

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

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**Appeal Number: 04A-UI-04783-H2T
OC 03-21-04 R 04
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 16, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 20, 2004. The claimant did participate. The employer did participate through Pete Behnke, Restaurant Manager and (representative) Terry Moffit, Director of Operations. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a customer service worker in a Kentucky Fried Chicken part-time

beginning June 7, 1994 through August 8, 2003 when she left to go on an employer approved leave of absence. The claimant returned to the employer and offered them her services around January 15, 2004. No work was available for the claimant and she was told to return in March 2004. Prior to her leave of absence the claimant had worked Monday, Thursday and every other Saturday as well as one or two nights per week. Employer's Exhibit One, the payroll record of the claimant, established that only on two separate pay periods (a pay period is two weeks) did the claimant ever work more than 30 hours per week. The records clearly establish that the claimant almost never worked 30 hours per week. On March 15, 2004, the employer offered the claimant work that would have included working on Saturday as well as working some nights per week, both of which she had done prior to her leave of absence. The claimant refused the work as she is now limiting her availability to work to days only with no weekends at all so that she can raise her grandson. The claimant also insisted that the employer provide her 30 hours per week, something Employer's Exhibit One makes clear the claimant never regularly had prior to her leave of absence. The claimant will only work 30 hours per week or none so that she can obtain state financed childcare for her grandson.

The employer will allow the claimant to start working full time daytime hours including no nights or weekends beginning June 7, 2004 when another employee changes hours for the summer. The employer could not meet all of the claimant's limitations on her work schedule prior to June 7, 2004.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective March 15, 2004.

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(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 record establishes that the claimant never worked 30 hours per week on a regular basis prior to her leave of absence. Additionally, prior to her leave the claimant worked nights and weekends regularly. When the claimant returned from her leave of absence she refused to work nights, weekends and demanded a minimum of 30 hours per week. The claimant is not willing to work during the hours in which suitable work for her is available. Accordingly, benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The April 16, 2004, reference 01, decision is reversed. The claimant is not able to work and available for work effective March 15, 2004. Benefits are denied. The claimant is overpaid benefits in the amount of \$1,304.00.

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