IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KARI A FRANZEN
Claimant

TELCO TRIAD COMMUNITY CREDIT UNION
Employer

APPEAL NO. 14A-UI-05647-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/04/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kari Franzen filed a timely appeal from the May 27, 2014, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on June 25, 2014. Ms. Franzen participated. Tim Piepho represented the employer and presented additional testimony through Roger Bentz. Exhibits One through Five and A were received 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: Kari Franzen was employed by Telco Triad Community Credit Union as a part-time teller/member services representative from May 2013 until May 8, 2014 when Tim Piepho, Chief Executive Officer, discharged her from the employment for attendance. Ms. Franzen spent the first couple months of her employment at the employer's main branch and then worked at the employer's Morningside branch. At the Morningside branch, Ms. Franzen's immediate supervisor was Robert Hughes, Branch Manager. On May 8 Mr. Hughes and Roger Bentz, Human Resources Director, met with Ms. Franzen and notified her of the discharge. At the time of the discharge, the employer advised Ms. Franzen that the attendance issues that triggered the discharge related to Ms. Franzen being absent at a time when the employer was short-staffed.

The employer considered absences dating back to April 3, 2014 in making the decision to end the employment. On April 3, 2014 Ms. Franzen was absent due to illness and properly reported the absence to the employer.

On April 17, 2014 Ms. Franzen and a coworker, Alison Montange, got into a verbal dispute when Ms. Montange attempted to adjust Ms. Franzen's work hours after another employee appeared to have quit without notice. Ms. Montange was a full-time teller/member services representative at the employer's Morningside branch and did not have supervisory authority

over Ms. Franzen's work. Mr. Franzen balked at, and took offense with, Ms. Montange's attempt to exercise supervisory authority over her. During the course of the verbal dispute, Ms. Franzen told Ms. Montange that Ms. Montange was not her boss and Mr. Hughes was her boss. For emphasis, Ms. Franzen added that it was Mr. Hughes, not Ms. Montange, whom Ms. Franzen would call when she was unable to report for work. When Ms. Montange continued the dispute, Ms. Franzen called Ms. Montange a "crazy bitch." The employer subsequently counseled both employees. Ms. Montange told the employer that the working relationship could not continue. Ms. Franzen started looking for other employment and did not hide that fact from Ms. Montange.

On April 29, 30 and May 1, 2014 Ms. Franzen was absent due to the illness of her young child and properly reported the absences to the employer.

Ms. Franzen was scheduled to work on Saturday, May 3, 2014. Ms. Franzen's regular work hours included a Saturday morning shift, 8:50 a.m. to noon, on alternating weekends. Ms. Franzen traded shifts with another employee and did not report for work on May 3. Ms. Franzen did not notify Mr. Hughes that she had switched shifts with the coworker. In July 2013, Ms. Franzen had participated in a staff meeting wherein the employer discussed Saturday staffing issues. The employer's minutes from that meeting indicate as follows:

> **Vacations/Saturday**
> Kay told staff when scheduling their vacations, if your Saturday to work falls within your vacation, you are responsible for finding a replacement for your Saturday. Once you find a replacement it must be approved by your supervisor and your replacement's supervisor to ensure that no scheduling conflicts will arise.

Mr. Hughes did not enforce the directive issued at the July 2013 meeting and allowed employees to switch Saturdays without directly involving him in the discussion.

The employer cites Ms. Franzen's absence on May 6, 2014 as the absence that triggered the discharge. On that day, Ms. Franzen was absent from a meeting and from her shift due to illness. Ms. Franzen was scheduled to attend a staff meeting at 9:00 a.m. and to work a shift from noon to 5:00 p.m. At about 5:30 a.m., Ms. Franzen began her attempts to notify Mr. Hughes of her need to be absent. The contact number that Ms. Franzen had for Mr. Hughes was a cellphone number. Ms. Franzen made at least four attempts to contact Mr. Hughes between 5:30 a.m. and 8:00 a.m. On each of those attempts, Ms. Franzen's call was routed to a voicemail box, where a message indicated that the mailbox was full. At about 8:00 a.m., Ms. Franzen attempted to contact the employer's branches and was routed to an automated answering system, but was unable to make contact with a person or to leave a message. Ms. Franzen considered that the staff was to be in meetings that morning. At 10:05 a.m., Ms. Franzen tried Mr. Hughes' cellphone number again and was able to leave a message in which she indicated she was ill and would be absent from work. Ms. Montange subsequently alleged to Mr. Bentz that Ms. Franzen had told Ms. Montange on May 5 that she would not be present for the May 6 meeting because she would be at a job interview. Ms. Montange further alleged to the employer that Ms. Franzen had said she would not be returning for additional shifts.

Ms. Franzen was next scheduled to work at noon on May 7, 2014. Shortly before 8:00 a.m., Ms. Franzen telephoned Mr. Hughes' cell phone and left a message indicating that she was ill and would be absent from work that day.

The employer has a written attendance policy. The employer provided Ms. Franzen with the attendance policy at the start of her employment and Ms. Franzen signed her acknowledgment of the policy at that time. The written policy provided as follows:

> **Notice of Illness/Sickness** – To allow management to make proper staffing arrangements due to a reduced labor force, the credit union requires all employees to properly inform their immediate supervisor, director of personnel, or management at least one hour prior to the employee's scheduled time to appear for work. Due to the importance and the essence of timely notice, communication must be direct and not of voice mail nature.
>
> Failure to Give Proper Notice of Absenteeism -
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> First-Time Offense – Employee will receive warning of incident.
> Second Offense – Employee may be *denied sick leave benefit.
> *Payment of sick time is discretional and subject to management decision.
> Third Offense and Subsequent Offense – Employee may be denied sick leave benefit and receive further reprimand including termination.

Mr. Hughes did not enforce the written attendance policy at the Morningside branch and accepted a voice mail message as proper notice of an absence. Prior to the discharge, Ms. Franzen had received no prior reprimands for attendance or for failure to give proper notice of absences.

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(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish misconduct in connection with the employment. Testimony from Mr. Hughes, Ms. Franzen's immediate supervisor, was conspicuously absent from hearing. The employer had the ability to present testimony from Mr. Hughes, but elected not to present that testimony. The employer has failed to present sufficient evidence to rebut Ms. Franzen's

assertion that Mr. Hughes did not enforce the employer's written attendance notification policy at the Morningside branch. In the absence of testimony from Mr. Hughes to rebut Ms. Franzen's assertion about more lax practices at the Morningside branch, the administrative law judge concludes that Ms. Franzen provided appropriate notice of her absences when she left a voicemail message for Mr. Hughes and, in the case of the switched Saturdays, when she secured a coworker to cover her shift on May 3.

The weight of the evidence fails to establish any absences that would be unexcused absences under the applicable law. The employer cited the May 6 absence as the last straw. The evidence indicates that Ms. Franzen was absent due to illness that day. Ms. Franzen took reasonable steps to notify Mr. Hughes of the absence by commencing attempts to contact Mr. Hughes at about 5:30 a.m. and continuing those attempts until she was able to leave a message for Mr. Hughes at 10:05 a.m. Again, testimony from Mr. Hughes was conspicuously absent from the hearing. The employer failed to present sufficient evidence to rebut Ms. Franzen's assertion that she was ill. The employer had the ability to present testimony through Ms. Montange, but elected not to present such testimony. The evidence establishes animosity between Ms. Franzen and Ms. Montange, which calls into question the reliability of her allegation that Ms. Franzen had given prior notice that she would be absent from the meeting on May 6 to attend a job interview or the allegation that Ms. Franzen had said she would not be returning for later shifts. Ms. Franzen clearly did return for a later shift, at which time she was discharged from the employment. The weight of the evidence indicates that the other absences the employer considered were due to personal illness, or the illness of a dependent child, and were properly reported to the employer.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

While Ms. Franzen's April 17 utterance was inappropriate, it had been addressed on and before April 23, 2014 and did not constitute a current act at the time of the discharge. It cannot serve as a basis, for disqualifying Mr. Franzen for benefits.

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

DECISION:

The claims deputy's May 27, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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

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