

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY L FREELS
Claimant

APPEAL NO: 06A-UI-08702-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

**OC: 07-23-06 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 28, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 14, 2006. The claimant did participate. The employer did not participate.

ISSUES:

Was the claimant discharged due to work connected misconduct?
Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a security officer full time beginning March 25, 1999 through July 22, 2006, when he was discharged for not returning to work after exhausting his FMLA entitlement. The claimant had been off work since April 2006 for a non-work-related back injury. The claimant did not return to work on July 22, 2006 because his treating physician would not release him to return to work until he received an opinion as to whether he needed back surgery from a specialist. The claimant saw the specialist in late July or early August. The claimant asked the employer for an additional extension of leave which was denied.

The claimant saw the back specialist in late July, early August and was given additional physical therapy. The claimant can no longer work at a job where he has to stand or walk for one to two hours. The claimant is also restricted to lifting anything over ten pounds. The claimant has applied for bus driver and delivery jobs positions and other jobs that would not require standing or walking for long periods of time, including delivery jobs. The claimant has also applied for data entry positions.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The only reason the claimant did not return to work on July 22, 2006, was because he had not yet been released by his treating physician to do so. The claimant was physically unable to return to work until early August, when he saw the specialist who released him with his current work restrictions. By the time the claimant had been released to return to work by his physician, he had already been discharged. The claimant was not required to return to the employer to offer services after the medical recovery because she had already been involuntarily terminated from her employment. Thus, the separation was a discharge. Iowa Code § 96.5(1)(d) does not require a claimant to return to the employer to offer services after a medical recovery or release if the employment has already been terminated. Porazil v. IWD, No. 3-408 (Iowa Ct. App. Aug. 27, 2003). The claimant's inability to physically return to work due to medical problem is

not work connected misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective August 6, 2006.

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.

871 IAC 24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

The claimant's treating physician has now released the claimant to return to work, albeit with restrictions. The claimant is seeking jobs that comply with his work restrictions, including work as a bus driver and a delivery driver. The claimant has established his ability to work after he was seen by the specialist in early August 2006. Benefits are allowed effective August 6, 2006, when the claimant was released to return to some type of work.

DECISION:

The August 28, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. The claimant is able to and available for work effective August 6, 2006. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw