

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH WESTPHALEN

Claimant

APPEAL NO. 10A-UI-17536-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KPTOO INC/MCDONALD'S

Employer

OC: 10/31/10

Claimant: Respondent (2/R)

Iowa Code § 96.4-3 - Able and Available for Work

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

McDonald's (employer) appealed an unemployment insurance decision dated December 16, 2010, reference 01, which held that Sarah Westphalen (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 23, 2011. The claimant provided a telephone number but was not available when that number was called for the hearing and, therefore, did not participate. The employer participated through Carol Grause, store manager, and Amy Wurscher, assistant manager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is working the same hours and wages as in her original contract of hire with this employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired as a part-time crew member on June 8, 2009 with no guarantee of hours. She has limited her availability and is unable and unwilling to learn assembly, so she cannot be scheduled before 7:00 a.m. The claimant is only willing to work until 2:00 p.m. during the weekdays and will not work on weekends. There has been no change in her hours or wages.

The claimant filed a claim for unemployment insurance benefits effective October 31, 2010 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

Iowa Code § 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 hired as a part-time crew member. There has been no separation from her part-time employment and she is currently working for this employer at the same hours and wages as contemplated in her original contract of hire. The claimant could receive more hours than she is currently working but personally limits her availability to work. The claimant is disqualified from receiving benefits.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated December 16, 2010, reference 01, is reversed. The claimant does not meet the availability requirements of the law and does not qualify for unemployment insurance benefits. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw