

## CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD



SAN JOSE OFFICE OF APPEALS  
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SAN JOSE CA 95113

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JESSE EWING  
SSN: 034-48-7664  
Claimant-Appellant

Case No. 1459749

Issue(s): 1256

VALLEY TRANSPORTATION AUT  
Account No: 000-0000  
Employer

Date Appeal Filed: 11/08/2004

EDD: 0410 BYB: 10/03/2004

**Date and Place of Hearing(s):**

- (1) 12/14/2004 San Jose
- (2) 01/12/2005 San Jose

**Parties Appearing:**

None  
Claimant, Employer

## DECISION

The decision in the above-captioned case appears on the following page(s).

The decision is final unless appealed within 20 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal. If you are entitled to benefits and have a question regarding the payment of benefits, call EDD at 1-800-300-5616.

J. Toni Aversa, Administrative Law Judge

Date Mailed:

MAR 25 2005

**Case No.: 1459749**

**San Jose Office of Appeals**

**CLT/PET: Jesse Ewing**

**ALJ: J. Toni Aversa**

**Parties Appearing: Claimant, Employer**

**Parties Appearing by Written Statement: None**

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### STATEMENT OF FACTS

The claimant filed an appeal from a department notice of determination, mailed on November 5, 2004, which found the claimant disqualified from receiving benefits pursuant to code section 1256. The department's decision was based on a finding that the claimant had been discharged for reasons of misconduct connected with his most recent work.

The claimant had been employed by Santa Clara County Valley Transportation Authority as a parts clerk with a terminating wage of \$25.70 per hour. The claimant had been employed approximately 14 years and his last day at work was August 16, 2004. The claimant left under the following circumstances.

In June 2001, the claimant entered into an agreement with the employer, following an arrest for possession of methamphetamine, to remain alcohol and drug free, and to submit to random testing for the next five years. The claimant was employed in a non-safety sensitive position; he was, however, required to have a valid driver's license as he occasionally was required to drive parts from one facility to another within the agency.

The employer has a policy regarding the use of illegal and legal drugs by employees in the claimant's position. Among those drugs prohibited in the workplace are marijuana and alcohol. This prohibition includes use on duty, intoxication and impairment affecting job performance. The policy does not prohibit the use of legally prescribed drugs and nonprescription drugs as long as they do not impair employees' ability to do their job safely. The use of legally prescribed drugs must be disclosed if those drugs impair an employee's ability to function at work. A legally prescribed drug is a drug for which an individual has a prescription from a physician for use in the course of medical treatment. An employee suspected of using alcohol or drugs in violation of the policy may be asked to submit to a test to determine the presence of those drugs, using the standard level for accurate detection established by federal guidelines. Reasonable-suspicion testing can be requested by supervisors based on specific, objective facts and circumstances including the appearance, behavior, speech or body odors of the employee.

The claimant was not observed to have any of the specific, objective factors or circumstances that would trigger reasonable suspicion testing. However, on

August 13, 2004 the claimant was asked to provide a sample for the random test under his 2001 agreement. At that time, the claimant advised his supervisor that he had a prescription for medical marijuana and he believed that he would test positive for the presence of marijuana. The claimant provided his employer with his medical marijuana card and submitted to the random test. The claimant had a positive showing for marijuana as a result of this test. This was the first positive showing for any substance since his 2001 agreement. The claimant was immediately suspended.

The employer does not have a specific policy regarding medically prescribed marijuana. The claimant sought relief through medical marijuana as a result of chronic pain due to an on-the-job back injury sustained in 1992, and obtained a prescription for medical marijuana after examination by a physician. For years, the claimant has used a variety of other medications for pain relief, including Vicodin, epidural blocks, acupuncture, Motrin, and various muscle relaxants. The claimant also developed glaucoma and experienced flashes of light in his peripheral vision. The claimant sought medical marijuana as an alternative treatment for both conditions, as the use of Motrin and Vicodin had undesirable side effects such as upset stomach, diarrhea, and loss of appetite. The claimant limited his use of the medical marijuana to after work or before bed, and never before or during work. The claimant's shift was 4:00 a.m. to 12:30 p.m.

The claimant also used Vicodin after his 2001 agreement and did not disclose that to his employer as he did not believe he was required to do so under the employer's drug policy. After reviewing the facts and circumstances, the claimant's supervisor made a decision to terminate the employment relationship. The supervisor had received an opinion by a physician that stated there was no way to monitor the claimant's impairment and that the claimant could not be deemed safe to drive. The employer believed that the claimant had violated the employer's trust under their substance abuse agreement by using medical marijuana without notifying the employer until he was asked to submit to a drug test. The employer acknowledged that there had been no other issues regarding misconduct during the claimant's employment since the 2001 agreement.

The claimant did not advise the employer immediately after he received his prescription for medical marijuana in May 2004 because he was unsure of the employer's response given the lack of a medical marijuana policy and the potential stigma attached to the use of marijuana. The claimant intended to advise the employer when asked to provide a test.

#### REASONS FOR DECISION

An individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work. (Unemployment Insurance Code, section 1256.)

"Misconduct connected with the work" is a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer. (Precedent Decision P-B-3, citing *Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719.)

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance as the result of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not misconduct.

An employee shall substantially comply with all the directions of his or her employer concerning the service on which he or she is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee. (Labor Code, section 2856.)

An employee's deliberate disobedience of a lawful and reasonable instruction of the employer, related to the employer's business, is misconduct. (Precedent Decision P-B-190.)

Every employee owes his or her employer an obligation of good faith and fair dealing. (Precedent Decision P-B-10.)

In this case, the claimant had obtained a legal right to use marijuana for relief of two specific medical conditions. The claimant was involved in unusual circumstances as he was under an agreement with his employer to remain alcohol and drug free, which would include the recreational use of marijuana. It is understandable that the employer chose to terminate a relationship in which the employer could not determine that the claimant was free of impairment under job duties that required the claimant to drive a car on public roads. However, the key issues here are whether or not the claimant was in violation of a lawful and reasonable instruction of the employer related to the employer's business, and whether or not the claimant violated his obligation of good faith and fair dealing with the employer such that it rises to the level of misconduct.

As to the first issue, the claimant has established that he had a legal right to medical use of marijuana. There is no evidence to show that the claimant was, in fact, impaired at anytime during his hours of employment; furthermore, the employer's policy as to the use of legally prescribed drugs requires only that it be disclosed if those drugs impair the claimant's ability to function at work. Under these circumstances, it is found that the claimant's use of this drug was not a

deliberate disobedience of a lawful and reasonable instruction of the employer under the employer's drug policy for the claimant's position.

The consideration of whether or not the claimant violated his obligation of good faith and fair dealing must be balanced against a lack of evidence that the claimant violated this obligation previously during his 14 years of employment. Therefore, it is found that the claimant's failure to advise the employer of his use of medical marijuana prior to being requested to submit to a random drug test as required under his agreement with the employer was an isolated instance of a good faith error in judgment and as such is not found to be misconduct.

The claimant is found to be qualified to receive benefits pursuant to code section 1256.

#### DECISION

The department notice of determination is reversed. The claimant is qualified to receive benefits pursuant to code section 1256. Benefits are payable provided the claimant is otherwise eligible.

FOHQ/pk