

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KITTI EIKENBERRY
Claimant

APPEAL NO. 16A-UI-02635-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REGIS CORP
Employer

OC: 01/24/16
Claimant: Appellant (1)

Iowa Code Section 96.4(3) – Able & Available
Iowa Administrative Code rule 871 24.23(10) – Leave of Absence

STATEMENT OF THE CASE:

Kitti Eikenberry filed a timely appeal from the February 25, 2016, reference 01, decision that denied benefits effective January 24, 2016, based on an Agency conclusion that Ms. Eikenberry was on a leave of absence that she requested and the employer approved and, therefore, was not available for work within the meaning of the law. After due notice was issued, a hearing was held on March 25, 2016. Ms. Eikenberry participated. David Moehle of ADP represented the employer and presented testimony through Darci Miller.

ISSUES:

Whether Ms. Eikenberry has been on a leave of absence that she requested and the employer approved since she established the claim that was effective January 24, 2016.

Whether Ms. Eikenberry has been able to work and available for work within the meaning of the law since she established the claim that was effective January 24, 2016.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kitti Eikenberry is employed by Regis Corporation as the full-time Salon Manager at the employer's Davenport Location. About 80 percent of Ms. Eikenberry's job involves cutting and styling customers' hair. That work requires that Ms. Eikenberry be able to stand for extended periods. About 20 percent of Ms. Eikenberry's job involves completing paperwork associated with her manager duties. That work is sedentary in nature. Ms. Eikenberry's immediate supervisor is Darci Miller, District Manager.

Ms. Eikenberry last performed work for the employer on January 23, 2016. Shortly thereafter, Ms. Eikenberry broke her leg at the ankle and the fibula in a non-work related fall. On January 25, 2016, Ms. Eikenberry underwent surgery on her leg. Ms. Eikenberry's doctor took her off work. Ms. Eikenberry made timely contact with the employer to advise of her injury and her need to be off work. Ms. Eikenberry submitted an application for a medical leave of absence under the Family and Medical Leave Act. The employer approved the FMLA leave of

absence for the period of January 25, 2016 through March 31, 2016. The leave was extended on March 24, 2016 to March 31, 2016. Ms. Eikenberry has not been released to return to the hair stylist duties that make up 80 percent of her work duties. Though Ms. Eikenberry asserts that her doctor provided the employer with a medical release that said Ms. Eikenberry could return to her sedentary paperwork duties, the employer is not aware of partial medical release. Ms. Eikenberry has still not been released to return to her full duties. Ms. Eikenberry has her next follow up appointment with the surgeon on April 11, 2016. The employer has not given notice to Ms. Eikenberry that the employer intends to end the employment. Ms. Eikenberry continues to be attached to the employment, but on the approved leave of absence.

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. 871-24.22(1)a provides:

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.

Iowa Admin. Code r. 871-24.22(2) provides:

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.

(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.

Iowa Admin. Code r. 871-24.23(10) provides:

(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.

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.

The evidence in the record establishes that Ms. Eikenberry is still attached to her employment with Regis Corporation. The evidence indicates that Ms. Eikenberry has been on an approved leave of absence since she established her claim for benefits and continued on the approved leave of absence at the time of the unemployment insurance appeal hearing. Ms. Eikenberry has been off work because she is unable to perform 80 percent of regular work duties due to her non-work related injury. Ms. Eikenberry continues under doctor's care and has not been released to return to her regular duties. Ms. Eikenberry is not able to work or available for work within the meaning of the law and, therefore, is not eligible for unemployment insurance benefits. Benefits are denied effective January 24, 2016. The ineligibility continues as of the March 25, 2016 appeal hearing date.

DECISION:

The February 25, 2016, reference 01, decision is affirmed. The claimant has been on a leave of absence that she requested and the employer approved since she established the claim that was effective January 24, 2016. The claimant has not met the work ability or availability requirement since she established her claim and is ineligible for unemployment insurance benefits. Benefits are denied effective January 24, 2016. The ineligibility continues as of the March 25, 2016 appeal hearing date.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs