

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHANTELL EMUNAH
Claimant

APPEAL NO: 11A-UI-04106-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCHANT INVESTMENT'S INC
Employer

OC: 02-06-11
Claimant: Respondent (2R)

Section 96.4-3 – Able and Available
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 16, 2011, 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 April 25, 2011. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Lawrence Seals, General Manager, participated in the hearing on behalf of the employer.

ISSUE:

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

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 delivery driver for Jimmy John's working from 4:00 p.m. to 10:00 p.m. She was working her regularly scheduled hours unless she called in and stated she would not be at work that evening. There was no change in her hours or wages and no short-term layoff.

The claimant has claimed and received unemployment insurance benefits since the representative's decision was issued March 16, 2011.

The claimant has separated from her employment with this employer. That issue has not been adjudicated by the Claims Section.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective February 6, 2011.

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 working the same hours and wages for the employer as in her original contract of hire at the time she filed for unemployment insurance benefits and was not on a short-term layoff. Therefore, because she was working for the employer she is not considered able and available for other work. Accordingly, benefits are denied.

The issue of the claimant's separation from this employer is remanded to the Claims Section for an initial determination.

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 March 16, 2011, reference 02, decision is reversed. The claimant is not able to work and available for work effective February 6, 2011. Benefits are denied. 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css