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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORMAN K. SEYMOUR,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF JOB SERVICE and TAMA MEAT PACKING CORPORATION,

Respondents-Appellants.

Filed September 6, 1984 239

4-110
83-1015

Appeal from the Iowa District Court for Tama County - William R.Eads, Judge.

Respondent employer appeals from the district court decision on judicial review reversing respondent agency's disqualification of petitioner from receipt of unemployment benefits, asserting that substantial record evidence supports the agency decision that petitioner was fired for excessive unexcused absenteeism constituting misconduct. REVERSED.

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid, Des Moines, Iowa, for respondent-appellant agency, and Paul C. Peglow, Marshalltown, Iowa and Gary F. Anderson, Tama, Iowa, for respondent-appellant employer.

David G. Challed, Cedar Rapids, Iowa, for petitioner-appellee.

Heard by Snell, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Nature of the Case

The Petitioner, Norman K. Seymour, was formerly employed by Tama Meat Packing Corporation from June 20, 1979, until he was discharged on March 18, 1982. Petitioner applied for unemployment benefits, and a claims deputy found he was eligible to receive such payments. The employer, Tama Packing Co., appealed this ruling and a telephone hearing was subsequently conducted on May 10, 1982 by a hearing officer from the Iowa Department of Job Service (hereinafter referred to as "The Agency"). On May 17, 1982, the hearing officer issued his decision overruling the claims deputy. In reversing, The Agency found that Seymour had been guilty of misconduct in connection with his employment and was therefore not entitled to unemployment benefits. Seymour appealed the decision of The Agency to the Job Service Appeal Board. The Board affirmed The Agency decision, finding that petitioner was in violation of Iowa Code section 96.5(2)(a) for misconduct relating to his employment.

After having exhausted all available administrative remedies, Seymour filed an action seeking judicial review of the final agency action in The Tama District Court on December 20, 1982. Following a telephone hearing, the Honorable William R. Eads entered an order on June 13, 1983 reversing The Agency decision. On July 12, 1983, Tama Meat Packing Corporation filed a notice of appeal from the judgment entered by the district court.

Findings of Fact

The Appeal Board issued a decision on this appeal October 8, 1982. The claimant made application for rehearing and the rehearing was granted November 12, 1982. After reviewing the administrative record, sworn testimony and considering the application for rehearing the Board finds: The claimant, Norman K. Seymour, was employed by Tama Meat Packing Corporation as a boner on a full-time basis from June 20, 1979 until March 18, 1982, when the claimant was

discharged by his employer. During the course of the claimant's employment, the claimant had accumulated an excessive record of absenteeism and had received several disciplinary actions in respect thereto. On January 16, 1982 the claimant was warned that one more infraction would lead to the termination of his employment. On March 15, 1982 the claimant called in sick and did not report for work. However, the claimant participated in a band competition in Cedar Falls, approximately fifty miles from his home, that night at approximately 9:00 p.m. The claimant did not call in sick on March 16 and did not report for work. On March 17 the claimant did not report for work, but did report his anticipated absence to his employer.

The claimant was discharged on March 18, 1982 because of the aforesaid absences. Claimant alleges that he did not call or report for work on the 16th because he believed he had the day off. The evidence did not establish that the employer excused the claimant on March 16.

Applicable Law

Iowa Code section 96.5 provides that [a] n individual shall be disqualified for benefits. . . (2) [i] f the department finds that the individual has been discharged for misconduct in connection with the individual's employment. . ." Iowa Code §96.5.2 (1983) (emphasis added).

The definition of "misconduct" relevant to this situation is found in the Iowa Administrative Code. "Misconduct" is defined 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 and wanton disregard of an employer's interest as is found in deliberate violation and disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such a 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 a 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 Iowa Administrative Code §4.32(1)(a) (1983).

This general definition of misconduct was approved by the Iowa Supreme Court in Huntoon v. Iowa Dept. of Job Service, 275 N.W.2d 445, 448 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979), because it "accurately reflects the intent of the legislature." Higgins v. Iowa Dept. of Job Service, No. 83-849, slip op. at 5 (Iowa June 13, 1984)(quoting language from the Huntoon opinion).

We have the authority to hear and decide this appeal pursuant to Iowa Code section 17A.20 which provides that "[a]n aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court under this chapter by appeal to the supreme court. . ." Code of Iowa §17A.20 (1983). Our review is limited to a determination of whether the district court made errors of law when it exercised its power of review of agency decision under Iowa Code section 17A.19. Woods v. Iowa Department of Job Service, 315 N.W.2d 838, 840 (Iowa Ct. App. 1981), Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979). Iowa Code section 17A.19 limits the district court's review to a determination of whether The Agency committed any of the errors of law set out in section 17A. 19(8). This is a finite list which provides that relief be offered a petitioner who has had substantial rights prejudiced

> if the agency action was:
> a. In violation of constitutional or statutory authority;
> b. In excess of the statutory authority of the agency;
> c. In violation of an agency rule;
> d. Made upon unlawful procedure;
> e. Affected by other error of law;
> f. In a contested case, unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole; or
> g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a merely unwarranted exercise of jurisdiction.

Code of Iowa §17A. 19(8)(a) -(g) (1983). Therefore, to determine if the district court properly exercised its power of judicial review "this court applies the standards outlined in section 17A. 19(8) to the agency decision, [with consideration of the whole record,] to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order, if they are not, reversal may be required." Jackson County, 280 N.W.2d at 429-30. Chapter 17A of the Code provides that the district court shall reverse or modify The agency decision if it is affected by error in the application of an administrative rule or the law. Code of Iowa §17A. 19(8)(a), (b), (c), (d), (e) (1983). Reversal or modification may also occur if the agency action is not supported by substantial evidence in the record made before the agency when the record is viewed as a whole. Id. at §17A. 19(8)(f). Or, if the agency acted unreasonably, if their decision was arbitrary or capricious, or a clearly unwarranted exercise of discretion. Id. at §17A. 19(8)(g).

We are bound by The Agency's findings of fact if they are supported by substantial evidence. Evidence is substantial if a reasonable person could rely on it as sufficient to reach similar findings. Woods, 315 N.W.2d at 841. The fact that a different result could have been reached is irrelevant. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269, 270 (Iowa 1982). While the substantiality of evidence must fairly take into account whatever in the record fairly detracts from its weight, Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 467 (1951); Briggs v. Board of Directors, 282 N.W. 2d 740, 743 (Iowa 1979), the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's decision from being supported by substantial evidence. Peoples Memorial Hosp. v. Iowa Civil Rights, 322 N.W.2d 87, 91 (Iowa 1982); City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978).

Applying these principles to the facts of the case at bar, we are persuaded that the record when viewed as a whole does in fact substantiate the decision made by The Agency and affirmed by The Appeal Board to deny Mr. Seymour unemployment benefits.

Mr. Seymour has a long history of absenteeism and tardiness that was not excused by his employer. Petitioner began work at Tama Meat Packing Corporation on June 20, 1979. On October 2, 1979 the record reflects that he received his initial warning for absenteeism by way of oral reprimand. Petitioner received a second oral warning for absenteeism and tardiness on January 14, 1980. On February 26, 1980, Seymour was given a written warning for being absent and tardy from work. Petitioner was suspended from work for three days after receiving his second written warning for being absent and tardy on December 12, 1980. It was on January 16, 1982 that Seymour was given a third written warning accompanied with the caveat that "This was his last chance. Any more infractions would lead to termination." The record reflects that the petitioner was aware of this warning. The record is also clear that Mr. Seymour's work day as a boner at the packing plant began at 5 o'clock a.m. and ended at 1:30 p.m. There is evidence in the record which is not in dispute to suggest that there was a lunch break that occurred at approximately 10:30 a.m. The petitioner was tardy from work on March 18, 1982 without a prior excuse from his employer. His doctor's slip entitled "Certificate to Return to Work or School" indicated that he should have and could have been to work at 5 o'clock a.m. on March 18, 1982. As he did not show up to work on March 18, 1982, until after 10:30 a.m., this constituted being tardy from work without excuse.

While there is some dispute as to exact days, there is no dispute in the record as to the fact that Mr. Seymour was absent from work on both March 16, and March 17, 1982 and on one of those days he was absent without excuse from his employer as he failed to call into work to inform them that he would not be able to be present at his job.

The Iowa Department of Job Service made a decision that Mr. Seymour

would not be eligible to receive unemployment compensation. This conclusion was based on the fact that Petitioner had been rightfully terminated from his job due to misconduct, grounded in excessive absenteeism and tardiness. We hold that there is substantial evidence in the record to support this conclusion. The decision of the district court is hereby reversed and The Agency decision will be affirmed.

REVERSED.