IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

Claimant

Employer

APPEAL NO. 13O-UI-04373-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/05/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision dated June 12, 2012, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on May 14, 2013. The claimant participated on his own behalf. The employer also participated.

ISSUE:

Was the claimant discharged for work-connected 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 was hired on June 26, 2004, as a full-time seasonal ready mix delivery driver. At the time of the claimant's separation from employment the claimant weighed 112 pounds. The claimant signed for receipt of the employer's Alcohol & Controlled Substance Policy. The policy indicates that it is prohibited for an employee to report for duty if he had an alcohol concentration of 0.04 or greater. The policy instructs the employee to submit to testing if the employer has a reasonable suspicion that the employee has reported to work with an alcohol concentration of 0.04 or greater. The alcohol testing requires an initial screening and a confirmation test by using saliva swabs or breath for the presence of alcohol.

On May 21, 2012, the claimant was supposed to be at work at 5:00 a.m. for a pre-shift meeting. The claimant arrived at work at 6:12 a.m., after the meeting. The safety director talked to the claimant about his tardiness and noticed that the claimant smelled of alcohol and had slurred speech. The safety director summoned the human resources manager who was a trained observer. The dispatch manager, a trained observer, noticed the claimant was laughing at odd times, was unsteady on his feet, and smelled of alcohol. The human resources manager also noticed that the claimant smelled of alcohol. He directed the safety director to take the claimant to the Quad City Occupational Health Facility to be tested for alcohol under the employer's policy and federal legal requirements. The dispatch manager, a trained observer, noticed the claimant was laughing at odd times and the claimant smelled of alcohol.

The claimant submitted to a properly administered alcohol breath test at 7:51 a.m. on May 21, 2012, and his blood alcohol level was 0.081. The claimant submitted to a second properly administered alcohol breath test at 8:08 a.m. on May 21, 2012, and his blood alcohol level was 0.071. The laboratory that analyzed the sample was a certified laboratory using the criteria set forth in 49 CFR Part 40. The results of the breath test were provided to the claimant and showed the claimant tested beyond the alcohol concentration limit of 0.04 in violation of the employer's policy. The employer returned the claimant to the workplace. The claimant tested positive because he had been at a graduation party the night before until approximately 10:30 p.m. and drank a six pack of beer or more. The employer terminated the claimant on May 21, 2012.

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 alcohol test, it would be impossible to issue a public decision identifying the claimant without disclosing the alcohol 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 § 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 claimant appeared for work with an alcohol concentration of 0.04 or greater. It matters not whether the claimant was unaware of his level or whether he drank the alcohol in the hours of a previous day. The claimant tested positive during his work hours. The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment The evidence in this case establishes that the alcohol 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 set forth the testing procedures. The claimant does not identify any notice or procedural problems with the testing.

The insurance law has been established in this case.

DECISION:

The unemployment insurance decision dated June 12. 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs