

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAIMANT

Claimant

APPEAL NO. 09A-UI-16089-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER

Employer

OC: 09/27/09

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
49 CFR 40.321 – Sealed Record Confidential Information
Federal Motor Carrier Safety Act (FMCSA) 49 CFR 40 and 382

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 21, 2009 (reference 02) decision that denied benefits. From the administrative record it appears that since the September 28, 2008 claim for benefits resulting from the temporary medical separation and ability to and availability for work issue was resolved, either no notification was made to the claims division of Iowa Workforce Development (IWD) that the separation had become permanent due to an allegation of misconduct or the issue was not noticed until a new claim was filed effective September 28, 2009. After due notice was issued, a telephone conference hearing was held on Saturday, December 12, 2009. Claimant participated and was represented by counsel. Employer participated by a co-owner. Employer's Exhibits 1 through 7 were admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits and if the hearing record and decision shall be publicly disclosed.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant worked since May 2, 2008 as a full-time as an over-the-road and local driver, which is a safety-sensitive position. He had a heart attack and was taken off work as of August 15, 2008. The medical release to return to work dated November 17, 2008 was to be effective November 24, 2008. Since he was off work for more than 30 days, DOT rules and employer's policy required him to undergo a preemployment drug screen (Employer's Exhibit 1), which was administered on November 28, 2008, test results were completed on November 30 through a service agent, and the medical review officer (MRO) contacted claimant on December 1, 2008 advising him the results were positive for marijuana. Claimant did not dispute the results. On December 3 employer met with claimant about the results and was advised that he was not able to retain his employment unless he underwent a rehabilitation and probationary licensing process. Claimant indicated his intent to do so and employer gave him contact information for substance abuse professional (SAP) services. (Employer's Exhibits 6

and 7) Claimant did contact SAP professionals but determined he could not afford to proceed and before the end of December 2008 he notified co-owner Pamela Bill but did not ask for financial assistance from the employer. It was not until an unemployment appeal hearing that employer realized claimant believed he was still an employee and sent a February 10, 2009 letter clarifying that the separation had occurred as of the date of the December 3 meeting after he failed to proceed with SAP services. Claimant acknowledged receipt of the employer's Policy Regarding the Use and Abuse of Drugs and Alcohol and the DOT Drug and Alcohol Policy for Drivers on April 12, 2008. (Employer's Exhibits 5 and 6 respectively)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 Federal Motor Carrier Safety Act (FMCSA) generally provides:

Section 382.501 requires the employer or designated employer representative (DER) to remove the driver from performing safety-sensitive functions.

Section 382.601 requires the employer to develop a policy about the misuse of alcohol and controlled substances and provide proof of employee receipt.

49 CFR 40.15 allows for the use of a service agent, such as a medical review officer (MRO) to act on behalf of the employer to meet DOT testing requirements.

Section 40.131 requires the employer or MRO to speak directly to the employee about the test result.

The employer has met the requirements of the FMCSA and knowledge of those rights and responsibilities is imputed to claimant because of his receipt of the relevant policies. The claimant's drug screen was positive and but he is required to be drug free in the workplace. The violation of the known work rule and DOT regulations constitutes misconduct as it presents a safety hazard to the employee and the general public and creates potential liability for the employer. The separation was for a current act of misconduct as claimant was notified on December 3 that he would not be employable if he did not follow through with the SAP and relicensing procedures and he elected not to do so or ask for financial assistance. Benefits are denied.

The second 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 § 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 § 22.1-3. Iowa Code § 17A.12(7) provides that contested case hearings "shall be open to the public." Under Iowa Code § 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 and medical information 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. 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 audio record, and any documents in the administrative file (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

DECISION:

The October 21, 2009 (reference 02) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs