

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA J WILKINSON
Claimant

APPEAL NO. 090-UI-08302-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KIMS FOODS INC-WENDY'S
Employer

OC: 02/08/09
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated March 25, 2009, reference 01, which held claimant able and available for work. After due notice, a telephone conference hearing was scheduled for and held on June 25, 2009. Employer participated by Becky Crone, General Manager. Claimant failed to respond to the hearing notice and did not participate.

ISSUE:

The issue in this matter is whether claimant is able and available for work and whether claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant works as a part-time crew person. During the year 2008 claimant worked on average 25.78 hours per week for this employer. Claimant in 2009 voluntarily asked that her hours be cut to 15 per week so she could receive some type of medical coverage. Claimant then filed for unemployment effective February 8, 2009.

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".

Benefits are withheld until such time as the claimant makes herself available for her regular hours of 26 per week. Claimant has unduly restricted herself from performing work in the same manner as she did during the base period. Claimant is not available for work and therefore disqualified for benefits. Benefits shall be withheld effective February 8, 2009.

The next issue concerns an overpayment of unemployment insurance benefits.

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.

This matter is remanded to claims section for determination of an overpayment.

DECISION:

The decision of the representative dated March 25, 2009, reference 01, is reversed and remanded. Claimant is not eligible to receive unemployment insurance benefits, effective February 8, 2009, until claimant meets all other eligibility requirements. This matter is remanded for determination of overpayment.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/pjs