

PUBLIC RECORD DECISION  
**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CLAIMANT**

**APPEAL NO. 12R-UI-02041-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EMPLOYER**

**OC: 10/02/11  
Claimant: Appellant (1-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

This matter was before the administrative law judge upon remand for a new hearing after the employer had been denied the opportunity to participate in an appeal hearing on November 17, 2011. Claimant appealed from the October 19, 2011, reference 01 decision that denied benefits. After due notice, and after the claimant was granted two postponements, a hearing was held on May 7, 2012. Claimant was not available at the number he had provided for the hearing and did not participate. Attorney X represented the employer and presented testimony through the Director of Human Resources, and Director of Safety and Compliance. The administrative law judge took official notice the Agency administrative documents submitted for and generated in connection with the October 18, 2011 fact-finding interview. A copy of the fact-finding materials was provided to the parties on March 19, 2012. Employer Exhibits One through Nine and 16 through 25 were received into evidence.

The administrative law judge took official notice of the claimant's undated, handwritten request to the Employment Appeal Board in Hearing Number 12B-UI-14078 "for an extension to submit further written arguments," received by the Employment Appeal Board on January 31, 2012. In that request, the claimant indicated he had "a major medical surgery and need at least 30 to 60 days." In response to the request, the Board extended the deadline for submission of brief and argument to February 8, 2012.

The administrative law judge took official notice of the claimant's undated, typed, faxed request to the Employment Appeal Board in Hearing Number 12B-UI-14078 for an extension "due to a severe medical emergency and major surgery. Again I request a 30 day extension." The fax date of the request was February 11, 2012. In response to the request, the Board extended the deadline for submission of brief and argument to February 24, 2012.

The administrative law judge took official notice of the claimant's recorded March 23, 2012 request to the administrative law judge for postponement of the March 27, 2012 telephonic appeal hearing due to the claimant's need to undergo a procedure on March 26, 2012 to have a portion of his sternum removed so that doctors could access a tumor. Claimant indicated that he would be hospitalized seven to 10 days and then would be discharged to home with home

health care. The digital recording of the March 23, 2012 conversation is part of the administrative record in this matter.

The administrative law judge took official notice of the claimant's April 6, 2012, typed, faxed request to the administrative law judge to postpone the April 9, 2012 rescheduled telephonic appeal hearing. Claimant wrote:

I have had a previous extension of this appeal due to medical reasons. As you know I have a malignant tumor in my breast. I have completed surgery but now am under a chemo therapy treatment. I receive treatments on Monday, Wednesday, and Fridays at Natividad Hospital in Salinas CA. My oncologist in [sic] tony Nyguyn. This process makes me very nauseated and exhausted for the day. I have treatment for the next 3 week.

Due to these facts I can not be available to the call telephone call. I would like to reschedule for a time after my treatment. If there are future complications I plan to withdraw my objection to the employers appeal as this is too stressful."

The administrative law judge took official notice of the Agency's administrative record of the claimant's weekly responses to the telephone automated weekly claim reporting system, which indicates that claimant has consistently responded through that system that he has made four or more in-person job contacts each week, included the entire period covered by the claimant's first extension request to the Employment Appeal Board through the benefit week that ended April 28, 2012.

By the signature at the end of this decision, the administrative law judge stipulates that the drug test information submitted in this case will only be made available to the parties to the proceeding, in compliance with 49 USC § 31306(c)(7), which requires that test results and medical information of employees tested under the Omnibus Transportation Employee Testing Act of 1991 remain confidential.

#### **ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since he established his claim for benefits.

#### **FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time over-the-road commercial truck driver from December 2010 until August 8, 2011, when the Director of Safety and Compliance discharged him from the employment based on a failed breath alcohol test. The claimant's employment as a commercial truck driver subjected him to random drug testing under U.S. Department of Transportation Federal Motor Carrier Safety Administration (FMCSA) regulations. The claimant was assigned to the employer's terminal in Missoula, Montana.

On August 8, 2011, the employer notified the claimant that he had been selected for random drug testing and directed him to report to the employer's terminal in Fort Dodge for testing.

Claimant had been selected for testing through the FMCSA authorized third-party random section process. In an attempt to thwart the testing process, claimant used an asthma inhaler while enroute to submit to breath alcohol testing. Claimant submitted to a breath alcohol test that indicated a breath alcohol concentration (BAC) of .134. After an appropriate waiting period, claimant submitted to a second, confirmatory test that indicated .135 BAC. The breath alcohol tests were performed on a machine approved by the FMCSA for that purpose. The machine used for the breath alcohol tests was appropriately calibrated. The breath alcohol tests were conducted by a person certified to operate the breath alcohol testing device.

After claimant provided breath alcohol specimens that indicated he was under the influence of alcohol, the employer notified him that he was discharged from the employment for violating the employer's Drug and Alcohol Policy for Drivers and Independent Contractors. In addition to notifying claimant verbally of the discharge, the employer mailed written notice of the discharge to claimant by certified mail. That same day, the employer mailed contact information to claimant concerning how to contact a Substance Abuse Professional, as required by FMCSA regulations.

Immediately following the discharge, the employer searched the cab of claimant's company-issued truck and located two full 24 ounce cans of alcohol and a receipt for purchase of three 24-ounce cans of beer and two containers of wine that morning.

The employer has a written Drug and Alcohol policy. Claimant was provided with a copy of the policy at the time of hire. The employer also provided claimant with a copy of the FMCSA regulations at the same time. The policy provided for random drug and alcohol testing. The employer's policy prohibited drivers from reporting for duty or remaining on duty requiring performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. The policy prohibited drivers on duty from possessing alcohol unless the alcohol was part of the shipment load and was "manifested" as such. The policy prohibited drivers from performing safety sensitive functions within four hours after using alcohol. The policy indicated that drivers found to have engaged in a prohibited act under the policy would be discharged from the employment.

The employer's written alcohol testing protocol provides as follows:

Alcohol tests will be performed using a device that is on the National Highway Traffic Safety Administration's (HNTSA) Conforming Products list (CPL) and meets the DOT's testing requirements. This may be a breath testing device or a saliva testing device, and may be provided through a vendor or agent. The device will be operated by a technician who is certified and trained on the specific device he or she will be operating. The driver shall report to the alcohol testing site as notified by the Company. All alcohol tests shall be performed just prior to, during, or just after duty. The driver shall follow all instructions given by the alcohol technician.

Any initial test indicating a blood alcohol concentration (BAC) of 0.02 or greater will be confirmed on an evidential breath testing device (EBT) operated by a breath alcohol technician (BAT). The confirmation test will be performed no sooner than 15 minutes and no later than 30 minutes following the completion of the initial test. In the event the confirmation test indicates a BAC of 0.02 to 0.0399, the driver shall be removed from duty for 24 hours or until his/her next scheduled on-duty time, whichever is longer. Drivers with tests indicating a BAC of 0.04 or greater are considered to have engaged in prohibited conduct.

The employer's breath alcohol testing of claimant conformed to FMCSA regulations and the employer's written policy. Under the FMCSA regulations, after the positive drug test, claimant was not eligible to operate a commercial motor vehicle until after he had complied with substance abuse evaluation and treatment mandated under the regulations.

Claimant established a claim for unemployment insurance benefits that was effective October 2, 2011.

Claimant appears to have been suffering from a major health condition since he established his claim for benefits. On January 31, 2012, claimant asked the Employment Appeal Board for a 30 to 60 day extension so that he could deal with "a major medical surgery." See handwritten request to the Employment Appeal Board in Hearing Number 12B-UI-14078. In response to the request, the Board extended the deadline for submission of brief and argument to February 8, 2012. On February 11, 2012, claimant submitted a written request to the Employment Appeal Board for a 30-day extension "due to a severe medical emergency and major surgery." See faxed request dated February 11, 2012. On March 23, 2012, claimant requested that the appeal hearing set for March 27, 2012 be postponed and stated he needed to undergo a procedure on March 26, 2012 to have a portion of his sternum removed so that doctors could access a tumor. On March 23, claimant indicated that he would be hospitalized seven to 10 days and then would be discharged to home with home health care. See digital recording of the March 23, 2012 telephone call between the claimant and the administrative law judge. On April 6, 2012, the claimant faxed a request to further postpone the appeal hearing, which had been reset for April 9, 2012. Claimant wrote:

I have had a previous extension of this appeal due to medical reasons. As you know I have a malignant tumor in my breast. I have completed surgery but now am under a chemo therapy treatment. I receive treatments on Monday, Wednesday, and Fridays at Natividad Hospital in Salinas CA. My oncologist in [sic] [deleted]. This process makes me very nauseated and exhausted for the day. I have treatment for the next 3 week.

Due to these facts I can not be available to the call telephone call. I would like to reschedule for a time after my treatment. If there are future complications I plan to withdraw my objection to the employers appeal as this is too stressful."

Despite these ongoing serious health issues cited by claimant in his requests to postpone deadlines and proceedings related to his unemployment insurance claim, claimant, or someone else on his behalf, has continued to use Iowa Workforce Development's automated telephonic weekly claim reporting system to indicate that claimant has made *four or more in-person* job contacts each week since his claim started.

#### **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). In the statement of the case, a stipulation in compliance with the regulation has been entered.

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 test results to be disclosed to the general public. Since the decision to discharge the claimant was based on his 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.

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:

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. 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.

The weight of the evidence indicates that the breath alcohol testing policy and procedure complied with applicable federal regulations and produced valid test results that indicated claimant had indeed operated the employer's tractor-trailer while under the influence of alcohol in violation of the employer's policy and FMCSA regulations. See Exhibit 17. In addition, the evidence establishes that claimant possessed alcohol in the employer's truck for personal consumption in violation of the employer's policy. Claimant's actions constituted misconduct in connection with the employment and disqualify him for unemployment insurance benefits. Claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to claimant.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Claimant has failed to present any evidence to establish that he has been able to work or available for work since he established his claim for unemployment insurance benefits. Claimant has presented no evidence to indicate he has satisfied the FMCSA drug and alcohol evaluation and treatment requirement or otherwise taken any steps to have his commercial driving privileges reinstated. Claimant has consistently reported to Iowa Workforce Development, and to the Employment Appeal Board, that he is suffering from a major medical condition. Claimant has advised the agency that he is under the care of one or more physicians, that he recently underwent significant surgery, and that he would require home health care services after the surgery. Claimant has not demonstrated that he has been able to work and available for work and is not eligible for benefits. Benefits are denied effective October 2, 2011.

This matter will be remanded for entry of an overpayment decision concerning all of the benefits claimant has received since October 2, 2011.

**DECISION:**

The Agency representative's October 19, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant has not been able and available for work since he established his claim. Benefits are denied effective October 2, 2011.

This matter is remanded for entry of an overpayment decision concerning all of the benefits the claimant has received since October 2, 2011.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs