

**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**

**CHARLES D SCHMITZ  
51 MILWAUKEE ST  
DUBUQUE IA 52001**

**CITY OF DUBUQUE  
ATTN PERSONNEL DEPARTMENT  
50 W 13<sup>TH</sup> ST  
DUBUQUE IA 52001-4864**

**Appeal Number: 04A-UI-01314-RT  
OC: 01-04-04 R: 04  
Claimant: Respondent (3)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, City of Dubuque, filed a timely appeal from an unemployment insurance decision dated January 30, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Charles D. Schmitz. After due notice was issued, a telephone hearing was held on February 27, 2004, with the claimant participating. Darlene Handelmann, Personnel Assistant, participated in the hearing for the employer. Paul Schultz, Solid Waste Management Supervisor, testified for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time temporary laborer from April 14, 2003 until he was separated from his employment on November 19, 2003. The claimant began working for the employer on April 19, 2000. For every year his employment was seasonal and he was laid off at the end of the season. The employer considered this a permanent layoff but then would rehire the claimant in the spring for additional seasonal work. The claimant's work was cleaning up the parks as a one-man crew. He was able to drive a truck with his chauffeur's license, but the claimant did not have a commercial driver's license. Essentially, he acted as a garbage man for the parks, cleaning the parks and driving a truck. This job was always seasonal and the claimant was laid off from this job on November 14, 2003.

The claimant was offered a different position in the solid waste management department, also acting as a garbage man, but picking up different garbage. The claimant was unable to drive the garbage truck because that required a commercial driver's license. Therefore, the claimant was involved in only lifting or picking up garbage. The claimant was under the reasonable belief that this was a short-term position of a couple of weeks. However, after the first day, November 19, 2003, the claimant discovered that he could not physically do the work since he was unable to drive the truck and he had to solely pick up garbage. Therefore, the claimant quit on that day. The claimant did not express any concerns to the employer before his quit, nor did he ever indicate or announce an intention to quit prior to his quit if any concerns were not addressed. Work remained available for the claimant at least for two weeks. However, the position that the claimant occupied actually continued because the employer had two regular employees who were out on indefinite leaves for injuries. This new position was categorized as a "seasonal" position.

Pursuant to his claim for unemployment insurance benefits filed effective January 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,680.00 as follows: \$210.00 a week for eight weeks from benefit week ending January 10, 2004 to benefit week ending February 28, 2004. However, of that amount, \$375.00 was offset against an overpayment from a prior benefit year. In a prior benefit year, from January 5, 2003 to January 2004, the claimant received unemployment insurance benefits in the amount of \$1,180.98 following his separation from the employer herein on or about November 19, 2003 and reopening his claim in that benefit year effective November 16, 2003 as follows: \$180.00 for benefit week ending November 22, 2003; \$195.00 per week for five weeks from benefit week ending November 29, 2003 to benefit week ending December 27, 2003, in the amount of \$975.00; and \$25.98 for benefit week ending January 3, 2004. This exhausted the claimant's unemployment insurance benefits for that benefit year. However, the claimant was later determined to be overpaid \$375.00 of that amount, and this was offset by benefits in the current benefit year. The total benefits received by the claimant following his separation from the employer herein were \$2,485.98.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

The parties concede that the claimant left his employment voluntarily. The issue then becomes whether the claimant left his employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with good cause attributable to the employer. See Iowa Code Section 96.6-2. Although it is a very close and difficult question, the administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. There is no dispute that the claimant has worked for the employer since April 19, 2000 as a seasonal worker, cleaning the parks and driving a truck, operating as a one-man crew. This was seasonal work and the employer treated each layoff at the end of the season as a permanent layoff, but the claimant was rehired the next year. Although the claimant does not have a commercial driver's license, he does have a chauffeur's license, which permits him to drive the truck necessary to clean the parks. The claimant was laid off from that job, as in the past, on November 14, 2003.

After his layoff the claimant was offered a different position with the solid waste management department, which the claimant accepted and for which he worked one day. This position involved also picking up garbage, but in a different manner. Further, the claimant was unable to operate the garbage truck on this new position because he does not have a commercial driver's license. Therefore, the claimant was faced with continually lifting garbage all day. This was not as he had expected. The claimant was unable to handle this job physically and quit after one day. Whether this position was actually a continuing position or whether it was to last for only two weeks is not certain. The claimant testified that he was told that this position would end around Thanksgiving and would only last a couple of weeks. The employer's witness, Darlene Handelmann, Personnel Assistant, denied this but did state that this new position was also "seasonal." She testified that the claimant would be doing miscellaneous jobs, but the bottom line is that he would actually be picking up refuse and waste all of the time, as noted above. The employer's other witness, Paul Schultz, Solid Waste Management Supervisor, testified that he was not sure how long the position offered to the claimant would last, that it was open-ended, but the extent of that was uncertain. Two full-time regular employees were on leaves for injuries. Even Ms. Handelmann testified that she was uncertain as to how long this

new position would last. It turns out now that that position is still in effect and still working. In O'Brien v. Employment Appeal Board, 494 N.W.2d 660 (Iowa 1993), the Iowa Supreme Court adopted an objective reasonable belief standard in determining whether a claimant has left work voluntarily with or without good cause attributable to the employer. The administrative law judge concludes that the claimant had a reasonable belief that the new position would be similar to the old position and that he would be, in part, driving a truck and would not be continually picking up refuse and further, a reasonable belief that it was only going to last a couple of weeks. The claimant had this reasonable belief because of statements made to him, perhaps vague, by the employer. When the claimant discovered that the position entailed more than his reasonable beliefs, he quit. It is true here that the claimant did not express concerns to the employer before his quit, nor did he indicate or announce an intention to quit, but the administrative law judge concludes that here the claimant did not have to do so since the job was certainly not what he had anticipated and he was physically unable to handle it. There did not appear to be any other position available to the claimant which would work as an alternative. The claimant did, at the time of his quit, indicate his problems with the position to the employer and the employer seemed to understand. Accordingly, although it is a close question, the administrative law judge concludes that what occurred here in effect was that the employer breached its contract of hire with the claimant, which breach was substantial, involving modification in the type of work and the duration of the work. The administrative law judge is not convinced that this breach was intentional by the employer, but the administrative law judge concludes that the claimant was justified in believing that the employer had willfully breached its contract of hire, as discussed above. The administrative law judge also concludes that the claimant was justified in believing that the position was only going to last a couple of weeks. The claimant so testified and the employer's witnesses equivocated on the duration of the job. This belief by the claimant affected his choice to quit. Accordingly, although it is a close and difficult question, the administrative law judge concludes that the claimant left his employment voluntarily with good cause attributable to the employer and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible. The administrative law judge notes that at the time the claimant was offered this position he had already been laid off from his regular and usual seasonal position as he had been in prior years. Because of the change in the position, the administrative law judge does not believe that the claimant would have had to have accepted the new position offered to him.

Even should the claimant's separation be considered a voluntary quit with good cause attributable to the employer, the administrative law judge would conclude under the facts here that the claimant quit two weeks before he was justified in believing that he would be laid off and therefore would be denied benefits only until the effective date of his anticipated layoff. The administrative law judge is not unmindful of Taylor v. Iowa Department of Job Service, 362 N.W.2d 534 (Iowa 1985), in which the Iowa Supreme Court holds that one who accepts work on a trial basis and then quits because it is unsuitable, must still establish that he or she quit with good cause attributable to the employer or be disqualified. However, the administrative law judge does not believe that that case is applicable here because of the previous custom and actions of the parties and the claimant's reasonable expectations, as discussed above.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,485.98 since separating from the employer herein on or about November 19, 2003. However, the claimant was entitled to two additional weeks of benefits, \$180.00 for benefit week ending November 22, 2003 and \$195.00 for benefit week ending November 29, 2003, for which the claimant was determined to be overpaid and which were offset by benefits to which the claimant was entitled. Accordingly, the administrative law judge concludes that the claimant is not overpaid any unemployment insurance benefits and is, in fact, underpaid unemployment insurance benefits in the amount of \$375.00 since this was erroneously determined to be an overpayment and then was offset. \$375.00 in benefits should be refunded to the claimant for the benefit weeks previously mentioned.

#### DECISION:

The representative's decision of January 30, 2004, reference 01, is modified. The claimant, Charles D. Schmitz, is entitled to receive unemployment insurance benefits beginning with benefit week ending November 22, 2003 and continuing thereafter, provided he is otherwise eligible, because he left his employment voluntarily with good cause attributable to the employer. As a result of this decision the claimant is not overpaid any unemployment insurance benefits and is, in fact, underpaid unemployment insurance benefits in the amount of \$375.00 for benefit weeks ending November 22, 2003 (\$180.00) and November 29, 2003 (\$195.00), which were determined to be overpaid and then offset by other benefits to which the claimant was entitled. \$375.00 should be refunded to the claimant.

b/b