

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**THEODORE FALCON JR**  
Claimant

**APPEAL 21A-UI-13799-SN-T**

**ADMINISTRATIVE LAW JUDGE  
AMENDED DECISION**

**PRIMO'S MEXICAN RESTAURANT INC**  
Employer

**OC: 03/14/21  
Claimant: Respondent (4R)**

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Iowa Code section 96.5(3)a – Failure to Accept Suitable Work  
Iowa Code section 96.4(3) – Able and Available  
Iowa Code section 96.1A(37) – Temporarily, Totally, Partially Unemployed  
Iowa Code section 96.7(2)a(2)(a), (b), and (c) – Subject to Charge

**STATEMENT OF THE CASE:**

The employer, Primo's Mexican Restaurant Inc., filed an appeal from the June 3, 2021, reference 03, unemployment insurance decision that granted benefits based upon the conclusion the claimant did not have to accept the offer because he was expecting to be recalled. The parties were properly notified of the hearing. A telephone hearing was held on August 12, 2021. The claimant participated and testified. The employer participated through Jose Aviles. No exhibits were received into the record. Official notice was taken of the administrative file.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked for the employer as a bartender from October 2010 to March 17, 2020. His hourly wage was \$8.50. He worked 20 to 30 hours per week.

The employer made an offer of work to claimant on April 24, 2020 in a certified letter. That offer stated he could return to work as a bartender at an hourly rate of \$10.00 per hour. The claimant's average weekly wage is \$210.00. The offer was made in the sixth week of unemployment. The claimant declined the offer because he was not available for work due to inadequate childcare.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did decline an offer of work because he was not available.

Iowa Code section 96.5(3)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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. (1) 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:

(a) One hundred percent, if the work is offered during the first five weeks of unemployment.

(b) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(c) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(d) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

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

Iowa Admin. Code r. 871-24.24(4) provides:

(4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or

health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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".

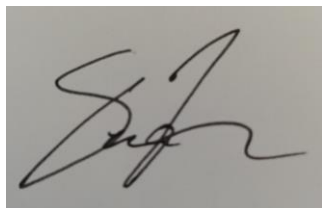
The offer may have been suitable, but the reason for the failure to accept the work was because claimant was not available for work. Therefore, claimant is not disqualified from receiving benefits, but is not eligible for the period from April 24, 2020 to August 12, 2021. Benefits are withheld until such time as claimant makes himself available for work.

**DECISION:**

The June 3, 2021, reference 03, decision is modified in favor of the appellant. The claimant did decline an offer of work but was unavailable at the time. Benefits are withheld effective April 24, 2020 until such time as the claimant makes himself available for work.

**REMAND:**

The administrative law judge is remanding to the Benefits Bureau the issue regarding whether the claimant has been overpaid regular unemployment insurance benefits. He is also remanding to the Benefits Bureau the issue regarding the disbursement of the claimant's PUA benefits.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is shown on a light gray background.

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Sean M. Nelson  
Administrative Law Judge  
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1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515) 725-9067

September 13, 2021  
Decision Dated and Mailed

smn/mh