

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIKA A FRANCIS
Claimant

APPEAL NO. 09A-UI-18046-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROSE HAVEN NURSING HOME INC
Employer

**Original Claim: 11/01/09
Claimant: Appellant (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 30, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 12, 2010. Claimant Erika Francis provided a telephone number for the hearing, but was not available at that number the scheduled time of the hearing and did not participate. Coleen Yearian, Administrative Assistant, represented the employer and presented additional testimony through Holli Welsh, Director of Nursing. Exhibits One and Two were received into evidence.

Claimant Erika Francis contacted the administrative law judge after the hearing record had closed and the employer had been excused. Ms. Francis did not provide good cause to reopen the record.

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: Erika Francis was employed by Rose Haven Nursing Home Inc. as a full-time Certified Nursing Assistant from June 2008 until November 5, 2009, when Holli Welsh, Director of Nursing, discharged her from the employment for recurrent negligence and attendance.

The final events that triggered the discharge occurred during Mr. Francis' shift on November 4. During the shift, Ms. Francis had her cell phone in her possession in a resident area in violation of the employer's written cell phone policy. The cell phone policy was set forth in the employee handbook. Ms. Francis received a copy of the handbook on June 4, 2009. During the same shift, Ms. Francis neglected to follow the established procedure for bathing a resident and employed an unauthorized shortcut instead. When the charge nurse questioned Ms. Francis about her deviation from the established bathing protocol, Ms. Francis argued with the charge nurse and then left work without authorization two hours before the scheduled end of her shift.

On November 2, 2009, the employer had issued a reprimand to Ms. Francis for neglect of her duties. During the last week in October, the employer had instructed each nursing assistant to wash two wheelchairs and Ms. Francis neglected to wash the two wheelchairs assigned to her. Ms. Francis had received a warning for the same thing on September 17, 2009, after she neglected to wash her two assigned wheelchairs two weeks in a row. The warning issued on November 2 also addressed Ms. Francis' neglect to perform her assigned duty of taking and documenting vital signs for three residents during the month of October. These duties were to be performed once per month.

On September 29, the employer had reprimanded Ms. Francis for neglect of her assigned duties after the charge nurse observed several assigned tasks that Ms. Francis had left uncompleted at the end of her shift. These included clothes left on the floor in the hallway, a resident whose teeth had not been brushed, three residents whose dentures had not been brushed, a resident whose blow-by oxygen had not been set up, a resident who was still in his/her day clothes and had not been washed up, and incomplete paperwork. Of the nine to 12 residents in Ms. Francis's care, eight of the residents' cares were left unfinished.

The November 2 warning also addressed Ms. Francis' absence from work on October 31 and November 1 due to her lack of a babysitter. Rather than telephoning the charge nurse at least an hour prior to the scheduled shift and finding a replacement—all as required by the employee handbook—Ms. Francis had left a note in Ms. Welsh's office on October 30 indicating she would be unable to work on October 31 and November 1 due to lack of a babysitter. The schedule containing these two shifts had been posted since October 22. Ms. Francis had also been absent on June 28, 2009 for personal reasons and had been absent without notifying the employer on June 30, 2009.

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).

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 excessive unexcused absences. These included the unauthorized early departure on November 4, as well as the absences for personal reasons on June 28, June 30, October 31, and November 1, 2009.

The weight of the evidence also establishes negligence so recurrent as to indicate a willful or wanton disregard of the employer's interests. The various incidents are referenced above and culminated in the unauthorized bathing shortcut and came to the charge nurse's attention on November 4.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that 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.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer

will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's November 30, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and be 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw