

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATELYN JOLLY
Claimant

APPEAL NO: 12A-UI-12637-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09-23-12
Claimant: Respondent (4R)

Section 96.4-3 – Able and Available for Work
Section 96.4-3 – Same Hours and Wages
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 17, 2012, reference 02, 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 December 11, 2012. The claimant participated in the hearing. Collette Miller, Manager of Store Operations; Ashley Lewis, Human Resources Manager; and Bruce Burgess, Employer's 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 night stock clerk for Hy-Vee May 22, 2011. She requested and was granted a leave of absence for personal reasons August 1 through August 19, 2012. She was not scheduled following her return and had a non-work-related knee surgery August 30, 2012. On September 17, 2012, she presented the employer with a doctor's release without restrictions. She was instructed to work that evening but that she would then have to speak to Manager of Store Operations Collette Miller and Human Resources Manager Ashley Lewis and she was not aware she was scheduled again until October 11, 2012. The employer scheduled the claimant September 24, 25, 26 and 30, 2012, but listed her as a no-call no-show. She worked October 11, 2012, and returned to her doctor and was placed on restrictions for three weeks beginning October 15, 2012, which meant she could not work until the week of November 5, 2012. She provided the employer with her restrictions October 18, 2012. She was scheduled October 22, 25, 27, 29, 30 and 31, 2012, even though her doctor had placed her on restrictions, but the employer classified her as a no-call no-show for all of those dates. On November 1, 2012, the claimant submitted her two-week resignation notice. She had asked Ms. Lewis if she could be trained as a cashier when she provided her doctor's restrictions

October 18, 2012, but was told she could not be a cashier. The claimant never received a warning, verbal or written, about being a no-call no-show and even though she came into the store on one occasion and checked for her schedule online on several occasions she was not aware she was scheduled on the days she was listed as a no-call no-show.

The claimant claimed and received unemployment insurance benefits beginning the week ending September 29, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was able and available for work from September 23 through October 15, 2012, and not able and available for work October 18 through November 1, 2012.

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".

The claimant was hired as a part-time night stock clerk. She filed a claim for unemployment insurance benefits September 23, 2012, and was able and available for work from that date through October 15, 2012, when she returned to her physician and was placed on restrictions following her August 30, 2012, knee surgery. Although the employer listed the claimant as a no-call no-show September 24, 25, 26 and 30, 2012, the claimant credibly testified she checked the schedule both in the store and frequently online and was not aware she was scheduled any of those dates. It is also curious that if the employer believed the claimant was a no-call no-show for four consecutive workdays it did not consider her to have voluntarily quit her job, or at least issued a verbal or written warning to her. The claimant was not able and available to work between October 18 and November 1, 2012, because she was placed on restrictions by her doctor. Consequently, the claimant was able and available for work and eligible to receive benefits for the four weeks ending October 20, 2012. She was not able and available after that date and therefore is denied benefits for the six weeks ending December 1, 2012.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of

determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 17, 2012, reference 02, decision is modified in favor of the appellant. The claimant was able and available for the four weeks ending October 20, 2012, but not able and available after that date. The claimant has received benefits but was not eligible for those benefits beginning the week ending October 27, 2012. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs