FILED
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IN THE COURT OF APPEALS OF IOWA

STEVEN J. ROWAN,

Petitioner-Appellant,

vs.

BULLOCK, INC., and IOWA DEPARTMENT OF JOB SERVICE,

Respondent-Appellee.

Filed April 23, 1986

6-47
85-1206

Appeal from the Iowa District Court for Dubuque County (No. 45112), Robert J. Curnan, Judge.

Petitioner appeals from the district court's affirmance of the Job Service decision denying his unemployment benefits on the basis of misconduct. **REVERSED AND REMANDED.**

Virginia L. Lins of Legal Services Corporation, for petitioner-appellant.

Blair Dewey, Iowa Department of Job Service, for respondent-appellee.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Appellant Rowan appeals from the district court ruling disqualifying him from receiving unemployment benefits. We reverse and remand.

Judicial review in the case of a worker fired for misconduct are at law and controlled by § 17A.19(8). Cook v. Iowa Department of Job Service, 299 N.W.2d 698, 701 (Iowa 1980). We review the record as whole to determine whether our decisions are the same as the trial court's. We may substitute our conclusions and legal judgments for those of the agency. Id.

In Iowa Administrative Code § 370-4.32(1) the Department defines misconduct as encompassing deliberate acts and deliberate omissions breaching the duties and obligations of the employment contract, willful and wanton disregard of the employer's interests, carelessness and negligence which shows equal culpability, wrongful intent and evil design, and an intentional and substantial disregard of the employer's interests and the employee's duties. I.A.C. § 370-4.32(1). This definition of misconduct has been accepted by the Iowa Supreme Court in Huntoon v Iowa Department of Job Service, 275 N.W.2d 2d 445, 448 (Iowa 1979).

The Department has further defined certain specific acts as constituting misconduct. The applicable specific regulation here is § 370 I.A.C. 4.32(7), which provides:

> Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered as misconduct except for illness or other reasonable grounds for which the employees was absent and that was properly reported to the employer.

In Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), the Iowa Supreme Court determined that tardiness, as well as absenteeism, falls within the scope of this rule.

The Department made a finding of fact that claimant was to deliver a load in Clinton on both days at 6:00 a.m. and that he showed up at the employer's

place of business at 6:30 a.m. on the first day and after 6:00 a.m. on the second day. Since there is sufficient evidence in the record to support this finding, we accept it as established fact. The employer asserted no additional incidents of misconduct in his work record. We find that two tardies unaccompanied by warnings to a worker do not constitute misconduct. In Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984), we wrote, "The acts for which petitioner was ultimately discharged were for arriving for work one and three minutes late. Standing alone, these do not constitute misconduct."

Because Rowan was terminated for acts which fall short of misconduct, we reverse and remand.

REVERSED AND REMANDED.

All judges concur except Hayden, J., who dissents.

HAYDEN, J. (dissenting)

I respectfully dissent.

I agree with the trial court's and the agency's conclusion that Rowan's actions show an intentional disregard of the employer's interest to the extent they constitute misconduct.