

evidence. The administrative law 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, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer, most recently as a part time clerk or delivery person from September 24, 1993 until he was discharged on August 22, 2005. The claimant averaged between 10 and 15 hours per week. The claimant was discharged for a lack of concern for the responsibilities of his job including a refusal to come to work when scheduled. For at least one year the claimant was dependant upon a posted schedule to determine the hours and days when he would work. The claimant was expected to always check that schedule. A schedule was posted two weeks before August 20, 2005 as shown at Employer's Exhibit 2 scheduling the claimant to work on Saturday, August 20, 2004 from 4:00 p.m. to 6:00 p.m.

Although the claimant was scheduled to work on August 20, 2005 at 4:00 p.m. he did not show up for work nor did he call and notify the employer that he was not coming to work. A pharmacy technician called the claimant and asked the claimant if he was coming to work. At that time the claimant was assigned to making deliveries from the pharmacy. The claimant informed the technician that he was not supposed to work and was not on the schedule. The pharmacy technician checked the schedule and came back and told the claimant that he was on the schedule. The claimant informed her that in any event, he was not coming to work. The pharmacy technician reported this to the Assistant Store Director Jaime Grannon, one of the employer's witnesses. Mr. Grannon called the claimant at approximately 4:15 p.m. Mr. Grannon told the claimant that he was in fact on the schedule and asked if he was coming to work. The claimant said that he had company and he was playing cards. Mr. Grannon then found a replacement for the claimant at approximately 4:30 p.m. the claimant arrived at the employer's but by that time he had been replaced. He was told to go home and come back on Monday, August 22, 2005 and speak to the Store Director Marc Hall, one of the employer's witnesses. The claimant did so and was discharged.

On Monday, August 15, 2005, the claimant came into the office of Mr. Hall. Mr. Hall pointed out to the claimant that he was on the schedule and asked the claimant if he was aware of that. He offered to make a photocopy of the schedule for the claimant. The claimant refused this and said he would just write it down. However, the claimant did not write down that he was on the schedule and missed work on August 20, 2005 as noted above. The claimant had received two verbal warnings with written records, as shown at Employer's Exhibit 1. Both were for delivering prescriptions to the wrong address. The first occurred on July 6, 2005 and the second on August 18, 2005. When the claimant received a second verbal warning he was specifically told that he cannot make mistakes in his job and he must take his job seriously and responsibly. The claimant said he understood. The claimant was informed at that time that this would be his last warning. Two days later the claimant did not show up for his shift as noted above.

Pursuant to his claim for unemployment insurance benefits filed effective August 21, 2005, the claimant had received no unemployment insurance benefits. Records show no weekly claims made by the claimant and no payments made to the claimant.

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 22, 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 witnesses credibly testified that the claimant was scheduled to work on August 20, 2005 from 4:00 p.m. to 6:00 p.m. They further testified that the schedule was posted two weeks before August 20, 2005. The schedule appears at

Employer's Exhibit 2 and clearly indicates that the claimant is scheduled to work on that day for those hours. The schedule was even pointed out to the claimant on August 15, 2005 by the employer's witness, Marc Hall, Store Director. On that day Mr. Hall reminded the claimant that he was on the schedule and asked him if he wanted a photocopy of the schedule. The claimant refused the copy and said he would write it down. Apparently the claimant did not write it down and missed work. When the claimant was called to come to work he refused, stating that he had company and was playing cards. Eventually, the claimant came to work but late and after a replacement had been found. The claimant was told to go home and report back to Mr. Hall on the following Monday, August 22, 2005. The claimant did so and was discharged.

Ordinarily, and in the absence of any other evidence, the administrative law judge would conclude that the claimant's failure to miss one day of work would not be disqualifying misconduct. There would be no evidence that the claimant's failure was either willful or deliberate or negligence or carelessness in such a degree of recurrence, as to establish disqualifying misconduct. However, the administrative law judge is constrained to conclude here that the claimant's failure was at the very least carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant was twice given verbal warnings with a written record as shown at Employer's Exhibit 1 for delivering the wrong prescriptions. These warnings followed close upon each other and the last warning, on August 18, 2005 was only two days before the claimant failed to show up for work on August 20, 2005. The claimant was clearly on notice, or should have been on notice, that the employer was concerned about his work. It is true that the two warnings were for delivering prescriptions to the wrong address, but on the last warning the claimant was told that he could not continue to make mistakes and that he needed to take his job seriously and responsibly. The claimant was informed at that time that that was his last warning. The claimant's testimony to the contrary is not credible because throughout the claimant's testimony he was vague and inconsistent. Further, there is evidence that the claimant was dependent upon a schedule to determine his work hours and days, for at least one year. The claimant was even reminded on August 15, 2005, that he was on the schedule. The claimant must not have checked the schedule or if he did, did not see his name and this is negligence. Because of the warnings the claimant received, the administrative law judge is constrained to conclude that the negligence was reoccurring and was therefore disqualifying misconduct.

In summary, and for all the reasons set out above, 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 no unemployment insurance benefits since separating from the employer herein on or about August 22, 2005 and filing for such benefits effective August 21, 2005. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

DECISION:

The representative's decision of September 16, 2005, reference 01, is reversed. The claimant, Virgil D. Swaim, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

dj/pjs