

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE L CHESTER
Claimant

APPEAL NO. 17A-UI-10440-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/17/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's October 6, 2017, decision (reference 01) that concluded Michelle Chester (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 31, 2017. The claimant participated personally. The employer participated by Lisa Harroff, Hearings Representative; Natalie McGee, Assistant Vice President of Human Resources; Jamie Aulwes, Director of Grocery Warehouse; Maryann Jamieson, Clerk; and Daniel Noel, Assistant Department Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 1, 2006, as a full-time assistant department manager for grocery working the overnight shift. The claimant signed for receipt of the employer's handbook on January 30, 2012. The handbook included the employer's drug policy. The policy states that a person who uses or possesses drugs on the employer's property is subject to discipline, including discharge. The policy allows for reasonable suspicion drug testing. When an allegation is raised, the worker must stop work immediately.

On September 14, 2015, the employer talked to the claimant about not checking the refrigerated trailer. It did not warn her about what would happen to her if future infractions should occur. No warnings were known to the claimant.

The claimant complained to the assistant vice president of human resources about harassment she was experiencing from three individuals in the office. One of the individuals was Daniel Noel. The assistant vice president told the claimant she investigated and found nothing. The claimant understood the assistant vice president to say she could not be a victim and a

manager. The claimant stopped reporting the behavior and tried to stay away from the harassers.

On September 10, 2017, the claimant was in the office with a truck driver. A clerk asked the claimant if she smelled something. The claimant did not and thought the clerk was referring to the driver. The claimant sent the driver to the showers. After the claimant left the office, the clerk discussed the conversation with Mr. Noel. Another person who had been harassing the claimant told Mr. Noel that the claimant had been smoking marijuana between the trailers.

On September 13, 2017, Mr. Noel said he smelled marijuana near where the claimant was walking in the trailers. He did not see the claimant smoking. Mr. Noel and the supervisor left work at about 2:00 a.m. on September 13, 2017. The claimant continued to work without incident alongside the department manager until her shift was complete. After the claimant's shift, Mr. Noel reported the allegation.

On September 13, 2017, the claimant reported to work. At about 6:15 p.m. the assistant vice president met with the claimant and the claimant denied the allegations. The assistant vice president asked the claimant to prove she was innocent. The claimant was shocked and could only think to ask the employer to check the cameras. The employer investigated by questioning five of the eighty people who worked the overnight shift on September 12 and 13, 2017. Of the five people, only Mr. Noel smelled smoke near where the claimant was walking.

On September 18, 2017, the claimant spoke to the employer again and said she wanted to take a drug test. The employer told her they do not perform reasonable suspicion drug tests any more. The employer told the claimant it was time to part ways.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

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:

a. The disqualification 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 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide any evidence of job-related misconduct. No one saw the claimant smoking, using, possessing marijuana on the employer's property. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's October 6, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs