IN THE COURT OF APPEALS OF IOWA

No. 3-224 / 92-494

FILED
DEC 29 1993
CLERK SUPREME COURT
000057

SHIRLEY J. CHIODO,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and YOUTH FOR UNDERSTANDING, INC.,

Appellees.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

The petitioner appeals the district court's decision on judicial review affirming the Employment Appeal Board's ruling denying her claim for unemployment benefits. **AFFIRMED.**

Shirley Chiodo, Des Moines, pro se, for appellant.

Ronald I. Tisch of Graham & James, Washington, D.C., and Candy Morgan of Black, Goldman & Powell, P.C., Des Moines, for appellee Youth for Understanding, Inc.

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

Considered en banc.

OXBERGER, C.J.

On April 22, 1991, the petitioner, Shirley Chiodo, was discharged from her position with her employer, Youth for Understanding, Inc. The discharge occurred after a heated dispute between Chiodo and her immediate supervisor regarding a job assignment. During the dispute, Chiodo used profanity and indicated to another employee that she would hit the supervisor if she walked into the supervisor's office. Chiodo had received warnings regarding the use of profanity. Chiodo claims her immediate supervisor engaged in threatening conduct which exacerbated the dispute. There is some indication in the record that the immediate supervisor only decided to terminate the petitioner's employment after she heard of an incident in which the petitioner transferred a personal call for another employee to a third employee.

The petitioner filed a claim for unemployment benefits with Job Service, which was initially granted on May 8, 1991. In a letter dated May 15, 1991, from the employer's Washington, D.C. office and in a second letter dated May 16, 1991, from the employer's Des Moines office, the employer notified Job Service of its intent to appeal the initial ruling awarding unemployment benefits. The letters were received by Job Service on May 20, 1991.

After an administrative hearing, an administrative law judge entered a decision determining Chiodo was disqualified from receiving unemployment benefits because

000059

she was discharged for insubordination for using profanity during her employment.

The Employment Appeal Board affirmed the decision with a modification. The board determined the disqualifying conduct was the actual threat made by the petitioner concerning the supervisor and the swearing was not the disqualifying misconduct.

On August 19, 1991, Chiodo requested a rehearing asking for the opportunity to submit a new brief regarding the threat issue. The Employment Appeal Board entered a decision denying the application for rehearing.

Chiodo filed her petition for judicial review challenging the board's decision. She claimed the employer failed to take a timely appeal from the initial decision awarding unemployment benefits. She also claimed the Employment Appeal Board improperly denied her request for a rehearing after the board determined she was disqualified from receiving unemployment benefits for a reason different than that initially determined by the administrative law judge. She also claimed there was unsubstantial evidence supporting the board's determination she was disqualified from receiving unemployment benefits for misconduct.

Prior to hearing on the petition, the court allowed the employer to supplement the record to include the envelope in which the appeal was mailed. The district court affirmed the Employment Appeal Board's decision. Chiodo appeals.

000060

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors at law. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. To make that determination this court applies the standards of Iowa Code section 17A.19(8) (1991) to the agency action to determine whether our conclusions are the same as the district court's. Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when that record is viewed as a whole. Eaton v. Iowa Dep't of Job Serv., 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731, 734 (Iowa App. 1986). The fact that two inconsistent conclusions can

000061

be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

I. Timely Filing of Appeal

Chiodo first contends YFU failed to timely file its appeal from the decision of the job service representative.

Issues not timely raised may not be considered on appeal. Armstrong v. State of Iowa Bldgs., 382 N.W.2d 161, 167 (Iowa 1986); Weishaar v. Snap-On Tools Corp., No. 92-0739 (Iowa App. June 29, 1993). Chiodo first raised the issue of timely appeal in her petition for judicial review. The ALJ and the Employment Appeal Board both reviewed the case prior to her submission of the issue to the district court. Chiodo failed to raise the timeliness question in either of those hearings. We find her failure to raise the issue constitutes waiver and we do not consider it now.

II. Substantial Evidence

Chiodo also contends that the Employment Appeal Board decision finding Chiodo was discharged for misconduct was not supported by substantial evidence.

A person who is discharged for misconduct in employment is disqualified from receiving unemployment benefits. Iowa Code section 96.5(2)(a) (1989). What constitutes misconduct justifying termination of an employee and what

is misconduct warranting denial of unemployment benefits are two separate decisions. Brown v. Iowa Dep't of Job Serv., 367 N.W.2d 305, 306 (Iowa App. 1985). In order to support a disqualification from benefits, the misconduct must be substantial. Newman v. Iowa Dep't of Job Serv., 351 N.W.2d 262, 265 (Iowa App. 1984). In addition, it is necessary to establish that the claimant acted willfully and intentionally committed an act or acts which were detrimental to the best interests of the employer. West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992).

The Employment Appeal Board determined the disqualifying conduct was a threat made by Chiodo regarding her supervisor. Both Chiodo's immediate supervisor and a co-employee testified hearing Chiodo threaten to hit her supervisor. The co-employee testified Chiodo made the following remarks:

> I am so mad, I'm so upset. If I go in that office I'm going to hit her.

In addition, the co-employee testified Chiodo said the supervisor "better get the fuck off my back" several times and indicated "I've got to get out of this fucking place." During these remarks, Chiodo was standing directly outside the supervisor's office.

Based on the testimony, we find substantial evidence to support the decision of the Employment Appeal Board. We affirm.

AFFIRMED.

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

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I cannot agree that the actions indicated by the majority constitute misconduct. The actions do not evidence a willful act detrimental to the employer's interest.

Chiodo said, "I'm so mad, I'm so upset. If I go in that office I'm going to hit her." (Emphasis added.) Chiodo also indicated serious displeasure with her supervisor and indicated she had to get away from that place. Instead of showing a willful disregard for the employer's interest, Chiodo's statements indicate an extreme frustration--but a substantial effort--at restraint. To avoid any precipitous conduct on her part, Chiodo expressed a need to avoid contact with her supervisor.

The majority expands the concept of misconduct far beyond its intended roots. Now it is not only found to be grounds for discharge to disparage a supervisor in a moment of frustration, it is now said to be misconduct calling for a denial of unemployment benefits. That is not the intent of the concept of misconduct.

I would reverse.