

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDON PENISTON
Claimant

APPEAL NO: 13A-UI-00326-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/08/12
Claimant: Appellant (1)

Iowa Code § 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Brandon Peniston (claimant) appealed an unemployment insurance decision dated December 4, 2012, reference 08, which held that he was not eligible for unemployment insurance benefits because he is still employed at the same hours and wages with Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 13, 2013. The claimant participated in the hearing. The employer participated through Randy Beimer, Human Resources Manager; Tim Hyink, Night Stock Manager; and John Fiorelli, Employer Representative. 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.

ISSUE:

The issue is whether the claimant is working the same hours and wages as in his original contract of hire with this employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a part-time night stocker on July 7, 2012 with no guarantee of hours. His weekly hours for the first two months of employment were as follows: 5, 19.9, 41.4, 32.5, 20, 26, 31.5, 38.8, and 45.1. The claimant averaged 22 hours per week in July, 27.5 in August, 40 hours in September, 40 hours in October and 21 hours in November. He continues to be employed in the same capacity with no change in his hours or wages.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

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.

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 claimant was hired as a part-time night stocker. There has been no separation from his part-time employment and he is disqualified from receiving benefits.

DECISION:

The unemployment insurance decision dated December 4, 2012, reference 08, is affirmed. The claimant continues to be employed part-time in the same hours and wages as contemplated in the original agreement of hire. Partial unemployment insurance benefits are denied.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs