

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAIMANT

APPEAL NO. 09A-UI-01929-BT

EMPLOYER

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/13/08 R: 04
Claimant: Appellant (1)**

Iowa Code § 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 3, 2009, reference 04, that concluded the claimant's discharge was for work-connected misconduct. A telephone hearing was held on February 27, 2009. The claimant participated in the hearing. The employer was represented at the hearing. Employer's Exhibits One through Three were admitted into evidence at the hearing. The claimant was informed that the documents had been released to the Appeals Bureau prior to the date of the hearing. The reasoning and conclusions of law section of this decision explain the decision regarding the confidentiality issue involving federal drug testing information. By the undersigned signature on this decision, the Administrative Law Judge stipulates that the drug test information submitted in this case will only be made available to the parties to the proceeding.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for the employer as a full-time warehouse load crew from July 19, 2007, to December 16, 2008. He had a commercial driver's license which is regulated by the Department of Transportation. The claimant was informed and understood that under the employer's written drug-testing policy and federal Department of Transportation regulations, drivers are required to submit to a drug testing under certain circumstances, including random drug tests, and were subject to termination if they tested positive for drugs.

The claimant tested positive for drugs on April 11, 2008 and was suspended while he went through substance abuse treatment. He was released to return to duty by his Substance Abuse Professional on April 28, 2008 with recommended follow-up testing. The claimant subsequently tested negative for drugs in May, July and twice in September 2008. He was tested again on December 11, 2008 and tested positive for marijuana. The employer was notified on December 16, 2008 and the claimant was discharged that same day for violation of the second

chance drug test. The claimant highly objected to some of the supervisors' lack of discretion when talking about his personal situation to other employees.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined 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 employer did request such a stipulation before the hearing and 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 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. 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.

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 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 claimant was discharged for violation of the employer's drug and alcohol policy due to his positive drug test for marijuana. Iowa Code §730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. 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. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "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.

However, when a drug test administered to a claimant pursuant to Federal law, the Iowa drug testing policy at Iowa Code §730.5 does not apply. See Iowa Code § 730.5(2) and 49 C.F.R. 382.109 for Federal rules preempting state rules if compliance with the state requirement is an obstacle to the accomplishment and execution of the requirements of the Federal rules. Iowa Code § 730.5 has stricter requirements for a drug test than the Federal rules at 49 CFR Subtitle A, Part 40. In the case herein, the claimant has a commercial driver's license which subjects him to Federal Department of Transportation drug testing guidelines. 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 employer complied with the federal drug testing regulations and its own policies. A preponderance of the evidence establishes the claimant violated the employer's drug policy. The claimant's second violation of the employer's drug policy shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct and benefits are denied.

DECISION:

The unemployment insurance decision dated February 3, 2009, reference 04, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs