

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MELVIN C JOHNSON**  
Claimant

**APPEAL NO. 12A-UI-13106-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 03/04/12**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated October 24, 2012, reference 03, which denied unemployment insurance benefits.. After due notice was provided, a telephone hearing was held on December 4, 2012. Claimant participated. The employer participated by Ms. Kris Rossiter, Employment Manager. Employer's Exhibits One through Nine were received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Melvin Johnson was employed by Tyson Fresh Meats Incorporated from December 4, 2007 until October 3, 2012 when he was discharged from employment. Mr. Johnson was employed as a full-time production worker and was paid by the hour.

Mr. Johnson was discharged for violation of the company's written drug and alcohol production policy. Under the terms of the policy employees are subject to discharge if they have a test result of 0.04.

On September 26, 2012 Mr. Johnson was observed by supervisory personnel slurring his words, having glassy eyes and smelling of alcohol. After placing the claimant in observation the company's two trained witnesses concluded there was cause for further testing. Mr. Johnson was taken to the company's medical department during working hours and submitted to testing. At 7:57 a.m. he had a test result of 0.122 grams of alcohol per 210 meters of breath, on 8:14 a.m. he had 0.119. The testing was given by a certified breath alcohol technician and a confirmatory test was performed in no less than 15 minutes and no more than 30 minutes after the completion of the initial positive screening test. Mr. Johnson was immediately provided a form that showed the positive test results and the claimant was suspended pending authorization to terminate from the corporate headquarters.

Mr. Johnson had previously tested positive for alcohol in a similar situation that had occurred in July of 2012 and at that time was allowed to rehabilitate and resume employment. Because the most recent incident was a second violation of the company's drug and alcohol policy, Mr. Johnson was discharged from employment.

It is the claimant's position that he was not intoxicated but may have smelled of alcohol because he had been drinking the night before.

### **REASONING AND CONCLUSIONS OF LAW:**

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In the present case the employer had reasonable suspicion to request an alcohol test under the provisions of its written drug and alcohol policy. The observations of the claimant were documented on the day it occurred and the employer complied with the testing provisions of section 730.5.

As the evidence in the record establishes that the employer had a written policy, that the claimant was tested for cause and that the requirements of the Iowa Drug and Alcohol Testing Policy had been followed the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant's discharge took place under disqualifying conditions. Mr. Johnson knew or should have known that reporting to work with amounts of alcohol in his system that exceeded the permissible level allowed by company policy could result in his termination from employment. The claimant had previously been allowed to enter the employer's rehabilitation program but that program was not eligible to him when he violated the company's alcohol policy for the second time. Unemployment insurance benefits are withheld.

**DECISION:**

The representative's decision dated October 24, 2012, reference 03, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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