

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANK M TORRES
Claimant

APPEAL NO. 09A-UI-11524-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS INC
Employer

**Original Claim: 07/05/09
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated August 3, 2009, reference 01, that held the claimant was not discharged for excessive unexcused absenteeism on July 9, 2009, and that allowed benefits. A hearing was held on August 26, 2009. The claimant participated. Becky Jacobsen, HR Manager, participated for the employer. Employer Exhibit One was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant worked as a full-time production worker from October 23, 2003 to July 8, 2009. The claimant received the employer's attendance policy, which provides for progressive discipline (steps 1-4) from verbal counseling, to a written warning, to a final written warning, and discharge for incurring 12 points. The employer considers an absence due to properly reported illness without a doctor's excuse to be two points of unexcused absence; and with a doctor's excuse, only one point

The claimant received a final written warning for accumulating eight points on June 3, 2009. The claimant had applied for and was granted FMLA for his ill spouse prior to missing work on May 7, 8, 13, and 14. When the claimant reported to work, the doctor's statement did not cover May 14, only the prior days. Although the claimant properly reported that he would be missing work for all of the days, the employer counted two points for May 14 due to a lack of a doctor's excuse.

The claimant called in on June 2 and reported he would miss work due to illness. The claimant was suffering some back pain and he went to see a doctor on that date. The claimant did not have enough money to cover his co-pay that day, so the appointment was re-scheduled and he went into work on June 3. On June 12, the employer advised the claimant he would be given 15 days to produce a doctor's excuse to cover the June 2 absence from work. When the claimant did not

produce the excuse, he accumulated 12 points of unexcused absence and was discharged on July 8, 2009.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

The administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on July 8, 2009, for excessive "unexcused" absenteeism, and any "current act" of misconduct. The employer's policy is not controlling on the Iowa Employment Security law as to what constitutes an excused absence. Absences due to properly reported illness are excused regardless of whether an employee has a doctor's statement. Most of the points, including the most recent absence of June 2, were due to properly reported illness. The employer waited 36 days to discharge the claimant for the June 2 absence, which is not a current act of misconduct.

DECISION:

The decision of the representative dated August 3, 2009, reference 01, is affirmed. The claimant was not discharged for misconduct or any current act of misconduct in connection with employment on July 8, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw