FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT J. HURTADO,

Petitioner-Appellee,

vs

IOWA DEPARTMENT OF JOB SERVICE and MEAD CONTAINERS d/b/a WATERLOO CORRUGATED BOX,

Respondents-Appellants.

Filed March 31, 1986

117

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85-1040

Appeal from the Iowa District Court for Black Hawk County (66148) - George L Stigler, Judge.

Respondent agency appeals the district court's reversal of the agency's finding that the claimant was not entitled to unemployment benefits due to deliberate misconduct. **AFFIRMED.**

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid, Des Moines, Iowa, for the respondent-appellant Iowa Department of Job Service.

Cheryl L. Weber, Waterloo, Iowa, for respondent-appellant Mead Containers.

Kay Delafield, Legal Services Corp. of Iowa, Waterloo, Iowa, for petitioner-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Respondent agency appeals the district court's reversal of the agency's finding that the claimant was not entitled to unemployment benefits due to deliberate misconduct. The agency contends the trial court erred on the ground there is substantial evidence in the record to support the final agency action of denying benefits. We affirm.

This is an action for unemployment benefits. Claimant, Robert Hurtado, worked full-time for the employer, Mead Containers, as a slitter operator from September, 1970 until September 21, 1974, when he was terminated after being found asleep in the restroom. The record showed that claimant had worked 12-hour shifts that week at his employer's request, already putting in 45-46 hours before the day in question. Hurtado testified he laid down merely to "straighten out" a sore back and to relieve the pain of "bleeding gums." He claimed he did not "deliberately" fall asleep and that he was only asleep for ten minutes. A company policy indicated a person could be discharged for deliberately sleeping on the job. Thirteen months prior to the incident in question, claimant had been issued a warning concerning sleeping while on duty.

The claims deputy denied benefits based on a finding of misconduct. Claimant appealed. At the hearing, he claimed he was tired from working long hours and ill. He claimed he dozed off accidentally. The hearing officer ruled his actions were misconduct and disqualified him from eligibility for unemployment benefits. The appeal board affirmed the disqualification.

On judicial review, the agency decision was reversed. The district court found that a finding of misconduct was not supported by substantial evidence in the record. The court reasoned that Hurtado's conduct was not serious enough to warrant a denial of benefits. The agency has appealed this determination.

Pursuant to the Iowa Administrative Procedure Act, our review is limited to a correction of errors of law. Foods, Inc. v. Iowa Civil Rights Commission, 318 N W.2d 162, 165 (Iowa 1982). In reaching our determination, we apply the standards set forth in section 17A.19(8) to the agency action and determine whether your conclusions are the same as the district court's. Gipson v. Iowa Dept of Job Service, 315 N.W.2d 834, 836 (Iowa Ct. App. 1981).

Where the facts are disputed, we will adopt the factual determinations made by the agency as long as they are supported by substantial evidence. Temple v Vermeer Mfg. Co., 285 N.W.2d 151, 160 (Iowa 1979). Where the facts are undisputed, however, the question becomes one of law. Green v. Iowa Dept. of Job Service, 299 N.W.2d 651, 655 (Iowa 1980). We are limited to the record before the hearing officer in making this determination. Id.

Iowa Code section 96.5(2) provides that a claimant is disqualified from unemployment benefits "[i]f the department finds that the individual has been discharged for misconduct in connection with the individual's employment."

Misconduct is defined by 370 Iowa Administrative Code section 4.32(1)(a) 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.

See also Huntoon v. Iowa Dept. of Job Service, 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979).

As the definition suggests, in order to support a disqualification for unemployment benefits, the misconduct must be substantial. "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219, 222 (Iowa Ct. App. 1983).

In the present case it is undisputed that Hurtado fell asleep on the job. However, as the district court determined, evidence does not support a finding that this conduct was willful or deliberate. Claimant had been working twelve-hour shifts and was suffering from back pain and bleeding gums. He testified that he laid down for relief and did not intend to sleep or be away from his duties for more than a few minutes. There is nothing in the record to indicate an intentional or substantial disregard of the employer's interests.

We recognize that Hurtado had been reprimanded for falling asleep on the job thirteen months before the incident in question. As the agency indicates, past acts and warnings can be used to assess the magnitude of a current act of misconduct. Brown v. Iowa Dept. of Job Service, 367 N.W.2d 305, 307 (Iowa Ct. App. 1985). Yet in the present case there is no current act of misconduct. The previous reprimand, therefore, is not a relevant consideration.

Based on the record, we conclude that a finding of misconduct is not supported by substantial evidence. Accordingly, the district court's decision is affirmed.

AFFIRMED.