

**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**

**JAMES E PICKENS
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OTTUMWA IA 52501**

**CITY OF OTTUMWA
ATTN PAYROLL
OTTUMWA IA 52501**

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**Appeal Number: 06A-UI-01190-JTT
OC: 12/25/05 R: 03
Claimant: Appellant (4R)**

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) – Able & Available

STATEMENT OF THE CASE:

Claimant James Pickens filed a timely appeal from the January 27, 2006, reference 01, decision that concluded he was not able to perform work and denied benefits effective December 25, 2005. After due notice was issued, a hearing was held on February 16, 2006. Mr. Pickens participated personally and was represented by Attorney William Roemerman. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits A and B were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James Pickens was employed by the City of Ottumwa as a full-time assistant to the Ottumwa Transit Administrator for approximately 13 years. Mr. Pickens' duties were clerical in nature and

included supervising drivers and scheduling work assignments. Mr. Pickens' job description indicated that his duties included driving one of the employer's buses as needed, but Mr. Pickens was called upon to operate a bus only two to four times per year and was usually able to make arrangements have someone else operate the bus.

On March 12, 2005, Mr. Pickens tripped over the office cat and suffered injury to his back. Mr. Pickens had a pre-existing back problem and the workplace accident exacerbated that condition. At the insistence of Ottumwa Transit Administrator Pam Ward, Mr. Pickens returned to work on March 16. At that time, Ms. Ward summoned Mr. Pickens to a meeting at which Ms. Ward discussed with Mr. Pickens his advanced age, his medical condition, his reduced productivity relative to other employees, and the employer's conclusion that he should separate from the employment. Ms. Ward and Mr. Pickens were both aware at the time of the meeting that Mr. Pickens would likely undergo back surgery in the near future. Ms. Ward presented Mr. Pickens with three options. If Mr. Pickens underwent surgery, he could continue in the employment until he had used his accrued sick time and the employer would pay him for his accrued vacation time at the time of separation. If Mr. Pickens elected not to undergo surgery, the employer would insist that he retire by his upcoming 70th birthday in November 2005. If Mr. Pickens decided neither to voluntarily quit nor retire, the employer intended to discharge Mr. Pickens from the employment. On March 22, 2005, Mr. Pickens met with the Transit Authority Board, which affirmed Ms. Ward's approach to Mr. Pickens continued employment. Mr. Pickens then enlisted the assistance of legal counsel. Mr. Pickens filed a complaint with the Iowa Civil Rights Commission and filed a workers' compensation claim. At some point, Mr. Pickens commenced a leave of absence under the Family and Medical Leave Act (FMLA).

On April 20, 2005, Mr. Pickens attorney notified the employer that Mr. Pickens intended to undergo back surgery and planned to return to the employment upon recovering from surgery. On May 16, 2005, Mr. Pickens underwent a procedure to fuse a portion of his spine.

By means of a letter dated May 13, 2005, the employer's attorney acknowledged that Mr. Pickens was on an FMLA leave and indicated that the parties would have "no real opportunity to address issues related to his employment status until August or later" in light of the fact Mr. Pickens was "facing a major surgical procedure from which, under the best of circumstances, he will have a significant recovery and rehabilitation."

On July 14, 2005, Mr. Pickens' doctor issued a partial medical release that indicated Mr. Pickens was unable to perform work until August 1, 2005, could then perform work for three hours per day for three weeks, and could then work five hours per day. Mr. Pickens provided the release to the employer. In mid-July, Mr. Pickens was in an auto accident that caused a setback in his recovery and Mr. Pickens was, therefore, unable to return to work. On August 1, 2005, Mr. Pickens provided the employer with a written release to allow the employer to obtain medical records relating to his back condition.

On September 22, 2005, Mr. Pickens' doctor issued a second partial medical release that indicated Mr. Pickens could work half days for two weeks and could thereafter increase his work time as tolerated. The release restricted Mr. Pickens to work involving no lifting or bending and indicated that Mr. Pickens should use a brace as needed. Mr. Pickens would have been able to perform his clerical duties, but would not have been able to operate the employer's buses. Mr. Pickens provided the medical release to Ms. Ward and indicated his desire to return to the employment. The employer did not respond to the medical release. The employer neither indicated whether it would allow Mr. Pickens to return to work nor indicated that Mr. Pickens had been discharged from the employment.

On November 15, 2005, Ottumwa Human Resources Manager Janet Richards sent a letter to Mr. Pickens. Ms. Richards' letter was not available to the administrative law judge, but Mr. Pickens' attorney's written response, dated November 21, was available. The November 21 letter referenced a passage in Ms. Richards' letter that asserted Mr. Pickens was "no longer actively working for this department." The November 21 letter indicated that Mr. Pickens was aware that his name continued to appear on the Transit Department roster. The November 21 letter indicated no intention of quitting the employment.

Mr. Pickens established a claim for unemployment insurance benefits that was effective December 25, 2005. Since establishing his claim, Mr. Pickens has not sought clerical work, but has sought other employment such as working at Menard's. Mr. Pickens has a general education diploma and has completed one year of college.

On February 15, 2006, Mr. Pickens' doctor issued a medical release that indicated Mr. Pickens could return to work with one restriction: "no lifting greater than 40 pounds repetitively." The medical release had not been presented to the employer at the time of the unemployment insurance appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

The issue before the administrative law judge is whether the evidence in the record establishes that Mr. Pickens has been able and available for work since establishing his claim for benefits.

An otherwise eligible claimant is eligible to receive benefits with respect to any week only if the evidence indicates that the individual is able to work, is available for work, and is earnestly and actively seeking work. Iowa Code Section 96.4(3).

871 IAC 24.22(1)a, b (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.

b. Interpretation of ability to work. The law provides that an individual must be able to work in be eligible for benefits. This 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.

(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.

The evidence in the record establishes that Mr. Pickens' employment over the last 13 years has been limited to work of a clerical nature. Accordingly, these were the services Mr. Pickens had to offer the labor market in his geographical area. See 871 IAC 24.22(4). However, Mr. Pickens has not sought such work since establishing his claim for benefits. The evidence in the record further indicates that prior to February 15, 2006, Mr. Pickens was unable to perform work that had any notable physical component. This would include employment a reasonable person might expect to find at retail establishments such as Menards. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Pickens was not able and available for work prior to February 15, 2006. Accordingly, Mr. Pickens would not be eligible for benefits prior to February 15, 2006. The evidence in the record establishes that Mr. Pickens has been able and available for work since February 15, 2006. Accordingly, Mr. Pickens is eligible for benefits effective February 15, 2006, provided he is otherwise eligible.

The evidence presented at the hearing raised the question of whether there has been a separation from the employment and, if so, the nature of the separation. The separation issues were not properly before the administrative law judge and the parties had not been formally notified that the separation issues would be addressed at the time of the appeal hearing. The employer did not participate in hearing and, therefore, the administrative law judge could not pursue waiver of formal notice so that the administrative law judge could address the separation issues. The separation issues need to be addressed to determine the claimant's underlying eligibility for benefits. Accordingly, this matter will be remanded to a claims representative for determination of whether there has been a separation from the employment, the nature of any such separation, and the claimant's eligibility for benefits based on any such separation.

DECISION:

The Agency representative's decision dated January 27, 2006, reference 01, is affirmed, but modified as follows. The claimant was not able and available for work prior to February 15, 2006, and was therefore disqualified for benefits prior to February 15, 2006. The claimant has been able and available for work since February 15, 2006. This matter is remanded to a claims representative for determination of whether there has been a separation from the employment, the nature of any such separation, and the claimant's eligibility for benefits based on any such separation.

jt/tjc