

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA A SMITH
Claimant

APPEAL NO. 11A-UI-01616-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEY RETIREMENT SERVICES INC
Employer

OC: 12/26/10
Claimant: Respondent (4-R)

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 1, 2011, reference 01, decision that allowed benefits effective December 26, 2010, based on an Agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on March 4, 2011. Claimant participated. Peggy Lockhart, Director Care Coordinator, represented the employer. The administrative law judge took official notice of the Agency's administrative record of wages reported by the claimant and benefits disbursed to the claimant.

ISSUES:

Whether the claimant was partially unemployed since she established the claim for benefits that was effective December 26, 2010.

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: Melissa Smith has been employed by Wesley Retirement Services, Inc., as a home health aide since July 2009. Ms. Smith's status is part time with benefits. In order to maintain eligibility for benefits, Ms. Smith is expected to work 30-40 hours per week. Ms. Smith's hourly wage was \$12.46. In addition, the employer paid Ms. Smith 44 cents per mile for her commute to clients' homes.

Ms. Smith established a claim for unemployment insurance benefits that was effective December 26, 2010. Ms. Smith's weekly benefit amount was set at \$284.00. Ms. Smith did not continue her claim beyond the benefit week that ended February 19, 2011. The wages Ms. Smith reported and the unemployment insurance benefits disbursed to Ms. Smith were as follows, with the weeks for which Ms. Smith received benefits in bold font:

<u>Benefit week end date</u>	<u>Wages reported</u>	<u>Benefits paid</u>
01/01/11	244.00	111.00
01/08/11	213.00	142.00
01/15/11	400.00	zero
01/22/11	372.00	zero
01/29/11	412.00	zero
02/05/11	289.00	66.00
02/12/11	376.00	zero
02/19/11	413.00	zero

Ms. Smith established her claim for benefits in response to a decrease in the number of work hours the employer made available to her. The employer utilizes a Monday through Sunday workweek for payroll and scheduling purposes. Below are Ms. Smith's weekly work hours for the period of August 30, 2010 through March 4, 2011, with the weeks corresponding to weeks for which Ms. Smith received unemployment insurance benefits in bold font:

9/5/10	49 hrs. and 16 mins.
9/12/10	33 hrs. and 21 mins.
9/19/10	34 hrs. and 36 mins. (Ms. Smith asked for a morning off, four hours.)
9/26/10	30 hrs. and 26 mins. (Decrease in hours attributable to a client being ill or away.)
10/3/10	40 hrs.
10/10/10	28 hrs. and 39 mins.
10/17/10	44 hrs. and 19 mins.
10/24/10	40 hrs.
10/31/10	30 hrs. (Ms. Smith requested four hours off and used vacation.)
11/7/10	27 hrs. and 44 mins. (One or more clients were unavailable.)
11/14/10	33 hrs. (A client was ill and therefore unavailable for services.)
11/21/10	34 hrs. and 7 mins.
11/28/10	25 hrs and 26 mins. (One or more high-hour clients traveled out of town.)
12/5/10	23 hrs.
12/12/10	27 hrs. and 43 mins.
12/19/10	30 hrs. and 45 mins.
12/26/10	30-31 hrs.
1/2/11	19 hrs. and 32 mins. (Two clients went away for the holidays.)
1/9/11	19 hrs. (Ms. Smith asked for one day (6 hours) off.)
1/16/11	14 hrs. and 30 mins. (Ms. Smith asked 1/11-13 off and used 16 hours vacation.)
1/23/11	29 hrs. (Ms. Smith requested one day off and used 8 hours vacation.)
1/30/11	32 hrs. and 30 mins.
2/6/11	23 (Ms. Smith requested 1/31 (6 hours and 2/4 (8 hours off.) (On 2/4, the employer asked Ms. Smith to work a 7:00 a.m. to 3:00 p.m. shift (8 hours) on 2/5, which Ms. Smith declined because she wanted to stay with her fiancé who was hospitalized.)
2/13/11	29 hrs. and 49 mins.
2/20/11	42 hrs.
2/27/11	27 hrs. and 22 mins.
3/6/11	48 hrs.

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 there have indeed been some weeks of partial unemployment since Ms. Smith established her claim for benefits. The employer's

account may be charged for benefits paid to Ms. Smith for weeks for which she is determined to have been partially unemployed. The employer's own statement of Ms. Smith's employment status, part-time with benefits, calls for her to work a minimum of 30 hours per week. Ms. Smith has had that employment status since December 2009. The weight of the evidence indicates that Ms. Smith was partially unemployed during the weeks that ended January 1, 2011 and January 8, 2011. During the first week, Ms. Smith only worked 19 hours and 32 minutes. The reason for this was that two clients had gone away for the holidays. During the second week, Ms. Smith only worked 19 hours. Though Ms. Smith asked for one day, six hours, off, her total work hours for the week would only have been 25 if she had worked the additional day. For both these weeks, Ms. Smith earned wages that were less than her weekly benefit. Ms. Smith was eligible for the benefits she received for these two weeks.

Ms. Smith's weekly wages prevented her from meeting the definition of partially unemployed during the weeks that ended January 15, 22 and 29, February 12 and 19, 2011. For each of these weeks Ms. Smith reported earning wages that exceeded her \$284.00 weekly benefit amount by more than \$15.00 and was not eligible for benefits.

The weight of the evidence establishes that Ms. Smith was not partially unemployed during the benefit week that ended February 5, 2011. For that week Ms. Smith reported \$289.00 in wages. The reported wages amount would not prevent Ms. Smith from being eligible for benefits under a theory of partially unemployed. But Ms. Smith requested January 31 off (6 hours) and February 4 off (8 hours) and also declined the opportunity to work an additional seven or eight hours. Had Ms. Smith been available to work the hours the employer had for her that week, she would have been working essentially full-time hours that week. Ms. Smith was not eligible for the \$66.00 in benefits she received for the week ending February 5, 2011.

Though Ms. Smith did not continue her claim for the week ending February 27, 2011, the weight of the evidence indicates that she was not partially unemployed that week because the wages she earned (27 hours X \$12.46 = \$340.00) were more than \$15.00 dollars over her \$284.00 weekly benefit amount. Ms. Smith would not have been eligible for benefits for the week that ended March 5, 2011 because of the number of hours worked (48) and the corresponding wages.

The weight of the evidence suggests that Ms. Smith continues to be at risk of periods of partial unemployment. If Ms. Smith desires to continue her claim for benefits, she will need to make the weekly report of her gross weekly wages so that any future partial unemployment may be determined week by week as appropriate.

DECISION:

The Agency representative's February 1, 2011, reference 01, decision is modified as follows. The claimant was partially unemployed during the benefit weeks that ended January 1 and January 8, 2011 and is eligible for benefits for those weeks, provided she is otherwise eligible. The claimant was not partially unemployed during the period of January 15, 2011 through March 5, 2011 and is not eligible for benefits for that period. The employer's account may be assessed for benefits paid to the claimant for the weeks ending January 1 and 8, 2011 and for any additional work for which the claimant is deemed, by this decision or subsequent decision, to be unemployed from the employer. In the event the claimant separates from the employer, the employer will want to report that to Workforce Development so that the impact on the claimant's benefit eligibility may be adjudicated.

This matter will be remanded to the Claims division for entry of an overpayment decision regarding the \$66.00 in benefits disbursed to the claimant for the week that ended February 5, 2011.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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