FILED
FEB 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HOWARD C. CLARK,

Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD, DEPARTMENT OF INSPECTIONS AND APPEALS, AND DIVISION OF JOB SERVICES, DEPARTMENT OF EMPLOYMENT SERVICES,

Respondents-Appellees.

95

8-331
88-277

Appeal from the Iowa District Court for Crawford County (28856), Richard J. Vipond, Judge.

Petitioner appeals the ruling of the district cout which affirmed the decision of the employment appeal board denying him unemployment benefits. **AFFIRMED.**

James Furey, Carroll, for petitioner-appellant.

Blair H. Dewey and William C. Whitten, Employment Appeal Board, for respondents-appellees.

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

SCHLEGEL, J.

Petitioner Howard C. Clark appeals the district court's ruling affirming the decision of the employment appeal board denying him unemployment benefits because he was discharged for misconduct involving excessive tardiness. On appeal, Clark claims that his tardiness was unintentional as a matter of law and the employment appeal board did not set forth sufficient findings of fact or a reasoned opinion.[1] We disagree and affirm.

In this case, there is little dispute as to the facts. The hearing officer found the following facts, which we adopt:

> The claimant was employed from August 8, 1983, through May 5, 1987, as a full-time production employee [at the Dubuque Packing Company]. He was discharged based upon his attendance record.
>
> On May 5, 1987, the claimant was nearly three hours late for work, having overslept. On April 18, the claimant was one and three-quarters hours late for work, having again overslept. On

---

1. Clark also asserts claims based upon wrongful termination by his employer. We note that our determination in this case does not involve the question of an employer's right to terminate his employee. Our sole task is to determine whether Clark is entitled to unemployment benefits as a matter of law. See Infante v. Iowa Dep't of Job Service, 364 N.W.2d 262, 264 (Iowa App. 1984). See also Newman v. Iowa Dep't of Job Service, 351 N.W.2d 806, 808 (Iowa App. 1984) (what constitutes misconduct justifying termination of employee and what is misconduct warranting denial of unemployment benefits are two separate decisions).

> December 31, 1987 (sic),[2] the claimant was almost one hour late for work, having again overslept.
>
> Even though the employer distinguishes between excused and unexcused absences, it maintains an attendance policy that does impose discipline for excessive excused absences. The claimant received two written warnings in 1985 and two in 1986 concerning his attendance. On January 14, 1987, he was placed on probation based upon two absences and one tardy (one of the absences being for family illness, when his wife gave birth). During 1986, the claimant's other absences were all for properly reported illnesses.

An Iowa Department of Job Service (Job Service) representative determined that although the claimant had been discharged, misconduct had not been established. Upon hearing, a hearing officer found that Clark had been discharged for "excessive tardiness" which constituted misconduct. The Employment Appeal board affirmed the hearing officer's decision. Upon Clark's petition for judicial review, the district court affirmed the agency decision.

> In cases arising out of the Iowa Administrative Procedures Act, our scope of review is limited to the correction of errors of law and no de novo. Iowa Code § 17A.20 (1985). In order to uphold the decision of the Job Service Appeal Board, such decision must be supported by substantial evidence in the record before the agency when the record is reviewed as a whole. Fernandez v. Iowa Dep't of Human Services, 375 N.W.2d 701, 705 (Iowa 1985). Evidence is substantial to support

---

2. As the district court noted, the hearing officer and the Employment Appeal Board intended to refer to the tardiness which occurred on December 31, 1986.

> an agency's decision if a reasonable person would find it adequate to reach the given conclusion. Meads v. Iowa Dep't of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). Though two inconsistent conclusions may be drawn from the record, such a possibility does not prevent the agency's finding from being supported by substantial evidence. Contract Services, Ltd. v. Iowa Dep't of Job Service, 372 N.W.2d 212, 215-16 (Iowa 1985).

Ray v. Iowa Dep't of Job Service, 398 N.W.2d 191, 193 (Iowa App. 1986).

Under Iowa Code section 96.5(2)(a) (1987), an individual may be disqualified for unemployment benefits if that individual is discharged for misconduct. "Misconduct" has been defined by 370 Iowa Admin. Code section 4.32(1)(a) as "carelessness or negligence of such degree of recurrence as . . . to show an intentional and substantial disregard of the employer's interest. . . . On the other hand . . . inadvertencies or ordinary negligence in isolated instances . . . are not to be deemed misconduct. . . ." This general definition of misconduct has been approved by the Iowa Supreme Court as an accurate reflection of legislative intent. Huntoon v. Iowa Dep't of Job Service, 275 N.W.2d 445, 448 (Iowa 1979), cert. den., 444 U.S. 852, 100 S. Ct. 105, 62 L.Ed.2d 68 (1979).

In the case at bar, Clark was discharged from his employment for having three "offenses" involving excessive absenteeism and tardiness within a period of one year. Pursuant to company rules, an employee could be terminated if he accumulated three "offenses" of absenteeism or tardiness in a year, whether excused or unexcused. Three

tardies, if they occur within a year, constitute a single offense.

Clark was given his first warning slip on May 8, 1986, for excessive absenteeism. On October 14, 1986, Clark was given a second warning for excessive absenteeism. Termination followed on May 5, 1987, for "excessive lates." The hearing officer found that all of the absences in 1986 were properly excused, and we give these absences no consideration in our determination. See Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 9 (Iowa 1982) (excessive absenteeism caused by incapacitating illness or other reasonable grounds for which claimant excused not misconduct).

The acts for which Clark was ultimately discharged were for arriving at work approximately one hour late, three hours late, and one and three-quarters hours late within a little over a four-month period due to oversleeping. Oversleeping cannot be deemed a "reasonable ground" for missing work. Higgins v. Iowa Dep't of Job Service, 350 N.W.2d 187, 191 (Iowa 1984). In Infante v. Iowa Dep't of Job Service, 364 N.W.2d 262 (Iowa App. 1984), the Iowa Supreme Court, citing Higgins, noted that "absenteeism includes conduct that is more accurately described as tardiness. As a practical matter, an absence is an extended tardiness and a tardiness is a limited absence." Id. at 266. The court further noted:

> In Higgins, the supreme court construed the terms "absenteeism" and "absences" as used in 370 Iowa Administrative Code, section 4.32(7) to refer to the time in which an employee is not at work when he or she is scheduled and expected to be there, irrespective of the length of such time. The court further noted that the determination of whether "unexcused absenteeism" is "excessive" necessarily requires the consideration of past acts and warnings.

Infante, 364 N.W.2d at 266-67.

Upon our review of the relevant case law, we conclude the evidence in the record is sufficient to support the agency's finding that Clark's tardiness amounted to "excessive unexcused absenteeism" and, thus, "misconduct." A review of the record indicates that Clark had one previous warning on September 25, 1985, for three excessive lates in 1985 for which he was suspended--the identical conduct which caused his discharge. The record also indicates that Clark was suspended on December 6 of that same year for an unexcused absence. As the district court stated:

> The significance of [the] tardiness depends on the nature of an employee's job. Some jobs permit a certain amount of tardiness without causing a problem for the employer. It is only necessary that projects be completed on time. The petitioner, however, did not have such a job. He was a production employee in a packing plant. His employer needed to have him on the job on time.

We therefore affirm the agency's decision disqualifying Clark from receiving unemployment benefits pursuant to Iowa Code section 96.5(2).

AFFIRMED.