

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARCIE ELLIOTT
Claimant

ROC TAPROOM INC
Employer

**APPEAL 21A-UI-11013-SN-T
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/15/20
Claimant: Appellant (2)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.19(38) – Definitions – Total, partial unemployment
Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search
Iowa Code § 96.7(2)A(2) – Charges – Same base period employment
Iowa Admin. Code r. 871-24.23(26) – Eligibility – A&A – Part-time same hours, wages

STATEMENT OF THE CASE:

On April 20, 2021, Marcia Elliott (claimant/appellant) filed an appeal from the April 16, 2021, reference 01, unemployment insurance decision that denied benefits effective April 4, 2020. The parties were properly notified of the hearing. A telephone hearing was held on July 7, 2021, at 9:00 a.m. The claimant participated. The employer participated through Human Resources Manager Juliet Diaz. No exhibits were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant is totally, partially or temporarily unemployed?
Whether claimant is able to and available for work?
Whether claimant is still employed at the same hours and wages?
Whether employer's account is subject to charge?

FINDINGS OF FACT:

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

The claimant, Marcie Elliott, began employment as a part-time server with the employer, ROC Taproom Inc., on May 7, 2018. The claimant works 27 to 33 hours per week. The claimant is guaranteed 27 hours per week. The claimant's hourly wage is \$5.25 plus tips. Her hourly wage was raised to \$8.00 from May 15, 2020 to June 15, 2020. The claimant is available for work Tuesday, Wednesday and Friday nights and from open to close on Saturday and Sunday. Ms. Diaz testified this is actually more availability than most of its servers have in its restaurant.

The claimant filed an initial claim for unemployment insurance benefits effective March 15, 2020. The claimant only received insured wages from the employer during her base period which spans from the fourth quarter of 2018 to the third quarter of 2019. The claimant's weekly

benefit amount is \$518.00. The employer closed its dining hall due to Covid-19 from March 15, 2020 through May 18, 2020. Prior to the dining room's reopening on May 18, 2020, the claimant worked as a delivery driver.

The claimant made weekly claims from the week ending March 21, 2020 to the week ending March 13, 2021. The claimant earned less than \$533.00 in insured wages for this entire period of weekly claims with the exception of the weeks ending July 25, 2020, May 1, 2021, May 29, 2021, June 5, 2021, and June 12, 2021. The claimant's availability did not change during this period. In fact, the claimant even offered to work on lunches when she was absolutely needed to fill in.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was partially unemployed and able and available effective April 26, 2020 with the exception of the following weeks: July 25, 2020, May 1, 2021, May 29, 2021, June 5, 2021, and June 12, 2021. Benefits are granted.

Iowa Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

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.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

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".

Iowa Admin. R. 871-24.23(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 difference from the contract for hire, such claimant cannot be considered partially unemployed.

Iowa Code section 96.7(2)a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

(b) An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(c) The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

First, the administrative law judge will evaluate whether the claimant was partially, temporarily or totally unemployed. To be partially unemployed for any given week, claimant must work less than 27 hours per week (claimant's regular full-time schedule) and earn less than \$533.00

(claimant's weekly benefit plus \$15.00). The claimant worked less than her regular schedule for each week she made weekly claims. The claimant earned less than \$533.00 in insured wages for this entire period of weekly claims with the exception of the weeks ending July 25, 2020, May 1, 2021, May 29, 2021, June 5, 2021, and June 12, 2021.

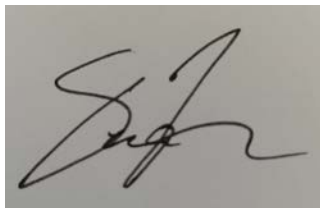
Second, the administrative law judge will evaluate whether the claimant was able and available for the period in question. The administrative law judge disagrees with the assessment of the representative below. Both parties agreed the claimant's availability was not unduly restricted during the period she made weekly claims. If anything the claimant was more available during the time she made weekly claims.

Third, the administrative law judge will determine whether the claimant was receiving the same hours and wages as in her base period. The administrative law judge finds the claimant's hours during this period were inconsistent with the hours and wages she received during her base period.

Fourth, the administrative law judge will determine whether the employer is subject to charge. The claimant only has the employer in her base period. As a result, the employer is subject to charge.

DECISION:

The April 16, 2021, reference 01, unemployment insurance decision is reversed. The claimant was partially unemployed and able and available for the weeks she made weekly claims with the exception of the weeks ending July 25, 2020, May 1, 2021, May 29, 2021, June 5, 2021, and June 12, 2021. Benefits are allowed.



Sean M. Nelson
Administrative Law Judge
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July 19, 2021
Decision Dated and Mailed

smn/scn