

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TODD J FRANKE
Claimant

APPEAL NO. 18A-UI-01388-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

K G B INC
Employer

OC: 12/31/17
Claimant: Appellant (2)

Iowa Code Section 96.5(2) – Discharge for Misconduct

STATEMENT OF THE CASE:

Todd Franke filed a timely appeal from the January 23, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Franke had voluntarily quit on December 24, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on February 26, 2018. Mr. Franke participated and presented additional testimony through Stephanie Smith and Darla Welsher. Bobbie Engebretson represented the employer and presented additional testimony through David Welsher and Lisa Floy. Exhibits 1, 2, 3, B and C were received into evidence.

ISSUE:

Whether Mr. Franke separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: George Slattery, doing business as K.G.B., Inc., owns and operates 25 Subway restaurants. Bobbie Jo Engebretson is K.G.B.'s Operations Director. Lisa Floy is Technology Supervisor. Ms. Engebretson and Ms. Floy are second and third in command, respectively, after Mr. Slattery. Leann Spencer, Area Supervisor, and David Welsher, Staff Development Manager, represent the next lower level of the management hierarchy.

Todd Franke was employed by K.G.B. during distinct periods. Mr. Franke most recently began employment with K.G.B. in May 2017. At that time, Mr. Welsher was aware of a need for an experienced employee at the Hubbell Avenue store in Des Moines. Mr. Welsher was aware, through his relationship with his sister, Darla Welsher, that Mr. Franke was without employment and needed employment. Mr. Franke is Ms. Welsher's boyfriend. Ms. Welsher also works for K.G.B. When Mr. Franke returned to the employment in May 2017, Mr. Welsher recruited him to the position without requiring an application or interview. Mr. Franke's personal relationship with Mr. Welsher continued to be a factor in the employment relationship until Mr. Franke separated from the employment.

From May 2017 until December 13, 2017, Mr. Franke worked as a full-time Sandwich Artist at the employer's Hubbell Avenue store in Des Moines. Stephanie Smith is Store Manager for the Hubbell Avenue store and was Mr. Franke's immediate supervisor during his time at the Hubbell Avenue store. During the first week of December 2017, Mr. Franke told Ms. Smith that he was leaving the Hubbell Avenue store to relocate to the Mason City area with Ms. Welsher and Ms. Welsher's son. Ms. Welsher is from north central Iowa. While Ms. Welsher had a K.G.B. job waiting for her at a Mason City Subway, Mr. Franke did not have another K.G.B. job lined up at the time he told Ms. Smith that he was leaving her store.

Once Mr. Franke and Ms. Welsher had relocated to Mason City, Mr. Franke spoke with Mr. Welsher about his desire to continue working for K.G.B. With the approval of Ms. Engebretson, Operations Manager, Mr. Welsher arranged for Mr. Franke to work at K.G.B.'s Clear Lake store and for Mr. Franke to fill in at other stores. The employer elected to treat the situation as a transfer from the Hubbell Avenue store to the Clear Lake store. The employer raised Mr. Franke's hourly wage by \$1.00 to \$11.00, with the understanding that Mr. Franke would travel to and work at other K.G.B. Subway stores in north central Iowa as needed. Brittney Woolry is Store Manager for the Clear Lake store. Mr. Franke's first day at the Clear Lake store was on December 18, 2017. Mr. Franke worked under one week at the Clear Lake store and worked his last shift at that store on Friday, December 22, 2017.

On the evening of December 21, 2017, Mr. Franke sent a text message to Mr. Welsher. Mr. Franke had decided that things were not working out well for him in the Mason City area and he had decided to return to the Des Moines area. Mr. Welsher had previously told Mr. Franke and Ms. Welsher that Ms. Engebretson was away from work dealing with illness and that Mr. Welsher would be assisting with Ms. Engebretson's duties during her absence. Mr. Franke's text message to Mr. Welsher stated as follows: "Pretty sure I will finish schedule but want to go back to hubbell." Mr. Welsher immediately responded, "Ok sounds good." Mr. Franke sent an immediate reply, "Thanks." Mr. Franke took from that brief exchange that Mr. Welsher had given his blessing to Mr. Franke transferring back to the Hubbell Avenue store as soon as Mr. Franke worked the posted schedule at the Clear Lake store. At that point, Mr. Franke was scheduled to work through December 26, 2017.

On the morning of December 22, 2017, Mr. Franke notified Brittney Woolry, the Clear Lake Store Manager, that Tuesday, December 26, 2017 would be his last day at the Clear Lake store. Ms. Woolry had prepared, but not yet posted, the upcoming work schedule. The new schedule had included work hours for Mr. Franke at the Clear Lake store. Upon receiving the news that Mr. Franke was leaving the Clear Lake store, Ms. Woolry initiated a text message exchange with Mr. Welsher. Ms. Woolry wrote: "Did u know frankies last day is Tuesday up here?" Mr. Welsher replied, "He text me last night and said he'd finish his schedule up here." Ms. Woolry then wrote, "He knew I had the scheduel done for next week to an he told me the 26th he was done." Mr. Welsher further wrote, "Ah ok.....well let me know if there's any shifts I can help with.....Im in Clarion on the 29th." Ms. Woolry further wrote, "I may need someone for the 27th 5-9 and the 29th 5-9."

Between his Clear Lake shift on December 22 and his final Clear Lake shift set for December 26, Mr. Franke worked shifts at the New Hampton Subway on December 23 and 24.

At 7:11 a.m. on December 26, 2017, Mr. Franke notified Leann Spencer, Area Manager, that he was supposed to open at the Clear Lake store that morning, but that he was experiencing chest pains and was going to the emergency room. Mr. Franke has a history of heart disease. At 7:24 a.m., Ms. Spencer replied, "Ok I got a hold of Brittney." Mr. Franke went to the Mason City emergency room for evaluation, was prescribed medications, and elected to defer further treatment until he returned to the Des Moines area. Following the trip to the emergency room, Mr. Franke drove to Des Moines with the intention of going back to work at the Hubbell Avenue store.

On December 27, 2017, Lisa Floy, Technology Supervisor, went to K.G.B.'s Mason City Subway. Ms. Welsher was working that day. While there, Ms. Floy engaged Ms. Welsher in conversation that touched on Mr. Franke. Ms. Floy asked Ms. Welsher how she was doing and Ms. Welsher replied that Mr. Franke had returned to the Des Moines area with Ms. Welsher's car. Ms. Welsher told Ms. Floy that Mr. Franke was returning to the Hubbell Avenue store. Ms. Floy had not previously been aware of any request, plan, or approval for Mr. Franke to transfer from the Clear Lake store to the Hubbell Avenue store. When Ms. Welsher mentioned that Mr. Franke was returning to work at the Hubbell Avenue store, Ms. Floy replied, "Oh no he is not." Ms. Floy contacted Ms. Engebretson and then contacted Stephanie Smith, Hubbell Avenue Store Manager, to see what Ms. Smith knew about a purported transfer back to the Hubbell Avenue store. At that point, Ms. Smith did not have any information about a proposed transfer back to the Hubbell Avenue store. Ms. Smith had not yet hired someone to replace Mr. Franke and was open to Mr. Franke returning to the Hubbell Avenue store. Ms. Floy told Ms. Smith that she was "not recommending" a transfer. In other words, Ms. Floy communicated to Ms. Smith that the employer would not approve a transfer. On December 27, Mr. Franke contacted Ms. Smith with the purpose of obtaining work hours in the Hubbell Avenue store. At that time, Ms. Smith told Mr. Franke that Ms. Floy would not allow the transfer to the Hubbell Avenue store. Thus, the employment relationship ended.

The employer is not generally averse to employees transferring from one store to another. However, the employer's usual transfer process begins with an employee request to transfer, followed by approval of the store managers involved in the transfer and approval by Ms. Engebretson and/or Ms. Floy. Once the transfer is approved, the transferring employee is expected to give a two-week notice to the store from which the employee is departing. Mr. Franke had not followed the regular transfer steps in connection with his move from the Hubbell Avenue store to the Clear Lake store and had again not followed the regular transfer steps in connection with his plan to return to the Hubbell Avenue store.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence establishes a discharge, not a voluntary quit. Mr. Franke's personal relationship with Mr. Welsher was a substantial factor in the employment relationship from the time Mr. Welsher recruited Mr. Franke to return to the employment in May 2017 through the December 27, 2017 separation date. The weight of the evidence establishes that Mr. Franke reasonably concluded that he had received appropriate approval from Mr. Welsher on December 21, 2017 to transfer back to the Hubbell Avenue Store effective once he had completed the posted schedule at the Clear Lake store effective December 26, 2017. Mr. Franke's reasonable conclusion that he had appropriate approval to return to the Hubbell

Avenue store was based on the text message exchange on December 21, 2017, based on Mr. Welsher's earlier statement that he was filling in for Ms. Engebretson, and based on the additional surrounding circumstances. Mr. Franke was willing to continue in the employment relationship. The employer elected to sever the employment relationship, thereby discharging Mr. Franke from the employment.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 a discharge 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).

The basis for the discharge was Mr. Franke's failure to follow the usual transfer request and approval process. However, as indicated above, Mr. Franke had a reasonable basis to conclude that the transfer had been appropriately approved by Mr. Welsher. Accordingly, Mr. Franke's failure to follow the usual process would not constitute misconduct in connection with the employment. The employer does not cite the absence on December 26, 2017 as a factor in ending the employment. The weight of the evidence establishes that the December 26 absence was due to illness and that Mr. Franke provided the employer with appropriate and reasonable notice under the circumstances. Accordingly, that absence would be an excused absence under the applicable law. See Iowa Administrative Code rule 871-24.32(7) (regarding discharges for excessive unexcused absences). Mr. Welsher testified during the hearing that Mr. Franke had allegedly spoken to Ms. Woolry and other staff at the Clear Lake store about obtaining marijuana, a controlled substance. Mr. Franke denies the allegation. The employer failed to present testimony of any of the people who were allegedly propositioned by Mr. Franke and failed to present sufficient evidence to prove the allegation by a preponderance of the evidence.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Franke was discharged on December 27, 2017 for no disqualifying reason. Accordingly, Mr. Franke is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The January 23, 2018, reference 01, decision is reversed. The claimant was discharged on December 27, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

Due to the claimant's status as a homeless person, a copy of this decision will be mailed to the claimant at the general delivery address of record and will be emailed to the claimant at the email address he used to file his appeal.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs