

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID W STRATTON**  
Claimant

**APPEAL NO. 10A-UI-12870-M**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FOODS INC**  
Employer

**OC: 08/15/10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.4-3 – Able and Available

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated September 9, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 13, 2010. Claimant participated personally and was represented by Katie Naset, Attorney at Law. Employer participated by Russell Samson, Attorney at Law for Foods Inc with witnesses Deb Jones, Office Manager and Charmin Folkerts, Payroll Supervisor. Exhibits A through E and One through Seven were admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct. The issue in this matter is whether claimant is able and available for work.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on June 6, 2010.

Claimant was discharged on August 14, 2010 by employer because claimant was off work due to illness. Claimant was given notice that he needed to complete FMLA papers for the time off or he would lose his job effective August 14, 2010. Claimant took the FMLA papers to the doctor. The doctor refused to return the papers because claimant did not follow up with an August appointment. Claimant did keep employer informed that he was absent due to illness through August 14, 2010.

Claimant is able to perform work in clerical and computer jobs. Claimant is able and available for full time work effective August 15, 2010. Work is readily available for which claimant has prior training and experience.

## 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.

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(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an

intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant was let go due to absenteeism caused by illness. Since claimant properly informed the employer of the time he needed off the absenteeism is excusable. Where properly reported, absenteeism due to illness is excusable. Claimant is not held responsible for his doctor's failure to return paperwork. Claimant's statement that he could not work is sufficient to establish that he was absent due to illness. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated September 9, 2010, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements. Claimant is able and available for work.

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Marlon Mormann  
Administrative Law Judge

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Decision Dated and Mailed

mdm/pjs