

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERYL L MOZENA

Claimant

APPEAL NO: 12A-UI-03689-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA SAVINGS BANK

Employer

OC: 08/21/11

Claimant: Appellant (1-R)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)i(1) – On-Call Worker
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The claimant appealed a department decision dated April 5, 2012, reference 02, that held she was still employed in the same part-time job on February 5, 2012, and benefits are denied. A telephone hearing was held on April 25, 2012. The claimant participated. Jan Whitver, Vice President/HR, Chad Leighty, and Janice Scott, participated for the employer. Employer Exhibit One was received as evidence.

ISSUES:

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

The issue is whether the claimant is partially unemployed.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began working for the employer as an on-call /part-time teller on April 12, 2010. The department record show employer reported earnings for claimant in the 2011 year as follows: first quarter - \$3,790; second quarter - \$2,771; third quarter - \$2,104; and, fourth quarter - \$1,829. The average weekly wages for the four quarters is \$291.54; \$213.15; \$161.85, and \$140.69. The reason the claimant worked more hours during the first part of 2011 is she was standing in for two employees who were on medical leave.

The claimant remains an on-call employee thru the date of this hearing. She is not a scheduled worker though she usually comes on Thursdays for other workers whom are allowed a comp day. The claimant has not worked for any other employer during her base period of employment to the date of re-opening her claim (February 5, 2012) thru the date of this hearing. Claimant has reported wages for 10 of the 11-week period she has recently claimed for benefits and the average wage earned is consistent in five of those weeks what she earned during her base period.

REASONING AND CONCLUSIONS OF LAW:

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 24.22(2)i(1) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

i. On-call workers.

(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

The administrative law judge concludes that the claimant is not eligible for benefits effective February 5, 2012, because she does not meet the availability requirements of the law.

She has worked only part-time on-call for the employer that limits her availability for work with any other employer. She is not a scheduled worker for the employer, but is called when needed.

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 department record shows claimant has received unemployment benefits on her February 5, 2012 claim, so the overpayment issue is remanded to claims for a decision.

DECISION:

The department decision dated April 5, 2012, reference 02, is affirmed. The claimant is not eligible for benefits effective February 5, 2012, as an on-call worker she does not meet the availability requirements of the law. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs