

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

TRACY L VAUGHN
310 W CLAY
MT PLEASANT IA 52641

TEMP ASSOCIATES
1000 N ROOSEVELT AVE
BURLINGTON IA 52601

Appeal Number: 04A-UI-00345-RT
OC: 10-05-03 R: 04
Claimant: Respondent (5)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-3 – Failure to Accept Work
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Temp Associates, filed a timely appeal from an unemployment insurance decision dated January 9, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Tracy L. Vaughn. After due notice was issued, a telephone hearing was held on February 2, 2004, with the claimant participating. Dennis Vaughn testified for the claimant. Debra Fox, Account Manager, and Deborah Eagleman, Branch Manager, participated in the hearing for the employer. 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 employed by the employer, a temporary employment agency, from October 1, 2002. From October 1, 2002 until October 7, 2003, the claimant was assigned to Wal-Mart working a 10-hour day on the day shift from 5:15 a.m. to between 2:45 p.m. and 3:45 p.m. Prior to that time the claimant had also been employed during the day shift. The claimant satisfactorily completed that assignment. The claimant was then issued another assignment on October 16, 2003 which ended on November 21, 2003 which the claimant satisfactorily completed. This position was on the second shift from 4:15 p.m. to 2:45 a.m. On November 21, 2003, the claimant was then offered a position with Experian, a temp-to-hire position on the second shift paying \$8.50 per hour for a 40-hour week or \$340.00 for a gross weekly wage. However, this position began at 3:00 p.m. and ended at 11:00 p.m. The claimant had placed restrictions on her employment to not start work until after 3:30 p.m. because her husband got off at that time and could take care of the kids and the claimant could not go to work prior to that time. The claimant was able to work out her child care situation when working the day shift at Wal-Mart from 5:15 a.m. to between 2:45 p.m. and 3:45 p.m. However, the claimant could not work out leaving at 3:00 p.m. to work at Experian. The claimant, therefore, had to refuse the offer of employment with Experian. Actually the claimant initially accepted the offer but when she learned the hours, she had to refuse the offer because of the complications with her children. The employer could not meet the claimant's time restrictions. No other offers of employment were made by the employer.

Pursuant to her claim for unemployment insurance benefits filed effective October 5, 2003, the claimant has received unemployment insurance benefits in the amount of \$1,200.00 as follows: \$600.00 for four weeks from benefit week ending October 18, 2003 to benefit week ending November 8, 2003, which amount was determined to be overpaid and was repaid by the claimant leaving an overpayment balance of zero. The claimant then received eight weeks of benefits at \$150.00 per week for a total of \$1,200.00. The claimant's average weekly wage is \$219.51.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for that reason.
2. Whether the claimant is disqualified to receive unemployment insurance benefits because she refused to accept suitable work. The claimant is not disqualified to receive unemployment insurance benefits for that reason.
3. Whether the claimant is overpaid unemployment insurance benefits. She is not overpaid unemployment insurance benefits.

871 IAC 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.

Before a disqualification for a failure to accept suitable work may be imposed, an individual must first satisfy the eligibility condition of being able and available for work. This issue was not set out on the notice of appeal but the parties permitted the administrative law judge to take evidence on and decide that issue.

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".

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 met her burden of proof to demonstrate by a preponderance of the evidence that she is and was able, available, and earnestly and actively seeking work. The claimant testified that she had placed restrictions on her availability for work not to start until after 3:30 p.m. when her husband came home to take care of her children. Therefore, the claimant could not begin a second shift position until 4:00 p.m. or thereafter. An individual does not have to be available for a particular shift. It is sufficient if an individual is available for work on the same basis as which her wage credits were earned and after considering restrictions as to hours of employment there exists a reasonable expectation of securing employment. The claimant worked for a year for the employer assigned to Wal-Mart on the day shift getting off at between 2:45 and 3:45 p.m. The claimant was able to work this time out with her children. The claimant also had some wage credits with previous employment in the day shift. The only second shift employment the claimant had was for a little over one month from October 16, 2003 to November 21, 2003 when she worked the second shift but she began at 4:15 p.m. and ended at 2:45 a.m. and this met the claimant's requirement for her children. Accordingly, the administrative law judge concludes that the claimant's wage credits were earned without starting a shift at 3:00 p.m. In view of the claimant's past employment record and the time when her wage credits were earned, the administrative law judge concludes that the restriction of not starting work until after 3:30 p.m. is not such a restriction that would impede a reasonable opportunity or expectation of securing employment. Therefore, the administrative law judge concludes that even with this restriction,

the claimant is and remains available for work and, therefore, is not ineligible to receive unemployment insurance benefits.

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.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work. The employer's witnesses credibly testified that the claimant was offered employment on November 21, 2003 to start November 24, 2003 at Experian. This was a temp-to-hire position paying \$8.50 per hour for a 40-hour week or a gross

weekly wage of \$340.00. This is substantially in excess of 100 percent of the claimant's average weekly wage of \$219.51 and is suitable as a result of the pay. However, this position was a second shift position from 3:00 p.m. until 11:00 p.m. and the claimant could not accept that start time as noted in the discussion above. The employer had no other start times available for the claimant so the claimant had to refuse this work. Because of the hours, the administrative law judge concludes that the offer of employment was not suitable and, therefore, the claimant's refusal was justified. There was some evidence as to whether the offer was actually made directly to the claimant. The administrative law judge concludes herein that it was and, in any event, the claimant's refusal was justifiable and the offer was not suitable. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant refused to accept suitable work, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,200.00 since filing for such benefits effective October 5, 2003. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 9, 2004, reference 02, is modified. The claimant, Tracy L. Vaughn, is entitled to receive unemployment insurance benefits because she did not refuse to accept suitable work but refused work that was not suitable. The claimant is able, available, and earnestly and actively seeking work and is not ineligible as a result. Further, as a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/b