

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUAN J COLUNGA**

Claimant

**APPEAL NO. 10A-UI-08146-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES STAFFING SERVICES INC**

Employer

**OC: 01/03/10**

**Claimant: Appellant (2)**

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

Iowa Code Section 96.5(3) – Work Refusal

Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Juan Colunga filed a timely appeal from the June 1, 2010, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on July 22, 2010. Mr. Colunga participated personally and was represented by law student Mark Simons and attorney Laura Humes. Stacey Navarro, Human Resources Coordinator, represented the employer and presented additional testimony through Ashley Leydens, Recruiter. Exhibits A, B, and C were received into evidence. The parties waived formal notice on the issue of whether the claimant refused and offer of suitable work without good cause.

**ISSUES:**

Whether Mr. Colunga separated from the temporary work assignment or the temporary employment agency for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Colunga refused an offer of suitable work without good cause.

Whether Mr. Colunga has been able to work and available for work since he established the additional claim for benefits that was effective May 9, 2010.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Juan Colunga performed work in a full-time temporary work assignment at MidAmerica Recycling from February 23, 2010 until May 6, 2010, when the client business laid him off from the assignment. The assignment was located in Des Moines. Mr. Colunga resided in Des Moines. The assignment had paid \$9.00 per hour. The work hours of the assignment had been 6:00 a.m. to 4:00 or 5:00 p.m., Monday through Friday. At the time the assignment ended, Mr. Colunga had just received a full medical release after suffering a workplace injury earlier in the assignment. Mr. Colunga notified the temporary employment agency on May 6, 2010 that the assignment at MidAmerica had ended. Mr. Colunga was interested in a new work assignment.

On May 7, 2010, Mr. Colunga went to DES Staffing for the purpose of collecting his paycheck. While there, Ashley Leydens, Recruiter, spoke to Mr. Colunga for the purpose of offering a new work assignment. The proposed assignment was located in Adel, some 29.6 miles or 34 minutes from the Des Moines metropolitan area. The wage offered was \$10.25 per hour. The work hours would be 6:00 a.m. to 6:00 p.m., Friday, Saturday, and Sunday. Mr. Colunga refused the assignment because he lacked reliable transportation to travel to Adel. There was no further contact between Mr. Colunga and the employer after May 7, 2010.

Mr. Colunga continued to be available for work in the Des Moines metropolitan area. The whole time Mr. Colunga worked for DES Staffing, he also had a part-time job at Burger King. Mr. Colunga had placed DES Staffing on notice of his second job when he first applied for work with that agency. Mr. Colunga's work hours at Burger King were 5:00 p.m. to 1:00 a.m., three to four evenings per week. Mr. Colunga continued to be available for full-time, first shift work.

On February 17, 2010, the employer had Mr. Colunga execute a "Temporary Employee Contract." The document placed Mr. Colunga on notice of his obligation to contact DES Staffing within three working days of the end of an assignment to indicate his availability for a new assignment. The end-of-assignment notice requirement was the only policy set forth on the document. Mr. Colunga got a copy of the document he signed.

Mr. Colunga established an additional claim for benefits that was effective May 9, 2010.

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

The administrative law judge will first address the separation from the assignment, and the associated separation from the temporary employment agency, on May 6, 2010.

Iowa Workforce Development rule 871 IAC 24.1(113) provides as follows:

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The weight of the evidence in the record establishes that Mr. Colunga was laid off from the temporary work assignment. Mr. Colunga's separation from the work assignment was involuntary and was not based on misconduct. The separation from the work assignment would not disqualify Mr. Colunga for unemployment insurance benefits.

Iowa Code section 96.5-1-j provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department, but the individual shall not be disqualified if the department finds that:

j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

For the purposes of this paragraph:

(1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

871 IAC 24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The weight of the evidence indicates that the employer's end-of-assignment notice policy complied with the requirements of Iowa Code section 96.5(1)(j) and that Mr. Colunga received a copy of the policy. Mr. Colunga contacted the employer on the same day the assignment ended. Mr. Colunga contacted the employer to indicate his availability for new assignment. That contact led to further discussion the next day concerning a proposed new assignment. The fact that Mr. Colunga declined the particular out-of-town assignment the employer offered, did not negate the fact that Mr. Colunga contacted the employer within the statutory deadline for the purpose of obtaining a new assignment. The separation from the temporary employment agency that was effective May 6, 2010 was for good cause attributable to the employer. Mr. Colunga would be eligible for benefits, provided he was otherwise eligible. The employer's account may be charged for benefits.

The administrative law judge will now address the work refusal and whether Mr. Colunga is both able to work and available for work.

A person who refuses an offer of suitable employment without good cause is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. See Iowa Code section 96.5(3). Lack of transportation to the workplace provided good cause to refuse an offer of employment. See 871 IAC 24.24(4). In addition, absent prior agreement between the employer and the employee, an employee's refusal to work at a distant new job site shall not be reason for a refusal disqualification. See 871 IAC 24.24(10). The weight of the evidence indicates that the employer indeed make a bona fide offer of employment on May 7, 2010. Mr. Colunga refused the proposed assignment for

good cause based on the considerable commuting distance to the assignment and his lack of reliable transportation to get to the new assignment. Mr. Colunga's refusal of the assignment in Adel would not disqualify him for unemployment insurance benefits.

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".

871 IAC 24.22(1)a and (2) provide:

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.

(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 weight of the evidence indicates that Mr. Colunga had a full medical release as of May 6, 2010 and was able to perform work. The weight of the evidence indicates that Mr. Colunga continued to be available for full-time, first-shift work with the sizeable Des Moines metropolitan area where he resided, where he had previously performed work for the employer, and where he continued to work at part-time employment during the evening hours. The part-time

employment did not prevent Mr. Colunga from being available for full-time, first-shift employment. Mr. Colunga has met the work ability and availability requirements of Iowa Code section 96.4(3) since he established his claim for benefits.

**DECISION:**

The Agency representative's June 1, 2010, reference 04, decision is reversed. The claimant's separation from the temporary employment work assignment and temporary employment agency were for good cause attributable to the temporary employment agency. The claimant refused an offer of employment on May 7, 2010 for good cause, which refusal did not disqualify the claimant for benefits. The claimant is both able to work and available work since he established his additional claim for benefits. Effective May 9, 2010, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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