

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY A HARMENING
Claimant

APPEAL NO: 09A-UI-11477-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/21/09

Claimant: Respondent (4/R)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer)) appealed a representative's August 3, 2009 decision (reference 01) that concluded Gary A. Harmening (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 26, 2009. The claimant participated in the hearing. Tim Speir of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from one witness, Jill Kent. 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:

Is the claimant employed by the employer for less than his usual hours and wages even though he remains able and available for work, and is he therefore eligible for full or partial unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on November 4, 2003. As of March 2006 he had worked full time (40 hours per week) as a checker at the employer's Davenport, Iowa store, but as of March 23, 2009 the employer reduced him to part time status due to some attendance issues. After that date but prior to June 13 the employer was scheduling the claimant from between 22 and 39 hours per week. From March 2006 until June 13 the claimant's listed availability for work was unrestricted, open for work any time, including evenings and weekends.

On June 13, effective for the week beginning June 15, the claimant submitted a new availability form. He indicated that he would only be available for work Monday through Friday, 7:00 a.m. to 5:00 p.m., and Saturday, 9:30 a.m. to 5:00 p.m., and not at all on Sundays. The reason for the change was that the claimant was setting his schedule based upon the local bus system, as he did not have personal transportation. As a result in this change in his availability, the employer began scheduling him for about 14 or less hours per week.

On July 6 the claimant submitted a statement indicating his availability for work for that week indicating he could only work Monday through Thursday, 7:00 a.m. to 5:00 p.m. The claimant did not use the availability form as he had on June 13. While it is clear to the administrative law judge that this was intended to apply only to that week, the employer treated it as a new availability overall. And as a result, since July 6 the claimant has only been scheduled for about one day per week.

The claimant established an unemployment insurance benefit year effective June 21, 2009. The claimant has received unemployment insurance benefits since establishing his claim.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if he is not employed at his usual hours and wages and earns less than his weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b.

Beginning on or about March 23, 2009, the employer was not providing the claimant with substantially the same employment as it provided during his base period. Whether the employer had a good business reason for reducing the claimant's hours or even whether the reason might have been misconduct is not a consideration for eligibility where there has been a reduction of hours but not a separation. Consequently, the claimant is qualified to receive partial unemployment insurance benefits upon the filing of his claim effective June 21, 2009, provided he was otherwise eligible.

However, implicit with the concept of allowing benefits for a claimant whose full time hours with his employer have been reduced is the expectation that he remain available for work on the same basis as when he was previously working full time and earning the wage credits on which his unemployment insurance benefits are based. Iowa Code § 96.4-3; 871 IAC 24.22(2)(a). As of June 15, 2009 the claimant significantly reduced his availability from that he held open during his base period, January 1 through December 31, 2008. As of June 21 benefits are denied until or unless the claimant amends his availability with the employer to again be available on the same basis as he was when he was working full time.

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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The unemployment insurance decision dated August 3, 2009 (reference 01) is modified in favor of the employer. The claimant is eligible for partial unemployment insurance benefits based on his reduction of hours from the employer, but only for periods he is available for work on the same basis as when he was working full time. Benefits are denied as of June 21 until and unless he restores his work availability with the employer. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs