IN THE COURT OF APPEALS OF IOWA

No. 8-198 / 97-0688
Filed October 29, 1998

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CLERK SUPREME COURT

BILLIE D. WALKER-SIMMONS,
Appellant,

vs.

EMPLOYMENT APPEAL BOARD and PARKVIEW GARDENS CARE CENTER,
Appellees.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Billie Walker-Simmons appeals from the district court's ruling affirming the Employment Appeal Board's decision determining she engaged in misconduct disqualifying her from receiving unemployment benefits after her termination for excessive unexcused absenteeism. **AFFIRMED.**

Vivian P. Meyer-Betts of Legal Services Corporation, Waterloo, for appellant.

William C. Whitten, Des Moines, for appellees.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

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PER CURIAM

Petitioner, Billie Walker-Simmons, appeals from the district court's ruling on judicial review affirming the Employment Appeal Board's decision determining she engaged in misconduct disqualifying her from receiving unemployment benefits after her termination by her employer, Parkview Gardens Care Center, for excessive unexcused absenteeism. The petitioner claims the agency's decision her absences and tardiness caused by her abusive husband constituted disqualifying misconduct was erroneous as a matter of law and the decision was not supported by substantial evidence in the record. We affirm the district court.

Walker-Simmons worked as a nurse's aide for Parkview Gardens Care Center until she was terminated on April 29, 1996, for excessive unexcused absenteeism. Parkview Gardens had a policy requiring its employees notify them two hours in advance of a work shift regarding any absence. In March and April 1996, Walker-Simmons was frequently absent from work without excuse or timely notification. Parkview warned Walker-Simmons her absenteeism jeopardized her job. Walker-Simmons claims her absenteeism was caused by her husband's abusive conduct toward her, and he frequently denied her access to the family car preventing her from reporting to work on time. Walker-Simmons claims she attempted to explain her family situation to a supervisor who refused to allow her time off to resolve her family situation. Parkview Gardens denies Walker-Simmons adequately informed them of her abuse problems.

On April 27, Walker-Simmons failed to arrive for work because of illness. She later claimed she had a miscarriage. She did not inform Parkview Gardens of the problem. She failed to appear for work the next day because she believed she had been terminated. Parkview Gardens actually terminated her on April 29 for excessive absenteeism.

Walker-Simmons' claim for unemployment benefits was denied throughout administrative proceedings on the basis she was disqualified because her excessive absenteeism constituted misconduct. The Employment Appeal Board affirmed this decision. The Board found Walker-Simmons failed to disclose she was unable to come to work because of abuse by her husband. The Board concluded the excessive unexcused absenteeism and tardiness was established by the record and her employer could not be expected to accommodate Walker-Simmons regarding her unreported personal problems.

Walker-Simmons timely filed a petition for judicial review challenging the Board's decision. The district court affirmed the Board's decision. The court determined the decision was supported by substantial evidence in the record and by applicable law. In reaching this conclusion, the court noted Walker-Simmons did not attempt to obtain an emergency order under Iowa Code chapter 236 to protect herself from her husband's alleged abuse.

Our scope of review is limited to correction of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982). We review a district

court decision rendered in an appellate capacity to determine whether the district court correctly applied the law. *Id.* To make that determination, this court applies the standards of Iowa Code section 17A.19(8) to the agency action to determine whether our conclusions are the same as the district court's. *See Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 191 (Iowa 1984). The administrative law judge made a specific finding of credibility of Parkview Gardens' Director of Nursing. We do not take such finding of credibility lightly. *Woodbury County v. Iowa Civil Rights Comm'n*, 335 N.W.2d 161, 164 (Iowa 1983).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision unsupported by substantial evidence made before the agency when that record is viewed as a whole. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 916-17 (Iowa App.1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Id.* at 917. The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean one

of those conclusions is unsupported by substantial evidence. *Zenor v. Iowa Dep't of Transp., Motor Vehicle Div.*, 558 N.W.2d 427, 430 (Iowa App. 1996).

Iowa Code section 96.5(2) provides a claimant is disqualified from unemployment benefits if the Division finds the individual has been discharged for misconduct in connection with the individual's employment.

The Iowa Administrative Code defines "misconduct" 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. 370 Iowa Administrative Code § 4.32(1). The Iowa Supreme Court has accepted this definition as accurately reflecting the intent of the legislature. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507, 510 (Iowa App. 1985).

Misconduct must be substantial in order to support a disqualification from unemployment benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806, 808 (Iowa App. 1984). The employer has the burden of proving misconduct. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 917 (Iowa App.1985). Misconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits. *Eaton*, 376 N.W.2d at 917. As such, we do not examine the employer's right to discharge an employee. Rather, our sole task is to determine whether the employee is entitled to unemployment benefits. *Billingsley v. Iowa Dep't of Job Serv.*, 338 N.W.2d 538, 540 (Iowa App. 1983).

The focus of the administrative code definition of misconduct is on acts or omissions by the employee which rise to the level of being deliberate, intentional or culpable. *Eaton*, 376 N.W.2d at 917. In order to establish misconduct that will disqualify an employee from benefits, the employer must prove the acts culminating in discharge satisfy the requirements of the administrative code definition. The administrative code makes it clear, therefore, that acts of carelessness or negligence must be sufficiently recurrent and not merely isolated to rise to the level of culpable or intentional misconduct. *See Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 265 (Iowa App.1984). The administrative code does provide, however, that past acts and warnings can be used to determine the magnitude of a current act of misconduct. 370 Iowa Administrative Code § 4.32(8); *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa App. 1986).

Walker-Simmons was repeatedly absent or late for work during her two-month employment by Parkview Gardens. She received verbal warnings, written warnings, and a suspension for her poor attendance. Although some of her absences and tardies were excused, most were not. We conclude the district court correctly applied the law in affirming the Employment Appeal Board's decision denying Walker-Simmons unemployment benefits. Substantial evidence supports the finding Parkview Gardens Care Center properly discharged her for misconduct.

AFFIRMED.