

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER M SCHILLER
Claimant

APPEAL NO. 09A-UI-18457-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

K MART CORP
Employer

OC: 10/18/09
Claimant: Appellant (4-R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

Jennifer Schiller filed a timely appeal from the December 2, 2009, reference 02, decision that denied benefits effective November 30, 2009, based on an Agency conclusion that she was on an approved leave of absence. After due notice was issued, a hearing was held on January 20, 2010. Ms. Schiller participated. Amy Lateer, Human Resources Manager, represented the employer and presented additional testimony through Kimberly Chambers, Store Manager. The administrative law judge took official notice of the Agency's administrative record of wages reported for and by the claimant and benefits paid to the claimant. The administrative law judge also took official notice of the November 3, 2009, reference 01, decision allowing benefits in connection with the claimant's October 12, 2009 separation from McFarland Clinic, P.C.

ISSUES:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant was partially unemployed at any point since November 30, 2009.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Schiller established an original claim for benefits that was effective October 18, 2009. Ms. Schiller established this claim in response to her separation from employer McFarland Clinic, where she had worked 24-32 hours per week. McFarland Clinic did not protest the claim for benefits and, on November 3, 2009, a Workforce Development representative entered that reference 01 decision that allowed benefits, provided Ms. Schiller was otherwise eligible.

Ms. Schiller had started part-time employment with Kmart in February 2006, while she was also employed with McFarland Clinic and long before her separation from the employment at

McFarland Clinic. Ms. Schiller is still employed by Kmart on a part-time basis as a service desk associate. While Ms. Schiller remained in the employment of both employers, the McFarland Clinic employment was her primary employment and her availability for work at Kmart was conditioned on her work schedule at McFarland Clinic.

On October 20, 2009, Ms. Schiller commenced an approved medical leave of absence from the employment with Kmart so that she could undergo and recover from back surgery. The approved medical leave of absence expired on November 28, 2009. Ms. Schiller returned to her part-time work at Kmart on November 30, 2009. Ms. Schiller returned to work with the single medical restriction that she be allowed to sit as needed. Ms. Schiller's work hours before and after the surgery were as follows:

<u>Week ending date</u>	<u>Number of hours</u>
9/5/09	7.25
9/12/09	14.25
9/19/09	13.5
9/26/09	3.5 (Ms. Schiller's other job limited her availability for Kmart.)
10/3/09	12.25
10/10/09	8.0
10/17/09	19.25
10/24/09	4.25 (Ms. Schiller had commenced her leave of absence.)
...	
12/5/09	24.00 (Ms. Schiller returned from her leave of absence.)
12/12/09	23.25
12/19/09	21.5
12/26/09	24.75
1/2/10	32.25
1/9/10	26.75
1/16/10	21.5

REASONING AND CONCLUSIONS OF LAW:

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.

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b).

Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The evidence establishes that there has been no decrease in the number of hours that Kmart has made available to Ms. Schiller. Ms. Schiller has not been *partially* unemployed from Kmart or any other employer since she established her claim for benefits. Accordingly, Kmart will not be charged for benefits so long as Ms. Schiller continues in the employment under the same hours and wages.

The weight of the evidence indicates that from October 20, 2009 through November 28, 2009, Ms. Schiller was on an approved leave of absence. A person who is on an approved leave of absence is deemed voluntarily unemployed and does not meet the work availability requirements of Iowa Code section 96.4(3). See 871 IAC 24.23(10). The evidence indicates that Ms. Schiller also did not meet the work ability requirements of Iowa Code section 96.4(3) during the same period. Ms. Schiller was not eligible for benefits for the period of October 18, 2009 through the benefit week that ended November 28, 2009.

The remaining issue is whether Ms. Schiller has met the able and available requirements of Iowa Code section 96.4(3) since the benefit week that ended December 5, 2009. The weight of the evidence indicates that since Ms. Schiller returned to Kmart from her approved leave of absence, she has not enjoyed the same number of work hours she had when she worked for both Kmart and McFarland Clinic. The weight of the evidence indicates that there had been no reduction in the number of hours Ms. Schiller is willing to work. The weight of the evidence in the record establishes that Ms. Schiller has met the work ability and availability requirements of Iowa Code section 96.4(3) since the benefit week that ended December 5, 2009. Ms. Schiller is eligible for benefits beginning with the benefit week that ended December 5, 2009, provided she is otherwise eligible.

Two things remain. First, this case will be remanded to the Claims Division for review of Ms. Schilling's work ability and availability beginning with the benefit week that ended January 29, 2010. Second, this case will be remanded to the Claims Division for entry of an overpayment decision concerning the benefits Ms. Schiller received for the two-week period of November 15-28, 2009—the period during which Ms. Schiller was still on her approved leave of absence and not eligible for unemployment insurance benefits.

DECISION:

The Agency representative's December 2, 2009, reference 02, decision is modified as follows. The claimant has not been *partially* unemployed from Kmart since she established the claim that was effective October 18, 2009. Kmart will not be charged for benefits so long as there is not separation from the employment and no decrease in hours or wage.

The claimant was on an approved leave of absence and not able or available for work from the time she established her claim through the benefit week that ended November 28, 2009.

Effective the benefit week that ended December 5, 2009, the claimant has been able and available for work and eligible for benefits, provided she is otherwise eligible.

This matter is remanded to the Claims Division for review of the claimant's work ability and availability beginning with the benefit week that ended January 29, 2010.

This matter is remanded to the Claims Division for entry of an overpayment decision concerning the benefits the claimant received for the two-week period of November 15-28, 2009—the period during which the claimant was still on her approved leave of absence and not eligible for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css