

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

DINA FRENTRESS
115 - 5TH AVE SE
LEMARS IA 51031

HY-VEE INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166 0283

TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317

Appeal Number: 04A-UI-11593-DWT
OC: 10/03/04 R: 01
Claimant: Respondent (2)

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, 4th 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 are 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

871 IAC 24.23(26) – Part-time Employment and Partial Benefits
Section 96.3-7 –Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's October 21, 2004 decision (reference 01) that concluded Dina Frentress (claimant) was eligible to receive unemployment insurance benefits, and the account of Hy-Vee, Inc. (employer) could be charged because the claimant was not working the same number of hours as she had during her base period. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 22, 2004. The claimant participated in the hearing. David Williams, a representative with TALX, appeared on the employer's behalf. Jamie Gran, the manager of store operations; Lisa Gregg, the deli manager; and Mark Frentress, the store director, appeared as witnesses for the employer. During the hearing, Employer's Exhibit One was offered and admitted as evidence. 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:

Is the claimant eligible to receive unemployment insurance benefits as of October 3, 2004?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on October 17, 2003. The employer hired her to do various jobs, but did not guarantee she would work a certain number of hours per week. During her employment, the claimant worked anywhere from 17 to 56 hours a week or an average of 33.4 hours per week. The last ten weeks of her employment, the claimant worked an average of 29.8 hours a week.

Most recently the claimant had been working in the deli department. When Gregg came back from a medical leave in late September or early October, she asked the deli employees to let her know what hours they were available to work. During the week of October 3, the claimant reported she was only available to work 9:00 a.m. to 3:00 p.m., Monday through Friday. Prior to October 3, the claimant had been available to work any hours and had not restricted the number of hours she was available to work. After the claimant restricted her availability, Gregg scheduled her to work 13 hours for a week. As soon as the claimant saw the hours she had been scheduled to work, she rescinded her restrictions and told Gregg and other managers she was again available for all hours of work. When the claimant talked to Gregg about more hours, Gregg did not immediately have any more hours to schedule the claimant because she had already posted the schedule. Gregg, however, scheduled the claimant to work more hours in other areas of the store. The claimant worked 24 to 30 hours a week in subsequent weeks.

The claimant established an unemployment insurance claim during the week of October 3, 2004. She filed claims for the weeks ending October 9, 23 and 30, 2004. She received a total of \$309.00 in benefits for these weeks.

REASONING AND CONCLUSIONS OF LAW:

When a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract of hire and is not working on a reduced workweek, the claimant cannot be considered to be partially unemployed. 871 IAC 24.23(26). A claimant is not eligible to receive benefits when she unduly limits the hours she is willing to work. 871 IAC 24.23(16). The only reason the claimant's hours were reduced was because the claimant restricted the hours she would work. As a result of the claimant's restrictions, the employer did not schedule the claimant to work as many hours as she usually worked. In essence, the claimant caused her partial unemployed status because of the restrictions she placed on the hours she was willing to work. Even though the claimant made herself available to work all hours within a few days, schedules had already been posted.

During the week the claimant established her claim for unemployment insurance benefits, she restricted the hours she would work. As a result of the restriction on her availability, the employer could not schedule her to work as many hours in the deli department. When the claimant did not restrict the hours she would work, the employer again scheduled her to work 24 to 30 hours a week. The evidence indicates the claimant continues to work for the employer in the same pattern that she has always worked for the employer.

The claimant's assertion that her estranged husband influenced the number of hours she was scheduled to work is not supported by the facts. Under the fact of this case, as of October 3, the claimant is not eligible to receive partial unemployment insurance benefits because she caused her temporary reduction in hours, and she is not partially unemployed because she continues to work in the same pattern that she has always worked for the employer.

If an individual receives benefits she is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. Since the claimant is not partially unemployed, she is not legally entitled to receive benefits she received for the weeks ending October 9, 23 and 30, 2004. She has been overpaid a total of \$309.00 in benefits for these weeks.

DECISION:

The representative's October 21, 2004 decision (reference 01) is reversed. As of October 3, 2004, the claimant is not partially unemployed because during the week ending October 9, the claimant restricted her availability to work. When the claimant made herself available for any hours, she again worked the average number of hours she had been working the majority of the year. Therefore, as of October 3, 2004, the claimant is not eligible to receive unemployment insurance benefits. This means the claimant is not legally entitled to receive benefits for the weeks ending October 9, 23 and 30, 2004. The claimant has been overpaid and must repay \$309.00 in benefits she received for these weeks.

dlw/tjc