

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

Claimant

APPEAL 16A-UI-13776-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

Employer

**OC: 11/27/16
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 20, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show it discharged the claimant for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 20, 2017. The claimant did not respond to the hearing notice and did not participate. The employer participated. Employer's Exhibits 1 through 3 were received. Official notice was taken of the administrative record, specifically the fact-finding documents and the claimant's database read out (DBRO).

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits?
Can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Driver and Sales Representative beginning on March 31, 2014, and was separated from employment on November 15, 2016, when he was discharged. The employer is required to follow U.S. Department of Transportation (DOT) regulations. It conducts random drug tests of its employees. DOT regulations prohibit covered employees from using or being under the influence of illegal substances. Additionally, the employer has a policy that also prohibits drivers from driving while under the influence of illegal substances.

On November 8, 2016, the claimant was selected for a random drug test. The claimant's test came back positive for marijuana. The claimant told the employer he accidentally consumed marijuana brownies at a neighborhood fish-fry. The employer discharged the claimant for violations of its alcohol and drug policy as well as DOT regulations.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$464.00, since filing a claim with an effective date of November 27, 2016, for the week ending December 3, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification. The employer's documentation provides the date and reason for the claimant's discharge, but it did not provide a copy of the policy which the claimant is alleged to have violated.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is the effect of the confidentiality requirements of the federal law. The Omnibus Transportation Employee Testing Act of 1991 authorized the United States Department of Transportation (DOT) to prescribe regulations for testing of commercial motor vehicle operators. 49 USC § 31306. Congress required that the regulations provide for "the confidentiality of test results and medical information" of employees tested under the law. 49 USC § 31306(c)(7). 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). Although the employer did not request such a stipulation before the hearing, I conclude that this does cause the information to be excluded from the hearing record. In the statement of the case, a stipulation in compliance with the regulation has been entered, which corrects the failure of the employer to obtain the stipulation before submitting the information to the appeals bureau.

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. Although the general principle of confidentiality is set forth in a federal statute (49 USC § 31306(c)(7)), the specific implementing requirements are spelled

out in the federal regulation (49 CFR 40.321). The United States Supreme Court has further 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 the federal statute 49 USC § 31306(c)(7) and the implementing regulations 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.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

“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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

Employees in DOT safety-sensitive positions, such as drivers required to have a CDL, are required to be drug free in the workplace. The claimant tested positive for marijuana during a random drug test. The claimant's violation of the employer's policy and DOT regulations constitutes misconduct even without prior warning.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a

claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.7. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The unemployment insurance decision dated December 20, 2016 (reference 01) is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$464.00, but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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