IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

Claimant

Employer

APPEAL NO. 19A-UI-09212-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/27/19
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision dated November 18, 2019, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on December 17, 2019. The claimant participated personally. The employer also participated.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 May 28, 2015, as a full-time pilot. The claimant signed for receipt of the employer's handbook near the time of his hire.

The handbook contained a drug and alcohol testing policy. The employer tested employees randomly for five named substances: marijuana, cocaine, amphetamines, opiates, and PCP. The policy stated the following discipline, "Prohibited in the policy will be subject to disciplinary action up to and including termination of employment. Any employee who is convicted of a violation of a criminal drug statute occurring in the workplace who uses alcohol or drugs while on duty or who refuses to test including adulterating a urine sample." (sic)

On October 27, 2019, the claimant was chosen for random Department of Transportation (DOT) and non-DOT testing under the employer's policy. The claimant was informed of the requirement to submit to this random drug test on October 27, 2019. A urine sample was taken from the claimant and analyzed by a laboratory. The sample was split to allow a test of the split sample.

The analysis disclosed the presence of tetrahydrocannabinol (THC), in violation of the employer's policy. The test results were reviewed by a medical review officer (MRO), who verified the positive test result. On November 1, 2019, the MRO told the claimant of the positive result for THC and asked the claimant about taking any prescription medication which would

cause a positive outcome. The claimant answered in the negative. The claimant was taking an over-the-counter cannabidiol (CBD) pill for anxiety and rest. Prior to purchasing the CBD, he examined the packaging. It indicated no THC was contained in the substance. The initial package was purchased over the counter in Iowa. Refills were purchased on-line from California.

On November 1, 2019, the claimant called the supervisor and chief pilot and explained the situation. The employer telephoned the claimant and terminated. The claimant requested that the split sample be tested. The employer granted the request and on November 18, 2019, the same result was reached with the split sample. The employer terminated the claimant on November 18, 2019, for testing positive to THC on October 27, 2019. The employer also terminated the claimant because it had an unwritten “zero tolerance” drug policy regarding testing positive.

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 the 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 is eligible to receive unemployment insurance benefits.

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.

Under the federal requirement, the employer must have a written policy that identifies what discipline will occur in the event of a positive test. The employer read that policy into the record. The policy was not clear. It appears the employer had the option of any disciplinary action up to termination in the event of a positive drug test. In addition, the policy must state the cutoff concentrations that constitute a positive drug test. The employer's drug testing policy did not comply with the federal DOT requirements under 40 CFR § 40.87.

In this case, the claimant admits that to unknowingly ingesting a substance that contained some THC. The claimant was informed of the positive test. The employer was informed of the positive test. Neither of the parties knows what concentration the test showed. The employer's policy did not indicate that a positive had to reach a standard of concentration of 15 ng/mL. under 40 CFR § 40.87. The employer decided to terminate for any concentration. Under these set of facts, the employer has not proven its case that it tested appropriately under the federal law and/or that the claimant tested positive under that law.

While it is understood that pilots should not be under the influence of drugs and alcohol while working, it is also understood that employer's must follow the law when administering drug and alcohol testing. The employer has not met its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The unemployment insurance decision dated November 18, 2019, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/scn