IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

Claimant Employer	**APPEAL 19A-UI-08817-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/06/19** **Claimant: Respondent (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer appealed a representative's October 30, 2019 decision (reference 01) that concluded the claimant was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 4, 2019. The claimant participated personally. The employer also participated.

The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

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 November 28, 2018, as a part-time transit driver. On November 28, 2018, he signed for the Drug and Alcohol-Free Workplace policy. He signed for receipt of the Federal Motor Carrier Safety Regulations Motorcoach/Bus Pocketbook on December 12, 2018. The claimant acknowledged receipt of the Drug and Alcohol Testing Policy on December 14, 2018.

The employer had a "zero tolerance" policy regarding use of controlled substances. "Failure to comply with this provision shall result in employee being terminated". The employer's policies complied with 49 CFR 655 and 29. Marijuana, in any form, or THC was listed as a prohibited drug in the employer's policy.

The claimant was randomly chosen to be drug tested under the employer's policy and federal law. Pursuant to the policy, he was informed that he was required to submit to a random drug test as required by federal law on September 16, 2019. A urine sample was properly taken from

the claimant and properly analyzed by a certified laboratory using the criteria set forth in 49 CFR Part 40. The sample was split to allow a test of the split sample. The analysis disclosed the presence of THC in the claimant's system at a level that would demonstrate the claimant had tested positive for THC, in violation of the employer's policy. The test results were reviewed by a qualified medical review officer (MRO), who verified the positive test result.

The MRO attempted to contact the claimant with the results of the testing. The claimant did not respond after the MRO waited the appropriate period of time. On September 23, 2019, the MRO notified the employer of an inability to make contact with the claimant. The employer provided the MRO with additional contact information. On or about September 30, 2019, the MRO notified the employer that the claimant was not responding to its contacts. The employer asked the claimant for a meeting on September 30, 2019. The employer terminated the claimant on September 30, 2019, under the employer's zero tolerance policy.

On October 18, 2019, the claimant went to a physician for a medical exam. Medical staff asked the claimant, "Have you ever failed a drug test or been dependent on an illegal substance?" The claimant replied, "No". He had a urine test for protein, blood, sugar, and specific gravity.

The claimant filed for unemployment insurance benefits with an effective date of October 6, 2019. He received $1,832.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on October 22, 2019, by the employer's representative.

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.

This 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 decision maker in this case. It would defeat the purpose of the federal law of providing confidentiality to permit the information regarding the medical information to be disclosed to the general public. Since the decision to discharge the claimant was based on medical information on a DOT drug test, it would be impossible to issue a public decision identifying the claimant without disclosing the medical information. 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.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The evidence in this case establishes that the drug 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 claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer. The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct. Therefore, benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) “Participate,” as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer’s representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer’s representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) “A continuous pattern of nonparticipation in the initial determination to award benefits,” pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer’s representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) “Fraud or willful misrepresentation by the individual,” as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

DECISION:

The representative's October 30, 2019, decision (reference 01) is reversed. 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

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