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

KEVIN D MOORE
315 N WEBSTER
OTTUMWA IA 52501

MILLARD REFRIGERATED SERVICES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-00188-RT
OC: 12-12-04 R: 03
Claimant: Appellant (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 for Misconduct

STATEMENT OF THE CASE:

The claimant, Kevin D. Moore, filed a timely appeal from an unemployment insurance decision dated January 3, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on January 21, 2005, with the claimant participating. Kevin Van Asten, Plant Manager at the employer's plant in Ottumwa, Iowa, participated in the hearing for the employer, Millard Refrigerated Services, Inc. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time reach operator, a type of forklift, from December 7, 1999 until he was discharged on December 13, 2004. The claimant was suspended on December 9, 2004. The claimant was first suspended and then discharged for a positive drug test for marijuana in violation of the employer's drug testing policy. The employer has a drug testing policy, a copy of the basic provisions are contained in the employer's handbook, a copy of which the claimant received and for which he signed an acknowledgement as shown at Employer's Exhibit One. The employer also has a lengthy substance abuse and drug testing policy for which the claimant also signed an acknowledgement. The claimant's acknowledgement appears at Employer's Exhibit One. The employer's drug testing policy provides for unannounced or random drug testing of employees. The employer chooses seven names randomly each month from the entire population of employees. The claimant was so chosen for a sample collected on December 7, 2004. The sample was collected by Ottumwa Regional Medical Center in its Occupational Health Division under sanitary conditions and with due regard to the claimant's privacy and in a manner to preclude contamination or substitution. The employer paid all the costs of the drug test including providing transportation for the testees and the test occurred during the regular work period of the employees including the claimant. The claimant's sample was split into two components. An appropriate chain of custody was prepared and documented for the sample. The sample was sent to C J Cooper & Associates, Inc., for testing. That firm or lab is certified to perform drug tests. A drug test was performed on the claimant's sample and the results showed the claimant's urine sample tested positive for marijuana as shown at Employer's Exhibit Two. The employer has a medical review officer, Ken Fawcett, M.D., who reviewed and interpreted the positive result from the claimant's test. At the time the sample was taken the claimant was provided an opportunity to provide any information relevant to the test. The employer has established an awareness program, primarily an assistance program, where notices are posted and the employer maintains services accessing utilization of its programming services. The employer's supervisory personnel are appropriately trained, receiving two hours of initial training and thereafter one hour of annual training. The employer's requirements for disciplinary action are uniform indicating that an employee can be discharged for a positive drug test. The claimant was sent a letter certified mail return receipt requested as shown at Employer's Exhibit Three informing him of the positive drug test and further informing him that he had a right to obtain a confirmatory test of the second sample at a lab of his choice but at his expense. He was further informed that he needed to notify the employer if he wanted the confirmatory test either by certified letter or in person within seven days. There is no federal reason or requirement for the claimant's drug test.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 parties agree, and the administrative law judge concludes, that the claimant was suspended on December 9, 2004 and then discharged on December 13, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Here, the only allegation of disqualifying misconduct is a positive drug test pursuant to the employer’s drug testing policy. There is no federal reason or requirement for the drug test administered to the claimant so the drug test administered to the claimant and the employer’s drug testing policy must comply with Iowa law at Iowa Code section 730.5. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, it had to meet the requirements of the Iowa drug testing law at Iowa Code section 730.5 and that such drug test would be scrutinized carefully to see that the drug test complied with Iowa law. This decision was expanded by Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa 2003). In that decision the supreme court avoided determining whether strict or substantial compliance with Iowa Code section 730.5 was sufficient in order to disqualify someone for a positive drug test but the court determined that written notice of a positive drug test must be made by certified mail, return receipt, and the notice must inform the employee of his or her right to have a second confirmatory test done at a laboratory of his or her choice. An employee has seven days to request a second test. This notice was not sent to the claimant in that case. However, the administrative law judge concludes that such a notice was sent to the claimant in this case. This notice appears at Employer’s Exhibit Three. The only potential noncompliance with the employer’s notice is that it does not state specifically what the cost of the confirmatory test would be. The administrative law judge concludes that this one omission does not invalidate the notice sent to the claimant. The claimant was fully apprised of the drug test and his right to a confirmatory test and the seriousness of this matter by such notice. See Harrison. The administrative law judge notes that the claimant is free to choose any lab and it would be difficult, if not impossible, for the employer to know the cost at every lab available to the claimant.

The administrative law judge concludes that the employer's drug testing policy and, in particular, the claimant's drug test comply with all other requirements of Iowa Code section 730.5. The drug test was a random drug test of the entire population from which seven individuals' names are randomly selected each month and this was true for the claimant's drug test which was administered in December 2004. The employer has a written drug testing policy. It has uniform requirements for disciplinary action up to and including discharge for a violation. The employer has established an awareness program in the nature of an assistance program. Supervisory personnel are given an initial two hours of training and thereafter one hour of training annually. The employer paid for all costs related to the drug test including providing transportation. The urine sample taken from the claimant was collected by a medical facility, the Ottumwa Regional Medical Center, Occupational Health Division, under sanitary conditions and with due regard to the claimant's privacy and in a manner to preclude contamination or substitution, at least that sample which was sent to the laboratory for testing. The employer had a documented appropriate chain of custody for the urine sample. The claimant was given an opportunity to provide information relevant to the test. The test was performed by C J Cooper & Associates, Inc., a certified lab, and the result was positive for marijuana as shown at Employer's Exhibit Two. The employer has a medical review officer, Ken Fawcett, M.D., who reviewed and interpreted the positive test as shown at Employer's Exhibit Two.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the employer's drug testing policy and, in particular, the claimant's drug test, comply with Iowa Code section 730.5 and, as a consequence, the claimant's positive drug test for marijuana was disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of January 3, 2005, reference 01, is affirmed. The claimant, Kevin D. Moore, is not entitled to receive unemployment insurance benefits, because he was discharged for disqualifying misconduct.

pjs/b