

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOLLY B MOORE
Claimant

APPEAL NO. 09A-UI-11856-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

B & B OF NEWTON INC
Employer

**Original Claim: 07/12/09
Claimant: Respondent (2-R)**

Section 96.4-3 – Same Hours and Wages

STATEMENT OF THE CASE:

B & B of Newton, Inc. filed an appeal from a representative's decision dated August 17, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on September 1, 2009. Although duly notified, the claimant did not respond to the hearing notice and did not participate. The employer participated by Robert O'Brien, company president.

ISSUE:

The issue is whether the claimant is still employed at the same hours and wages as contemplated in the original contract of hire.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Molly Moore has been employed by the Newton Dairy Queen for approximately nine years. The claimant holds the position of part-time counter help and is paid by the hour. Under the terms of the original agreement of hire in effect between the parties, Ms. Moore works on an intermittent basis. Work is available to the claimant when she avails herself of the opportunity to perform services for the employer. If the claimant is unwilling to work, she is not removed from the employment rolls; rather, the employer keeps hours available for Ms. Moore when she chooses to accept them.

On July 9, 2009, Ms. Moore was temporarily not allowed to work due to a medical condition that day that prevented her from performing her duties. The claimant was aware that she could avail herself of working hours by merely contacting Mr. O'Brien the next day or any other workday and has done so. At the time of hearing, the claimant remains employed working the same hours and wages as contemplated in the original contract of hire.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant has not been separated from employment and continues to be employed in a part-time job at the same hours and wages as contemplated in the original agreement of hire.

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) 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.

The evidence in the record establishes that, on the basis of a personal agreement between the parties, Ms. Moore is allowed to essentially set her own working hours. When the claimant presents herself for employment, the employer makes hours available to her on a part-time basis. If the claimant elects not to work, she is not discharged from employment; rather, the claimant's job position is maintained for her until she makes herself available to accept additional working hours.

The evidence in the record establishes that the claimant was not discharged from employment on July 9, 2009, but that work was not available to the claimant that day based upon the claimant's medical condition and her inability to reasonably perform the duties incident to her part-time employment. Ms. Moore was aware that she could resume her part-time employment relationship the following day or any day thereafter by merely presenting herself for more work and in a medical condition fit for work.

As there has been no separation from employment and the claimant remains employed part-time at the same hours and wages as contemplated in the original agreement of hire, benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual,

benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated August 17, 2009, reference 01, is reversed. The claimant is still employed in a part-time job at the same hours and wages as contemplated in the original agreement of hire. The claimant is not working under a reduced work-rate basis different from the original contract of hire and therefore cannot be considered partially unemployed as of July 9, 2009. The issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw