

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GAYLE A SHEPHERD
Claimant

APPEAL NO. 10A-UI-01913-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC
Employer

OC: 12/20/09
Claimant: Respondent (2-R)

Section 96.4-3 - Able to and Available for Work
Section 96.3-7 - Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated January 28, 2010, reference 01, that concluded the claimant was on a short time layoff and was available for work. A telephone hearing was held on March 16, 2010. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Dave Wagner participated in the hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant able to and available for work?

FINDINGS OF FACT:

The claimant started working for the employer as a supported living technician providing services to clients with developmental disabilities in April 2009. Her rate of pay was \$9.25 per hour.

Employees, including the claimant, received a notice by email each week about the open shifts for the following week and then indicate the shifts they want to prepare the schedule.

The claimant filed a new claim for unemployment insurance benefits with an effective date of December 20, 2009. Her weekly benefit amount was determined to be \$174.00. This means her earning limit to receive benefits was \$189.00.

During the week of December 20 to 26, the claimant was scheduled for 21.75 hours of work and training and her gross wages totaled \$201.19. The claimant could have more hours if she had requested more shifts. The claimant reported wages of \$148.00 when she filed her weekly claim for benefits. She apparently did not report wages she received for 5 hours of training she received. She received \$69.00 in unemployment benefits for the week.

During the week of December 27, 2009, to January 2, 2010, the claimant was scheduled to work 11.75 hours and her gross wages of \$108.69. The claimant could have had more hours if

she had requested more shifts and earned at least \$189.00, which would amount to a little over 20 hours of work. She received \$106.00 in benefits for the week.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant is able to work, available for work, and earnestly and actively seeking work as required by the unemployment insurance law in Iowa Code section 96.4-3.

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 claimant applied for partial unemployment insurance benefits for the weeks ending December 26 and January 2 based on a reduction in her hours, but the evidence presented makes it clear that the employer did not reduce her hours and she could decide how many hours she wanted to work each week. She was not eligible for benefits for the weeks in question.

In looking over this file, it appears the claimant may have been working another part-time job. The result, however, is the same because the claimant had the ability to work more hours for the employer and chose not to do so.

The unemployment insurance law requires benefits to 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. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal 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 section 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated January 28, 2010, reference 01, is reversed. The claimant is ineligible for benefits effective December 20, 2009. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs