

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERI L CERWICK
Claimant

APPEAL NO. 12A-UI-12960-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRIENDSHIP HAVEN INC
Employer

OC: 09/30/12
Claimant: Respondent (2R)

Section 96.4-3 – Employed at Same Hours and Wages
871 IAC 24.23(26) – Still Employed Part-time at the Same Hours and Wages as Agreed
In the Contract of Hire

STATEMENT OF THE CASE:

Friendship Haven Inc. filed a timely appeal from the representative's decision dated October 19, 2012, reference 01, which held the claimant eligible to receive unemployment insurance benefits beginning September 30, 2012 finding that the claimant was able and available for work. After due notice was provided, a telephone hearing was held on November 29, 2012. The claimant participated personally. The employer participated by Ms. Stacy Beck, Rehabilitation Coordinator.

ISSUE:

At issue in this matter is whether the claimant is able and available for work within the meaning of the Employment Security Law.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Ms. Teri Cerwick began employment with Friendship Haven Inc. on July 19, 2007. The claimant was hired to work as a part-time certified nursing assistant and was not guaranteed any minimum number of working hours each week as a part-time employee.

During the course of her employment with Friendship Haven Ms. Cerwick has worked various hours and days. In January 2012 the claimant limited her working hours to Thursdays and every other weekend due to another part-time job and the need to care for a family member. Later the claimant was given additional working hours when available, however, at times the claimant called off work because she was ill and at times the claimant gave her working shifts away to other employees rather than working them herself. Ms. Cerwick was given approximately two and one-half days per week of scheduled working until the end of September 2012. At that time the claimant's working hours were reduced to two shifts per week due to low patient census. Ms. Cerwick filed a claim for unemployment insurance benefits with an effective

date of September 30, 2012. Ms. Cerwick at times continues to give some working hours away to other employees after she had filed her claim for benefits.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the claimant should be disqualified for being unavailable for work. She should.

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".

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) 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.

Inasmuch as the evidence in the record establishes that Ms. Cerwick was hired as a part-time employee with no guarantee as to any minimum number of working hours per week and the claimant continues to be employed under the same terms as contemplated in the original agreement of hire, she was not working on a reduced workweek different from the contract of hire and thus cannot be considered to be partially unemployment.

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.

DECISION:

The representative's decision dated October 19, 2012, reference 01, is reversed. The claimant is not eligible to receive partial unemployment insurance benefits effective September 30, 2012 as she continues to be employed part time working the same hours and wages as contemplated in the original of hire that did not guarantee any minimum number of working hours per week as a part-time employee. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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