

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
Claimant	APPEAL NO. 07A-UI-11305-LT
Employer	ADMINISTRATIVE LAW JUDGE DECISION
OC: 10/21/07 R: 03 Claimant: Appellant (1)	

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 3, 2007, reference 02, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 20, 2007. Claimant participated and was represented by Michael Brandy, Attorney at Law. Employer participated through Kate Murphy, Kennedy Fawcett, and Russell Frisch and was represented by David Williams of TALX UC eXpress. Employer's Exhibits 1 through 3 were received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time equipment operator from October 28, 2005 until October 19, 2007, when he was discharged. He was suspended with pay on September 17 pending investigation through October 1, 2007 after he tested positive in a random drug test on September 1, 2007 for a commercial driver's license (CDL) testing pool under Department of Transportation (DOT) rules. Claimant then successfully completed a substance abuse evaluation on September 25, 2007 and recommended follow-up treatment. (Employer's Exhibit 1) He then was assigned to take a return-to-duty drug screen by urine sample on October 5, 2007 at Sartori, a certified laboratory. During a period of three hours, he was unable to provide a urine sample of at least 45 mL after ingesting at least 40 ounces of fluid (water and orange juice). (Employer's Exhibit 2) On October 5, 2007, Kennedy Fawcett, M.D. medical review officer (MRO) then referred claimant to urologist Michael Welton who reported to Dr. Fawcett that claimant did not have any "voiding abnormalities" and "voided two different times, the last time under observation, without any apparent difficulties." Dr. Welton opined his failure to void on October 5 was "situational anxiety." From that report, Dr. Fawcett determined on October 15, 2007 that claimant failed to provide a urine specimen without an approved explanation and found it equivalent to a refusal or positive test. (Employer's Exhibit 3)

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case pertains to 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. 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 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. Since the decision to discharge the claimant was based on his imputed positive 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.

For the reasons that follow, the administrative law judge concludes claimant was discharged for reasons related to job misconduct.

49 CFR 40.193 provides in relevant part:

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine (see paragraph (b)(4) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of urine to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

(2) [Reserved]

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check "Test Cancelled" (Step 6) on the CCF; and

(ii) Sign and date the CCF.

(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check "Refusal to test because" (Step 6) on the CCF and enter reason in the remarks line; and

(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.

(f) As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

40 CFR 195 provides, in part:

(a) This section concerns a situation in which an employee has a medical condition that precludes him or her from providing a sufficient specimen for a pre-employment follow-up or return-to-duty test and the condition involves a permanent or long-term disability.

. . .

(d) For purposes of this section, permanent or long-term medical conditions are those physiological, anatomic, or psychological abnormalities documented as being present prior to the attempted collection, and considered not amenable to correction or cure for an extended period of time, if ever.

(1) Examples would include destruction (any cause) of the glomerular filtration system leading to renal failure; unrepaired traumatic disruption of the urinary tract; or a severe psychiatric disorder focused on genito-urinary matters.

(2) Acute or temporary medical conditions, such as cystitis, urethritis or prostatitis, though they might interfere with collection for a limited period of time, cannot receive the same exceptional consideration as the permanent or long-term conditions discussed in paragraph (d)(1) of this section.

Iowa Code § 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 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 driver can be tested, and (2) 49 CFR Part 40 that sets forth the testing procedures. The

claimant does not identify any notice or procedural problems with the testing but relies upon his inability to provide a sufficient sample as an excuse for not completing the drug screen.

While claimant argued he was willing to stay beyond the three hours or offer a blood sample, the three hour window is specifically limited by rule and a blood sample is an option only for those who have a verified physiological or psychological recognized medical condition that prevents providing a urine sample. The claimant's failure to provide an adequate testing sample was ultimately determined to be the result of "situational anxiety," a condition specifically excluded from exceptions to an imputed refusal to test, which is effectively equivalent to a positive test. Claimant's refusal to test is work-connected misconduct as defined by the unemployment insurance law. Benefits are denied.

DECISION:

The unemployment insurance decision dated December 3, 2007, reference 02, is affirmed. Claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw