

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
Claimant	<b>APPEAL NO. 06A-UI-09440-SWT</b>
Employer	<b>ADMINISTRATIVE LAW JUDGE DECISION</b>
<b>OC: 08/27/06 R: 04 Claimant: Appellant (1)</b>	

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

The claimant appealed an unemployment insurance decision dated September 21, 2006, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on October 9, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing. The employer's representative participated in the hearing on behalf of the employer. 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.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant worked full time for the employer as a street maintenance worker from May 22, 1995, to August 24, 2006. The claimant was informed and understood that under the employer's written drug-testing policy and federal department of transportation regulations, he was required to submit to a drug testing under certain circumstances, including random drug tests, and was subject to termination if he tested positive for drugs. Under the employer's policy, employees can be given the opportunity to obtain substance-abuse treatment after a positive test result but are subject to termination if they test positive again for an illegal drug. The policy provides for after-treatment drug testing in accordance with the plan submitted by the substance abuse professional.

The claimant was randomly chosen to be tested for drugs under the employer's policy and under federal legal requirements. Pursuant to the policy, he was informed that he was required to submit to a random drug test as required by federal law on May 2, 2006. A urine sample was taken from the claimant and analyzed by a certified laboratory. There is no evidence that the sample was split to allow a test of the split sample at the claimant's request. The analysis was positive for cocaine. The test results were reviewed by a qualified medical review officer (MRO), who verified the positive test result. The MRO contacted the claimant and informed him

of the positive test results. He was not informed of his right to have the split sample tested and the claimant was unaware of that right.

The claimant requested and was allowed the opportunity to undergo treatment. He did not disclose the extent of his drug problem to the substance abuse professional because he did not believe he would be allowed the time to undergo more intense treatment. As a result, his treatment consisted of stress management classes. He completed the classes and had a negative drug test in June 19, 2006, which allowed him to return to work subject to unannounced follow-up drug testing as set forth in the plan established by the substance abuse professional.

The claimant had follow-up drug tests on July 6 and 10, 2006, that were negative for illegal drugs. He had two follow-up drug tests in August 2006 pursuant to the plan established by the substance abuse professional. One was during the week of August 14 and the other was on August 21. A urine sample was taken from the claimant and analyzed by a certified laboratory. There is no evidence that the sample was split to allow a test of the split sample at the claimant's request. The analysis was positive for cocaine. The test results were reviewed by a qualified MRO, who verified the positive test result. The MRO contacted the claimant and informed him of the positive test results. He was not informed of his right to have the split sample tested and the claimant was unaware of that right.

The employer discharged the claimant on August 24, 2006, under its drug testing policy, for testing positive for drugs on the two tests conducted in August 2006.

#### **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 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 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, 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.

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 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.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "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.

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 fails to establish that the drug testing complied with 49 CFR 40.153, which requires MROs to notify employees of their right to a test of the split specimen. The employer's representative was unknowledgeable about the requirement of 49 CFR 40.71 that "[a]ll collections under DOT agency drug testing regulations must be split specimen collections." She did not know whether the sample had been split or whether the MRO had provided notice of the right to have the split sample tested. The test results or chain-of-custody form was not submitted to provide evidence on this issue. The claimant denied being notified of this right, and there is no reason to question his credibility on this point.

The result in this case is not totally satisfactory, since the claimant's appeal was not based on improper testing procedures, but the employer has the burden of proof in a discharge case and the requirements of court precedents cannot be ignored. In the Eaton case, the claimant had admitted to using drugs. The Iowa Supreme Court, however, focused on whether the drug test complied with the law, not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise in this case, the claimant was discharged due to the positive test result. Therefore, he is not subject to disqualification, because the testing procedures used by the employer did not comply with the law.

**DECISION:**

The unemployment insurance decision dated September 21, 2006, reference 01, is reversed.  
The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw