IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

Claimant

Employer

APPEAL NO. 09A-UI-03274-MT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/11/09
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 12, 2009, reference 01, that concluded the claimant's discharge was for work-connected misconduct. A telephone hearing was held on March 25, 2009. The claimant participated in the hearing. The employer was represented at the hearing Lea Peters, Human Resource Generalist. Exhibit A was 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 in claimant's exhibits. 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 in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The claimant worked for the employer as an over-the-road truck driver from November 22, 2006, to September 24, 2008. The claimant was informed and understood that under the employer's written drug-testing policy and federal department of transportation regulations, drivers were 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 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 September 24, 2008. A urine sample was properly taken from the claimant and properly analyzed by a certified laboratory using the criteria set forth in 49 CFR Part 40. The sample was split to allow a test of the split sample. The analysis disclosed the presence of illegal drugs in the claimant's system at a level that would demonstrate the claimant had tested positive for marijuana, in violation of the employer's policy. The test results were reviewed by a qualified medical review officer (MRO), and she verified the positive test result.

The MRO contacted the claimant and informed him of the positive test results and his right to have the split sample of his urine retested. The claimant did not request to have the split sample tested. The claimant admitted to making a one-time mistake and did not dispute the test.

On September 24, 2008, after it received the results of the drug test, the employer discharged the claimant for violating the employer's drug policy by testing positive for marijuana.

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 11, 2009 which resulted in disqualification. Claimant completed all aftercare programs required to get his driving privileges back. Employer refused to rehire claimant.

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 section 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 section 22.1-3. Iowa Code section 17A.12-7 provides that contested case hearings "shall be open to the public." Under Iowa Code section 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. I conclude that he was.

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.

The division has interpreted misconduct as follows in 871 IAC 24.32(1):

> 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 (Iowa 1979).

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 section 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 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 claimant admits to using illegal drugs. Claimant was aware of federal rules and regulations prohibiting such use. The preponderance of the evidence establishes that the claimant willfully violated a known company rule in testing positive for an illegal drug. This is misconduct as defined by Iowa law.

The appeals bureau has no jurisdiction over claimant’s rehire status with the employer. This is not an issue relevant to the receipt of unemployment.

DECISION:

The unemployment insurance decision dated February 12, 2009, reference 01, is affirmed. The 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.

_____
Marlon Mormann
Administrative Law Judge

_____
Decision Dated and Mailed

mdm/pjs