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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-631 / 92-760

**MUJAHID SULUKI,**

Appellant,

vs.

**EMPLOYMENT APPEAL BOARD and IOWA BEEF PROCESSORS, INC.,**

Appellees.

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Appeal from the Iowa District Court for Woodbury County, Dewey J. Gaul, Judge.

The petitioner appeals from the district court's affirmance of the Employment Appeal Board's decision to deny his claim for unemployment benefits. **AFFIRMED.**

Joseph G. Basque of Legal Services Corp. of Iowa, Sioux City, for petitioner-appellant.

William C. Whitten and Joe E. Smith, Des Moines, for respondents-appellees.

Heard by Donielson, P.J., and Sackett, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

**KEEFE, S.J.**

Mujahid Suluki started working for Iowa Beef Processors, Inc. (IBP) on May 22, 1990. Suluki's job was to push beef in a cooler at the company's plant in Dakota City, Nebraska. IBP's attendance policy was explained to Suluki when he began work. The company's policy is that three unexcused absences in one year will cause an employee to be discharged. When an employee is ill, he must call in one-half hour before his shift begins in order for his absence to be excused.

Suluki had one unexcused absence on August 14, 1990. He did not report to work and did not call in. He received a written warning. Suluki's second unexcused absence was on February 19, 1991, when he again failed to report to work and did not call in. Suluki received a second written warning and was suspended from one day of work.

On May 10, 1991, Suluki called IBP at 6:00 a.m. to notify the employer he was not coming to work. Suluki's shift began at 6:00 a.m. The employer considered this an unexcused absence because he did not call in one-half hour before his shift began. IBP determined Suluki had three unexcused absences and discharged him on May 13, 1991.

Suluki filed a claim for unemployment benefits. An administrative hearing was held on September 24, 1991. At the hearing, Suluki testified that on May 10, 1991, he was living at the Siouxland YMCA in Sioux City. He stated he

had a cold or the flu on that day. He did not have a telephone in his room. The nearest telephone was at the front desk of the YMCA, and that did not open until 6:00 a.m. A pay telephone was available about one and one-half blocks from the YMCA. Suluki testified that because he was sick he decided not to walk to the pay telephone, but to call in at 6:00 a.m. when the YMCA telephone was available to him. He stated, "I didn't feel like going out."

The administrative law judge (ALJ) determined Suluki had engaged in misconduct and was not entitled to unemployment benefits. The ALJ noted that due to the two earlier written warnings, Suluki should have known that a failure to call in and report his absence would result in his discharge. The ALJ found Suluki failed to show he was unable to call in on time and notify the employer of his intended absence. The Employment Appeal Board adopted the decision of the ALJ.

Suluki then filed a petition for judicial review. The district court affirmed, finding there was substantial evidence in the record to support the board's decision. Suluki appealed.

In considering a district court judgment in a judicial review proceeding, we determine whether the district court correctly applied the law. Sioux City Brick & Tile Co. v. Employment Appeal Board, 449 N.W.2d 634, 637 (Iowa 1989). Like the district court, we apply the standard of Iowa Code

section 17A.19(8) to the agency action. Id. The agency's factual findings must be supported by substantial evidence in the record made before the agency when that record is viewed as a whole. Messina v. Iowa Department of Job Service, 341 N.W.2d 52, 59 (Iowa 1983). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a given conclusion. Ray v. Iowa Department of Job Service, 398 N.W.2d 191, 193 (Iowa App. 1986).

A claimant will be disqualified from unemployment benefits if the department finds the individual has been discharged for misconduct. Newman v. Iowa Department of Job Service, 351 N.W.2d 806, 808 (Iowa App. 1984). The burden to show misconduct is on the employer. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218, 221 (Iowa 1984). Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of benefits. Breithaupt v. Employment Appeal Board, 453 N.W.2d 532, 535 (Iowa App. 1990).

Suluki relies upon the cases Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa App. 1992), and Floyd v. Iowa Department of Job Service, 338 N.W.2d 536 (Iowa App. 1983), to support his argument that his conduct did not constitute misconduct. In both of these cases we found there was no misconduct where an employee, who did not have a telephone, failed to report his absence from work when he

was too ill to travel to a telephone. Gimbel, 489 N.W.2d at 39; Floyd, 338 N.W.2d at 538.

We find Gimbel and Floyd are factually distinguishable from the present case. In Gimbel, the employee had an asthma attack which rendered him unable to report his illness. 489 N.W.2d at 39. The evidence showed the employee attempted to use an inhaler and was unable to find his asthma pills. Id. at 38. The employee's illness occurred in the winter. Id. The employee saw a doctor later in the day and obtained an excuse. Id. In Floyd, the employee was seriously ill with scarlet fever. 338 N.W.2d at 537. The employee there also brought a doctor's excuse to the employer. Id.

In the present case, no evidence was presented to show Suluki was physically unable to report his absence to IBP. We note there is no evidence Suluki sought medical attention for his illness. Suluki stated he had had a lingering cold for some time, but felt worse on May 10, 1991. We note Suluki's illness occurred in May, when presumably the weather would be more clement than it would be in the winter. Based on Suluki's statements that he probably should have called in at 5:30 a.m. and that he "didn't feel like going out," we determine there is substantial evidence in the record to support the board's findings.

We affirm the decision of the district court and the Employment Appeal Board that Suluki should be disqualified from receiving unemployment benefits due to misconduct.

**AFFIRMED.**