

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARLIN AVALO SANTOS
Claimant

HART2HART2 INC
Employer

APPEAL 24A-UI-05853-PT-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/26/24
Claimant: Appellant (4)

Iowa Code § 96.4(3) – Able to and Available for Work
Iowa Code § 96.1A(37) – Partial Unemployment
Iowa Admin. Code r. 871-24.23(26) – Able & Available – Part time, same hours and wages
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

The claimant, Marlin Avalo Santos, filed an appeal from the June 12, 2024, (reference 01) unemployment insurance decision that denied benefits as of May 26, 2024, based on the deputy's conclusion that the claimant was still employed for the same hours and wages as in the original contract of hire and was not partially unemployed within the meaning of the law. The parties were properly notified of the hearing. A telephone hearing was held on July 9, 2024. The claimant participated personally. The employer, Hart2hart2, Inc., participated through Human Resources Director Rachel Stinehart. Spanish-language interpretation services were provided by Martin with CTS Language Link. The administrative law judge took official notice of the administrative record.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began working for Hart2hart2, Inc., doing business as McDonalds, on May 23, 2023. She remains employed with the employer and works part-time hours as a crew member. The claimant was not guaranteed a certain number of hours each week when she was hired. However, she typically worked between 20 and 25 hours per week. The claimant regularly worked those hours until early-June 2024. The claimant last reported to work on June 18, 2024.

During the first week of June 2024, the claimant was scheduled to work on June 1, 6, and 7, 2024. However, the claimant missed all three shifts because she was sick and unable to work. Because the claimant called out sick for three days, the claimant's supervisor removed the claimant from the work-schedule. On June 10, 2024, the claimant provided her supervisor with a

doctor's note excusing her absences. When the claimant provided the doctor's note, she asked to be put back on the schedule to work her usual shifts. However, the claimant's supervisor did not put the claimant back on the schedule.

Since being removed from the schedule on June 7, the claimant has tried to pick up shifts from other employees. However, she has only been allowed to work one day, on June 18, 2024, which was the last time the claimant performed services for the employer. The claimant has performed no work and earned no wages since June 18, 2024. Since June 10, 2024, the claimant has had no medical restrictions, has been physically able to perform all of the duties of her position, and has been waiting to return to her regular part-time employment. The claimant is still employed with the employer, but the employer has not allowed the claimant to return to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

Iowa Code section 96.1A(37) 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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 Code section 96.7(2)a(2)a 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.

Iowa Admin. Code 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 different from the contract for hire, such claimant cannot be considered partially unemployed.

For an unemployed individual to be eligible to receive benefits, she must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code § 96.4(3). The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22. In this case, the claimant was scheduled to work her regular hours between May 26 and June 8, 2024. However, she became ill and called out sick on June 1, 6, and 7, 2024. As such, the claimant was not able to and available for work pursuant to Iowa Code section 96.4(3) and is not eligible for unemployment insurance benefits for the two weeks between May 26 and June 8, 2024.

By June 9, 2024, the claimant had recovered from her illness and was physically able to perform all of the duties of her position. However, since June 9, 2024, the claimant has only worked one day for the employer. The claimant has been working less than her regular work week. This was not because the claimant restricted the hours she could work, but because the employer took the claimant's regular work schedule away from her. Since June 9, 2024, the employer has provided no available shifts to the claimant and her only viable option for hours occurs if someone is unable to work their regularly scheduled shift.

Since June 9, 2024, the claimant has not been employed under the same hours and wages as contemplated at hire. Because the claimant's level of employment is not consistent with the base period wage history with this employer, the claimant may be considered partially

unemployed. Benefits are allowed provided the claimant is otherwise eligible and subject to the claimant reporting wages earned. Inasmuch as the employer is not offering the same wages and hours as contemplated at hire, its account may be charged.

DECISION:

The June 12, 2024 (reference 01) unemployment insurance decision is modified in favor of the appellant. The claimant was not able and available for work from May 26 through June 8, 2024. The claimant recovered from her illness and has been able and available for work effective June 9, 2024. However, since June 9, 2024, the claimant has not been employed at the same hours and wages as agreed upon at the time of hire and, therefore, is partially unemployed. Benefits are allowed provided she is otherwise eligible. She is required to report gross wages earned for each week of benefits claimed. The account of the employer may be charged.



Patrick B. Thomas
Administrative Law Judge

July 16, 2024
Decision Dated and Mailed

PBT/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.