

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

LAURA L SKAGGS
301 W BROADWAY ST
ROME IA 52642

WAL-MART STORES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-07205-RT
OC: 05-16-04 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.3-7 – Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated June 25, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Laura L. Skaggs. After due notice was issued, a telephone hearing was held on September 1, 2004, with the claimant participating. Delores Geiman, Co-Manager of Store #784 in Mt. Pleasant, Iowa, participated in the hearing for the employer. Jodi Wilson, Personnel Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The employer was represented by Twila Patterson of TALX UC eXpress. The administrative law judge takes official notice of Iowa

Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1 and 2 were admitted into evidence. An initial hearing was scheduled in this matter on July 26, 2004 at 3:00 p.m. and rescheduled by the administrative law judge to August 16, 2004 at 11:00 a.m. and then rescheduled again at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was and still is employed by the employer as a full-time cashier since November 16, 1992. The claimant has not been permanently separated from the employer. However, the claimant has worked very little for the employer since January 2004. The claimant requested or approved a series of leaves of absence either for medical reasons or personal reasons. The claimant first requested a leave of absence from January 13, 2004 to February 2, 2004 because of neck and back injuries. The claimant then requested a second leave of absence to run to February 16, 2004 because of back and shoulder injuries. The claimant then requested a leave of absence from February 17, 2004 until an unknown return date for a herniated disc. The claimant then requested a leave of absence from February 23, 2004 for six to eight weeks because of a cervical herniated disc. The claimant then requested yet another leave of absence from January 12, 2004 to May 17, 2004 because she was under a doctor's care. Throughout this period, the claimant requested all of the leaves of absence and was not able to work because of medical conditions. All of these leaves of absence were approved by the employer. Some of these leaves of absence are shown at Employer's Exhibit 1.

The claimant was released to return to full duty on May 17, 2004 as shown at Employer's Exhibit 2. However, the claimant had been absent from work for so long that according to the employer's policy, she was no longer guaranteed the old position she had held with the employer. The employer did have work for the claimant as a cashier and that was acceptable to the claimant. However, hours that the employer had available involved weekend work and the claimant had never worked weekends. Throughout her employment, the claimant had worked as a shoe department manager from 7:00 a.m. to 4:00 p.m. Monday through Friday. However, this job and those hours were no longer available to the claimant because of her long period of absences. After discussing the matter with the employer on or about May 17, 2004, the claimant agreed to accept and sign a personal leave of absence until June 25, 2004. Work was available to the claimant during this period of time but would not meet the claimant's restrictions on availability because she did not want to work weekends and also placed some restrictions on evening work on Tuesdays and Fridays.

The claimant returned to work on June 25, 2004 but had numerous and continuous absences because of her illness and injuries. The claimant often was unable to work because of these medical problems. Also, the claimant was unable to work some hours because of the restrictions she had placed on her hours of availability. On July 15, 2004, the claimant requested another leave of absence for medical reasons from July 13, 2004 with no ending date. On July 26, 2004, the claimant requested yet another medical leave of absence from July 13, 2004 to August 2, 2004 because of a cervical disc problem. Finally, the claimant requested another leave of absence on August 17, 2004 to run from August 11, 2004 to August 19, 2004 because of neck pain and back pain. The claimant returned to work but worked very sporadically and was off a great deal because she was unable to work because of the pain.

Pursuant to her claim for unemployment insurance benefits filed effective May 16, 2004, the claimant has received unemployment insurance benefits in the amount of \$3,632.00 for 15 weeks from benefit week ending May 22, 2004 to benefit week ending August 28, 2004. During that time, the claimant reported earnings as follows: \$134.00 for benefit week ending May 22, 2004; \$190.00 for benefit week ending July 3, 2004; \$281.00 for benefit week ending July 10, 2004; \$90.00 for benefit week ending July 17, 2004; \$315.00 for benefit week ending August 7, 2004; and \$248.00 for benefit week ending August 14, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. The claimant has not separated from her employment permanently and, therefore, is not disqualified to receive unemployment insurance benefits for that reason.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was at relevant times hereto not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for this reason.
3. Whether the claimant is overpaid unemployment insurance benefits. She is.

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), (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.

(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.

871 IAC 24.23(1), (10) provide:

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

(1) An individual who is ill and presently not able to perform work due to illness.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Both parties testified and the administrative law judge concludes that the claimant has not been permanently separated from her employment. The issue then becomes whether the claimant is able, available, and earnestly and actively seeking work. The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence either that she is able and available for work or that she is excused from such provisions. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant is either temporarily unemployed or partially unemployed under Iowa Code Section 96.19(b) and (c) so as to be excused from the provisions requiring that she be able and available for work. The administrative law judge is also constrained to conclude that the claimant is not available for work. The evidence establishes that throughout most of the claimant's employment since January 2004, the claimant has been on a medical or personal leave of absence either requested by the claimant or consented to by the claimant and this period is deemed to be a period of voluntary unemployment and the claimant shall be considered ineligible for benefits because of not being available for work. The administrative law judge also concludes that the claimant throughout this period was injured and ill and not able to perform work and this is also a reason for being disqualified for not being available for work. See the discussion below. There was some evidence that the claimant had placed some restrictions on her availability for work, refusing to work on weekends and nights on Tuesdays and Fridays. Although this is a restriction on her availability and does impede the claimant's opportunity to work because the employer has employment and work available for the claimant during those periods of time, the administrative law judge concludes that this is not a reason for the claimant being unavailable for work. The claimant throughout her employment had worked Mondays through Fridays from 7:00 a.m. to 4:00 p.m. The claimant does not have to be available for a particular shift; it is sufficient if the claimant is available for work on the same basis as which the claimant's wage credits were earned and there is still a reasonable expectation of securing employment. See 871 IAC 24.22(2)(a). The administrative law judge concludes that insofar as the restrictions placed by the claimant on the days that she would work, that the claimant is still available for work on the same basis as the wage credits were earned and she is not unavailable for work because of

these restrictions. However, as noted above, the administrative law judge concludes that the claimant is not available for work for other reasons.

The administrative law judge is also constrained to conclude that the claimant is not able to work. From January 2004 through May 17, 2004, the claimant was not able to work because she was on medical leaves of absence requested by the claimant and by her physician. The claimant was given a full release to work on May 17, 2004, but the claimant then signed a personal leave of absence and was not available for work thereafter. Finally, when the claimant returned to work on June 25, 2004, she began to have numerous and consistent absences because of her health. Even the claimant testified that she missed a lot of work because she was unable to work. Finally, the claimant was on leaves of absence for medical reasons from July 13, 2004 through at least August 19, 2004 and is still missing a great deal of work because of her pain and her inability to work. Under the evidence here, the administrative law judge is constrained to conclude that the claimant is not able to work. Iowa Workforce Development records show some small earnings for the claimant during this period of time as noted in the Findings of Fact but they do not indicate that the claimant is able to work because they are so small and the claimant was unable to work so as to earn more because of her absences and her leaves of absence. Again, the administrative law judge notes that the claimant, herself, conceded that she missed a lot of work because she was unable to work. At some point, these absences establish that the claimant is not able to work and the administrative law judge so concludes that it does in this case.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant is and was not able and available for work from and after May 16, 2004, and, as a consequence, she is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless the claimant demonstrates that she is able, available, and earnestly and actively seeking work and is otherwise eligible for such benefits.

Iowa Code Section 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$3,632.00 since filing for such benefits effective May 16, 2004. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid these benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of June 25, 2004, reference 01, is reversed. The claimant, Laura L. Skaggs, is not entitled to receive unemployment insurance benefits, until or unless she demonstrates that she is able, available, and earnestly and actively seeking work, because at material times hereto, the claimant has not been able and available for work. The claimant has not permanently separated from her employment. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,632.00.

pjs/tjc