

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS, DAVID, D
Claimant

APPEAL NO. 11A-UI-01940-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ANNA ENTERPRISES
STAFFING SOLUTIONS**
Employer

**OC: 01/16/11
Claimant: Respondent (1-R)**

Section 96.4(3) – Able & Available
Section 96.5(3) – Work Refusal

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 16, 2011, reference 01, decision that allowed benefits and that concluded the claimant had good cause for refusing a work offer on November 1, 2010. After due notice was issued, a hearing was held on March 15, 2011. Claimant David Thomas participated and presented additional testimony through Jamie Thomas. Katherine Druivenga represented the employer. The administrative law judge took official notice of the Agency's administrative record (DBRO) of benefits disbursed to the claimant.

ISSUES:

Whether the claimant refused a suitable offer of employment without good cause.

Whether the claimant was able for work and available for work at the time of the alleged refusal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. David Thomas began getting work through Staffing Solutions in September 2010 and performed work in just one work assignment. That assignment was a full-time temporary work assignment at Adel Brick and Tile in Adel. That assignment paid \$9.50. Mr. Thomas lives in Winterset and commuted to the assignment in Adel. Mr. Thomas completed the work assignment on October 21, 2010, at which time the client business no longer needed his services.

On the morning of November 1, 2010, Staffing Solutions Manager Bill Van Sloun telephoned Mr. Thomas to offer him a one-day assignment in Johnston. The assignment was for that same day. The hours of the assignment were 7:00 a.m. to 4:30 p.m. The day-labor assignment was to pay \$8.00 per hour. Mr. Thomas refused the proposed one-day assignment. Mr. Thomas told Mr. Van Sloun that he needed to participate in walk-in interviews with a telemarketing company in Winterset that same day. The walk-in interview period was 1:00 p.m. to 8:00 p.m.

Mr. Van Sloun wanted Mr. Thomas to go work the one-day assignment and go to the walk-in interview after the assignment was done. Mr. Thomas told Mr. Van Sloun that he would “pass” on the one-day assignment. Mr. Thomas interviewed with the Winterset telemarketing firm that same day and received an offer of permanent, full-time employment. On November 4, Mr. Thomas notified Staffing Solutions that he had accepted full-time permanent employment with the telemarketing firm.

Workforce Development records indicate that Mr. Thomas’ average weekly wage during the base period quarter with the highest earnings was \$473.75. This corresponds to an average hourly wage of \$11.83.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence establishes that the separation from employment occurred on October 21, 2010 for unemployment insurance purposes. That is the date Mr. Thomas completed the assignment at Adel Brick and Tile and was laid off from that assignment. In any event, the decision the employer appealed was not in reference to the separation from employment, the separation issues were not set for hearing, and adjudication of the October 21, 2010 separation and its impact on Mr. Thomas’s eligibility for unemployment insurance benefits will have to be addressed as part of a remand to the Claims Division. During the hearing, Mr. Thomas appeared to have somewhat limited cognitive ability and the administrative law judge concluded it would only invite further confusion to ask the parties to waive formal notice on the separation issues so that they could be addressed as part of the appeal hearing. The ruling in this matter will be limited to the work refusal and work availability issues addressed in the lower decision. Those issues, along with the overpayment of benefits issue, were the only issues set for hearing on appeal.

Iowa Code § 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.

Iowa Administrative Code rule 871 IAC 24.24(1)(a) provides as follows:

Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

Iowa Administrative Code rule 871 IAC 24.24(8) provides as follows:

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 rule 871 IAC 24.24(4) states as follows:

Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code § 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 If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept 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 § 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 establishes that the employer made a bonafide offer of employment on November 1, 2010. But the weight of the evidence establishes that the employment offered to Mr. Thomas on November 1, 2010 was not *suitable* employment. First, the proposed employment paid significantly less than Mr. Thomas had received in the earlier assignment and significantly less than Mr. Thomas had earned during the relevant base period. Second, the proposed employment was too far away. Mr. Thomas' commute from Winterset to the Adel assignment had been approximately 20 miles. The commute to Johnston would be about 40 miles. The unsuitability of the work provided good cause for Mr. Thomas' rejection of the proposed assignment. The short notice the employer provided to Mr. Thomas provided good cause for rejecting the offered assignment. In addition, Mr. Thomas' desire to interview in Winterset that same day for permanent full-time work provided additional good cause for declining the assignment. A reasonable person in Mr. Thomas' position would not have been okay with waiting until the end of the walk-in interview period to apply for a limited number of positions.

The weight of the evidence establishes that Mr. Thomas was indeed able to work and available for full-time work at the time he declined the unsuitable proposed assignment on November 1, 2010. This is indicated by his plans that very day to stay in Winterset and to pursue a permanent full-time position.

DECISION:

The Agency representative's February 16, 2011, reference 01, decision is affirmed. The employment offered on November 1, 2010 was unsuitable. The claimant had good cause for rejecting the unsuitable offer of employment. The claimant was able and available for work at the time of the refusal. The claimant is eligible for benefits, provided he is otherwise eligible.

This matter is remanded to the Claims Division for adjudication of the separation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs