

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JEFFREY C BURGER
1032 E STATE ST
MASON CITY IA 50401

K MART CORPORATION
c/o TALX EMPLOYER SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01555-DT
OC: 01/23/05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits

STATEMENT OF THE CASE:

Jeffrey C. Burger (claimant) appealed a representative's February 1, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in conjunction with his employment with K Mart Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 27, 2006. The claimant participated in the hearing. The employer responded prior to the hearing and indicated that it would not participate in the hearing, as it was not contesting the claimant's claim for unemployment insurance benefits. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The claimant started working for the employer on October 17, 1977. He originally worked full time as a department manager in the employer's Mason City, Iowa, store. As of on or about January 26, 2004, as part of a cost-containment measure affecting numerous employees, the employer changed the claimant to part time status and changed him to an associate position. He established an unemployment insurance benefit year effective January 25, 2004. His weekly benefit amount for that claim year was calculated to be \$300.00 based on a base period (4/02 – 3/03) high quarter average weekly wage of \$551.15, which represented approximately 45 hours of work per week. He filed weekly claims each week and received partial unemployment insurance benefits for weeks in which his wage was less than \$315.00.

Upon the expiration of that claim year on January 23, 2005, the claimant established a second claim year. His weekly benefit amount for the new claim year was calculated to be \$271.00 based on a base period (4/03 – 3/04) high quarter average weekly wage of \$480.52, which represented approximately 39 hours of work per week. He filed weekly claims each week and received partial unemployment insurance benefits for weeks in which his wage was less than \$286.00.

There were five consecutive weeks between November 20 and December 24, 2005, in which the claimant's wages were over \$286.00; he therefore received no benefits during those weeks, and was required to reactivate his claim with an additional claim effective December 25, 2005, due to his hours again being cut. A new notice of claim was sent to the employer's third-party administrator, TALX Employer Services, on December 29, 2005. TALX responded by submitting a protest form postmarked January 5, 2006, asserting that "this claimant may be subject to disqualification because: . . . Still Employed . . . part time." Attached was a letter stating that "the claimant is a part-time employee who works all available hours." On February 22, 2006, TALX sent the Agency a letter stating, "we are not contesting this unemployment claim as it is due to a lack of work.

During the five weeks prior to December 25 the claimant had been working approximately 35 or more hours per week. As of December 26, 2005, his hours were cut back to sometimes only seven to ten hours per week due to lack of work. Upon the expiration of the claimant's second claim year on January 22, 2006, the claimant established a third claim year. His weekly benefit amount for the new claim year was calculated to be \$185.00 based on a base period (4/04 – 3/05) high quarter average weekly wage of \$328.51, which represented approximately 26 hours of work per week. He has been filing weekly claims each week and received partial unemployment insurance benefits for weeks in which his wages are less than \$200.00.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the employer can now withdraw its protest to the claimant's claim. The employer does not have the right to withdraw a timely protest. Claimants are not automatically qualified in the absence of a protest. Kehde v. Iowa Division of Job Service, 318 N.W.2d 202 (Iowa 1982). The employer's attempted withdrawal of the protest is ineffective.

The substantive issue in this case is whether the claimant is eligible for partial unemployment insurance benefits. 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. Iowa Code §96.19-38-b.

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.

Beginning on or about December 26, 2005, the employer was not providing the claimant with substantially the same employment as it provided during his base period for his then-current claim year. Consequently, the claimant is qualified to receive partial unemployment insurance benefits upon the filing of additional claim effective December 25, 2006, provided he was otherwise eligible. Likewise, as of January 22, 2006, the employer was not providing the claimant with substantially the same employment as it provided during his now-current claim year, therefore he is likewise currently qualified for partial unemployment insurance benefits in his current claim year, provided he is otherwise eligible.

DECISION:

The unemployment insurance decision dated February 1, 2006 (reference 01) is reversed. The claimant is eligible for partial unemployment insurance benefits for the period of beginning December 25, 2005, through and until such time as the conditions change to either an increase in hours or a separation from employment.

ld/kjw