

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-02205-DWT
OC 11/20/03 R 03
Claimant: Respondent (2/R)

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 are 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 – Availability for Work
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

A-Z Maintenance & Painting (employer) appealed a representative's February 18, 2004 decision (reference 01) that concluded Michael R. Aswegen (claimant) was eligible to receive unemployment insurance benefits and the employer's account was not relieved from charge because the claimant was not working the same number of hours he had worked in his base period for the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 26, 2004. The claimant participated in the hearing with his representative, Hattie Holmes. Rocky Smalley, the owner, appeared on the employer's behalf. During the hearing, Employer's Exhibit One was offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the claimant available for work as of November 23, 2003 as he was during his base period?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on March 17, 2003. The employer hired the claimant to work as a full-time assistant. The claimant worked full time until he attended school in late August or early September. After the claimant started school, he asked to work part time instead of full time. The claimant gave the employer the hours he was available to work Monday through Friday. Initially, the claimant was available to work about 24 hours a week. The employer made arrangements to accommodate the claimant's school schedule. The claimant's initial schedule worked for a few weeks.

The claimant then indicated he was not available to work on Mondays and Tuesdays because he needed time to study. The employer accommodated this request. After a while, the claimant contacted the employer when he was available to work because his availability changed. The employer still tried to accommodate the claimant's schedule and made arrangements for the claimant to work at varying assignments.

So he had time to study for tests, the claimant asked the employer to schedule him to work weekends. The employer again made special accommodations and arrangements with clients so the claimant could work on the weekends. Problems occurred when the claimant did not report to work or notify the employer he was unable to work on various Sundays. The claimant also did not always show up for work at 8:00 a.m. and at least one time left work early without the employer's knowledge.

When the claimant did not report to an assignment on Sunday, December 7, the employer decided he would no longer make any special arrangements for the claimant to do weekend work. When the claimant turned in his timecard on December 9, the employer told him he no longer had any weekend work for him.

The claimant and the employer saw each other at a social gathering at Christmas. The claimant did not let the employer know what hours he was available to work at that time.

The claimant established a claim for unemployment insurance benefits during the week of November 23, 2003. He filed claims for the weeks ending January 24 through March 20, 2004. He received his maximum weekly benefit amount of \$164.00 during each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

Each week a claimant files a claim for unemployment insurance benefits, he must be able to and available for work. Iowa Code §96.4-3. A student devoting the major portion of his time and effort to studies is deemed to have no reasonable expectancy of securing employment except if the student is available to the same degree and extent as his accrued wage credits. 871 IAC 24.23(5). The facts establish the claimant began working full-time for the employer in mid-March 2003. The claimant then changed his employment status by asking the employer for part-time hours when he started school in the fall. The claimant's availability continued to change. The employer tried to accommodate the school schedule until the claimant failed to go to the assignment or notify the employer he was unable to work as scheduled after the

employer made special arrangements with clients for the Saturday and Sunday work. The claimant's unemployed status occurred because he made himself unavailable to work full time after he started school. The claimant earned wage credits working full time, not part time. As of November 23, 2002, the claimant is not eligible to receive unemployment insurance benefits.

When the claimant testified, his testimony was not consistent as to how many hours he was available for work. The employer's testimony was detailed and consistent. A preponderance of the evidence indicates the employer's testimony is credible. As a result, the findings of fact reflect the employer's version of events.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending January 24 through March 20, 2004. He has been overpaid a total of \$1,476.00 in benefits he received for these weeks.

The facts also indicate the employer no longer considers the claimant an employee. Since a separation issue was not noted on the hearing notice as an issue, the separation issue is remanded to the Claims Section to investigate and issue a written decision.

DECISION:

The representative's February 18, 2004 decision (reference 01) is reversed. The claimant made himself unavailable to work when he went to school by limiting his availability to part-time instead of full-time hours. As of November 23, 2004, the claimant is not eligible to receive unemployment insurance benefits. The claimant is not legally entitled to receive benefits during the weeks ending January 24 through March 20, 2004. The claimant has been overpaid a total of \$1,476.00 in benefits. A separation issue is remanded to the Claims Section to investigate and issue a written decision.

dlw/b