

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH E BURGIN
Claimant

APPEAL NO. 12A-UI-07757-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JASLYN CLEANING SERVICES INC
Employer

**OC: 11/27/11
Claimant: Appellant (4)**

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:

Deborah Burgin filed a timely appeal from the June 25, 2012, reference 03, decision that denied benefits effective June 3, 2012, based on an agency conclusion that she was not partially unemployed. After due notice was issued, a hearing was held on July 19, 2012. Ms. Burgin participated. Lynn Wise represented the employer and presented additional testimony through Pam Thielen and Mark Rick. Exhibits A, B, and C were received into evidence.

ISSUES:

Whether Ms. Burgin has been able to work and available for work since establishing her claim for benefits.

Whether Ms. Burgin has been partially unemployed from her employment at any point since June 3, 2012.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a commercial cleaning enterprise. Deborah Burgin began her employment with Jaslyn Cleaning Services, Inc., in February 2012 and continues in the employment. Ms. Burgin is a part-time cleaner. At the start of the employment, Ms. Burgin was assigned to the employer's Clear Lake cleaning crew. Mark Rick was Ms. Burgin's immediate supervisor on the Clear Lake cleaning crew. While Ms. Burgin was assigned to the Clear Lake crew, she would start work at 5:00 p.m., Monday through Friday, and work 25 to 30 hours per week.

In March, Ms. Burgin complained to the employer about verbal abuse she had received from Mr. Rick. The verbal abuse included Mr. Rick yelling at Ms. Burgin and another employee under his supervision to "shut the fuck up" and that he did not need any "back talk." The verbal abuse included Mr. Rick uttering "son of a bitch" during an angry outburst directed at Ms. Burgin and

another worker under his supervision. Ms. Burgin reported to the employer that she felt threatened and intimidated by Mr. Rick. In response to the complaint, Jason Wise, owner, and Scott Deetz, operations manager, spoke to Ms. Burgin and to Mr. Rick, after which things improved for a while.

On April 5, 2012, Ms. Burgin again complained to the employer about Mr. Rick's utterances after he asked her repeatedly the evening before, "Why are you busting my balls?"

On May 14, the employer moved Ms. Burgin from the Clear Lake cleaning crew to the Mason City cleaning crew. Ms. Burgin had not asked to be removed from the Clear Lake cleaning crew. Pam Thielen supervised the Mason City cleaning crew. On the Mason City cleaning crew, Ms. Burgin still starts at or around 5:00 p.m., but only gets 2 to 4 hours per night three days per week, or seven to ten hours per week. Ms. Burgin's hourly wage has remained unchanged at \$8.50 per hour.

In response to the reduction in work hours, Ms. Burgin established an additional claim for unemployment insurance benefits that was effective June 3, 2012. The additional claim for benefits is based on an original claim that was established on November 27, 2011. Ms. Burgin has not yet received benefits in connection with the additional claim. Ms. Burgin's weekly unemployment insurance benefit amount has been set at \$240.00. Since the additional claim went into effect, Ms. Burgin has reported the following wages from her employment with Jaslyn Cleaning Services:

<u>Week ending date</u>	<u>Wages reported</u>
06/09/12	68.00
06/16/12	64.00
06/23/12	75.00
06/30/12	49.00
07/07/12	54.00
07/14/12	68.00
07/21/12	68.00

The employer has documented three absences for Ms. Burgin since she started the employment. All three of those absences predate the employer's decision to switch Ms. Burgin to the Mason City crew and the corresponding reduction in her work hours.

At some point, Ms. Thielen engaged Ms. Burgin in casual conversation about returning to the Clear Lake cleaning crew and Ms. Burgin responded that she was not interested in doing that because of Mr. Rick's intimidating behavior. The employer has not formally requested that Ms. Burgin return to the Clear Lake cleaning crew or directed her to do so since the employer moved her to the Mason City cleaning crew. Ms. Burgin has not formally refused a request or directive that she return to the Clear Lake cleaning crew.

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.]

The weight of the evidence in the record establishes that Ms. Burgin has indeed been partially unemployed since she established the additional claim for benefits that was effective June 3, 2012. The partial unemployment began on May 14, 2012, when the employer moved Ms. Burgin from the Clear Lake cleaning crew to the Mason City cleaning crew and significantly reduced her weekly work hours. Effective June 3, 2012, Ms. Burgin is eligible for unemployment insurance benefits, provided she meets all other eligibility requirements. The evidence further

indicates that Ms. Burgin has been able to work and available for work since she established the additional claim for benefits.

Jaslyn Cleaning Services is not a base period employer in connection with the original claim for benefits that Ms. Burgin established in November 2011. What that means is that this employer cannot be charged for benefits paid to Ms. Burgin during the period of November 27, 2011 through November 24, 2012.

While this was a partial unemployment case, not a case dealing with a separation from employment, the administrative law judge would note, as he did at the time the hearing, that workers are not required to endure verbal abuse. The administrative law judge found no reason to discount Ms. Burgin's assertions concerning the abusive utterances Mr. Rick directed at her. A worker who voluntarily quits employment due to intolerable or detrimental working conditions is deemed to have quit for good cause attributable to the employer. See Iowa Admin. Code section 871 IAC 24.26(4). Jaslyn Cleaning Services may wish to consider further steps to better resolve the issues that led to Ms. Burgin's complaints and the employer's decision to move her from one cleaning crew to another. Such steps may help the employer avoid charges to their account in the future.

DECISION:

The Agency representative's June 25, 2012, reference 03, is reversed. The claimant has been able and available for work, and partially unemployed, since she established the additional claim for benefits that was effective June 3, 2012. Effective June 3, 2012, the claimant is eligible for benefits, provided she meets all other eligibility requirements. Because the employer is not a base period employer, the employer's account will not be charged for any benefits paid to the claimant through November 24, 2012, the day on which the claimant's current benefit year will expire.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw