unemployed within the meaning of the law since he established the additional claim for benefits that was effective January 5, 2014. Benefits are denied effective January 5, 2014. The employer's account will not be charged for benefits paid to the claimant under the theory that he was partially unemployed. This matter is remanded to the Benefits Bureau for entry of an appropriate overpayment decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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