

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KAREN M MATTES**  
Claimant

**APPEAL NO. 09A-UI-10025-H2**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SUPPORT SERVICES OF SOUTH CENTRAL  
IOWA**  
Employer

**OC: 05-31-09**  
**Claimant: Respondent (2R)**

Section 96.4-3 - Able and Available  
871 IAC 24.23(26) – Same Hours and Wages  
Section 96.3-7 - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 9, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 17, 2009 in Creston, Iowa. Claimant did participate. Employer did participate through Kendalyn Huff, Manager.

**ISSUES:**

Was the claimant able to and available for work or was she employed at the same hours and wages?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant is employed as a supported community specialist part time beginning May 9, 2008 through date of hearing as claimant remains employed.

The claimant was hired to work part time and was told that due to the nature of the work there was no guarantee of any particular shift or hours for any time period. The claimant's hours have varied due to the work needs of the employer as well as being cut during a time period when the claimant was overwhelmed. The claimant desires a set schedule but the nature of the employer's business does not accommodate that need. The claimant was never promised or guaranteed any set hours and knew when hired that the hours could vary depending upon the needs of the employer. Under such circumstances the claimant could not have any expectation of set regular hours or hours that did not vary widely based upon the employer's needs.

Claimant has received unemployment benefits since filing a claim with an effective date of May 31, 2009.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective May 26, 2009.

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.

When the claimant was hired she was specifically told that there was no guarantee of any particular hours or set shift. The employer cannot arrange nor are they required to arrange the schedule so that the claimant only works what she considers a reasonable manageable schedule. Accordingly, benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code section 96.3(7)b is remanded to the Agency.

**DECISION:**

The July 9, 2009, reference 01, decision is reversed. The claimant is not able to work and available for work effective May 26, 2009. Benefits are denied. Claimant is overpaid benefits in the amount of \$997.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs