

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MATTHEW A BERNIER**  
Claimant

**APPEAL NO. 09A-UI-19285-AT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KMART CORP**  
Employer

**Original Claim: 11/08/09  
Claimant: Respondent (2-R)**

Section 96.4-3 – Eligibility for Benefits

**STATEMENT OF THE CASE:**

Kmart Corporation filed a timely appeal from an unemployment insurance decision dated December 15, 2009, reference 01, that allowed benefits to Matthew A Bernier. After due notice was issued, a telephone hearing was held February 3, 2010, with Personnel Manager Gloria Longmier participating for the employer. Although Mr. Bernier provided a telephone number at which he could be contacted, he was not available at the time of the hearing. He had not requested a postponement.

**ISSUE:**

Is the claimant eligible to receive unemployment insurance benefits at this time?

**FINDINGS OF FACT:**

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Matthew A. Bernier has been employed by Kmart Corporation since September 2, 2008. He last worked as a stockman and last performed services on August 4, 2009. At that time, Mr. Bernier requested a leave of absence to deal with a personal issue. He has not returned to the employer to request to go back to work.

Mr. Bernier has received unemployment insurance benefits since filing a claim effective November 8, 2009.

**REASONING AND CONCLUSIONS OF LAW:**

The question is whether the claimant meets the eligibility requirement of being available for work. He does not.

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".

The claimant has the burden of proof. See Iowa Code section 96.6-2. As noted above, the claimant did not participate and did not request a postponement of the hearing. An individual on a negotiated leave of absence is considered to be in a period of voluntary unemployment and is not eligible for unemployment insurance benefits. See 871 IAC 24.22(2)j. The uncontradicted evidence in this record is that Mr. Bernier remains on his requested leave of absence. Therefore, benefits must be withheld.

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.

The question of whether Mr. Bernier has received benefits that must be repaid is remanded to the Unemployment Insurance Services Division.

**DECISION:**

The unemployment insurance decision dated December 15, 2009, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits. The question of repayment of benefits is remanded to the Unemployment Insurance Services Division.

---

Dan Anderson  
Administrative Law Judge

---

Decision Dated and Mailed

kjw/kjw