

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBBIE A SKARIN
Claimant

APPEAL NO. 14A-UI-01307-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/07/13
Claimant: Respondent (2)

Section 96.4-3 – Still Employed at Same Hours and Wages

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed a timely appeal from a representative's decision dated January 30, 2014, reference 03, which held claimant eligible to receive a partial unemployment insurance benefits beginning January 5, 2014. After due notice was provided, a telephone hearing was held on February 26, 2014. Claimant participated. The employer participated by Ms. Ajah Anderson, Hearing Representative, and witnesses: Mr. Colin Venenga, Store Director, and Mr. Merlin Eckersen, Kitchen Manager.

ISSUE:

The issue in this matter is whether the claimant is still employed part time in the same hours and wages as in the original agreement of hire.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: The claimant began her employment with Hy-Vee, Inc. on September 2, 2012 and continues to be employed at the time of hearing. Ms. Skarin was hired as a part-time kitchen clerk with no guarantee of a minimum number of working hours each week. Claimant was hired to be paid by the hour and continues to be paid at the same or greater rate of pay per hour. As a part-time/as-needed kitchen clerk, the working hours assigned to Ms. Skarin are governed by the volume of business at the Hy-Vee facility where Ms. Skarin is employed. Because the facility is near a resort area, the hours of work offered to the claimant increase during the summer months, but decrease during winter months. It is the company's policy not to guarantee part-time/as-needed employees any number of minimum working hours each week. Since being employed by Hy-Vee, Inc. as a part-time/as-needed kitchen clerk the number of hours of part-time/as-needed work offered to Ms. Skarin has both declined and escalated depending upon the employer needs each week. The working hours offered to Ms. Skarin during the off-season winter weeks have remained essentially consistent with the pattern of employment during the claimant's base period of employment with Hy-Vee, Inc.

It is the claimant's position that when hired as a part-time/as-needed clerk, she hoped to be offered 20 or more working hours each week. Claimant found, however, that her working hours increased during the busy summer months but, had declined to 20 hours per week or fewer hours during the winter months based upon employer needs.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Skarin is still employed in a part-time job at the same hours and wages as contemplated in the original agreement of hire. It does.

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".

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.

The evidence in the record establishes that Ms. Skarin was hired in a part-time/as-needed capacity with no guarantee as to the minimum number of hours she would be assigned each week. The claimant was also to be paid by the hour and continues to be paid at the same or greater rate per hour. As a part-time/as-needed employee the claimant's hours have fluctuated due to business needs. The claimant's pattern of employment is consistent with the pattern of part-time/as-needed employment with Hy-Vee, Inc. during her base period, therefore, the claimant cannot be considered to be partially unemployed as she is still employed part-time/as-needed at the same hours and wages as contemplated in the original agreement of hire. As there was no guarantee of the minimum number of hours the claimant would be assigned each week, there has been no change in the agreement of hire. The claimant's reduced workweeks are, therefore, no different than agreed upon by the parties when Ms. Skarin was hired by Hy-Vee, Inc. Benefits are denied as of January 5, 2014.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrator record reflects the claimant has received unemployment insurance benefits in the amount of \$585.00 since claiming benefits beginning January 5, 2014.

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.

Because the claimant received unemployment insurance benefits to which she was not entitled, the claimant is liable to repay that amount. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and later is determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. In this case the claimant received benefits but was not eligible for those benefits and, therefore, the claimant is obligated to repay to the agency the benefits she received.

DECISION:

The representative's decision dated January 30, 2014, reference 03, is reversed. Claimant was not eligible to receive partial unemployment insurance benefits beginning January 5, 2014 as she continued to be employed part time at the same hours and wages agreed upon at the time of hire. Claimant has been overpaid unemployment insurance benefits in the amount of \$585.00 and is liable to repay that amount.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs