

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN MILLER
Claimant

APPEAL NO: 10A-UI-15411-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

D & S CONVENIENCE STORES INC
Employer

OC: 10/03/10
Claimant: Respondent (4/R)

Iowa Code § 96.4-3 - Able and Available for Work
Iowa Code § 96.3-7 - Overpayment
Iowa Code § 96.5-1 - Voluntary Quit

STATEMENT OF THE CASE:

D & S Convenience Stores, Inc. (employer) appealed an unemployment insurance decision dated November 2, 2010, reference 01, which held that Karen Miller (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 21, 2010. The claimant participated in the hearing. The employer participated through owner Sue Steichen. Both parties waived formal notice so the final separation issues could be addressed in the hearing. 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, and if the claimant's voluntary separation from employment qualifies her to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time cashier from April 15, 2009 to April 23, 2010 when she quit for another job at Staples. The claimant left Staples on July 30, 2010 and returned to work for the employer on a part-time basis with no guarantee of hours.

The claimant began working for Lemars, Inc. on a full-time basis on August 2, 2010 but she continued working for the employer on a part-time basis. She lost her full-time job on October 7, 2010 so only had her part-time job with the employer until December 4, 2010 when she quit for a full-time job with North American Company-Pack.

The claimant filed a claim for unemployment insurance benefits effective October 3, 2010 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 cashier on July 30, 2010 and continued in that capacity until she voluntarily quit on December 4, 2010, when she quit for a full-time job. Prior to that, there was no separation and no change in her hours or wages. Consequently, the claimant does not qualify for unemployment benefits from this employer from July 30, 2010 through December 4, 2010. However, the issue of whether she quit with good cause attributable to the employer has yet to be determined.

Iowa Code § 96.5-1-a provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

871 IAC 24.28(5) provides:

Voluntary quit requalifications and previously adjudicated voluntary quit issues.

(5) The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment.

871 IAC 23.43(5) provides:

(5) Sole purpose. The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. No charge shall accrue to the account of the former voluntarily quit employer.

An individual who leaves employment voluntarily is disqualified from receiving job insurance benefits unless the quit was for good cause attributable to the employer. Iowa Code § 96.5(1). An exception is if the individual left in good faith for the sole purpose of accepting other employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. Accordingly, benefits are allowed as of December 11, 2010 and the employer's account shall not be charged.

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.

DECISION:

The unemployment insurance decision dated November 2, 2010, reference 01, is modified in favor of the appellant. The claimant does not meet the availability requirements of the law from October 3, 2010 through December 4, 2010 and benefits are denied. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. Subsequent to December 4, 2010, benefits are allowed, provided she is otherwise eligible because the claimant voluntarily left her employment in order to accept other employment. The employer's account shall not be charged.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs