

**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**

**ASHLEY D ASH  
1025 E DIVISION ST APT 47  
OTTUMWA IA 52501-1866**

**ALIU, BURIM  
RIVERSIDE FAMILY RESTAURANT  
PO BOX 107  
GRINNELL IA 50112-0107**

**Appeal Number: 06A-UI-05002-JTT  
OC: 04/09/06 R: 03  
Claimant: Appellant (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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4(3) – Able and Available  
Section 96.4(3) – Still Employed Same Hours and Wages  
871 IAC 24.22(2)(j) – Leave of Absence

STATEMENT OF THE CASE:

Claimant Ashley Ash filed a timely appeal from the May 9, 2006, reference 01, decision that denied benefits and concluded that she was unable to work due to a pregnancy. After due notice was issued, a hearing was held on May 24, 2006. Claimant participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The administrative law judge took official notice of the Agency's administrative file. The record was left open so that Ms. Ash could submit a note from her doctor, which note was received into the record as Exhibit A.

#### FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: In November 2004, Ashley Ash commenced her employment as a part-time waitress at the Riverside Family Restaurant. Ms. Ash is pregnant and is due to deliver her baby on June 8, 2006. When Ms. Ash reached her sixth month of pregnancy, restaurant owner Burin Aliu decided that she should cease working at the restaurant for the duration of the pregnancy. Ms. Ash persuaded Mr. Aliu to allow her to continue working until she was further along in her pregnancy. On April 6, Mr. Aliu told Ms. Ash that she would no longer be allowed to work until she delivered her baby. Ms. Ash last appeared and worked a shift on April 8. Ms. Ash has not experienced any issues with her pregnancy that would prevent her from performing her duties. Ms. Ash's doctor has not recommended that she go on a leave of absence. Though Ms. Ash had planned to commence a leave of absence on or about May 25 and to continue on a leave of absence until six weeks after the baby is born, as of this date Ms. Ash is still able to work and believes she would have continued to work up to her due date. Ms. Ash still intends to be on a leave of absence for six weeks after the baby is born. Ms. Ash and Mr. Aliu both intend for Ms. Ash to return to the employment six weeks after the baby is born.

#### REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Ash is disqualified for benefits based on the requirements set forth in Iowa Code section 96.4(3) that she be 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.

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). An individual shall be deemed *temporarily unemployed* if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed *due to a plant shutdown, vacation, inventory, lack of work or emergency* from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).

871 IAC 24.23(26) provides:

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

(26) 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.

The evidence in the record indicates that Ms. Ash has worked less than her normal schedule since the employer removed her from the work schedule effective April 8. Indeed, the employer has given Ms. Ash no hours at all on the schedule. Both parties intend for Ms. Ash to return to the employment after she has her baby and a subsequent six-week leave of absence.

The administrative law judge concludes that Ms. Ash is not subject to the able and available requirements set forth in Iowa Code section 96.4(3) because she is partially and/or temporarily unemployed. Accordingly, Ms. Ash is eligible for benefits from April 8 until June 8, the anticipated date of her child's birth.

A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period. 871 IAC 24.22(2)(j). If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1). On the other hand, if the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits. 871 IAC 24.22(j)(2).

The evidence in the record establishes that Ms. Ash will commence an approved leave of absence upon the birth of her child. At that point, Ms. Ash's status will no longer be that of partial and/or temporary unemployment, Ms. Ash will be subject to the requirements set forth in Iowa Code section 96.4(3), will be away from the work pursuant to a voluntary separation, and will not be available for employment. Accordingly, Ms. Ash is disqualified for benefits effective June 8.

DECISION:

The Agency representative's May 9, 2006, reference 01, decision is reversed. The claimant was partially and/or temporarily unemployed during the period of April 8, 2006 through June 8, 2006. Ms. Ash is eligible for benefits for that period. Effective June 8, 2006, Ms. Ash will commence an approved leave of absence and will no longer be eligible for benefits.

jt/kkf