

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANE N PARMENTER
Claimant

APPEAL NO. 07A-UI-01831-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NASH FINCH CO
Employer

OC: 01/07/07 R: 03
Claimant: Respondent (2)

Section 96.4(3) – Able and Available
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Nash Finch, filed an appeal from a decision dated February 16, 2007, reference 01. The decision allowed benefits to the claimant, Shane Parmenter. After due notice was issued a hearing was held by telephone conference call on March 26, 2007. The claimant participated on his own behalf. The employer participated by Human Resources Representative Dennis Glover; Shipping Manager Larry Nesbitt; Distribution Director Marty Pistulka; and was represented by TALX in the person of Cheryl Rothmeier.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Shane Parmenter was employed by Nash Finch beginning January 23, 2006, as a part-time warehouse worker with no guarantee of a minimum number of hours per week. The claimant worked an average of 20 hours per week with some times, such as holidays, being more. Mr. Parmenter took the month of January 2007 off from school in the anticipation that he would work more hours per week. However, Shipping Manager Larry Nesbitt and Distribution Director Marty Pistulka never promised him more hours. January is traditionally a slow month coming after the holidays and the collective bargaining agreement provides that workers with the most seniority are given priority for the available hours.

Shane Parmenter has received unemployment benefits since filing a claim with an effective date of January 7, 2007.

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 is still working in the same job at the same hours as agreed upon when he was hired. Although he may have anticipated being scheduled for more hours in January when he was not in school, he did not discuss this with his supervisors and was never promised more hours. Under the provisions of the above Administrative Code section, the claimant is not eligible for 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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of February 16, 2007, reference 01, is reversed. Shane Parmenter is not eligible for benefits as he is not able and available for work. He is overpaid in the amount of \$234.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css