

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 D VIDMAR
1521 – 24TH ST
ROCK ISLAND IL 61201-3757

LOWE'S HOME CENTERS INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05060-JTT
OC: 11/23/05 R: 12
Claimant: Appellant (1-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 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 & Available

STATEMENT OF THE CASE:

Sheri Vidmar filed a timely appeal from the May 4, 2006, reference 03, decision that she was not able and available for work March 26 through April 15, 2006 and denied benefits for that period. After due notice was issued, a hearing was held on June , 2006. Claimant participated. The employer did not respond to the hearing notice instructions and did not participate. The administrative law judge took official notice of the Agency's administrative file.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sheri Vidmar has been employed by Lowe's Home Centers on a part-time basis since September 2004. Ms. Vidmar also engages in self-employment as a massage therapist and maintains office hours on Monday, Wednesday and Friday, 8:00 a.m. to 5:00 p.m. Ms. Vidmar's

self-employment limits her availability to work for Lowe's. Ms. Vidmar works 15-30 hours per week at Lowe's and works varied hours on Tuesday, Thursday, Saturday, and/or Sunday. Ms. Vidmar established a claim for benefits that was effective October 23, 2005 and has received benefits. Ms. Vidmar established her original claim after her hours were reduced to 13-21 per week.

Lowe's weekly work schedules run from Saturday through Friday. During the March 25-31 workweek, Ms. Vidmar was scheduled for 23 hours and worked all of those hours. During the April 1-7 workweek, Ms. Vidmar utilized accrued vacation hours. During the April 8-14 workweek, Ms. Vidmar continued on vacation. Ms. Vidmar acknowledges that she would not be eligible for benefits during the two weeks she was on vacation, but believes she should be eligible for benefits during the first workweek when she worked the 23 hours and was not on vacation.

Information previously supplied by the employer and contained in the administrative file indicates that Lowe's had hours available for Ms. Vidmar on the days that she elected to pursue self-employment: Mondays, Wednesdays, and Fridays.

REASONING AND CONCLUSIONS OF LAW:

The question is whether Ms. Vidmar was able and available for work during the period of March 26-April 25, 2006.

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 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that

sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

871 IAC 24.23(7), (16), (26), (29) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(7) Where an individual devotes time and effort to becoming self-employed.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

(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.

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

The decision being appealed disqualified Ms. Vidmar for benefits during the benefit weeks that ended April 1, April 8, and April 15. The evidence indicates that Ms. Vidmar was on vacation during the benefit weeks that ended April 8 and April 15 and, therefore did not meet the requirement that she be available for work. The evidence indicates that Ms. Vidmar was no longer working reduced hours at Lowe's during the benefit week that ended April 1, but had returned to the 15-30 hours per week schedule that she had maintained up to October 2005. In other words, Ms. Vidmar was once again employed at the same hours with the same employer. It is unclear when Ms. Vidmar's hours rebounded. The evidence indicates that Ms. Vidmar made herself unavailable for hours that Lowe's had available to her by choosing to pursue self-employment all day on Mondays, Wednesdays and Fridays.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Vidmar was not available for work during the three benefit weeks in question and is therefore disqualified for benefits for those weeks.

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 issue of whether Ms. Vidmar has been overpaid benefits for the three weeks in question is the subject to a companion case. See appeal number 06A-UI-05061-JTT. The evidence presented at the hearing raises the question of whether Ms. Vidmar was able and available during other weeks in which she claimed benefits. It would appear that she made herself unavailable by pursuing self-employment during hours and days when Lowe's had work available to her. This matter will be remanded so that the Agency can determine whether Ms. Vidmar was able and available at other times during her claim and whether she has been overpaid for benefits received at other times during her claim.

DECISION:

The Agency representative's May 4, 2006, reference 03, decision is affirmed. The claimant was not available for employment during the period of March 26-April 15, 2006 and is disqualified for benefits for that period.

REMAND:

This matter is remanded so that the Agency can determine whether Ms. Vidmar was able and available at other times during her claim and whether she has been overpaid for benefits received at other times during her claim.

jt/pjs