

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICHOLAS S HANSEL
Claimant

**ARTHUR J GALLAGHER SERVICE
COMPANY**
Employer

APPEAL NO. 21A-UI-24782-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/03/21
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Nicholas Hansel, filed a timely appeal from the October 26, 2021, reference 01, 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 September 24, 2021 for violation of a known company rule. After due notice was issued, a hearing was held on January 5, 2022. The claimant participated and presented additional testimony through Lucas Radech. Phyllis Schwindt represented the employer. Exhibit A was received into evidence.

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 became an employee of Arthur J. Gallagher Service Company several years ago when Gallagher bought the company where the claimant worked as a full-time insurance salesman/producer. Phyllis Schwindt, Satellite Manager, was the claimant's immediate supervisor throughout the Gallagher employment. Ms. Schwint reports to Chris Behnke, Branch Manager. The claimant has at all relevant times resided in Eldridge, Iowa and in the North Scott Community School District. Gallagher is a multinational insurance agency with 40,000 employees.

The claimant continued in the employment until September 24, 2021, when the employer's human resources personnel elected to discharge the claimant from the employment. Mr. Behnke communicated the discharge decision to the claimant. Ms. Schwint was not involved in the discharge decision.

The sole conduct that factored in the discharge was a brief public speech the claimant made on September 20, 2021 in support of his candidacy for a position on the North Scott Community School District School Board. The speech took place on September 20, 2021, in the vicinity of a school building, but away from the workplace and outside of work hours. The claimant gave the speech as a private citizen, not as a representative of the employer. The claimant made no reference to the employer during the speech and there was nothing about the claimant's presence or presentation in that event that indicated a link between the claimant as school board candidate and the claimant's role as an employee of Gallagher. However, the claimant had marketed and sold the employer's insurance products to the school district and within the district.

During the speech, the claimant ostensibly advocated for an educational environment free of overt political influence and indoctrination. All the while, the claimant interwove several current common Republican talking points on hot-button educational and cultural issues. When speaking about his child being educated regarding "micro-aggressions," the claimant referenced his children being negatively labeled because the family had supported Donald Trump. The claimant added, "I don't want kids to be labeled Hitler supporters." The claimant referenced a recent school board meeting during which accusations of prejudice and "reverse-prejudice" were made. The claimant asserted that LGBT flags and Trump flags did not belong in the learning environment. The claimant asserted that he should not be able to discern a teacher's political affiliation in the context of the learning environment. The claimant spoke of the threat of mandates. At one point, the claimant momentarily stumbled over his words when he stated the district should be "white." The claimant immediately acknowledged the error in word choice. The claimant had intended the comment to continue his theme of sanitizing or white-washing the learning environment of political influence and indoctrination. The claimant's comments were the sort that an audience of one political outlook would embrace and another would abhor.

The claimant's speech was televised and uploaded to YouTube. The speech generated thousands of comments on social media, for and against. On or more people who were either aware of the claimant's affiliation with Gallagher, or who became aware of his affiliation, contacted Gallagher to complain.

At the time Mr. Behnke notified the claimant of the discharge, the contact was brief. Mr. Behnke said he had to let Mr. Hansel go. Mr. Hansel asked whether it was a joke. Mr. Behnke said it was not joke. Mr. Hansel asked whether Mr. Behnke had heard his speech. Mr. Behnke said that was not important and that he had to let Mr. Hansel go.

The employer concedes that speech was an exercise of free speech, but asserts that the claimant's speech was divisive, that it violated unspecified company policies regarding diversity and inclusion, and that it violated unspecified policies set forth in the code of business conduct. The employer witness was unable to cite a particular policy at the time of the appeal hearing.

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 evidence in the record establishes a discharge for no disqualifying reason. The employer presented insufficient evidence to prove the employer had a work rule that put the claimant on notice that the particular off-duty conduct could or would subject the claimant to discipline in the employment. In addition, the claimant's political speech was constitutionally protected free speech, had no reasonable nexus with the employment, did not constitute misconduct in connection with the employment, and cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 26, 2021, reference 01, decision is reversed. The claimant was discharged on September 24, 2021 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

February 7, 2022
Decision Dated and Mailed

jet/mh