

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH D HYATT
Claimant

CITY OF MARION
Employer

APPEAL 19A-UI-02778-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/10/19
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge Misconduct

STATEMENT OF THE CASE:

On April 2, 2019, the claimant filed an appeal from the March 29, 2019, (reference 01) unemployment insurance decision that denied benefits based on her discharge for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on May 3, 2019. Claimant participated and was represented by attorney Bill Roerman. Employer participated through Chief of Police Joseph McHale and Human Resource Manager Jen Ketelsen.

ISSUE:

Was the claimant discharged due to disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 29, 2015. Claimant last worked as a full-time communication operator. Claimant was separated from employment on March 14, 2019, when she was discharged.

On February 22, 2019 the employer began an internal investigation after receiving two reports of potential misconduct on behalf of the claimant. The first incident was the result of an employee reporting to a supervisor that claimant was observed possessing and consuming CBD oil while on work property. The second related to an allegation that claimant was sleeping in a supervisor's office on her break period. Sergeant Jeff Hartwig was assigned to complete the investigation. Sgt. Hartwig's investigation consisted of interviewing witnesses and the claimant and compiling those interviews into an internal affairs packet, which was submitted to Chief McHale for review. Claimant admitted to using the CBD oil, but denied she was sleeping while at work. She admitted she did go into the supervisor's office over her break time and was laying on the floor stretching and resting.

The investigation concluded claimant had brought CBD oil onto work property and ingested the oil during work hours. Claimant did not have a permit to consume medical cannabidiol. The

manufacturer's website indicated the product used by the claimant did contain THC, but the product label itself did not list THC as an ingredient. Claimant believed the CBD oil was legal and she did not need a permit to possess or utilize this particular product. Chief McHale acknowledged this is a complicated area of the law, that he did not believe claimant was intoxicated by the product or using it for that purpose, and that he did not believe her to be in violation of Iowa Code § 124, which prohibits the use of controlled substances. Chief McHale did conclude claimant's possession of the CBD oil was unlawful under Iowa Code § 124E, the Medical Cannabidiol Act. Chief McHale ultimately concluded claimant's possession and use of the CBD oil while at work violated the employer's policies regarding possession and use of drugs while at work. Chief McHale further concluded, based on the other witness reports, that claimant violated the employer's policies regarding sleeping while on duty, neglect of duty, and truthfulness during an investigation. Based on these conclusions claimant was discharged from employment. The only previous disciplinary action claimant had ever received was related to attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

There is a dispute between the parties in this case as to whether the CBD oil claimant possessed was a controlled substance under Iowa law, and whether it was illegal for claimant to possess the substance. Claimant contends the substance she possessed was not illegal and therefore not in violation of the employer's drug policies.

Iowa Code § 124.101(20) defines marijuana as:

[A]ll parts of the plants of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

Iowa Code § 124E.2(6) defines medical cannabidoil as:

[A]ny pharmaceutical grade cannabinoid found in the plant *Cannabis sativa* L. or *Cannabis indica* or any other preparation thereof that has a tetrahydrocannabinol level of no more than three percent and that is delivered in a form recommended by the medical cannabidiol board, approved by the board of medicine, and adopted by the department pursuant to rule.

Iowa Code § 124E goes on to provide detailed regulations regarding the use, possession, and distribution of medical cannabidoil for practitioners, patients, manufacturers, and dispensaries. Iowa Code § 124E.12 provides for an affirmative defense for individuals charged under Iowa Code § 124, who have met the qualifications to possess medical cannabidoil under Iowa Code § 124E.

Iowa Code § 124E.16(1) provides:

A person who knowingly or intentionally possesses or uses medical cannabidiol in violation of the requirements of this chapter is subject to the penalties provided under chapters 124 and 453B.

Here, the employer contends the claimant violated its policies by illegally possessing CBD oil under Iowa Code § 124E. However, that code section appears to simply provide an affirmative defense to individuals who are charged with crimes under Iowa Code §§ 124 and 453B and to make clear that individuals not meeting the requirements of Iowa Code § 124E may be subject to prosecution under those statutes. Whether a substance is considered marijuana under Iowa Code § 124.101 is dependent on what part of the plant the substance is made from. Here, neither party was able to testify as to what the CBD oil in claimant's possession was made from, nor did they agree as to whether the product contained THC. Claimant's testimony that she did not know the use or possession of CBD oil violated the employer's policies is credible, especially given the employer's acknowledgement as to current disagreements on the legality of these substances.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. CBD oil was not particularly covered in the employer's policies and it has not been established that claimant knew or had reason to know that the product would be considered an illegal substance. Claimant's only prior disciplinary action was related to an attendance issue. Inasmuch as employer had not previously warned claimant about the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The March 29, 2019, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs