

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODIE ZUBLIS
Claimant

APPEAL NO: 11A-UI-16282-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10-30-11
Claimant: Appellant (1)

Section 96.4-3 – Able and Available for Work
Section 96.4-3 – Same Hours and Wages

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 12, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 24, 2012. The claimant participated in the hearing with current salad bar employee Robin Hess. The employer 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.

ISSUE:

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

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 deli clerk and cashier for Hy-Vee August 25, 2010, and continues to be employed in that capacity. Salad bar employee Robin Hess spoke to the employer about hiring the claimant and explained she was working at another job but was not receiving enough hours to support herself and her child. The employer told Ms. Hess he could guarantee the claimant 25 to 30 hours per week between the deli and cashiering. The claimant worked that number of hours until the week ending November 12, 2011, when she was not scheduled until asked to work five hours as a cashier November 12, 2011. The claimant is pregnant and experiencing a difficult pregnancy. She was hospitalized October 27, 2011, and was off October 27, 28 and 29, 2011. When she returned to work she provided the employer with a doctor's note restricting her from lifting more than 25 to 30 pounds and stated she needed to take frequent breaks. After that the claimant was scheduled to work five hours November 2, 4, 6, 12, 17, 19, 20, 25, 27, 30, December 1, 2, 7, 10, 11, 14, 15, 17, 19, 21 and 22, 2011. She was on vacation December 23 and 24, 2011, and the store was closed December 25, 2011. The claimant was hospitalized December 26 through December 30, 2011, and then was taken off work by her physician and started reporting to the Department that she was not able and available for work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not employed at the same hours and wages as contemplated in the original contract of hire due to restrictions related to her pregnancy.

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".

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 deli clerk and cashier. There has been no separation from her part-time employment and the claimant is currently off work per her physician's orders due to her difficult pregnancy. The claimant's schedule was modified after she provided a doctor's note stating she was restricted from lifting more than 25 to 30 pounds and needed to take frequent breaks. Because the claimant's schedule change was due to restrictions involving her pregnancy it cannot be attributable to the employer. Even though the employer guaranteed the claimant 25 to 30 hours per week at the time of hire, the circumstances surrounding her pregnancy and the subsequent restrictions were a change the employer could not have anticipated at the time the claimant was hired. Consequently, the claimant is not eligible for benefits based on her part-time employment. Therefore, benefits must be denied at this time. If when the claimant is released to return to work without restrictions, offers her services to the employer and the claimant's regular work or comparable suitable work and hours are not available, she would be qualified to receive unemployment insurance benefits, provided she is otherwise eligible.

DECISION:

The December 12, 2011, reference 01, decision is affirmed. The claimant is not employed at the same hours and wages as in her original contract of hire due to the advice of her treating physician for a non-work-related condition and therefore benefits must be denied.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css