

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATT A DAWSON
Claimant

APPEAL NO. 10A-UI-17099-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**“FEE, RONALD D “FEE, KAREN J
CHECKERBOARD PIZZA SHACK**
Employer

**OC: 03/28/10
Claimant: Respondent (2-R)**

Section 96.4-3 – Still Employed At Same Hours And Wages

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated December 13, 2010, reference 01, which held claimant eligible to receive unemployment insurance benefits beginning November 14, 2010 finding that the claimant is employed part time but not performing services in the pattern of employment as in the base period subjecting the employer's account to potential charging. After due notice, a telephone hearing was held on January 24, 2011. Although duly notified the claimant did not respond to the notice of hearing and did not participate. The employer participated by Rhonda Zimmerman, Manager/Co-Owner.

ISSUE:

The issue in this matter is whether the claimant is still employed part time in the same hours and wages as in the original contract of hire.

FINDINGS OF FACT:

Having heard the testimony and considered all of the evidence in the record, the administrative law judge finds: The claimant began his employment with Checkerboard Pizza Shack on September 15, 2010 and continues to be employed at the time of hearing. Mr. Dawson was hired as a part-time cook with no guaranteed minimum number of hours of work each week. The claimant was hired at the rate of \$7.25 per hour. Claimant is paid each two weeks.

During his first two-week period of employment, Mr. Dawson was assigned to work 18 hours. The following two weeks he was assigned to work 26.1 hours, then 29.9 hours and during the last of the most recent four weeks of his employment Mr. Dawson was assigned to work 30 and 31 hours per two-week period, respectively. Claimant's pay remains at \$7.25 per hour. Mr. Dawson has declined some working hours available to him and had asked the employer to "cut his hours" so that the claimant could be available for other work.

REASONING AND CONCLUSIONS OF LAW:

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.

For the above stated reasons the administrative law judge concludes the claimant cannot be considered to be partially unemployed as he is still employed part time at the same hours and wages contemplated in the original contract of hire. There was no guaranteed minimum number of hours the claimant would be assigned each week and there has been no change in the agreement of hire. The claimant has been offered additional working hours each week. Most recently the claimant has requested that his hours be cut for reasons unrelated to his employment with Checkerboard Pizza Shack.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual,

benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated December 13, 2010, reference 01, is reversed. The claimant is not partially unemployed. Benefits are denied as of November 14, 2010. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs