

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA S ROTHMAN
Claimant

APPEAL NO. 07A-UI-10869-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCSOIFER'S INC
Employer

OC: 10/14/07 R: 04
Claimant: Appellant (1)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Barbara Rothman filed a timely appeal from the November 15, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 11, 2007. Ms. Rothman participated. Becky Willson represented the employer.

ISSUE:

Whether the claimant has met the able to work and available for work requirements of Iowa Code section 96.4(3) since establishing her claim for benefits on October 14, 2007.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Barbara Rothman established a claim for unemployment insurance benefits that was effective October 14, 2007.

In December 2006, Ms. Rothman broke her ankle. Prior to breaking her ankle, Ms. Rothman had worked part-time, approximately 20 hours per week, at the Independence McDonald's restaurant operated by McSoifer's, Inc. Ms. Rothman commenced an approved leave of absence from the employment in December 2006 and her last day of work prior to the leave was December 20, 2006. Ms. Rothman's leave of absence was supposed to end on July 19, 2007. However, Ms. Rothman's ankle prevented her from performing her previous grill duties. The employer reassigned Ms. Rothman to less physically taxing duties in the front of the restaurant. These included sweeping and other cleaning. Ms. Rothman did not work any shifts at McDonald's until September 2007. During September, Ms. Rothman worked two shifts, each six hours long.

Ms. Rothman had other employment during her employment at McDonald's. In September 2006, Ms. Rothman started working as a part-time transport driver for Northern Iowa Community Action Group. Ms. Rothman worked in this employment 16 to 20 hours per week. Ms. Rothman was off work from that employment after she broke her ankle and returned to that work in September 2007. However, Ms. Rothman's health prevented her from performing essential duties related to the transport driver position.

Ms. Rothman has been diagnosed with Chronic Obstructive Pulmonary Disease (COPD). At the end of September or beginning of October 2007, Ms. Rothman began utilizing a portable oxygen tank. Ms. Rothman has a tank that she wears as a shoulder pack and another that sits on a wheeled cart. Ms. Rothman is able to perform sedentary work without experiencing breathing difficulty. If Ms. Rothman moves around much, her breathing difficulty requires use of the portable oxygen tank.

Ms. Rothman's health issues prompted her separation from the transport driver position and the application for unemployment insurance benefits. Ms. Rothman was able to drive a vehicle, but was not able to assist wheelchair bound passengers. Ms. Rothman's use of the portable oxygen tank also necessitated a change in her duties at McDonald's. After Ms. Rothman commenced using the portable oxygen, the employer assigned her to work collecting cash or washing dishes for brief, two-hour shifts. The employer generally schedules Ms. Rothman to work only during busier shifts when more employees are on hand and, therefore, less physically taxing work is available for Ms. Rothman. The employer has more hours available for Ms. Rothman than Ms. Rothman is available to work. Ms. Rothman's work ability and availability have kept her McDonald's hours low.

Ms. Rothman receives Social Security retirement benefits and must limit her employment to part-time to avoid adversely affecting her eligibility for retirement benefits.

On October 16, 2007, Ms. Rothman commenced working for a law office. This employment commenced the same week Ms. Rothman established her claim for unemployment insurance benefits. Ms. Rothman initially worked two 6.25-hour shifts per week at the law office. During the week that began December 9, 2007, Ms. Rothman commenced working three 6.25-hour shifts per week at the law office.

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, (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.

(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.

(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.

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 work week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. See Iowa Code section 96.19(38)(b).

Where a claimant is still employed in a part-time job at the same hours as existed during her base period, such claimant cannot be considered partially unemployed. 871 IAC 24.23(26). The base period consists of the first four of the last calendar quarters that predate the quarter in which the claim for unemployment insurance benefits is filed. See 871 IAC 24.1(11). A claimant's benefits are figured based on the wage credits earned during the base period. See 871 IAC 24.1(11).

The evidence indicates that Ms. Rothman is able to work as a general principle. This is indicated by her continued relationship with McDonald's and by her employment at the law firm.

Ms. Rothman's availability is a different issue.

Workforce Development rule 871—24.23(96) provides, in relevant part, as follows:

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

24.23(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.

24.23(22) Where a claimant does not want to earn enough wages during the year to adversely affect receipt of federal old-age benefits (social security).

If a part-time worker is not available to the same degree and to the same extent as when the wage credits were accrued, the individual does not meet the eligibility requirements of the law. 871 IAC 24.22(2)(f).

The evidence indicates that Ms. Rothman's availability for work at McDonald's is limited by several factors. The first limitation is Ms. Rothman's health. Ms. Rothman is not available to perform the duties she previously performed for McDonald's, but instead is only available for what amounts to light-duty employment. Ms. Rothman's availability for work at McDonald's is further limited by her employment at the law firm. Ms. Rothman's availability for work generally is limited by her need to avoid earning a quantity of money that would negatively impact her social security benefit eligibility. The administrative law judge concludes that Ms. Rothman is not available for work at McDonald's to the same extent as during her base period. Accordingly, Ms. Rothman cannot be considered partially unemployed from the employment at McDonald's.

The evidence indicates that the work at the law firm has essentially replaced the transport driver income and employment.

DECISION:

The Agency representative's November 15, 2007, reference 01, decision is affirmed. The claimant has not been available for work to the same extent as during her base period and, therefore, cannot be considered partially unemployed. The claimant does not meet the availability requirements of Iowa Code section 96.4(3) and is not eligible for benefits

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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