IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

Claimant **Employer**	**APPEAL 20A-UI-08774-AD-T** **ADMINISTRATIVE LAW JUDGE** **PUBLIC DECISION** **OC: 07/14/19** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
49 CFR 40.321 – Sealed Record Confidential Information
49 CFR 40 and 382 - Federal Motor Carrier Safety Act (FMCSA)

STATEMENT OF THE CASE:

On July 30, 2020, employer/appellant filed a timely appeal from the July 24, 2020 (reference 01) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed from work on April 20, 2020 but the record did not show willful or deliberate misconduct.

A telephone hearing was held on September 9, 2020. The parties were properly notified about the hearing. Claimant/respondent did not register a number for the hearing and did not participate. Employer participated through its owner.

Employer's Exhibits 1 and 2 were admitted. Official notice was taken of the administrative record.

ISSUES:

Shall the hearing record and decision be publicly disclosed?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds:

Claimant began working for employer on July 22, 2019. Claimant was employed as a full-time dock worker/driver. The last day claimant worked on the job was April 19, 2020. Claimant was discharged on April 20, 2020. Claimant was discharged because of a positive random drug screen. Employer randomly tests employees on a quarterly basis. The drug screen was positive for marijuana.

The Medical Review Officer (MRO) contacted claimant about the results. Employer is unsure whether the MRO offered claimant a split sample test. It is unclear whether the MRO offered

claimant an opportunity to provide a legitimate medical reason for the positive test. Employer could not recall whether claimant acknowledged at the time of his discharge that he had used marijuana. The positive drug screen meant claimant could no longer legally drive a truck for employer.

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 for no disqualifying reason.

The Federal Motor Carrier Safety Act (FMCSA) provides, among other things:

- The employer must notify the employee of the test results and, if positive, which controlled substance was present. 49 CFR 382.411.
- The employer or designated employer representative (DER) must remove the driver from performing safety-sensitive functions. 49 CFR 382.501.
- The employer must develop a policy about the misuse of alcohol and controlled substances and provide proof of employee receipt. 49 CFR 382.601.
- The employer may use of a service agent, such as a medical review officer (MRO) to act on behalf of the employer to meet DOT testing requirements. 49 CFR 40.15.
- The employer or MRO must speak directly to the employee about the test result. 49 CFR 40.131 requires
- The MRO must offer the employee a chance to provide a legitimate medical explanation for the positive test result. 49 CFR 40.137.
- The MRO must notify the employee of the right to a split specimen test at their cost and how to obtain that test. 49 CFR 40.153; see also, 49 CFR 40.171.
- The MRO must report the initial and split test results, if any, to the employer and employee. 49 CFR 40.163; see also, 49 CFR 40.187.

The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. While the employer certainly may have been within its rights to test and fire the claimant, it failed to provide claimant with an opportunity for a split sample test. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits.

Here, employer has failed to establish the requirements of the FMCSA were followed. Specifically, employer is unsure whether the MRO offered claimant a split sample test. It is unclear whether the MRO offered claimant an opportunity to provide a legitimate medical reason for the positive test. As such, the positive drug screen cannot form the basis to disqualify claimant from benefits. Benefits are therefore allowed.

DECISION:

The July 24, 2020 (reference 01) unemployment insurance decision that allowed benefits based on a finding claimant was dismissed from work on April 20, 2020 is AFFIRMED. Claimant is not disqualified from benefits. Benefits are allowed, provided claimant is otherwise eligible for benefits.

Andrew B. Duffelmeyer
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September 16, 2020
Decision Dated and Mailed

abd/scn