

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

LUCINDA L KELLER  
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LEWIS IA 51544-0159

BIRGE RANCH INC  
D/B/A ATLANTIC PIZZA RANCH  
PO BOX 823  
HULL IA 51239-0823

Appeal Number: 05A-UI-02970-RT  
OC: 01-23-05 R: 01  
Claimant: Appellant (4)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Lucinda L. Keller, filed a timely appeal from an unemployment insurance decision dated March 17, 2005, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 7, 2005, with the claimant participating. Bruce Birge, Owner, participated in the hearing for the employer, Birge Ranch, Inc., doing business as Atlantic Pizza Ranch. This appeal was consolidated with appeal number 05A-UI-02971-RT for the purposes of the hearing with the consent of the parties. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was and still is employed by the employer as a part-time staff person from the end of August 2004. The claimant averages nine hours per week. The claimant's last day of work for the employer was February 6, 2005 because she was pregnant and her due date was approaching. The claimant had her baby on February 13, 2005 and was not released by her physician to return to work until March 13, 2005. Once the claimant was released by her physician, she returned to work. The claimant also has a full-time regular employer, Hearing Health Care Center, L.L.C. but the claimant is on a temporary layoff from that job. The claimant expects to return to work for her regular full-time employer during the first part of May 2005. The claimant remains job attached to that employer. By a decision by an authorized representative of Iowa Workforce Development dated March 24, 2005, reference 04, the claimant was determined to be eligible for benefits as of March 13, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she is and was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for five weeks between February 6, 2005 and March 12, 2005 or for benefit week ending February 12, 2005 to benefit week ending March 12, 2005.

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".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A

statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she was able to work from February 6, 2005 to March 12, 2005 and failed to demonstrate by a preponderance of the evidence that she was excused from the provision requiring her to be able to work. The evidence does establish that the claimant is temporarily unemployed as defined by Iowa Code section 96.19(38)(c) which initially appears to excuse the claimant from the requirement that she be able, available, and earnestly and actively seeking work. However, being temporarily unemployed does excuse the claimant from being available and earnestly and actively seeking work but does not excuse the claimant from being able to work. Even though temporarily unemployed, the claimant still must remain able to work. The administrative law judge is further constrained to conclude that from February 6, 2005 through March 12, 2005, the claimant was not able to work. The claimant was pregnant and her last day of work was February 6, 2005. She was unable to work thereafter because of her pregnancy. She had her baby on February 13, 2005 and then was prohibited from working by her physician until she was released to work on March 13, 2005. The administrative law judge concludes that the claimant was not able to work during a majority of the weeks for five weeks between February 6, 2005 and March 12, 2005. This applies to benefit weeks ending February 12, 2005 to benefit week ending March 12, 2005. Accordingly, the administrative law judge concludes that the claimant was not able to work for the weeks set out above and, as a consequence, she is ineligible to receive unemployment insurance benefits for those weeks, namely benefit week ending February 12, 2005 to benefit week ending March 12, 2005.

#### DECISION:

The representative's decision of March 17, 2005, reference 02, is modified. The claimant, Lucinda L. Keller, is not entitled to receive unemployment insurance benefits for five weeks between February 6, 2005 and March 12, 2005 or benefit week ending February 12, 2005 to benefit week ending March 12, 2005, because she was not able to work during that period of time and was not excused from the provisions requiring her to be able to work during that period of time.

pjs/pjs