IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLAIMANT
Claimant

EMPLOYER
Employer

APPEAL NO. 08A-UI-03526-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/09/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated April 1, 2008, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on April 24, 2008. The claimant participated in the hearing. The employer participated in the hearing. Exhibits One through Four and A through F were admitted into evidence at the hearing. The reasoning and conclusions of law section of this decision explain my decision regarding the confidentiality issue involving federal drug testing information. By my signature on this decision, I stipulate that the drug test information submitted in this case will only be made available to the parties to this proceeding.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as an over-the-road truck driver from June 27, 2005, to December 4, 2007. He 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 illegal drugs or refused to submit to a required alcohol or drug test.

The claimant was off work due to a work-related injury starting in July 2007. He underwent carpel tunnel surgery on July 16, 2007, and was off work recuperating from the surgery afterward.

While the claimant was off work receiving workers' compensation benefits, he 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 October 12, 2007.

During the week before October 12, 2007, the claimant has smoked marijuana. He reported to the clinic on October 12 but knew he would test positive for marijuana. He called the president of the business. He told the president there was no point in him taking the test because he knew he would test positive as he had recently smoked marijuana. The president agreed that the claimant could leave the clinic, but he would have to undergo an evaluation by a substance abuse professional

(SAP), follow the evaluation recommendations, and have a negative drug test result before returning to work. The claimant agreed to these requirements.

The claimant followed through on the SAP evaluation on October 25, 2007. The evaluation recommendation was for the claimant to attend two counseling classes in November 2007. He followed through and completed those classes but his SAP did not certify his completion of the program until December 18, 2007.

On October 23, 2007, the claimant's doctor released him to return to work effective November 15, 2007. When the president was notified about the work release, he knew the claimant would have to complete a return-to-duty drug test to drive again. On November 5, 2007, the claimant's wife was at the employer's office. The employer wanted the claimant to return to work after Thanksgiving. The president talked to the claimant's wife about having the claimant take the return-to-duty drug test. She responded that it would be too soon to take the drug test because the marijuana would probably be in his system yet. Nothing more was said about the drug test. No manager ever directed the claimant to take any drug test orally or in writing. The employer gave no date or deadline to the claimant for taking the return-to-duty drug test.

The claimant did not return to work on November 15, 2007, because complications from the carpal tunnel surgery caused his doctor to withdraw the work release and refer the claimant to an orthopedic specialist for an evaluation, which was scheduled for December 3, 2007. A couple of days after Thanksgiving, the president called the claimant and asked whether he was coming back to work. The claimant told the president that his doctor had not released him to work but instead had referred him to specialist for an evaluation. The president did not mention anything about the return-to-duty drug test.

On December 4, 2007, the vice president of the business informed the claimant that he was discharged for refusing to take the return-to-duty drug test. Later that day, when the claimant talked to the president, the president told him that he had to put another driver in the claimant's truck because the business was losing money.

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 decisionmaker in such a proceeding, provided the decisionmaker issues a binding stipulation that the information released will only be made available to the parties to the proceeding. 49 CFR 40.323(b). In the statement of the case, a stipulation in compliance with the regulation has been entered.

In my judgment, 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). 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 decisionmaker 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.

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.

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 employer discharged the claimant for two reasons: (1) because the employer needed to fill his position for financial reasons since he was unable to drive, and (2) because he allegedly refused to take a return-to-duty drug test. The first reason would not meet the standard for work-connected misconduct.

In regard to the second reason, the employer initially complied with federal DOT regulations after the claimant refused the DOT random drug test on October 12, 2007. The employer allowed the claimant to seek an SAP evaluation and drug treatment/education. 40 CFR 40.285. An employer, however, who decides to permit the employee to return to work after a DOT drug test violation must ensure that the employee takes a return-to-duty drug test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. 40 CFR 40.285. The employer did not comply with this requirement, because it did not wait until the claimant had completed the SAP recommended counseling classes. Furthermore, to be considered to have refused a DOT drug test, the employer must have “directed” the employee to appear for a test. 40 CFR 40.191. The employer's suggestion to the claimant's wife that he go in for a drug test sometime before Thanksgiving falls far short of directing the claimant to appear for a drug test. The employer never personally directed the claimant to take the return-to-duty drug test, never directed him to do so in writing, and never established a date or deadline for taking his return-to-duty test. No willful and substantial misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated April 1, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw