

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

Claimant

APPEAL 22A-UI-19599-AW-T

Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/13/22

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from the December 7, 2022 (reference 01) unemployment insurance decision that denied benefits finding claimant was discharged on November 18, 2022 for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on January 5, 2023. Claimant participated. Employer participated through a Human Resources Generalist. Claimant's Exhibits A through C were admitted.

ISSUES:

Whether the hearing record and decision should be publicly disclosed.

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed as a full-time Sewer Maintenance Worker from May 7, 2018 until his employment ended on November 18, 2022. Claimant's job requires a commercial driver's license (CDL).

Employer has drug and alcohol policy. The policy is outlined in the employee handbook. The policy notifies employees of the substances tested for and provides uniform standards for actions taken in case of a confirmed positive test. Pursuant the policy, a first positive drug test results in a five-day suspension and follow-up testing during a probationary period. A second positive drug test results in termination. Employer also has an awareness program to inform employees of the dangers of drug and alcohol use. Claimant was aware of the policy and had access to the handbook on employer's intranet.

In August 2021, employer subjected claimant to a random drug test. The test results from claimant's sample were positive for marijuana. Employer suspended claimant from August 25, 2021 through September 1, 2021. Because of the positive drug test, claimant was subjected to follow-up testing during a probationary period. Claimant knew another positive drug test result during his probationary period would result in discharge.

On November 7, 2022, employer directed claimant to report for a follow-up drug test. Claimant reported to a certified testing facility as directed and provided a sample. On November 11, 2022, the medical review officer (MRO) notified the parties that claimant's sample was diluted.

On November 14, 2022, employer directed claimant to report for a retest. Claimant again reported as directed and provided a sample. On November 17, 2022, the MRO notified the parties that claimant's sample was positive for marijuana and notified claimant of his right to confirmatory testing of the split sample. Claimant was upset about the positive test result and denied using marijuana. (Exhibit A) The MRO explained that marijuana is stored in fatty tissue and it is possible that it was released. (Exhibit A) Claimant told the MRO that he had been taking a fat reducing supplement. (Exhibit A) The MRO told claimant that she did not know if the supplement would cause marijuana to be released from his tissues. (Exhibit A) The MRO is not aware of any medical studies that show a fat reducing supplement could cause marijuana to be released from a person's tissue. (Exhibit A)

On November 18, 2022, employer discharged claimant for violation of its drug policy. On November 18, 2022, claimant completed a drug test on his own initiative. (Exhibit B) Claimant's test result was negative for marijuana. (Exhibit B) On November 28, 2022, claimant completed another drug test on his own initiative. (Exhibit C) The result was negative for marijuana. (Exhibit C) In mid-December 2022, claimant requested confirmatory testing of his November 14, 2022 split sample; the results were positive for marijuana.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is the effect of the confidentiality requirements of the federal law. For the reasons that follow, the administrative law judge concludes:

The United States Congress authorized the United States Department of Transportation (DOT) to prescribe regulations for drug testing of commercial motor vehicle operators. 49 USC 31136 and 31306. Pursuant to this grant of rulemaking authority, the DOT established confidentiality provisions in 49 CFR 40.321 that prohibit the release of individual test results or medical information about an employee to third parties without the employee's written consent.

There is an exception, however, to that rule for administrative proceedings (e.g. unemployment compensation hearing) involving an employee who has tested positive under a DOT drug or alcohol test. 49 CFR 40.323(a)(1). The exception allows an employer to release the information to the decision maker in such a proceeding, provided the decision maker issues a binding stipulation that the information released will only be made available to the parties to the proceeding. 49 CFR 40.323(b). Employer requested such a stipulation before the hearing.

This federal confidentiality provision must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). Iowa Code § 22.2(1) provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." The exhibits, decision, and audio recording in an unemployment insurance case would meet the definition of "public record" under Iowa Code § 22.1-3. Iowa Code § 17A.12(7) provides that contested case hearings "shall be open to the public." Under Iowa Code § 96.6(3), unemployment insurance appeals hearings are to be conducted pursuant to the provisions of chapter 17A. The unemployment insurance rules provide that copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. Code r. 871-26.17(3).

The federal confidentiality laws regarding drug testing and medical information must be followed because, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). One way that federal law may pre-empt state law is when state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 605. The specific confidentiality requirements are spelled out in the federal regulation (49 CFR 40.321). The United States Supreme Court has ruled that "[f]ederal regulations have no less preemptive effect than federal statutes." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (ruling that federal regulation of cable television pre-empted Oklahoma law restricting liquor advertising on cable television, and Oklahoma law conflicted with specific federal regulations and was an obstacle to Congress' objectives).

In this case, the Iowa Open Records law, APA, and Employment Security law actually conflict with 49 CFR 40.321 to the extent that they would require the release of individual test results or medical information about an employee to third parties beyond the claimant, employer, and the decision maker in this case. It would defeat the purpose of the federal law of providing confidentiality to permit the information regarding the test results to be disclosed to the general public. Therefore, the public decision in this case will be issued without identifying information. A decision with identifying information will be issued to the parties; but that decision, the audio record, and any documents in the administrative file (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

The next issue to be determined is whether claimant's separation was a discharge for disqualifying job-related misconduct. For the reasons that follow, the administrative law judge concludes:

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 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 Code section 96.5(2)d(9) provides:

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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.

Employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Employer employs individuals who are subject to drug and alcohol testing pursuant to DOT regulations. Claimant was an employee subject to drug and alcohol testing under the regulations. Employer is required to comply with all applicable requirements and procedures of 49 CFR Parts 40 and 199.

The employer has followed the requirements of the DOT regulations for follow-up testing and retesting after a diluted sample. Claimant was aware of employer's drug and alcohol use policy and had access to the policy online. Claimant was tested at a certified testing facility for follow-up testing per the policy and applicable regulations. Claimant's test result was positive for marijuana. Pursuant to employer's policy, a second positive drug test result warrants termination of employment.

Claimant asserts that a fat reducing supplement that he was taking may have caused marijuana to be released from his fatty tissue but provided no medical studies to support his theory. Even if claimant's theory is correct, the outcome would remain the same – marijuana was present in claimant's sample. Furthermore, claimant's positive drug test result is not negated by subsequent negative drug test results. Claimant's violation of a known work rule and DOT regulations constitutes misconduct as it presents a safety hazard to the general public and potential liability for the employer. Employer has established that claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

DECISION:

The December 7, 2022 (reference 01) unemployment insurance decision is **AFFIRMED**. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.



Adrienne C. Williamson
Administrative Law Judge

January 27, 2023
Order Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.