

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY L SMITH
Claimant

APPEAL NO. 09A-UI-06509-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**Original Claim: 03/08/09
Claimant: Respondent (2-R)**

Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (Tyson) filed an appeal from a representative's decision dated April 14, 2009, reference 02, which allowed benefits to Kelly Smith but denied the employer relief from benefit charges. After due notice was issued, a hearing was held by telephone on May 22, 2009. Ms. Smith participated personally. The employer participated by Eloisa Baumgartner, Employment Manager.

ISSUE:

At issue in this matter is whether Ms. Smith satisfies the availability requirements of the law.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Smith began working for Tyson on December 17, 2007 as a part-time production worker. In November of 2008, she was told she needed to go to full-time status in order to remain in the employment. She opted to remain and became full time on November 24, 2008.

Ms. Smith's son experiences seizures and she sometimes had to miss work due to his condition. Her mother also needs assistance because of illness. For these reasons, Ms. Smith opted to return to being a part-time employee. She became part time on January 23, 2009 but could have remained a full-time employee. The employer is providing her with the amount of work agreed to on January 23, 2009.

Ms. Smith filed a claim for job insurance benefits effective March 8, 2009. She has received a total of \$432.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

In order to receive job insurance benefits, an individual must be available for work within the meaning of Iowa Code section 96.4(3). Where an individual is still employed in a part-time job under the same terms and conditions as hired, she is not considered partially unemployed and

is not available for work. 871 IAC 24.23(26). It was Ms. Smith's decision to change her status from full-time to part-time in January of 2009. Therefore, when she filed her claim for job insurance benefits effective March 8, 2009, she was working the number of hours contemplated by the January 23, 2009 agreement. Because her workweek was not reduced by the employer, she was not partially unemployed.

The administrative law judge appreciates that Ms. Smith went to full time in November of 2008 at the employer's initiative. If she had not gone to full-time, she would have still been part-time in January of 2009. Therefore, she would have still been working under the same terms and conditions as hired. The intervening period of full-time employment does not alter the fact that she was working part-time when she filed her claim for benefits, either based on the original terms of hire or the terms of the January 23 agreement. For the reasons stated herein, it is concluded that Ms. Smith was not available for work within the meaning of the law as of March 8, 2009. As such, she is not entitled to job insurance benefits.

Ms. Smith has received benefits since filing her claim. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated April 14, 2009, reference 02, is hereby reversed. Ms. Smith is not entitled to job insurance benefits on her claim filed effective March 8, 2009, as she was not available for work within the meaning of the law. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Smith will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw