

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DANIEL L SAMMON
Claimant

D OF S FOODS INC
Employer

APPEAL NO. 21A-UI-00716-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/30/20
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 16, 2020, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 30, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on February 10, 2021. Claimant, Daniel Sammon, did not provide a telephone number for the appeal hearing and did not participate. Bryan O'Neil represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2 and 3 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: The claimant was employed by D of S Foods, Inc., doing business as McDonald's as a part-time crew member from March 2019 until August 30, 2020, when the employer discharged him from the employment. At some point prior to the discharge date the claimant posted comments to his Facebook page in which the claimant expressed frustration that coworker's time off requests were granted, but that his request for time off to accompany his child's mother to an ultrasound appointment was denied. The employer witness does not know when the Facebook posts were made or when they came to the attention of the employer. The employer has a social media policy that the claimant acknowledged at the start of his employment.

In making the decision to discharge the claimant from the employment, the employer also considered the claimant's late arrival for an August 13, 2020 meeting. The employer does not know when the claimant was notified of the meeting.

REASONING AND CONCLUSIONS OF LAW:

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 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).

The evidence in the record establishes a discharge for disqualifying reason. The claimant's Facebook post expressing frustration about the unfairness of a time-off policy under which he was denied time off to participate in a medical appointment concerning his offspring was protected speech under Section 7 of the Labor Relations Act and not disqualifying misconduct in connection with the employment. The claimant was discharged for no disqualifying reason. The evidence fails to establish a current act of misconduct in connection with the employment. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The November 16, 2020, reference 01, decision is affirmed. The claimant was discharged on August 30, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

February 26, 2021
Decision Dated and Mailed

jet/scn