IN THE COURT OF APPEALS OF IOWA

No. 6-346 / 95-1696

RICHARD PINT,

Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and DEPARTMENT OF REVENUE AND FINANCE/LOTTERY,

Respondents-Appellees.

FILED
OCT 25 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, K. D. Briner, Judge.

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

Van T. Tran, Waterloo, for appellant.

William C. Whitten, Des Moines, for appellees.

Considered by Sackett, C.J., and Habhab and Vogel, JJ.

HABHAB, J.

Richard Pint was employed in a security position as a store-keeper by the Iowa Department of Revenue and Finance Lottery Division. He worked at a warehouse which stores Iowa Lottery tickets and game machines worth millions of dollars. Pint was employed in this capacity from July 26, 1985 until January 25, 1994, when he was suspended with pay. Pint was ultimately discharged for misconduct on January 31, 1994.

Access to the warehouse Pint worked in is highly restricted. On January 25, 1994, Jim Tallman, a lottery district sales representative lead worker, and Steve Newberry, a lottery district sales representative, arrived at the warehouse to unload a vending machine from a truck which arrived early that morning. Pint was aware that as a lead worker, Tallman had access to the area and had authority to authorize other workers to enter the area. Newberry was generally not authorized to be in the area unless he had permission from an authorized person such as Tallman.

Tallman entered the warehouse and prepared to unload the machine. He opened a rear door for Larry Snyder, the truck driver. He then went to the hallway and asked Newberry to come into the warehouse to assist him.

When Pint saw Newberry in the warehouse, he yelled at Newberry to leave. Pint then quickly approached him and took him by the shoulder to escort him out. Newberry resisted and Pint then wrapped both of his hands around his throat and

attempted to force him out of the warehouse. Newberry shoved Pint away and then left the warehouse. Newberry's neck was bruised for several days following the incident.

Pint claims he only could have touched Newberry's neck after being shoved. Newberry claims Pint grabbed him by the neck and he shoved Pint in order to get Pint to release his grip.

On the basis of the incident, the Department terminated Pint's employment. Pint filed a claim for unemployment benefits, which was denied throughout administrative proceedings on the basis that Pint engaged in an assault which constituted misconduct disqualifying him from receiving unemployment benefits. The Employment Appeal Board entered a final decision denying unemployment benefits on January 6, 1995, with one member of the board dissenting.

On January 23, 1995, Pint filed a petition for judicial review. On August 31, 1995, the district court entered a decision affirming the board's ruling denying benefits. The court determined there was substantial evidence supporting the determination that Pint engaged in a serious assault causing bodily injury which constituted misconduct disqualifying him from receiving unemployment benefits.

On October 2, 1995, Pint filed a notice of appeal.

I. Substantial Evidence. Pint brings this action pursuant to the judicial review provision of the Iowa Administrative Procedure Act, Iowa Code section 17A.19

(1995). On appeal from judgment entered on judicial review of agency action, our review is limited to the correction of errors at law. *Gaffney v. Dep't of Employment Serv.*, 540 N.W.2d 430, 433 (Iowa 1995)(citation omitted). Pint asserts the findings of fact by the district court exceeded the scope of judicial review and should not be considered. Furthermore, Pint asserts the factual findings made by the administrative law judge are not supported by substantial evidence.

> We are not bound by an agency's interpretation of pertinent statutes. We are, however, bound by the agency's fact findings that are supported by substantial evidence in the record. An agency decision is supported by substantial evidence if a reasonable person, viewing the record as a whole, would accept it as adequate to reach a conclusion.

Id.

Pint maintains the following finding made by the administrative law judge is not supported by the evidence in the record:

> The force used by the claimant was excessive and this encounter caused bruise marks to be upon the body of Mr. Newberry, which included marks on the neck of Mr. Newberry, which was caused by the claimant placing both hands onto the neck of Mr. Newberry.

Pint also contends there was no substantial evidence to show that his conduct was intentional, a wanton disregard of the Department's interest, or a material breach of his duty to the Department. Additionally, Pint asserts there is no substantial evidence in the record showing he was fighting with or committed an assault on Newberry; and therefore, the administrative law judge's finding of misconduct was not warranted. We disagree.

We first consider whether substantial evidence in the record supports the agency's findings that Pint's actions were intentional and that he used excessive force, leaving bruises on Newberry's neck.

At the hearing before the administrative law judge, Newberry testified that after he entered the warehouse on the morning of January 25, Pint immediately told him to leave as he was walking toward him. Newberry stated that events transpired so quickly he did not have an opportunity to respond. Newberry explained that when Pint reached him, Pint immediately grabbed his shoulder and began pushing him toward the door. Newberry maintained Pint then quickly grabbed his neck with both hands and was squeezing very hard. Newberry stated Pint's grip was such that he was unable to speak during this time and so he pushed Pint back approximately two feet. Newberry added that as a result of this incident he sustained bruises which lasted several days and he experienced soreness in the area of his Adam's apple.

Jim Tallman testified that he witnessed the incident and he was sure that Pint grabbed Newberry by the throat. Larry Snyder testified that from his vantage point he could not see Pint choke Newberry, as Pint's form was obstructing his view. He did state that Pint screamed at Newberry to leave and he saw Pint take hold of Newberry's shoulders to turn him around. He testified Newberry was holding himself at the door as Pint was trying to force him out. Snyder explained that when Pint let go of Newberry, he lunged forward in reaction to being released and ran into Pint, and

as a result, Pint was set back about three feet. Snyder also maintained Pint use strong and excessive force when he took hold of Newberry's arm.

Pint's version of the incident was rather different than that of Newberry, Tallman, and Snyder. Pint testified no one told him Newberry was authorized to be in the warehouse and he only took Newberry by the right shoulder to escort him out. Pint maintained it was at that time Newberry grabbed Pint by the neck with one hand and shoved him back fifteen feet. Pint testified he never put his fingers around Newberry's throat to choke him but he may have touched him in reaction to being shoved.

"The fact that two inconsistent conclusions may be drawn from the same evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* Viewing the record as a whole, we find the testimony of Newberry, Tallman, and Snyder more than constitutes substantial evidence to support the agency's findings that Pint used excessive force to remove Newberry, Newberry sustained bruises on his neck as a result of the incident, and Pint's conduct was intentional. The district court correctly determined substantial evidence indicates Pint engaged in a serious assault causing bodily injury which constituted misconduct disqualifying Pint from receiving unemployment benefits.

II. Misconduct. Pint maintains this was an isolated incident of poor judgment or a good faith error in judgment or discretion and as such does not constitute misconduct. We disagree.

Persons found to have committed misconduct in connection with their employment are disqualified from receiving unemployment benefits. Iowa Code section 96.5(2)(a) (1995).

> *a. 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 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 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.

Iowa Admin. Code r. 345-4.32(1). "In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect of employees." *Diggs v. Employment Appeal Bd.*, 478 N.W.2d 432, 424 (Iowa App. 1991) (citing *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App. 1986)). "Misconduct consists of deliberate acts or omissions by the employee, or such carelessness as to indicate wrongful intent." *Henecke v. Iowa Div. of Job Serv.*, 533 N.W.2d 573, ___ (Iowa App. 1995). "Misconduct must be substantial in nature to support a disqualification from unemployment benefits." *Id.*

The testimony of Newberry, Tallman, and Snyder established that Pint's attack of Newberry was unprovoked, deliberate, and indicative of Pint's wrongful intent. Pint's actions clearly violated standards of behavior which the Department had a right to expect of him. Pint committed a material breach of his duty to the Department in assaulting Newberry. We uphold the agency's decision denying benefits as substantial evidence supports its decision that Pint's actions were misconduct as defined by the Iowa Administrative Code and the Iowa Code.

AFFIRMED.