

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

TAMMY L KIRKPATRICK  
300 WEBB CT  
MAXWELL IA 50161

NEVADA COMMUNITY SCHOOL DISTRICT  
ATTN SECRETARY  
1035 – 15<sup>TH</sup> ST  
NEVADA IA 50201

Appeal Number: 05A-UI-07312-RT  
OC: 05-29-05 R: 02  
Claimant: Appellant (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-3 – Failure to Accept Work  
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Tammy L. Kirkpatrick, filed a timely appeal from an unemployment insurance decision dated July 14, 2005, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 3, 2005, with the claimant participating. Rob Kirkpatrick, the claimant's husband, was available to testify for the claimant but not called, because his testimony would have been repetitive and unnecessary. Brian Schaeffer, School Board Secretary and Business Manager, participated in the hearing for the employer, Nevada Community School District. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the

claimant. This appeal was consolidated with appeal number 05A-UI-07313-RT for the purposes of the hearing with the consent of the parties.

#### 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 as a part-time general food service worker in the 2004-2005 school year. This position ended at the end of the 2004-2005 school year. The claimant worked 4.25 hours per day five days a week in the elementary school and was paid \$9.36 per hour for a gross weekly wage of \$198.90. This position ended with the 2004-2005 school year. The claimant was not provided any reasonable assurance of any position thereafter.

On June 17, 2005, the employer had an opening in its middle school cafeteria and the employer offered the claimant a position there on June 17, 2005 as a general food service worker performing similar services as she had in the 2004-2005 school year. However, this position was only 2½ hours per day for a five-day week and paid \$9.13 per hour for a gross weekly wage of \$114.12. The middle school is approximately one-half mile from the elementary school where the claimant was employed in the 2004-2005 school year. The claimant refused this offer by a letter dated June 20, 2005. She refused the offer because it involved a significant pay cut and the claimant could not afford to make the commute from her home, 19 or 20 miles away, for the reduced pay.

The claimant has placed no physical restrictions or training restrictions on her ability to work. The claimant has placed no time restrictions or day restrictions on her availability for work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant's average weekly wage for unemployment insurance benefit purposes is \$208.10. The claimant filed for unemployment insurance benefits effective May 29, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. 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, because she did not refuse to accept suitable work.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits because she is able, available, and earnestly and actively seeking work.

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. There is very little difference between the testimony of the two witnesses. The claimant was employed previously with the employer as a general food service worker in the employer's elementary school for the 2004-2005 school year working 4.25 hours per day for five days a week earning \$9.36 per hour, or a gross weekly wage of \$198.90. This position ended at the end of the school year. On June 17, 2005, the employer had an opening at its middle school cafeteria and offered the claimant a position there on June 17, 2005, working as a general food service worker performing similar functions as she had previously. However, this position was for 2½ hours per day for five days a week paying \$9.13 per hour for a gross weekly wage of \$114.12. The middle school is only one-half mile from the elementary school. The claimant refused the offered position because it did not pay her enough money to make her commute from home, which is approximately 19 or 20 miles away. The claimant's average weekly wage is \$208.10. The gross weekly wage of the offered position at the middle school has a gross weekly wage of \$114.12 and is not 100 percent of the claimant's average weekly wage. The offer was made in the claimant's third week of unemployment and would have to pay 100 percent of the average weekly wage in order for the

work to be suitable. It does not. Accordingly, the administrative law judge is constrained to conclude that the offer of employment to the claimant at the middle school cafeteria made on June 17, 2005, was not suitable. Accordingly, the claimant's refusal was not a refusal of suitable work. Therefore, the administrative law judge concludes that the claimant did not refuse 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.

The administrative law judge notes that the between academic years or terms denial of unemployment insurance benefits under Iowa Code section 96.4(5) is not relevant here because, although the employer is an educational institution, the claimant did not have reasonable assurance that she would be working for the employer under the same circumstances in the new academic year, 2005-2006, as she had in the prior academic year, 2004-2005. The evidence establishes that the claimant's first position in the 2004-2005 year was completed and that position was no longer available to the claimant.

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, at all relevant times, able, available, and earnestly and actively seeking work. The claimant so testified credibly and there is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, she is not ineligible to receive unemployment insurance benefits.

#### DECISION:

The representative's decision of July 14, 2005, reference 02, is reversed. The claimant, Tammy L. Kirkpatrick, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she did not refuse to accept suitable work. The claimant is able, available, and earnestly and actively seeking work.

pjs/kjw