**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

| | |
|---|---|
| **JOSH LANSINK**<br>Claimant<br><br>**TYSON FRESH MEATS INC**<br>Employer | **APPEAL 19A-UI-06418-S1-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 07/14/19**<br>**Claimant: Appellant (2)** |

Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Josh Lansink (claimant) appealed a representative's August 6, 2019 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Tyson Fresh Meats (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 3, 2019. The claimant was represented by Rick Lubben, Attorney at Law, and participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 3, 2009, as a full-time skilled support technician. He signed for receipt of the employer's handbook when he was hired. The claimant did not read some policies and misplaced his handbook. He was unaware whether the employer had a policy on off duty conduct. He knew there were policies concerning illegal, immoral, and indecent conduct. The claimant thought the employer gave employees second chances. He remembered receiving one warning for broken equipment and one warning for attendance.

While the claimant was on vacation from July 3 to July 14, 2019, he posted pictures and posts on his Facebook account. His profile identified him as an employee of Tyson Foods. While responding to a discussion about Colin Kaepernick, the claimant posted, "Can somebody please take this n****r out". The claimant did not want to see Colin Kaepernick anywhere anymore.

The claimant was set to return to work on July 15, 2019, but properly reported his absence to care for his son. On July 16, 2019, he returned to work and met with the employer. The employer showed the claimant the employer's policies and asked him about the post. The

claimant admitted to posting the comment on his Facebook page. The employer told the claimant it was a terminable offense and terminated him.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Off duty conduct must be "work related" if it is to be grounds for discharge and disqualification for misconduct. That is, it must have a direct, negative effect on the employer. *Diggs v. Employment Appeal Board*, 478 N.W.2d 432 (Iowa App. 1991). In order for an employer to show that is employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

> [T]hat the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

*Dray v. Director*, 930 S.W.2d 390 (Ark. App 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Department of Employment Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77–78.

First of all, the claimant connected his behavior with his work by identifying himself as an employee of Tyson Foods in his profile. Disqualification for off-duty conduct which does not have a direct negative effect is guided by the decision in *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416 (Iowa 1992). In that case the claimant was disqualified from unemployment benefits as a result of her being convicted of selling cocaine off duty at her home. That case rested on the employer's policy specifically prohibiting any "illegal, immoral or indecent conduct" on or off the premises and whether or not on company time. *Kleidosty* did not require a showing of adverse impact on the employer, simply a violation the rule prohibiting illegal, immoral, or indecent conduct. In this case, the claimant understood that the employer had rules prohibiting illegal, immoral, or indecent conduct. Posting a request to take someone out is akin to asking for their disposal. The post's request and language was immoral and indecent.

Finally, the claimant did not post with the intent or knowledge that the employer would suffer. He did not read the employer's policies. The employer did not participate in the hearing to provide information about how the claimant would have known of any policies preventing this type of off duty conduct. As a result, the employer did not provide sufficient evidence of job-related off duty misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's August 6, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/rvs