

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA ROJAS
Claimant

APPEAL NO. 11A-UI-13531-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

K MART CORP
Employer

OC: 03-06-11
Claimant: Respondent (2)

Iowa Code § 96.4(3) – Able and Available
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 4, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 8, 2011. The claimant did participate. The employer did participate through Bryan Nelson, Store Manager and Peggy Smith, Human Resources Manager. Employer's Exhibit One was entered and received into the record.

ISSUES:

Is the claimant able to and available for work?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a soft lines associate part time beginning October 29, 2009 through date hearing as she remains employed. The claimant's hours were reduced because she limited the number of hours she was willing to work. Prior to October 6, 2011 the claimant was available for work Monday, Tuesday Wednesday, Thursday and Friday. Before July 26, 2011 the claimant had stopped being available to work weekends. The claimant asked for and was granted the month of August off work. She was to contact the employer by the end of August to tell them whether she was going to return to work in September. When the employer never heard from the claimant by the end of August, she was not put back on the work schedule. When the claimant finally contacted the employer to tell them she was available she was put back on the schedule. The claimant had been instructed specifically to tell Ms. Smith when she was ready to return to work. The claimant was not sure she would really be ready to return to work on September 1 because she was caring for a dying aunt.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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".

871 IAC 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The claimant limited her own hours of work. She also was granted a leave of absence for the month of August. The claimant knew that all she had to do to be put back on the schedule was to contact Ms. Smith and ask to be scheduled again for hours. The claimant did not know if she would be ready to return to work on September 1 so Ms. Smith was waiting to actually hear from the claimant before scheduling her. The claimant failed to contact Ms. Smith as she knew she was to do to get back on the schedule. The claimant herself was responsible for not being on the schedule in September. Accordingly, benefits are denied.

Iowa Code § 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.

Because the claimant's was not able to and available for work, benefits were paid to which the claimant was not entitled. 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. The claimant is obligated to repay those benefits.

DECISION:

The October 4, 2011 (reference 01) decision is reversed. The claimant is not able to work and available for work effective September 4, 2011. The claimant has been overpaid unemployment insurance benefits. Benefits are denied.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css