

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENISE R SEALMAN**  
Claimant

**APPEAL NO. 15A-UI-11877-B2**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GIT-N-GO CONVENIENCE STORES INC**  
Employer

**OC: 09/27/15**  
**Claimant: Respondent (2)**

Iowa Code § 96.4-3 – Able and Available

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated October 20, 2015, reference 01, which held claimant able and available for work. After due notice, a hearing was scheduled for and held on November 10, 2015. Claimant participated personally, and had witness, Edward Anderson. Employer participated by John Judge.

**ISSUE:**

The issue in this matter is whether claimant is able and available for work.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant was injured in an off duty accident in 2014. On December 14, 2014, claimant had back surgery and missed work up until December 29, 2014. After claimant returned to work, she was on limited hours she was able to work and had a weight restriction on items she could carry.

Employer kept claimant as a store manager with its commensurate pay and benefits although claimant was not able or willing to work the 50+ hours a week required by managers. As claimant was not able to work the large number of hours, she was not able to be kept in her manager's position. Claimant moved between stores in the Marshalltown and Hudson Iowa area doing many of the manager's duties while retaining a lower number of hours while she recovered from her back surgery. Employer requested, and claimant complied with working for a number of months in Des Moines area stores also, even though claimant lives in the Marshalltown area.

Claimant was released to work without restrictions on August 31, 2015. This would allow claimant to be available to work the extra hours that claimant had not worked since her back surgery. Claimant stated to employer that she did not want to work in the Des Moines area after the State Fair. As employer did not have any manager positions open in the Marshalltown area and claimant was still receiving pay and benefits commensurate with being a manager, employer asked that claimant work in Des Moines until a managerial position opened up at a

store in the Marshalltown area. Claimant declined this offer. Employer offered claimant to work second shift hours such that she would not have to wake up at 3:00 a.m. in order to drive to Des Moines to open a store. Claimant declined this also.

Although claimant wishes to continue working for employer, she wishes to work manager's hours and only in the Marshalltown/Hudson area. Claimant has not been included on the company's work schedules since she declined work. Claimant's last day of work was September 21, 2015. Since that date, claimant has been offered work which the claimant declined as it was not managing in either Marshalltown store. Employer does not wish to give claimant pay and benefits commensurate with being a manager when the only positions available in Marshalltown are non-managerial positions.

### **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".

Iowa Admin. Code r. 871-24.23(4) provides:

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).

Iowa Admin. Code r. 871-24.23(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.

Claimant in this matter was hired to be a manager with its commensurate hours and availability for work. After claimant's surgery, she was not able to work all of the necessary manager's hours, so employer had to get another employee to take the manager position. Employer kept claimant at the same rate of pay throughout claimant's recovery, and claimant has retained the manager's benefits package.

Inasmuch as the injury was not work-related and the treating physician has released the claimant to return to work, the claimant has established the ability to work. Employer has work available for claimant in an area where claimant has worked for an extended period. Although claimant argues that she is not willing to work in the Des Moines area, she has assented to doing work there through her months of working in Des Moines.

Claimant wishes to retain the manager's pay and benefits, but is not willing to work those hours when a manager must be available to work. Through working for months in the Des Moines area, claimant established that area as a usual area for her work. As such, claimant's decision not to work in the Des Moines area creates a situation where claimant is not available for work. As claimant is not available for work, benefits in this matter will be denied.

**DECISION:**

The October 20, 2015, reference 01, decision is reversed. As claimant is not available for work that exists for her in an area where she had willingly worked in the past, claimant has not satisfied the requirement of being able and available for work. Claimant is not eligible to receive unemployment insurance benefits, effective October 6, 2015.

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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

bab/pjs