The claimant was aware that under the employer's written drug-testing policy and federal department of transportation regulations, the claimant was subject to random testing and could be subject to termination if the claimant tested positive for illegal drugs. On May 22, the claimant's name was randomly selected by computer by the employer's independent drug testing consultant. The claimant was informed of the fact that of being selected for testing and needed to report to a clinic to provide a urine sample, and promptly did so. A urine sample was taken from the claimant at a certified clinic, and was analyzed by a certified laboratory. The employer did not have details regarding the collection process and did not present the complete chain of custody documentation.

The sample was split to allow a test of the split sample. Initial testing processes were run on the primary sample. The preliminary analysis was that the sample had a pH which was too low to be unadulterated. The test results were reviewed by a qualified medical review officer (MRO) who contacted the claimant. The claimant indicated the claimant routinely took a medication for high blood pressure and that additionally daily drank a solution of vinegar and water; the MRO indicated to the claimant that the MRO did not find this to be an adequate medical explanation for the low pH level. The MRO therefore concluded that the sample had somehow been adulterated, which was viewed by the MRO and the employer as a "refusal to test." No medical evidence was presented offering explanations as to how a test subject could have adulterated urine resulting in a low pH if there was a presumably properly collected and maintained sample with proper security observed in the collection process.

When the MRO's office informed the employer of the test results, the employer informed the claimant that the claimant must submit and pay for a testing of the split portion of the sample, a cost of approximately $200.00. Information as to the employer's cost of having the initial testing conducted was not provided. The claimant declined to do pay for testing on the split sample, indicating that if there was a problem with the initial portion of the sample, the same problem would likely exist with the reserved portion of the sample. The claimant denied doing anything intentionally that could have resulted in an untestable sample, and further denied consumption of any of the drugs for which the sample was to have been tested. The employer did not seek to have the claimant provide a new urine sample, but rather only sought further testing of the split portion of the sample. When the claimant declined to pay for the split sample to be tested, the employer discharged the claimant.

The employer's policies provide that an employee is subject to discharge if the employee "fail[s[[or] decline[s] to take a second test the company or collector has directed you to take." Another provision specifies that "if there is no acceptable medical explanation for the test result . . . it is reported as a refusal to test if the specimen was adulterated. Concluding that the claimant had refused to test both due to the MRO's report that the sample was "adulterated" and because the claimant declined to pay for the split portion of the sample to be retested, the employer discharged the claimant.

The claimant established an unemployment insurance benefit year effective December 24, 2006. The claimant filed an additional claim effective June 3, 2007.

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). Although the employer did not request such a stipulation before the hearing, it did so during the hearing; I conclude the failure to request the stipulation before the hearing does not 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.

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). 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 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 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 her 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.

Turning to the separation issue, a claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or

b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or

2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with applicable drug testing laws. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "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 tested under federal law and regulations. Iowa Code § 730.5-2. Although the Iowa 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 employer seeks to assert that both the conclusion that the initial sample was "adulterated" and the claimant's refusal to pay for the testing of the split portion of the sample both constitute a "refusal to test" subjecting the claimant to termination under the employer's policies. While concededly a truly adulterated sample can constitute a "refusal to test," the opportunity for testing of the split sample is designed to be a right, a protection for the person subjected to the testing process, not an additional obligation for which a declination is separately deemed to be a "refusal to test." 49 CFR § 40.153.

The claimant asserts that the conclusion that the test sample was adulterated was invalid, as the claimant did nothing knowingly that would affect the validity of the sample. The employer has not presented any evidence as to anything the claimant conceivably could have done that would have resulted in a too low pH. This calls into question the legitimacy of the collection process and the chain of custody, for which the employer did not provide sufficient evidence to conclude that it was proper, particularly in the face of the question raised. Further, the claimant had good cause to decline to expend a significant sum on the remaining portion of a sample that was questionable as to its collection or custody. The claimant's failure to have the split portion of the original sample tested is not the same as "decline[ing] to take a second test" – there would have to be a new sample collection in order for an employee to "take" a second test.

The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began October 1, 2005 and ended September 30, 2006. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's July 17, 2007 decision (reference 03) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if the claimant is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/kjw