

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID B MUETHER
Claimant

APPEAL NO. 14R-UI-12258-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECORAH COMM SCHOOL DISTRICT
Employer

OC: 08/24/14
Claimant: Appellant (2)

Iowa Code § 96.19-38-a & b – Total and Partial Unemployment
Iowa Admin. Code r. 871-24.22(2)f – Part-Time Worker – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 18, 2014, reference 01, which held claimant not able and available for work. After due notice, a hearing was scheduled for and held on October 16, 2014. The Administrative Law Judge issued a Ruling finding claimant able and available for work.

This matter was then appealed to the Employment Appeals Board which affirmed the decision of the Administrative Law Judge on the issue of able and available for work; and remanded back to the Administrative Law Judge such that the court could explore the issue of whether the contract existing between claimant and employer partially or totally existed of claimant working on an on-call basis. The Administrative Law Judge was instructed to explore the issue of whether there has been a job separation. Claimant participated personally and with attorney Karl Knudson. Employer participated with attorney Kristy Latta and with witnesses Darlene Woodhouse and Greg Schaller. Employer's Exhibits One through Six and Claimant's Exhibits A through C were admitted into evidence.

ISSUES:

The issues are whether claimant is still employed at the same hours and wages and partially unemployed.

FINDINGS OF FACT:

The claimant currently works as a substitute custodian for Decorah Community School District, a base-period employer. Claimant has no other wages in the base-period history.

Claimant worked for a number of years for employer on an on-call basis. Claimant was asked a number of years ago if he would like to work full time for employer. Claimant denied full time work as his mother was ill at the time he was asked and he preferred to have his summers off.

Employer lost another custodial employee and was starting a building project. As such, claimant began working full-time hours, although he was never termed a full-time employee (A look at claimants weekly wage filings show that throughout the time period when claimant was working large numbers of hours, he was listed as a custodial substitute). Claimant's job title never changed from substitute even though for years he worked at or near the number of hours of a full-time contract employee. In 2011 through 2013 claimant worked five to eight hours at five days a week, almost every week. Claimant was not contacted on a daily basis and asked to come into work that day as is the procedure for other substitute workers for employer. Rather, at the start of the year, claimant just began working as full-time workers worked. Claimant had an agreement with employer's custodial supervisor that he would be working full-time hours for a number of years. This was done with one notable exception; whereas claimant was a substitute, he still received summer hours off or greatly decreased; this was not the case with full-time workers for employer.

This last spring, employer hired two full-time custodians for the school district. At the same time, construction which had been ongoing for years was finishing. As a result of these two events, claimant has been called into work far more infrequently than he'd worked for a number of years. Throughout this fall, claimant has remained able and available for work. Employer stated that although claimant is called less frequently with the addition of new full-time employees, claimant has been called on occasion to work. The total number of calls received by claimant has been very few. An example of this is shown comparing September 2011 through 2013 to September 2014. In each of the prior three years claimant worked, at a minimum, five hours a day at five days a week. In 2014 claimant worked nine hours for the month.

Claimant, who had agreed with employer years before that he would be working the same hours as full-time custodians, was not personally informed of the decision to drop his hours to basically none. Claimant was also not personally informed of the permanent job openings although the notifications were done through standard procedures. Employer's supervisor stated that was because he'd been asked years ago if he wished to work full time and claimant declined the offer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is partially unemployed and the employer is relieved of benefit charges. Claimant established through previous years that he was more than an on-call employee and the employer unilaterally changed that agreement. Additionally, there has been at least a partial job separation; claimant had previously worked for years for employer nearly full time and is now receiving at or near zero hours per week.

Iowa Code § 96.19-38 provides:

"Total and partial unemployment".

- a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.
- b. 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 \$15.

An individual shall be deemed partially unemployed in any week in which the individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department and not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work, or emergency from the individual's regular job or trade in which the individual worked full time and will again work full time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code § 96.7(2)a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus 50 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.

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 § 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work, or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under § 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under § 85.33, § 85.34, subsection 1, or § 85A.17, or responsible for paying indemnity insurance benefits.

Iowa Admin. Code r. 871-23.43(4)a provides in part:

(4) Supplemental employment.

a. An individual, who has been separated with cause attributable to the regular employer and who remains in the employ of the individual's part-time, base-period employer, continues to be eligible for benefits as long as the individual is receiving the same employment from the part-time employer that the individual received during the base period. The part-time employer's account, including the reimbursable employer's account, may be relieved of benefit charges....

Claimant is still employed by employer; this is evidence by the fact that employer has called claimant offering work this fall on a few occasions. Evidence additionally shows that claimant's current hours of work are far different than they have been over the past few years. Although claimant acknowledges in his hourly documentation that he is an on-call employee, his documentation shows that he consistently received five or more hours a day at five days a week for years and testimony of claimant's supervisor supports the finding that claimant did not have to follow procedures of on-call employees. Specifically, claimant did not have to call in daily, weekly, or even monthly to find out if work would be available. Claimant continues to be an on-call employee as he was during the base period, but claimant's unwritten agreement with employer's custodial supervisor is no longer in effect.

Because the claimant has no other base-period wages and is currently employed part time with no hours on most recent weeks, claimant is considered partially unemployed. Benefits are allowed. Inasmuch as the current part-time employer is offering the same wages, but far different hours as in the base period, benefit charges shall be made to its account.

DECISION:

The September 18, 2014, reference 01, decision is reversed. The claimant is partially unemployed and benefits are allowed, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

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