

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEILA M BERGIS
Claimant

APPEAL NO. 14A-UI-01937-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/19/14
Claimant: Respondent (2-R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 13, 2014, reference 01, decision that allowed benefits to the claimant effective January 19, 2014, and assessed liability to the employer, based on an agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on March 12, 2014. Claimant Leila Bergis did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Ajah Anderson of Corporate Cost Control represented the employer and presented testimony through Pam Scarpino. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant and wages reported by the claimant (DBRO) and of the wages reported by the employer (DBRO and WAGEA).

ISSUES:

Whether Ms. Bergis has been able to work and available for work since establishing the claim for benefits that was effective January 19, 2014.

Whether Ms. Bergis has been partially unemployed from Hy-Vee since establishing the claim that was effective January 19, 2014.

Whether the employer's account may be assessed for benefits paid to the claimant.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Ms. Bergis established a claim for unemployment insurance benefits that was effective January 19, 2014. Workforce Development calculated Ms. Bergis' weekly benefit amount at \$408.00. Since Ms. Bergis established her claim for benefits, she has reported wages and received benefits as follows:

<u>Benefit week end date (Saturday)</u>	<u>Wages reported</u>	<u>Benefits paid</u>
1/25/14	368.00	142.00
2/1/14	88.00	408.00
2/8/14	292.00	218.00
2/15/14	368.00	142.00
2/22/14	368.00	142.00
3/1/14	368.00	142.00

Ms. Bergis "base period" for purposes of the claim that was effective January 19, 2014 consists of the fourth quarter of 2012 and the first, second and third quarter of 2013. Ms. Bergis base period wages reflect a substantial decrease in hours from the fourth quarter of 2012 to the first quarter of 2013. Ms. Bergis' quarterly wages, as reported by Hy-Vee to Iowa Workforce Development, went from \$6,714.00 for the fourth quarter of 2012 to \$4,469.00 during the first quarter of 2013. In light of Ms. Bergis' \$12.70 hourly wage, the change reflects a decrease from full-time hours (40.67 per week average) during the fourth quarter of 2012 to part-time hours (27.07 per week average) during the first quarter of 2013. Thereafter, the average weekly hours during the base period, as reflected by the quarter wages reported to Workforce Development, never strayed above 31.65. The decrease in base period hours and wages appears to correspond to track with changes in the federal health care insurance law known as the Affordable Care Act.

Leila Bergis commenced her employment with Hy-Vee in 1994 and continues as a part-time employee of Hy-Vee. Since the summer of 2012, Ms. Bergis has worked as a cashier in the employer's front checkout lanes. Prior to that, Ms. Bergis was a customer service clerk for two years. Except for two weeks in February 2014, Ms. Bergis has consistently worked right around 29 hours per week at least since the beginning of February 2013.

Ms. Bergis' hourly wage since February 17, 2014 has been \$13.00. Ms. Bergis' hourly wage for the preceding year was \$12.70. Twenty-nine hours multiplied by \$13.00 per hour equals \$377.00. Twenty-nine hours multiplied by \$12.70 equals \$368.00.

The employer's work week scheduling runs from Monday through Sunday. During the work week of January 27, 2014 through February 2, 2014, Ms. Bergis only worked seven hours. This was because she was hospitalized from January 28, 2014 through February 2, 2014. During the work week of February 3-9, 2014, Ms. Bergis only worked 22.7 hours. Ms. Bergis had returned to work on February 3, but went home early that day due to illness. On February 4, 2014, Ms. Bergis left one hour early from her 7:00 a.m. to 2:00 p.m. shift. Otherwise, Ms. Bergis has not declined any hours the employer had available for her since she established her claim for benefits.

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".

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 fifteen dollars. Iowa Code Section 96.19(38)(b).

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. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty 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.

(a) 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 section 96.8, subsection 5.

[Emphasis added.]

Ms. Bergis' base period wages reflects a substantial change in the conditions of the employment between the fourth quarter of 2012 and the first quarter of 2013. The changed conditions have continued since that time and, thereby, became established conditions of the employment. Except for first two benefit weeks in February 2014, Ms. Bergis has continued to enjoy the same hours and wages from Hy-Vee since at least February 2013. Accordingly, Ms. Bergis' 29-hour per week regimen would not fit the definition of partial unemployment, since it is not a decrease from the base period work hours. By remaining in the employment for an extended period after the changed conditions, Ms. Bergis has effectively acquiesced in the

changed conditions. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990).

The benefit weeks that ended February 1, 2014 and February 8, 2014 must be addressed separately. During the week that ended February 1, 2014, Ms. Bergis was not able to work or available for work within the meaning of the law due to her hospitalization from Tuesday, January 28 through the end of the benefit week. Ms. Bergis also was not partially unemployed from Hy-Vee within the meaning of the law during that week. During the benefit week that ended February 8, 2014, Ms. Bergis' 6.3 hour decrease in work hours, from the 29-hour per week norm, was attributable to Ms. Bergis' hospitalization that ended on February 2 and the shortened work days on February 3 and 4 that were attributable to Ms. Bergis' illness. Though Ms. Bergis remained available for work that week within the meaning of the law because she was available for the majority of the week, her situation still did not meet the definition of partial unemployment.

Ms. Bergis has not been partially unemployed since she established her claim for benefits and is not eligible for unemployment insurance benefits under a theory of partial unemployment. Benefits are denied effective January 19, 2014 and the disqualification continued as of the March 12, 2014 appeal hearing. Because Ms. Bergis has not been partially unemployed from Hy-Vee, that employer's account will not be charged for benefits that have been paid to Ms. Bergis under the theory of partial unemployment.

Because overpayment of benefits was not set forth on the hearing notice as an issue for the hearing, and because the claimant was unavailable to waive formal notice on that issue, this matter will be remanded to the Benefits Bureau for entry of an appropriate overpayment decision.

DECISION:

The Claims Deputy's February 13, 2014, reference 01, decision is reversed. The claimant has not been partially unemployed since she established the claim that was effective January 19, 2014 and is not eligible for benefits under a theory of partial unemployment. Benefits are denied effective January 19, 2014 and the disqualification continued as of the March 12, 2014 appeal hearing. The employer's account will not be charged for benefits that have been paid to the claimant under the theory of partial unemployment. This matter is remanded for entry of an appropriate overpayment decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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