

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WENDY LABINGER
Claimant

KIRKWOOD COMM COLLEGE AREA 1
Employer

APPEAL 22A-UI-03978-SN-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 01/02/22
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(3)A – Work Refusal
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:

The claimant, Wendy Labinger, filed an appeal from the January 21, 2022, (reference 01) unemployment insurance decision that denied benefits effective January 2, 2022 based upon the conclusion she was not willing to work in her usual occupation. The parties were properly notified of the hearing. A telephone hearing was held on March 15, 2022. The claimant participated. The employer participated through Human Resources Supervisor Sheri Hlavacek. Exhibits D-1 and D-2 were received into the record.

ISSUES:

Whether the claimant's appeal is untimely? Whether there are reasonable grounds to consider her appeal otherwise timely?

Whether the claimant refused a suitable job offer?

Whether the claimant is able and available effective January 2, 2022?

FINDINGS OF FACT:

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

The claimant previously worked as an adjunct instructor for the employer's English language acquisition ("ELA") class from September 14, 2021 to December 14, 2021. The claimant was paid \$3,760.00 for teaching this class over the semester. The claimant taught this class remotely over Zoom, as she had since the onset of the Covid19 pandemic. Her average weekly wage in that position was \$289.23. The claimant's average weekly wage for her entire base period is \$559.73.

On January 14, 2021, Associate Dean Darek Benesh offered the claimant an adjunct instructor position with the same pay and the same subject matter as the position she held from September 14, 2021 to December 14, 2021. However, Mr. Benesh said the claimant would have

to teach the class at the employer's Iowa City campus. The claimant rejected that offer due to her concern regarding Covid19 infection and its potential complications including long-term injury or even death. Human Resources Supervisor Sheri Hlavacek explained that the employer advertises itself as an in-person education provider. Students are encouraged to wear masks. The claimant has received a Covid19 booster vaccination shot. The claimant is 69. The claimant does not have a medical condition which makes her more susceptible to Covid19 infection, injury, or death. Ms. Hlavacek explained that the State of Iowa's passage of a bill requiring it to provide 100% in-person instruction in 2021 changed its posture regarding remote instruction.

The following section gives the findings of fact necessary to resolve the timeliness issue:

A disqualification decision was mailed to claimant's last known address of record on January 21, 2022. The claimant received the decision on January 26, 2022, which was within ten days of its mailing date. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 3, 2022. (Exhibit D-1) The claimant filed her appeal on February 2, 2022, which is before the date noticed on the disqualification decision. (Exhibit D-2)

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant's appeal is timely because it was filed within the appeal period stated on the decision. He further concludes the claimant was not able and available for work effective January 2, 2022.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of issuance of the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was issued, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The timeliness issue was placed on the notice of hearing in error. The claimant filed her appeal within the period stated on the decision.

The next issues evaluate whether the claimant was able and available for work effective January 2, 2022 and whether she rejected an offer for suitable 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(14)(a)(b) provides:

Failure to accept work and failure to apply for suitable work. Failure to accept work and failure to apply for suitable work shall be removed when the individual shall have worked

in (except in back pay awards) and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

(14) Employment offer from former employer.

a. The claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the **purview of the usual occupation of the claimant**. The provisions of Iowa Code section 96.5(3)"b" are controlling in the determination of suitability of work.

b. The employment offer shall not be considered suitable if the claimant had previously quit the former employer and the conditions which caused the claimant to quit are still in existence.

Iowa Code section 96.4(3)a provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. a. 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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".

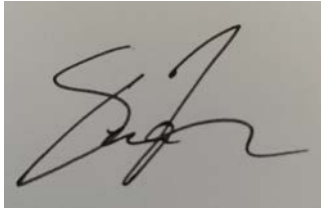
Iowa Admin. Code r. 871-24.24(4) provides:

(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 childcare 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.

The administrative law judge agrees with the representative. The claimant was not able and available for work effective January 2, 2022. While the administrative law judge recognizes the claimant's fears regarding Covid19 infection, injury and death, the claimant's insistence on the employer providing remote work teaching assignments makes her unavailable for work. Historically, teachers have performed work in the classroom. The claimant's refusal to work in the classroom makes her unavailable for work in her usual occupation. Benefits are denied effective January 2, 2022, until she has shown she is able and available for work.

DECISION:

The January 21, 2022, (reference 01) unemployment insurance decision is affirmed. Claimant declined an offer of work but was unavailable at the time. Benefits are withheld effective January 2, 2022, until such time as the claimant makes herself available for work.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is shown on a light gray background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

March 29, 2022
Decision Dated and Mailed

smn/scn