

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER J HUNTER
Claimant

APPEAL NO. 09A-UI-17050-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAPITAL SENIOR LIVING INC
Employer

OC: 10/11/09
Claimant: Respondent (2-R)

Section 96.4-3 – Same Employed at Same Hours and Wages
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Capital Senior Living, Inc. filed a timely appeal from a representative's decision dated November 6, 2009, reference 02, which held claimant eligible to receive unemployment insurance benefits based upon current employment with Capital Senior Living, Inc. After due notice, a telephone conference hearing was scheduled for and held on December 17, 2009. The claimant participated personally. The employer participated by Ms. Kylie Newheart, Executive Director.

ISSUE:

The issue is whether the claimant is still employed at the same hours and wages in the agreement of hire and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds Heather Hunter was employed by Capital Senior Living, Inc. from March 16, 2009 until November 11, 2009 when the claimant discontinued reporting for work. Ms. Hunter held the position of part-time dietary aide and was paid by the hour. Her most recent immediate supervisor was Vivian Hanson.

The claimant began employment on March 16, 2009 and was assigned to work 16 hours during the first full week of employment. Employees are considered to be full-time workers if they are hired on a full-time basis and are assigned to work 35 or more hours each week. During the course of her employment Ms. Hunter averaged 20 hours of work or less per week. The claimant's working hours were often less due to child care issues, non attendance, tardiness and failure to report or provide notification.

Part-time employees are not guaranteed any minimum number of working hours each week and are informed of their part-time status and the lack of guarantee of any specific number of hours each week during orientation and the new hiring process. Ms. Hunter did not disagree with her

part-time status until shortly before her employment ended. At that time the company's executive director, Ms. Newheart, informed Ms. Hunter that she was hired and continued to be in the position of a part-time employee with no minimum hours of work guaranteed.

It does not appear that the claimant's separation from employment which subsequently occurred has been adjudicated although the employer attempted to provide notice to Iowa Works that a separation had occurred.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant is working on a reduced workweek different than the contract of hire. It does not.

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 evidence in the record establishes that Ms. Hunter was informed at the time of hire that she was being hired as a part-time dietary aide and that there was no guarantee as to the minimum number of hours that would be available to her in that part-time position each week. The evidence in the record further establishes that the claimant's initial full week of employment constituted 16 hours of work and that the claimant thereafter averaged 20 hours or less per week below the 35 hour per week threshold for full-time employment with this company.

Additional working hours that may have been available to Ms. Hunter went to other employees due to child care problems on the part of the claimant, punctuality issues and the claimant's failure to report for scheduled work at times. The administrative law judge notes that although the claimant maintains that she was hired on a full-time basis, the claimant did not have 35 hours a week or more during any week of her employment and made no complaint to company management about her hours until shortly before a separation from employment took place. The evidence further establishes that the company's executive director immediately explained to Ms. Hunter when questioned that the claimant was a part-time employee with no guarantee of a minimum number of hours available to her each work week.

For the above-stated reasons and upon application of the law, the administrative law judge concludes that the claimant is not eligible for partial unemployment insurance benefits based upon her part-time employment with Capital Senior Living, Inc. The claimant was still employed in a part-time job with the same hours and wages contemplated in the original agreement of hire and was not working on a reduced workweek different from the contract of hire that did not guarantee any minimum number of hours each week. As such, the claimant cannot be considered partially unemployed. Partial unemployment insurance benefits based upon wage credits earned from this employer 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.

Based upon the hearing record in this matter, the administrative law judge concludes that a separation from employment subsequently occurred. The subject of the claimant's separation from employment is remanded to UIS Division for investigation and a determination on the claimant's separation from employment.

DECISION:

The representative's decision dated November 6, 2009, reference 02, is reversed. Heather Hunter is not eligible for partial unemployment insurance benefits based upon employment with Capital Senior Living, Inc. The issue of whether the claimant must repay the unemployment

insurance benefits that she has received is remanded to the UIS Division for determination. The issue of whether a disqualifying separation from employment has taken place is remanded to the UIS Division for investigation and issuance of an appealable determination on the separation from work.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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