

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIA C GIRON
Claimant

APPEAL NO. 06A-UI-09568-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 01/15/06 R: 02
Claimant: Respondent (2)**

Section 96.4(3) – Able and Available
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Wal-Mart, filed an appeal from a decision dated September 15, 2006, reference 01. The decision allowed benefits to the claimant, Maria Giron. After due notice was issued a hearing was held by telephone conference call on October 16, 2006. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by Assistant Manager Craig Bender.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Maria Giron began employment with Wal-Mart in January 2000. She was hired to be full-time in the infants area. All employees are to indicate the days and hours they would be available to be scheduled. Employees may change their availability, but are notified changes in availability could affect the number of hours available to them. The work schedules are generated according to a data base indicating the days and hours the store had the highest customer traffic in any given area.

Ms. Giron had originally indicated an availability of 2:00 p.m. to 11:00 p.m., Sunday, Monday, Tuesday, Thursday and Friday. The scheduling in the infants area is highest in the evening and on the weekends. However, the claimant changed her availability several times during the course of her employment. Her most recent availability was only 7:00 a.m. to 5:00 p.m. Monday through Friday. During these hours the employer only needs the department manager on duty in the infants area.

Assistant Manager Craig Bender has been working with the claimant for at least two weeks in an attempt to find her more hours. Currently 96 jobs are available in that Wal-Mart store, including the department manger for the infants area, but the claimant has not indicated any interest in any of these jobs.

Maria Giron has received unemployment benefits since filing an additional claim with an effective date of July 30, 2006.

The record was closed at 10:12 a.m. At 12:38 p.m. the claimant called and requested to participate. Ms. Giron received the hearing notice prior to the October 16, 2006 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the claimant directly contacted the Appeals Section was on October 16, 2006, after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice, and had assumed that the Appeals Section would initiate the telephone contact even without a response to the hearing notice.

REASONING AND CONCLUSIONS OF LAW:

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 24.23(29) provides:

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

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

The employer has established there is work available to the claimant in the Wal-Mart store where she is employed. These jobs would not be in the infants area but would be able to accommodate her current availability schedule. The claimant did not participate in the hearing to indicate why these other jobs, including the infants department manager job, are not acceptable. She has failed to establish she is able and available for work with her regular employer and under the provisions of the above Administrative Code section, she cannot be considered able and available for work.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the October 16, 2006 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the hearing, she failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

DECISION:

The representative's decision of September 15, 2006, reference 01, is reversed. Maria Giron is not able and available for work with her regular employer, and is ineligible for benefits. She is overpaid in the amount of \$1,457.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs