

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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| 68-0157 (9-06) - 3091078 - EI | |
| Claimant | APPEAL NO. 06A-UI-11232-DWT |
| Employer | ADMINISTRATIVE LAW JUDGE DECISION |
| | OC: 09/24/06 R: 02 Claimant: Appellant (1) |

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a representative's October 16, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the employer's would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 6, 2006. The claimant participated in the hearing. The employer's operation manager appeared on the employer's behalf. 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.

The reasoning and conclusions of law section of this decision explain my decision regarding a 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.

ISSUE:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 2, 1978. The claimant worked as a full-time truck driver. The claimant knew the employer had a drug free workplace policy. The claimant understood he was subject federal law, which allowed random drug tests. The claimant also understood he could be discharged if he failed a drug test.

Five years ago, the claimant informed the employer he had a drug problem. The employer allowed the claimant to seek treatment. After the claimant finished his treatment, the employer allowed the claimant to continue his employment.

In early September 2006, the claimant went on vacation. While on vacation he smoked some marijuana. When the claimant returned to work two weeks later, the employer asked him to submit to a random drug test on September 14. The claimant assumed his drug test would be all right because he had smoked marijuana it two weeks earlier. The claimant was wrong.

After the test results were known, a medical review officer from the laboratory informed the claimant on September 22 this test was positive for marijuana and he had the right to have a second test performed on a split sample. The claimant declined the second test. After the employer learned about the positive drug test, the employer discharged the claimant on September 26, 2006.

The claimant established a claim for unemployment insurance benefits during the week of September 24, 2006. On October 16, 2006, a representative's decision was mailed to the claimant and employer. This decision disqualified the claimant from receiving unemployment insurance benefits as of September 24, 2006.

The claimant received the representative's decision on October 18, 2006. He mailed his appeal letter to the Appeals Section on October 20, 2006. When the claimant did not receive a hearing notice or an acknowledgement that he had filed an appeal, he contacted the Appeals Section the week of November 21. The Appeals Section informed the claimant that his appeal letter had not been received. The post office did not return the claimant's appeal letter to him. The claimant mailed his second appeal letter on November 21, 2006. The Appeals Section received this letter.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code § 96.6-2. Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's testimony is credible. Even though the Appeals Section did not receive the October 20, 2006, the claimant mailed an appeal on this date. Therefore, the claimant filed a timely appeal. The Appeals Section has jurisdiction to address the merits of the claimant's appeal.

The effect of the confidentiality requirements of the federal law must be examined in this case. 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 prohibited 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 the information in this case should 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. 871 IAC 26.17(3).

In this case, the federal confidentiality laws regarding drug testing must be followed. 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).

The employer discharged the claimant because he had a positive random drug test. It is 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.)

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. It is well established that the employer has the burden to prove disqualifying misconduct. Iowa Code § 96.6 (2). The only reason the employer discharged the claimant was because of a positive drug test on September 22, 2006.

In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, the drug test had to meet the requirements of

the Iowa Drug Testing Law at Iowa Code § 730.5 and that such drug tests would be scrutinized carefully to see that the drug test complied with Iowa law.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "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 required to be tested under federal law and regulations. Iowa Code § 730.5-2. Although the 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The evidence in this case establishes the drug testing complied with federal drug testing laws. The claimant even acknowledged he could have a split sample tested and understood why he had had a positive test. The employer established the claimant was discharged for work-connected misconduct. Therefore, as of September 24, 2006, the claimant is not qualified to receive unemployment insurance benefits.

DECISION:

The representatives' October 16, 2006 decision (reference 01) is affirmed. The claimant filed a timely appeal, so the Appeals Section has jurisdiction to address the merits of this case. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits until he 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.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

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