

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

AMBER E BOUSKA  
218 E 14<sup>TH</sup> ST #4B  
SPENCER IA 51301

FAREWAY STORES INC  
2300 E 8<sup>TH</sup> ST  
BOONE IA 50036

Appeal Number: 05A-UI-01951-JTT  
OC: 01/09/05 R: 01  
Claimant: Appellant (1)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4(3) – Able and Available  
871 IAC 24.23(10) –Leave of Absence

STATEMENT OF THE CASE:

Amber Bouska filed a timely appeal from the February 17, 2005, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on March 10, 2005. Ms. Bouska participated in the hearing. Fareway participated through Mike Mazour, Vice President of Human Resources. Exhibits A through C, and D-1 through D-3 were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Amber Bouska is currently on an approved medical leave of absence from her duties as a part-time clerk for Fareway. On January 2, 2005, Ms. Bouska suffered an injury to her lower back as she

was placing a pitcher of water in her refrigerator at home. On January 3, Ms. Bouska consulted with a Physician's Assistant, who prescribed a muscle relaxer and instructed her not to work until she met with her general physician. On January 10, Ms. Bouska met with her general physician, who diagnosed Ms. Bouska with spinal stenosis and "bad disks" in her back. The physician advised Ms. Bouska that she needed bedrest and physical therapy. The physical therapy was soon abandoned when it appeared to make Ms. Bouska's condition worse. Ms. Bouska was scheduled to meet with another doctor on March 18, 2005, to undergo diagnostic imaging of her spine and to consult with a neurosurgeon.

On January 10, Ms. Bouska's physician released her to return to her full-time work at a tax return preparation firm. Unfortunately, that employer discharged Ms. Bouska because it could not train her in time for the busy tax season. Ms. Bouska has not been released to return to her work at Fareway, which is more physically taxing. Ms. Bouska is doubtful that she will be able to return to Fareway.

On March 3, 2005, Workforce Development entered a decision, reference 06, that approved Ms. Bouska for Department Approved Training, effective January 9, 2005, and waived the work search requirement so long as Ms. Bouska continued to satisfactorily attend training.

#### REASONING AND CONCLUSIONS OF LAW:

The question for the administrative law judge is whether Ms. Bouska is able and available for work.

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 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.

Under the Workforce Development rule that requires claimants to be able to work, ability to work means "that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides." See 871 IAC 24.22(1)(b).

The evidence in the record establishes that Ms. Bouska is on an approved leave of absence from her duties at Fareway. As of the date of the hearing, Ms. Bouska has not been able and available for work. However, this conclusion is rendered moot by the Agency decision dated March 3, 2005, reference 06.

DECISION:

The February 17, 2005, reference 02, decision is affirmed. The claimant is not able and available for work. However, this decision is without effect, or moot, due to the Agency decision dated March 3, 2005, reference 06.

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