

judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time assembler or paint preparation person from February 28, 2005 until he was discharged on August 15, 2005. The claimant was discharged for not following a Commitment Letter that he had signed on July 20, 2005 as shown at Employer's Exhibit Two and in particular in his failure to get along with a co-worker. The claimant had problems with a co-worker who was the father of his girlfriend. These problems were personal and did not arise out of their employment. The two had several verbal fights while at work on the employer's premises. The claimant received at least one oral warning from Randy Ennen, Second Shift Supervisor, and one verbal warning from the employer's witness, LeAnne Van Ort, Human Resources Manager, before July 20, 2005. Because the claimant and the co-worker continued to have difficulties, the claimant was brought in on July 20, 2005 and his difficulties with the co-worker were discussed. The claimant executed a Commitment Letter as shown at Employer's Exhibit Two committing himself to not repeating work performance issues and communicating in a professional manner and entering into a program with the employer's Employee Assistance Program. The Commitment Letter indicated that any further outbursts of anger or insubordination or disruptive and offensive behavior would result in his immediate termination. Fifteen days later the claimant delivered to the Human Resources Office a list of the things the co-worker was doing from 2:55 p.m. to 4:58 p.m., as shown at Employer's Exhibit One. None of those documented matters involved the claimant. The claimant had no job responsibilities to observe and document what the co-worker was doing. The documentation was not even necessary. The claimant was then discharged.

Prior to July 20, 2005, the claimant had asked another co-worker to deliver a message to the co-worker with whom the claimant was having difficulties informing the co-worker to stay out of the claimant's house. While attending the Employee Assistance Program the claimant had difficulties with his male counselor to the extent that the counselor had to be changed. Nevertheless, the claimant was not expelled from the program but had not completed the program before his discharge. Pursuant to his claim for unemployment insurance benefits filed effective August 28, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,419.00 as follows: \$183.00 for benefit week ending September 3, 2005 (earnings \$23.00) and \$206.00 per week for six weeks from benefit week ending September 10, 2005 to benefit week ending October 15, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is

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.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on August 15, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, LeAnne Van Ort, Human Resources Manager, credibly testified that the claimant was discharged for violating a Commitment Letter that he signed on July 20, 2005 and which appears at Employer's Exhibit Two. The claimant had been having difficulties with a co-worker who was the father of his girlfriend. Apparently these difficulties stemmed from personal matters outside of work but the two brought them to work and entered into several verbal fights. The claimant was given at least two verbal warnings prior to July 20, 2005 about his conduct. Finally, on July 20, 2005 the claimant was brought in and given a warning and signed a Commitment Letter as shown at Employer's Exhibit Two. The Commitment Letter is self explanatory. Nevertheless, it appears that the claimant's work performance was suffering because of his personal matters and he was involving other co-workers in his dispute with the co-worker with whom he was having problems and he was being disruptive and offensive. The claimant committed to not repeating any of the work performance issues for which he was warned and promised to communicate and act in a professional appropriate manner and begin a program in the employer's Employee Assistance Program. The claimant acknowledged that any further outbursts of anger, insubordination,

disruptive and offensive behavior would result in his immediate discharge. Just 15 days after executing the Commitment Letter the claimant observed the work of the co-worker with whom he was having difficulties for two hours and wrote up a list of the things the co-worker was doing as shown at Employer's Exhibit One. The claimant then submitted this list to the employer. The claimant had no job responsibilities to observe that co-worker or make up such a list. Even the claimant conceded it was not necessary. The claimant also conceded that nothing on the list had anything to do with him.

The administrative law judge concludes that the claimant was basically continuing with his difficulties with the co-worker and merely instigating additional difficulties and was not in compliance with the Commitment Letter. The claimant's testimony to the contrary is not credible. The claimant testified that he was never the instigator of any difficulties with the co-worker and he did nothing to instigate or cause the difficulties and that he was even afraid of the co-worker. However, the claimant conceded that he got into several verbal fights with the co-worker and further conceded that he had asked an employee to give a message to the co-worker that the co-worker was to stay out of his house. It appears that the claimant was equally responsible for the difficulties. If he was truly afraid of the co-worker or was not instigating he would not have engaged in the verbal fights and he would not have asked the employee to give a message to the co-worker and he would not have made the list as shown at Employer's Exhibit One. More compellingly, the claimant entered the Employee Assistance Program but had difficulties with the counselor and his counselor had to be changed. Even the claimant reluctantly but finally conceded this.

The administrative law judge believes that it always takes two parties to enter into a fight, verbal or otherwise, or to continue and maintain difficulties between the two. Clearly the claimant was given at least two oral warnings for this behavior and then was sat down and given another warning resulting in the Commitment Letter. The claimant violated the warnings and the Commitment Letter and was discharged. The administrative law judge is constrained to conclude that the claimant's violation of the warnings and the Commitment Letter were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinced a willful or wanton disregard of the employer's interest and were, at the very least, carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,419.00 since separating from the employer herein on or about August 15, 2005 and filing for such benefits effective August 28, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 19, 2005, reference 01, is reversed. The claimant, Eric G. Nelson, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,419.00.

kkf/kjw