

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

SHERI LAY
1717 MONTEREY CT
BETTENDORF IA 52722

MIDWEST MEXICAN CONNECTION LTD
MAID-RITE
C/o TALX UCM SERVICES LTD
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-08580-BT
OC: 06/26/05 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 for Work
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Maid-Rite (employer) appealed an unemployment insurance decision dated August 8, 2005, reference 02, which held that Sheri Lay (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 19, 2005. The claimant participated in the hearing. The employer participated through Brenda Montenguise, Manager and Employer Representative Beverly Lamb. Employer's Exhibits One and Two were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired as a part-time waitress on November 19, 2003 with no guarantee of hours. Since the job was seasonal, her hours fluctuated and she sometimes worked overtime. Initially, the claimant worked at another job during the day and had to go to nights for the employer. The employer tried to schedule the claimant around her other job but it was not always possible, since the claimant did not provide her schedule until after the employer had prepared the schedule. Eventually, the claimant moved back to days. On October 11, 2004, she advised the employer she could not work Saturdays and could only work every other Sunday as of November 1, 2004. In January 2005, the claimant advised the employer she could work on Sundays only if she was given the first shift.

The claimant injured her back at work on January 16, 2005 and contends the employer began cutting her hours after that. The employer provided the claimant's work hours for each month of her employment, and they are as follows:

Month	Year
November 2004	66.78
December 2004	88.30
January 2005	62.76
February 2005	82.86
March 2005	67.71
April 2005	87.00
May 2005	58.06
June 2005	46.04
July 2005	41.58
August 2005	45.23
September 2005	56.12

The claimant's hours do not appear to have changed until May 2005. She was sick on May 9 and requested days off on May 10, 14, 28, 29, and 30. She began physical therapy in June 2005 on Tuesdays and Thursdays, when she usually worked over the noon hour. Her one-hour appointment began at 1:00 p.m. and it would take her at least 30 minutes driving time. Since this was during a busy time when the employer needed extra help, the claimant was not scheduled these two days. The claimant also requested eight days off in June, ten days off in July, eight days off in August, including one sick day, and she already had 56 hours as of September 19, 2005.

The claimant filed a claim for unemployment insurance benefits effective June 26, 2005 and has received benefits after the separation from employment in the amount of \$1,981.00.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

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.

The claimant was hired as a part-time waitress with no guarantee of hours. She admitted her hours fluctuated, and although she may not have been working as many hours at the time of this claim, it was due to her physical therapy appointments and requests for time off work. There has been no separation from her part-time employment and she is currently working for this employer at the same hours and wages as contemplated in her original contract of hire. The claimant is disqualified from receiving benefits.

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 unemployment insurance decision dated August 8, 2005, reference 02, is reversed. The claimant does not meet the availability requirements of the law and is denied unemployment insurance benefits. The claimant is overpaid benefits in the amount of \$1,981.00.

sdb/kjw