

Claimant was suspended on August 17, 2005 by employer because he was allegedly smoking on the barge. Claimant had been warned in June 2005 about smoking on the boat. The captain found cigarette butts in claimant's room on August 10, 2005. Claimant was not confronted concerning the smoking until August 17, 2005. Claimant was then suspended for 60 days due to the smoking violation. Claimant did not smoke in his room August 10, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this matter is whether claimant was discharged for misconduct.

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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be

based on such past act or acts. The termination of employment must be based on a current act.

In this matter, the evidence fails to establish that claimant was suspended for an act of misconduct when claimant violated employer's policy concerning smoking in a barge room. Claimant was warned concerning this policy.

The last incident, which brought about the suspension, fails to constitute misconduct because claimant was not caught smoking. The employer found cigarette butts in the room but did not observe claimant smoking. Furthermore there is no current incident of misconduct for which the disciplinary suspension was invoked. Employer waited seven days to confront claimant on the issue of smoking. This is too stale to amount to a current incident of misconduct. The administrative law judge holds that claimant was not suspended for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated September 8, 2005, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

mdm\s