

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK W SERVANTEZ
Claimant

APPEAL NO. 07O-UI-10152-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

**OC: 07/22/07 R: 02
Claimant: Respondent (1)**

Section 96.4-3 – Able and Available for Work
Section 96.5-3 – Bona Fide Offer/Refusal for Suitable Work

STATEMENT OF THE CASE:

Express Services, Inc. (employer) appealed an unemployment insurance decision dated August 27, 2007, reference 01, which held the claimant eligible for unemployment insurance benefits. A telephone hearing was held on September 18, 2007 in which both the claimant and the employer representatives participated. By decision dated and mailed September 19, 2007, the decision holding the claimant eligible for unemployment insurance benefits was reversed. Unemployment insurance benefits were withheld and the claimant was held to be overpaid benefits in the amount of \$2,888.00. Mark Servantez (claimant) appealed the decision to the Employment Appeal Board. By decision dated October 2007, the administrative law judge's decision was reversed; the Appeal Board holding that the claimant did not quit. Based upon that finding, the Appeal Board in addition found that the issues of possible disqualifications based upon a refusal of suitable work and/or the claimant's availability and ability should be heard and decided. As notice of those issues had not been previously provided, it was determined that these issues should be remanded to the Appeals Section so that a hearing could be held on the issues of refusal of suitable work and the claimant's ability and availability for work.

Pursuant to the order of the Appeal Board, a telephone conference hearing was scheduled for and held on November 20, 2007. Mr. Servantez participated personally. Acting as the claimant's designated representative was his wife, Shawna Servantez. The employer participated by Andre Smith.

ISSUE:

At issue in this matter is whether Mr. Servantez was able and available for work and whether the claimant has refused a bona fide offer of suitable work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant was employed by this temporary employment agency until the

afternoon of July 18, 2007 when he was informed prior to reporting for the evening shift that his assignment as a general laborer for the client, Sunny Fresh, had ended. Mr. Servantez had, earlier that day, visited the offices of Express Services, Inc. and at that time had been offered the possibility of a new job assignment with Wood Harbor, another client of Express Services, Inc. At the time of that offer, Mr. Servantez had not been informed that his long-term assignment with Sunny Fresh was ending and the claimant believed based upon representations from Sunny Fresh that his assignment at that location would continue for another two to three weeks. Because the claimant believed that his current assignment had not ended and he had not been informed that it had, he did not express an interest in accepting an assignment at the Wood Harbor Company. The claimant noted that the job requirement for the Wood Harbor temporary position required him to complete a mathematical examination and that the pay was \$2.00 per hour less than he was currently receiving at his assignment at Sunny Fresh. The claimant, who has difficulty with mathematics, believed that he could not pass the math examination after examining it and also reasonably concluded that he would not be eligible or offered the position at Wood Harbor based upon his poor mathematical skills.

In an effort to further explain his non interest at the time in the Wood Harbor temporary position, the claimant stated that he desired to remain at the Sunny Fresh location for the two to three week duration that he believed continued to be available to him because he needed the extra money that the pay and overtime would provide. He further explained because he would be closing on a new house in the next few weeks he desired to make no changes that might affect his loan application.

Mr. Servantez left the Express Services facility that morning believing that his assignment at Sunny Fresh was ongoing and planned to report to work that evening. At approximately 5:00 p.m. on July 18, 2007, he was contacted and informed that his temporary assignment with Sunny Fresh had ended "as of then" and that he should not report to Sunny Fresh's location that night. On July 20, Mr. Servantez personally visited the Express Services facility to obtain his most recent paycheck and to seek other work. At that time he was told other positions were not available. The claimant has actively sought re-employment by making application with prospective employers and attempting to seek work through Iowa Workforce Development. The claimant has also contacted Express Services for additional work but has not been reassigned.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge in this case is whether the claimant has refused an offer of suitable work and whether the claimant is able and available for work within the meaning of the Iowa Employment Security Act. Based upon the evidence in the record, the administrative law judge finds that the claimant has not refused a bona fide offer of suitable work and the claimant is able and available for work within the meaning of the law. The evidence in the record on a rehearing of this matter shows that at the time Express Services, Inc. mentioned the possibility of a new assignment with the Wood Harbor Company, Mr. Servantez' current assignment with the Sunny Fresh Company had not ended. The claimant had been informed that his temporary long-term assignment with Sunny Fresh had concluded and Mr. Servantez reasonably believed that he had two to three more weeks at the Sunny Fresh client location before that assignment would end. Believing that he had an ongoing assignment that paid a substantially higher rate of pay per hour and offered overtime, Mr. Servantez did not express an interest in taking a mathematical examination that might have led to a future job offer for temporary employment doing woodworking tasks at the Wood Harbor Company. The evidence establishes that Mr. Servantez reasonably believed based upon his poor math skills that he would not be able to pass what he considered to be a difficult examination to establish his eligibility for a new assignment. Mr. Servantez, in an effort to explain, also stated that he

wished to continue working at Sunny Fresh for the remaining two to three weeks that he believed that assignment would last because he was in the process of purchasing a new home. The claimant stated that he wanted to continue to receive the higher pay at Sunny Fresh and believed that leaving that assignment to take a new lower paying one might jeopardize his home loan application. The claimant denies in any manner stating that he was engaged in working on or preparing the new home or that he was unavailable for work because he was engaged in the process of purchasing a new home.

The evidence in the record also establishes that later that day the claimant received his first notice that his assignment at Sunny Fresh was ending immediately and he should not report to work that evening. Mr. Servantez testified that he began seeking new employment and contacted Express Services one day later in hopes of obtaining a new assignment. The claimant testified that he was told at that time by a female worker that another assignment was not available. The evidence in the record establishes the claimant has actively and earnestly sought reemployment by making application and contacting prospective employers and utilizing the services of Iowa Workforce Development. Although the claimant has been in recontact with Express Services, he has not been offered additional assignments through that temporary employment service.

871 IAC 24.24(1)a provides:

(1) 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 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.

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 administrative law judge concludes that the claimant is able and available for work and has actively sought re-employment. The administrative law judge also concludes based upon the evidence in the record that a bona fide offer of work was not made to the claimant, only that the claimant had an opportunity for potential eligibility if he were able to pass a preliminary examination establishing his qualifications.

DECISION:

It is the finding of the administrative law judge that the claimant is able and available for work and that the claimant has not refused a bona fide offer of suitable work. No disqualification from benefits is applicable for these reasons. Benefits are allowed, providing he is otherwise eligible for benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs