

administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was and still is employed by the employer as a part-time sales floor associate since February 23, 2004. The claimant has not separated from her employment. At all material times during the claimant's employment she was part-time. The employer never reduced the claimant's hours. However, on February 14, 2005, the claimant changed her availability and reduced her hours as shown at the second page of Employer's Exhibit 1. Again on July 13, 2005, the claimant changed her availability and reduced her hours as shown at the first page of Employer's Exhibit 1. Throughout this period of time the claimant's old hours were available to the claimant had she chosen to work them. Previously, the claimant's hours had been open anywhere from 9:00 a.m. to 10:00 p.m. Saturday through Friday. The claimant is still working for the employer but under her new available hours as shown by her request dated July 13, 2005 at Employer's Exhibit 1. The employer has never reduced the claimant's hours on its own. Iowa Workforce Development records indicate that the claimant had another job, at least in the first quarter of 2005, in which she earned \$4,227.00 and in the second quarter of 2005 in which she earned \$3,636.00. It appears that the claimant obtained a full time job and therefore reduced her hours from the employer herein. By decision dated September 19, 2005, at reference 06, amending reference 05, an Iowa Workforce Development representative determined that the employer would not be charged for any unemployment insurance benefits to which the claimant is entitled and that the employer's account would be relieved of any such charges.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the account of the employer herein should be charged for any unemployment insurance benefits to which the claimant is entitled because the claimant was not receiving the same employment from the employer that she received in her base period. The administrative law judge concludes that the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled because the claimant, at all material times hereto, was receiving the same employment, or could have received the same employment, that she had received during her base period.
2. Whether the claimant is overpaid unemployment insurance benefits. The administrative law judge really does not have jurisdiction to decide this issue nor can he decide the issue based upon the evidence here. Whether the claimant is entitled to unemployment insurance benefits was not an issue set out on the notice of appeal and the claimant did not participate in the hearing to accept any issues concerning her eligibility.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.
 - a. (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.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant was receiving the same employment from the employer, or could have received the same employment from the employer, from and after the time that she filed for unemployment insurance benefits effective June 5, 2005, that she had received during her base period. The employer's witness, Mike Kelly, Co-Manager of the employer's store in Indianola, Iowa, credibly testified that when the claimant was first employed the availability for her hours was open from 9:00 a.m. to 10:00 p.m., Saturday through Friday and that she worked those hours until she requested a change in her availability of hours and a reduction of her hours on February 14, 2005 and again on July 13, 2005, as shown at Employer's Exhibit 2. The employer accommodated both of the claimant's requests for reduction in hours. Workforce Development records indicate that for the second and third quarter of 2005, the claimant had employment from another employer in which she earned more money than she did from the employer herein. This appears to be full time employment. Accordingly, since the employer did not change the claimant's hours on its own but rather accommodated the claimant's request, and because the same employment that the claimant had during her base period was available to her at all relevant times herein, the administrative law judge concludes that the claimant's employment was the same during the times that she applied for benefits as in her base period. Therefore, the administrative law judge concludes that the account of the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled and the account of the employer herein should be relieved of any such charges.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$199.00 as follows: Zero benefits for benefit week ending June 11, 2005 (earning \$285.00); \$188.00 for benefit week ending June 18, 2005 (earnings \$60.00) and \$199.00 for benefit week ending June 25, 2005. Of that amount \$188.00 was offset against an overpayment for benefit week ending June 18, 2005 because of vacation pay. See decisions dated June 30, 2005 at reference 03 and 04. The administrative law judge does not have jurisdiction to determine whether the claimant is entitled to these benefits nor can he determine that issue based upon the evidence here. The claimant did not participate in the hearing and the eligibility of the claimant to receive such benefits was not an issue set out on the notice of appeal. Therefore, the administrative law judge can not address the issue as to whether the claimant is eligible for benefits and, as a consequence, cannot address the issue as to whether the claimant is overpaid unemployment insurance benefits.

DECISION:

The representative's decision of September 16, 2005, reference 05, is modified. The employer, Wal-Mart Stores, Inc., should not be charged for any unemployment insurance benefits to which the claimant is entitled and the account of the employer herein, Wal-Mart Stores, Inc., should be relieved of any charges for unemployment insurance benefits to which the claimant is entitled, because at all material times hereto, the claimant was receiving, or could have received, the same employment from the employer herein as she did during her base period. This comports with the decision by an authorized representative dated September 19, 2005 at reference 06, amending reference 05. The administrative law judge cannot determine whether the claimant is overpaid any unemployment insurance benefits.

dj/pjs