

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SAMUEL L LOCKETT**  
Claimant

**APPEAL NO. 11O-UI-00934-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SCHENKER LOGISTICS INC**  
Employer

**OC: 08/08/10**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge  
Iowa Code section 730.5 – Private Sector Drug-free Workplace Testing

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated September 20, 2010, reference 03, which denied benefits upon a finding that the claimant violated a known company rule. After due notice, a telephone hearing was held on November 9, 2010. The claimant participated personally. The employer participated by Amy Pasqualetto, Hearing Representative and witnesses, Nicki Brick and Dr. John Budnick, Medical Review Officer. On November 12, 2010 an administrative law judge decision was issued affirming the fact-finder's decision that the claimant had been discharged under disqualifying conditions. The decision was appealed to the Employment Appeal Board. On January 21, 2011 the matter was remanded for additional fact taking on the issue of whether a split sample was taken and the claimant was aware of it,, the method of notification of the positive test results and evidence as to what the employee assistance program consisted of. A telephone hearing was held on February 28, 2011. Although duly notified the claimant, Samuel Lockett did not respond to the notice of hearing and did not participate. The employer participated by Mr. Rob Kincade, Hearing Representative; Ms. Nicki Brick, Human Resource Manager; and Dr. John Budnick, Medical Review Officer.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Samuel Lockett was employed by Schenker Logistics from August 18, 2008 until June 25, 2009 when he was discharged for violation of a known company rule, failing a drug test urinalysis. Mr. Lockett was employed full time and worked as a pallet jack operator. He was paid by the hour.

Mr. Lockett was discharged after he failed a random drug urinalysis that was taken on June 25, 2009. After the claimant was informed that the urinalysis was to be taken that day the claimant requested to forego the drug testing by entering into an employee assistance program instead. The claimant's request was denied as the company policy provides that a request for employee

assistance for drug rehabilitation must be made prior to an employee being informed of the day of testing.

Mr. Lockett was discharged for violation of the employer's drug policy due to his positive test for marijuana. The employer has a written drug testing policy per Iowa Code section 730.5(9)(b) and tested the claimant on a random basis. The claimant was advised of the drugs to be tested and was given an opportunity to advise the medical review officer, Dr. Budnick of any drugs that he was taking that might affect the outcome. The test was performed during the normal workday within the facilities and split samples were taken at the time of collection. Iowa Code section 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive test results before reporting the results to the employer. Iowa Code section 730.5(7)(g). The medical review officer concluded that no medications the claimant was taking could have given a positive test result for marijuana.

The claimant was notified by certified mail, return receipt requested of the positive test results and his right to obtain a confirmatory test of the secondary sample and the claimant was given excess of seven days to request a confirmatory test. Iowa Code section 730.5(7)(i)(1) and (2). Mr. Lockett was advised that if he wanted to proceed to test the secondary sample he needed to notify the human resource manager. Mr. Lockett declined to do so.

The employer maintains an employee assistance program and notifies each employee of the policy and procedures at the time of hire. Iowa Code section 730.5(9)(c)(1).

Based upon the claimant's positive test results that were confirmed by a second confirmatory test using a different test method, and the claimant's failure to request testing of the split sample the suspension from work initially imposed by the employer became a termination from employment. Mr. Lockett was aware of the split sample that had been maintained and his right to obtain a confirmatory test but did not invoke his statutory right to request and obtain a confirmatory test of the second sample at a laboratory of his choice.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code section 96.5-2-a.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug policy due to his positive test result for marijuana. Iowa Code section 730.5 sets forth the rules at which a private company may screen its employees for use of illegal drugs. 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 Iowa's drug testing laws. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999). The Eaton Court stated, "It would be contrary to the spirit of chapter 730 to allow an employer the benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee for unemployment compensation benefits." Eaton, 602 N.W.2d at 558.

The employer complied with the Iowa drug testing statute and its own policies. A preponderance of the evidence establishes the claimant violated the employer's drug policy.

The claimant was provided notice of the company's employee assistance program and chose not to avail himself of the program prior to being notified of a date set for drug testing. The employer complied with the provisions of Iowa's drug testing statute in the manner in which the sample was taken and split sample maintained in the proper amount and for the proper period of time to allow retesting if the claimant exercised his right to request retesting. The claimant was aware of the drug prohibited under company policy and the claimant was contacted by a medical review officer to determine if any other factors had possibly skewed the claimant's test results. Mr. Lockett was notified of the positive test results by certified letter, return receipt requested and informed of his right to request testing of the split sample. The claimant was given seven or more days to request retesting but did not do so.

Based upon the facts of this case and the application of the law the administrative law judge concludes the employer has sustained its burden of proof in establishing the claimant's discharge was disqualifying under the provisions of the Employment Security Act. Benefits are withheld.

**DECISION:**

The representative's decision dated September 20, 2010, reference 03, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has

worked in and been paid wages for insured work equal to ten times his weekly benefit amount, providing that he meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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