

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSANA L ORTEGA
Claimant

APPEAL NO. 06A-UI-10419-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS INC
Employer

**OC: 09/24/06 R: 01
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Farmland Foods filed a timely appeal from the October 17, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 8, 2006. Claimant Susana Ortega did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Human Resources Manager Denise Baldwin represented the employer. The administrative law judge took official notice of Agency administrative records that indicate no benefits have been disbursed to the claimant to date.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Susana Ortega was employed by Farmland Foods as a full-time production worker from July 16, 1998 until July 6, 2006 when Night Operations Manager Brian Boland discharged her for attendance. The employer has an attendance policy that is set forth in an employee handbook. Ms. Ortega was aware of the policy. The policy required Ms. Ortega to notify the employer prior to the scheduled start of her shift if she needed to be absent from work. The employer provided employees a designated telephone number for this purpose. The policy required Ms. Ortega to notify the employer each day she was absent unless she knew at the time she called that she would be absent multiple days, in which case she was to inform the employer how long she would be absent.

The final absences that prompted the discharge occurred on June 29 and 30. The employer recorded these absences as “no-call, no-show” absences. However, at some point, Ms. Ortega had provided the employer with a written doctor’s excuse for absences during June 27 through July 4. Ms. Ortega would have provided the notice to the human resources department, the company nurse, or to her supervisor. The employer’s witness does not know when or how Ms. Ortega provided the notice. On June 21 and 26, Ms. Ortega had been absent due to

illness, but notified the employer after the scheduled start of her shift. On June 27 and 28, Ms. Ortega was absent due to illness and properly notified the employer each day. Ms. Ortega returned to work on July 5. There were no other absences in June. There were no absences in April or May.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Ortega was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Ortega's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The greater weight of the evidence fails to establish that Ms. Ortega's absences on June 29 and 30 were unexcused absences. The evidence indicates that these absences were due to ongoing illness. The evidence indicates that Ms. Ortega provided the employer a doctor's excuse that covered all of her absences during June 27 through July 4. There is a gap in the evidence that the employer's witness was not able to fill, that is, when Ms. Ortega provided her doctor excuse to the employer. Mr. Ortega may well have provided the excuse prior to the June 29 and 30 absences. These two absences followed two days when Ms. Ortega was absent from work and properly notified the employer. The evidence suggests Ms. Ortega may have provided the notice of the extended absence on June 28. The employer had the ability to resolve this mystery by presenting testimony from the person who received the doctor's excuse from Ms. Ortega, but the employer produced no such testimony. The administrative law judge concludes that the evidence fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Ortega for unemployment insurance benefits. See 871 IAC 24.32(8). Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ortega was discharged for no disqualifying reason. Accordingly, Ms. Ortega is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ortega.

DECISION:

The Agency representative's October 17, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs