FILED
OCT 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

TAMMY J. REX,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE and VOSS PETROLEUM COMPANY OF IOWA CITY,

Respondents-Appellees.

Filed October 29, 1985

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5-376
84-1520

Appeal from the Iowa District Court for Johnson County, Thomas M. Horan, Judge.

Petitioner appeals from the district court's affirmance of the Job Service decision denying her unemployment benefits on the basis of misconduct. Petitioner asserts that the denial of her benefits on the alleged basis of her participation in a labor dispute violated her first amendment right to free speech. Petitioner alternatively asserts that the employer failed to meet its burden of showing that her conduct constituted misconduct. **REVERSED.**

Lois Cox and Mark L. Hill of Legal Services Corporation, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey, Joseph L. Bervid, and Deborah A. Dubik, Iowa Department of Job Service, for respondent-appellee Iowa Department of Job Service.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

This appeal from a denial of unemployment benefits involves the question of whether an employee who was fired after engaging in picketing her employer was guilty of misconduct. The appellant says she was not guilty of misconduct and that her first amendment rights were violated by the appeal board decision. We reverse.

The petitioner, Tammy Rex, was employed as a full-time manager at Voss Petroleum Company's convenience store near Coralville from October 15, 1982, to June 9, 1983. In March 1983 an inventory determined irregularities in accounting. On May 3 the manager and vice president of the company, Don Shannon, met with Rex to discuss the fact merchandise had been improperly priced. Rex claims she had not been informed what the markup percentages should be. Rex says she diligently began to correct the markup percentages. On May 20 a report was received by the employer showing a shortgage of cash and merchandise. The employees of the store were required to take polygraph tests, and all employees passed. Subsequently, three store employees were discharged. The employer says they were discharged because the shortgages occurred in areas accessible only to these employees.

On June 2 Shannon says he had another talk with Rex in which she allegedly agreed she was doing things "less than correct." That evening Rex contacted the Vice President of Voss Petroleum, Shannon to ask for sick leave for the following day, saying she had worked a 12-hour day and was "drained from all the commotion." That evening Rex and other current and former employees met to discuss forming a labor organization. The next day, Rex called Shannon again. The employer says she asked for additional sick leave. Rex says she asked for additional leave for personal reasons. A witness to Rex's part of the conversation says she heard Rex ask for an additional "leave of absence." The witness further indicated the absence was for personal reasons.

Rex and the other employees began picketing the employer's store June 4 through June 6. Both parties agree the picketing was peaceful, although the employer claimed his business was slowed down. On June 5 Rex gave an interview to a television and radio station in which she stated:

> So all the employees agreed to take a polygraph and every individual passed the polygraph test. And then a week later, well not even a week later, three people were fired in one day. I just hope that this, that maybe they'll learn a lesson and that they just can't push everyone over and that people can take their business elsewhere and that's from the outcome of things, that's what people are doing.

Rex says after this interview a friend told her she had called the store and was told by Mr. Shannon's daughter that Rex was no longer an employee. The claimant then says she called Shannon and was told she was still employed. Hearing further statements that she was not an employee of the company, Rex again says she called Shannon and was told to contact Voss's attorney. The attorney said he knew nothing about the situation. Rex called Voss who told her she was no longer an employee. June 9, at the end of her leave of absence, Rex returned to work and was told by Mr. Shannon she had quit on television. When Rex denied she had quit, Shannon told her she was discharged.

Several reasons were given for the claimant's discharge. On the Job Service form Shannon checked the box which indicated Rex had voluntarily quit. An explanation written by Shannon on a Job Service form said Rex had quit, and referred to the fact he thought she had asked for sick leave, but had not been sick.

At the Job Service hearing Shannon reiterated that Rex had asked for sick leave when she called June 3. He gave as an explanation for her leaving the company her announcement that she quit, the request for sick leave when she was not sick, and problems with the pricing of merchandise. He agrees that when she insisted she had not quit, he discharged her.

The Job Service hearing officer determined that Rex had been fired because of her picketing activities, and that she was not guilty of misconduct. The Job Service Appeals Board reversed this, saying the employer was reasonable in assuming the request for additional leave of a week was because the claimant was sick, since she had been sick the day before. It noted Rex's problems with the price marking as further evidence of misconduct. The board further found picketing activities by Rex were not willful disregard of the employer's interests. The district court affirmed the appeals board decision.

The claimant appeals, saying that the appeals board decision violates her first amendment right to free speech, and that her actions were not misconduct. We find there was no misconduct as defined in our administrative code, and do not find it necessary to address the constitutional issue.

In her brief, Rex claims that our review should be de novo since she has asserted the constitutional right to free speech. In our decision, however, we limit ourselves to the issue of misconduct and our scope of review is that ordinarily given to reviewing an agency decision. We are to uphold the appeals board decision if the factual findings are supported by substantial evidence and if the proper law was applied to those facts. Iowa Code § 17A.19(e), (f)(1985).

Misconduct is defined as follows:

> 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 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.

Three reasons are given by the employer for the claimant's discharge: (1) she quit; (2) she claimed to need sick leave when she was not sick; and (3) problems with pricing the merchandise.

It is apparent from the evidence that the only conclusion that may be reached regarding the first claim is that the claimant did not quit. The employer did not hear the broadcast of claimant's remark, and a review of her comment shows she did not quit in that statement. The employer said he fired her when she denied she quit. We find there is no evidence to support the finding by the Department that the claimant quit.

The employer claims that Rex asked for additional sick leave when she was not sick, and that is misconduct. The claimant says she asked for additional leave, for personal reasons. The witness, according to the appeals board and the court, said that she heard Rex ask for additional leave. The record shows that the witness added that Rex asked for leave for personal time.

The board found the employer was reasonable in assuming a request for additional leave was a request for more sick time. However, the misconduct by the employee must be deliberate. Id. In this case her employer misconstrued her request for leave as a request for sick leave. There is no evidence of willful intent by Rex to deceive Shannon. In another jurisdiction, discussing false statements to any employer, a court has stated an employee's failure to characterize a minor swimming accident as back trouble was an error of judgment, not deliberate and intentional falsification and was not misconduct. Dunlap v. Michigan Employment Security Commission, 99 Mich. App. 400, 403, 297 N.W.2d 682, 683 (1980). The employer's misinterpretation cannot be described as misconduct by the employee.

Rex claims, and the employer does not dispute, that she was never given a deadline for completing the pricing markup. Without being given a deadline for marking up the prices, Rex's failure to complete price markups in the store in less than one month cannot rise to the level of deliberate act against the employer's interests. Misconduct involves a deliberate act or omission or such carelessness as to indicate a wrongful intent. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). The claimant could not deliberately avoid a deadline to complete the pricing changes if she did not know the deadline. The employer also does not contradict claimant's assertion she was diligently complying with the employer's request to make the changes.

The employer has stated several times that the claimant was not discharged for her picketing activities. Since the three reasons given for her termination do not fit the definition of misconduct, we find the court's decision must be reversed and that the claimant is entitled to unemployment benefits.

REVERSED.

SACKETT, J. (dissenting)

I dissent. Our review is confined to determining whether there is substantial evidence to warrant the decision the agency made. Woods v. Iowa Dept. of Job Service, 315 N.W.2d 838, 840 (Iowa App. 1980). Where there is a conflict in evidence or reasonable minds might disagree as to inferences to be drawn from the evidence, the reviewing court is not free to interfere with the agency's findings. Ward v. Iowa Dept. of Transportation, 304 N.W.2d 236 (Iowa 1981). There is sufficient evidence in the record to support the agency's findings.

I would affirm the trial court.