IN THE COURT OF APPEALS OF IOWA

No. 0-646 / 00-0249
Filed January 10, 2001

DARIN L. KRUSE,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and DOUGLAS A. WIRTZ d/b/a WHITTEMORE FEEDERS SUPPLY,
Respondents-Appellees.

FILED
JAN 10 2001
CLERK

Appeal from the Iowa District Court for Kossuth County, Frank B. Nelson, Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the respondent board's ruling determining the petitioner was disqualified from receiving unemployment benefits. **AFFIRMED.**

Mark S. Soldat, Algona, for appellant.

Richard R. Ramsey, Des Moines, and Anita Garrison, Des Moines, for appellee board.

Thomas W. Lipps of Peterson & Lipps, Algona, for appellee employer.

Considered by Streit, P.J., and Vogel and Hecht, JJ.

HECHT, J.

Darin Kruse appeals from the district court's ruling on judicial review affirming the Employment Appeal Board's ruling determining he is disqualified from receiving unemployment benefits. Kruse contends the record lacks substantial evidence supporting the Board's determination his physical altercation with another employee constituted misconduct and such a determination was affected by errors of law. We affirm.

I. Factual Background and Proceedings. Kruse was employed by Douglas Wirtz and Charles Wirtz, d/b/a Whittemore Feeders Supply from March of 1997 until October of 1998. He was primarily employed as a full-time feed truck delivery person. On October 2, 1998, Kruse arrived at work early and began preparing for the day's deliveries. When he left to make his first delivery of the day, he left a load of feed in the mixer, apparently preventing any other feed from being mixed. When Kruse returned to work after making the delivery, his supervisor, David Peterson, spoke to him about the incident. Peterson then returned to his office. According to Adam Warrington, a co-employee, Kruse then began throwing items and swearing in anger. Warrington testified he told Kruse to "keep it to himself." A reasonable person could find from the record that profanities were exchanged between Kruse and Warrington. The two men became involved in a physical altercation resulting in Warrington lying on the floor, with the breath knocked out of him.

Kruse and Warrington were the only witnesses to the incident and their descriptions of it differed. Kruse testified Warrington initiated the physical attack

by pushing him, and Kruse struck him in an effort to defend himself. Warrington's version of the story was quite different. He testified Kruse followed him back to his work area and tackled him, hitting him in the ribs and knocking the wind out of him. After the altercation, Kruse went to Peterson's office and told him he and Warrington had a disagreement. Peterson testified Kruse admitted he had punched Warrington. Peterson went the work area and found Warrington[1]. Peterson summoned Charles Wirtz, who came to the worksite and spoke to both Kruse and Warrington about the incident. Wirtz suspended Kruse on that day and, after discussing the situation with his brother, Douglas Wirtz, and their attorney, he terminated Kruse's employment.

Kruse filed a claim for unemployment compensation benefits. On October 28, 1998, a workforce center representative issued a decision denying benefits to Kruse because he had been discharged from his employment for "fighting on the job." Kruse appealed the decision. An administrative law judge held a hearing on the matter, and on March 5, 1999, determined Kruse was eligible for benefits. The employer appealed the decision. On April 26, 1999, the Board reversed the ALJ's decision and denied eligibility for benefits, finding Kruse had a duty to retreat after he was "lightly pushed" by Warrington, and because the record indicated no evidence of retreat, Kruse was not entitled to rely on self-defense. Kruse filed a petition for judicial review. On September 3, 1999, the district court reversed and remanded, ordering:

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[1] Kruse points out inconsistencies in the record with respect to whether Warrington was standing or still lying on the floor when Peterson approached.

> The matter is remanded to the Employment Appeal Board so that it may make a determination whether the conduct of the petitioner amounted to misconduct which not only justified the employer in discharging him but also justified a finding that he is not entitled to benefits.

The Board filed a second decision and again denied benefits to Kruse who again sought judicial review. The district court affirmed the decision of the Board. Kruse appeals.

II. Standard of Review. This court's review of an agency decision is ordinarily for correction of errors of law. Iowa R. App. P. 4; *Bridgestone/ Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85, 90 (Iowa 1997). We apply the standards of section 17A.19(8) to assess whether our conclusions are the same as those reached by the district court. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). We accord an agency only limited deference on matters of law. *Swanson v. Employment Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa App. 1996).

The agency's decision is binding if substantial evidence supports the decision and it is not based upon an incorrect conclusion of law. *See Bridgestone/Firestone*, 570 N.W.2d at 90. "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Eaton v. Employment Appeal Bd.*, 602 N.W.2d 553, 554 (Iowa 1999). The issue for the court is not whether the evidence is in conflict or whether reasonable minds might disagree about the conclusions to be drawn from the evidence; rather, the issue for the court is whether the evidence is so one-sided a finding contrary to that reached by the agency is demanded as a matter of law. *Freeland v.*

Employment Appeal Bd., 592 N.W.2d 193, 197 (Iowa 1992). In reviewing a district court decision on the validity of agency action, the appellate court asks only whether the district court correctly applied the law. *Cobb v. Employment Appeal Bd.*, 506 N.W.2d 445, 447 (Iowa 1993).

III. Merits. Iowa Code section 96.5(2) provides a claimant is disqualified for unemployment benefits if the individual has been discharged for misconduct in connection with the individual's employment. *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa App. 1995). 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 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.

Iowa Admin. Code r. 871-24.32(1)(a) (1997). Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Myers v. Employment Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa App. 1990). Misconduct that may warrant a discharge from employment does not necessarily justify a denial of unemployment benefits. *Diggs v. Employment Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa App. 1991). The burden of proving the employee was guilty of

misconduct is on the employer. *Billingsley v. Iowa Dep't of Job Serv.*, 338 N.W.2d 538, 540 (Iowa 1983).

Substantial evidence in the record supports the Board's findings. Kruse was clearly involved in a verbal confrontation with a co-worker while at work. Although the evidence differed as to which employee initiated the first physical contact, Kruse admitted he continued to approach Warrington during their verbal exchange and did not retreat even assuming Warrington struck him first, but instead struck Warrington with enough force to knock him to the ground. *See Savage v. Employment Appeal Bd.*, 529 N.W.2d 640, 642 (Iowa App. 1995) (holding an employee should avoid the use of force when involved in a altercation at the workplace and has a duty to retreat if provided with a reasonable opportunity). Peterson's testimony supports the Board's conclusion Kruse was the main aggressor in the altercation. Immediately after the incident, Kruse went to Peterson and admitted he and Warrington had a disagreement and he had hit Warrington. Kruse's action of finding the supervisor, rather than walking away, could lead a reasonable person to find Kruse thought Warrington's injuries were serious enough to warrant attention from a third party.

Kruse argues the employer failed to prove which of its interests he "willfully and wantonly" disregarded during the incident in order to support the Board's finding of misconduct. Charles Wirtz testified he was concerned about his company's potential liability because of injuries suffered by Warrington in the workplace fight. We acknowledge Warrington suffered no serious injury as a result of the altercation. However, we do not believe an employee must inflict

serious injury in a workplace fight in order to be guilty of disqualifying misconduct. We concur with the Board's conclusion it is against an employer's interest to have its employees involved in physical altercations in which combatants are tackled or otherwise knocked to the floor and punched in the course of their employment.

Kruse further contests the Board's finding Warrington was more credible than Kruse, in contradiction of the ALJ's determination Kruse was more credible. Kruse specifically argues there was no basis for the Board's credibility finding because Warrington's testimony was inconsistent in several respects. For example, a reasonable person could find Warrington's description of the number and severity of the blows inflicted on him by Kruse increased from one recounting to the next. The Board relied on corroboration of Warrington's testimony by his manager, Peterson, who was the first on the scene after the fight. Kruse points out while Peterson testified Warrington was on the floor when he was summoned to the room, Warrington testified he was up by the time Peterson entered. Kruse also asks this court to give weight to the determinations of the ALJ because the ALJ had the opportunity to observe the witnesses first-hand and was therefore in a better position to assess their credibility than the Board. Although Kruse makes reasonable arguments on these points, we must be mindful of the standard governing our review of this case. We do not review credibility or weigh the evidence de novo. *See New Homestead v. Iowa Dep't of Job Serv.*, 322 N.W.2d 269, 271 (Iowa 1982). Our task is not to decide whether we would have made the same findings, but rather, whether the Board's findings are supported

by substantial evidence in the record. *See id.* Our supreme court has refused to give an elevated status to the credibility findings of the ALJ when those findings were not adopted by the agency. *See Iowa State Fairgrounds v. Iowa Civil Rights Comm'n,* 322 N.W.2d 293, 294-95 (Iowa 1982). Although a reasonable person could find considerable support in the record for the ALJ's finding Kruse was more credible than Warrington, the record before us and the applicable law do not permit us to substitute our judgment for the Board's determination Warrington was more credible. We find the Board's decision is supported by substantial evidence in the record and is not affected by an error of law.

AFFIRMED.