

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHELSEA THOMAS
Claimant

APPEAL NO: 12A-UI-12766-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

OC: 02-05-12
Claimant: Appellant (1R)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 17, 2012, reference 06, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 28, 2012. The claimant participated in the hearing. Lyle Ellenwood, Store Director, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant is able and available for 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 deli clerk for Dahl's Food Stores June 15, 2012. She notified the employer at the time of hire she was attending school and as a result she was unable to work Tuesdays and Wednesdays and the employer was able to accommodate her scheduling limitations. The claimant averaged 20 to 30 hours per week prior to September 10, 2012, at which time she informed the employer her school schedule changed and she could only work weekends. The employer scheduled her on some weekends but the claimant had six absences during the four months of her employment and the employer eventually stopped scheduling her after she was a no-call/no-show October 7 and 13, 2012.

The claimant has claimed and received benefits since her change in availability.

During the hearing it became apparent the claimant has been separated from her employment with Dahl's. Consequently, the issue of the claimant's separation from employment is remanded to the Claims Section for an initial determination and adjudication.

REASONING AND CONCLUSIONS OF LAW:

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

The claimant was averaging between 20 and 30 hours per week prior to informing the employer her school schedule changed and she could no longer work the hours she had been working since the date of hire. The claimant initiated the change due to her school schedule and not at the behest of the employer who had continuing work available at her previous hours and some, but not as many available, after the claimant changed her availability. The claimant is not available to the extent she was previously due to her own decisions. Accordingly, benefits are denied.

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.

The issue of the claimant's separation from employment with this employer is remanded to the Claims Section for an initial determination and adjudication.

DECISION:

The October 17, 2012, reference 06, decision is affirmed. The claimant is not able to work and available for work effective September 16, 2012. 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. The issue of the claimant's separation from employment with this employer is remanded to the Claims Section for an initial determination and adjudication.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css