

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 as a full-time line cook from July 5, 2000 until he was discharged on September 15, 2005. The claimant was discharged for insubordination and poor attitude arising out of his inability to control his emotions or anger towards co-workers and in particular managers. On September 13, 2005, the claimant was running the line and he got very busy. He could not handle everything and he was getting behind on his tickets. The employer's witness, Linda Mausser, Beverage Hospitality Manager, approached the claimant and asked why there were delays. The claimant said he was busy and needed help. Ms. Mausser, in some way, volunteered to help the claimant, indicating that she could assemble. The claimant said abruptly that that was not what he needed, he needed someone else. The claimant was angry at Ms. Mausser. He complained that they were short staffed. Ms. Mausser explained to the claimant that he would have to work with what the employer had at the time. The claimant continued the argument stating that he was tired of multiple tasking and continued to argue further with Ms. Mausser. Ms. Mausser told the claimant that if he could not do the work, he should leave. The claimant left and went out and had a cigarette and returned and apologized to Ms. Mausser and finished his shift. When the claimant returned to work on September 15, 2005, he was confronted about this and admitted that he had been hostile to the employer and the claimant was discharged as shown at Employer's Exhibit 2, which is a performance discussion recap.

Although the claimant had received no written warnings for his behavior, his attitude and emotions and inability to get along with crewmembers was mentioned frequently in his performance reviews. In the claimant's performance review in January of 2002, the claimant's poor attitude and his failure to get along better with his crewmembers was mentioned. In the claimant's performance review in March of 2003, the claimant was informed that he needed to improve his attendance and to become more consistent in his production methods. In his performance review in September of 2003, the claimant was informed that he needed to control his emotions. At that time the claimant wrote out a response admitting that he needed to work on his discussions with crewmembers. In his performance review in March of 2004, the claimant was informed that he needed to keep calm with other crewmembers. At that time the claimant admitted that he needed to improve his relationship with managers. In his performance review in August of 2004, the claimant was admonished for letting his emotions get out of hand. Finally, in his performance review in January of 2005, as shown at Employer's Exhibit 1, the claimant was noted as needing improvement in remaining calm and patient in stressful situations concerning self-responsibility. The claimant was specifically reminded that he needed to remember to watch late at night his relationships with servers because he tends to get cranky with them at close. Finally, in addendum review on August 6, 2005, also shown at Employer's Exhibit 1, the claimant is noted as struggling in the area of total commitment and that he needed to improve in "crewmanship" along with "leadership." The claimant was reminded that he needed to earn the respect of his fellow crewmembers by treating them with respect. Again, the claimant was reminded that he needs to stress personal pride with product put out and remain calm in stressful situations. The claimant did not improve in these matters throughout his employment and they were continually noted in his performance reviews. Even the claimant conceded that he was emotional and that it was always an area that he needed to work on. There was no other reason for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective September 18, 2005, the claimant has received unemployment insurance benefits in the amount of \$378.00 as

follows: \$189.00 for two weeks, benefit weeks ending September 24, 2005 and October 1, 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 September 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 witnesses credibly testified that on September 13, 2005, the claimant became angry and hostile towards the beverage hospitality manager, Linda Mausser, one of the employer's witnesses, when Ms. Mausser simply offered to help the claimant. The claimant was running the line at the time and was getting busy and was getting behind on orders called tickets. Ms. Mausser asked the claimant why and he said that he was busy and needed help. Ms. Mausser offered to help assemble. The claimant became angry and stated that that was not what he needed but he needed someone else. The claimant then continued to argue with Ms. Mausser about the shortage of staff. Ms. Mausser responded that the claimant would have to work with what was available. The claimant continued to be angry and argue. Ms. Mausser told the claimant that if he did not want to work he should leave. The claimant went out and had a cigarette and then returned and apologized to Ms. Mausser and finished his shift. The next working day for the claimant on September 15, 2005, he was discharged for this incident. The claimant concedes that he was angry and he must have even recognized that he was angry because his actions caused him to apologize. If this had been the only incident, the administrative law judge might conclude that it was merely an isolated instance of carelessness or negligence. However, the claimant had a long history of a poor attitude and difficulties in relating to crewmembers and managers.

He received warnings for the above behavior similar behavior in his performance reviews in January of 2002; March of 2003; September of 2003; March of 2004; August of 2004; and July of 2005 including and addendum to the performance review on August 6, 2005. The claimant's performance review in July of 2005 and the addendum thereto, dated August 6, 2005, appear at Employer's Exhibit 1. Even the claimant conceded that he was emotional and that it was always an area he needed to work on. It is clear from all of these performance reviews that the claimant did not improve on these matters. They ultimately culminated with the incident on September 13, 2005. It is true that the claimant received no specific warnings or reprimands for this behavior, but the administrative law judge believes that all of the performance reviews were similar to warnings and should have apprised the claimant that he needed to work on his attitude and his relationship with crewmembers and the control of his emotions and anger. Even the claimant concedes that he needed to work on this. It is also clear that the claimant did not improve on these matters.

Because of the numerous performance reviews and the claimant's continued lack of improvement culminating in the incident of September 13, 2005, the administrative law judge is constrained to conclude that the claimant's behaviors were deliberate acts constituting a material breach of his duties and obligations arising of his workers contract of employment and evince a willful and wanton disregard of an employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. What occurred here was far more than ordinary negligence in an isolated instance or a good faith error in judgment or discretion or mere inefficiency, or failure in good performance as a result of an inability or incapacity. The claimant simply would not control his emotions when he was busy, even after repeated warnings in his performance reviews to do so. This is disqualifying misconduct.

In summary, and for all the reason 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 unemployment insurance benefits in the amount of \$378.00 since separating from the employer herein on or about September 15, 2005 and filing for such benefits effective September 18, 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 Iowa law.

DECISION:

The representative's decision of October 5, 2005, reference 01, is reversed. The claimant, Jeremiah L. 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 \$378.00.

dj/kjw