

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
Claimant	APPEAL NO: 14A-UI-xxxxx-DT
Employer	ADMINISTRATIVE LAW JUDGE DECISION
OC: 04/06/14 Claimant: Appellant (1)	

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed a representative's April 23, 2014 decision (reference 01) that concluded the claimant was not qualified to receive unemployment insurance benefits after a separation from employment with the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 4, 2014. The claimant participated in the hearing. The employer also participated in the hearing. During the hearing, testimony was discussed regarding federal drug testing results. In the course of the hearing the employer requested that the testimony be held as confidential. The reasoning and conclusions of law section of this decision explain my decision regarding the confidentiality issue involving federal drug testing information. By my signature on this decision, I stipulate that the drug test information submitted in this case will only be made available to the parties to the proceeding. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 24, 2002. The claimant worked full time as an over-the-road truck driver. The claimant's job required the claimant to be subject to federal department of transportation regulatory provisions. The claimant's last day of work was April 3, 2014. The claimant was discharged at that time. The reason for the discharge was a positive drug test result.

The claimant was aware that under the employer's written drug-testing policy and federal department of transportation regulations, the claimant could be subject to termination if the claimant tested positive for illegal drugs. On March 25, 2014, the claimant was informed that he had been randomly selected for a drug test and that he needed to report to a clinic to provide a urine sample. The claimant did so at a medical office in Glenwood, Illinois on March 26. A urine sample was properly obtained and was analyzed by a certified laboratory.

The sample was split to allow a test of the split sample. Initial and confirmatory testing processes were run on the primary sample. The analysis disclosed the presence of cocaine in the claimant's system at a level that would demonstrate the claimant had tested positive in violation of the employer's policy. The test results were reviewed by a qualified medical review officer (MRO), who verified the positive test result on April 2.

The MRO contacted the claimant on April 2 and informed the claimant of the positive test results and of the claimant's right to have the split sample of his urine retested. The claimant did not request to have the split sample tested.

On April 3, after it received the results of the drug test, the employer discharged the claimant for violating the employer's drug policy by testing positive for cocaine.

The claimant asserts that he must have come into skin contact with cocaine at some point when he was disposing of substances he found in his home which had been brought into the home by his son. He provided some second-hand testimony that it is medically possible that a person could absorb a sufficient amount of cocaine by incidental skin contact to test positive for cocaine. No definitive scientific evidence was provided to indicate that more likely than not the claimant's positive drug test was as a result of such incidental skin contact.

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., an 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 decisionmaker in such a proceeding, provided the decisionmaker 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, it did so during the hearing; I conclude the failure to request the stipulation before the hearing does not 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.

In my judgment, 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. Rule 871 IAC 26.17(3).

The federal confidentiality laws regarding drug testing 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 decisionmaker 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. Since the decision to discharge the claimant was based on his testing positive on a DOT drug test, it would be impossible to issue a public decision identifying the claimant without disclosing the drug test results. 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 exhibits, and the audio record (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

Turning to the separation issue, 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); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with applicable drug testing laws. *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. Iowa's drug testing laws, however, do not apply to employees who are tested under federal law and regulations. Iowa Code § 730.5-2. Although the Iowa court has not addressed this issue, it is logical that the courts would likewise require compliance with federal law before disqualifying a claimant who was discharged for failing a drug test required by federal law and regulations.

The evidence in this case establishes that the drug testing in this case was consistent with federal drug testing regulations and complied with the applicable procedural requirements of 49 CFR Part 40. Under federal drug testing laws, once there has been an initial positive drug test, the claimant then "has the burden of proof that a legitimate medical explanation exists." 49 CFR § 40.137(c). The claimant has not overcome the presumption that the test results were correct in indicating consumption of illegal drugs.

The preponderance of the evidence establishes that the claimant willfully violated a known company rule in testing positive for an illegal drug. This shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's April 23, 2014 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 3, 2014. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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