

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

THERESA L BUCKINGHAM
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-11826-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/20/15
Claimant: Respondent (2)

Iowa Code § 96.4-3 – Able and Available
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 14, 2015 reference 02, which held claimant able and available for work. After due notice, a hearing was scheduled for and held on November 5, 2015. Claimant participated personally. Employer participated by hearing representative James Trafaglia, with witnesses Nicky Waldron and Ashley Heise. Claimant's Exhibit A was admitted into evidence.

ISSUES:

Whether claimant is able and available for work?

Whether claimant has been overpaid unemployment benefits?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant missed over 15 days of work since being employed by employer in July, 2014. Claimant missed these days because of anxiety, illnesses, inappropriate medications, and other reasons. Claimant had worked in the sandwich department. There were few other people to fill in when claimant missed work, so employer was put in a bind by claimant's absenteeism. Claimant did generally follow procedures in reporting her absences, but sometimes would not call in a full two hours before her shift. Claimant signed a warning prepared by employer stating that she would not miss any more days of work, and shortly after signing the document, claimant missed another day in early September, 2015.

Employer decided that claimant could not continue to work in the sandwich shop as her absences often left the shop short of necessary employees. On September 17, 2015 claimant was offered a position at the same wages and hours working in the courtesy department. Said job would involve moving carts and other jobs necessary to keep proper flow within the store. Claimant did not wish to do this job, as it would be too hard for her physically. Claimant was told to call the courtesy manager such that she could begin training and get hours set.

Claimant stated that she has tried to call in to Hy Vee since she was told to call the other manager, but calls haven't been returned. She stated that she left one message. Claimant has not visited the store to attempt to be in contact with her new manager. Employer stated that claimant is still gainfully employed, but has not made herself available for her training and new shifts.

The overpayment issue in this case was created by a ruling claimant was improperly paid unemployment benefits. Claimant was deemed to have been overpaid \$821.00 for the five weeks ending October 31, 2015.

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".

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.

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Inasmuch as the illness was not work-related and the treating physician has released the claimant to return to work, the claimant has established the ability to work. As claimant has not put in a satisfactory effort to secure hours in the new department where she was placed, claimant has not shown that she is available for work. Benefits are withheld until such time as the claimant presents herself to employer as being available to work. Employer's placement of claimant in a new department under the same pay rate and working the approximately same number of hours is reasonable considering that claimant was not guaranteed a department in which she would be working, and further considering that the courtesy department has more built-in flexibility in its workers than the sandwich department necessarily can have. Benefits are denied as claimant has not shown that she is available for work.

The administrative law judge concludes that claimant was overpaid unemployment insurance benefits in the amount of \$821.00 for the five weeks ending October 31, 2015, pursuant to Iowa Code section 96.3-7 as the decision that created the overpayment has now been reversed.

DECISION:

The decision of the representative dated October 14, 2015, reference 02 is reversed. Claimant is not eligible to receive unemployment insurance benefits, effective September 26, 2015. Claimant was overpaid unemployment insurance benefits in the amount of \$821.00.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/pjs