

**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**

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**Appeal Number: 04A-UI-02336-ET
OC 01-11-04 R 02
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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 23, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 23, 2004. The claimant participated in the hearing with Attorney Bill Byers. The employer chose not to participate in the hearing.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time printer for Specialty Graphics from July 1999 to December 30, 2003. He was diagnosed with a work-related fracture of his right foot October 6,

2003, (Claimant's Exhibit B) and pursuant to medical advice from a treating physician was unable to work without light-duty restrictions from October 6, 2003 through the end of his employment. The claimant's restrictions prevented him from doing work in a standing position from October 16, 2003 through December 11, 2003, and limited him to spending one hour per day on his feet from December 11, 2003 through March 4, 2004, when he was allowed to stand for four hours per day (Claimant's Exhibits C, D, E, F and G). The employer did not have any light-duty work available and the claimant was granted the maximum 12-weeks of medical leave allowed by the employer's policy. The claimant had not obtained a full medical release by the end of his leave of absence and the employer terminated his employment effective December 30, 2003, in a letter dated January 7, 2004 (Claimant's Exhibit A).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code Section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was on a medical leave of absence following what his physician deemed a work-related injury, although the workers' compensation carrier apparently denied the claimant's workers' compensation claim. Because the employer chose not to participate in the hearing, the administrative law judge must rely on the claimant's testimony that the injury was in fact work-related and will be making this decision based on that information. Therefore, assuming the claimant's last injury was work-related, and the employer did not have any light-duty work available, the employer's decision to terminate the claimant's employment at the conclusion of his leave of absence due to a work-related injury cannot be considered a discharge for misconduct as defined by Iowa law and benefits must be allowed.

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.

Although the claimant is restricted to standing for four hours per day, in order to be able and available for work, he is only required to be able to perform some type of work and not necessarily in his customary occupation. Consequently, he is considered able and available for work and must actively seek work according to Iowa Workforce Development requirements.

DECISION:

The February 23, 2004, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason and is able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

je/kjf