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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DALE HILDENBRAND,	)	
Petitioner-Appellant,	)	121
vs.	)	
IOWA DEPARTMENT OF JOB SERVICE, and ROCKFORD LUMBER COMPANY, INC.,	)	6-343 86-198
Respondents-Appellees.	)	

Appeal from the Iowa District Court for Floyd County (CE 23880) - Albert Habhab, Judge.

Petitioner appeals from the district court's affirmance of the Job Service decision denying his unemployment benefits on the basis of misconduct. **AFFIRMED BY OPERATION OF LAW.**

Evelyn Ocheltree, Mason City, Iowa, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey, Joseph L. Bervid, and John Rossi, Des Moines, Iowa, for respondent-appellee Iowa Department of Job Service.

Heard by Snell, P.J., Schlegel, and Hayden, JJ., but decided en banc.

On this appeal the judges have evenly divided on the result they would reach. Pursuant to Iowa Code section 602.5106(1), the decision of the district court is affirmed by operation of law. Judges Donielson, Hayden, and Sackett, JJ., would affirm for the following reasons:

Claimant was employed by Rockford Lumber Company, Inc., from September 17, 1984, through November 14, 1984. He worked as a full-time truck driver; his duties consisted of picking up and delivering materials. During this seven-week period claimant was allegedly involved in seven incidents of breakage, with damages totaling $469.82. Claimant's employer spoke to him several times about the amount of breakage and each time he replied that it was all accidental. Claimant was eventually dismissed for excessive breakage of materials and reckless handling of the company truck.

The occurrence which led to claimant's discharge was the breaking of a door on November 10, 1984. Claimant asserts that while attempting to load the door into the back of the truck he slipped on some rocks, fell, and in the action of falling, put his knee through the door. The employer asserts that while picking up this door from the supplier claimant jumped into the truck and put his knee through the door. The claimant did not report the broken door to his employer and when the employer received a bill for two doors claimant was immediately fired. Claimant testified an employee of the supplier said he would receive a replacement door; claimant assumed the supplier had given the second door for free and therefore he felt there was no reason to report the incident.

The claim for unemployment benefits was filed November 16, 1984, and denied by a claims deputy in a decision dated November 29, 1984. Claimant appealed and an in-person hearing was held January 30, 1985. The hearing officer reversed the decision of the claim deputy, holding that no evidence existed to show any willful or deliberate act on the part of the claimant so as to constitute misconduct. The employer appealed and on March 26, 1985, the Board

reversed the decision of the hearing officer, finding claimant's conduct so negligent and careless as to be equal culpability and thereby misconduct. The appeal board also assessed an overpayment of $1,233.42. Rehearing was denied and claimant petitioned the district court for further review. The district court, in an order filed January 10, 1986, affirmed claimant's disqualification of benefits.

Claimant asserts: (1) there is insufficient evidence in the record to support the agency's finding that the claimant evinced carelessness or negligence of such a degree of recurrence as to show equal culpability and thereby misconduct; and (2) as a matter of law, his allegedly unintentional damaging of employer's property did not constitute disqualifying misconduct.

In cases arising out of the Iowa Administrative Procedure Act, our scope of review is limited to the correction of errors of law. Iowa Code § 17A.20 (1985); Mary v. Iowa Department of Transportation, 382 N.W.2d 128, 131 (Iowa 1986). When we review the decision of the district court, the issue with which we are concerned is whether the district court correctly applied the law. "In order to make that determination, this court applies the standard of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court." Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Iowa Code section 17A.19(8)(f) provides that in a contested case the court shall grant relief from an agency action which is not supported by substantial evidence when that record is viewed as a whole. Evidence is substantial to support an agency's decision if a reasonable person would find it adequate to reach the given conclusion. Meads v. Iowa Department of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). The possibility of drawing two inconsistent conclusions from the record does not prevent the agency's finding from being supported by substantial evidence. Contract Services, Ltd. v. Iowa Department of Job Service, 372 N.W.2d 212, 215-16 (Iowa 1985). Our sole task is to determine

whether claimant is entitled to unemployment benefits. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). We do not challenge the employer's right to terminate claimant's employment.

A claimant is disqualified from unemployment benefits "[i]f the department finds the individual has been discharged for misconduct in connection with the individuals employment." Iowa Code § 96.5(2) (1985). The Iowa Code does not provide a definition of misconduct.

The Iowa Administrative Code 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 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.

370 I.A.C. § 4.32(1)(a) (language taken from Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941)). This definition reflects the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979). The employer has the burden of proving misconduct. 370 I.A.C. § 4.32(4).

In Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 222 (Iowa Ct. App. 1983), we held the misconduct must be substantial. (Emphasis added.) We now question the logic of this statement. Misconduct as found in section 96.5(2) and defined in 370 Iowa Administrative Code section 4.32(1)(a) is

sufficient, in and of itself, to disqualify an employee from benefits. After years of struggling to define "misconduct," in Budding we added the further test of finding "substantial" misconduct, we now conclude this additional standard is unnecessary.

Further, we disagree with the language in Budding: "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." Id. Again, misconduct, as defined by the Administrative Code, is enough to warrant the denial of benefits. The sentence should read: Actions serious enough to warrant the discharge of an employee are not necessarily serious enough to warrant misconduct. On appeal we are concerned solely with "misconduct," which results in the denial of benefits.

In determining whether misconduct exists, the reviewing body should consider whether the final incident that resulted in claimant's discharge was one of a series of acts evincing a willful disregard of the employer's interests. Misconduct may consist of a series of incidents as well as a single incident. See Gliddens v. Appeal Board of Michigan Employment Security Commission, 4 Mich. App. 526, 534-35, 145 N.W.2d 294, 298 (1966) (citing Booker v. Employment Security Commission, 369 Mich. 547, 551-52, 120 N.W.2d 169, 171 (1963)). This concept was referred to as the "last straw" doctrine, in Gliddens, the language provided:

> Indeed, if we were to sum up the latitude to be permitted an employer in dealing with a recalcitrant employee who has consistently demonstrated disregard for the employer's interests, we might call it a "last straw" doctrine in which the final infraction, though unrelated to previous infractions, is of such a nature that it demonstrates conclusively the employee's utter disregard for the employer's interests.

4 Mich. App. at 535, 145 N.W.2d at 298. A termination of employment cannot be based on such past act or acts, it must be based on a current act. While

past acts and warnings can be used to determine the magnitude of a current act of misconduct. 370 I.A.C. § 4.32(8). In other words, in line with the Gliddens case, misconduct may consist of a series of incidents as well as a single incident.

In order to establish misconduct the employer must prove conduct by the employee consisted of deliberate acts or omissions or evincing carelessness as to indicate a wrongful intent. Billingsley, 338 N.W.2d at 540. The focus of 370 Iowa Administrative Code section 4.32(1)(a) is on deliberate or intentional acts, or negligence of such a degree as to manifest equal culpability. Holt v. Iowa Department of Job Service, 318 N.W.2d 28, 29 (Iowa Ct. App. 1982). Here the Appeals Board found claimant's conduct so negligent and careless so as to evince equal culpability.

In Jacobs v. California Unemployment Insurance Appeals Board, 25 Cal. App.3d 1035, 1037, 102 Cal. Rptr. 364, 366 (1972), the Court said:

> The conduct may be harmful to employer's interests and justify the employees discharge; nevertheless, it evokes the disqualification for unemployment benefits only if it is willful, wanton or equally culpable.

The employer had the burden of showing conduct evincing such willful or wanton disregard of its interests as is found in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. We find the following persuasive: A series of accidents, attributable to negligence, occurring periodically and with consistent regularity, producing substantial financial loss to the employer will support the conclusion that an employee is guilty of misconduct. See Coulter v. Commonwealth Unemployment Compensation Board of Review, 16 Pa. Commw. 462, 466, 332 A.2d 876, 879 (1975).

The Appeals Board found claimant's conduct evinced carelessness or negligence of such a degree of recurrence as to show equal culpability. This finding

was based on the seven occurrences of breakage in seven weeks and the fact that claimant was warned to improve his performance or lose his job. Rehearing was denied and the district court affirmed.

Reasonable minds could differ as to whether seven incidents of breakage in as many weeks manifest misconduct. On such appeals we function under a limited scope of review. See Hurtado v. Iowa Department of Job Service, No. 85-1040, slip op. (Iowa Sept. 17, 1986). We find the decision of the Appeals Board supported by substantial evidence and thereby affirm.

Claimant also contends that as a matter of law he did not commit misconduct. From a review of the Appeal Board's opinion we find correct legal standards were applied. Here we had a series of accidents, occurring periodically and with consistent regularity, producing financial loss to the employer. The crucial issue is whether claimant was negligent or careless to such a degree as to warrant misconduct. The Appeal Board found misconduct; we will not disturb its finding.

Judge Snell and Chief Judge Oxberger would reverse for the following reasons:

The Iowa Employment Security Law provides benefits for persons unemployed through no fault of their own. Iowa Code section 96.2 (1985). In this context, the word "fault" means worthy of censure or failure of volition. See Amana Refrigeration, Inc. v. Iowa Department of Job Service, 334 N.W.2d 316, 319 (Iowa Ct. App. 1983). The fault concept is underscored by the Iowa Administrative Code definition of misconduct, which is an act that is culpable, of wrongful intent, evil design, or shows intentional and substantial disregard of an employer's interests. 345 Iowa Administrative Code 4.32(1)(a). An act is not legal misconduct under the Code if it is merely inefficient, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertency, or ordinary negligence in isolated instances, or good faith errors in judgment or discretion. Id.

From this, I conclude that to constitute misconduct an act must be volitionally blameworthy.

On review, we affirm the agency determination if it is supported by substantial evidence. Here there is no evidence of fault, i.e. that the employee intended to commit acts harmful to his employer. In fact, the employer testified he definitely didn't think it was intentional, it was just carelessness. The employee said he would pay for anything he broke—it could be taken out of his check.

It matters not that there were seven incidents reported to the employer. Fault must be attributable to one or more of these incidents. The record fails to establish this requirement. To stray from this underlying concept of employment security is to eviscerate the legislative intent.

Judge Schlegel and Chief Judge Oxberger would reverse for the following reasons:

In this case we have no evidence considered by the agency or by the district court that the employee's conduct was willful, wanton, or deliberate. Up until now, we have held there must be evidence presented that the employee's acts demonstrated a wrongful intent, evil design, willful and wanton disregard of the employer's interest or carelessness or negligence that manifests culpability equal to that of intentional conduct before we will find misconduct. Newman v. Iowa Department of Job Service, 351 N.W.2d 806, 807-09 (Iowa Ct. App. 1984).

Even a cursory examination of the record reveals that no evidence was provided that went to the conscious indifference of the employee to the duty owed the employer or a willingness to inflict harm or damage to the employer's interests. Neither the district court or the Appeal Board refers to any such evidence. In fact, the employer himself testified:

> I definitely don't think it was intentional and I think it was just carelessness is the biggest thing of the whole thing.

The employee testified to the various circumstances of his acts which resulted in damage. Nothing in those accounts indicate conscious indifference to the employer's interests. People to whom the employee delivered materials signed a statement that the employee did not break anything on purpose or act in a reckless manner. Therefore, the real issue we are confronted with in this case is an interesting and important one: in the absence of any evidence an employee acted with conscious indifference to an employer's interest or with a willingness to inflict harm, can the Job Service conclude that repeated accidents by an employee without more constitute misconduct per se? The Job Service concluded, and the district court agreed, that seven accidents without

more constitute misconduct. I believe this is a misapplication of the law. I believe the hearing officer properly applied the law in this area when he concluded that since there was nothing in the testimony presented at the hearing which went to volition, misconduct could not be established. Part of our duty on review of agency decisions is to correct misapplication of the law. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218, 221 (Iowa 1984). I believe that some evidence must be in the record that the employee acted with conscious indifference to the employer's interests. I believe there must be some showing of volition. Without this, it is a misapplication of the law to find that a series of accidents rises to the level of misconduct.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 276 N.W. 636, 640-41 (1941), the case from which our administrative code takes its definition of misconduct, said that even where there was evidence of negligence, this negligence was not transformed into misconduct absent evidence [emphasis added] of wanton or deliberate disregard of the employer's standards. Since the supreme court has said that the misconduct definition taken from Boynton and adopted by our administrative code reflects the intent of our legislature, Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979), it is reasonable to conclude that our legislature requires a showing of volition before misconduct can be found.

The cases on which the affirming judges rely for the proposition that repeated accidents will support a conclusion of willful misconduct are not persuasive. In Coulter v. Commonwealth Unemployment Compensation Board of Review, 16 Pa. Commw. 462, 466, 332 A.2d 876, 879 (1975), cited for the above proposition, the court in fact found that since there was no evidence [emphasis added] of willful misconduct, the employer failed to carry its burden.

In Coulter, the uncontradicted employee's testimony as to the nature of the accidents, coupled with the failure of the employer to introduce testimony as to a reasonable standard for the conduct objected to resulted in the finding of no willful misconduct. Similarly, in the instant case no testimony was introduced contradicting the employee's testimony and no reasonable standard was established for the conduct objected to. The majority also cites Jacobs v. California Unemployment Insurance Board, 25 Cal. App.3d 1035, 1037, 102 Cal. Rptr. 364, 366 (1972), wherein the California court found no evidence [emphasis added] of willfulness, wantonness, or equal culpability. The court said it was using a test which was essentially "volitional." Id. at 366. The court found since no evidence was introduced establishing the requisite volition, disqualification for misconduct was not appropriate. Id. at 368. In other words, the affirming judges have failed to cite a single case wherein a series of accidents, in and of themselves without a finding of volition, can support a conclusion that these acts can be raised to the level of misconduct. In fact, the cases cited stand for the exact opposite proposition.

Employer and employee in this case differ concerning the applicability of the terminology of negligence to the context of unemployment compensation law. While there may not be an exact fit between the tort context and the unemployment compensation law context, I do observe that there are three levels of inappropriate employee behavior built into the Iowa Administrative Code definition of misconduct, two of which are grounds for misconduct. These levels of behavior are noticeably similar to the language used to distinguish tortious acts. I am not alone in making such an observation. In Sabatelli v. Unemployment Compensation Board, 168 Pa. Super. 85, 87, 76 A.2d 654, 656 (1950), the Pennsylvania court, in referring to the Restatement (Second) of Torts, said:

> Negligence consists of inattention or inadvertence. Willfulness exists where the injury to the employer, though realized, is so recklessly disregardful that even though there be no actual intent, there is at least a willingness to inflict harm, a conscious indifference to the perpetration of the wrong.

Our case law firmly establishes there must be evidentiary support in the record to support a finding of misconduct. Ellis v. Iowa Department of Job Service, 285 N.W.2d 153, 157 (Iowa 1979). Since there is no evidence in the record there was any willfulness, reckless disregard, or conscious indifference, and since the employer testified there was none, I would find misconduct has not been established in this case. More importantly, however, I think we should directly address the very important issue raised in this case: whether repeated accidents without evidence of volition, can be raised to the level of misconduct. To sidestep the issue by restating our limited scope of the review is to do a disservice to the parties involved as well as to our jurisprudence in this area.

Additionally, I do not agree to any weakening of Budding that may be inferred from the affirming judge's comments. While I do agree that we should keep the distinction clear between unacceptable conduct for the purpose of dismissal of the employee by the employer and employee acts which constitute misconduct which will result in the denial of unemployment benefits, I think the affirming judge's language may result in unforeseen and undesirable consequences. For instance, I would not like to see this opinion to be read for the proposition that conduct which is insubstantial may be sufficient to constitute misconduct. I do not see the purpose, at this stage of our jurisprudence in this area, in suggesting that Budding is being questioned.

For the foregoing reasons, I must dissent.