

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DESIDERIO DE LA TORRE

Claimant

APPEAL NO. 12A-UI-12852-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QPS EMPLOYMENT GROUP INC

Employer

OC: 08/05/12

Claimant: Appellant (2)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Desiderio De La Torre filed a timely appeal from the October 28, 2012, reference 03, decision that denied benefits based on an agency conclusion that he has refused an offer of suitable work on August 7, 2012 without good cause. After due notice was issued, a hearing was held on November 28, 2012. Mr. De La Torre participated. Rhonda Hefter De Santisteban represented the employer and presented additional testimony through Ana Martinez. The administrative law judge took official notice of the agency's administrative record (DBRO) of Mr. De La Torre's base period wages and average weekly wage during his highest earning base period quarter.

The administrative law judge notes the employer's clarification on the record that the employer intentionally did *not* protest the claim for benefits on the basis of the claimant's *separation* from the temporary work assignment on August 7, 2012 or *separation* from the employer on that same date. The employer clarified on the record that its protest is based instead on a refusal of an offer of employment on August 7, 2012. With that clarification, there is not further need to adjudicate the August 7, 2012 *separation* and the *separation* would not disqualify the claimant for benefits.

ISSUE:

Whether Mr. De La Torre refused an offer of suitable work on August 7, 2012 without good cause.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Desiderio De La Torre is from Texas and travels to the Midwest each year with his wife in connection with her work. Mr. De La Torre works for a period and then returns to Texas. Mr. De La Torre attended school to the 10th grade and later earned a G.E.D. Mr. De La Torre's work history consists of general labor and operation of heavy equipment. At all times relevant to this matter, Mr. De La Torre resided in Williamsburg, Iowa.

QPS Employment Group is a temporary employment agency/staffing agency. On July 14, 2012, the employer placed Mr. De La Torre in a full-time, temporary production assignment at Riverbend Industries in Victor, Iowa. The commute from Mr. De La Torre's home to the assignment was roughly 20 miles. The assignment had paid \$10.00 per hour. The work hours for that assignment were 6:00 a.m. to 6:00 p.m. and the work days varied from week to week. Riverbend Industries ended the assignment on August 7, 2012. On that same day, Ana Martinez, Iowa City Branch Manager for QPS Employment Group notified Mr. De La Torre that the assignment had ended. At that time, Mr. De La Torre expressed interest in additional work.

On August 7, 2012, Ms. Martinez spoke with Mr. De La Torre in her office and offered Mr. De La Torre a new assignment. The proposed assignment was at the University of Iowa laundry facility located in Coralville. The distance from Mr. De La Torre's home in Williamsburg to the UI laundry facility was approximately 25 miles. Ms. Martinez told Mr. De La Torre the assignment would start the next day, but that Mr. De La Torre would have to complete a two-hour orientation that Ms. Martinez would provide before he could start. QPS had already completed the requisite background check on Mr. De La Torre and the new assignment was his if he wanted it. Ms. Martinez told Mr. De La Torre that the assignment would pay \$9.00 an hour. She told him that the hours would be 5:00 a.m. to 1:30 p.m. until August 31 and would then be 6:00 a.m. to 2:30 p.m., Monday through Friday, with possible overtime. Ms. Martinez told Mr. De La Torre that he would receive overtime pay for any overtime hours. Mr. De La Torre told Ms. Martinez that he had turned down another job offer in Iowa City a week before, that the other position would pay more, and that he first wanted to check with the other company that day to see whether the other position was available. The distance from Mr. De La Torre's home in Williamsburg to the other prospective employment in Iowa City was approximately 32 miles. This was seven miles further than the UI laundry facility. Ms. Martinez told Mr. De La Torre that would wait for Mr. Martinez to call her later that day.

Mr. De La Torre did not get back to Ms. Martinez on August 7. Mr. De La Torre had contacted the other prospective employer, but had been unable to speak to the person with the authority to tell him whether the position was still available. Mr. De La Torre did not get back to Ms. Martinez until August 15, at which time he told her that he had found and accepted another position at Williamsburg Manufacturing. Mr. De La Torre told Ms. Martinez that he had started the position at Williamsburg Manufacturing on August 14, 2012.

Mr. De La Torre established a claim for unemployment insurance benefits that was effective August 5, 2012. The claim was established in response to the assignment at Riverbend Industries being ended. Mr. De La Torre's base period for purposes of the claimant that was established August 5, 2012 consists of the second, third, and fourth quarters of 2011 and the first quarter of 2012. Mr. De La Torre did not have any wages during the second quarter of 2011. Mr. De La Torre's highest earning base quarter was the fourth quarter of 2011, when his average weekly wage was \$456.36. The full-time, temporary position at the UI laundry facility would have paid \$360.00 per week. The position at Riverbend Industries had paid \$400.00 per week.

Mr. De La Torre cites multiple reasons for not wanting to accept the position offered at the UI laundry facility. First, he cites the commute. Mr. De La Torre had a vehicle he could use to get to work. The commute to the other, Iowa City employment he was interested in was substantially longer. Second, he cites the decrease in pay from what he had earned at Riverbend Industries and the prospect of greater pay somewhere else. The pay offered at the UI facility was a \$1.00 less per hour than what he had been making at Riverbend Industries. Third, he cites an erroneous belief that the UI laundry facility in Coralville was located on the University campus, and adds that he thought he would be uncomfortable working around

students. Finally, he cites his preference for working in an environment where his coworkers would predominantly be men, not women.

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".

871 IAC 24.22(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence indicates that Mr. De La Torre was available for work during the period in question and was actively and earnestly seeking new employment. This is indicated by his comments to Ms. Martinez on August 7, his contact with the other prospective employer that same day, his acceptance of new employment, and his starting a new job on August 14.

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the

department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
- (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

Iowa Administrative Code section 871 IAC 24.24(15) provides as follows:

Suitable work. In determining what constitutes suitable work, the department shall consider, among other relevant factors, the following:

- a. Any risk to the health, safety and morals of the individual.
- b. The individual's physical fitness.
- c. Prior training.
- d. Length of unemployment.
- e. Prospects for securing local work by the individual.
- f. The individual's customary occupation.
- g. Distance from the available work.

- h. Whether the work offered is for wages equal to or above the federal or state minimum wage, whichever is higher.
- i. Whether the work offered meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.
- j. Whether the position offered is due directly to a strike, lockout, or other labor dispute.
- k. Whether the wages, hours or other conditions of employment are less favorable for similar work in the locality.
- l. Whether the individual would be required to join or resign from a labor organization.

The weight of the evidence indicates that the employer made a bona fide offer of employment to Mr. De La Torre on August 7, 2012 and that the offer was made in the context of a claim for unemployment insurance benefits that was effective August 5, 2012. The offer of employment was suitable in all but the wage offered. The offer of employment came during the very first week of Mr. De La Torre's claim for unemployment insurance benefits, not during the sixth through twelfth week of the claim, as stated in the October 18, 2012, reference 03, decision. The UI laundry position offered wages of \$360.00 per week. This was substantially less than the \$456.36. average weekly wage from the highest earnings base period quarter and also substantially less than the \$400.00 Mr. De La Torre had earned in the assignment that ended on August 7, 2012. Because the work was unsuitable due to the wage offered, any refusal on the part of Mr. De La Torre to accept the work would not disqualify him for unemployment insurance benefits. Mr. De La Torre is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's October 28, 2012, reference 03, decision is reversed. The work the employer offered to the claimant on August 7, 2012, during the first week of the claim, was unsuitable due to the wage offered. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css