

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GREGORY L GOLDEN

Claimant

APPEAL NO: 11A-EUCU-00617-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PROFESSIONAL SPORTS CATERING LLC

Employer

OC: 12/05/10

Claimant: Appellant (1/R)

Section 96.4(3) – Able & Available
Section 96.4(3) – Still Employed Same Hours and Wages
871 IAC 24.22(2)(i)(3) – On-call Workers

STATEMENT OF THE CASE:

Gregory L. Golden (claimant) appealed a representative's July 26, 2011 decision (reference 01) that concluded he was not qualified to receive partial unemployment insurance benefits in connection with his employment with Professional Sports Catering, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 22, 2011. The claimant participated in the hearing. Jonathon Harris appeared on the employer's behalf. 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.

ISSUES:

Whether the claimant has been able to work and available for work and meets the definition of an unemployed person for unemployment insurance purposes.

FINDINGS OF FACT:

The claimant started working for the employer on or about February 13, 2008¹. He worked part time as kitchen employee at the employer's Davenport, Iowa baseball park business client, primarily on a seasonal basis. He performed work during the 2009 and 2010 baseball seasons and returned for the 2011 baseball season, working at least most home games. He also occasionally performed work for the employer in connection with off-season events held at the ballpark. He last worked at a baseball game July 29, 2011. There was a separation from employment on July 30, 2011; that separation has not yet been reviewed.

The claimant had established a claim for unemployment insurance benefits effective December 5, 2010. His base period was therefore determined to be the third quarter 2009 through the second quarter 2010. All of the claimant's base period wages were with the

¹ The claimant had indicated that he believed his employment began in 2008, but the Agency wage records reflect that the first wages from the employer were in the first quarter 2009.

employer. During the 2010 season the claimant's hourly wage was \$9.25; as of about April 1, 2011, his hourly wage was \$9.75. Based upon the wages reported as paid by the employer to the claimant, in the second quarter 2010 the claimant averaged about 18 hours per week; in the second quarter 2011 he averaged about 15 hours per week. He filed an additional claim effective June 19, 2011.

There were variations in the claimant's hours at least in part due to the scheduling of home baseball games; there could also have been some variation in the number of hours the claimant worked during the home games. If there was a week with many home games, he could work a significant number of hours, but if there was a week with no home games, he worked no hours.

During the benefit week ending June 25 the claimant reported earning \$195.00, equating to working 20 hours. During the benefit week ending July 2 the claimant reported earning \$450.00, equating to working over 46 hours. During the benefit week ending July 9 the claimant reported earning \$121.00, equating to working just over 12 hours. For the benefit week ending July 16 he reported earning \$375.00, equating to working just over 38 hours. For the benefit week ending July 23, he reported earning \$120.00, equating to working just over 12 hours. Finally, for the benefit week ending July 30, he reported earning \$210.00, equating to working just over 21 hours. He worked no hours for the employer and reported no wages in the weeks following July 30.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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(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.

(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 § 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 Administrative Code rule 871 IAC 24.22(2)(i)(3) provides as follows:

i. On-call workers.

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work ... is not considered an unemployed individual within the meaning of Iowa Code § 96.19 (38)“a” and “b.” An individual who is willing to accept only on-call work is not considered to be available for work.

Iowa Code § 96.7(1) and (2) provide in pertinent part:

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.]

The administrative law judge concludes that the claimant's employment with the employer is indeed part-time and on-call in nature. He worked those days per year when home games were scheduled at the baseball park. The evidence indicates that the employer had substantially made the same work available to the claimant in 2011 that it has always had. While there was some week to week variation, it does not appear that the variation was such that could not be attributed to the variation in the scheduling of home baseball games, and that week to week variation, including weeks in which there were no home games and no work, was part of the established pattern of employment. In other words, the claimant cannot be deemed partially unemployed. He does not meet the work availability requirements of the law. Benefits are denied through July 30, 2011.

An issue as to whether the claimant might be eligible to receive unemployment insurance benefits after the July 30, 2011 separation from employment arose during the course of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The unemployment insurance decision dated July 26, 2011 (reference 01) is affirmed. The claimant has not met the work availability requirements of the law and is not partially unemployed as defined in the unemployment insurance law. Benefits are denied through July 30, 2011. The matter is remanded to the Claims Section for investigation and determination of the July 30, 2011 separation issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs