

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K REUTER
Claimant

APPEAL NO. 11A-UI-15979-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR SERVICES INC
Employer

OC: 04/17/11
Claimant: Respondent (2-R)

Section 96.4(3) – Able & Available
Section 96.4(3) – Still Employed Same Hours and Wages
Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 6, 2011, reference 04, decision that allowed benefits effective October 30, 2011 based on an Agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on January 17, 2012. Claimant Kimberly Reuter did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jennifer Foster represented the employer. Exhibits One through Four were received into evidence. The administrative law judge took notice of the Agency's administrative record (DBRO) of benefits of wages reported by the claimant and benefits disbursed to the claimant.

ISSUES:

Whether Ms. Reuter has been able to work and available for work since she established the additional claim for benefits that was effective October 30, 2011.

Whether Ms. Reuter has been partially unemployed since she established the additional claim for benefits that was effective October 30, 2011.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kimberly Reuter was employed by Family Dollar Services as a full-time repack order filler from October 17, 2011 and last performed work for the employer on December 21, 2011. Family Dollar Services is not a base period employer for purposes of the claim year that started for Ms. Reuter on April 18, 2011 and that will end for her on or about April 16, 2012. Ms. Reuter's hourly wage was \$10.45. Ms. Reuter's work week was supposed to consist of four 10-hour shifts per week, 7:00 p.m. to 5:30 a.m., with a half hour for lunch. The employer "guaranteed" 32 hours per week. Ms. Reuter worked at the distribution facility that supplied the employer's

retail stores. The specific number of hours the employer had available for her any given week was contingent upon the needs of the retail stores.

Prior to becoming an employee of Family Dollar Services on October 17, 2011, Ms. Reuter had performed work for the employer through Sedona staffer during the period of August 1, 2011 to August 17, 2011.

Ms. Reuter's weekly hours worked and gross wages earned during the employment were as follows:

<u>Week ending date</u>	<u>Gross wages</u>	<u>Hours worked</u>	<u>Wages Ms. Reuter reported</u>
10/22/11	367.53	35.17	pre claim
10/28/11	292.40	27.98	pre claim
11/5/11	348.72	33.97	320.00
11/12/11	364.92	34.92	349.00
11/19/11	314.82	26.75 *	260.00

*Ms. Reuter was absent for a shift on 11/14/11.

11/26/11	369.62	35.37**	340.00
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**Ms. Reuter's wages during Thanksgiving week derived from 8.35 hours on Monday, 10.18 hours on Tuesday, and 6.83 hours on Wednesday. The employer paid Ms. Reuter for 10 hours of holiday pay for the Thanksgiving holiday.

12/3/11	340.86	39.78	290.00
12/10/11	387.37	34.48	340.00
12/17/11	265.70	21.25***	220.00

***Ms. Reuter was absent for a shift on 12/12 and left work due to illness shortly after starting her shift on 12/15.

12/24/11		20.24****	210.00
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****Ms. Reuter left the employment midway through this week.

12/31/11			240.00
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Ms. Reuter established an additional claim for benefits that was effective October 30, 2011 and received benefits for the period of October 30, 2011 through December 31, 2011. Ms. Reuter's weekly unemployment insurance benefit amount was \$321.00. Ms. Reuter discontinued her claim after December 31, 2011.

Ms. Reuter received \$705.00 in benefits for five weeks between October 30 and December 24, 2011. Ms. Reuter received an additional \$161.00 in benefits for the week ending December 31, 2011.

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".

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). Under this rule, regardless of the number of work hours Ms. Reuter got from the employer, Ms. Reuter could not be considered partially unemployed during any week in which her weekly wages exceeded \$336.

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 this employer is not a base period employer, this employer's account would not be charged for benefits paid to Ms. Reuter for the benefit year that started on April 17, 2011 and that will end on or about April 16, 2012.

Ms. Reuter understated her gross weekly wages when reporting them to Workforce Development. Ms. Reuter's gross weekly wages exceeded her weekly benefit amount plus \$15.00 during the weeks that ended November 5, November 12, November 26, December 3, and December 10, 2011. Ms. Reuter was not partially unemployed and not eligible for benefits for any of these weeks. This leaves only the week ending November 19 and the week ending December 17. The weight of the evidence indicates that during each of the weeks from the filing of the claim on October 30, 2011 through the week that ended December 24, 2011, the employer continued to make roughly 34 hours available to Ms. Reuter. The employer had only

guaranteed her 32 hours. The evidence indicates that since filing the additional claim on October 30, 2011, any decrease in hours worked was attributable to a decreased in the number of hours Ms. Reuter was available to work. The evidence indicates that Ms. Reuter was not partially unemployed during the period of October 30, 2011 through December 24, 2011. Ms. Reuter is not eligible for benefits during the period of October 30, 2011 through December 24, 2011 under a theory of partial unemployment.

Given the extent that Ms. Reuter was working for the employer during the period of October 30, 2011 through December 24, 2011, Ms. Reuter did not meet the "available" definition for unemployment purposes. Where a claimant's availability for *other* work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market, the claimant does not meet the availability requirement and is disqualified for benefits. See 871 IAC 24.23(23).

Ms. Reuter was not partially unemployed, not "available" for work, and not eligible for unemployment insurance benefits during the period of October 30, 2011 through December 24, 2011.

Because overpayment of benefits was not an issue set for hearing, and because the claimant did not make herself available for the hearing, this matter will be remanded to the Claims Division for entry of an overpayment decision concerning the \$705.00 in benefits the claimant received for five weeks between October 30 and December 24, 2011. The remand will need to address the claimant's separation from the employment, her availability during the week that ended December 31, 2011, and any overpayment for the \$161.00 received for that week.

DECISION:

The Agency representative's December 6, 2011, reference 04, is reversed. The claimant was not partially unemployed, not "available" for work, and not eligible for unemployment insurance benefits during the period of October 30, 2011 through December 24, 2011.

This matter is remanded to the Claims Division for entry of an overpayment decision concerning the \$705.00 in benefits the claimant received for five weeks between October 30 and December 24, 2011. The remand will need to address the claimant's separation from the employment on December 21, 2011. The remand will also need to address the claimant's availability during the week that ended December 31, 2011, and any overpayment for the \$161.00 in benefits disbursed for that week

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw