

IN THE COURT OF APPEALS OF IOWA

No. 8-204 / 97-0926

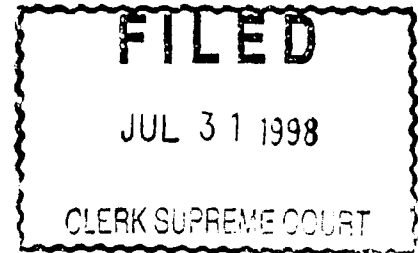
STEVE DETCHES,

Petitioner-Appellant,

vs.

**EMPLOYMENT APPEAL BOARD and
IAMS COMPANY,**

Respondents-Appellees.



Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell,
Judge.

Petitioner appeals from the district court's ruling on judicial review affirming respondent board's decision that petitioner engaged in misconduct disqualifying him from receiving unemployment benefits. **AFFIRMED.**

Karen Stinson Wiberg, Legal Services Corporation of Iowa, Sioux City, for
appellant.

William C. Whitten and Anita M. Garrison, Des Moines, for appellees.

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

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MAHAN, J.

Steve Detches appeals the denial of unemployment benefits. Detches contends the district court erred when it found substantial evidence existed to support the Employment Appeals Board's (the Board) denial of benefits because: (1) IAMS Company (IAMS) did not meet its burden of proof that Detches' last two absences were unexcused and constituted misconduct; and (2) there was no causal connection between Detches' discharge for violating the company's policy regarding absences during his probationary period and the reason for the absences. We affirm.

IAMS hired Detches as a full-time production operator on January 8, 1996. IAMS' policy treats the first ninety days of employment as a probationary period. IAMS allows no more than two absences during the probationary period, regardless of the reason for the absence. An absence of two or more consecutive days is treated as one absence. On January 29, 30, and 31, Detches called in sick due to the flu. On February 3, he called in and was absent because his car would not start. Detches contends the extremely cold weather was to blame for this absence. According to Detches, most of the other plants in the area were closed that day due to the extreme cold, and there was a shortage of available cabs.

After the second absence, Detches' supervisor warned him he had reached his maximum number of absences for the probationary period. On April 5, Detches' eighty-ninth day of employment, he called in sick, complaining of fatigue. IAMS then released Detches for violation of the absence policy.

After a telephonic fact-finding hearing, a Job Service representative denied Detches unemployment benefits. Detches appealed, and following a hearing an administrative law judge affirmed. In its decision, the administrative law judge stated:

During the administrative hearing, the claimant testified he did not adequately explain himself during the fact-finding interview, that the claimant meant to state his "fatigue" and "burnout" caused him to be "nauseated, dizzy, light-headed, not holding food down, vomiting" The administrative law judge is not convinced this is the truth. In fact, the administrative law judge specifically finds this not to be the truth. If the claimant was suffering these symptoms, the claimant would not have said he was fatigued or burned out, but would have told the fact-finder he was suffering from these symptoms, i.e., that he had the flu. The administrative law judge does not believe these symptoms to be associated with fatigue or burnout. The administrative law judge believes the claimant just did not feel like going to work and manufactured this testimony to explain his absence. Accordingly, it is held that claimant was discharged from his employment because of unexcused absenteeism, which is job misconduct, and the claimant is not entitled to receive unemployment insurance benefits.

I. STANDARD OF REVIEW. Judicial review of an administrative agency is governed by the standards of Iowa Code section 17A.19(8). *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996). Because the district court itself acts in an appellate capacity to correct any legal error made by the agency, our task is merely to determine whether our legal conclusions match those reached by the district court. *Bridgestone/Firestone v. Accordino*, 561 N.W.2d 60, 62 (Iowa 1997). The agency's decision is final if it is supported by substantial evidence and is correct in its conclusions of law. *Robbennolt*, 555 N.W.2d at 233. In reviewing the

interpretation of the statutes governing the agency, we defer to the expertise of the agency, but reserve for ourselves the final interpretation of the law. *Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 546 (Iowa 1995).

The agency's findings of fact have the effect of a jury verdict. *Vosberg v. A. Y. McDonald Mfg. Co.*, 519 N.W.2d 405, 407 (Iowa App. 1994). We, like the district court, are obliged to broadly and liberally construe an agency's factual findings so as to uphold, rather than defeat, the agency's decision. *Bridgestone/Firestone*, 561 N.W.2d at 62. The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence. *Robbennolt*, 555 N.W.2d at 233.

II. UNEXCUSED ABSENCES. Iowa Code section 96.5(2) disqualifies a claimant from receiving unemployment benefits if the person has been discharged for misconduct in connection with his or her employment. *Savage v. Employment Appeal Bd.*, 529 N.W.2d 640, 642 (Iowa App. 1995). There must be a direct causal relation between the misconduct and the discharge. *West v. Employment Appeal Bd.*, 489 N.W.2d 731, 734 (Iowa 1992). We think it is clear when IAMS released Detches it was directly related to the absences. However, we must still determine whether these absences amounted to misconduct.

The burden of proving an employee is guilty of misconduct is on the employer. *Savage*, 529 N.W.2d at 642. To sustain a charge of misconduct, it is necessary to establish the claimant willfully and intentionally committed an act or acts that were

detrimental to the best interest of the employer. *West*, 489 N.W.2d at 734.

Misconduct is a deliberate act or omission constituting willful or wanton disregard of an employer's interest and must be intentional. *Savage*, 529 N.W.2d at 642. To show misconduct there must be evidence of a deliberate intention or culpable act by the employee. *Id.* What constitutes misconduct justifying termination of an employee and what is misconduct which warrants denial of unemployment benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Service*, 425 N.W.2d 679, 680 (Iowa App. 1988).

In this instance, Detches has been denied unemployment benefits based on excessive unexcused absences. The Iowa Administrative Code defines excessive unexcused absences:

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.

Iowa Admin. Code r. 871-24.32(7) (1997) (emphasis added).

Both sides admit the January absence due to the flu was an excused absence. *See Higgins v. Iowa Dep't of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984) (petitioner's absences resulting from sickness or injuries are not to be considered against her). The Board argues the February 3 absence because Detches' car would not start was unexcused. Absenteeism arising out of matters of purely personal responsibilities such as transportation has been held not excusable. *Id.*

In affirming the administrative law judge, the district court cited *Higgins* to support its finding the absence was unexcused and was misconduct. However, we find the district court's reliance is misplaced. *Higgins* cites several cases as examples of when personal matters are unexcusable, but these cases are distinguishable from the case at bar. In *Oldynski v. Pennsylvania*, 426 A.2d 213 (Pa. Commw. Ct. 1981), the court found *three weeks* of absence from work was unexcusable. Also, Oldynski failed to report some of his absences, and public transportation was also available. *Id.* at 214. In *Spence v. Unemployment Compensation Bd. of Review*, 409 A.2d 500 (Pa. Commw. Ct. 1979), the court found absenteeism caused by car trouble, babysitting problems, and a washing machine breakdown were unexcused absences amounting to misconduct. However, Spence had a record of excessive tardiness and absenteeism. *Id.* at 501-02. Spence had been previously suspended twice for a total of seven days due to tardiness and two days for unauthorized absence. *Id.* at 501. In *Scheel v. Unemployment Compensation Bd. Of Review*, 409 A.2d 500 (Pa. Commw. Ct. 1979), the court determined the *repeated excuse* of mechanical problems with a car over an eight-month period was not justification for tardiness. In *Hillsborough County Dep't of Emergency Medical Servs. v. Unemployment App. Comm.*, 433 So. 2d 24 (Fl. Dist. Ct. App. 1983), the court found being absent because of being jailed for contempt of court due to failure to pay child support was a foreseeable consequence and amounted to willful misconduct. In *Sanchez v. Department of Labor & Employment Security*, 411 So. 2d 313 (Fl. Dist. Ct. App. 1982), the court

noted Sanchez had verbal altercations with other employees and never worked a forty-hour week as was required by his job. *Id.* at 314. Sanchez was ultimately fired because he chose to have non-emergency, elective surgery without getting the approval of his supervisor for the absence. In *Castillo v. Florida Dep't of Commerce*, 253 So. 2d 162 (Fl. Dist. Ct. App. 1971), the court found Castillo was absent from work because of personal problems of his own making.

In this instance, Detches was unable to attend work because his car would not start due to the extremely cold weather. Detches called a taxi company in an attempt to find a ride to work. However, there was a shortage of taxies and the taxi company was running very far behind. Detches did notify IAMS of his problems and the fact he would not be able to make it into work. We find this absence from work was not misconduct and the district court incorrectly applied the law. We also find any determination by the administrative law judge that this absence amounted to misconduct was not supported by substantial evidence.

The Board also argues the final absence on April 5 was unexcused. Because we have found the first two absences were not unexcused absences, Detches can only be denied unemployment benefits if the final absence was misconduct. Courts are not in agreement as to whether a single instance of absenteeism constitutes misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 897 (Iowa 1989). Most courts have made this determination based on the facts and circumstances of the individual cases. *Id.* Certain contributing factors have been considered in determining whether

an employee's single unexcused absence constitutes misconduct. *Id.* These factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of his or her absence. *Id.*

When the administrative law judge made its finding, it stated, "The administrative law judge believes the claimant just did not feel like going to work and manufactured this testimony to explain his absence." We find Detches' absence was an intentional and deliberate act constituting willful or wanton disregard of IAMS' interests. We also find this single unexcused absence amounts to misconduct. Thus, we find the administrative law judge correctly denied Detches unemployment benefits and the district court did not err when it affirmed the administrative law judge.

For these reasons, we affirm the denial of unemployment benefits.

AFFIRMED.