

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

IRIS A PILMER

Claimant

APPEAL NO. 12A-UI-09003-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROWN CUSTOMER DELIGHT GROUP INC

Employer

OC: 06/24/12

Claimant: Respondent (2-R)

Section 96.4-3 – Same Hours and Wages

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated July 17, 2012, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 4, 2012. The claimant participated. Participating on behalf of the employer was Stephanie Van Dellen, hearing representative, and witness Ms. Kelly Betts, office manager.

ISSUE:

At issue in this matter is whether the claimant is still employed part-time as agreed upon between the parties.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: The claimant began her employment with Brown Customer Delight Group, Inc., doing business as McDonald's, on June 1, 2011. At that time, the claimant was employed as a full-time crew person and was paid by the hour. Ms. Pilmer was paid at the rate of \$7.25 per hour. Subsequently, in mid-June of 2012, by the claimant's request, Ms. Pilmer went to "on-call" status, where she would be called in to substitute for other workers and would have the option of accepting or rejecting each call in. Ms. Pilmer's child was required to undergo medical treatment and the claimant therefore was not willing to continue to work full-time.

Ms. Pilmer opened a claim for partial unemployment insurance benefits with an effective date of June 24, 2012. The claimant did not request that her employer re-institute her full-time work hours or that more working hours be made available to her.

REASONING AND CONCLUSIONS OF LAW:

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 question is whether the evidence in the record establishes that Ms. Pilmer is still employed as a part-time worker as contemplated in the specific agreement of hire reached between the parties in mid-June 2012. It does.

The evidence in the record clearly establishes that Ms. Pilmer had initially been hired in a full-time capacity but subsequently personally requested to be changed to an "on-call" status where she filled in for employees on an intermittent basis. The claimant's hours have fluctuated because of the availability of Ms. Pilmer to accept more hours, at times. The claimant continues to be employed part-time working with no guarantee of minimum hours and is paid at the same or greater rate of pay than agreed upon at the time of hire.

For the above-stated reasons, the administrative law judge concludes the claimant cannot be considered to be partially unemployed, as she is still employed part-time with no guarantee of minimum hours, per her request, as contemplated in the agreement of hire reached between the parties in mid-June 2012. As per the claimant's request, there was no guarantee of a minimum number of working hours that the claimant would be assigned each week and there has been no change in that agreement. The claimant's reduced work weeks are therefore no different than agreed upon by the parties. Benefits are denied as of June 24, 2012.

Iowa Code section 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.

The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated July 17, 2012, reference 01, is reversed. The claimant cannot be considered to be partially unemployed. Benefits are denied as of June 24, 2012. The claimant is employed part-time at the same hours and wages as contemplated in the agreement of employment between the parties. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw