

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARRIN J BIRKICHT
Claimant

APPEAL NO. 07A-UI-08241-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

X-L SPECIALIZED TRAILERS INC
Employer

**OC: 07/22/07 R: 04
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Darrin Birkicht filed an appeal from a representative's decision dated August 24, 2007, reference 03, which denied benefits based on his separation from X-L Specialized Trailers, Inc. (X-L). After due notice was issued, a hearing was held by telephone on October 22, 2007. Mr. Birkicht participated personally and offered additional testimony from Michael Atherley, PA-C. Exhibits A through I were admitted on Mr. Birkicht's behalf. The employer did not respond to the notice of hearing.

ISSUE:

At issue in this matter is whether Mr. Birkicht was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Birkicht began working for X-L on September 25, 2006 and worked full time as a painter. He left work on or about March 14, 2007 on the advice of his doctor. He was experiencing pain throughout his body, primarily the upper body. Mr. Birkicht was placed on a medical leave of absence and initially maintained weekly contact with the employer. He was later told he only needed to contact the employer after each doctor's visit. Mr. Birkicht received treatment from his family doctor and was referred to two specialists. He has been tentatively diagnosed as having costalchondritis and fibromyalgia.

On June 19, the employer mailed Mr. Birkicht a letter advising that his employment was terminated effective June 19, 2007. He was discharged because there was no indication as to when he would be able to return to work and because he had been approved for long-term disability benefits. The letter advised that he could apply for work when his condition improved and would be considered for any current openings at that time. Mr. Birkicht was released to return to work on July 21, 2007.

REASONING AND CONCLUSIONS OF LAW:

Mr. Birkicht was separated from employment before he could recover from his condition and re-offer his services. Therefore, Iowa Code section 96.5(1)d is not applicable. Mr. Birkicht was discharged while away from work on a medical leave of absence. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Birkicht was discharged because of his extended absence. The employer was notified of the need to be absent and was provided periodic updates regarding his medical condition. Since he was absent for medical reasons and properly reported the need to be absent, Mr. Birkicht's absences beginning on or about March 14, 2007 are all excused.

Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive. While the employer may have had good cause to discharge Mr. Birkicht in order to fill his position, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated August 24, 2007, reference 03, is hereby reversed. Mr. Birkicht was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css