

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARTA E GUERRERO
Claimant

APPEAL NO. 08A-UI-10850-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 08-24-08 R: 02
Claimant: Appellant (1)**

Iowa Code § 96.4(3) – Able and Available
Iowa Code § 96.5(3)a – Work Refusal

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 7, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 4, 2008. The claimant did participate through the interpretation of Angela Arellana and was represented by Justin Gross, Attorney at Law. The employer did participate through Omar Velazco, Staffing Supervisor.

ISSUE:

Is the claimant able to and available for work and whether claimant refused a suitable offer of work and if so, whether the refusal was for a good cause reason.

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed by Kelly Services and assigned to work at the EDS plant beginning on January 22, 2008 through July 30, 2008 when she was laid off due to lack of work. The claimant worked full-time hours from 3:00 p.m. to midnight Monday through Friday during her assignment.

After being laid off by EDS the claimant was contacted by Kelly Services on August 1, 2008 and offered another assignment at EDS for the first shift. The claimant refused the position with no reason given to the employer. The claimant denies being contacted by Kelly Services in August for another assignment at EDS.

On October 6, Kelly Services again contacted the claimant to offer her another full-time position at EDS on the line. The claimant refused the position because she was approximately eight months pregnant at the time and could not work full time standing on the line for eight hour shifts.

The claimant delivered her baby on November 22, 2008 and will not be released by her physician to go back to any type of work until January 15, 2009.

The claimant worked part time for a McDonald's restaurant beginning at the end of August 2008 until she delivered her baby at the end of November 2008.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

While the employer alleges that they made an offer for work to the claimant on August 1, 2008 the administrative law judge is not persuaded that any such offer was made. The claimant did not file a claim for unemployment insurance benefits until August 24, 2008. Even if an offer was made to the claimant on August 1, 2008 since she had no claim for benefits pending, the administrative law judge does not have jurisdiction to consider whether the offer was suitable.

For the reasons that follow, the administrative law judge concludes claimant did refuse a suitable offer of work on October 6, 2008.

Employer made an offer of work to claimant on October 6, 2008. That offer included return to work at EDS for full-time line position.

Iowa Code § 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 24.23(16) provides:

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

- (16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The wage offered for the job is comparable to the going rate of pay for similar work in the Des Moines area. The claimant refused the offer because she did not want to work full time due to her pregnancy. The offer was suitable as it was for full-time work for an assignment that claimant had previously performed for six months. The claimant chose not to work full time because of her pregnancy. The hours available to her for the EDS assignment were full time as she had worked previously. The claimant chose for personal reasons, her pregnancy, to only work part time hours. The claimant's work history with Kelly is comprised of full-time work. The claimant's personal choice to limit her hours to part time is not a good cause reason for the refusal. The administrative law judge does not have jurisdiction to evaluate any potential offer or refusal of work made before August 24, 2008 since the claimant did not have a claim for benefits on file.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective November 22, 2008 through January 15, 2009.

Iowa Code § 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".

871 IAC 24.22(1)a 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the pregnancy was not work related and the treating physician has not released the claimant to return to work, the claimant has not established ability to work. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

DECISION:

The November 7, 2008, reference 02, decision is affirmed. Claimant did refuse a suitable offer of work on October 6, 2008. Benefits are withheld until such time as the claimant works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is not able to and available for work from November 22, 2008 through January 15, 2009.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

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