

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOCELYN A KIRCHNER
Claimant

APPEAL NO. 15A-UI-13021-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/27/15
Claimant: Respondent (4)

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
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 17, 2015, reference 01, decision that allowed benefits to the claimant effective September 27, 2015, provided she met all other eligibility requirements, based on an Agency conclusion that the claimant was able to work and available for work. After due notice was issued, a hearing was held on December 14, 2015. Claimant Jocelyn Kirchner did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Sabrina Bentler of Corporate Cost Control represented the employer and presented testimony through Marcie Neuhalfen and Zachary Rickett. The administrative law judge took official notice of the Agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant (DBRO). The administrative law judge took official notice of the Agency's administrative record of the claimant's weekly claims reports (KCCO).

ISSUES:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant has been partially unemployed since establishing her claim for benefits.

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

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jocelyn Kirchner has been employed by Hy-Vee since August 7, 2014 and continues in the employment. Ms. Kirchner began the employment as a part-time overnight stocker. Ms. Kirchner's regular

work hours in the overnight stocker position were 10:00 p.m. to 5:30 a.m. Her wage was \$9.00 per hour.

During the summer of 2015, the employer had an opening for a baker. Ms. Kirchner applied for the position and was hired for the position. Ms. Kirchner began her work in the bakery department during the first week of July. Her work hours in the bakery department were 5:00 a.m. to 1:00 p.m. Because the bakery's busiest days fell on the weekend, Ms. Kirchner's bakery department work schedule generally included Saturdays and/or Sundays. The employer would schedule Ms. Kirchner for an additional two or three shifts during the remainder of the week. The bakery work paid \$9.00 per hour, the same as the overnight stocking work.

On or about September 8, 2015, Ms. Kirchner notified Marcie Neuhalfen, Manager of Perishables, that she no longer wanted to work weekends. Ms. Kirchner told Ms. Neuhalfen that she wanted be home on the weekends to participate in her children's activities. Based on Ms. Kirchner's notice of changed availability, the employer began to schedule her for fewer weekend shifts.

The employer uses a Monday-Sunday work week. During the work week that started August 31, 2015, Mr. Kirchner worked 24.17 hours. During the work week that started September 7, 2015, Ms. Kirchner worked 41.8 hours. This was the week during which Ms. Kirchner announced she no longer wanted to work weekends. During the work week that started September 14, 2015, Ms. Kirchner worked 27.91 hours. During the work week that started September 21, 2015, Ms. Kirchner worked 18.03 hours, but called in sick for her shift on Saturday, September 26, 2015.

Ms. Kirchner established her claim for unemployment insurance benefits during the week that started September 27, 2015. Workforce Development calculated Ms. Kirchner's weekly benefit amount at \$166.00. Hy-Vee is the sole base period employer.

Ms. Kirchner reported weekly wages and received weekly benefits as follows. For the week that ended October 3, 2015, Ms. Kirchner reported \$144.00 in wages and received \$63.00 in benefits. The same thing happened for the weeks that ended October 10 and 17, 2015. For the week that ended October 24, 2015, Ms. Kirchner reported \$216.00 in wages and received no unemployment insurance benefits. The same thing happened for the week that ended October 31, 2015. Ms. Kirchner then discontinued her claim for benefits.

During the benefit week of September 27, 2015 through October 3, 2015, Ms. Kirchner was scheduled to work three 5:00 a.m. to 1:00 p.m. shifts in the bakery. Ms. Kirchner called in sick for the shifts scheduled for Sunday, September 27 and Monday, September 28. Those shifts would have provided about 15 hours of work and \$135.00 in wages. Ms. Kirchner worked the shift scheduled for Friday, October 2, 2015. Indeed, on that day, Ms. Kirchner worked from 5:00 a.m. to 2:23 p.m., with a 30-minute unpaid lunch. In other words, Ms. Kirchner worked just short of nine hours and earned wages just short of \$81.00. Had Ms. Kirchner not told the employer she was no longer available on Saturdays, she would have been scheduled for a Saturday shift.

During the benefit week of October 4-10, 2015, the employer only scheduled Ms. Kirchner for a single 5:00 a.m. to 1:00 p.m. shift on Wednesday, October 7, 2015. Ms. Kirchner worked from 4:59 a.m. to 1:48 p.m., with a 30 minute lunch. In other words, Ms. Kirchner worked roughly 8.25 hours and earned wages of about \$74.00. Had Ms. Kirchner not told the employer that she was no longer available to work weekends, she would have had one or two additional shifts on Saturday and/or Sunday of that week.

During the benefit week of October 11-17, 2015, Ms. Kirchner was scheduled to work three 5:00 a.m. to 1:00 p.m. shifts and worked all three. Indeed, Ms. Kirchner worked until 2:13 p.m. on Sunday, October 11, worked until 1:16 p.m. on Wednesday, October 14, and worked until 1:31 p.m. on Friday, October 16, 2015. In all, Ms. Kirchner worked about 23.5 hours for the week and had wages of about \$211.50. Had Ms. Kirchner not told the employer she was unavailable to work Saturdays, she would have been scheduled to work Saturday, October 17, 2015.

During the benefit week of October 18-24, 2015, Ms. Kirchner was scheduled to work at 5:00 a.m. to 1:00 p.m. shifts on Thursday, October 22 and Saturday, October 24. On October 22, Ms. Kirchner worked until 2:02 p.m. On October 24, Ms. Kirchner worked until 2:49 p.m. During that week, Ms. Kirchner picked a 9:00 a.m. to 4:00 p.m. cashiering shift on October 21, 2015. For the week, Ms. Kirchner worked just over 26 hours and earned wages of about \$234.00.

During the benefit week of October 25-31, 2015, Ms. Kirchner returned to her overnight stocking position and worked three shifts. Ms. Kirchner worked about 25.5 hours and earned about \$229.50 in wages.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 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).

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.]

Because the claim was only active for the five-week period of September 27, 2015 through October 31, 2015, the administrative law judge need only be concerned with those weeks. The questions of whether Ms. Kirchner was available for work and/or partially unemployed must be determined week-by-week.

For the week that ended October 3, 2015, Ms. Kirchner's wages totaled \$81.00. She would have had an additional \$135.00 in wages had she not been absent for shifts on September 27 and 28, 2015. In addition, she would have had additional wages had she not reduced her availability. The evidence indicates that Ms. Kirchner was not available for work for the majority of the week and, therefore, did not meet the availability requirement for that week. In addition, because the scheduled hours would have provided wages exceeding her weekly unemployment benefit amount by more than \$15.00, she cannot be deemed partially unemployed for that week. Ms. Kirchner is not eligible for benefits for the week that ended October 3, 2015.

During the benefit week that ended October 10, 2015, the employer had indeed reduced Ms. Kirchner's work hours to the single shift and Ms. Kirchner had wages of \$74.00. The reduction in hours for the week went beyond Ms. Kirchner's change in availability. For that week, Ms. Kirchner met the work availability requirement and was indeed partially unemployed. Ms. Kirchner was eligible for benefits for that week provided she met all other eligibility requirements.

During the benefit weeks that ended October 17, 2015, Ms. Kirchner worked about 23.5 hours for the week and had wages of about \$211.50. Ms. Kirchner was available for work that week, but was not partially unemployed that week. Ms. Kirchner was not eligible for benefits for that week.

During the benefit week that ended October 24, 2015, Ms. Kirchner worked just over 26 hours and earned wages of about \$234.00. Ms. Kirchner was available for work, but was not partially unemployed that week. Ms. Kirchner was not eligible for benefits for that week.

During the benefit week that ended October 31, 2015, Ms. Kirchner worked about 25.5 hours and earned about \$229.50 in wages. Ms. Kirchner was available for work, but was not partially unemployed that week. Ms. Kirchner was not eligible for benefits for that week.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for the benefits, Workforce Development must recover the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits. Because this decision disqualifies Ms. Kirchner for benefits for the weeks that ended October 3 and 17, 2015, the benefits she received for those weeks constituted an overpayment. The claimant was overpaid \$63.00 in benefits for the week that ended October 3, 2015. The claimant was overpaid \$63.00 in benefits for the week that ended October 17, 2015. The total overpayment was \$126.00. The claimant must repay that amount.

DECISION:

The November 17, 2015, reference 01, decision is modified as follows. For the week that ended October 3, 2015, the claimant did not meet the availability requirement, was not partially unemployed and was not eligible for benefits. For the week that ended October 10, 2015, the claimant was available for work, was partially unemployed and was eligible for benefits provided she met all other eligibility requirements. The employer's account may be charged for the benefits paid to the claimant for that week. For the weeks that ended October 17, 24, and 31, 2015, the claimant was available for work, but not partially unemployed, and not eligible for benefits. The claimant was overpaid \$63.00 in benefits for the week that ended October 3, 2015. The claimant was overpaid \$63.00 in benefits for the week that ended October 17, 2015. The total overpayment was \$126.00. The claimant must repay that amount.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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