

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SALLY E FRANCY-SIEGRIST
Claimant

APPEAL NO. 11A-UI-15799-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAGCRAFTPAPERCON II LLC
Employer

OC: 08/07/11
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

Sally Francy-Siegrist filed a timely appeal from the December 5, 2011, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on January 11, 2011. Ms. Francy-Siegrist participated. Tina Stewart, Human Resources Manager, represented the employer. Exhibits A through D were received into evidence.

ISSUE:

Whether the claimant 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: Sally Francy-Siegrist was employed by Bagcraft as a full-time waxer from June 2010 until November 7, 2011, when Tina Stewart, Human Resources Manager, discharged her for attendance. Ms. Francy-Siegrist's shift started at 6:00 a.m. The employer's policy required that Ms. Francy-Siegrist notify a supervisor at least an hour prior to her shift if she needed to be absent. Ms. Francy-Siegrist was aware of the policy.

The final absence that triggered the discharge occurred on November 7, 2011. On that day, Ms. Francy-Siegrist did not appear for work or notify the employer she would be absent from her shift. Ms. Francy-Siegrist believed she had "pointed out" under the employer's attendance policy. At about 8:00 a.m., Ms. Francy-Siegrist telephoned the workplace and left a message for Ms. Stewart, asking for a call back to discuss her separation from the employment. Ms. Stewart called Ms. Francy-Siegrist back between 9:00 and 9:30 a.m. Ms. Francy-Siegrist said she had not come to work because she thought she had pointed out. Ms. Stewart told Ms. Francy-Siegrist that, prior to the absence on November 7, Ms. Francy-Siegrist actually had another half a point before she met the eight-point threshold for termination of employment. But, Ms. Stewart told Ms. Francy-Siegrist that since she had not given proper notice of her absence on November 7, she had incurred an additional four attendance points and was being discharged from the employment "as a voluntary quit."

In making the decision to end the employment, the employer considered prior absences. Those prior absences included a tardiness for personal reasons on October 29, 2010, and on May 10, July 8, August 22, and September 15, 2011. Immediately prior to the November 7 absence, Ms. Francy-Siegrist had been absent due to illness properly reported on November 2, 3, and 4. The employer had issued reprimands for attendance on January 10, July 8, September 20, and October 26. Ms. Francy-Siegrist had other absences that were either for illness properly reported or that were not considered by the employer.

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 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 evidence in the record establishes an unexcused absence on November 7, 2011, when Ms. Francy-Siegrist elected not to appear for work as scheduled because she thought she had pointed out. The employer had not said anything to Ms. Francy-Siegrist to indicate that she had pointed out or that she should not report for work. The final unexcused absence follows four warnings for attendance and unexcused tardiness on October 29, 2010, and on May 10, July 8, August 22, and September 15, 2011. The final absence and these additional instances of unexcused tardiness were sufficient to establish excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Francy-Siegrist was discharged for misconduct. Accordingly, Ms. Francy-Siegrist 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. Francy-Siegrist.

DECISION:

The Agency representative's December 5, 2011, reference 04, decision is modified as follows. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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