

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN M GAUL
Claimant

APPEAL NO: 06A-UI-09038-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM DISTRIBUTION MGMT INC
Employer

**OC: 01-15-06 R: 04
Claimant: Respondent (2)**

Section 96.4-3 - Able and Available
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 29, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 25, 2006. The claimant did participate. The employer did participate through Jodi Bryson, Manager of the Flat Pack Department, Mauricio Castaneda, Human Resources Manager and was represented by Peg Heenan of TALX UC eXpress. Employer's Exhibit One was received.

ISSUES:

Was the claimant able to and available for work?

Was the claimant overpaid unemployment insurance payments?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a processor full-time beginning in March 1995. She is still employed to date of hearing. The employer has a voluntary layoff policy that allowed employees to volunteer for layoffs. If an employee does not volunteer to be laid off, then they will be allowed to work. The claimant signed up for voluntarily layoff on July 24, 26 and 28. If the claimant had not signed up for layoff, she would have been allowed to work. It was the claimant's choice to sign up for voluntary layoff. The claimant also signed up for voluntary layoff for August 14, 15 and 16. The building was closed for inventory on August 17 and 18 and no employees were allowed to work. It was the claimant's choice to sign up for voluntary layoff for the first three days of the week. The claimant would have been allowed to work on August 14, 15 and 16 if she had not signed up for voluntary layoff.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

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 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(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 did not have to sign up to take time off work. It was solely the claimant's choice as to whether she worked or did not work. The claimant removed herself for three days each week that she signed up for voluntary time off. The claimant could have worked but by signing up to take time off, she removed herself from availability for work. She did not have to sign up to take time off. The administrative law judge concludes that the claimant removed herself from work. The administrative law judge further concludes that this situation is not like an employee who is forced to bump an employee in order to maintain employment and thus, eligible for benefits. Here the employer did not in any way require the claimant to take time off or to face unemployment if she chose not to bump. It was up to the claimant alone to remove herself from the workplace for the majority of each week. To award benefits under these circumstances would be allowing someone to take leave without pay, yet still collect unemployment insurance benefits even when work was available for them. Here work was available for the claimant and she chose not to work, she has thus, removed herself to the point where she cannot be considered able to and available for work. Accordingly, benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The August 29, 2006, reference 01, decision is reversed. The claimant is not able to work and available for work effective July 24, 2006 through July 28, 2006 and from August 14, 2006 through August 16, 2006. Benefits are denied. The claimant is overpaid benefits in the amount of \$658.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/cs