IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

Claimant **Employer**	**APPEAL 18A-UI-03333-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/04/18** **Claimant: Appellant (1)**

49 CFR 40.321 – Sealed Record Confidential Information
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the March 5, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 6, 2018. The claimant participated and testified. The employer participated through the interim director for human resources, Christina Murphy, and superintendent of services, Todd Jones. Employer's Exhibit 1 through 6 were received into evidence.

ISSUES:

Shall the hearing record and decision be publicly disclosed?
Was the claimant discharged for disqualifying job-related misconduct?

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant began employment with this employer on November 9, 2009 and was most recently employed full time as a street maintenance worker, until this employment ended on January 24, 2018, when he was discharged.

The DOT rules govern a commercial driver's license (CDL) and the claimant was required to have a valid CDL for performance of his job duties. On January 9, 2018, the employer requested claimant submit to a reasonable suspicion drug test. This request was made based on claimant's general behavior since he returned to work from medical leave on December 12, 2017. Jones testified claimant had been showing up to work late, was observed slurring his speech, was often gone for long periods of time without his whereabouts being known, and was found sleeping while at work one day in December. However, Jones also testified there was not anything specific that occurred on or around January 9, 2018 that prompted the request. Claimant took the initial test as requested, but due to an issue with the chain of custody and labeling, claimant had to resubmit a sample on January 17, 2018. The results of the January 17, 2018 test came back positive for an illegal substance. The medical review officer (MRO) called claimant with the results on January 23, 2018. Claimant was offered but declined a split

sample test. Claimant testified he was told by the MRO he would have to cover the cost of the split sample test himself and he declined because he could not afford it.

The claimant filed a new claim for unemployment insurance benefits with an effective date of March 5, 2018, but has not claimed or received any benefits to date. The employer did not participate in a fact finding interview regarding the separation on March 1, 2018. The employer was prepared to participate in the fact-finding interview at the scheduled start time, 2:20 p.m. The employer did not receive a phone call at the scheduled start time. The employer called Iowa Workforce Development to let them know it had not received a call and was told someone would look into it. The fact-finder finally called at 3:04 p.m., but by that time the employer had left to attend another meeting. The fact finder determined claimant qualified for benefits.

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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The Federal Motor Carrier Safety Act (FMCSA) generally provides:

49 CFR 382.411 requires that the employer notify the employee of the test results and, if positive, which controlled substance was present.

Section 382.501 requires the employer or designated employer representative (DER) to remove the driver from performing safety-sensitive functions.

Section 382.601 The employer is required to develop a policy about the misuse of alcohol and controlled substances and provide proof of employee receipt.

49 CFR 40.15 allows for the use of a service agent, such as a medical review officer (MRO) to act on behalf of the employer to meet DOT testing requirements.

Section 40.131 requires the employer or MRO to speak directly to the employee about the test result.

Section 40.137 The MRO must offer the employee a chance to provide a legitimate medical explanation for the positive test result.

Section 40.153 The MRO must notify the employee of the right to a split specimen test at their cost and how to obtain that test. See also, 49 CFR 40.171.

Section 40.163 The MRO must report the initial and split test results, if any, to the employer and employee. See also, 49 CFR 40.187.

Here, the employer requested a reasonable suspicion drug test based on claimant's general behavior since returning to work from medical leave. This behavior included tardiness, sleeping at work, observations of slurred speech, and being absent from the work area. While this behavior is certainly odd, the employer was not able to identify anything that occurred on or around the time the test was requested. Because the employer was not about to identify any specific act or behavior that was contemporaneous to the request for testing, it has failed to show reasonable suspicion upon which the base the drug test. 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 show the test was requested under sufficient reasonable suspicion. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The unemployment insurance decision dated March 5, 2018, (reference 01) is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

THIS RECORD IS SEALED AND SHALL NOT BE PUBLICLY DISCLOSED.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs