

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ANNA MCNALLY

Claimant

APPEAL NO: 14A-UI-07818-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PLATINUM HOLDINGS LLC

GRAND HARBOR RESORT & WATERPARK

Employer

OC: 06/29/14

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Platinum Holdings, L.L.C. / Grand Harbor Resort & Waterpark (employer) appealed a representative's July 23, 2014 decision (reference 01) that concluded Anna McNally (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 20, 2014. The claimant participated in the hearing. Alicia Fricke appeared on the employer's behalf. During the hearing, Employer's Exhibits One, Two, and Three and Claimant's Exhibit A entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on May 30, 2012. She worked full time as a lifeguard. Her last day of work was June 26, 2014. The employer discharged her on that date. The reason asserted for the discharge was the conclusion that she had been consuming an illegal drug on duty.

On June 26 an unknown guest reported to a maintenance worker that the guest had smelled marijuana near the back entrance. The maintenance worker reported to the executive assistant, Fricke, that he had gone toward the back entrance and had passed the claimant and another employee coming in. The maintenance worker's wife also reported that she had been at the back entrance that day and saw "a group of employees" and smelled marijuana. Fricke approached the other employee and asked to see the content of the other employee's purse.

That other employee did have a marijuana pipe in her purse and she was discharged. Fricke testified that the other employee told her that it had been the claimant who had actually been smoking marijuana. However, the claimant testified under oath that she did not smoke any marijuana (and that the other employee had not either). The claimant provided a statement from the other employee in which that other employee stated that she had not told Fricke that the claimant was smoking marijuana.

REASONING AND CONCLUSIONS OF LAW:

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. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such 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 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 of the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the belief that she had consumed marijuana on the employer's premises. The employer relies exclusively on the second-hand account from other persons; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken, whether they actually observed the entire time, whether they are credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact consumed marijuana on the employer's premises as alleged. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 23, 2014 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs