

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**ISMENDER DAVIN**  
Claimant

**KELLY SERVICES INC**  
Employer

**APPEAL 19A-UI-04525-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/07/19**  
**Claimant: Appellant (2-R)**

---

Iowa Code § 96.5(3)a – Failure to Accept Work  
Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

**STATEMENT OF THE CASE:**

On June 3, 2019, Ismender Davin (claimant) filed a timely appeal from the May 29, 2019, reference 04, unemployment insurance decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 10, 2019. The claimant participated personally. Kelly Services, Inc. (employer) participated through Commercial Recruiter Stacey Mumm. No exhibits were offered into the record.

**ISSUES:**

Is the claimant able to and available for work?  
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 heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The claimant filed an original claim for unemployment insurance benefits effective April 7, 2019. The average weekly wage he earned during the high quarter of his base period is \$531.82. The claimant had previously worked an assignment for the employer located in Iowa City, Iowa, within walking distance of his home.

The employer made an offer of work to claimant via telephone on May 7, 2019. The offer was for a full-time Assembly position in North Liberty, Iowa on first or second shift earning \$10.10 an hour. The claimant declined the offer as his license was suspended in April 2019 and he was seeking employment only in Iowa City, Iowa which would be accessible by means other than his own personal vehicle. On May 10, the employer made another offer of work to the claimant via telephone for a full-time third shift Packaging Customization position in West Branch, Iowa earning \$12.00 an hour. The claimant declined that position for the same reason he declined the North Liberty position.

The claimant has filed continued weekly claims for each week from April 7 through July 6. He obtained full-time employment some time at the end of May with Proctor & Gamble earning either \$12.30 or \$12.50 an hour. The claimant usually works between 30 and 40 hours each

week. He did not report any wages earned during the weeks ending May 25 and June 1. He reported \$12.00 earned during the week ending June 8. He has reported between \$225.00 and \$250.00 earned for each of the four weeks between June 9 and July 6.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant is able to and available for work effective May 5, 2019 and he did not refuse a suitable offer of work. Benefits are allowed, provided he is otherwise eligible.

#### *1. Is the claimant able to and available for work?*

Before the question of whether a suitable offer of work was refused can be addressed, the claimant must first be deemed able to and available for work.

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".

Iowa Admin. Code r. 871-24.22(2) provides, in relevant part:

Benefit 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.

Iowa Admin. Code r. 871-24.23 provides, in relevant part:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

..

(4) If the means of transportation by an individual was lost from the individual's residence to the area of the individual's usual employment, the individual will be deemed not to have met the availability requirements of the law. However, an individual shall not be disqualified for restricting employability to the area of usual employment. See subrule 24.24(7).

...

(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

...

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22. The claimant was limiting his work search to jobs within walking, biking, or bussing distance of his home in Iowa City, Iowa. This is not unduly limiting the claimant's ability to work because the geographical area is a large city which has available public transportation. Additionally, the claimant's area of usual employment is within Iowa City. The claimant is able to and available for work effective May 5, 2019. Benefits are allowed, provided the claimant is otherwise eligible.

The claimant has since obtained full-time employment and continues to file for unemployment insurance benefits. He is unsure of when the employment started, his hourly wage, or how many hours he works each week. Whether the claimant is partially unemployed or able to and available for work after he started employment with Proctor & Gamble and whether he has unreported or underreported wages after he started employment is remanded to the Benefits Bureau and/or the Investigations and Recovery Unit of Iowa Workforce Development (IWD) for an initial investigation and determination on the issues.

*II. 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?*

As the claimant is able to and available for work, the next issue is whether he failed to accept suitable offers of work.

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.

Iowa Admin. Code r. 871-24.24 provides, in relevant part:

Failure to accept work and failure to apply for suitable work. Failure to accept work and apply for suitable work shall be removed when the individual shall have worked in (except in back pay awards) and been wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

...

(3) Each case decided on its own merits. Based on facts found by the department through investigation it shall then be determined whether the work was suitable and whether the claimant has good cause for refusal. Each case shall be determined on its own merits as established by the facts. A reason constituting good cause for refusal of suitable work may nevertheless disqualify such claimant as being not available for work.

...

(25) Suitable work. In determining what constitutes suitable work, the department shall consider, among other relevant factors, the following:

a. Any risk to the health, safety and morals of the individual.

b. The individuals physical fitness.

- c. Prior training.
- d. Length of employment.
- e. Prospects of securing local work by the individual.
- f. The individual's customary occupation.
- g. Distance from available work.
- h. Whether the work offered is for wages equal to or above the federal or state minimum wage, whichever is higher.
- i. Whether the work offered meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.
- j. Whether the position offered is due directly to a strike, lockout, or other labor dispute.
- k. Whether the wages, hours or other conditions of employment are less favorable for similar work in the locality.
- l. Whether the individual would be required to join or resign from a labor organization.

The employer offered the claimant two jobs during the fifth week of his unemployment; therefore, the wages earned in each job would have to equal one hundred percent of the claimant's average weekly wage, or \$531.82, to be considered suitable. The job offered in North Liberty would have only resulted in a gross weekly wage of \$404.00, at \$10.10 an hour for forty hours a week. The job offered in West Branch would have resulted in a gross weekly wage of \$480.00, at \$12.00 an hour for forty hours a week. As neither job offered paid gross weekly wages equaling one hundred percent of the claimant's average weekly wage, they are not considered suitable. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The May 29, 2019, reference 04, unemployment insurance decision is reversed. The claimant is able to and available for work effective May 5, 2019. The employer did not offer the claimant suitable work. Benefits are allowed, provided the claimant is otherwise eligible.

**REMAND:**

Whether the claimant is partially unemployed or able to and available for work after he started employment with Proctor & Gamble and whether he has unreported or underreported wages after he started employment is remanded to the Benefits Bureau and/or the Investigations and Recovery Unit of IWD for an initial investigation and determination on the issues.

---

Stephanie R. Callahan  
Administrative Law Judge

---

Decision Dated and Mailed

src/rvs