

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK O ROBINSON
Claimant

APPEAL NO. 09A-UI-15999-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACKERMAN INVESTMENT CO
Employer

**Original Claim: 09/20/09
Claimant: Respondent (2-R)**

Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The employer, Ackerman Investment, filed an appeal from a decision dated October 16, 2009, reference 01. The decision allowed benefits to the claimant, Mark Robinson. After due notice was issued, a hearing was held by telephone conference call on December 1, 2009. The claimant participated on his own behalf. The employer participated by General Manager Brian Bocken and Hotel Manager Molly Hiscox.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Mark Robinson began employment with Ackerman Investment beginning December 17, 2007 as a part-time houseman. He was not guaranteed any minimum number of hours per day, week, or pay period, but generally worked an average of 20 to 25 hours per week. At certain periods of the year, usually January through March, the guest census would be higher and his hours might increase due to the extra work, but then would return to the average part-time status. His hours and earnings have remained the same since at least January 1, 2008.

In September 2009, Hotel Manager Molly Hiscox was approached by Head Housekeeper Tabitha Rejba on behalf of the housekeeping staff. The staff was concerned about the decrease in business and wanted to know if they could file for partial unemployment benefits. Ms. Hiscox said that decision was entirely up to them but did not assure anyone the unemployment would not be contested. Mark Robinson has received unemployment benefits since filing a claim with an effective date of September 20, 2009.

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 24.23(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.

The claimant was hired, and remains, as a part-time employee with no guarantee of a minimum number of hours per day, week, or pay period. Under the provisions of the above Administrative Code section, the claimant is not eligible for unemployment benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This

subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of October 16, 2009, reference 01, is reversed. Mark Robinson is not eligible for unemployment benefits. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw