

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EVERARDO TORRES

Claimant

APPEAL 18A-UI-05041-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 02/18/18

Claimant: Respondent (5)

Iowa Code § 96.5(3)A – Failure to Accept Work

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the April 20, 2018 (reference 02) unemployment insurance decision that found claimant was eligible to receive unemployment insurance benefits because the job offered did not provide wages of at least 100% of his average weekly wage. The parties were properly notified of the hearing. A telephone hearing was held on May 30, 2018. The claimant, Everardo Torres, participated personally and was represented by Attorney C. Aron Vaughn. CTS Language Link provided language interpretation services for claimant. The employer, Swift Pork Company, participated through witness Vicky Cervantes. Claimant's Exhibit B was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was a suitable offer of work made to the claimant?

If so, did the claimant fail to accept and was the failure to do so for a good cause reason?

FINDINGS OF FACT:

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

Claimant separated from employment with this employer after working approximately ten years as a forklift driver on first shift (7:00 a.m. to 3:00 p.m.) in the distribution center seven days per week. Claimant filed a claim for unemployment insurance benefits with an effective date of February 18, 2018. The fourth quarter of 2016 is the quarter of his base period in which his wages were the highest (\$19,463.00). His average weekly wage based upon his highest base period quarter is \$1,497.15.

On March 26, 2018, the employer met with the claimant about two different jobs during an in person meeting with union representatives and Nicholas Aguirre. The parties discussed a job on 3rd shift in the distribution center. His job duties would have been driving a forklift and organizing boxes in the distribution center, which was the job he had previously done. However, the working hours would have been 11:00 p.m. to 7:00 a.m. working eight hours per day, up to seven days per week. No information regarding hourly rate of pay was given to claimant during the in person meeting. Ms. Cervantes testified that this job would have paid

\$15.60 per hour. No start date was given to the claimant. Claimant would have started with no seniority and would have been on probation for six months regarding attendance.

The second job the parties discussed during the March 26, 2018 meeting was a job on 1st shift as a pallet jack driver in the loin department. Claimant's job duties would have been driving the product to the production line to keep the line running. Claimant would have rotated to different areas because he would not have owned the job since he would be starting over with no seniority. No hourly rate of pay was given to claimant at the March 26, 2018 meeting. Ms. Cervantes testified that this job would have paid \$15.60 per hour. The working hours would have been from 6:45 a.m. to 3:45 p.m. Monday through Friday with occasional Saturdays. No start date was given to the claimant.

On or about the first week of April 2018, the employer telephoned claimant again to inquire about the 1st shift job as a pallet jack driver in the loin department. Again, no hourly rate of pay was given to the claimant during this telephone call.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that no offer of work was actually communicated to claimant.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the following may be considered: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* The Administrative Law Judge finds that claimant's testimony, based upon first-hand knowledge, is more credible than Ms. Cervantes' testimony.

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.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

No information regarding starting date or rate of pay was ever communicated to the claimant about either of these jobs. As such, no offer of work was actually made to the claimant. Since no offer of work was actually made, benefits are allowed.

Even if the Administrative Law Judge finds that the hourly rate of pay of \$15.60 per hour was communicated to the claimant for both job offers during the sixth through twelfth week of unemployment, the gross weekly wages for the work did not equal or exceed 75% of the claimant's average weekly wage for insured work paid to claimant during the highest quarter of his base period. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The April 20, 2018 (reference 02) unemployment insurance decision is modified with no change in effect. Employer did not communicate an offer of work to claimant. Benefits are allowed, provided claimant is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs