

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STACEY SEAVER
Claimant

CALCIUM PRODUCTS INC
Employer

APPEAL 23A-UI-11230-DZ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/12/23
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Calcium Products Inc, the employer/appellant,¹ appealed the Iowa Workforce Development (IWD) December 1, 2023 (reference 01) unemployment insurance (UI) decision. IWD found Ms. Seaver eligible for REGULAR (state) UI benefits because IWD concluded the employer dismissed her from work on November 7, 2023 for a reason that did not disqualify her from receiving UI benefits. On December 6, 2023, the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Seaver for a telephone hearing scheduled for December 19, 2023.

The undersigned administrative law judge held a telephone hearing on December 19, 2023. The employer participated in the hearing through Greg Walstrom, operations manager. Ms. Seaver did not participate in the hearing. The administrative law judge took official notice of the administrative record and admitted Employer's Exhibits 1-3 as evidence.

ISSUES:

Did the employer discharge Ms. Seaver from employment for disqualifying job-related misconduct?

Did IWD overpay Ms. Seaver UI benefits?

If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Seaver began working for the employer in 2021. She worked as a full-time customer service load out worker. Her employment ended on November 10, 2023.

The employer's policy prohibits use, possession, sale, manufacturing and/or distributing illegal or controlled substances or drug paraphernalia on the employer's property. The policy provides that the employer may randomly drug test employees. The policy further provides that any detectable amount of any prohibited substance may violate the employer's policy and the employer may discipline an employee up to, and including, terminating their employment if an

¹ Appellant is the person or employer who appealed.

employee violates the policy. The policy also provides that an employee may use legally prescribed drugs if such use does not impair the employee's ability to do their job effectively and does not endanger health and safety. Ms. Seaver acknowledged receiving a copy of the policy on, or about, her hire date.

On July 17, 2023, Ms. Seaver notified the employer that she takes one cannabidiol (CBD) gummy per day that contains less than 0.05 percent tetrahydrocannabinol (THC) to treat a mental health condition. Ms. Seaver stated that she purchases the gummies legally and she has a medical marijuana card. Ms. Seaver asked the employer if taking CBD gummies would cause her to test positive on a random drug test, and if she tested positive would the employer consider the fact that she legally purchases the gummies and has a medical marijuana card. The employer had not considered these questions/issues before. The employer researched the matter and concluded that the employer would treat all positive test results the same. The employer shared its conclusion with Ms. Seaver.

On November 7, the employer selected Ms. Seaver for a random urine drug test. Ms. Seaver tested non-negative. The employer sent Ms. Seaver home that day and sent her urine sample to the employer's third-party test administrator for further testing. The third-party administrator is a lab approved by the United States Department of Health and Human Services, Substance Abuse and Mental Health Administration. On November 9, the third-party test administrator's Medical Review Officer notified the employer that Ms. Seaver tested positive for cannabinoids. The next day, the employer sent Ms. Seaver the test results via United States Postal Service certified mail, gave Ms. Seaver the option to have a second confirmatory test performed and terminated Ms. Seaver's employment effective immediately.

IWD has not paid Ms. Seaver any REGULAR (state) UI benefits during her current claim year.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Seaver from employment on November 10, 2023 for disqualifying, job-related misconduct, IWD did not overpay Ms. Seaver any UI benefits, and Ms. Seaver is not required to repay any UI benefits back to IWD.

The Employer Terminated Ms. Seaver's Employment for Disqualifying, Job-Related Misconduct

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(9) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

Iowa Code section 96.5(14) provides:

14. Marijuana or controlled substance use in the workplace — disqualified.

a. For purposes of this subsection, unless the context otherwise requires:

(1) "Controlled substance" means the same as defined in section 124.101.

(2) "Marijuana" means the same as defined in section 124E.2.

b. If the department finds that the individual became separated from employment due to ingesting marijuana in the workplace, working while under the influence of marijuana, or testing positive for any other controlled substance, for which the individual did not have a current prescription or which the individual was otherwise using unlawfully, under a drug testing policy pursuant to section 730.5 or any other procedures provided by federal statutes, federal regulations, or orders issued pursuant to federal law.

c. A disqualification under this subsection 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.

The employer has the burden of proof in establishing disqualifying job misconduct.² The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.³ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁴

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa law allows drug testing of an employee. Testing shall include confirmation of initial positive test results. Iowa Code section 730.5(7)(j)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, the employer must notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test. For breathalyzer testing,

² *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

³ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁴ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

initial and confirmatory testing may be conducted pursuant to the employer's written policy. A policy shall include requirements governing breath testing devices, alcohol screening devices, and qualifications for administering personnel consistent with DOT rules. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits."⁵

In this case, the employer has met the requirements of Iowa Code section 730.5 and has established disqualifying, job-related misconduct. Ms. Seaver received a copy of employer's policy, she was randomly tested via a certified testing facility, the drug screen was positive for cannabinoids, the employer notified her of the test result by certified mail and offered her the option to have a second confirmatory test. Ms. Seaver's violation of the employer's drug policy constitutes misconduct. Ms. Seaver is not eligible for UI benefits.

IWD Did Not Overpay Seaver Any UI Benefits, and
Ms. Seaver is Not Required to Repay IWD Any UI Benefits

The administrative law judge further concludes IWD did not overpay Ms. Seaver any REGULAR (state) UI benefits.

Iowa Code §96.3(7) provides, in relevant part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

Since IWD did not pay Ms. Seaver any UI benefits during her current claim year, IWD did not overpay her any UI benefits and she is not required to repay IWD any UI benefits.

⁵ *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

DECISION:

The December 1, 2023 (reference 01) UI decision is REVERSED. The employer discharged Ms. Seaver from employment on November 10, 2023 for job-related misconduct. Ms. Seaver is not eligible for UI benefits until she has worked in and been paid wages for insured work equal to ten times her weekly UI benefit amount, as long as no other decision denies her UI benefits.

Since IWD has not paid Ms. Seaver any UI benefits during her current claim year, IWD did not overpay Ms. Seaver UI benefits and she is not required to repay IWD any UI benefits.



Daniel Zeno
Administrative Law Judge

December 22, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.