

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

ASHTON D PALMER
Claimant

WALMART INC
Employer

APPEAL 23A-UI-04305-SN

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/26/23
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Ashton D. Palmer, filed an appeal from the April 21, 2023, (reference 01) unemployment insurance decision that denied benefits effective March 30, 2023 based upon the conclusion he violated a known rule. The parties were properly notified of the hearing. A telephone hearing was held on May 23, 2023 at 10:30 a.m. The employer participated through Asset Protection Agent Madison Bradshaw. Unemployment Insurance Representative Kathleen Travers represented the employer. The claimant participated and testified. The claimant's wife was present to observe.

The claimant's proposed exhibits were not admitted because they had not been sent to the employer consistent with Iowa Admin. Code r. 871-26.15.

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:

The claimant worked as a full-time front-end cashier from June 2010, until she separated from employment on March 31, 2023, when she was terminated.

The employer has a drug and alcohol policy. The policy is in writing and is accessible through the Internet. The policy strictly forbids the use of marijuana in the workplace. It also specifically forbids distribution at work. The claimant acknowledged receipt of the policy at the time of her hire.

The claimant has chronic back pain from lupus and other chronic health conditions. The claimant obtained a medical cannabidiol card issued by the State of Iowa in 2021. At the time of her separation, the claimant had a valid medical cannabidiol card. In early 2023, the claimant had been taking several opiates prescribed by her physician to treat these symptoms. The

claimant disclosed her use of prescription drugs to the employer's staff. She did not report her expected use of marijuana to the employer's staff.

In early-March 2023, the claimant appeared disoriented and lethargic. An associate reported to Asset Protection Agent Madison Bradshaw that the claimant blurted out that she was "extremely high." Ms. Bradshaw sent this concern to a division called Ethics, which gives guidance on disciplinary decisions.

On March 16, 2023, the claimant was in the back of the employer's building near another associate. The associate asked what the claimant was doing. The claimant explained that she was in pain and that she takes marijuana gummies three times a day for her back pain. The claimant then offered the associate one. The associate rejected the offer. This incident was reported to Ms. Bradshaw. That same day, the claimant admitted to ingesting marijuana. The claimant explained that she had a card issued to her by the State of Iowa for ingesting marijuana.

The claimant was subsequently tested in Mount Pleasant on March 31, 2023. The claimant received a negative test result on the test. Nevertheless, the employer terminated her because she had previously admitted to using marijuana in the workplace. The employer also believed the associate's claim that the claimant offered him marijuana at work.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 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).

Iowa Code section 96.5(2)b, c and d provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) 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.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

Iowa Code § 96.5(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.

Iowa Code § 124E establishes the medical cannabidiol program in Iowa. Iowa Code § 124E.21 states that it does not stand in contradiction of employer's forbidding marijuana from use by employees. Nor does it forbid testing, so long as the employer's programs are compliant with drug testing requirements set forth in Iowa Code § 730.5. As to Iowa Code § 730.5, the administrative law judge finds it does not apply here because although the employer tested the claimant, it did so only after she admitted taking the substance on the clock. In that context, whether the testing evidence is procedurally impaired by the employer's foibles is immaterial in the face of the claimant's admission to use.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

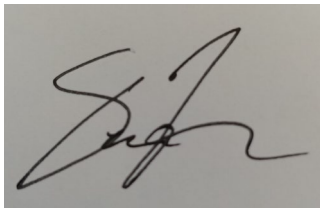
The administrative law judge finds the claimant engaged in misconduct. It is acknowledged that Iowa Code section 96.5(2)b(4),(5) and Iowa Code § 96.5(14) predicate drug and alcohol related misconduct on its status of being prescribed. The administrative law judge sees that clause as fitting within the larger context given by the Legislature in the scheme establishing the medical cannabidiol system in Iowa Code § 124E. Iowa Code § 124E.21 allows an employer to prohibit

use. In that context, the administrative law judge sees an implication for conversation, with the employer ahead of time, about expected use in the workplace, especially if the employer has a policy prohibiting such use. See Iowa Code § 124E.21. The administrative law judge finds Iowa Code section 96.5(2)(d)(1)-(14) as a non-exhaustive clarification or restatement of misconduct as defined by Iowa courts with an accompanying rule capturing violation of an employer's known rule, so long as that known rule is uniformly enforced. If the misconduct is a restatement as defined by Iowa Courts, then no such limitation is made regarding uniform enforcement. Compare Iowa Code § 96.5(2)(d)(2) with the remaining subsections in Iowa Code § 96.5(2)(d). With that in mind, the administrative law judge does not find information regarding other employees as relevant to the determination of misconduct.¹

The claimant did not make such efforts regarding her use of marijuana in this case. She had with her use of opiates in the past. Her concealment of that use means that she does not enjoy the safe harbors regarding prescription in Iowa Code §§ 96.5(2)b(4), (5) and Iowa Code § 96.5(14). Furthermore, the administrative law judge finds the claimant also offered the marijuana gummy to her associate. This behavior would never enjoy a safe harbor regardless of the circumstances regarding medication. Benefits are denied.

DECISION:

The April 21, 2023, (reference 01) unemployment insurance decision is AFFIRMED. The 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.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

May 31, 2023
Decision Dated and Mailed

smn/mh

¹ The record also reflects the employer did not have knowledge of this use. The claimant acknowledged she did not inform the employer.

APPEAL RIGHTS. If you disagree with the 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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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 adquiriera 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.