IN THE COURT OF APPEALS OF IOWA

No. 1-576 / 91-830

FILED
MAY 23 1992
CLERK SUPREME COURT

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JUDY K. FEE,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and BOOM-CO,

Appellees.

Appeal from the Iowa District Court for Wapello County, James D. Jenkins, Judge.

Fee challenges the district court's ruling which affirmed the agency's action denying her unemployment benefits. **AFFIRMED.**

Sarah Wenke, Legal Services Corporation of Iowa, Ottumwa, for appellant.

William C. Whitten and Joe E. Smith, Employment Appeal Board, for appellee.

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

SCHLEGEL, J.

Judy Fee was employed as a packer and candler by Boom-Co from March 7, 1988, until her discharge on January 31, 1989. Boom-Co processes dairy and egg products for sale. Fee's duties required her to sort dairy products returned by grocery stores and to throw away the items Boom-Co would not reuse. She was to put "bad" items in a garbage can which was later emptied in an outside dumpster.

While working on January 31, 1989, Fee found two tubs of out-dated margarine. She wrapped the margarine in paper towels and took it to the ladies restroom where she placed it in a waste basket. At lunch time she took the margarine to her car. Fee states she wrapped the margarine in towels because it had broken eggshells on it and was leaking.

When asked later by her foreman if she had anything to tell him, she replied in the negative. He then asked her if she had taken the margarine. She admitted she had, and she retrieved it from her car. Boom-Co then fired Fee because she had not asked permission to take the margarine.

Fee applied for unemployment benefits. The claims deputy, administrative law judge, and Employment Appeal Board all denied such benefits. The district court dismissed her petition as untimely, and she appealed. See Fee v. Employment Appeal Bd., 463 N.W.2d 20 (Iowa 1990). The supreme court remanded. The district court then affirmed the Employment Appeal Board, finding Fee's theft of the margarine constituted misconduct to warrant her disqualification from unemployment benefits. Fee appeals.

Our scope of review is for corrections of errors at law. We apply the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as the district court's. Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence. Eaton v. Iowa Dep't of Job Serv., 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731, 734 (Iowa App. 1986).

First, Fee argues the district court substituted its own findings of fact. The trial court did state Fee's "act of taking her employer's product was theft, as defined by Sections 714.1 (1) and (2)." Fee claims the court exceeded its authority in finding her guilty of fifth-degree theft absent that finding by the agency.

The administrative law judge specifically found:

> Whether or not her actions would constitute theft under Iowa Code Chapter 714, it is clear that Ms. Fee removed company products from work spaces without authorization and under circumstances that would lead a reasonable person to suspect that she intended to take the product without paying for it.

We determine the district court made no independent finding of fact. The court recognized the taking of the property was theft. Whether her actions would constitute a crime under the criminal code is a different question not relevant here. We find the district court did rely on the facts as determined by the agency.

Second, Fee argues there is not substantial evidence in the record to support the agency's findings. The administrative law judge noted: "[Fee's] actions were not in the employer's interest because, at the very least, it interfered with inventory control and could be viewed as an invitation to additional employee pilferage." Fee argues the employer did not present any evidence of a written policy on inventory control. She further states she had no knowledge of such a policy.

Fee removed two tubs of margarine, concealed them in paper towels, placed them in a restroom garbage can, and later took them to her car with the stated intent of taking them home. We find her acts were intentional and deliberate. Her acts were not in the best interest of her employer, and her behavior is not the standard of behavior an employer has the right to expect. The margarine was the property of the employer, and testimony indicates some

other use may have been made of the items after Fee had handled them.

The administrative law judge mentioned inventory control to support his holding that the act of taking the product was misconduct. Viewing the record as a whole, we find the decision of the agency is supported by substantial evidence.

Third, Fee claims the Employment Appeal Board incorrectly applied the law. She feels because she had no notice and "the company policy was inconsistent at best, she cannot be found to have deliberately violated or disregarded the employer's standards of behavior." We disagree.

A person discharged for misconduct is disqualified for benefits. Iowa Code § 96.5(2)(a) (1991); Iowa Admin. Code r.345-4.32(1)(b) (1988). Misconduct is defined:

> 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 a right to expect of employees, . . .

Iowa Admin. Code r.345-4.32(1)(a) (1988).

An employer has the right to expect certain standards of behavior from its employees. One of these standards is not to take the employer's property without authorization. Fee violated this standard, and that constitutes

misconduct. It is unfortunate Fee did not first seek permission to take the margarine. We affirm the agency and district court rulings denying unemployment benefits.

AFFIRMED.