

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW A KAIN
Claimant

APPEAL NO. 11A-UI-03928-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NPC INTERNATIONAL INC
PIZZA HUT**
Employer

**OC: 01/30/11
Claimant: Respondent (2-R)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 24, 2011, reference 01, decision that allowed benefits under a theory of partial unemployment and that concluded the employer's account could be charged for benefits. After due notice was issued, a hearing was held on April 20, 2011. Claimant participated. Jonathan Heyer, Area General Manager, represented the employer.

ISSUES:

Whether the claimant has been able to work and available for work since establishing the new original claim for benefits that was effective January 30, 2011.

Whether the claimant was partially unemployed from his employment since January 30, 2011.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mathew Kain has been employed by the Pizza Hut in Oskaloosa since July 2009 and continues in the employment at this time. Mr. Kain started the employment as a part-time server, averaging 15-20 hours per week. Mr. Kain now averages 25-30 hours per week. Some of those hours come from work as a shift manager. There has been no decrease in the number of work hours the employer makes available to Mr. Kain. There has been no decrease in Mr. Kain's wage. Indeed, the hours and the wage have increased. When Mr. Kain works as a server he makes an hourly wage plus tips. When Mr. Kain works as a shift manager he receives an \$8.50 hour wage.

Prior to working for Pizza Hut, Mr. Kain had most recently worked for Pella Corporation. Mr. Kain separated from that employment in 2008.

Mr. Kain established a new original claim for benefits that was effective January 30, 2011.

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".

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b).

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. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against

the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The Agency's sole basis for allowing benefits to Mr. Kain in connection with the claim that was effective January 30, 2011, when the erroneous conclusion that Mr. Kain was partially unemployed from the Pizza Hut in Oskaloosa. The administrative law judge notes that this employer is the sole base period employer for purposes of the claim year that began January 30, 2011. The evidence indicates that there has been no employer-initiated decrease in available work hours or wage. Mr. Kain is not partially unemployed and is not eligible for benefits under the theory that he is partially unemployed. The employer's account will not be charged for benefits paid to the claimant in connection with the claim year that started January 30, 2011.

Further, since Mr. Kain continued to enjoy the same or better employment from the sole base period employer as he enjoyed throughout the base period, Mr. Kain does not meet the availability requirement set forth in Iowa Code section 96.4(3). Mr. Kain has been ineligible for benefits since he established his claim for benefits. Benefits are denied effective January 30, 2011.

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.

Any benefits Mr. Kain has received in connection with the claim year that started January 30, 2011 would constitute and overpayment. This matter is remanded to the Claims Division for entry of an appropriate overpayment decision.

DECISION:

The Agency representative's March 24, 2011, reference 01, is reversed. The claimant has not been partially unemployed since he established the claim for benefits that was effective January 30, 2011. The claimant has not met the work availability requirement in Iowa Code section 96.4(3) since establishing his claim for benefits. The claimant is ineligible for benefits in connection with the claim that was effective January 30, 2011. Benefits are denied effective January 30, 2011. The employer's account shall be relieved of charges for benefits paid to the claimant in connection with the claim that was effective January 30, 2011.

This matter is remanded to the Claims Division for entry of an overpayment decision regarding any benefits disbursed to the claimant in connection with the claim that was effective January 30, 2011.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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