IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

Claimant Employer	**APPEAL 18A-UI-04929-NM-T** **ADMINISTRATIVE LAW JUDGE SEALED DECISION** **OC: 04/01/18** **Claimant: Appellant (2)**

49 CFR 40.321 – Sealed Record Confidential Information
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Federal Motor Carrier Safety Act (FMCSA) 49 CFR 40 and 382

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 19, 2018 (reference 01) unemployment insurance decision that denied benefits based on his voluntary quit. After due notice was issued, a telephone conference hearing was held on May 15, 2018. Claimant participated and was represented by attorney Philip Mears. Employer participated and provided testimony.

ISSUES:

Shall the hearing record and decision be publicly disclosed?

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as an operator 3 and was separated from employment on April 2, 2018.

The DOT rules govern a commercial driver's license (CDL) and the claimant was required to have a valid Class B CDL for performance of his job duties. On March 24, 2018, claimant was driving one of the employer's vehicles when he accidently scrapped it against a wall. The employer's general practice is to conduct drug and alcohol testing whenever there is an accident. This policy was not written down anywhere. The employer called one of its police officers over to conduct field sobriety testing, including the administration of a breathalyzer test. Claimant blew a .036, well below the legal limit for operating a motor vehicle. The employer then sent claimant to the local hospital for additional drug and alcohol testing. Claimant was later informed by the hospital that the drug and alcohol screen did not show any drugs or

alcohol were present in his system. Nevertheless, the employer made the decision to terminate claimant from employment. Prior to being discharged claimant was given the option of resigning in lieu of termination, which he accepted. Claimant had no prior warnings or disciplinary action for conduct similar in nature to that occurring on March 24.

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 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. Iowa Admin. Code r. 871-26.17(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.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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:
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> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The Federal Motor Carrier Safety Act (FMCSA) generally provides:

49 CFR 382.411 requires that the employer notify the employee of the test results and, if positive, which controlled substance was present.

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

Section 382.601 The employer is required 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.

Section 40.137 The MRO must offer the employee a chance to provide a legitimate medical explanation for the positive test result.

Section 40.153 The MRO must notify the employee of the right to a split specimen test at their cost and how to obtain that test. See also, 49 CFR 40.171.

Section 40.163 The MRO must report the initial and split test results, if any, to the employer and employee. See also, 49 CFR 40.187.

Section 40.23(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. If you receive an alcohol test result of 0.02 -- 0.39, you must temporarily remove the employee involved from performing safety-sensitive functions, as provided in applicable DOT agency regulations. Do not wait to receive the written report of the result of the test.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

Here, the employer did not have a written drug or alcohol testing policy in place. Nevertheless, claimant submitted to testing at the employer's request. Initial testing showed a presence of alcohol below the legal limit for operating a motor vehicle. A confirmatory test did not show the presence of any drugs or alcohol in claimant's system. Additionally, claimant had no prior warnings involving accidents while at work. Inasmuch as employer had not previously warned claimant about the issue leading to the separation and has not established any other type of misconduct, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The unemployment insurance decision dated April 19, 2018, (reference 01) is reversed. The claimant did not voluntarily quit, but was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

THIS RECORD IS SEALED AND SHALL NOT BE PUBLICLY DISCLOSED.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs