

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBBIE M MEYER

Claimant

APPEAL NO. 11A-UI-06915-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY TABLE OF ALGONA LTD

Employer

OC: 04/24/11

Claimant: Respondent (2R)

Section 96.4-3 – Able and Available

Section 96.4-3 – Same Hours and Wages

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated May 20, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 22, 2011. Claimant participated. Employer participated by Dan Potts, owner. The record consists of the testimony of Debbie Meyer; the testimony of Dan Potts; and Employer's Exhibits 1-11.

ISSUES:

Whether the claimant is able and available for work; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a restaurant located in Algona, Iowa. The claimant was hired in December 2003 as a part-time waitress. She is still employed by the restaurant.

The claimant established a claim for unemployment insurance benefits with an original claim date of April 24, 2011. She filed this claim because she felt that she was not getting as many hours as she had received previously. The week of April 18, 2011 through April 24, 2011, the claimant signed off, that is she asked not to be scheduled, for four days and she then said she could not work for one shift. (Exhibit 2) The week of May 2, 2011, through May 8, 2011, the claimant signed off one shift and worked three shifts. (Exhibit 3) The week of May 16, 2011, through May 22, 2011, the claimant signed off two days and only worked two shifts. (Exhibit 4) The week of May 30, 2011 through June 5, 2011, the claimant signed off three days and worked two days. (Exhibit 6)

The claimant's reasons for signing off or being unable to work were primarily childcare responsibilities such as taking the children to the doctor or staying home with them. She also had personal illness and personal doctor's appointments.

The claimant did ask for extra hours. The employer could not provide these hours because it would have meant taking hours away from other employees. The claimant felt that since she had given her shifts to these employees, these employees should have given their shifts to her.

REASONING AND CONCLUSIONS OF LAW:

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 evidence in this case established that the claimant is likely working fewer hours than during her base period. When she initially started working for the employer, she worked on average 30 hours per week. Although the claimant testified that she was "guaranteed" 30 to 32 hours per week when hired, the more credible testimony from the employer was that hours are never guaranteed for part-time employees.

The question in this case is why the claimant is working fewer hours. The greater weight of the evidence is that the claimant is working fewer hours by choice. The claimant has family responsibilities and as a result, she either does not make herself available for work or she does not come to work and has another employee work for her. A reasonable inference from the testimony is that the claimant expects that the employer will make hours available to her when she wants to work them as opposed to being available when her employer asks her to work. She also wants the employer to take away hours from other employees who are willing to work when asked to by the employer. This is not a reasonable expectation on her part.

The administrative law judge concludes that the claimant has failed to make herself available because she is unwilling to work during the hours in which suitable work is available. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated May 20, 2011, reference 01, is reversed. The claimant is disqualified from receiving benefits beginning April 30, 2011, due to not being able and available for work. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs