

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**TROY IRBY
76 W POST RD NW
CEDAR RAPIDS IA 52405**

**CAMBRIDGE TEMPOSITIONS INC
ATTN MANAGER
610 – 32ND AVE SW STE A
CEDAR RAPIDS IA 52404-3910**

**Appeal Number: 04A-UI-12037-DT
OC: 06/06/04 R: 03
Claimant: Appellant (3/R)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Able and Available
Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits

STATEMENT OF THE CASE:

Troy Irby (claimant) appealed a representative's November 4, 2004 decision (reference 06) that concluded he was not qualified to receive unemployment insurance benefits in conjunction with employment with Cambridge Tempositions, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 3, 2004. The claimant participated in the hearing. Traci Carkhuff appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant's first and to-date only assignment through the employer began on July 16, 2004. As of the date of the hearing, he remains employed in the assignment. When he began the assignment, he was working full time, working a rotating schedule of four 12-hour shifts (7:00 a.m. to 7:00 p.m.) one week, three 12-hour shifts the next week. He worked this schedule for the business client for no more than five weeks, through no later than the week ending August 21, 2004.

The claimant's son became ill. As a result, the claimant approached the business client and worked out a change in his work schedule with the business client. Beginning approximately August 22, 2004, he only worked three days per week from 10:00 a.m. to 2:00 p.m., no more than 12 hours per week, so that he could be home with his son. His regular full time work with the business client was still open to him had he been available for the work, and the employer had other work that could have been provided to the claimant to fill in hours back to full time if he had been available.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if he is not employed at his usual hours and wages and earns less than his weekly benefit amount plus \$15.00. Iowa Code section 96.19-38-b.

871 IAC 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.

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".

871 IAC 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.

871 IAC 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

Beginning on or about August 22, 2004, the claimant was not working his prior hours; however, it was not due to the employer or the employer's business client failing to provide substantially the same employment as it previously provided. The evidence establishes that the claimant had a choice to work, and that the willingness to work would have led to actual employment. 871 IAC 24.23(41). The claimant was unavailable for further work because his childcare obligations unduly limited his availability. 871 IAC 24.23(8). The reason the claimant was not working his prior full time hours is because he was not able and available for the work. Benefits are denied effective August 22, 2004.

The disqualification in this case will result in an overpayment of unemployment insurance benefits, an issue not included on the hearing notice. Further, Agency records indicate that there is an apparent discrepancy in the wages reported by the claimant during his weekly claims after the commencement of his assignment with the employer on July 16, 2004. The case will be remanded for an investigation and preliminary determination on the overpayment issue. 871 IAC 26.14(5).

DECISION:

The representative's November 4, 2004 decision (reference 06) is modified in favor of the employer. The claimant was not partially unemployed due to the employer not providing him with his regular hours and wages, and he was able to work and available for work. Effective August 22, 2004, the claimant is not qualified to receive unemployment insurance benefits. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

ld/pjs