

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KATHY A HOSKINS
Claimant

BLACK HAWK COUNTY
Employer

APPEAL NO. 14A-UI-05582-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/04/14
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 May 29, 2014, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 18, 2014. Claimant participated personally. Employer participated by Angie Maus. Employer's exhibits A-D were admitted into evidence.

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 April 1, 2014. Employer discharged claimant on May 19, 2014 because of a positive drug test combined with no treatment recommendation.

Claimant was working housekeeping duties for employer on April 1, 2014, when she was discovered sleeping in the residents' lounge area. As this was very unusual for her to do, her supervisor was alerted. When she was awoken from her sleep she appeared somewhat disoriented. Claimant's supervisor had claimant come into his office. Soon thereafter he made the decision that he had reasonable suspicion to ask claimant to take a drug test. In addition to this sleeping incident, a few days earlier claimant had been in a bathroom for 1.5 hours. She had stated that she had a stomach ailment. Claimant was sent to a facility to take a drug test, which came back positive for cocaine. During claimant's 33 years working on the job there were no questions ever raised about claimant's possible drug or alcohol use prior to this incident. Claimant stated that in the weekend prior to the incident she had been to a party where someone had handed her a cigarette that she inhaled, not knowing what it was. She gave credible, unrefuted testimony that she doesn't drink, doesn't do drugs (except for her prescribed medications) and had never done cocaine before this incident when she didn't know that she was smoking cocaine when she was given the cigarette.

Claimant was offered an opportunity to get a drug and alcohol evaluation and seek counselling. Claimant followed employer's directives and got an evaluation. The evaluation determined that no treatment was necessary based on claimant's usage amounts and history. Employer followed proper protocol under Iowa Code Sec. 730.5 in sending the results via certified mail. Employer then requested claimant get an evaluation from claimant's primary care physician. Claimant's primary care physician also gave no treatment referral.

After the county was informed that there was no treatment referral from either the county's own drug and alcohol evaluator or the claimant's primary care physician a determination was made that claimant would not be allowed to keep her job. None of the people making this determination about claimant's continued employment were physicians or involved in the drug treatment field. The employer's representative stated that if claimant had been given a treatment referral that employer would have continued to work with claimant so long as she followed that referral and was negative on drug testing that would be conducted. But as she was not given a referral, she was not allowed to keep her job.

REASONING AND CONCLUSIONS OF LAW:

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).

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 drug usage. Claimant had no previous violations to provide a warning concerning this policy, and it was unclear whether claimant had ever received a handbook detailing this policy.

The difficulty that arises in this matter is the application of the policy to different levels of drug users. As claimant stated a one-time usage, she was unable to get a treatment referral from either the county-recommended treatment evaluator or her primary care physician. As a result of no treatment referral, claimant lost her job of 33 years. Should claimant have been a heavy user, she would have been referred to treatment and been able to retain her employment.

Since the consequence of claimant's positive drug test was more severe than other employees would receive for like conduct, the disparate application of the policy cannot support a disqualification for benefits.

DECISION:

The decision of the representative dated May 29, 2014, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/pjs