

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KIRSTIE L THOLEN
Claimant

DM SERVICES INC
Employer

APPEAL NO. 22A-UI-05878-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/30/22
Claimant: Appellant (4)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code section 96.1A(37)(b) – Partial Unemployment
Iowa Code section 96.7(2)(a)(2)(a) – Employer Liability

STATEMENT OF THE CASE:

On March 7, 2022, Kirstie Tholen (claimant) filed a timely appeal from the February 28, 2022 (reference 01) decision that denied benefits for the period beginning January 30, 2022, based on the deputy's conclusion that the claimant was still employed for the same hours and wages and was not partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on April 15, 2022. Claimant participated. The employer did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Exhibit A, the online appeal, was received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, WAGE-A.

ISSUES:

Whether the claimant was able to work and available for work for the period beginning January 30, 2022.

Whether the claimant was partially and/or temporarily unemployed for the period beginning January 30, 2022.

Whether the employer's account may be charged for benefits for the period beginning January 30, 2022.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Kirstie Tholen (claimant) has at all relevant times been employed by DM Services, Inc. as a home-based Collector/Credit Analyst. Until August 2021, the claimant's wage was \$14.90 an hour. In August 2021, the claimant's wage increased to \$15.10 an hour. Until December 6, 2021, the claimant was a full-time employee and worked a Monday through Friday work week. Effective December 6, 2021, the employer reduced the claimant to part-time status and commenced providing 29 hours of work per week. The demotion from full-time to part-time status was based on the claimant not satisfying the employer's criteria for earning commission

pay. The claimant had suffered multiple significant personal losses in 2021 that impacted her emotional health and work performance. The claimant anticipated the demotion to part-time status was a prelude to being discharge from the employment. This belief factored in the claimant's motivation and in her decision to report, or not report, for available part-time shifts.

The claimant established an original claim for benefits that was effective January 30, 2022, in response to the reduction in work hours. Iowa Workforce Development set the weekly benefit amount at \$447.00. The weekly benefit amount is based on a base period history of full-time employment. The base period consists of the fourth quarter of 2020 through the third quarter of 2021. The claimant's wages during the base period were as follows:

EMPLOYER	ACCT-LOC	2020/4	2021/1	2021/2	2021/3
DM SERVICES INC	280020-000	10290	5953	2134	7436

The claimant's average weekly wage during the base period was as follows:

EMPLOYER	ACCT-LOC	2020/4	2021/1	2021/2	2021/3
DM SERVICES INC	280020-000	792	458	164	572

The claimant's more recent quarterly wages are as follows:

EMPLOYER	ACCT-LOC	2021/4	2022/1
DM SERVICES INC	280020-000	7096	4139

The claimant's average weekly wages during these most recent reporting quarters have been as follows:

EMPLOYER	ACCT-LOC	2021/4	2022/1
DM SERVICES INC	280020-000	546	318

Since the claim took effect, the employer has consistently made available 29 hours of work each week. Those 29 hours have been within the claimant's established hours of availability. The wages for 29 hours of weekly work would be \$437.90, if the claimant worked all 29 hours. That amount is less than the \$447.00 weekly benefits amount plus \$15.00, or \$461.00.

Since the claimant established her unemployment insurance claim, the claimant has not worked all 29 weekly hours the employer has made available.

During the week that ended February 5, 2022, the claimant was absent from an eight-hour shift on January 31 for personal family matter. On February 1, the claimant was absent 1.75 hours for the same family matter. On February 4, the claimant was 20 minutes late. The claimant's absences caused the claimant's work hours to reduce from 29 to about 19 hours. The wages earned for the week totaled about \$286.00. The claimant was available for the majority of the hours the employer had for the claimant that week.

During the week that ended February 12, 2022, the claimant was absent eight hours on February 7, four hours on February 9, and one hour on February 10, all related to bereavement. The claimant was also absence four hours on February 11 for personal reasons. The absences caused the claimant's work hours to reduce from 29 to 12 hours. In other words, the claimant was not available for the majority of the hours the employer had for her for the week. The wages for 12 hours would be about \$181.00.

During the week that ended February 19, 2022, the claimant elected to take February 18 off as an unpaid personal day, thereby missing out on an eight hour shift. The claimant was also 51 minutes late for personal reasons on February 14. The claimant's absences caused the claimant's work hours to reduce from 29 to about 20. The claimant was available for the majority of the hours the employer had for the claimant that week. The wages for 20 hours would be \$302.00.

During the week that ended February 26, 2022, the claimant took February 21 off as a personal day and thereby missed an eight-hour shift. The claimant also took four hours off on February 25 for a personal day. The claimant was late 55 minutes on February 23 and was 16 minutes late on February 16. The claimant's absences reduced the claimant's work hours from 29 to about 16 hours. The claimant was available for the majority of the hours the employer had for the claimant that week. The wages for 16 hours would be about \$242.00.

During the week that ended March 5, 2022, that claimant used eight hours of paid "floating holiday" to take the day off with pay. On March 1, the claimant was absent for a five-hour shift for personal business. On March 4, the claimant was about an hour late. The claimant's absences reduced the work hours from 29 to about 15 hours. The claimant was available for the majority of the hours the employer had for the claimant that week. The claimant was paid for 23 hours, about \$347.00.

During the week that ended March 12, 2022, the claimant elected to take eight-hours off on March 7 for personal business and also requested March 11 off, thereby missing a four-hour shift. On March 9, the claimant was without Internet access for a four-hour shift and therefore was not available to perform work for the employer. On March 10, the claimant was without Internet access for about 17 minutes and unavailable to perform work for the employer during that time. The claimant was required to maintain Internet access as a condition of the employment. The claimant's Internet provider was unreliable. The claimant's absences reduced the work hours from 29 to about 13. In other words, the claimant was not available for a majority of the hours the employer had for the claimant that week. The wages for 13 hours would be about \$196.00.

During the week that ended March 19, 2022, the claimant was absent on March 15 for a five-hour hour shift and on March 18, elected to take a second eight-hour paid "floating holiday." The claimant's absences reduced the claimant's work hours from 29 to 16. The claimant was paid for 24 hours. The claimant was available for the majority of hours the employer had for the claimant that week. The wages for 24 hours would be about \$362.00

During the week that ended March 26, 2022, the claimant elected to be absent from an eight – hour shift on March 21 and from a four-hour shift on March 25, thereby reducing her work hours from 29 to 17. The claimant was available for the majority of the hours the employer had for the claimant that week. The wages for 17 hours would be about \$257.00.

During the week that ended April 2, 2022, the claimant elected to miss an four-hour shift on March 28 and a five-hour shift on March 29. In addition, the claimant was without Internet access for her eight-hour shift on April 1 and, thereby, unavailable to perform work for the employer. The claimant's absences and Internet issue reduced the claimant's work hours from 29 to 12. In other words, the claimant was not available for the majority of the hours the employer had for the claimant that week. The pay for 12 hours would be about \$181.00.

During the week that ended April 9, 2022, the claimant requested April 5 off in advance, thereby missing a four-hour available shift. The claimant was also about an hour late on April 8. The claimant's absences reduced the work hours from 29 to about 24.00 The claimant was available

for the majority of the work hours the employer make available that week. The pay for 24 hours would be about \$362.00.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3)(a) provides as follows:

96.4 Required findings. An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. a. 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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.

Iowa Admin. Code r. 871-24.23(26) and (29) 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.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

Iowa Code section 96.1A(37)(b) provides:

"Total and partial unemployment".

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.

If a claimant 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. Iowa Code section 96.7(2)(a)(2)(a).

Since the claimant established her unemployment insurance claim, the base period employer has not provided has not provided the claimant with the same full-time employment the claimant received during the base period. Thus, the employer's account may be assessed for benefits for any week for which the claimant is deemed eligible for benefits. Further, since the claimant established her claim, the maximum wages the claimant would be able to receive under the 29-hour a week regiment would be less than the weekly benefit amount plus \$15.00. In other words, the claimant has been partially unemployed each week since the claim took effect.

The claimant has been able to work since she filed her claim.

The claimant has been available for work within the meaning of the law each week in which she worked the majority of the 29 work hours the employer made available. The claimant has not been available for work within the meaning of the law during those weeks in which she has not worked the majority of the 29 work hours the employer made available. Accordingly, the claimant is eligible for benefits for the weeks ending February 5, February 19, February 26, March 5, March 19, March 26 and April 9, 2022, provided the claimant meets all other eligibility requirements. The claimant is not eligible for benefits for the weeks ending February 12, March 12 and April 2, 2022.

This same analysis applies going forward when determining the partial unemployment, availability, and employer liability issues. In other words, provided the claimant meets all other eligibility requirements, the claimant is eligible for benefits for those weeks when the employer provides less than full-time hours, when the wages do not exceed the weekly benefit amount plus \$15.00, and when the claimant makes herself available for the majority of the hours the employer makes available. The claimant is advised, for future reference, that restricting the number of hours she is available to work could have an adverse impact on her future eligibility for unemployment insurance benefits.

DECISION:

The February 28, 2022 (reference 01) decision is MODIFIED in favor of the claimant/appellant as follows. The claimant has been able to work and partially unemployed since the claimant established the January 30, 2022 original claim. The employer's account may be charged. The claimant met the availability requirement during the weeks that ended February 5, February 19, February 26, March 5, March 19, March 26 and April 9, 2022 and is eligible for benefits for those weeks, provided the claimant meets all other eligibility requirements. The claimant did not meet the availability requirement during the weeks that ended February 12, March 12 and April 2, 2022, and is not eligible for benefits for those weeks.

Provided the claimant meets all other eligibility requirements, the claimant will continue to be eligible for benefits for those weeks when the employer provides less than full-time hours, when the wages do not exceed the weekly benefit amount plus \$15.00, and when the claimant makes herself available for the majority of the hours the employer makes available.



James E. Timberland
Administrative Law Judge

May 11, 2022

Decision Dated and Mailed

jet/ac