

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA MCCORMICK
Claimant

APPEAL NO: 11A-UI-12919-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 08-07-11
Claimant: Respondent (1)

Section 96.4-3 – Able and Available for Work
Section 96.4-3 – Same Hours and Wages

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 20, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 24, 2011. The claimant participated in the hearing. Antonio Romeo, Manager of Perishables and former Human Resources Manager and Paula Mack, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a part-time deli clerk April 11, 2008, and continues to be employed in that capacity. The claimant has cancer and has been undergoing chemotherapy. By mutual agreement the claimant's hours were decreased for a period of time in 2010 but then, after she felt well enough to work her regular number of shifts, her hours were not increased to the same level she was working prior to her illness. She had been working approximately four shifts per week of less than eight hours per shift. Between May 2 and May 8, 2011, the claimant worked 28.3 hours; between May 9 and May 15, 2011, she worked 24.9 hours; between May 16 and May 22, 2011, she worked 18.4 hours; between May 23 and May 29, 2011, she worked 25.4 hours; between May 30 and June 5, 2011, she worked 30.7 hours; between June 6 and June 12, 2011, she worked 13.13 hours; between June 13 and June 19, 2011, she worked 11.94 hours; between June 20 and June 26, 2011, she worked 11.7 hours; between June 27 and July 3, 2011, she worked 12.7 hours; between July 4 and July 10, 2011, she worked 24.68; between July 11 and July 17, 2011, she worked 15.41 hours; between July 18 and July 24, 2011, she worked 11.45 hours; between July 25 and July 31, 2011, she worked 12.32 hours; between August 1 and August 7, 2011, she worked 17.97 hours; between August 8 and August 14, 2011, she worked 9.90 hours; between August 15 and August 21, 2011, she worked

5.85 hours; between August 22 and August 28, 2011, she worked 10.90 hours; between August 29 and September 4, 2011, she worked 11.01 hours; between September 5 and September 11, 2011, she worked 19.55 hours; between September 12 and September 18, 2011, she called in sick for two shifts and did not work any hours; between September 19 and September 25, 2011, she worked 11.65 hours; between September 26 and October 2, 2011, she worked 24.77 hours; between October 3 and October 9, 2011, she worked 23.70 hours; between October 10 and October 16, 2011; and between October 17 and October 23, 2011. On July 8, 2011, the claimant left early with the approval of her manager because she was very ill at the end of her chemotherapy. She was absent due to illness August 21, 2011. She had emergency outpatient surgery September 16, 2011, and was too ill to work September 17 and 18, 2011, with a doctor's note. The claimant has picked up three extra shifts during the last three months. She had a disagreement with her supervisor after her supervisor stated she did not believe the claimant had cancer or was undergoing chemotherapy treatments and that the claimant was just saying she did to garner sympathy so the claimant brought a note from her physician stating she did in fact have cancer.

The claimant's base period wages were \$2,924.00 in the third quarter of 2010; \$2,837.00 in the fourth quarter of 2010; \$2,792.00 in the first quarter of 2011; \$2,716.00 in the second quarter of 2011; and \$1,790.00 in the third quarter of 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not still employed at the same hours and wages as contemplated in the original contract of hire.

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".

The claimant was hired as a part-time deli clerk. There has been no separation from her part-time employment. The employer testified the claimant was never guaranteed a certain number of hours and her hours were determined by business needs and the claimant's health and that is the reason for the fluctuations in her schedule. However, during the claimant's base period of employment, which is the last 18 months of her employment, she averaged wages in the amount of \$2,817.00 in the first four quarters of her base period and earned \$1,790.00 during the last quarter, which was the third quarter of 2011, a difference of \$1,027.00. She was not working to the same extent during the third quarter of 2011 as during the first four quarters of her base period. Consequently, the administrative law judge concludes the claimant is not working to the same extent as established during her base period and therefore is eligible for partial unemployment insurance benefits.

DECISION:

The September 20, 2011, reference 01, decision is affirmed. The claimant is not employed at the same hours and wages as in her original contract of hire and therefore is qualified for partial benefits based on her part-time employment, provided she is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs