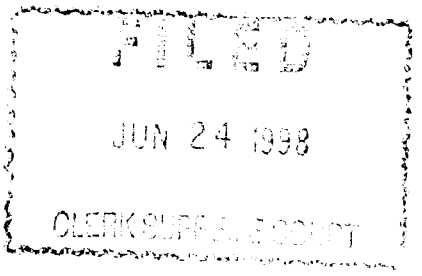
IN THE COURT OF APPEALS OF IOWA

No. 8-085 / 97-0523
Filed June 24, 1998



MATT SEEDORFF,
Appellant,

vs.

EMPLOYMENT APPEAL BOARD and DEPARTMENT OF EMPLOYMENT SERVICES and MENARD, INC.,
Appellees.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

The petitioner appeals from the district court's ruling affirming the respondent Board's decision that he was disqualified from receiving unemployment benefits because of misconduct. **AFFIRMED.**

Martin Ozga of Legal Services Corporation of Iowa, Des Moines, for appellant.

William C. Whitten, Des Moines, for appellee Board.

David T. Coriden, Eau Claire, Wisconsin, for appellee Menard.

Heard by Cady, C.J., and Sackett and Huitink, JJ.

HUITINK, J.

Matt Seedorff appeals the district court's decision affirming the Employment Appeal Board's denial of his claim for unemployment benefits. We affirm.

I. Background Facts and Proceedings.

Seedorff worked at a Waterloo Menards store from May 7, 1990, until May 15, 1996. After his employment at Menards ended, Seedorff applied for unemployment benefits. He was awarded benefits after a Job Service representative determined Menards' allegations of Seedorff's disqualifying misconduct lacked sufficient evidentiary support.

Menards appealed Seedorff's initial award of benefits to an Administrative Law Judge (ALJ).

The ALJ found:

> Mr. Seedorff walked off the job on May 2, 1996, without giving his employer notice. He was then a no call/no show on May 3, 1996. He was off work the following week due to an automobile accident. He returned to work and was given a warning on May 15, 1996. Mr. Seedorff asked about unemployment beneifts after he received the warning. Mr. Seedorff never returned to work. He was a no call/no show on May 16 and May 17, 1996. He was then terminated from his position. Based on this evidence the employer has shown misconduct. Benefits are denied.

The Employment Appeal Board (EAB) affirmed this decision, adopting the ALJ's Findings of Fact and Reasoning and Conclusions of Law as its own. The district court on judicial review found substantial evidence supported the EAB's findings of

misconduct. Seedorff's contention that the absences resulting in his termination were due to "properly reported illnesses" was also rejected.

In this appeal Seedorff challenges the sufficiency of the evidence supporting the EAB's findings of disqualifying misconduct. He also argues Menards' misconduct claims are precluded because Menards initially claimed Seedorff voluntarily quit his job without good cause.

II. Standard of Review.

Appellate review of an agency's decision is governed by Iowa Code section 17A.20 (1993). Review is at law, not de novo. *Diggs v. Employment Appeal Bd.*, 478 N.W.2d 432, 433 (Iowa App. 1991). The agency's decision is final if supported by substantial evidence in the record and correct conclusions of law. *Id.* Evidence is substantial if reasonable minds, viewing the record as a whole, would accept the record as adequate to reach the conclusion found. *Id.* The possibility of drawing two inconsistent conclusions from the record does not prevent the agency's finding from being supported by substantial evidence. *Carpenter v. Iowa Dep't of Job Service*, 401 N.W.2d 242, 244 (Iowa App. 1986).

III. Misconduct.

We first consider Seedorff's argument Menards is precluded from raising the issue of misconduct. Disqualification from benefits rests on the grounds the employer asserts before the agency. *Bartlet v. Employment Appeal Bd.*, 494 N.W.2d 684, 687 (Iowa 1993). An employer cannot assert grounds for disqualification on appeal that

were not advanced before the EAB. *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991).

In its initial resistance to Seedorff's claim, Menards selected "QUIT VOLUNTARILY without good cause" from a Job Service form list of possible reasons why Seedorff was subject to disqualification. Menards also made the following written remarks: "Matt (abandoned) his (job). Didn't show up for scheduled hours. Had a history of absenteeism." In the fact finding sheet for misconduct, Menard stated Seedorff was terminated for failing to report to work on May 16 after a history of unexcused absences and receiving a warning. In its decision granting Seedorff's claim for benefits, the Job Service representative found "OUR RECORDS INDICATE YOU WERE DISMISSED FROM WORK ON 05/15/96, FOR ALLEGED MISCONDUCT. HOWEVER, YOUR EMPLOYER DID NOT FURNISH SUFFICIENT EVIDENCE TO SHOW MISCONDUCT."

Our review of the record indicates Menards raised the issue of Seedorff's misconduct beginning with the initial hearing before the Job Service representative. Evidence of misconduct was also offered before the ALJ and argued on appeal to the EAB. Under these circumstances, Menards' initial response is not definitive of the issues appropriate for appellate review. Menards is not precluded from asserting its theory of misconduct on appeal.

Seedorff next asserts his unexcused absences did not constitute misconduct. He also argues the EAB's finding he engaged in misconduct is not supported by substantial evidence.

Section 96.5(2) provides a claimant is disqualified from unemployment benefits if the Employment Appeal Board finds the individual has been discharged for misconduct in connection with his or her employment. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418, 419 (Iowa App. 1989). Misconduct consists of deliberate acts or omissions by the employee, or such carelessness as to indicate a wrongful intent. *Carpenter v. Iowa Dep't of Job Service*, 401 N.W.2d at 245.

Agency rules define misconduct, in part, as acts or omissions evincing an intentional or substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. 345 Iowa Admin. Code 4.32(1)(a). The supreme court has held the agency rule's definition of misconduct is an accurate reflection of legislative intent. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992). Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Myers v. Employment Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa App. 1990). An employer has the burden of proving a claimant is disqualified for benefits because of misconduct. *Id.*

Seedorff testified he left work early without notifying Menards on May 2, 1996. The record also indicates Seedorff missed work May 3, 1996 without notifying Menards. On May 15, 1996, Menards warned Seedorff another unexcused absence

would warrant his termination. We find Seedorff's deliberate act of failing to report to work on May 16, 1996, is sufficient evidence he intended to disregard Mendards' expressed standard of behavior for its employees. The EAB and the district court did not err in finding Seedorff's behavior on May 16, 1996 was sufficient misconduct to disqualify him from receiving unemployment benefits. We affirm the district court on this issue.

We also find the record includes substantial evidence to support the EAB's conclusion Seedorff's termination was based on his misconduct. Seedorff's testimony and the testimony of his employer, Scott McKenzie, confirmed Seedorff's history of unexcused absences without proper notification. On the disciplinary notice form recording Seedorff's termination, Seedorff's supervisor noted "Matt was supposse [sic] to work thursday [sic] 5-16-96 from 3-10. Matt did not show up for work or call in . . . Matt has been warned and notified more than 3 times about missing work. Matt Seedorff is now terminated on this day 5-16-96." We affirm the district court on this issue.

Seedorff last argues his absences were excused by the Family and Medical Leave Act. The district court did not address this issue, and Seedorff did not file a 179(b) motion requesting a ruling on this issue. Accordingly, we find Seedorff has failed to properly preserve this issue for appellate review. *See PEB Practice Sales, Inc. v. Wright*, 473 N.W.2d 624, 625 (Iowa App.1991)(issues must be presented to and passed upon by the district court before they may be raised upon appeal); *see also*

State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206-07 (Iowa 1984) (citations omitted)(a rule 179(b) motion is necessary to preserve error when a district court fails to resolve an issue, claim, or defense properly submitted to it for adjudication). We decline to address this claim.

We have considered all of Seedorff's remaining claims on appeal and find them to be without merit. The decision of the district court is affirmed.

AFFIRMED.