

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBBIE J FOY**  
Claimant

**APPEAL NO. 12A-UI-09593-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERICAN BLUE RIBBON HOLDINGS INC**  
Employer

**OC: 07/08/12**  
**Claimant: Appellant (4)**

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:**

Debbie Foy filed a timely appeal from the August 7, 2012, reference 01, decision that denied benefits effective July 8, 2012 based on an agency conclusion that she was unduly restricting her work availability and did not meet the work availability requirement. After due notice was issued, a hearing was held on August 30, 2012. Ms. Foy participated. Conrad Thomas, General Manager, represented the employer. A Talx representative had provided a telephone number for the hearing, but was not available at the time of the hearing. The administrative law judge took official notice of the agency's administrative record of wages reported by the claimant.

**ISSUES:**

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant was partially unemployed from her employment.

Whether the employer's account may be assessed for benefits paid to the claimant.

**FINDINGS OF FACT:**

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

Since 2007, Debbie Foy has been employed by American Blue Ribbon Holdings, L.L.C., d/b/a Village Inn in Des Moines, as a food server. Ms. Foy continues in that employment. Ms. Foy's pay is based on a \$4.45 hourly wage plus tips. Ms. Foy's brother passed away on May 6, 2012. Up to that time, Ms. Foy had worked full-time for the employer. Ms. Foy had worked four or five days per week for shifts that lasted seven to eight hours. The weekly hours totaled 35 to 40. In connection with her brother's passing, Ms. Foy was off work from May 6-11, 2012. Ms. Foy returned to work for a few days, but then was needed to go off work again to address mental health issues. Ms. Foy returned to work on May 27 and at that time worked two days a week.

Ms. Foy took additional time off in June. On June 27, 2012, Ms. Foy's doctor released her to return to work full-time without restrictions. Though Ms. Foy asserts that the employer held to working just two days per week until the week that ended August 11, 2012, the employer's record of scheduled hours suggests Ms. Foy may have been scheduled for slightly more than that.

Until July 30, 2012, the employer used a Friday through Thursday work week. Ms. Foy's weekly work hours for the period of June 8, 2012 through July 19, 2012 were as follows:

<u>F-Th work week</u>	<u>Number of hours worked</u>
6/8-6/14	0.00
6/15-6/21	19
6/22-6/28	26
6/29-7/5	21
7/6-7/12	22
7/13-7/19	22 (Ms. Foy requested 7/16 and 7/20 off.)
7/20-7/26	No figure provided by the employer.

Effective Monday, July 30, 2012, the employer switched to a Monday through Sunday work week. Ms. Foy's weekly work hours for the period of July 30, 2012 through August 26 were as follows.

<u>M-S work week</u>	<u>Number of hours worked</u>
7/30-8/5	13 (Ms. Foy requested 8/1 off.)
8/6-8/12	23 (Ms. Foy requested 8/8 off.)
8/13-8/19	27 (Ms. Foy requested 8/17 off.)
8/20-8/26	27

At the time of the appeal hearing Ms. Foy was scheduled for additional work hours as follows:

<u>M-S work week</u>	<u>Number of hours worked</u>
8/27-9/2	21 (Ms. Foy requested 8/27, 8/28 and 8/29 off.)
9/3-9/9	28

Debbie Foy established a claim for unemployment insurance benefits that was effective July 8, 2012, but so far has not received benefits in connection with the claim. Ms. Foy discontinued her claim after the week that ended August 4, 2012. At the time the claim was established, Workforce Development calculated Ms. Foy's weekly benefit amount to be \$180.00. For the four weeks Ms. Foy had an active claim for benefits, she reported wages as follows:

<u>Benefit week end date</u>	<u>Wages reported</u>
7/14	200.00
7/21	110.00
7/28	130.00
8/4	130.00

Ms. Foy reports that her gross wages plus tips *from the Village Inn employment* since she discontinued her claim for unemployment insurance benefits have been as follows:

<u>Benefit week end date</u>	<u>Gross Village Inn wages and tips per Ms. Foy</u>
8/11	186.00 (for 3 days/18 hours of work)
8/18	296.00 (for 3 days of work)
8/25	492.00 (for 3 scheduled and 2 picked up shifts)
9/1	98.00 (for the one shift worked prior to the appeal hearing)

Ms. Foy's decision to discontinue her claim for unemployment insurance benefits after the week that ended August 4 was based on three things. The first was the August 7, 2012, reference 01 decision that denied benefits, the decision from which Ms. Foy is appealing in this matter. The second reason she discontinued the claim was that the employer was allowing her to pick up additional shifts. The third reason she discontinued the claim was that she decided to seek a second job. Ms. Foy secured a second, part-time job at KFC/Taco Bell and started that employment on Wednesday, August 22, 2012. The new employment pays \$8.75 per hour and is to be 20 hours per week. During the week that ended August 25, 2012, Ms. Foy worked 11 hours and therefore earned \$96.25 in gross wages. If she works 20 hours per week, the gross wages from the secondary employment would be \$175.00.

The Village Inn employment was Ms. Foy's sole base period employment. Ms. Foy's base period consists of the second, third, and fourth quarter of 2011 and the first quarter of 2012. For those respective base period quarters, the employer reported paying the following wages to Ms. Foy: \$4,159.88, \$3,156.14, \$3,836.99, and \$3,881.53. Using these amounts, Ms. Foy's average weekly wages during her base period were \$289.00. Ms. Foy's average weekly wages for the highest earning base period quarter were \$319.99.

#### **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 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).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(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.

[Emphasis added.]

Because Ms. Foy's claim for unemployment insurance benefits was only in effect from the four-week period of July 8, 2012 through August 4, 2012, it is only Ms. Foy's eligibility for unemployment insurance benefits for those four weeks that need be addressed and ruled upon.

The weight of the evidence indicates that Ms. Foy was able to work for the employer full-time and was available for full-time work during the four-week period of July 8, 2012 through August 4, 2012, when her unemployment insurance claim was active. The weight of the evidence supports Ms. Foy's assertion that the employer made substantially fewer hours available to Ms. Foy during the four weeks her unemployment insurance claim was active, compared to the full-time hours the employer had offered during her base period and up to the time of Ms. Foy's brother's passing in early May 2012.

Upon Ms. Foy's being released to return to work without restrictions effective June 27, 2012, the employer declined to again make full-time work available to Ms. Foy. Ms. Foy's requests for time off during the weeks that ended July 21 and August 4 did not prevent her from being available for full-time work. The employer continued to make available substantially fewer hours. Ms. Foy continued to make herself available to work the hours the employer had for her. Based on the limited number of available work hours, Ms. Foy met the first prong of the test for partial unemployment during the four weeks when her unemployment insurance claim was active.

The second prong of the partial unemployment test required that Ms. Foy's gross wages not exceed her \$180.00 weekly benefit amount plus \$15.00. During the week that ended July 14, Ms. Foy reported \$200.00 in wages for the week that ended July 14, 2012. Accordingly, Ms. Foy did not meet the second prong of the partial unemployment test for that week and was not eligible for unemployment insurance benefits under a theory of partial unemployment during the week that ended July 14, 2012. For the weeks that ended July 21, July 28, and August 4, 2012, Ms. Foy's wages were substantially less than her weekly benefit amount. For those weeks, Ms. Foy met the second prong of the partial unemployment test, was indeed partially unemployed, and was eligible for benefits under a theory of partial unemployment, provided she was otherwise eligible.

Because the employer has not made available to Ms. Foy the same work hours she enjoyed during her base period, the employer's account will not be relieved of charges. The employer's account may be charged for benefits paid to Ms. Foy for any week in which she is deemed to be partially unemployed.

**DECISION:**

The Agency representative's August 7, 2012, reference 01, is modified as follows. The claimant was able to work full-time and available for full-time work during the four-week period of July 8, 2012 through August 4, 2012. The claimant was not partially unemployed during the week that ended July 14, 2012 because her wages exceeded her weekly benefit amount plus \$15.00. The claimant was partially unemployed during the benefit weeks that ended July 21, July 28, and August 4, 2012. The claimant is eligible for benefits for those three weeks, provided she is otherwise eligible. Because the employer has not made available to the claimant the same work hours she enjoyed during her base period, the employer's account may be charged for benefits paid to the claimant for any week in which she is deemed to be partially unemployed.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs