

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERYL STARK
Claimant

APPEAL NO: 10A-UI-13974-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEDAR FOUNDATION
Employer

OC: 08-29-10
Claimant: Respondent (2/R)

Iowa Code § 96.4-3 - Able and Available for Work
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Cedar Foundation (employer) appealed an unemployment insurance decision dated October 6, 2010, reference 01, which held that Cheryl Stark (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 November 22, 2010. The claimant participated in the hearing. The employer participated through Judy Kaeser, Administrator and Cindy Licht, Assistant Director of Nursing. Claimant's Exhibits One through Five were admitted into 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:

The issue is whether the claimant is working the same hours and wages with this employer.

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 registered nurse/charge nurse from September 2, 2002 through October 8, 2010. She began employment full-time and worked from 10:00 p.m. to 6:00 a.m. In May 29, 2003, the claimant added the 6:00 a.m. to 2:00 p.m. shift. She voluntarily reduced her hours to part-time on October 5, 2008 and only worked the morning shift as the second nurse after that date. The claimant was not guaranteed a minimum number of hours working part-time.

The employer determined it no longer needed a second nurse on the morning shift on November 15, 2009. It offered the claimant hours on the second and third shifts to give her 32 hours per week but the claimant refused. She told the employer her physician told her not to work the night shift but never provided any paperwork to substantiate that restriction. The claimant continued filling in on the morning shift and filed a claim for unemployment benefits effective August 29, 2010. She filed for three weeks of benefits ending September 18, 2010. The claimant submitted her written resignation on September 22, 2010 and worked through October 8, 2010 when she quit for other employment.

The claimant filed a claim for unemployment insurance benefits effective August 29, 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 full-time but voluntarily reduced her hours to a part-time basis on October 5, 2008 when she only accepted work on the morning shift. The employer no longer needed a second nurse on the morning shift after November 15, 2009 and offered the claimant hours on the second and third shifts but she refused those hours. She continued filling in on the morning shift until she voluntarily quit on October 8, 2010 to accept other employment.

There was no separation from her part-time employment on August 29, 2010. She had been working for the employer at the same hours and wages since November 15, 2009 and had voluntarily reduced her availability. Consequently, the claimant is disqualified from receiving benefits from this employer for the three-week period ending September 18, 2010.

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 October 6, 2010, reference 01, is reversed. The claimant does not meet the availability requirements of the law for the three-week period ending September 18, 2010 and benefits are denied for that same time frame. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs