

IN THE COURT OF APPEALS OF IOWA

RICK LYMAN,

Petitioner-Appellant,

vs .

IOWA DEPARTMENT OF JOB SERVICE
AND SIOUX TOOLS, INC.,

Respondents-Appellees.

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Appeal from Woodbury District Court, James P. Kelley, Judge.

Petitioner appeals from the district court decision on judicial review affirming the denial of unemployment benefits contending (a) there was no substantial evidence in the record to support the agency's conclusion petitioner was guilty of misconduct and (b) the case should have been remanded to permit introduction of additional medical evidence. We affirm the trial court's decision which upheld the agency's determination petitioner did not qualify for unemployment benefits due to misconduct. AFFIRMED.

LeRoy J. Sturgeon of Smith & Smith, Sioux City, for petitioner-appellant.

P. L. Nymann of Jacobs, Gaul, Mymann & Green, Sioux City, for respondent-appellee employer.

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid, Des Moines, for respondent-appellee agency.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Petitioner appeals from the district court decision on judicial review affirming the denial of unemployment benefits contending (a) there was no substantial evidence in the record to support the agency's conclusion petitioner was guilty of misconduct and (b) the case should have been remanded to permit introduction of additional medical evidence. We affirm the trial court's decision which upheld the agency's determination petitioner did not qualify for unemployment benefits due to misconduct.

Petitioner, Rick J. Lyman, was a full-time employee at Sioux Tools from July 1978 until his discharge on May 23, 1980. On May 21, 1980, petitioner notified his supervisor, Mark Mattox, he was too sick to report for work that day. Petitioner had complained of an eye problem. That same day petitioner's supervisor and the company's industrial relations manager, Don Campbell, were informed petitioner was mowing yards for pay at the Evergreen Trailer Court, where petitioner lived. They investigated the report concerning petitioner and first saw him riding a lawn mower and then saw him mowing a person's yard.

The next day petitioner was questioned about mowing lawns. Petitioner initially denied his activities. When confronted with the information that Campbell and Mattox obtained the previous day, petitioner admitted to mowing lawns in the evenings. When petitioner was informed Campbell and Mattox saw him at the trailer court between 11 a.m. and 1:15 p.m., there is evidence petitioner nodded his head in agreement with the allegations. Petitioner was suspended for the rest of the week, during which time he was given the opportunity to expose any factors relevant to his absence or activities on May 21, 1980. No new information was submitted and the company discharged petitioner.

Petitioner applied for unemployment benefits, which were granted to him by a claims deputy on June 12, 1980. The decision was appealed to a hearing officer,

who conducted an evidentiary hearing on July 28, 1980. Petitioner was notified of the hearing but did not personally appear. On August 15, 1980, the hearing officer overruled the claims deputy and concluded petitioner's falsification of his health status on May 21, 1980, constituted misconduct. Finding misconduct to be the cause of petitioner's discharge, the hearing officer concluded petitioner was not entitled to unemployment benefits and ordered a return of all benefits previously paid to him.

After receiving the adverse decision, petitioner complained to the chief hearing officer that the presiding hearing officer was prejudiced. The chief hearing officer, noting petitioner's failure to complain of prejudice until after an adverse ruling had been made, forwarded the complaint, as an appeal, to the appeal board. Petitioner also requested a new hearing for the purpose of taking additional evidence on petitioner's mental condition prior to his discharge. The appeal board, without specifically ruling on petitioner's application for introducing additional evidence, affirmed the hearing officer's decision. On application for judicial review, the district court affirmed the decision of the appeal board.

On appeal from the decision of the trial court, petitioner contends the district court erred in not remanding the case to the agency for the purpose of taking additional evidence and in finding substantial evidence in the record to support the agency's finding petitioner was guilty of misconduct.

I. Remand for Additional Evidence

On October 3, 1980, nearly one and one-half months after the decision of the hearing officer denying petitioner's request for unemployment benefits was filed, petitioner made application to the appeals board to amend the official record to include additional evidence. The new evidence, in the form of a medical report on petitioner's mental condition, was claimed to show petitioner was not responsible for his acts leading to his discharge. The appeals board did not specifically rule on

petitioner's request to present the additional evidence. Petitioner contends the Appeal Board's failure to specifically rule on the application constituted an abuse of discretion that prejudiced substantial rights of petitioner. Petitioner on appeal argues the trial court erred in affirming the decision of the Appeal Board since the Appeals Board did not rule on petitioner's request to present new evidence. We disagree with petitioner.

Under 370 I.A.C. 6(4)(4)(a), the appeals board is empowered to reopen a case for good cause. Good cause includes discovery of

(1). . . . evidence or facts which are neither cumulative nor corroborative, but material to the issue decided and of sufficient weight to cause a reversal or change in the appeal board decision.

(2) Prior to and at the time of the appeal board decision, such new information must have been available through reasonable search by the applicant and must not have been previously considered in any prior appeals decision.

370 I.A.C. 6(4)(4)(C)(1), (2). Under 370 I.A.C. 6(4)(1)(g)(1), and (2), additional evidence can be made a part of the official record on appeal from the decision of a hearing officer to the appeal board if an application in writing is filed with the board stating the nature and materiality of the evidence and the reasons the evidence was not introduced at the hearing. Under section 17A.19(7), The Code 1979, a court may remand a case to the agency for the purpose of taking additional evidence if the evidence is material and good cause for the failure to introduce the evidence is established. See Cedar Valley Leasing, Inc. v. Iowa Department of Revenue, 274 N.W.2d 357, 362 (Iowa 1979). The obvious purpose of the regulations and the statute is to allow the taking of additional evidence only where the movant establishes the crucial nature of the evidence to the just resolution of the case and the movant could not have discovered the evidence using due diligence. We conclude the petitioner did not meet his burden. Petitioner failed to establish due diligence was utilized in attempting to discover the medical evidence and in attempting to apprise either the hearing officer or the appeals board of its nature

and materiality. We think it strange petitioner contends the medical report, which would allegedly show he was not responsible for his acts leading to his discharge, was unavailable at the time of the hearing, yet no mention of any such physical or mental disability was made until long after the decision of the hearing officer was rendered. We think it obvious that if one had some form of disability to excuse actions, some evidence of either its existence or attempts toward diagnosis would be at least mentioned by the party. Since we conclude petitioner did not establish that the new evidence was crucially material to his case and that the evidence was unavailable to him at the time of the hearing, we find the appeals board's failure to rule on petitioner's application in no manner prejudiced petitioner. Accordingly, we deny petitioner's request for a remand to take additional evidence and address the substantive merits of petitioner's appeal.

II. Misconduct.

The agency concluded petitioner's actions constituted misconduct which disqualified him from receiving unemployment benefits. The trial court affirmed that decision. On appeal, our review is limited to a determination of whether the trial court committed an error at law. § 17A.19(8)(e), The Code 1979. In this case our review is limited to a determination of whether the district court erred in finding substantial evidence in the record of misconduct on the part of petitioner. See Hoffman v. Iowa Department of Transportation, 257 N.W.2d 22, 25 (Iowa 1977). We take as established factual findings of the agency that have substantial support in the record. See Hoffman v. Iowa Department of Transportation, 257 N.W.2d at 25. However, we are entitled to "make anew the judicial determinations specified in § 17A.19(8)." Thus, we must determine whether, on the record presented, the facts found by the agency constitute "misconduct" under 370 I.A.C. § 4.32(1)(a), which defines misconduct.

The Iowa Department of Job Service defines "misconduct" 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 if 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 desire, 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.

370 I.A.C. § 4.32(1)(a).

Applying the above principles, we are of the opinion there is substantial evidence petitioner was guilty of misconduct. There is substantial support for the district court's conclusion petitioner falsely reported to his employer that he was ill. The evidence is undisputed petitioner was mowing grass on a day he had represented he was too sick to work. Petitioner argued that being too sick to work at Sioux Tools did not mean he was too sick to engage in other physical activity. While that may be true, we agree with the agency's finding that the work conditions at Sioux Tools would be no worse on petitioner's reported eye problem than the conditions extant while riding a lawn mower on a bright, sunny day without sunglasses. The conduct of petitioner which evinces a willful disregard of the interests of the employer, constitutes misconduct. The decision of the trial court is affirmed.

AFFIRMED.