

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANNETTE S LEWIS
Claimant

APPEAL NO. 13A-UI-06550-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/04/12
Claimant: Respondent (2-R)

Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The employer, Hy-Vee, filed an appeal from a decision dated May 23, 2013, reference 03. The decision allowed benefits to the claimant, Annette Lewis. After due notice was issued a hearing was held by telephone conference call on July 9, 2013. The claimant participated on her own behalf. The employer participated by Human Resources Manager Carrie Irons, Bakery Manager Linda Wypasek and was represented by Corporate Cost Control in the person of Julia Church. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Annette Lewis began employment at this Hy-Vee on February 7, 2011. She was a part-time employee with no guarantee of a minimum number of hours, although the employer puts a “cap” on part-time hours of 27 per week.

The number or hours for which a part-time employee is scheduled is dependent, in part, on their availability. Each employee may specify the days and hours they are available to be scheduled. On April 12, 2013, Ms. Lewis changed her availability indicating she was only able to be scheduled Monday through Thursday from 3:00 p.m. to 8:00 p.m., no Fridays or Sundays and any time on Saturday. This was because she had enrolled in some coursework. As a result the hours for which she was scheduled were reduced and she filed an additional claim for unemployment benefits with an effective date of April 28, 2013. She has reported wages each week and received partial benefits since that time.

REASONING AND CONCLUSIONS OF LAW:

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".

871 IAC 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.

The claimant was not guaranteed any minimum number of hours per week, only a maximum. She reduced her availability and therefore the number of hours the employer could schedule her. Under the provisions of the above Administrative Code section, she is not able and available for work and ineligible for unemployment benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the

department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of May 23, 2013, reference 03, is reversed. Annette Lewis is not able and available for work and ineligible for unemployment benefits. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs