

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LAURA WILDER**  
Claimant

**APPEAL NO. 11A-UI-09233-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 05-29-11**  
**Claimant: Respondent (2-R)**

Section 96.4-3 – Able and Available for Work  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 5, 2011, reference 03, decision that denied benefits to the claimant for the one-week period ending June 4, 2011. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 4, 2011, and was completed on September 13, 2011. The claimant participated in the hearing. Sailu Timbo, store director; Brett Smith, kitchen manager; and Paula Mack, employer representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

**ISSUE:**

The issue is whether the claimant was able and available to work.

**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 kitchen clerk for Hy-Vee on May 14, 2008, and continues to be employed in that capacity. Her hours were repeatedly cut due to disciplinary reasons. There were numerous customer complaints about the claimant, she repeatedly violated the employer's smoking policy, she frequently called in absent, and her quality of work was poor. The employer issued the claimant at least seven written warnings. The claimant was scheduled every week but usually failed to work some of her scheduled shifts. The claimant has claimed and received unemployment insurance benefits from this employer. In fact, she began filing weekly claims beginning the first week ending May 29, 2011, and going through the week ending October 1, 2011. The claimant failed to report any wages and received unemployment benefits each week.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant is not able and available to work.

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 kitchen clerk. 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 is disqualified from receiving benefits from this employer.

An issue as to whether the claimant had earned but unreported wages arose as a result of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded to the Investigation and Recovery Division for an investigation and determination on this issue. 871 IAC 26.14(5).

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The July 5, 2011, reference 03, decision is reversed. The claimant was not able to work and available for work for the one-week period ending June 4, 2011, and benefits are denied. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency. This case is also remanded for an investigation and determination as to whether the claimant has earned but unreported wages. 871 IAC 26.14(5).

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw