IN THE COURT OF APPEALS OF IOWA

No. 1-241 / 90-1949

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CLERK SUPREME COURT

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ALBERT W. SCHOEMAN,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and **SWIFT INDEPENDENT PACKING CO.,**

Appellees.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Albert Schoeman was discharged from his employment with Swift Independent Packing Co. after three absences. The Employment Appeal Board denied his request for unemployment benefits on the ground that he had been discharged for misconduct. On judicial review, the district court affirmed. Schoeman now appeals. **REVERSED AND REMANDED.**

Gary J. Otting of Legal Services Corporation of Iowa, Waterloo, for appellant.

William C. Whitten and Joe E. Smith, Employment Appeal Board, Des Moines, for appellees.

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

DONIELSON, J.

Albert Schoeman began working for Swift Independent Packing Company (Swift) on May 22, 1989, as a full-time butcher. Schoeman was absent from work on July 11, October 2, and November 28, 1989, due to transportation problems. Schoeman notified his employer he would be absent on each of these dates. Swift had a written policy which provided that three unexcused absences in a twelve-month period could result in discharge. On November 28, 1989, Swift discharged Schoeman for excessive unexcused absenteeism.

Schoeman filed a claim for unemployment benefits. The employer disputed the claim on the ground that Schoeman had been discharged for misconduct. Schoeman was granted benefits by a Claim's Representative's decision dated December 18, 1989. Swift appealed this decision. After an administrative hearing, an Administrative Law Judge (ALJ) concluded that where excessive absenteeism is due to a purely personal responsibility, such as transportation, it may constitute misconduct. The ALJ found three such absences within five months constituted excessive unexcused absenteeism. The Employment Appeal Board (the Board) affirmed the ALJ's denial of benefits; one member of the three-member panel dissented.

Schoeman filed a petition for judicial review. The district court affirmed the Board. The district court assessed court costs of $70 against Schoeman. Schoeman

filed an application for a nunc pro tunc order on the ground that Iowa Code section 96.15(2) prohibits a court from charging fees of any kind against an individual claiming unemployment benefits. The district court denied Schoeman's application. Schoeman now appeals.

Schoeman claims his three absences did not amount to misconduct for the purposes of denying unemployment insurance benefits.

Schoeman also contends the district court's assessment of court costs against him violated Iowa Code section 96.15(2) (1989). He states that court costs are "fees" within the meaning of section 96.15(2). This contention can be disposed of summarily.

At oral argument, appellees conceded the recent decision in Geiken v. Lutheran Home for the Aged requires a modification of the district court judgment to the extent of removing the order that Schoeman pay court costs. 468 N.W.2d 223 (Iowa 1991). In Geiken it was held that "the prohibition in section 96.15(2) against charging a claimant 'fees of any kind' encompasses court costs." 468 N.W.2d at 227 (Iowa 1991). The district court erroneously assessed court costs against Schoeman.

We now address whether the Employment Appeal Board properly denied a claimant unemployment benefits on the ground he was discharged for misconduct within the meaning

of Iowa Code section 96.5(2).[1]

The principles that govern our review are well established. Our review is not de novo, but is limited to correction of errors at law. Roberts v. Iowa Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1984). Consequently, we are bound by the hearing officer's findings of fact if those findings are supported by substantial evidence. Evidence is substantial when a reasonable mind could accept it as adequate to reach the same finding. New Homestead v. Iowa Dep't of Job Serv., 322 N.W.2d 269, 270 (Iowa 1982). However, we are not bound by the agency's legal conclusions, but may correct misapplications of law. Roberts, 356 N.W.2d at 221. If the facts and inferences fairly to be drawn therefrom are undisputed, the issue becomes one of law. Green v. Iowa Dep't of Job Serv.. 299 N.W.2d 651, 655 (Iowa 1980). Our task is to review the district court decision and determine whether the district court correctly applied the law. Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262, 264 (Iowa App. 1984).

We do not question the employer's right to terminate the claimant's employment. Our sole task is to determine whether the employee is entitled to unemployment benefits. Id. The claimant has the burden of proving satisfaction of the basic eligibility conditions of Iowa Code section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits under Iowa Code

1. All references are to Iowa Code (1989).

section 96.5(2). See Sallis v. Employment Appeal Bd., 437 N.W.2d 895, 896 (Iowa 1989).

A person who is discharged for misconduct in employment is disqualified from receiving unemployment benefits. Iowa Code § 96.5(2)(a). The issue is whether Schoeman committed misconduct.

Misconduct is defined in the Iowa Administrative Code 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 and 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.

345 Iowa Admin. Code 4.32(1)(a). This definition is reflective of the legislature's intent. See Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed.2d 68 (1979).

The Iowa Administrative Code also 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 misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

345 Iowa Admin. Code 4.32(7). This language indicates that although absenteeism may be grounds for discharge, it is not necessarily misconduct under Iowa Code section 96.5(2). Sallis, 437 N.W.2d at 897 (citations omitted).

Schoeman asserts his absences did not constitute misconduct because he had reasonable grounds for being absent and his absences were properly reported to the employer. He also argues his absences should not be considered misconduct because the employer failed to follow its policy of providing written warnings and counseling sessions after absences. We find this latter contention persuasive.

Where an employer has a written policy which provides that an unexcused absence will result in a written warning, the lack of a written warning subsequent to an absence entitles the employee, and a reviewing entity, to conclude the absence is excused. Pursuant to its written policy, the employer has, in essence, defined an "unexcused" absence as an absence that results in a written warning. Swift acknowledges its written policy provides that written warnings will be issued for unexcused absences.[2] Swift

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2. Swift argued that its usual practice, however, is to ignore the written policy. A Swift representative testified the usual practice is to verbally warn an

also acknowledges Schoeman did not receive any written warnings. Therefore, we conclude the absences were excused by Swift. Excused absences do not constitute misconduct.

This court recognizes that absenteeism arising out of matters of purely personal responsibilities such as child care and transportation have been held not excusable. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984). The Board relied on this general principle in concluding Schoeman's absences, resulting from transportation problems, were unexcused. Similarly, the district court found this principle controlling and affirmed the Board's denial of unemployment benefits. If Swift had not defined an "unexcused" absence, we too would find the general principle controlling. However, by its written policy, Swift has defined an "unexcused" absence as one which results in a written warning. Absent a written warning, the absence must be considered excused. Swift has, therefore, failed to establish Schoeman was discharged for misconduct. Schoeman is entitled to receive unemployment benefits.

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employee for an unexcused absence. Swift argues Schoeman was aware written warnings were not the usual practice and, therefore, it should not be bound by the written warning provision of its own policy.

This contention is disingenuous. Swift relies on the written policy in asserting Schoeman was discharged for misconduct; it contends the written policy provides for discharge following three unexcused absences. Yet Swift does not want to be similarly bound by the written policy. Fairness dictates that if the employee is required to comply with the written policy, the employer is required to comply as well. If Swift wants to change the written policy provisions, it knows how to do so.

The Board and the district court erred in concluding Schoeman was discharged for misconduct. We reverse the district court and remand to the district court for remand to the agency for the determination of benefits.

REVERSED AND REMANDED.