

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES B SUMMERS
Claimant

APPEAL NO. 09A-UI-00408-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS INC
Employer

**OC: 12/07/08 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated January 7, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 27, 2009. The claimant participated personally. The employer participated by Ms. Becky Jacobsen, Human Resource Manager. Exhibits One through Five were received into evidence.

ISSUE:

At issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from August 8, 1988 until November 26, 2008 when he was discharged for excessive absenteeism. Mr. Summers was employed as a full-time production worker and was paid by the hour.

The claimant was discharged after he exceeded the permissible number of attendance infractions allowed under the company's no-fault attendance policy. Under the policy employees who are absent are assessed attendance infraction points. Employees are assessed one point for being absent due to illness if they provide a doctor's note and are assessed two points if they do not provide a doctor's note. After amassing a set number of attendance infractions and points within a set period, employees receive a final warning from the company. If an employee receives more than two final warnings within a rolling 24-month period, the employer reserves the right to discharge the employee rather than giving a third final written warning.

Mr. Summers was absent due to illness on November 20, 2008 and properly reported his impending absence to the company. Although the claimant attempted to make a doctor's appointment to minimize the attendance infraction points, he was unable to make the

appointment for that day, November 20, and therefore was discharged because his accumulated points in a 12-month period had exceeded ten. The company elected to discharge Mr. Summers rather than issuing him a third written warning.

The claimant had not been absent from work for a number of months prior to the final incident. The claimant's absences in the past had been related to illness and properly reported to the company.

REASONING AND CONCLUSIONS OF LAW:

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

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 denial of unemployment benefits. Misconduct that may be serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance 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 1992).

The Supreme Court of Iowa held in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) that excessive unexcused absenteeism is one form of misconduct. The court held that the absences must both be excessive and unexcused. The Court further held, however, that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer.

The evidence in the record establishes that the claimant was discharged when he exceeded the permissible number of attendance infractions allowed under company policy but that the claimant's final attendance infraction was because of illness and properly reported to the company. The evidence in the record further establishes that Mr. Summers attempted to minimize the attendance infraction points by attempting to schedule a doctor's appointment for that day but was unable to do so.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for a violation of its no-fault attendance policy but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Act. While the decision to terminate Mr. Summers may have been a sound decision from management viewpoint, intentional disqualifying misconduct at the time of separation has not been shown. The administrative law judge must therefore conclude that the claimant's separation took place under nondisqualifying conditions and benefits are allowed providing the claimant is otherwise eligible.

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.

DECISION:

The representative's decision dated January 7, 2009, reference 01, is affirmed. The claimant was dismissed under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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