

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 29 1982

CLERK SUPREME COURT

TERRY L. NEVE,

)

Petitioner-Appellant,

)

Filed December 29, 1982

vs.

)

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IOWA DEPARTMENT OF JOB SERVICE
and VECTOR CORPORATION,

)

2-406
2-68421

)

Respondents-Appellees.

)

Appeal from Polk District Court - Luther T. Glanton, Jr., Judge.

Petitioner appeals judgment of the district court affirming the determination of respondent agency that petitioner was discharged from his employment for misconduct and is therefore ineligible to receive unemployment compensation benefits. REVERSED.

Dennis Groenenboom, Cedar Rapids, Iowa, for petitioner-appellant.

Blair H. Dewey, Job Service of Iowa, for respondents-appellees.

Heard en banc.

Petitioner appeals judgment of the district court affirming the determination of respondent agency that petitioner was discharged from his employment for misconduct and is therefore ineligible to receive unemployment compensation benefits. Petitioner claims that the agency's conclusion that he was guilty of misconduct is not supported by substantial evidence in the record and that that agency erroneously applied a "prudent person" standard in evaluating petitioner's conduct in the events surrounding his discharge. We reverse.

Petitioner was employed as a machinist at Vector Corporation. When he punched out after work on June 11, 1980, he mistakenly marked the spot on his time card where he was to punch in the following morning. The timekeeper's usual procedure in cases of mistakes on time cards was to put a piece of white tape over the mistake and pencil in the correct time. However, this had not been done when petitioner returned to work on the morning of June 12; consequently, he did not punch in right away. After the 6:00 a.m. buzzer sounded, indicating the beginning of the work shift, the timekeeper brought petitioner's time card to him and told him to punch in over the prior day's mistake. This was the first time the timekeeper, who had no supervisory authority over petitioner nor any authority to give him orders, told him to punch in over a mistake without first putting white tape over the mistake. Petitioner refused because punching in at that time would make him appear tardy when in fact he was on time that day. His concerns in this regard were justified; if he accumulated much more tardy time than he already had, he would be discharged. According to his uncontroverted testimony, his foreman suggested, but did not specifically order, that he punch in to "make her [the timekeeper] happy," but he did not. He was discharged for excessive insubordination due to this alleged failure to follow orders in violation of company policy.

Petitioner's application for unemployment compensation was rejected by a Job Service claims deputy upon finding that petitioner was discharged for

misconduct. See Iowa Code § 96.5(2)(a). The hearing officer reversed that decision, finding that there was no evidence contradicting petitioner's assertion that he had not been ordered to punch in on June 12; therefore, he did not fail to follow an order properly given by one of his supervisory authorities. In an unrelated incident on June 11, petitioner did refuse to obey a proper order not to punch in one of his co-workers, but his superintendent told him he would not be discharged for that. Since neither incident was sufficient to rise to the level of dischargeable misconduct, the hearing officer concluded petitioner was eligible for unemployment benefits. This decision was in turn reversed by the agency's appeal board which concluded petitioner refused to follow his foreman's "request," and further stated that "[a] prudent person would have done as he was told by the foreman and then grieved to the proper authorities." Petitioner's request for judicial review proved fruitless when the district court found that the appeal board's finding of misconduct was supported by substantial evidence. This appeal followed.

Our review of agency action is governed by Iowa Code § 17A.19(8). One ground upon which we may reverse an agency action is if it is "unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole." § 17A.19(8)(f). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). In this case it is alleged that petitioner is disqualified from receiving benefits because he was discharged for misconduct. "Misconduct" is defined in 370 I.A.C. § 4.32(1)(a) 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 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.

(emphasis added.) The employer has the burden of proving misconduct. 370 I.A.C. § 4.32(4); Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).

We agree with petitioner that the employer here did not sustain its burden of proving misconduct. According to petitioner's uncontradicted testimony, his foreman did not order him to punch in on June 12; he merely suggested he do so to satisfy the timekeeper who, again, had no supervisory authority over petitioner. Rather than evincing a "willful or wanton disregard of [his] employer's interest," his refusal to punch in was based on his reasonable fear that doing so would show him tardy when he was in fact on time and thus possibly lead to his discharge for excessive tardiness. At most, petitioner was guilty of a good faith error in judgment in choosing how to handle the situation. As the administrative definition makes clear, however, this is not enough to support a finding of "misconduct."

Under these circumstances, we conclude that the agency's conclusion is not supported by substantial evidence in the record when viewed as a whole. Therefore, we reverse the ruling of the district court affirming that conclusion and remand with directions to reinstate the ruling of the hearing officer that petitioner is entitled to receive unemployment benefits.

REVERSED AND REMANDED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent.

I believe there is substantial evidence in the record to support the finding that petitioner was discharged for misconduct. The day preceding the day petitioner engaged in the activities for which he was discharged, petitioner arrived at work, punched his own time card and then attempted to punch the time card of a co-worker who was not yet present. He was specifically told not to punch the co-worker's card, but he ignored the instruction and punched the card anyway. For this incident, petitioner was only reprimanded. The following day the petitioner refused to obey the orders of both the timekeeper and the supervisor directing him to punch in even though it would show him to be tardy. Both the timekeeper and the supervisor knew of the circumstances and knew that petitioner had not been tardy. Nevertheless, they required him to punch in to work.

I disagree with the majority that the timekeeper had no authority to give petitioner orders. A 'timekeeper' is a person who keeps a record of the time spent by the workmen at their work; one who notes and records the time occupied in some action or operation, or the number of hours of work done by each of a number of workmen. Jenkins v. Penn Bridge Co., 73 S.C. 526, 531-32, 53 S.E. 991, 993 (1905). To function properly, this person must have authority over matters relating to time cards. Her orders to petitioner were directed to his noncompliance with the normal punch in procedure. I believe she had authority to order him to follow the normal procedure and that it was insubordination for him to refuse to do so.

I also disagree with the majority's statement that the foreman "suggested, but did not specifically order" that petitioner punch in to make the timekeeper happy. The foreman told petitioner, "go do it and make her happy." There was no 'suggestion' in this statement; it was an order that petitioner punch in his time card.

I believe these two incidents show petitioner had been insubordinate and was discharged for misconduct. The former act of insubordination merely demonstrates the magnitude of the more recent act of misconduct. Petitioner was reprimanded for punching in someone else's time card and the following day refused to punch in his own. These two days of insubordination go to the very heart of the employer-employee relationship. I believe the district court's finding of misconduct was supported by substantial evidence and would, therefore, affirm the ruling.