

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD D MCCABE JR
Claimant

APPEAL NO. 06A-UI-09258-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 08/06/06 R: 01
Claimant: Appellant (1)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits

STATEMENT OF THE CASE:

Donald D. McCabe, Jr. (claimant) appealed a representative's September 11, 2006 decision (reference 02) that concluded he was not qualified to receive partial unemployment insurance benefits in conjunction with his employment with Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 3, 2006. The claimant participated in the hearing and presented testimony from one other witness, Peggy McCabe. David Williams of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Estela Ebner. One other witness, Kari Blevins, was available on behalf of the employer but did not testify. 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:

Is the claimant employed by the employer for less than his usual hours and wages and eligible for full or partial unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on December 19, 1999 as a part-time custodian. As of January 7, 2002 he worked a guaranteed 30-hour position as a night stock clerk in the employer's Sioux City, Iowa store. He continues in that employment as of the date of the hearing. His work schedule is 10:00 p.m. to 7:00 a.m. four nights per week, most usually Thursday, Friday, Saturday and Sunday.

The claimant established an unemployment insurance benefit year effective beginning August 6, 2006. His weekly benefit amount was calculated to be \$264.00. He initiated his claim because he believed his hours had been cut. He filed weekly claims for the weeks ending August 12 and August 19, reporting wages that were less than \$279.00 (\$264.00 + \$15.00) and received partial unemployment insurance benefits for those weeks.

For the benefit week of August 6 through August 12 the claimant worked 6.88 hours on Sunday August 6, 8.13 hours on Thursday August 10, 8.13 hours on Friday August 11, and only .5 hour

on Saturday August 12, for a total of 23.64. On August 12 he only worked the half hour he attended for a mandatory store meeting; however, the claimant had also been scheduled to work his normal eight-hour shift that night, which would have brought him to approximately 31.64 hours. He had missed seeing that he was scheduled to work that shift, and was a no-call, no-show. He established his claim and filed a weekly claim for that week because he thought he had been scheduled for less than his normal four shifts.

For the week of August 13 through August 19 the claimant was scheduled and worked 32.17 hours: Sunday August 13 – 7.65 hours; Thursday August 17 – 8.22 hours; Friday August 18 – 7.95 hours; and Saturday August 19 – 8.35 hours¹.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for partial unemployment insurance benefits if a claimant is not employed at his regular hours and wages.

Iowa Code section 96.19-38-b provides in pertinent part:

b. 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.

¹ Since unemployment insurance is based on a Sunday through Saturday week and the employer's work and pay schedule is based on a Monday through Sunday week, and further the employer considers the "workday" for an overnight shift such as the claimant's to be the day in which the shift was scheduled to start, not the day in which the shift was completed or even the day in which most of the work was performed, it is possible that the claimant was reporting his wages and hours on a different basis than the method used by the employer. For example, for the Sunday through Saturday week ending August 19, the amount of paid time reported by the claimant for that week could have been based on the number of hours he worked after 12:00 a.m. August 13 (presumably 5.65 that day) through 11:59 p.m. on August 19 (ending with first hour and 59 minutes of his shift that started at 10:00 p.m. that day), it would have been that week he would have calculated as being short hours at only 23.82 hours. Under that approach, however, he would have missed out on approximately six hours from the shift that was scheduled to begin at 10:00 p.m. on August 12 from 12:00 a.m. until approximately 7:00 a.m. on August 13, which would again have brought him to approximately 30 hours. Under any variation, however, so long as the same formula is applied consistently week to week, the average result should remain fairly constant, the average weekly hours should be about the same unless there has been a week in which fewer than 30 hours were worked. For purposes of this decision, the administrative law judge does not opine as to which method is more proper so far as weekly reporting of wages earned should the claimant become partially unemployed because of not being provided with at least his regular hours and wages.

For purposes of the claimant's employment with the employer, the minimum of 30 hours is his "full-time week." 871 IAC 24.1(135)(c). However, the claimant must be available for and work the hours that are provided.

871 IAC 24.23(26), (29) 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.

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

The employer was providing the claimant with substantially the same employment as it had previously provided; it was the claimant's failure to report for available work the shift that began at 10:00 p.m. on August 12, scheduled until approximately 7:00 a.m. August 13, 2006, which resulted in his reduction in hours. Consequently, the claimant is not qualified to receive partial unemployment insurance benefits for either of the two weeks ending August 12 and August 19, 2006.

DECISION:

The unemployment insurance decision dated September 11, 2006 (reference 02) is affirmed. The claimant is not eligible for partial unemployment insurance benefits for the benefit weeks ending August 12 and August 19, 2006.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs