IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERIKA A FRANCIS
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 11A-UI-11007-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/17/11
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

Erika Francis filed a timely appeal from the August 11, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on September 13, 2011. Ms. Francis participated. David Williams of TALX represented the employer and presented testimony through Maurena Parkash, Steve Dowd and Ginny Zmolek. Exhibits One through Six were received into evidence.

ISSUE:

Whether Ms. Francis separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Erika Francis was employed by Care Initiatives as a part-time Certified Nursing Assistant at Lantern Park in Coralville from November 2010 and last performed work for the employer on July 10, 2011. Ms. Francis was assigned to the first shift and her work hours were 6:00 a.m. to 2:00 p.m. Maurena Parkash, Director of Nursing, was Ms. Francis' immediate supervisor.

Ms. Francis requested, but was not approved, to take July 15, 16 and 17 off. Ms. Francis needed the time so that she could travel to Minnesota to fulfill the requirements of a college class. On July 8, Ms. Francis spoke to Ginny Zmolek, Nurse Manager, about the fact that she was on the schedule to work the days she had requested off. Ms. Zmolek told Ms. Francis that she would need to work the shifts or find a replacement. As of July 14, Ms. Francis was still contacting coworkers trying to find someone to cover her scheduled shifts on July 15, 16 and 17. Ms. Francis was unable to find a replacement, but took the time off anyway.

When Ms. Francis did not appear for work on July 15, the Charge Nurse telephoned her. Ms. Francis was in a car heading to Minnesota and told the charge nurse that she was on her way to Minnesota on a school trip and that the Director of Nursing had agreed to find a replacement for her. Ms. Francis told the charge nurse she would not be in to work that

weekend. Ms. Francis did not make further contact with the employer with regard being absent on July 15, 16 or 17.

Ms. Francis was next scheduled to work on July 22. Ms. Francis appeared for work at 6:00 a.m., but was not allowed to start her shift at that time. Ms. Zmolek told Ms. Francis that she would first have to speak with Ms. Parkash. Ms. Parkash had already made the decision that Ms. Francis would not be allowed to continue in the employment. Ms. Francis contacted Ms. Parkash at home. Ms. Parkash told Ms. Francis that she had taken her off the schedule because she had been absent without notifying the employer. Ms. Parkash told Ms. Francis that she would be at the workplace at 8:00 a.m. and that she could meet with Ms. Francis at that time or later. After Ms. Francis was done with the telephone call to Ms. Parkash, she decided to leave rather than wait for Ms. Parkash to arrive. This was the last contact between the parties.

The employer had a written attendance policy set forth in an employee handbook. Ms. Francis got a copy of the handbook at the start of her employment. The policy indicated that no call, no show absences could lead to termination of employment. The policy did not say that an employee would be deemed to have voluntarily quit as a result of no call, no show absences.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The weight of the evidence establishes that Ms. Francis was discharged for attendance and did not quit. Ms. Francis had given no notice that she intended to quit. The employer's policy did not indicate that one or more no call, no show absences would be deemed a quit. Ms. Francis attempted to return to work on July 22, but was not allowed to do so. All of these point to a discharge from the employment, not a voluntary quit.

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 unexcused absences on July 15, 16 and 17. These consecutive unexcused absences were excessive and constituted misconduct in connection with the employment. Ms. Francis was discharged for misconduct. Accordingly, Ms. Francis is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Francis.

DECISION:

The Agency representative's August 11, 2011, reference 02, decision is modified as follows. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs