IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CINDY L SWANSON Claimant **IA DEPT OF HUMAN SVCS/GLENWOOD** Employer	**APPEAL 17A-UI-02108-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 17, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on March 20, 2017. The claimant, Cindy L. Swanson, participated. The employer, Iowa Department of Human Services—Glenwood, participated through Natalie McEwen, Public Service Supervisor; and Kathy King, Treatment Program Administrator; and Steven Zaks of Employers Edge L.L.C. represented the employer. Employer's Exhibits 1 through 33 was received and admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a resident treatment worker responsible for caring for individuals with disabilities, from November 29, 2010, until February 2, 2017, when she was discharged. On November 24, 2016, claimant purchased marijuana while she was on her lunch break. (Exhibit 7) After making this purchase, she was pulled over was pulled over because she had a headlight out. (Exhibit 7) Claimant reported to the arresting officer that she had smoked marijuana before work that day. (Exhibit 7) Claimant's truck was searched, and she was arrested for possession of marijuana. Claimant took a paid leave of absence after this to, according to McEwen, "get things in order." Claimant enrolled in an EAP therapy program and received continuing care related to the arrest.

Once claimant was ready to return to work, the employer requested a Record Check Evaluation to ensure she was still eligible for employment. On January 23, 2017, when claimant came in for the Record Check Evaluation, she wrote a statement related to her November arrest. (Exhibit 7) McEwen testified that this was the first occasion on which the employer learned that claimant had reported to work under the influence of marijuana on November 24. The employer maintains a policy that prohibits an employee from reporting to work while in a condition unsafe

to others, a condition that renders the employee incapable of performing her job responsibilities, or a condition that creates an unfavorable public image. (Exhibits 26-27) Claimant received a copy of this policy. (Exhibit 21) Claimant testified she knew that she was not permitted to report to work after using marijuana. However, she maintains that she smoked marijuana three or four hours prior to her shift, and she did not believe it would hurt anything to come to work after that.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
>
> 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 individual shall be disqualified for benefits 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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not

misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the 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 that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was 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. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

Here, it is undisputed that claimant smoked marijuana prior to reporting to work on November 24, 2016. While claimant may have felt this was not a big deal, the employer is responsible for the care and safety of dependent adults and claimant was employed specifically to care for these dependent individuals. Claimant's decision to come to work after using marijuana was a deliberate disregard of her employer's interests and was disqualifying misconduct even without prior warning. Even if claimant's conduct prior to her shift on November 24 was done while not working, it amounts to work-connected misconduct. She ingested illegal and impairing drugs mere hours before reporting to work, impairing her own ability to care for dependent adults and clearly harming her employer's interests. This conduct was violative of both the express prohibition on drug use contained in the Employee Handbook and the implied agreement between an employer who engages in dependent care and the employee who is hired expressly to care for dependent adults. Any reasonable individual would know that her employer's interest would suffer from this conduct. Benefits are withheld.

DECISION:

The February 17, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

_____
Elizabeth A. Johnson
Administrative Law Judge

_____
Decision Dated and Mailed