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

ROGER A SOUTHARD
915 CENTRAL AVE E
CLARINDA IA 51632-1648

EATON CORPORATION
C/O TALX EMPLOYER SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-07279-DT
OC: 06/18/06 R: 01
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:

Eaton Corporation (employer) appealed a representative's July 12, 2006 decision (reference 01) that concluded Roger A. Southard (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 10, 2003. The claimant participated in the hearing. Thomas Zaidan appeared on the employer's behalf. One other witness, Paul Anderson, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

FINDINGS OF FACT:

The claimant started working for the employer on August 22, 1994. He worked full-time as a maintenance technician in the employer's Belmond, Iowa, heavy duty engine valve manufacturing facility. His last day of work was June 21, 2006. The employer discharged him on that date. The reason asserted for the discharge was failing a drug test under the employer's drug policy.

The employer's policy provides for drug testing in cases of an incident causing injury. The claimant was on notice of the employer's drug policy. On June 7, 2006, the claimant was involved in an incident in which his fingers were injured necessitating four stitches. The accident was noted on the employer's OSHA report. For treatment of his injuries, the claimant was taken to the local hospital. The hospital personnel advised the claimant that under the employer's policy he would need to provide a urine sample. There was no specification of the drugs for which he would be tested. The claimant complied with providing the sample. There is no evidence that a split sample was taken or maintained. Neither the claimant nor the employer had any further contact with anyone regarding the drug test until June 21, 2006.

On June 21, the employer's occupational health nurse informed Mr. Zaidan that the claimant's drug test had come back positive for cannabis (marijuana). Mr. Zaidan then provided the claimant a copy of the drug test results and verbally informed him that he was discharged. There was no discussion of retesting of any split sample that might exist.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

Iowa Code § 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 reason cited by the employer for discharging the claimant is failing a drug test under the employer's drug policy. Use of a controlled substance on an employee's own time can be work-connected misconduct in some instances, including violation of a valid drug policy of which the claimant was on notice. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). However, in order for a violation of an employer's drug policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Jack Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost.

Here, the employer's application of its drug policy fails on several counts. First, the employer did not provide the claimant a list of the drugs for which the sample would be tested. Iowa Code § 730.5(7)c(2). Prior to testing or at least prior to release of the test results, he was not provided an opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. Id.; Iowa Code § 730.5(7)g. Especially significant is the fact that there is no evidence that the required split sample was made and retained. Iowa Code § 730.5(7)b. Further, the employer could not establish that there was confirmatory test done on the sample by an approved means other than the initial screen. Iowa Code § 730.5(7)f(2). Finally, the employer did not provide the claimant any written notice, by certified mail or otherwise, of the claimant's right to request and obtain a confirmatory test of the split sample (which should have been previously collected and stored) at an approved laboratory of the

claimant's choice, and the fee payable by the claimant to the employer for reimbursement of expenses concerning the retest. Iowa Code § 730.5(7)i(1).

The employer has not substantially complied with the drug testing statute. Therefore, while the administrative law judge cannot condone the use of marijuana even off-duty, the employer has not met its burden to show disqualifying work-connected misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 12, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/cs