

IN THE COURT OF APPEALS OF IOWA

ALICE P. BARNGROVER,)

Petitioner/Appellant,)

v.)

IOWA DEPARTMENT OF JOB SERVICE,)

Respondent-Agency/Appellee,)

And Concerning)

IOWA BEEF PROCESSORS OF)
STORM LAKE,)

Respondent-Employer/Appellee.)

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Appeal from the Iowa District Court for Buena Vista County (No. 22136)

- Tom Hamilton, Judge.

Claimant appeals from the judicial review decision affirming a denial of unemployment compensation benefits. **AFFIRMED.**

Dennis M. McElwain of Smith & Smith Law Offices of Sioux City for petitioner/appellant.

Blair H. Dewey, Walter F. Maley and Joseph L. Bervid of Des Moines for respondent-appellee agency.

Larry A. Storm of the Bikakis firm of Sioux City for respondent-appellee employer.

Considered by Oxberger, C.J., Donielson and Sackett, JJ.

OXBERGER, C.J.

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The appellant challenges the district court's decision affirming an agency ruling denying her unemployment benefits. First, she contends that the district court erred in finding that there was substantial evidence in the record supporting the agency's determination of misconduct. In addition, she maintains that the agency failed to independently determine whether the incidents of tardiness which ultimately culminated in the termination of her employment were excessive or unexcused within the meaning of 307 Iowa Administrative Code section 4.32(7). We affirm.

I. SCOPE OF REVIEW

The principles governing our review of administrative decisions are set forth in Taylor v. Iowa Department of Job Service, 362 N.W.2d 534, 537 (Iowa 1985). Our scope of review is at law, not de novo, and we are limited to the record made before the agency. Id; Green v. Iowa Department of Job Service 29 N.W.2d 651, 655 (Iowa 1980). Our task is to review the district court's decision and to determine whether the court correctly applied the law. Infante v. Iowa Department of Job Service, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984). In addition, we must ascertain whether the agency's decision is supported by substantial evidence when the record is viewed in its entirety. Iowa Code § 17A.19(8)(f)(1985); see also Rowan v. Bullock, Inc., No. 85-1206, slip op. at 3 (Iowa filed Oct. 15, 1986).

II. MISCONDUCT

The appellant was discharged from her employment when it was determined that she was excessively tardy in returning from work breaks in violation of a company rule. Pursuant to that rule, an employee is subject to progressively more severe disciplinary action each time he fails to return from a break within the prescribed time, or is otherwise unprepared to perform his job; if four

such "incidents" occur within a twelve month period, the employee is terminated from employment. The appellant was found to have incurred four such infractions, and was discharged. Her subsequent request for unemployment benefits was denied at each level of the administrative process, and upon judicial review by the district court. The basis for this denial was a finding that the appellant's "unauthorized break violations" constituted misconduct.

The appellant alleges that the department's finding that she was guilty of misconduct was not supported by substantial evidence. As a basis for this assertion, she maintains that the record does not support the allegation that she was tardy when she was cited for her fourth violation; she contends that the assembly line started early on that day. In refuting this contention, the hearing officer noted:

A stop watch is used to govern the break time and the employee is expected to be at his work station when the assembly line starts moving. The claimant maintains that the line started early and this is why she was considered late. However, the procedure for restarting the assembly line has been constant and the employer will normally exceed the 15 minutes if there is any doubt. The claimant was familiar with the rules and the disciplinary procedures of the employer and her infractions of the rules on the breaks is considered misconduct.

This conclusion is supported by the testimony of the appellant's employer. Adhering to the principle that, "[w]here the facts are disputed, we will adopt the determinations made by the [department] as long as they are supported by substantial evidence in the whole record," Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983), we affirm the agency's finding.

The appellant further asserts that even if she may have violated the employer's rule thereby warranting her discharge, her actions did not rise to the level of misconduct disqualifying her from unemployment compensation within the meaning of Iowa Code section 96.5(2)(a)(1985). We have previously

recognized that misconduct serious enough to warrant an employee's discharge is not necessarily serious enough to warrant the denial of benefits. Budding, 337 N.W.2d at 222. Excessive, unexcused absenteeism has, however, been found sufficient to disqualify an employee from the receipt of benefits because it constitutes an intentional disregard of the duty owed to an employer. 370 Iowa Admin. Code § 4.32(7)(1985). Furthermore, in Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 190 (Iowa 1984), the supreme court subscribed the following synonymous definition to "absenteeism" and "tardiness":

We note for the sake of clarity that the use of the term 'absenteeism' or 'absence' also encompasses conduct of an employee that is more accurately referred to as 'tardiness'. As traditionally used in the area of employment, the term 'absent' refers to an employee who has missed a full day's work whereas the term 'tardy' means an employee who reports to work late. As a practical matter, an absence is an extended tardiness and a tardiness is a limited absence. In any event, we believe the terms 'absenteeism' and 'absences', as used in Cosper and in 370 Iowa Admin. Code § 4.32(7), were intended 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.

Accordingly, the court has upheld the denial of unemployment benefits based upon the claimant's unexcused tardiness. Rowan v. Bullock, Inc., No. 85-1206, slip op. at 3; see also Harlan v. Iowa Department of Job Service, 350 N.W.2d 192, 194 (Iowa 1984); Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 190 (Iowa 1984). We think that the supreme court's recent decision in Rowan is particularly dispositive of the appellant's contention in the instant case. In Rowan, the claimant was denied unemployment compensation following the termination of his employment because he overslept on two successive occasions. The court affirmed the denial of benefits, stating that oversleeping cannot be deemed a reasonable ground for missing work, and that the agency's finding of misconduct was supported by substantial evidence. Rowan, No. 85-1206, slip op. at 2-3.

Similarly, we think that the record in the instant case supports the agency's determination. The record discloses that because the employer operates an assembly line, it is necessary for him to implement strict rules governing the attendance of the employees. These rules are explained at orientation, and are posted on a bulletin board. The record further reveals that the appellant incurred four infractions of the employer's rule requiring dismissal upon the occurrence of four such "incidents" in which an employee is unprepared for work. The department found that she was given an oral warning after her first violation, a written warning after her second, a written warning and one-day suspension after her third.

Following her dismissal, the appellant proffered several excuses for the incidents of tardiness. She maintains that the department failed to independently consider whether these explanations rendered the particular episodes of tardiness "excused" as the term is used in 370 Iowa Administrative Code section 4.32(7). That section provides that an act of absenteeism is not "unexcused" if the absence is due to "illness or other reasonable grounds . . . that were properly reported to the employer." 370 Iowa Administrative Code § 4.32(7). The agency's report and the district court's opinion both reflect that the appellant's proffered explanations were considered; they were rejected, however, because the employer had in effect a grievance procedure through which an employee could challenge any alleged infractions and have them eradicated from his or her record. In fact, the appellant herself had previously utilized the grievance process. She never used it, however, to challenge the incidents which culminated in her dismissal.

The appellant stresses that this case is no different from Cosper v. Iowa Department of Job Service, 321 N.W.2d 6(Iowa 1982). In Cosper, the supreme court held that the agency's finding of misconduct was to be re-examined upon

remand because the agency failed to consider the claimant's contentions that her absences were excused. Id. at 9. We think that Cosper is factually distinct. There, the hearing officer summarily concluded that "excessive tardiness and absenteeism . . . does come within the meaning of misconduct." Id. The officer made no distinction between excused and unexcused absences. The same cannot be said in the instant case; here, the department explicitly noted that the appellant was not being reprimanded for several tardies which she had properly reported to her employer.

We conclude that the decision of the agency and the district court is affirmed.

AFFIRMED.