IN THE COURT OF APPEALS OF IOWA

No. 1999-409 (9-662) / 99-0183
Filed February 9, 2000

JOHN W. LEE,
Petitioner-Appellee,

vs.

EMPLOYMENT APPEAL BOARD,
Respondent-Appellant,

MITCHELL COUNTY SECONDARY ROADS,
Intervenor-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

The intervenor appeals from the district court's ruling on judicial review reversing the respondent's decision to deny the petitioner unemployment benefits based on misconduct. **REVERSED.**

Mark L. Walk, Mitchell County Attorney, Osage, for appellant Mitchell County.

Richard Ramsey, Des Moines, for appellant Board.

John S. Allen and Lois K. Cox, University of Iowa Clinical Law Program, and Bridget Butler and Myra Emerson, Student Legal Interns, Iowa City, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Intervenor Mitchell County Secondary Roads appeals the district court decision that reversed the decision of the Employment Appeal Board, which had denied Petitioner John Lee unemployment benefits. We reverse the district court and affirm the Employment Appeal Board's decision.

John Lee was hired by Mitchell County's Secondary Road Department on August 30, 1982. His duties included plowing snow and operating a dump tuck to spread gravel and spread sand during and after snow storms. Lee's problems at work began in 1991, when the County noted in an oral job warning that Lee's attitude and morale dropped severely and Lee had damaged property without reporting it. Further, the County had received several complaints from the public about his performance in plowing snow. The oral warning noted the areas that needed improvement were attitude, morale, job performance, initiative, and desire. No warnings between 1991 and 1995 appear in the record.

In 1995 Lee was given an oral warning for poor job performance, followed by a January 26, 1995 written warning for unsatisfactory job performance, destruction of county property, bad attitude, low morale, and lack of initiative. In addition, other county employees expressed concerns for their safety when working around Lee, and also expressed concerns for the traveling public when Lee was operating heavy equipment on the road. Mitchell County issued Lee a notice of termination at that time. However, the County allowed Lee to return to work upon his successful completion of alcohol treatment.

Later in 1995, Lee hit an overhead electrical wire while driving a county dump truck, causing a voltage surge that resulted in extensive damage to major electrical appliances in a nearby home, for which the county was responsible. It does not appear that any oral or written warning was issued at that time. Lee's supervisor, Mitchell County Engineer Jim Hyde, testified that whenever Lee received an oral or written warning, Lee's only comment was "get the union in here." He testified that in his opinion, despite the warnings, and despite annual job evaluations, Lee made no effort to improve his job performance and showed no concerns about doing so. Hyde testified that Lee also never took the initiative to discuss with his supervisors what steps needed to be taken to improve.

Two incidents, occurring two days apart, led to Lee's termination. On April 14, 1998, Lee was hauling rock in a dump truck. Lee testified that a car came around a curve toward him. The road was apparently slippery, and Lee testified he had the choice of hitting the car or swerving off the road. Lee chose the latter. He testified that he needed one hand to steer the truck and the other to shift, which left him unable to lower the truck's box. In the process, the raised box of his truck hit an electrical wire. Lee reported the incident immediately.

Two days later, on April 16, 1998, Lee was spreading rock at an intersection of a wooded area. Lee testified because trees blocked his view of the poles, he did not see a guy wire stretching across the road at an angle. His truck hit the wire, pulling it down. Lee again immediately reported this incident by calling into the main shop and saying "Howard, you might just as well call him again I got another one."

County Engineer Hyde then called a termination hearing, held on April 27, 1998. Present was the Mitchell County Board of Supervisors, Lee, Lee's union representative and Hyde. Besides the two recent incidents described above, the Board of Supervisors also considered recent complaints from fellow employees about safety concerns when working with Lee, and also a rock quarry operator's refusal to allow Lee to use their equipment. At Hyde's recommendation, the Board offered Lee two options: (1) immediate termination; or (2) a two-week suspension, a physical, and an agreement to undergo four drug and alcohol tests per year, three of them at Mr Lee's expense. Lee chose immediate termination, stating that he would not pay for three drug and alcohol tests per year. The County terminated his employment on May 4, 1998.

The next day Lee applied for unemployment benefits. The Iowa Workforce Development Center determined that he was eligible for benefits, and Mitchell County appealed to an Administrative Law Judge. The ALJ reversed the Workforce Development Center's decision, and Lee appealed to the Employment Appeal Board, which affirmed the ALJ's decision, adopting the ALJ's Findings, Reasoning and Conclusions. Lee sought judicial review in the Iowa District Court for Polk County. On January 5, 1999, that court reversed the decision of the Employment Appeal Board. It held that the agency made an error of law in determining that Lee's failure to perform his job to the best of his ability was misconduct, because it had not found that he was intentionally working at a level lower than his capabilities. It also held that Lee's conduct, although negligent as found by the agency, was of isolated instances and not carelessness or

negligence of such degree of recurrence as to manifest culpability equal to deliberate violation or disregard of standards of behavior which the employer has the right to expect, or to be seen as intentional. Mitchell County appeals.

Under the Iowa Administrative Procedure Act, when this court reviews the district court's decision on the validity of an agency action, we ask only whether the district court has correctly applied the law. *H & Z Vending v. Iowa Dept. of Inspections and Appeals*, 593 N.W.2d 168, 170 (Iowa App. 1999) (citations omitted). The district court is itself acting in an appellate capacity to correct errors of law by the agency. *Id.* In our review of such actions by the district court, we merely apply the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as those of the district court. *Id.*

We are not free to interfere with the agency's findings of fact where there is conflict in the evidence or when reasonable minds might disagree about the inferences to be drawn from the evidence whether disputed or not. *UNI-United Faculty v. PERB*, 545 N.W.2d 274, 277-78 (Iowa 1996). In determining whether the district court applied the law correctly, we inquire whether the agency's findings of fact are supported by substantial evidence when the agency record is viewed as a whole. Iowa Code § 17A.19(8)(f); *West v. Employment Appeal Bd, Dept. of Inspections and Appeals*, 489 N.W.2d 731, 733 (Iowa 1992).

Evidence is substantial if a reasonable person would find it adequate to reach a given conclusion, even if we might draw a contrary inference. *West*, 489 N.W.2d at 733 (citation and quotation omitted). If we determine that the agency's

findings of fact are supported by substantial evidence, we are bound by those findings and must affirm. *Id.* If we find the facts unsupported by substantial evidence, we reverse. *Id.*

We note at the outset that we do not question the employer's right to terminate Lee's employment. The issue we address relates solely to whether or not Lee is entitled to unemployment compensation. Iowa Code section 96.5(2) provides a claimant is disqualified for unemployment benefits "[i]f the division of job service finds that the individual has been discharged for misconduct in connection with the individual's employment." Iowa Code § 96.5(2) (1999). However, that subsection does not provide a definition of misconduct. The agency determined that the events leading to Lee's termination constituted misconduct, as defined in 871 I.A.C. Sec. 24.32(1). That section states that:

> *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.

The Iowa Supreme Court has stated on repeated occasion that this definition accurately reflects the intent of the legislature. *See, e.g., Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993) (citation omitted);

Kleidosty v. Employment Appeal Bd., 482 N.W.2d 416, 418 (Iowa 1992) (numerous citations omitted).

Further, 871 I.A.C. 24.32(8) (formerly 370 I.A.C. 24.32(8)) provides that "past acts and warnings can be used to determine the magnitude of a current act of misconduct." This provision has been referred to as the "last straw doctrine" since a relatively minor infraction, when viewed in the light of prior infractions, may evidence sufficient disregard for the employer's interests to constitute misconduct. *Budding v. Iowa Dept. of Job Serv.*, 337 N.W.2d 219, 223 (Iowa App. 1983). A finding of misconduct, however, must be based upon a current act for unemployment benefits to be denied. *Myers v. Iowa Dept. of Job Serv.*, 373 N.W.2d 507, 510 (Iowa App.1985). The fact that the prior acts were remote in time from the one for which the employee was discharged, or different in nature, does not preclude a finding of misconduct. *Budding,* 337 N.W.2d at 223.

In this case, the Agency specifically found that "the claimant *refused* to improve his performance by exercising more caution." (Emphasis added). In reversing the decision of the Agency, the district court stated

> [T]he ALJ did not cite any facts which showed Mr. Lee was *intentionally* working at a level lower than his capabilities.
>
> Mr. Lee's conduct, although negligent, was of *isolated instances* and not *carelessness or negligence of such degree of recurrence* so as to rise to the *intentional* level and is therefore not misconduct.

(Emphasis in original). We find that there was substantial evidence in the record for the agency to conclude Lee committed misconduct.

Black's Law Dictionary compares the definitions of "neglect" and "refusal" as follows: "'neglect' signifies a mere omission of a duty, which may happen through inattention, dilatoriness, mistake, or inability to perform, while 'refusal' implies the *positive denial* of an application or command, or at least a mental determination not to comply." Black's Law Dictionary 1282 (6th ed. 1990) (emphasis added). The agency's finding that Lee refused to improve his clearly deficient performance is a finding of a mental determination not to improve, therefore an intentional failure to work to the level of his capabilities. This constitutes "misconduct" under the definition set forth above. *See Sellers v. Employment Appeal Board*, 531 N.W.2d 645, 647 (Iowa App. 1995) (cited by the agency in its decision in this case).

Evidence of Mr. Lee's refusal to improve his performance is manifest throughout the record. He received a written warning in 1991 for poor attitude and bad morale. In 1995, he received both a verbal and then a written warning concerning his job performance. The 1995 written warning was issued in January of that year, and noted again Mr. Lee's poor attitude and his destruction of county property. He was allowed to keep his job only because he completed outpatient alcohol treatment. Sometime later that year, he tore electrical wires away from a house, which caused a voltage surge and resulted in damage to several electrical appliances. There is testimony in the record that from 1995 to Lee's dismissal in 1998, he did not improve in the areas about which he had been warned, but instead simply requested that the union be brought in whenever his performance was discussed or evaluated. Finally, the two

instances in 1998 of running into power lines within a three-day period resulted in his termination.

Lee's refusal to improve his job performance constitutes an intentional failure to work up to the standard of which he was capable and meet his employer's reasonable expectations. "Intentional acts which result in work not being performed in a timely and efficient manner, and continue after repeated warnings by the employer, can constitute misconduct." *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 647 (Iowa App. 1995). While in isolation, the two "accidents" in 1998 might be seen as mere negligence, the magnitude of those incidents is greatly enhanced and can constitute misconduct when viewed in light of the previous warnings and accidents of the same type over the seven prior years. *See Budding v. Iowa Dept. of Job Serv.*, 337 N.W.2d 219, 223 (Iowa App. 1983).

The agency's determination that Lee refused to improve his job performance is supported by substantial evidence in the record when the record is considered as a whole. A "refusal" is "intentional". An intentional failure to perform a job to the level of one's ability is misconduct. *See. Sellers v. Employment Appeal Board*, 531 N.W.2d 645, 647 (Iowa App. 1995). The district court erred in holding the agency misapplied the law.

The decision of the district court is reversed. The Employment Appeal Board's decision is affirmed.

REVERSED.