

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ERIC R SMILEY**  
Claimant

**APPEAL NO. 17A-UI-11427-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MYDATT SERVICES INC**  
Employer

**OC: 10/08/17**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Eric Smiley (claimant) appealed a representative's October 30, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with MyDatt Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 29, 2017. The claimant participated personally. The employer participated by Scot Blanchad, Operations Manager; Dawn Konen, Operations Supervisor; and Steven Wilcox, Clean Ambassador. The employer offered and Exhibit 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 October 1, 2014, as a full-time clean ambassador. The claimant signed for receipt of the employer's handbook on December 23, 2014. The employer did not issue the claimant any warnings during his employment.

On October 6, 2014, he signed for receipt of the employer's one-half page Drug and Alcohol Testing Policy. The policy does not list the specific drugs the employer will test for or the standard for alcohol that will trigger discipline. It does not indicate who pays for the testing or how the results of the testing will be communicated to the employee. The policy states, "Refusal to submit to testing may result in disciplinary action, up to and including termination of employment."

In the fall of 2016, the claimant was taken from work to the hospital by a friend. He discovered he had high blood pressure and started taking medication. In the mornings, his condition, his medications, and his dental structure cause him to slur his words. Sometimes the claimant's blood pressure rose at work. When this happened at work before, he was allowed to go home and lie down. On October 8, 2017, an employee told the operations supervisor that the claimant was slurring his words and unsteady on his feet. Neither the employee nor the supervisor had

attended training to recognize evidence of employee drug/alcohol abuse since starting work with the employer.

The supervisor took the claimant into her office and shut the door. The claimant asked the supervisor for another employee to be a witness in the room but the supervisor denied his request. The supervisor told the claimant he would be alcohol tested. The claimant agreed to be tested. Soon thereafter the supervisor found the laboratory was closed. The supervisor called her superior to find out what to do. She continued to argue with the claimant about having a witness in the room.

The claimant became upset and felt his blood pressure rising. He told the supervisor he was not feeling well and had to go home. The supervisor told him he could be terminated if he left work but the claimant did not hear her. The supervisor asked the claimant for his key and the claimant gave it to her. The claimant was still willing to be tested but no lab was available when the claimant went home sick. The employer called and terminated the claimant on October 9, 2017.

### **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). Iowa Code Section 730.5(9)e requires that an employer establish in its written policy a standard for alcohol concentration that violates the policy and that concentration shall not be less than .04. Iowa Code Section 730.5(7)c(2) requires that an employer provide employees and prospective employees a list of drugs to be tested. Iowa Code Section 730.5(9)b requires that an employer's policy provide uniform requirements for what disciplinary actions an employer shall take against an employee upon the refusal of to provide a testing sample. Iowa Code Section 730.5(6)b requires that an employer pay for the costs of the testing. The employer's policy does not address any of these matters.

The employer's drug and alcohol testing policy was substantially noncompliant with the requirements of Iowa Code Section 730. 5(9). The claimant's refusal to test under such a policy is not misconduct. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's October 30, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs