

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER M BONHAM
Claimant

APPEAL NO. 09A-UI-00317-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE BOYLE COMPANY INC
Employer

**OC: 11/16/08 R: 01
Claimant: Respondent (4/R)**

Section 96.4-3 – Able and Available

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits

Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

The Boyle Company, Inc. (employer) appealed a representative’s January 5, 2009 decision (reference 01) that concluded Jennifer M. Bonham (claimant) was qualified to receive at least partial unemployment insurance benefits in connection with her employment with the employer. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on February 5, 2009. The claimant participated in the hearing. Linda Sliceman appeared on the employer’s behalf and presented testimony from one other witness, Grant Jager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the claimant employed by the employer for less than her usual hours and wages and eligible for full or partial unemployment insurance benefits? Was the claimant eligible for unemployment insurance benefits by being able and available for work? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 20, 2008. She was hired to work part time as a cook, about 16 hours per week, and part time in housekeeping and laundry, about 16 hours per week, in the employer’s long-term care nursing facility and independent living facilities. She was to be paid \$10.50 per hour for her work as a cook and \$9.50 per hour for her work in housekeeping and laundry.

The claimant only worked in the cook position through October 2. The employer had received a number of complaints regarding the claimant’s work as a cook and decided not to schedule her for work as a cook any further. She was informed that she would be given more hours in housekeeping and the laundry to make up the difference in hours.

The employer was also not satisfied with the claimant's work performance in housekeeping, giving her a number of write-ups for performance failures. Also, the claimant was pregnant, due for delivery on January 8, 2009. While the claimant was under no doctor's restrictions as to the work she should not do and the claimant had not asked for any accommodations for her pregnancy other than not handling strong chemicals such as bleach, the employer determined that it did not want the claimant to be doing some of the physical aspects of the job. As a result, between the employer's dissatisfaction with the claimant's job performance and the employer's decision not to have the claimant do work the employer felt was beyond what she should do in her condition, the claimant's scheduled hours were drastically reduced, some weeks not being given any hours and other weeks only working a day or two; she worked only a day or two during the entire month of December. As a result, the claimant established an unemployment insurance benefit year effective November 16, 2008 and began filing weekly claims and collecting full or partial for unemployment insurance benefits for those weeks in which her earnings fell below her weekly benefit amount (\$227.00) plus \$15.00.

As of the date of the hearing the claimant had last worked for the employer on January 8, 2009. She was not scheduled again until January 20. However, the claimant went into the hospital in labor on January 18 and gave birth on January 19. As a result, she contacted the employer and indicated she would not be back at work until she was released by her doctor after the delivery. The anticipated leave would be approximately six weeks; as of the date of the hearing the claimant had not yet been released by her doctor and had not returned to work.

After going to the hospital and giving birth, the claimant made weekly claims and received unemployment insurance benefits for the weeks ending January 24 and January 31, 2009.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if she is not employed at the hours and wages for which she was hired and earns less than her weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b; 871 IAC 24.23(26).

Beginning on or about October 2, 2008, the employer was not providing the claimant with substantially the same employment for which it had hired her. While the employer may have had a good business reason for reducing the claimant's hours, as the employer determined to keep the claimant on as an employee albeit on a reduced basis, she is entitled to benefits for the difference between her weekly earnings and her weekly unemployment insurance benefit amount plus \$15.00. Consequently, the claimant is qualified to receive partial unemployment insurance benefits upon the filing of her claim effective November 16, 2008, provided she was otherwise eligible.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3.

While the employer may not have been satisfied with the claimant's work performance and may have had its own concerns regarding the work the claimant should or could do while pregnant, these were restrictions on the claimant's work imposed by the employer, not by the claimant or by her doctor. Up until January 18, 2009 the claimant was able and available for work, and was therefore eligible to receive unemployment insurance benefits up until that date. However, the claimant entered the hospital for delivery of her baby on January 18 and therefore was not able

and available for work during the benefit weeks ending January 24 and January 31, 2009. 871 IAC 24.22(1)a; 871 IAC 24.23(37). She will not be eligible to receive benefits until such time as she has been released by her doctor and informs the employer that she is able to return from her leave of absence. 871 IAC 24.23(10).

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits for the weeks ending January 24 and January 31, 2009 but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

The final issue is whether the employer's account is subject to charge for benefits paid to the claimant other than for the week ending January 24, 2009. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2007 and ended June 30, 2008. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's January 5, 2009 decision (reference 01) is modified in favor of the employer. The claimant is eligible for partial unemployment insurance benefits for the period from November 16, 2008 during weeks in which the employer does not provide the claimant at least 32 hours of work and she is otherwise able and available for work.. The claimant was able to work and available for work until the week beginning January 18, 2009. The claimant was qualified to receive unemployment insurance benefits through January 17, 2009. As of January 18 the claimant is not eligible for unemployment insurance benefits until she has been released by her doctor and has informed the employer she is ready to return to work. The

matter is remanded to the Claims Section for investigation and determination of the overpayment issue for the weeks ending January 24 and January 31, 2009.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css