

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVIS, STEPHANIE, M**  
Claimant

**APPEAL NO. 13A-UI-02268-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CEDAR RAPIDS COUNTRY CLUB**  
Employer

**OC: 01/20/13**  
**Claimant: Appellant (1)**

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:**

Stephanie Davis filed a timely appeal from the February 20, 2013, reference 02, decision that denied benefits effective January 20, 2013 based on an agency conclusion that she was medically unable to perform work. After due notice was issued, a hearing was held on March 25, 2013. Ms. Davis participated. Megan Mullin, Banquet Manager, represented the employer and presented additional testimony through Christophe Granger, General Manager.

**ISSUES:**

Whether Ms. Davis has been able to work and available for work since she established her claim for benefits.

Whether Ms. Davis has been partially unemployed since she established her claim for benefits.

Whether the employer's account may be charged for benefits paid Ms. Davis.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Stephanie Davis established a claim for unemployment insurance benefits that was effective January 20, 2013, but has not yet received any unemployment insurance benefits.

Ms. Davis commenced her employment with Cedar Rapids Country Club in September 2012 and is still employed with that employer. Ms. Davis last performed work for the employer on March 14, 2013. Ms. Davis was hired to perform bartending and banquet serving duties. Ms. Davis' work time has been equally divided between those two sets of duties. Ms. Davis' primary supervisor is Becky Konigsmark, Banquet Captain.

After the first three weeks of the employment, Ms. Davis weekly scheduled hours has fluctuated substantially. This was due in part to the nature of the employer's business. Ms. Davis was likely to have more hours during a week when the employer had banquets scheduled and was

likely to have fewer hours when business was slower. The employer's business slowed in October and picked back up in December when the employer had Christmas banquets booked.

The employer utilizes a Monday through Sunday workweek for scheduling purposes and a two-week pay period. Ms. Davis' total weekly *scheduled* hours since the start of the employment and her number of hours *actually worked* per pay-period have been as follows:

<u>Monday</u>	<u># hours scheduled</u>	<u>Pay-period</u>	<u># actual hrs worked</u>
9/17/12	35 hours	9/10 - 9/23	32.9 hours
9/24/12	32.5 hours	9/24 - 10/7	70.6 hours
10/1/12	37 hours		
10/8/12	7.5 hours	10/8 - 10/21	17.4 hours
10/15/12	19.5 hours		
10/22/12	17 hours	10/22 - 11/4	37.3 hours
10/29/12	25 hours		
11/5/12	9.5 hours	11/5 - 11/18	35 hours
11/12/12	27 hours		
11/19/12	17 hours	11/19 - 12/2	31.83 hours
11/26/12	7 hours		
12/3/12	39 hours	12/3 - 12/16	71.92 hours
12/10/12	32 hours		
12/17/12	28 hours	12/17 - 12/30	26.3 hours
12/24/12	14 hours		
12/31/12	14.5 hours	12/31 - 1/13	0.45 hours
1/7/13 (Only worked 1/3/13.)	0.0 hours		
1/14/13	0.0 hours	1/14 - 1/27	0.0 hours
1/21/13	0.0 hours		
1/28/13	11 hours	1/28 - 2/10	0.0 hours
2/4/13	12 hours		
2/11/13	0.0 hours (Wisdom teeth)	2/11 - 2/24	8.38 hours
2/18/13	9 hours		
2/25/13	4.5 hours	2/25 - 3/10	0.0 hours
3/4/13	0.0 hours		
3/11/13	13 hours	3/11 - 3/24	16.73 hours
3/18/13	7 hours		
3/25/13	14 hours		

Ms. Davis has had multiple medical issues since she began the employment as follows. Those medical issues have been primary reason for Ms. Davis' decreased work hours since she established her claim for unemployment insurance benefits in January 2013.

On October 7, 2012, Ms. Davis went to the emergency room with what she thought might be a kidney infection. The emergency room doctor concluded Ms. Davis might have a pulled muscle. The doctor prescribed hydrocodone and a muscle relaxer and directed her to follow up with her primary care physician. Ms. Davis did not provide the employer with any medical documentation concerning this emergency room visit.

On November 8, 2012, Ms. Davis saw her primary care doctor to discuss the pain in her back. Ms. Davis at times describes the pain as a spasm in her neck, but at other times references issues with her lower back. The primary care doctor told Ms. Davis to continue with the medications prescribed by the emergency room doctor. The doctor instructed Ms. Davis to stay home for a few days, from November 8 through November 11. The doctor imposed medical restrictions that included no lifting, bending, twisting, or sitting or standing for longer than 30 minutes at a time. Such restrictions essentially indicated that Ms. Davis could not work. Ms. Davis got a note from her doctor setting forth the restrictions, but did not provide a copy of the note to the employer.

On November 12, Ms. Davis returned to her primary care doctor. The doctor wanted Ms. Davis to remain off work. Ms. Davis needed money and did not follow that recommendation. The doctor continued the previous medical restrictions. Ms. Davis got a note from her doctor setting forth the restrictions, but did not provide a copy of the note to the employer. Ms. Davis did however speak to Megan Mullin, Banquet Manager, about having some medical restrictions affecting her ability to stand and lift. Ms. Mullen allowed Ms. Davis to sit as needed. The employer would sometimes have Ms. Davis polish silverware or fold napkins. The employer instructed Ms. Davis not to attempt to carry trays of food when assisting with banquets, but to instead carry only one plate at a time while others carried the trays. The employer instructed Ms. Davis not to carry the buckets of ice needed in the bar. There were others available to assist with such duties as needed. The employer otherwise made a good-faith effort to accommodate the medical restrictions as stated to them by Ms. Davis.

On November 21, 2012, Ms. Davis met with a doctor at a pain clinic and received an epidural shot that she and the doctor hoped would help with her back pain. Ms. Davis did not provide the employer with a medical note concerning this appointment.

On November 29, Ms. Davis followed up with her primary care doctor to discuss whether the epidural shot had helped with the pain. It had not helped. Ms. Davis' doctor had been unable up to that point to determine the cause of Ms. Davis back pain, though the cause was not work related. According to Ms. Davis, the doctor told her that she should remain less active and be careful. The doctor continued the previously imposed medical restrictions. Ms. Davis received a note indicating the medical restrictions, but did not provide a copy of the note to the employer. However, Ms. Davis spoke to Danielle Eddie, one of her supervisors, concerning some medical restrictions.

On November 30, Ms. Davis saw a doctor at a walk-in clinic in reference to a respiratory/sinus issue. The doctor took Ms. Davis off work for that day. Ms. Davis did not provide a doctor's note to the employer in connection with this medical visit.

On December 3, Ms. Davis went to the Emergency Room in reference to her back pain. Ms. Davis was admitted to the hospital for an overnight stay. Ms. Davis was discharged from

the hospital the next day with instructions to follow up with her family doctor and to stay off work. Ms. Davis received a document with these instructions and restrictions, but did not provide a copy to the employer.

On December 17, Ms. Davis had a follow-up appointment with her primary care doctor regarding multiple ailments. The doctor provided Ms. Davis with the note, but Ms. Davis did not provide a note to the employer.

On December 29, Ms. Davis saw a doctor at a walk-in clinic for respiratory, nausea, and diarrhea issues. The doctor told Ms. Davis to stay off work for 24 hours. The doctor provided Ms. Davis with a note, but Ms. Davis did not provide a copy to the employer.

On December 31, Ms. Davis met with a neurosurgeon, who had Ms. Davis undergo a CT scan of her *lower* back. According to Ms. Davis, the CT scan did not reveal anything significant. The neurosurgeon instructed Ms. Davis to follow up with her family doctor.

In December 2012, Ms. Davis started five weeks of physical therapy that lasted into January.

On January 6, 2013, Ms. Davis followed up with a primary care doctor regarding her back. Ms. Davis' usual primary care doctor was out of town, so Ms. Davis met with another doctor. According to Ms. Davis, the doctor instructed her to take it easy for a couple days. Ms. Davis was at that point on a leave of absence and did not provide a note to the employer in connection with the medical appointment.

Ms. Davis has a great deal of work in connection with her health issues since she started in the employment. On November 7, Ms. Davis went home early due to illness. On November 8, Ms. Davis called in sick. On November 9, Ms. Davis notified the employer she could not work her six and a half-hour bartending shift due to problems with standing. The employer asked Ms. Davis if she could fold napkins and Ms. Davis came in and folded napkins for about four hours. On November 10, Ms. Davis was absent due to her back issues from her six-hour bartending shift. On November 14, Ms. Davis went home early due to illness. On November 30, Ms. Davis notified the employer she would be absent for a seven-hour shift because her brother was taking her to the emergency room. Later that same day, Ms. Davis notified the employer that she was staying in the hospital overnight for pain management. On December 1, Ms. Davis notified the employer she would be absent for a seven-hour shift because she had just been released from the hospital and needed to sleep. On December 20, Ms. Davis was absent for a seven-hour shift due to illness. On December 21, Ms. Davis went home early due to illness. On December 28 and December 29, Ms. Davis was absent from 12-hour shifts due to illness. On December 31, Ms. Davis called in absent for a ten-hour shift. Ms. Davis told the employer she had been throwing up and that she was to have x-rays done that afternoon. Ms. Davis mentioned that she had a doctor's note, but did not provide the doctor's note. On January 3, 2013, Ms. Davis went home sick within half an hour of starting a nine-hour shift.

After all of the absences referenced above, the employer decided it would be best to meet with Ms. Davis to see whether Ms. Davis would be better off if she just stayed home to recover from her multiple illnesses. In this respect, the employer was unknowingly echoing what Ms. Davis' doctor had already recommended multiple times. The employer did not force Ms. Davis to take time off. Instead, the employer suggested it might be a good idea for Ms. Davis's recovery and for the employer's ability to schedule shifts without having to recruit someone last minute to cover them. Ms. Davis commenced an approved leave of absence at that time. Ms. Davis

subsequently contacted the employer and requested to be put back on the schedule. The employer accommodated that request.

From January 27, 2013 through February 11, 2013, the employer shut down some aspects of operations. However, during that period, the employer gave employees the option of coming into work between 8:00 a.m. and 5:00 p.m. Ms. Davis told the employer she did not want to work more than four hours at a time and could not work a full day. On January 31, Ms. Davis called in sick for a three-hour shift and indicated she needed to attend doctor appointments that day. On February 1, Ms. Davis called in sick for a two-hour shift and stated that she wanted a day to rest. On February 4, Ms. Davis was absent from a three-hour shift because she did not appropriately check her schedule. On February 7, Ms. Davis missed over half of her three-hour shift due to a doctor appointment and then declined the employer's offer to have her work later to make up for lost time. Ms. Davis indicated she needed to take somebody else to the doctor.

Ms. Davis was unable to work at all during the week that ended February 16, 2013 because she had her wisdom teeth removed that week and was on pain medication for that.

On Saturday, February 23, the employer asked Ms. Davis if she could come in and work a five-hour shift. Ms. Davis initially agreed to work the shift, but then told the employer she needed to attend a class instead.

On Thursday, March 14, 2013, toward the end of her shift, Ms. Davis reported to the employer's controller that she had tripped on a carpet and had hurt her back as a result. The employer arranged for Ms. Davis to be seen by a doctor that same day. The doctor took Ms. Davis off work. The doctor prescribed vicodin and a couple other medications. On Monday, March 18, Ms. Davis met with the employer-designated doctor again. The doctor ordered x-rays and took Ms. Davis off work until a follow up appointment set for Monday, March 25, 2013. That happened to be the day of the unemployment insurance appeal hearing. Ms. Davis had been on the schedule to work a seven-hour shift on Wednesday, March 20, but could not work that shift due to being taken off work in connection with the purported workplace injury. As of the appeal hearing on March 25, 2013, Ms. Davis continued off work due to the purported workplace injury. The plan as of the March 18 doctor appointment was for Ms. Davis to participate in physical therapy two to three times per week in the immediate future.

Ms. Davis also has ongoing, unresolved issues with kidney stones that cause her pain.

## **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".

871 IAC 24.22(1)a 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

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(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

871 IAC 24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

871 IAC 24.23(29) provides:

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

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

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).

The evidence in the record, as detailed in the findings of fact above, establishes that Ms. Davis has not met the work ability and work availability requirements since she established the claim for benefits that was effective January 20, 2013. Up to that time, according to Ms. Davis' own testimony, she had been advised multiple times by a doctor that she needed to stay off work. The weight of the evidence suggests that Ms. Davis purposely did not fully disclose her medical restrictions to the employer because if she did, the employer would have been on notice that Ms. Davis was not supposed to be working. The weight of the evidence indicates that Ms. Davis has been under the care of multiple physicians since she established her claim for benefits. Ms. Davis had provided no medical documentation. The medical documentation Ms. Davis testified about points to her not being able to work. Ms. Davis has not met the work ability or work availability requirements since she established her claim for benefits and is not eligible for benefits. Benefits are denied effective January 20, 2013 and the disqualification continues as of the March 25, 2013 appeal hearing.

The weight of the evidence fails to establish that Ms. Davis has been partially unemployed since she filed her claim.

**DECISION:**

The Agency representative's February 20, 2013, reference 02 is affirmed. The claimant has not been able and available for work since establishing her claim for benefits. Accordingly, the claimant is not eligible for benefits. Benefits are denied effective January 20, 2013 and the disqualification continues as of the March 25, 2013 appeal hearing.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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