

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LINDSAY ECKHOFF**  
Claimant

**APPEAL NO. 10A-UI-01060-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAREWAY STORES INC**  
Employer

**Original Claim: 08/23/09  
Claimant: Respondent (2/R)**

Iowa Code § 96.4-3 - Able and Available for Work  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Fareway Stores, Inc. (employer) appealed an unemployment insurance decision dated October 12, 2009, reference 04, which held that Lindsay Eckhoff (claimant) was eligible for unemployment insurance benefits. The employer submitted a written appeal to this decision on October 16, 2009, but the appeal was mistakenly transferred to the Employment Appeal Board. The Board sent the employer's appeal letter to the Appeals Section on January 20, 2010. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 2, 2010. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted and, therefore, did not participate. The employer participated through Attorney Garrett Piklapp and Store Manager Tom Loew. 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 employed as a part-time checker from October 24, 2005 through December 15, 2009, when she was terminated. The final separation from employment was not included in the hearing notice and there has been no determination made as to whether it is disqualifying or not. This case will be remanded for further agency action on those issues.

The claimant filed for partial unemployment benefits as of August 23, 2009. However, at the time she was hired, she was not guaranteed a minimum number of hours. There was no change in her hours or wages during her employment and she continued to be employed in that same capacity until her termination date.

The claimant filed a claim for unemployment insurance benefits effective August 23, 2009 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 checker. There had been no separation from her part-time employment until December 15, 2009 when she was terminated. Prior to that date, the claimant was working for this employer at the same hours and wages as contemplated in her original contract of hire. The claimant does not meet the availability requirements of the law and benefits are denied as of August 23, 2009.

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.

The issues raised by the employer as to the claimant's final separation were not included in the Notice of hearing for this case, and the case will be remanded for an investigation and determination on those issues. 871 IAC 26.14(5).

**DECISION:**

The employer's appeal is timely. The unemployment insurance decision dated October 12, 2009, reference 04, is reversed. Benefits are denied as of August 23, 2009, because the claimant does not meet the availability requirements of the law. The case is remanded to the Claims Section for investigation and determination of the overpayment and separation issues.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw