

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANK W GARMON
Claimant

APPEAL NO: 14A-UI-06115-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 05/18/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant appealed a department decision dated June 5, 2014, reference 01, that held he was discharged for misconduct on May 16, 2014, and benefits are denied. A telephone hearing was held on July 8, 2014. The claimant participated. David Rodriguez, HR Specialist, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

Whether claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds: The claimant was hired on October 3, 2011, and last worked for the employer as a full-time boxer on May 16, 2014. The employer has a no-fault attendance policy. An employee who has eight attendance occurrences may be discharged.

The employer met with claimant on February 21, 2014 to advise he had eight attendance occurrences. When claimant responded two occurrences were due to a serious medical condition, the employer advised it would help claimant apply for FMLA (leave) so they would not count against him. These occurrences happened as claimant reported sick on February 19, and March 4, 2013.

When claimant failed to obtain a physician certification form for the illness, the employer submitted repeated notices. Claimant offered reasons why he had failed. The employer discharged claimant on May 16, 2014 for failing to submit the physician certification form to obtain FMLA in order to excuse the 2013 absences.

The employer attendance record shows claimant was at seven attendance occurrences as of February 3, 2014 and April 14. There is no record claimant incurred a further attendance occurrence to reach the eight point threshold.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r.871-24.32(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.

Iowa Admin. Code r. 871-24.32(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 employer failed to establish claimant was discharged for a current act of misconduct on May 16, 2014. The most recent misconduct act must be a current act to establish job disqualifying misconduct. Claimant's absenteeism must be excessive "unexcused" absences.

Although claimant was at eight attendance occurrences on February 21, 2014, the employer did not discharge or suspend claimant. He was allowed to continue employment through May 16 while he was given an opportunity to have his February 19, and March 4, 2013 occurrences covered by FMLA that meant they would not be counted against him.

Claimant's failure to obtain FMLA for lack of a physician certification form is not a current act of misconduct. Claimant's absences were due to properly reported illness that is not misconduct whether covered by FMLA or not.

Claimant did not reach the eight attendance occurrence level at any time after the February 21, 2014 meeting so there is no issue of misconduct on this basis.

DECISION:

The department decision dated June 5, 2014, reference 01, is reversed. The claimant was not discharged for a current act of misconduct on May 16, 2014. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css