

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

NIKOLE R KAUP  
1533 – 12<sup>TH</sup> AVE S  
CLINTON IA 52732

DATA DIMENSIONS CORPORATION  
PO BOX 1465  
JANESVILLE WI 53547

Appeal Number: 04A-UI-02368-RT  
OC: 05/11/03 R: 04  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 - Required Findings (Able and Available for Work)  
Section 96.7-2-a-2 – Employer Contributions and Reimbursements  
(Same Employment Benefits not Charged)  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Data Dimensions Corporation, filed a timely appeal from an unemployment insurance decision dated March 1, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Nikole R. Kaup. After due notice was issued, a telephone hearing was held on March 23, 2004, with the claimant participating. Jean Stefano, Human Resources Administrator, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The 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 One, the administrative law judge finds: The claimant was and still is employed by the employer since January 11, 1993. She was also previously employed by the employer. The claimant was full time going to part-time at some time in the late 1990's. The claimant then went to part-time on call on January 19, 2003. Both of these changes were at the claimant's request. The part-time on call position is set out on Employer's Exhibit One providing that when the workload is heavy on call employees must work a minimum of 15 hours per week and a minimum of 2 hours per day and that when the workload doesn't demand hours they may put in hours as they desire provided there is work. The claimant went to part-time on call because she could arrange a more flexible schedule. During 2003, the claimant's part-time on call hours were similar to those hours she worked as part-time. Earnings reported by the employer for the claimant are as follows: fourth quarter of 2002-\$5,585.85 (claimant was just part-time, but not on call), first quarter of 2003-\$4,146.76 (claimant was part-time on call from hereon), second quarter of 2003-\$3,944.23, third quarter of 2003-\$3,827.32, and fourth quarter of 2003-\$5,521.43. However, beginning in January 2004, the workflow diminished and there was no work and the claimant worked no hours or very few hours. The claimant has placed no restrictions on her availability for work nor has she placed any restrictions on her ability to work. The claimant is not actively seeking work. In October 2003 and again in January 2004, the claimant requested that she be returned to part-time work, but the employer refused. Pursuant to her claim for unemployment insurance benefits filed effective May 11, 2003 and reopened effective October 19, 2003 and January 11, 2004, the claimant has received unemployment insurance benefits since reopening her claim effective January 11, 2004 in the amount of \$2,530.00 as follows: \$253.00 per week for ten weeks from benefit ending January 17, 2004 to benefit week ending March 20, 2004. The claimant received benefits prior to reopening her claim but they are not relevant here.

## REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was at all material times hereto, not able, available, and earnestly and actively seeking work and was not excused from such provisions. The claimant is not ineligible to receive unemployment insurance benefits.
2. Whether the claimant is receiving the same employment as she did in her base period and therefore the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled. The claimant is not receiving the same employment as she did in her base period and the employer should be charged for any benefits to which the claimant is entitled.
3. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 administrative law judge concludes that the claimant has the burden to prove to show that she is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she is excused from the provisions requiring her to be able, available, and earnestly and actively seeking work. The administrative law judge concludes that the claimant is really both partially unemployed and temporarily unemployed as defined at Iowa Code Section 96.19(38) (b & c) and is therefore excused from such provisions. The claimant is partially unemployed because she is working at her then regular job working less than a regular full time week and earning less than her weekly benefit amount plus \$15.00. The administrative law judge concludes that the claimant is working at her regular job. The claimant was part-time for some significant period beginning in the 1990's and continuing through January 19, 2003. At that time, the claimant became part-time on call but continued to work approximately the same hours as she did while she was merely part-time. This is confirmed by the claimant's earnings records from the employer as shown in the Findings of Fact. The claimant credibly testified that she was working the same hours part-time on call as she did when she was part-time. The employer's witness, Jean Stefano, Human Resources Administrator, testified that the claimant was not promised any hours and cites as an example the employer's rules for on call work at Employer's Exhibit One. The rule does not really specifically state that no hours are guaranteed and in fact requires 15 hours when the workload is heavy. It does state that when the workload does not demand hours from part-time on-call employees they may put in hours, provided there is work. Nevertheless, as noted again in the claimant's earnings it appears that the claimant was earning part-time on call as much as or almost as much as, as she did while part-time. Accordingly, the administrative law judge concludes that the claimant had every right to expect the same amount of hours. Further, the claimant had been working at this job for a long time at least four years. This employment does appear to be the claimant's regular job. Finally, the claimant is temporarily unemployed because the evidence establishes that she is not working because the workload diminished and there is simply no work. Accordingly, the administrative law judge concludes that the claimant is partially unemployed and temporarily unemployed and, as a result, is not subject to the provisions that she be able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits. Further, the administrative law judge concludes that the claimant is able and available for work. The claimant credibly testified and it was conceded by Jean Stefano, Human Resources Administrator and the employer's witness, that the claimant had placed no restrictions on her availability or ability for work. The fact that the claimant is working part-time or part-time on call does not affect her availability for work. 871 IAC 24.22(2)(a) provides that an individual does not have to be available for a particular shift and it is sufficient if the individual is available for work on the same basis as which the individual's wage credits were earned and there is a reasonable expectation of securing employment. The administrative law judge concludes that the claimant is available as she was when the wage credits were earned again as shown by the claimant's earnings records in the Findings of Fact and therefore is available for work.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant is able and available for work and is further excused from the provisions requiring that she be able, available, and earnestly and actively seeking work and as a consequence, she is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible and remains excused from those provisions or remains able, and available, and earnestly and actively seeking work.

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 that the claimant is not receiving the same employment from the employer that she did during her base period as noted by the earnings record in the Findings of Fact. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled shall be charged to the account of the employer herein and the account of the employer herein shall not be released from any such charges.

The administrative law judge notes that both parties conceded that the claimant had not permanently separated from her employment and therefore is not disqualified to receive unemployment insurance benefits.

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 \$2,530.00 since filing for such benefits effective May 11, 2003 and reopening her claim for benefits effective January 11, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated March 1, 2004, reference 02, is affirmed. The claimant, Nikole R. Kaup, is entitled to receive unemployment insurance benefits provided she is otherwise eligible and remains able, available, and earnestly and actively seeking work or remains excused from such provisions. As a result of this decision the claimant is not overpaid any unemployment insurance benefits after reopening her claim for such benefits effective January 11, 2004.

kjf/b