

employer to call. No one did so before the record was closed and the hearing was over at 2:16 p.m. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 4:04 p.m. on October 6, 2005, the administrative law judge spoke to the claimant who asked that the hearing be rescheduled because he was working with the employer to get his job back. The administrative law judge agreed and rescheduled the hearing at his request.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time alcohol operator from November 1997 until he was discharged on July 12, 2005. The claimant was discharged for smoking in a non-smoking area. The claimant was in the southeast corner of the plant where alcohol load out is performed. The claimant went outside of the control room and into the alcohol load out area and smoked a cigarette. The area of the plant where the claimant was working makes alcohol. The claimant was fully aware that alcohol is extremely flammable. The claimant also knew that the area was a non-smoking area. The employer had made that area and, in fact, the whole plant, non-smoking in July of 2004. Sometime prior to the claimant's smoking the plant manager had sent out a written warning to all employees informing them that if anyone was caught smoking in the plant they would be discharged. The claimant was caught smoking in the plant and was discharged.

Pursuant to his claim for unemployment insurance benefits filed effective August 28, 2005, the claimant had received no unemployment insurance benefits. Iowa Workforce Development records show no weekly claims made by the claimant nor any 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 not because he has received no such benefits.

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 claimant credibly testified, and the administrative law judge concludes, that he was discharged on July 12, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although the employer did not participate in the hearing, the administrative law judge nevertheless concludes that there is a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The claimant credibly and candidly testified that he was caught smoking in a non-smoking area of the plant. At the time the claimant was working in the alcohol load out area. The claimant was aware that alcohol is extremely flammable. The claimant was also aware that it was a designated non-smoking area by the employer. In July of 2004 the employer had prohibited smoking in the entire plant. Further, sometime prior to the claimant's smoking in the plant, the plant manager had sent out a written warning to all employees informing them that if anyone was caught smoking in the plant they would be discharged. The claimant had no reasonable explanation as to why he was smoking in the plant. The claimant testified that it was a "dumb mistake." The administrative law judge agrees and believes that it was well past "dumb." Not only was the smoking prohibited by the employer and the plant designated as a non-smoking area and the claimant was aware of that, there is the enormous safety issue. The claimant was knowingly smoking in an alcohol load out area. Among other things the plant made alcohol for ethanol and the claimant was working in that area of the plant where the alcohol was loaded out. Smoking in such an area must be extremely hazardous. Because the claimant was aware that this was a non-smoking area and was aware of the safety involved and further aware from the written warning of the plant manager, that if he was caught smoking he would be discharged, the administrative law judge is constrained to conclude that the claimant's smoking in the prohibited area was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is therefore disqualifying misconduct. Accordingly, 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 July 12, 2005 and filing for such benefits effective August 28, 2005. The administrative law judge further concludes that since the claimant has received no such benefits he is not overpaid any such benefits.

DECISION:

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

dj/kjw