

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HARRIETT A FRANKLIN
Claimant

APPEAL NO. 07A-UI-03862-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TPI
Employer

**OC: 03/18/07 R: 03
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Harriett Franklin filed a timely appeal from the April 10, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 30, 2007. Ms. Franklin participated. J.T. Breslin, Human Resources Manager, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Harriett Franklin was employed by TPI as a full-time Finish Operator from November 11, 2006 until March 20, 2007, when Human Resources Manager J.T. Breslin discharged her for attendance. The employer's written attendance policy required Ms. Franklin to notify her immediate supervisor within 30 minutes before or after the scheduled start of her shift if she needed to be absent. Ms. Franklin was aware of the policy. Ms. Franklin's immediate supervisor was Third-shift Supervisor Kevin Haynes. When Mr. Haynes was absent, Ms. Franklin's immediate supervisor was the assistant third-shift supervisor. The final absence that prompted the discharge occurred on March 19, 2007, when Ms. Franklin was absent due to illness and properly reported the absence to the employer. Ms. Franklin had also been absent on March 12, 13, 14, 15, 16, due to the same flu or viral illness, and had properly notified her immediate supervisor each day. Ms. Franklin did not see a doctor in connection with the illness or absences. The third-shift supervisor and assistant supervisor are each still employed by TPI, but did not testify.

Ms. Franklin's husband was arrested on March 15, 2007. On that day, Ms. Franklin spoke with Human Resources Manager J.T. Breslin. Ms. Franklin indicated at that time that she had been absent from work due to personal family issues. Mr. Breslin did not speak with Ms. Franklin again until March 20, 2007, when Ms. Franklin attempted to return to work. At that time,

Mr. Breslin notified Ms. Franklin that she was discharged from the employment because she had accrued too many attendance points under the employer's attendance policy.

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.

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 Ms. Franklin's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 greater weight of the evidence in the record establishes that the final absence that prompted the discharge was an absence due to illness and was properly reported to the employer. The administrative law judge notes that the employer presented no testimony from the shift supervisor or assistant shift supervisor, the two individuals to whom Ms. Franklin daily reported her absences. The employer has failed to present available direct and satisfactory evidence to support the allegation that all of the absences in question were for personal matters rather than for illness. Though Ms. Franklin may have indicated in a conversation on March 15 that she had missed work due to family issues, this evidence does not by itself provide sufficient proof that the absences that followed were attributable to family issues, rather than illness.

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

DECISION:

The claims representative's April 10, 2007, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw