

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

CITY OF DES MOINES, IOWA)

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Petitioner-Employer-Appellant,)

FILED JUNE 25, 1986

vs.)

IOWA DEPARTMENT OF JOB SERVICE)

6-35
85-819

Respondent-Agency-Appellee,)

and FRANCIS J. PICRAY, JR.)

Respondent-Claimant-Appellee.)

Appeal from the Iowa District Court for Polk County (No. AA 574) - Rod Ryan, Judge.

Petitioner City of Des Moines appeals the district court's affirmance of the decision of respondent Job Service to award unemployment benefits to claimant. **AFFIRMED.**

Nelda Barrow Mickle, City Solicitor, Des Moines, Iowa, for petitioner-employer-appellant.

Blair H. Dewey, Iowa Department of Job Service, Des Moines, Iowa, for respondent-agency-appellee.

Roger J. Kuhle, of Mumford, Schrage, Merriman, Zurek & Kuhle, P.C., Des Moines, Iowa, for respondent-claimant-appellee.

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

SCHLEGEL, J.

Petitioner City of Des Moines appeals the district court's affirmance of the decision of respondent Job Service to award unemployment benefits to claimant. We affirm the district court.

Claimant was employed by the City of Des Moines as a senior building equipment operator from September 25, 1979, to June 28, 1982. He was discharged due to alleged incompetency, inefficiency, negligence in the performance of his duties, insubordination, and falsification of his original and subsequent employment applications. Claimant sought unemployment benefits but was initially disqualified by the claims deputy. Claimant appealed the decision and the hearing officer reversed the claims deputy and awarded claimant benefits. The city then appealed the hearing officer's decision to the Iowa Department of Job Service Appeal Board, but the hearing officer's decision was affirmed. The city then petitioned for judicial review of the agency's action and the district court affirmed the department's decision. On appeal, the city alleges the agency erred in failing to find that claimant's conduct exhibited an intentional and substantial disregard for his employer's interest, and constituted a current act of willful and deliberate misconduct, according to Iowa code § 96.5(2)(a) and (b).

The main issues involve primarily allegations concerning the sufficiency of the evidence regarding claimant's alleged misconduct. However, the city also argues that the award of benefits in this case represents a serious departure from the statutorily authorized benefits, therefore requiring reversal as a matter of law. The city argues that benefits in this case should be denied because claimant is not unemployed through no fault of his own. In other words, because claimant's unemployment resulted from his own acts, benefits must be denied.

The city cites Iowa Code section 96.2 and Amana Refrigeration v. Iowa Dept. of Job Service, 334 N.W.2d 316, 319 (Iowa App. 1983), for its authority.

Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited under Iowa Code §174.20 to the correction of errors in law. Budding v. Iowa Dept. of Job Service, 337 N.W. 2nd 219, 221 (Iowa App. 1983).

We disagree with the city's argument. Both Iowa Code section 96.2 and Amana Refrigeration are inapplicable to the facts and the issue before us. Amana discusses the issue of "fault" and Iowa Code § 96.2 as they apply to being available for work. See Amana Refrigeration, 334 N.W.2d at 319. The issues raised by the city relate only to misconduct and therefore the concept of "fault", as it applies to unemployment benefits, does not apply. See Moulton v. Iowa Employment Security Commission, 239 Iowa 1161, 1172-73, 34 N.W.2d 211, 217 (1948).

I. Intentional and Substantial Disregard for Employer's Interest.

The hearing officer concluded that the record did not support a finding that claimant was guilty of misconduct as it applies to Iowa code section 96.5(2) and defined in 370 Iowa Admin. Code 4.32(1). The city, however, argues the facts support the opposite conclusion. Where the facts are disputed, we will adopt the factual determinations made by the Department as long as they are supported by substantial evidence in the whole record. Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983). We do not make an independent determination concerning the preponderance of the evidence. Id.

Claimant was in charge of the daily maintenance of the City Hall building equipment and whatever additional projects specifically required by his superiors. During the last week of May 1982, the city conducted an inspection of the equipment for which claimant was responsible. As a result of that inspection,

it was discovered that: (1) the air filters were dirty; (2) the air handling units were operating with worn out blower belts; (3) the vacuum pump oil level was low, with water leaking from the steam pipe joint; air handlers had split coils due to freezing; coils were uncoiled and dirty; dampers were closed and automatic controls were disconnected; (4) the water level control for the boiler was mounted 1½ inches too high and the fire eye was wired incorrectly, resulting in premature shutdown of the boiler; and, (5) the boiler room, pump room, fan room and claimant's office were filled with excess junk, broken parts, debris, cans and other materials constituting fire and tripping hazards.

In her findings of fact, the hearing officer determined the evidence showed that the city could not specifically state when certain items like the air filters had last been inspected. Claimant and his previous assistant stated that the filters were maintained on a regular basis and that they had inspected the filters in response to a specific request by the city. Claimant also testified that because the blower belts wear from the inside out, it is impossible to always tell when the belts are ready to be changed. He stated that he inspected them on a regular basis just the same as the filters. The city had no policy of regular maintenance of the belts. Claimant testified that the automatic controls were not deliberately disconnected but were placed in such a position in order to keep the system running. He also stated that he followed the city's instructions regarding the maintenance of the coils.

The department has interpreted misconduct as follows in Iowa Admin. Code section 370-4.32 (1), 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 culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest 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.

Based upon her findings of fact, the hearing officer concluded that claimant was not negligent in the performance of his duties. We agree with the hearing officer's conclusion. But, even if we were to find a pattern of negligence in claimant's performance, that conclusion would still be insufficient evidence to support a denial of benefits based upon misconduct. The hearing officer was correct in concluding that the city failed to show by substantial and competent evidence that claimant's performance of his duties, or lack thereof, constituted misconduct within the meaning of Iowa code section 96.5(2).

II. Current Willful and Deliberate Acts

A. Weekend Destruction

The findings of fact include additional incidents, alleged by the city to constitute misconduct, that transpired during the month between the time of the inspection and claimant's dismissal. The city maintained that claimant deliberately turned off or disconnected switches on the boiler and cooling systems in City Hall during the weekend beginning on Friday, June 4, 1982. A week later, on June 14, 1982, valves were discovered closed, breakers were shut off and new belt equipment located above the city engineer's office had been broken. On Saturday, June 12, 1982, an elevator door in City Hall was reported jammed and subsequent problems occurred with the operation of that elevator. On June 21, 1982, a routine Monday inspection revealed a high level hose in the police department had been cut or slashed across the top causing water to leak when the engine was running and the cooling system was under pressure.

The city alleged that the facts strongly suggested claimant willfully and deliberately tampered with city equipment during the above weekends. But the hearing officer found no evidence in the record to show that, in fact, claimant willfully and deliberately tampered with the equipment. Although claimant acknowledged being in City Hall on June 5, 1982, there is no evidence to show that he tampered with the equipment. Moreover, the hearing officer noted that claimant was not the only employee working in the area of the equipment during the weekends in question. The burden is on the city in this case to present substantial and competent evidence demonstrating claimant's culpability. Mere allegations are not sufficient to find misconduct. See Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 11 (Iowa 1982); See also Iowa Admin. Code 370.4.32(4). We affirm the hearing officer's decision that the city failed to carry its burden on this issue.

B. Failure To Disclose Prior Employment

On June 16, 1982, the city discovered that claimant had worked for the State of Iowa for three months from October 31, 1975 to December 31, 1975. It was demonstrated at the hearing that claimant failed to indicate this prior employment in his application for work with the city initially and in subsequent applications for promotions during his employment with the city. The city subsequently discovered that claimant had been discharged from the State due to similar problems that were existing between the city and the claimant. After further investigation into claimant's employment background, the city learned that claimant had previously been released from employment with Wilson Foods due to conflicts with management. However, the hearing officer found that claimant listed his prior employment with Wilson Foods and explained his reason for separation as, "being 'set up' by union steward, not discharged as (sic) foreman but by union dissents." The hearing officer concluded that first, the city did

not prove that claimant willfully and intentionally omitted the prior employment with the state; and secondly, even if he had, the omission would not have endangered the health, safety or morals of the claimant or others with whom he worked or resulted in placing the employer in any jeopardy. Without such consequences, misconduct is not proven. See Iowa Admin. Code 370-4.32(6). It is well established that the employer has the burden of proving misconduct which would lead to a disqualification of benefits. 370 Iowa Admin. Code 32(4); Woods v. Iowa Dept. of Job Service, 327 N.W.2d 768,770 (Iowa App. 1982). The city has failed to provide any evidence, or Iowa authority demonstrating how the omission of this past employment has amounted to misconduct. There is substantial evidence to support the hearing officer's decision.

C. Refusal to Answer Questions. The city held a meeting with claimant and his union representative on June 28, 1982, and asked him to respond to several questions. These questions related to generally, (1) claimant's work habits; (2) the damage done to equipment over the weekends; and (3) the omission of claimant's prior employment with the State.

After approximately an hour the questions and answers had become very heated and finally claimant refused to answer any more questions. Shortly thereafter, claimant's employment was terminated. The city alleges on appeal that the hearing officer erred in failing to find this refusal constituted misconduct.

Both the agency and the city cite a district court opinion as authority on this issue. In addition, the city cites a Wisconsin case in support of its position. Neither authority is binding on this court. And yet, we have been unable to find appellate authority directly on point with the fact in this particular issue.

In Endicott v. Iowa Dept. of Job Service, 367 N.W.2d 300, 303 (Iowa App.

1985), this court discussed the refusal of an employee to perform a specific task for the employer. We cited with approval McLean v. Unemployment Compensation Bd. of Review, 476 Pa. 617, 383 A.2d 533 (1978), and its interpretation of a willful misconduct statute similar to Iowa Admin. Code 370-32 (96). We stated:

Thus, we must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reasons for noncompliance. The employee's behavior cannot fall within "willful misconduct" if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in willful disregard of conduct the employer "has a right to expect." In other words, if there was "good cause" for the employee's action, it cannot be charged as willful misconduct.

Id. at 620, 383 A.2d 535.

The city acknowledges in its brief that it already had "fully established" the discrepancies concerning claimant's past employment, and already had eyewitnesses placing claimant in the buildings during the weekend in question. The only purpose for the questioning, it appears, was to have claimant acknowledge either his deliberate omission of employment history, or his involvement or culpability concerning the damage done over the previous weekends. This claimant refused to do. We find no other reasons for the meeting or for the city's insistence that claimant admit something he chose not to admit. We fail to understand, in light of all the circumstances, how the city's request in this issue is reasonable. It is reasonable, in light of all the circumstances for claimant to refuse to answer the questions because, as it turns out, the city has completely failed to prove either claimant's culpability for the damage, or how the omission of employment history has constituted misconduct.

III. "Last Straw Doctrine". The city urges an appeal that misconduct should be found under the "last straw doctrine" established by this court's opinion in Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

There we stated:

370 I.A.C. 4.32(8) provides that "past acts and warnings can be used to determine the magnitude of a current act of misconduct." This provision has been referred to as the "last straw doctrine," since a relatively minor infraction, when viewed in the light of prior infractions, may evidence sufficient disregard for the employer's interests to constitute misconduct. The fact that the prior acts were remote in time from the one for which the employee was discharged, or different in nature, does not preclude a finding of misconduct. Giddens v. Appeal Board of Michigan Employment Security Commission, 4 Mich. App. 526, 145 N.W.2d 294, 298 (1966). However, this course of conduct must be sufficient to manifest an intentional and substantial disregard for the employer's interests.

Id. at 223.

In order to find misconduct under this theory, we must consider only those acts preserved on appeal,¹ as well as those acts sufficiently surviving our prior determination that claimant at least committed the act, albeit perhaps serious enough to warrant discharge but not serious enough to warrant denial of benefits.

First, it cannot be denied that claimant's work habits and his demeanor were less than satisfactory. But the city only proved that he was "balky and argumentative, but not that he harbored a willful disregard for the employer's interest." Budding, 337 N.W.2d at 222. Second, we cannot consider the allegations of deliberate destruction of equipment during the weekends because

¹The record shows that claimant refused to sign a performance evaluation in February 1982. The hearing officer found that this was not misconduct because it was not a current act according to Iowa Admin. Code 370-4.32(8). However, the supreme court in Green v. Iowa Dept. of Job Service, 299 N.W.2d 651 (Iowa 1980), found that a claimant's refusal to sign a written warning constituted misconduct as a matter of law. Thus, if "past acts and warnings" can be used to determine the magnitude of a current act of misconduct, it would be logical to conclude that a prior act, constituting misconduct as a matter of law, considered with the present act, would therefore amount to misconduct. However, we need not decide this because the city has failed to discuss the issue of claimant's refusal to sign the evaluation in its brief.

the city has completely failed to prove claimant's involvement with these acts. Third, we have determined that the city failed to show the omission of claimant's prior employment with the State was either intentional or that it was somehow a substantial disregard for its interests. Finally, we have determined that claimant's refusal to answer questions at the June 28 meeting was reasonable in light of all the circumstances. Therefore, considering the appropriate past acts, we are unable to conclude that claimant's course of conduct was "sufficient to manifest an intentional and substantial disregard for the employer's interest." Id. at 223.

We have reviewed all of the alleged errors on appeal and have determined that the decisions of the hearing officer are supported by substantial evidence. We therefore affirm the agency's award of unemployment benefits to claimant.

AFFIRMED.