IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

BRANDY K DONNELLY Claimant **MITCHELL MANAGEMENT CO** **JIMMY JOHNS** Employer	**APPEAL NO. 21A-UI-05616-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/27/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 11, 2021, reference 02, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on December 19, 2020 for misconduct in connection with the employment. After due notice was issued, a hearing was held on April 27, 2021. Claimant participated. Ginna Ziepke, Payroll, represented the employer.

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 Mitchell Management Company, d/b/a Jimmy John's, during multiple distinct periods. The most recent period of employment began on April 3, 2020 and ended on December 19, 2020, when the employer discharged the claimant from the employment. The claimant worked at the employer's Lake Manawa restaurant as a part-time sandwich maker and shift manager. In September 2020, the claimant's General Manager and supervisor went on maternity leave. At that time, Christina McColligan began to work at the Lake Manawa store as the General Manager. Until December 4, 2020, the claimant worked about 30 hours per week. Until December 4, 2020, the claimant regularly worked Thursday through Sunday, 4:00 p.m. to 10 p.m. and an additional 11:00 a.m. to 4:00 p.m. shift. The claimant was paid $11.30 an hour when she worked as a sandwich maker and $12.50 an hour when she worked as a shift manager.

Ms. McColligan made the decision to discharge the claimant on December 19, 2020 in response to a Facebook comment the claimant posted prior to reporting for work on December 19, 2020. In the comment, the claimant stated that she was apparently very toxic at work and had a "shitty boss" who had told the claimant that she was toxic. The claimant posted her comment in

response to a friend's posted comment. The employer lacks a social media policy. The employer lacks a work rule that would subject the claimant to discipline in the employment for off-duty conduct. The claimant had not made prior social media posts. When Ms. McColligan documented the discharge, she set forth the reason for the discharge as the claimant posting negative comments regarding her boss and coworkers. However, the discharge involved only the one post. That post did not reference coworkers, did not name the "boss," and did not name the workplace. However, anyone who reviewed the post and knew where the claimant worked would be able to deduce that the claimant was referencing Ms. McColligan in the post.

The employer cites prior warnings as a factor in the discharge. The employer may not have presented a number of warnings as written reprimands calling for the claimant's signature, but did place documentation regarding each matter in the claimant's personnel file. In connection with each counseling incident, the employer warned the claimant that she could face reduction of work hours or discipline up to discharge from the employment if the attendance issued continued. The prior warnings included multiple warnings for attendance, with the most recent warning for attendance being issued on October 4, 2020 concerning October 3, 2020. The October 4 warnings also addressed the claimant's purported negative attitude.

On December 4, 2020, Ms. McColligan reduced the claimant's scheduled work hours to 10 to 15 per week. Ms. McColligan indicated she no longer wanted the claimant and another employee to work together and that this was the basis for the reduction in work hours.

On December 14, 2020, the claimant and Ms. McColligan participated in a conference call with a human resources representative. The claimant requested the meeting. Following the meeting, Ms. McColligan was supposed to restore the claimant to her previous work hours, but did not do that. It was during this meeting that Ms. McColligan characterized the claimant's presence in the workplace as toxic. When the claimant reviewed the work schedule following this meeting, Ms. McColligan had not restored the claimant's work hours. When the claimant asked about this, Ms. McColligan said that was just the way it was going to be. The claimant's December 19, 2020 Facebook comment followed.

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 Iowa Administrative Code rule 871-24.32(4).

Violation of a specific work rule, even off-duty, can constitute misconduct. In *Kleidosty v. EAB*, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct in connection with the employment. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The National Labor Relations Act [29 U.S.C. §§ 151-169] protects the rights of employees to act together to address conditions at work, with or without a union. *See* www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/the-nlrb-and-social-media. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter. *Id.*

The evidence in the record establishes a discharge for no disqualifying reason. The employer lacked a social media policy. The employer lacked a policy that would subject the claimant to discipline for off-duty conduct. The claimant's Facebook comment did not identify the employer

in any manner and was likely protected speech under the NLRA. The Facebook post did not constitute misconduct in connection with the employment. Accordingly, the evidence fails to establish a current act of misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 11, 2021, reference 02, decision is reversed. The claimant was discharged on December 19, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

August 31, 2021
Decision Dated and Mailed

jet/kmj