IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

RICK L. JONES,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE, and K-MART CORPORATION, STORE NO. 4465,

Respondents-Appellees.

Filed October 29, 1985

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84-1502

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Appeal from the Iowa District Court for Woodbury County - Phillip S. Dandos, Judge.

Petitioner appeals the district court's ruling on judicial review disqualifying him from receiving unemployment benefits. **AFFIRMED.**

Thomas A. Krause of Legal Services Corporation, Sioux City, Iowa, for petitioner-appellant.

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

Considered by Donielson, P.J., Schlegel, and Sackett, JJ.

SACKETT, J.

Petitioner Rick L. Jones appeals the district court's ruling on judicial review disqualifying him from receiving unemployment benefits. We affirm the trial court.

Petitioner Jones was an employee of respondent K-Mart for nine years as a women's apparel stockman. During seven of those years Jones was also the manager of a softball team sponsored by Phillips Kiln Service (Phillips). During his tenure as manager of the softball team, Jones frequently was required to inform Phillips of the need for more or new equipment, and in turn, purchase that equipment either from the K-Mart store where he worked, or at another sporting goods store.

In November of 1982, Phillips asked Jones to determine the equipment needs for the next season. Jones obtained an obsolete sporting goods form with K-Mart letterhead from a co-employee at K-Mart, listed needed merchandise on the form, tallied the price of the items, and submitted the form to Phillips. Jones testified that he informed Phillips that not all of the items on the list were available at K-Mart and that he needed to buy some of the equipment at another store. However, Jones did not indicate this fact on the form itself. Nor does the form indicate that it was merely an estimate submitted by Jones and not an actual bill for the purchases at K-Mart.

Phillips then issued a check to Jones made out to K-Mart for the amount of the entire list of equipment. Jones took the check to K-Mart in December of 1982, endorsed the check with his name and received cash for it. A new cashier cashed the check after Jones explained that the check was for the purchase of softball equipment. K-Mart's personnel policy forbids any one other than the manager from cashing a check made out to K-Mart. The matter was only discovered when Phillips' new softball manager went to Phillips to get money

for more equipment. Phillips in reviewing their records came across the fact they had issued a significant amount of money to purchase equipment and wondered why more equipment was needed. Phillips contacted K-Mart since the check was issued to the store. After an investigation, the manager called Jones into his office, confronted Jones about the check, and then fired him for violating company policy. Jones never denied cashing the check.

Jones filed for unemployment benefits and was originally awarded unemployment compensation by the claims deputy at the Iowa Department of Job Service. K-Mart protested the award and claimed that the benefits should be denied on the basis that Jones was fired from his job because of misconduct. A hearing was held on October 10, 1983, and the hearing officer held that Jones should be disqualified from receiving benefits in that his actions constituted misconduct according to Iowa Code section 96.5(2) (1983). Petitioner Jones appealed for judicial review, and the district court affirmed the hearing officer's decision.

Petitioner appeals the district court's ruling, alleging that the facts, as determined by the hearing officer, do not constitute misconduct as it is defined in Iowa Admin. Code 370—4.32(1)(a).

I. **Scope of Review.** Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited under Iowa Code section 17A.20 to the correction of errors in law. Newman v. Iowa Dept. of Job Service, 351 N.W.2d 806, 807 (Iowa App. 1984); Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 165 (Iowa 1982). The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is

whether the district court correctly applied the law. Newman at 807; Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983). In order to make that determination, we apply the standards 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. Newman, at 807; Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Where the facts are disputed, we will adopt the factual determinations made by the agency as long as they are supported by substantial evidence in the whole record. Newman, at 807; Temple v. Vermeer Manufacturer Co., 285 N.W.2d 157, 160 (Iowa 1979).

Where the facts and inferences fairly to be drawn therefrom are undisputed, however, the issue becomes one of law. Newman, at 808; Green v. Iowa Dept. of Job Service, 299 N.W.2d 651, 655 (Iowa 1980). We are limited to the record before the hearing officer in making his determination. Newman, at 808; Green, at 655. While the court should give the agency's construction weight, it is not bound by that construction. The court is instead obligated to make an independent determination of the statute's meaning. Ellis v. Iowa Dept. of Job Service, 285 N.W.2d 153, 156 (Iowa 1979); City of Des Moines v. PERB, 275 N.W.2d 753, 759 (Iowa 1979).

II. Misconduct.

A. Relation to Employment. Iowa Code section 96.5(2) (1981), provides that a claimant is disqualified from unemployment benefits "if the department finds the individual has been discharged for misconduct in connection with the individual's employment." Our review in this case relates only to whether the claimant is entitled to unemployment benefits. Newman v. Iowa Dept. of Job

Service, 351 N.W.2d 806, 808 (Iowa App. 1984). As in Newman, we do not question here the employer's right to terminate petitioner's employment.

Misconduct is defined by Iowa Admin. Code 370—4.32(1)(a) 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 isolate instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. (Emphasis ours.)

The record shows that the hearing officer determined that Jones's use of a K-Mart sporting goods form, and his cashing the check at K-Mart constituted sufficient "material breach of the duties and obligations arising out of such worker's contract or employment." We agree with the hearing officer that these acts were sufficient to violate the applicable code section. It was Jones' position with K-Mart which enabled him to secure the K-Mart letterhead sporting goods form. It was also Jones' position with K-Mart that enabled him to cash the check made out to K-Mart even though he was not authorized to endorse the check and cash it. There was evidence in the record that could support the fact that he got the check cashed only because he was an employee of K-Mart.

B. Willful and Wanton Disregard of Employer's Interest. In Newman v Iowa Dept. of Job Service, 351 N.W.2d 806, 808 (Iowa App. 1984), the court said:

> The misconduct, in order to support a disqualification from unemployment benefits, must be *substantial*. Budding v. Iowa Department of Job Service, 337 N.W.2d at 222. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits. Id. The focus of 370 Iowa Administrative Code section 4.32(1)(a) is on deliberate or intentional acts by an employee. Holt v. Iowa Department of Job Service, 318 N.W.2d 28, 29 (Iowa Ct. App. 1982). Misconduct is defined in terms of "deliberate act[s] or omission[s]," "willful or wanton disregard of an employer's interest," "deliberate violations or disregard of standards of behavior," and "culpability, wrongful intent, or evil design." Id.

Although claimant denied knowledge of the store policy, there is evidence in the record that when a person is hired at K-Mart they are told they cannot cash checks that are made out to K-Mart. The hearing officer concluded, "The endorsement and cashing of a check made out to another party is not an acceptable practice. Even if the claimant was not aware this was against company policy, the claimant is aware that a check made out to another party is not his property." We hold that the claimant's conduct shows a willful and deliberate disregard of the standards of behavior which an employer has a right to expect from his employees and therefore is job misconduct within the meaning of Iowa Code section 96.5(2). We affirm the trial court's ruling.

AFFIRMED.

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

SCHLEGEL, J. (dissenting)

I respectfully, but vigorously dissent. I feel that the alleged acts are not sufficient to violate Iowa Administrative Code 370-4.32(1)(a). Petitioner Jones was a women's apparel stockman. He did not work in the sporting goods department. Nor did he use any form or bill that K-Mart was then using, rather it was an out-of-date form.

The majority seems very willing to emphasize what Jones did not do when he presented the bill to Phillips. However, the record clearly shows that Jones did tell Phillips that not all of the items on the list were available at K-Mart and that he needed to buy some of the equipment at another store. It is undisputed that Jones was not involved in any way in the decision to pay for the equipment in this manner. Also, according to the record, the cashier did not cash the check because Jones was an employee of K-Mart. Rather, the manager himself testified that she cashed the check because "he said it was for a softball team." There is no other evidence in the record that could support the fact that he got the check cashed only because he was an employee of K-Mart.

Proper application, in this case, of Iowa Code section 96.5(2) (1981), and Iowa Admin. Code 370-4.32(1)(a), would place upon the employer K-Mart the burden of proving not merely that petitioner was guilty of misconduct sufficient to be terminated from employment, but also that the misconduct was sufficient that he should also be denied unemployment benefits. The employer did not carry this burden.

The employer attempted to establish that claimant Jones knew that cashing checks made out to K-Mart for personal use was strictly forbidden and was cause for immediate suspension. However, when asked this question directly the claimant denied knowledge of this policy. The employer's position is further damaged by the fact that a cashier, whose job it is to know the check cashing policies (for this would be in accord with her contract of employment), cashed the check upon Jones's statement that the proceeds were for softball equipment.

The hearing officer concluded, "The endorsement and cashing of a check made out to another party is not an acceptable practice. Even if the claimant was not aware this was against company policy, the claimant is aware that check made out to another party is not his property." The district court concluded the incident "resulted in embarrassment to (the claimant's) employer."

I do not believe the conclusions above find support in the record. Although the employer has a right to terminate its employees for whatever reason, I do not agree that the facts are sufficient to deny claimant unemployment benefits. The record does not support the conclusion that Jones was guilty of "deliberate act[s] or omission[s]," "willful or wanton disregard of an employer's interest," "deliberate violation or disregard of standard behavior," and "culpability, wrongful intent, or evil design."

Where the facts are disputed, [the appellate court] will adopt the factual determinations made by the agency as long as they are supported by substantial evidence in the whole record. Newman v. Dept. of Job Service, 351 N.W.2d 806, 807 (Iowa App. 1984); Temple v. Vermeer Manufacturer Co., 285 N.W.2d 157, 160 (Iowa 1979). In the case before us the majority can only say that there "was" evidence supporting the fact that claimant cashed the check only because he was an employee of K-Mart. They also state that "there is evidence in the record" that K-Mart allegedly told their employees of the check cashing policy. This is simply not sufficient evidence that is required to uphold the agency's decision. The evidence must substantially support the agency's findings. Newman, at 807.

Because the whole record does not substantially support the agency's findings, and, because I do not believe the claimant's actions constituted misconduct according to Iowa Administrative Code 370-4.32(1)(a), I would reverse the decision of the trial court.