

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

EDGAR T GATTO
1464 CENTRAL AVE APT 7
DUBUQUE IA 52001

LABOR READY MIDWEST INC
ATTN PAYROLL TAX DEPT
PO BOX 2910
TACOMA WA 98401-2910

Appeal Number: 04A-UI-10401-HT
OC: 08/29/04 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer, Labor Ready, filed an appeal from a decision dated September 20, 2004, reference 01. The decision allowed benefits to the claimant, Edgar Gatto. After due notice was issued a hearing was held by telephone conference call on October 18, 2004. The claimant participated on his own behalf and was represented by Attorney Ben Roth. The employer participated by Branch Manager Tom Teal.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Edgar Gatto was employed by Labor Ready from

October 20, 2003 until August 27, 2004. His last assignment was with the City of Dubuque. At the time he applied for work the claimant agreed, on the application form, to submit to screening for drugs or alcohol. However, no specific drug testing policy was ever given to him.

On or about July 30, 2004, the claimant was injured on the job. He was treated by a physician and submitted to a drug test. The employer was unable to provide the name of the laboratory to which the sample was sent, or whether the sample was split. The claimant was not contacted by a medical review officer but the employer was notified the test had come back positive for marijuana. A copy of the test was not submitted at the appeal hearing.

The corporate office notified Branch Manager Tom Teal to discharge the claimant and he was notified in person on August 27, 2004, that he was fired for testing positive for a controlled substance. He was not notified by certified mail, nor was he notified of his right to have the split sample retested at a laboratory of his choice

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is not.

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.

871 IAC 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 failed to meet the provisions of Iowa Code chapter 730.5 regarding the testing of employees for drugs or alcohol. The employer did not know the name of the facility which did the test nor whether it was an approved laboratory. No medical review officer discussed the results with the claimant, nor was Mr. Gatto notified by certified mail of the test results and his right to have another test. Without meeting these and other requirements set out by Iowa law, the test results, where not provided as an exhibit for the appeal hearing, cannot be accepted. The employer has failed to meet its burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of September 20, 2004, reference 01, is affirmed. Edgar Gatto is qualified for benefits, provided he is otherwise eligible.

bgh/b