

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

Claimant

**APPEAL NO: 10A-UI-07492-DT**

Employer

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/04/10**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The claimant appealed a representative's May 14, 2010 decision (reference 02) that concluded the claimant was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on August 1, 2007. The claimant participated in the hearing. The employer participated in the hearing. During the hearing the employer provided testimony regarding results of a drug test conducted under federal law. 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 provided 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 September 22, 2008. The claimant worked full time as a hired hand on the employer's grain farming and manure application business. The last day of work was on or about April 1, 2010.

To be able perform part of the claimant's job duties, the claimant was required to obtain a federal commercial driver's license (CDL). The claimant therefore was subject to federal department of transportation regulatory provisions regarding random drug testing. On an unspecified date that was more than two weeks prior to April 1, the claimant was randomly chosen to be tested for drugs under the employer's policy and under federal legal requirements. The analysis disclosed the presence of marijuana in the claimant's system at a level that would demonstrate the claimant had tested positive for marijuana, in violation of the employer's policy. The claimant did not deny the validity of the positive test. This information was known by the claimant and the employer at least two weeks prior to April 1.

The employer did not discharge the claimant upon being informed of the positive test. Rather, the employer allowed the claimant to continue working in non-CDL required duties and allowed him to pursue rehabilitation through an outpatient program. However, about two weeks prior to April 1 the claimant informed the employer that given the rehabilitation and given the stress of the positive drug test on the claimant's marriage, while the claimant could continue working the regular off-season schedule of Monday through Friday, about 8:00 a.m. to 5:00 p.m., when the busy season began the claimant would not be able to work the extended hours, which could be starting very early until very late at night and on weekends. The employer did not refuse the claimant's request, but indicated it would need to find someone else to cover the additional hours. The employer did not tell the claimant that if someone could not be found to cover the additional hours, the claimant would be replaced.

The claimant continued working on the regular basis for several weeks. The claimant had understood that another employee was going to be covering at least a portion of the extended hours. However, the employer was not satisfied that the arrangement would cover all of the needed work. Another candidate was then found who was able to work the claimant's entire position, both the regular and extended hours. As a result, the employer determined that as of the start of the busy season on or about April 1 to hire the new candidate and discharge the claimant; the employer informed the claimant of this decision on that day.

#### **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, including simply verbally testifying as to the results, 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 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, I conclude that this 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 verbally offering the information during the hearing.

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).

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 substantially based on 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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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. 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. 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The true underlying reason the employer discharged the claimant was the positive drug test. 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 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 court 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 complied with the applicable requirements of: (1) 49 CFR Part 382 that deal with the circumstances under which a truck driver can be tested, and (2) 49 CFR Part 40 that set forth the testing procedures. The claimant does not identify any notice or procedural problems with the testing. The preponderance of the evidence establishes that the claimant willfully violated a known company rule in testing positive for an illegal drug.

However, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The drug test results were known to the parties more than two weeks prior to the employer's discharge of the claimant. The employer allowed the claimant to continue in the employment under the understanding that the claimant could continue working on the regular off-season basis, and did not advise the claimant that the claimant would still be discharged for the positive drug test if the employer could not find someone to cover the additional busy season hours. When it became more convenient for the employer to replace the claimant entirely rather than to simply find someone to cover the additional hours, it opted to do so. There is no showing that the claimant committed any additional misconduct in the intervening time between the positive drug test results and discussion regarding the claimant's work availability and the discharge. While the employer had a good business reason for choosing to replace the claimant, based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's May 14, 2010 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if the claimant is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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