

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHY A ENGELBART
Claimant

APPEAL NO. 10A-UI-12395-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**EASTERN IOWA VISITING NURSES AND
HOMEHEALTH CARE**
Employer

OC: 06/27/10
Claimant: Respondent (4/R)

Section 96.4-3 – Able and Available
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Eastern Iowa Visiting Nurses and Homehealth Care (employer) appealed a representative's August 18, 2010 decision (reference 02) that concluded Kathy Engelbart (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 18, 2010. The claimant provided a telephone number for the hearing but was not at the number at the time of the hearing. She, therefore, did not participate. The employer participated by Linda Fanton, Administrator/Chief Executive Officer. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant is able and available for work.

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 hired on March 30, 2007, as an administrative assistant/home healthcare aide. From approximately June 28, 2009, through December 31, 2009, the employer only had two days of work for the claimant and considered the claimant to be laid off. On December 31, 2009, the employer separated the claimant from employment due to financial considerations.

On March 4, 2010, an article appeared in the Anamosa Journal-Eureka indicating the claimant was the owner of a business, Clothes Connection.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant is not available for work.

871 IAC 24.23(7) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(7) Where an individual devotes time and effort to becoming self-employed.

When an employee is devoting time and effort to being self-employed, she is considered to be unavailable for work. The claimant was devoting her time and efforts to opening her own store. She is considered to be unavailable for work after March 4, 2010. The claimant is disqualified from receiving unemployment insurance benefits beginning March 4, 2010, due to her unavailability for work. The claimant was able and available for work from June 28, 2009, through March 3, 2010.

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 claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits may now constitute an overpayment. The issue of the overpayment is remanded for determination.

DECISION:

The representative's August 18, 2010 decision (reference 02) is modified in favor of the appellant. The claimant is qualified to receive unemployment insurance benefits from June 28, 2009, through March 3, 2010. The claimant is disqualified from receiving unemployment insurance benefits because she is not available for work as of March 4, 2010. The issue of the overpayment is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css