IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

RICHARD LOWERY Claimant **DEERE & COMPANY** Employer	**APPEAL NO. 19A-UI-00870-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/06/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 28, 2019, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 14, 2019. Claimant participated personally. Employer participated by Craig Cornwell.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 10, 2019. Employer discharged claimant on January 10, 2019 because claimant tested positive for marijuana after a reasonable suspicion that claimant had been smoking marijuana on or around January 3, 2019. Said positive test occurred after claimant had previously been suspended for work-related violations of employer's Rules of Conduct.

Claimant worked as a production laborer for employer. At the time of hire, claimant received a copy of the Rules of Conduct. Said rules indicate a number of different violations that may lead to consequences for employees. Included in those consequences was the possession of drugs or alcohol or arriving to work under the influence of drugs or alcohol.

Throughout claimant's 10 years of employment he'd received warnings and suspensions for attendance, kicking a cat that had wandered into the production area, and wearing earbuds while working. Claimant's most recent suspension, of thirty days for wearing earbuds, occurred in early 2017 and was considered a safety violation.

December 22, 2018 – January 1, 2019 employer shut down the plant over the holidays. Claimant went to Colorado over this time period. Claimant stated that he'd smoked marijuana while in Colorado.

On January 3, 2019 a supervisor believed that he smelled marijuana on or near claimant or his car. Said supervisor did not testify in the hearing and employer was not able to give context to the alleged observation. Employer went through video and identified it was claimant through the car license the supervisor forwarded. Claimant was brought into the office and told of the supervisor's allegation. Claimant denied the allegation, stating that he hadn't smoked and wasn't high at the time, but admitting that he'd smoked marijuana in Colorado while the company was on break. Employer had no drug recognition expert to tell of any signs claimant showed of being high and employer's witness gave no statements as to how he independently believed claimant was high on January 3.

Employer sent claimant to a local facility where they sent employees for drug tests. Employer could not say who conducted the test or what training they had. Employer stated they were informed by the testing agency of claimant's positive test. Claimant was not given a split sample and claimant's results were not sent to claimant via certified mail.

Claimant went back to work on January 4, 2019 and worked for employer January 4-10. Employer explained that whereas claimant might have been under the influence of marijuana on January 3, 2019, by January 4, 2019 he was believed to be able to return to work. Employer did acknowledge that claimant would probably have still tested positive for marijuana on January 4, 2019, when he did come back to work.

When claimant came to work on January 10, 2019, he was asked to meet with employer. There he was told that he was being terminated for his positive marijuana test in that the test created a violation of employer's rules of conduct – namely that employees were not to come to work *under the influence* of intoxicants. (Italics added for emphasis). As claimant had a violation in 2012 for a safety violation, a violation in 2013 for attendance, a suspension in 2016 for kicking a cat who wandered into the production floor and a suspension in February 2017 for a safety violation, this violation created too many offenses for claimant to retain his employment.

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.
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> 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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers,* 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.,* 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.,* 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning a positive test for marijuana and the resultant violation of the Rules of Conduct was too many violations for employer to keep claimant employed.

The last incident, which brought about the discharge, fails to constitute misconduct because initially employer did not bring forward the person who was alleged to have smelled marijuana on claimant. The only witness for employer did not state that claimant had an odor about him or that claimant gave that witness reasonable suspicion claimant was under the influence of marijuana. When claimant was tested, employer did not follow procedures required under Iowa Code § 730.5 in that employer did show that claimant was given an opportunity for a split sample, nor was claimant sent results through certified mail. Employer then allowed claimant to return to work the next day and continue working for a week, surmising that claimant was no longer under the actual influence of marijuana, even if he were to still potentially to test positive. Only after a week of claimant's ongoing work did employer terminate claimant for his violation. This shows that employer did not find claimant's intoxication to be more than a one-day action.

Whereas employer did not believe claimant to be under the influence of intoxicants after January 3, 2019, employer did not prove that claimant was under the influence of intoxicants through the testimony of witnesses who could describe the intoxication on January 3, 2019, and employer did not test claimant according to the procedures necessary to find misconduct on claimant's part, employer still used the results of an improper test to find reason for a progressive discipline termination. Employer's procedures in this matter do not satisfy those necessary for a misconduct disqualification.

The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated January 28, 2019, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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