

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAULAMAN J SCHLEGEL

Claimant

APPEAL NO. 12A-UI-09789-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHUCK'S RESTAURANT INC

Employer

OC: 07/08/12

Claimant: Respondent (2-R)

Section 96.4-3 – Able and Available

Section 96.4-3 – Same Hours and Wages

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated August 6, 2012, reference 01, which held the claimant eligible to receive unemployment insurance benefits beginning July 8, 2012, finding the claimant was available for work and eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held September 6, 2012. Although Mr. Schlegel was duly notified, he did not respond to the notice of hearing and did not participate. The employer participated by Ms. Linda Bisignano, company owner/manager.

ISSUE:

The issue is whether the claimant is disqualified for being unavailable for work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Saulaman Schlegel began employment with Chuck's Restaurant on January 12, 2012. Mr. Schlegel was hired to work as a part-time server with no guarantee as to any minimum number of hours available to him for any work week. Mr. Schlegel was paid by the hour. His immediate supervisor was the company owner, Ms. Linda Bisignano.

Although Mr. Schlegel was not guaranteed any minimum number of work hours per week as a part-time, on-call server, Mr. Schlegel nonetheless made himself unavailable for work on numerous occasions due to personal activities. During July of 2012, the claimant made himself unavailable for work on July 5, 6, and 7, while doing volunteer work for a concert. The following week, the claimant indicated he was not available to work because he was "moving." The week after that, Mr. Schlegel made himself unavailable for work because he had a court hearing about his eviction. The third week, the claimant made himself unavailable for work because he was again "moving." Subsequently, the claimant also indicated that he was not available for any working hours because he was babysitting a teenage sister.

The claimant applied for unemployment insurance benefits with an effective date of July 8, 2012. The claimant understood at the time of hire that his hours would fluctuate and that there was no guarantee as to any minimum hours of work for any week.

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".

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 worker with no guarantee as to any minimum number of working hours each week. Mr. Schlegel agreed to accept part-time employment with no minimum number of hours at the time he was hired and understood that his hours were dependent upon the employer's needs. That has not changed. The evidence in the record establishes that Mr. Schlegel routinely made himself unavailable for working hours that would otherwise have been available to him because of his personal pursuits. The claimant is not eligible to receive partial unemployment insurance benefits, because the original agreement of hire has not changed and because the claimant has made himself unavailable for working hours that would have otherwise been available to him. Benefits are denied as of July 8, 2012.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated August 6, 2012, reference 01, is reversed. The claimant cannot be considered to be partially unemployed. Benefits are denied as of July 8, 2012. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw