

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEREK A SPENCE
Claimant

APPEAL NO. 09A-UI-06718-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/13/08
Claimant: Respondent (2)

Iowa Code section 96.4(3) – Able & Available
Iowa Code section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code section 96.7(2) – Employer Liability
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 24, 2009, reference 05, decision that allowed benefits effective March 22, 2009 under a theory of partial unemployment. After due notice was issued, a hearing was held on May 21, 2009. Claimant Derek Spence participated. Tim Spier of Unemployment Insurance Services represented the employer and presented testimony through Chris Woodhouse, Assistant Manager.

ISSUES:

Whether the claimant has been able to work and available for work since establishing the additional claim for benefits that was effective March 22, 2009.

Whether the claimant was partially unemployed from his employment since he established the additional claim for benefits that was effective March 22, 2009.

Whether the employer's account may be assessed for benefits paid to the claimant.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Derek Spence began working for the North Dodge Hy-Vee in Iowa City in August 2008. Mr. Spence worked as a part-time grocery stocker until the end of November 2008. In the part-time grocery stocker position, Mr. Spence worked 24 hours per week. Mr. Spence worked three eight-hour day shifts per week.

At the end of November, the employer offered Mr. Spence the opportunity to transfer into a stocker position in the dairy department, where a greater number of work hours were available. Mr. Spence transferred into the dairy department stocker position. While in the position,

Mr. Spence worked approximately 40 hours per week. Mr. Spence continued to work day hours. Mr. Spence got frustrated with the dairy stocking work and requested to return to his previous grocery stocker position. In mid-December, Mr. Spence went back to the part-time grocery stocker position. Mr. Spence again worked 24 hours per week, three eight-hour shifts per week, and worked daytime hours.

In mid-January, the employer reduced Mr. Spence's part-time work hours to one eight-hour shift per week.

The employer offered Mr. Spence the opportunity to transfer into an overnight grocery stocking position, where 32-40 hours per week would be available. At the beginning of February 2009, Mr. Spence transferred into the night stocker position. Along with the night stocking duties, the overnight shift required that Mr. Spence operate a cash register as needed. Mr. Spence operated the cash register about two hours per overnight shift. Mr. Spence did not like operating the cash register. Three weeks to a month into the overnight work, Mr. Spence requested to return to the part-time daytime grocery stocker position that would offer him only one eight-hour shift per week. Mr. Spence knew a return to the daytime position would mean working just one shift per week. At the beginning of March 2009, Mr. Spence returned to the daytime stocking position. Mr. Spence continues in the part-time day stocking position. Except for a week in which Mr. Spence covered additional shifts for an absence coworker, Mr. Spence had worked the one shift per week. '

Mr. Spence filed an additional claim for unemployment insurance benefits that was effective March 22, 2009. The claim was filed in connection with Mr. Spence's voluntary return to the reduced daytime stocking hours.

So far, Mr. Spence has received benefits totaling \$806.00 for the six-week period from March 22, 2009 through the benefit week that ended May 2, 2009.

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".

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. Iowa Code section 96.19(38)(b).

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. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The weight of the evidence indicates that Mr. Spence's additional claim for benefits occurred in the context of Mr. Spence's voluntary reduction in work hours, not a cut in hours initiated by the employer. Mr. Spence's voluntary reduction in work hours cannot be deemed partial unemployment within the meaning of Iowa Code section 96.4(3) and 96.19(38)(b).

The evidence indicates that the employer provided Mr. Spence with 32-40 hours per week prior to Mr. Spence's March 2009 voluntary reduction in work hours. The evidence indicates that Mr. Spence accepted the additional work hours, worked the overnight hours for a number of weeks, and then reduced his work hours to avoid operating a cash register. This voluntary reduction in work hours was the second such voluntary reduction in work hours during the employment. It was not the employer's reduction of the work hours in January that prompted the March 22, 2009 claim for benefits, but the voluntary reduction in work hours initiated by Mr. Spence in March. Where a person's availability for work is unduly limited because the person is not willing to work during the hours in which suitable work is available, the person cannot be deemed available for work within the meaning of Iowa Code section 96.4(3). See 871 IAC 24.23(16).

Because Mr. Spence is not partially unemployed and is not available for work within the meaning of the law, he is not eligible for benefits. Benefits are denied effective March 22, 2009. The employer will not be charged for any benefits paid to the claimant for the period of March 22, 2009 through May 2, 2009.

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 \$806.00 in benefits Mr. Spence has received in connection with the additional claim for benefits that was effective March 22, 2009 constitute an overpayment of benefits. Mr. Spence must repay that amount to Iowa Workforce Development.

DECISION:

The Agency representative's April 24, 2009, reference 05, decision is reversed. The claimant has not been partially unemployed since he established the additional claim for benefits that was effective March 22, 2009. The claimant has not met the availability requirements of Iowa

Code section 96.4(3) since he established the additional claim for benefits that was effective March 22, 2009. The claimant is ineligible for benefits effective March 22, 2009. The claimant is overpaid \$806.00 in benefits for the period of March 22, 2009 through May 2, 2009. The employer will not be charged for benefits paid to the claimant for the period of March 22, 2009 through May 2, 2009.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs