

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RIGGAN, MARILYN, R

Claimant

NPC INTERNATIONAL INC

PIZZA HUT

Employer

APPEAL NO. 11A-UI-01659-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/19/10

Claimant: Respondent (4-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 1, 2011, reference 01, decision that allowed benefits effective December 19, 2010, based on an Agency conclusion that the claimant was partially unemployed from her employment at Pizza Hut. After due notice was issued, a hearing was held on March 9, 2011. Claimant participated. Kathy Champagne represented the employer. The administrative law judge took official notice of the Agency's administrative record (DBRO) of wages paid to the claimant, wages reported by the claimant, and the fact that no benefits have been disbursed to the claimant thus far.

ISSUES:

Whether the claimant has been able to work and available for work since she established a claim for benefits that was effective December 19, 2010.

Whether the claimant has been partially unemployed from her employment at Pizza Hut at any point since she established a claim for benefits.

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: Marilyn Riggan was employed by Pizza Hut from August 2007 until January 25, 2011. Ms. Riggan worked as a shift manager and delivery driver. When Ms. Riggan worked as a shift manager, she earned \$9.64 per hour. When Ms. Riggan worked as a delivery driver, she earned \$7.25 per hour plus tips.

According to Workforce Development records, Pizza Hut was Ms. Riggan's sole "base period" employer. The base period consisted of the third and fourth quarter of 2009 and first and second quarter of 2010. Based on the wages the employer reported for Ms. Riggan for those

four quarters, Ms. Riggan's average weekly wage for the period of July 1, 2009 through June 30, 2010 was \$392.58. Using the higher hourly wage Ms. Riggan would receive as a shift manager, this average weekly wage translates to an average of 40.72 hours per week ($\$9.64 \times 40.72 = \392.58). These were the average weekly hours *before* Kathy Champagne, Area Manager, began to supervise the area that included the store where Ms. Riggan worked.

According to Workforce Development records, the employer reported \$5,150.00 in wages paid to Ms. Riggan during the third quarter of 2010 and \$4,403.00 in wages reported to Ms. Riggan for the fourth quarter of 2010. Thus, the average weekly wage for the third quarter was \$396.15 ($\$5,150.00$ divided by 13 weeks = \$396.15). Using the higher hourly wage Ms. Riggan would receive as a shift manager, the average weekly wages for the third quarter of 2010 translate to an average of 41.09 hours were week. Ms. Riggan's average weekly wages for the fourth quarter of 2010 work out to be \$338.69. Using the higher hourly wage Ms. Riggan would receive as a shift manager, this works out to 35.13 hours per week.

Ms. Riggan established a claim for unemployment insurance benefits that was effective December 19, 2010. Ms. Riggan's weekly benefit amount was set at \$243.00. Since Ms. Riggan established her claim for benefits she has reported the following weekly wages:

<u>Benefit ending date</u>	<u>Amount reported</u>
12/25/10	195.00
01/01/11	192.00
01/08/11	354.00
01/15/11	161.00

Ms. Riggan did not claim benefits for the weeks that ended January 22, 2011 or January 29, 2011. Ms. Riggan did reopen the claim effective January 30, 2011, after she separated from the employment.

Ms. Riggan established that claim that was effective December 19, 2010 only after the new manager who had recently been hired to operate the store where Ms. Riggan worked substantially cut Ms. Riggan's work hours. After the new manager started, Ms. Riggan's work hours dropped to 20 to 30 hours per week. Ms. Riggan did not decline any work the employer had available. Though Ms. Riggan was a part-time college student at the same time she worked for the employer, Ms. Riggan continued to adjust her personal schedule week-by-week in an effort to maximize her work hours.

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.]

One or more of the parties was unwilling to waive formal notice on the issues related to the separation that occurred on or about January 25, 2011. Accordingly, the administrative law judge's decision will address only the period from the filing of the claim to the separation date.

The weight of the evidence establishes that Ms. Riggan was indeed able to work and available for work during the period in question. Ms. Riggan's part-time academic pursuits did not prevent her from being available for full-time employment. The weight of the evidence establishes that Ms. Riggan experienced a decrease in her work hours during each of the weeks that fell between December 19, 2010 and January 15, 2011. For one of those weeks, the week ending January 8, 2011, Ms. Riggan reported \$354.00 in wages. Because this amount was more than \$15.00 over Ms. Riggan's \$243.00 weekly benefit amount, she would not meet the definition of partially unemployed for that week. For the weeks ending December 25, 2010, January 1, 2011 and January 15, 2011, Ms. Riggan was indeed partially unemployed under the law.

The weight of the evidence in the record establishes that since Ms. Riggan established her claim for benefits the employer did not continue to offer her the same sort of full-time hours she had enjoyed throughout the employment until the new general manager started. The

employer's account may be charged for benefits paid to Ms. Riggan during any of the weeks for which she was partially unemployed.

This matter will be remanded to the Claims Division to address the impact of the January 25, 2011 separation on Ms. Riggan's eligibility for benefits and the employer's liability for benefits. As part of that remand, the Claims Division will need to address any availability issues arising in connection with the additional claim for benefits that was effective January 30, 2011.

DECISION:

The Agency representative's February 1, 2011, reference 01, decision is modified as follows. The claimant was able and available for work from the time she established her claim on December 19, 2010 through the benefit week that ended January 15, 2011, when she temporarily discontinued her claim. The claimant was partially unemployed during the benefit weeks that ended December 25, 2010, January 1, 2011, and January 15, 2011, and is eligible for benefits for those weeks, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant for those three weeks. The claimant was not partially unemployed, and not eligible for benefits, during the week that ended January 8, 2011 because she reported wages that were more than \$15.00 over her weekly benefit amount.

This matter is remanded to the Claims Division to address the impact of the January 25, 2011 separation on the claimant's eligibility for benefits and the employer's liability for benefits. As part of that remand, the Claims Division will need to address any availability issues arising in connection with the additional claim for benefits that was effective January 30, 2011.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs