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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CINDY J. HILL,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF EMPLOYMENT SERVICES, Job Service Division,

and

EMPLOYMENT APPEAL BOARD, A Division of the Department of Inspections and Appeals,

Respondents-Appellees.

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8-318
87-1738

Appeal from the Iowa District Court for Polk County (No. AA4-1161), Ray A. Fenton, Judge.

Petitioner appeals from the district court ruling upholding the denial of her unemployment compensation based on misconduct. **AFFIRMED.**

John S. Allen of Legal Services Corporation of Iowa, Des Moines, for petitioner-appellant.

Richard G. Blane II of Hansen, McClintock & Riley, Des Moines, and William C. Whitten and Blair H. Dewey, Des Moines, for respondents-appellees.

Heard by Donielson, P.J., and Sackett and Habhab, JJ., but considered en banc.

DONIELSON, P.J. **143**

In an administrative proceeding, the petitioner was denied unemployment compensation on the ground she had been fired for misconduct. Upon judicial review, the district court upheld the agency's action. The petitioner has appealed from the district court's ruling. She challenges the conclusion that she was fired for misconduct because her conduct was protected by statute. In the alternative, she contends that even if her conduct was not protected by statute, her conduct did not amount to misconduct but instead was merely an isolated instance of good faith error in judgment.

Cindy Hill was employed by the Union County Care Facility from August 1984 to September 1985. She was a certified medication aide whose duties included direct patient care. In July 1985, Hill became concerned about a newly-admitted resident, a man referred to as "Randy," who had suffered brain damage in an auto accident. Randy's behavior was frequently unmanageable, abusive, and threatening. Hill believed that Randy's presence posed a risk to other residents and to staff members. Hill was also concerned because Randy suffered "rug burns" on two occasions after the care facility's administrator dragged Randy to his room when Randy refused to get up off the floor. These injuries were promptly disclosed to county authorities, a doctor, and to Randy's mother.

Hill reported her concerns about Randy to a member of the county board of supervisors, to the local public health nurse, and to Hill's personal physician, who had no contact with Randy or with the care facility.

Randy was removed from the care facility after a month upon the agreement of all interested parties that the care facility was not an appropriate place for him. The care facility was ultimately fined $200 by the Iowa Department of Health for the incidents which resulted in the floor burns. Hill was fired for her role in the events surrounding Randy. The two reasons given for her discharge were: (1) insubordination by failing to follow the established procedures for internal complaints, and (2) unauthorized disclosure of confidential patient information.

After her discharge, Hill sought unemployment compensation. The department of employment services and the employment appeal board denied benefits to Hill on the ground she had been discharged for misconduct and was therefore disqualified from receiving benefits. Upon judicial review, the district court upheld the administrative action. Hill has appealed from the district court's ruling.

Our scope of review in cases involving unemployment benefits and the district court's review of a final agency action regarding the same, is at law, not de novo. Heatherly v. Iowa Dep't of Job Serv., 397 N.W.2d 670, 670

(Iowa 1986). The final agency decision should be affirmed by the district court and the appellate court when there is no error of law and the decision is supported by substantial evidence in the record as a whole. Id.; Iowa Code § 17A.19.

To determine whether the district court has correctly applied the law, we apply the standards of Iowa Code section 17A.19(8) to the agency decision. If our conclusion is the same as that of the district court, we affirm. McClure v. Iowa Real Estate Comm'n, 356 N.W.2d 594, 596 (Iowa App. 1984). Substantial evidence supports an agency decision if a reasonable person would find the evidence adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference. Hollensbe v. Iowa Dep't of Job Serv., 418 N.W.2d 77, 78 (Iowa App. 1987).

I. Hill claims her actions were protected by statute and cannot form the basis for a misconduct disqualification. Hill contends her disclosure of information to Mr. Brown and Ms. Davenport, both employees of local government units, meets the criteria of Iowa Code section 79.29. Therefore, her discharge was illegal and her actions cannot be deemed to have constituted misconduct.

Respondent argues that the disclosure by Hill of confidential information to the doctor, the public health nurse, and to the supervisor, and the taking of photographs of the resident and showing them to people were violations of the

rules of her employer; that Hill was aware of the rules; and that her conduct would be a violation thereof. Respondent denies that the discharge was in retaliation, but was because she violated rules concerning confidentiality, which in their opinion was misconduct.

Hill contends she is protected against discharge by Iowa Code section 79.29 (1987), which provides:

> A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in employment by a political subdivision of this state as a reprisal for a disclosure of information by that employee to a member of the general assembly, or an official of that political subdivision or a state official or a disclosure of information which the employee reasonably believes evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety. This section does not apply if the disclosure of that information is prohibited by statute. (emphasis added)

Section 79.29 clearly prohibits the disclosure of information that is protected by statute. The agency found the medical records of the resident to be protected as confidential information citing Iowa Code section 22.7 and Iowa Administrative Code sections 470-57.40 and 470-57.41(3).[1] Release of confidential resident records requires the consent of the resident, 470 Iowa Admin. Code 57.40, or an order by the court, lawful custodian, or other

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1. 470 Iowa Admin. Code 57.40 and 57.41 transferred to 481 Iowa Admin Code 57.40 and 57.41 July 15, 1987.

duly authorized person. Iowa Code § 22.7. The agency found no release in this case and that both Bob Brown and Kathy Davenport were not authorized by the Union County Care Facility nor were they assigned to the treatment of the resident in question.

Petitioner contends that the agency's reliance on Iowa Code section 22.7 is misplaced. She asserts that no release of information was necessary because the records belong to the county and the county is the lawful custodian. As such, the county supervisor, Mr. Brown, had authority to examine the information. Similarly, since Ms. Davenport frequently worked in the facility, she was "employed" by the facility. Further, section 22.7 restricts only the access of the general public to patient records and not that of state agencies in the exercise of their investigative powers citing Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981).

Iowa Code section 22.7 provides:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:
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> * * *
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> 2. Hospital records, medical records, and professional counselor records of the condition, diagnosis, care, or treatment of a patient or former patient or a counselee or former counselee, including outpatient. . . .

The applicability of section 22.7[2] is discussed in Brown v. Johnston, 328 N.W.2d 510, 511 (Iowa), cert. denied 463 U.S. 1208, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983). The court found the county attorney's investigative authority comparable to and in some instances in lieu of the grand jury. "As such, the county attorney's investigative power must be broad to adequately discharge the public responsibility." Id. at 512. In addition, the records were requested with a subpoena duces tecum, which requires a court order for its issuance. Therefore, execution of the subpoena was not prevented by this statute.

No subpoena was issued in the case at issue. No exception exists which warrants release of the information to Brown and Davenport. The facts in this case are distinguishable. Neither the county supervisor nor the public health nurse have the power of the county attorney with a subpoena or the authority of the Iowa Civil Rights Commissioner with an administrative subpoena in this situation. In both of these cases, the overriding public interest supported release of the records. In "Randy's" case, the issue of confidentiality is the overriding concern and the two people to whom disclosure took place did not have broad investigative powers comparable to either the county attorney or the Civil Rights Commission with subpoenas. There-

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2. Discussed as Chapter 68A, which was transferred to Chapter 22 in Code 1985.

fore, we find that the agency correctly applied the law in this case when it found that Hill disclosed confidential information to unauthorized personnel.

II. The second issue is whether Hill's disclosure constituted misconduct or was, at worst, an isolated instance of good faith error in judgment. Hill argues that the employer has the burden to prove the elements of misconduct. She claims she lacked the wrongful intent required in that her conduct was justifiable and reasonable under the circumstances.

The hearing officer found that Hill's actions were continuous, repeated, and evidenced a scheme of designs purported to use the resident's medical records in pursuit of her own goals and that Hill knew her actions were wrongful as there was an element of concealment in her actions. These conclusions are based on the definition of misconduct which is:

> [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 a willful or wanton disregard of an employer's of an employer's interest as is found in deliberate violation or disregard of standards or 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.

Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979).

To be disqualified from benefits, Hill must have committed misconduct. In other words, Hill must have deliberately violated or disregarded the standard of behavior her employer had the right to expect. Id. Hill was aware of the rules of confidentiality, yet she disclosed the information on Randy. Hill initiated the contacts with Brown and Davenport. Hill photographed Randy's rug burns. She did not follow the procedures established at the facility for reporting such instances. A reasonable person would find adequate evidence to conclude that Hill intentionally disclosed confidential information to unauthorized persons. There is substantial evidence to find that Hill was engaged in misconduct. There was no error of law in this case. Therefore the decision of the district court is affirmed.

AFFIRMED.

All judges concur, except Sackett, J., who specially concurs, and Schlegel, J., and Oxberger, C.J., who dissent.

SACKETT, J. (specially concurring)

I agree with the majority because I determine there is strong evidence Hill breached the confidentiality of the resident in question by disclosing to a doctor, who was not the resident's doctor, confidential information about the resident. This unauthorized release of confidential information is substantial evidence to support a finding of misconduct. Therefore, although I found the manner in which she exposed the resident to the supervisor reflected an insensitivity to the resident's needs, I find it unnecessary to address the issue of whether a county supervisor should be privy to confidential information regarding a resident of a county home.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I believe that petitioner Hill's actions were protected by statute and do not form the basis for a misconduct qualification.

Iowa Code section 79.29 (1987), set out in the majority's opinion, is the legislature's attempt to protect public employees such as Cindy Hill from personnel actions as reprisals for providing information to legislators or public officials or disclosing waste, mismanagement, or violations of law. H.F. 173, 71 G.A., ch. 60, Iowa Acts 1985. It is clear that Hill reasonably believed that her disclosure evidenced a violation of law which, in fact, it proved to be. It is also clear that her actions were not prohibited by any other statute.

The majority relies upon Iowa Code section 22.7 (1985) in finding Hill's actions to be unprotected. I cannot agree. In Head v. Colloton, 331 N.W.2d 870, 874 (Iowa 1983), the Iowa Supreme Court, in discussing the Iowa Public Records statute, stated: "Because chapter 68A[1] defines the right of the general public to access to public records, the exemptions in 68A.7[2] delineate exceptions

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1. Transferred to chapter 22 in 1985 Code.

2. Transferred to section 22.7 in 1985 Code.

only to the same general right." (Emphasis added). In this case, Brown, as a member of the board of supervisors, holds investigative authority pursuant to Iowa Code section 253.8 (1985). Davenport, as a public health nurse, also had authority pursuant to Iowa Code section 143.3 (1985). It is clear that neither Brown nor Davenport received Hill's information as a "citizen" under section 22.7, but acted pursuant to their statutory duties to assist the Iowa Department of Health in carrying out its duty to ensure the safety and health of care facility residents.

In view of the foregoing, I would accordingly reverse the agency's ruling.

Oxberger, C.J., joins this dissent.