PUBLIC RECORD DECISION

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

CLAIMANT Claimant **EMPLOYER** Employer	**APPEAL NO. 22A-UI-15662-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/19/22** **Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

On July 29, 2022, the employer filed a timely appeal from the July 19, 2022 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on June 2, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on September 2, 2022. Claimant (claimant) participated. The employer participated. Exhibits 1 through 4, 7, 8 and A were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record reflects no benefits have been disbursed in connection with the claim.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant (claimant) was employed by employer as a full-time dedicated route commercial truck driver from August 2021 until June 14, 2022, when the employer discharged her from the employment. The claimant operated a tractor-trailer unit. The claimant primarily drove from Davenport to Chicago. The work required a commercial driver's license (CDL) and subjected the claimant to United Sates Department of Transportation (USDOT) Federal Motor Carrier Safety Administration (FMCSA) drug testing requirements. The claimant began the employment in August 2021. At the time of hire, the employer provided the claimant the employer's Driver's Policy & Safety Handbook and the FMCSA DOT Handbook. The claimant initialed to acknowledge receipt of both handbooks. The employer's handbook included a Drug and Alcohol Policy. The policy stated the claimant was subject to the commercial driver's license requirements, including random drug testing pursuant to 49 CFR 382.305. Regarding random drug testing, the policy further stated:

F. Random Testing Requirements.

The regulations require that 50% of all [EMPLOYER] drivers be tested each year. The social security numbers of all [EMPLOYER] employees, subject to the regulations, have been placed in a random number generator by our medical review officer. Bi-monthly, the numbers produced are provided to the [EMPLOYER] Drug Program Adminstration office in St.Louis. This information is then transmitted to the appropriate [EMPLOYER] Regional Office for notification to the respective employee. Upon notification that he/she has been selected, the driver must report to an approved [EMPLOYER] clinic or collection site as soon as possible after being notified and present himself for the random drug test. The random number generator will be updated monthly.

The employer's policy further stated:

H. Refusal to Take Test.

ANY DRIVER WHO REFUSES TO SUBMIT TO A POST-ACCIDENT, RANDOM, REASONABLE SUSPICION, OR FOLLOW-UP DRUG TEST IS PROHIBITED FROM PERFORMING OR CONTINUING TO PERFORM ANY SAFETY SENSITIVE FUNCTION AND WILL BE TERMINATED BY [EMPLOYER]. REFUSAL TO SUBMIT TO A DRUG TEST IS CONSIDERED A POSITIVE TEST.

The claimant last performed her regular duties on May 13, 2022. The claimant's doctor had taken the claimant off work during the week of April 25-29, 2022, due to a hip ailment the claimant asserts is work-related. The claimant asserts that exerting the force necessary to open trailer doors in the normal course of her duties caused her hip ailment. After the week off in April 2022, the claimant returned to work following a steroid injection. The claimant's doctor again took the claimant off work effective May 13, 2022. The claimant was thereafter on a de facto leave of absence until she was discharged in June 2022. The claimant's assertion of a work-related injury from opening trailer doors gave rise to a contested worker's compensation claim. The claimant sought evaluation and treatment through her health care provider. The claimant's doctor referred the claimant to physical therapy and for an MRI.

At about 1:00 p.m. on June 1, 2022, the employer called the claimant to notify her she had been selected for USDOT random drug testing and needed to promptly schedule and report for drug testing pursuant to USDOT drug testing protocol. The employer was the claimant's supervisor. The claimant was part of a pool of drivers subject to random testing and had been selected for random drug testing through the required randomized section process. The claimant resides in Bettendorf, 2.8 miles from the Concentra drug testing facility and 4.1 miles from the Utica Ridge drug testing facility. The claimant told the employer she could not report for drug testing that day, but did not say why. The claimant advises that due to a medication she had taken she could not drive and lacked transportation. The employer told the claimant the test facilities would also be open as of 8:00 a.m. on June 2, 2022. The claimant said she would report for drug testing at that time the next morning.

During the evening of June 1, 2022, the claimant initiated an email message exchange with the employer. The claimant asked, "What are the policies and procedures for a requested drug test while an employee is on leave?" The employer replied, "You['re] still under the dot random drug test policy." The claimant then misstated USDOT FMCSA drug random drug testing requirements as follows:

> Yes, by the DOT within a company that I am performing duties as a driver, I am currently not performing those duties because I am on leave for injury. If it is required that I'm to perform a drug test I am willing and capable to do so when I am released to those duties.

The claimant's leave status did not exclude the claimant from the pool subject to random testing and did not excuse the claimant from the random drug testing requirements.

The employer conferred with the employer's DOT compliance officer prior to responding to the claimant as follows: "Employees on worker's compensation are required to participate in the random testing program per DOT regulations unless their injury prevents them from getting to Work Comp clinic appointments."

The claimant replied, "I haven't been to … my appointments because I can't get out of bed."

The employer replied, "Just an FYI a failure to test will go down as a positive test result."

The claimant responded, "Im [sic] not refusing, I am unable to drive. Im [sic] hurting, what am I supposed to do."

The employer replied, "I'm just telling you the policy and procedures," to which the claimant replied, "Show me them please!!" The policy the claimant was demanding to see was actually not a policy, but was instead the USDOT FMCSA drug testing law.

The claimant did not report for drug testing on June 2, 2022. The weight of the evidence indicates the claimant's hip issue did not prevent her from traveling to a testing site or from participating in federally mandated drug testing. Failure to report for drug testing is indeed deemed a refusal under the federal regulations and, as such, required the employer to suspend the claimant's authorization to operate commercial vehicles, required the employer to report the drug testing refusal, and required the employer to provide the claimant with contact information for drug abuse counselors.

On June 6, 2022, the employer sent a text message to the claimant asking that she call him when she had a minute. The claimant replied, "Im [sic] at Physical therapy [and will] call as soon as done." The claimant advises that her son transported her to the physical therapy appointment. After the appointment, the claimant and Employer spoke. At that time, the employer notified the claimant she was suspended pending further investigation. On June 7, 2022, the employer reviewed the matter with the company President. On June 8, 2022, the employer sent a letter to the claimant indicated she was "suspended pending an investigation into missing a DOT random drug screen."

On June 14, 2022, the employer sent a termination letter to the claimant via certified mail. The letter stated:

> As prescribed by the U.S. Department of Transportation Federal Highway Administration, Part 382.501 of the safety regulations, you have been found to be medically disqualified to operate a commercial vehicle.

> Your DOT Random Drug Test on June 1st was confirmed "Positive for Refusal to Test". For this reason, you are hereby terminated from the employment of [EMPLOYER] Logistics, Inc.
>
> The following information for Substance Abuse Professional is submitted for your referral: [name and address of SAP omitted by administrative law judge].

The claimant subsequently acknowledged receipt of the termination letter.

During the week of June 19, 2022, the claimant established an original claim for unemployment insurance benefits. [EMPLOYER] Parts is the sole base period employer. The claimant has not received benefits in connection with the claim.

On June 22, 2022, the claimant obtained a note from her doctor. The note is backdated to June 2, 2022, but indicates it was electronically signed on June 22, 2022. The note states: "To whom it may concern, Erica has been in bed due to right hip pain from work comp. Unable to driver because of pain, medicine making drowsy, headache and dizziness."

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). The 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). 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).

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. The decision to discharge the claimant was based on a drug test refusal that the applicable treats as a positive DOT drug test. It would be impossible to issue a public decision identifying the claimant without also disclosing the per se positive drug test result. 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, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

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 parties concede the claimant's employment as a commercial truck driver subjected her to random drug testing under 49 CFR 382.305. In selecting the claimant for random drug testing, the employer complied with the random selection process called for under 49 CFR 382.305(i)(1). The employer duly notified the claimant she was required to promptly report for drug testing as required by 49 CFR 382.305(l). Though the law required the claimant to report immediately, the employer reasonably accommodated the claimant's request to report first thing the following morning. Regardless of whether the claimant was able to drive herself to the drug testing facility, the weight of the evidence indicates the claimant had the ability to arrange suitable transportation to get her to the drug testing facility.

The claimant's leave status did not excuse her from complying with the random drug testing requirement. The USDOT has provided guidance on this issue, as follows:

> Section § 382.305: Random testing.
> Guidance Q & A
> Question 10: If an employee is off work due to temporary lay-off, illness, injury or vacation, should that individual's name be removed from the random pool?
> Guidance: No. The individual's name should not be removed from the random pool so long as there is a reasonable expectation of the employee's return.

See https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/if-employee-work-due-temporary-lay-illness-injury-or-vacation.

49 CFR Part 40 § 40.191 provides as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

(a) As an employee, you have refused to take a drug test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.61(a));

The evidence in the record establishes a discharge for misconduct in connection with the employment, based on the claimant's refusal to submit to federally-mandated random drug testing. The claimant's failure to appear was a refusal. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The July 19, 2022 (reference 01) decision is reversed. The claimant was suspended on June 8, 2020 and discharged on June 14, 2022 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

September 14, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.