IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLAIMANT

EMPLOYER

APPEAL NO. 13A-UI-08211-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/16/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision dated July 3, 2013, reference 01. The decision allowed the claimant to receive unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on August 19 and 20, 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 23, 2013, as a full-time carman 1. The claimant was covered by a union contract and the employer followed Department of Transportation regulations. The claimant was subject to random urine samples. He had always cooperated with the employer and had never had a problem providing a sample in the past. Those policies included a provision that stated: As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine…you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

On June 11, 2013, the claimant was exposed to an unknown chemical at work. The chemical was on his clothes and the employer had the claimant remove his clothing and put on a Tyvek suit to go to the hospital. The doctor released the claimant but the union contract states that an employee has to provide a urine sample for drug and alcohol testing if there is any sort of accident while working. The safety coordinator walked the claimant through the hospital in the Tyvek suit causing the claimant embarrassment. He became hot, sweaty, and angry inside the suit. The walk was about three blocks to get to the testing facility.

At the testing facility the claimant produced a urine sample at 8:42 a.m. but it was not large enough for the medical review officer to test. The claimant was placed on a shy bladder log and allowed forty ounces of water and three hours to provide a sample. The claimant's aunt saw the claimant in the suit and thought the claimant had been arrested. The claimant continued to be embarrassed, angry, and sweaty. He produced two more samples but they were not large enough to be tested and the medical review officer threw them away. The laboratory would not provide him with more water or time. At 11:42 a.m. on June 11, 2013, the laboratory would not allow the claimant to try any more.

The employer suspended the claimant for five days beginning June 12, 2013. The employer did not direct the claimant to obtain an evaluation from a licensed physician regarding his failure to produce a urine sample or obtain an explanation from the medical review officer. The claimant did not hear from the employer, but the employer considered the claimant to have been terminated as of June 19, 2013, for failure to cooperate with a by providing a urine sample.

The employer did not participate in the July 2, 2013, fact-finding interview.

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 testing procedures in 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 not.

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.
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> 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.

In this case the claimant was terminated for failure to produce a sufficient amount of urine at his drug test. The employer had a procedure to follow when employees produced an insufficient sample. The employer failed to follow that procedure and offered no explanation for noncompliance. Without knowing the reason the claimant did not produce a urine sample, one cannot make a determination that the claimant's actions were willful or deliberate. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The unemployment insurance decision dated July 3, 2013, reference 01, is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css