

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANTONIO MARTINEZ**  
Claimant

**APPEAL NO. 08A-UI-03166-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FARMLAND FOODS INC**  
Employer

**OC: 03/02/08 R: 01**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Farmland Foods, Inc., filed a timely appeal from the March 24, 2008, reference 02, decision that allowed benefits. After due notice was issued, a hearing was commenced on April 15, 2008 and concluded on April 17, 2008. Mr. Martinez participated. Becky Jacobsen represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Nine, A and B into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Antonio Martinez was employed by Farmland Foods, Inc., as a full-time production employee from November 2, 2006 until February 6, 2008, when Becky Jacobsen, Human Resources Manager, discharged him for attendance. Mr. Martinez was assigned to the second shift, which started at 3:00 or 4:00 p.m. and worked 8 to 10-hour shifts.

The employer has a written attendance policy and an absence notification policy set forth in an employee handbook. Mr. Martinez received a copy of the attendance policy at the start of his employment. The attendance policy assigned attendance "points" to absences based on the nature of the absence. If the absence was due to illness, the employer assessed attendance points based on whether the employee provided medical documentation to support the absence. The absence notification policy required Mr. Martinez to telephone a designated message line prior to the start of his shift and leave a voice mail message with his name, the production line to which he was assigned and the reason for the absence. The employer then had a designated employee review the messages and send written notice to Mr. Martinez's immediate supervisor. The supervisor was charged with further recording the absence and reporting the absence on to the employer's human resources department.

The final absence that prompted the discharge occurred on January 29, 2008. On that date, Mr. Martinez telephoned the employer prior to the start of the shift to indicate that he would be absent due to winter weather conditions. The winter weather conditions had significantly reduced road visibility. Other employees were also absent from Farmland Foods on the same day for the same reason and each received an attendance point for the absence if he or she failed to make it to work for at least part of the shift. The next most recent absence that factored into the decision to discharge occurred on December 14, 2007, when Mr. Martinez was tardy for personal reasons.

The employer considered additional absences in making the decision to discharge Mr. Martinez from the employment. On February 9, 2007, Mr. Martinez was absent due to illness properly reported, but did not submit medical documentation. On February 16, 2007, Mr. Martinez was tardy due to winter weather conditions. The vehicle in front of Mr. Martinez started to slip off the road. The car in which Mr. Martinez was riding then slipped off the road as well and became snowbound. Mr. Martinez had to wait until a tow truck could remove the car from the snow before he could get to work. On March 3, 2007, Mr. Martinez was absent due to illness properly reported. Mr. Martinez had been in an off-duty accident and suffered injury. On March 20, 2007, Mr. Martinez was absent due to injury properly reported. On May 25, 2007, Mr. Martinez was absent due to illness properly reported. Mr. Martinez was suffering from diagnosed depression and insomnia related to his mother's recent death and his father's serious illness. Mr. Martinez's duties at Farmland Foods involved operating a mechanical ham skinning machine with a blade that was two to three feet long. Mr. Martinez determined that he was not able to safely perform his duties and called in sick. On June 9, 2007, Mr. Martinez left work early. Neither the employer nor Mr. Martinez has information regarding why Mr. Martinez left work early on that day. On July 7, 2007, Mr. Martinez was absent due to illness properly reported. On August 27, 2007, Mr. Martinez was absent due to an injury suffered by his eight-year-old son, who had fallen and injured his head. Mr. Martinez properly reported the absence and provided the employer with medical documentation of the son's evaluation/treatment. Mr. Martinez had other absences due to illness properly reported to the employer. The employer did not consider those additional absences in making the decision to discharge Mr. Martinez. Mr. Martinez had ongoing medical issues related to diagnosed predisposition to migraine headaches.

The employer issued several written attendance warnings to Mr. Martinez to notify him that he had accrued attendance points that could lead to disciplinary action up to discharge from the employment.

## **REASONING AND CONCLUSIONS OF LAW:**

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 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 a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 weight of the evidence in the record establishes that the final absence that prompted the discharge was due to winter weather conditions that were beyond Mr. Martinez's control. Accordingly, the absence would be an excused absence under the applicable law. Because the final absence was an excused absence under the applicable law, the evidence in the record fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Because there was not current act, the discharge was not for misconduct and would not disqualify Mr. Martinez for unemployment insurance benefits. Because there was no current act, the administrative law judge need not consider the prior absences and whether they were excused or unexcused absences under the applicable law. However, the outcome in this matter would have been the same even if the final absence had been deemed unexcused. This is because the weight of the evidence establishes but one prior absence that would be an unexcused absence under the applicable law, the tardiness on December 14, 2007.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Martinez was discharged for no disqualifying reason. Accordingly, Mr. Martinez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Martinez.

**DECISION:**

The Agency representative's March 24, 2008, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs