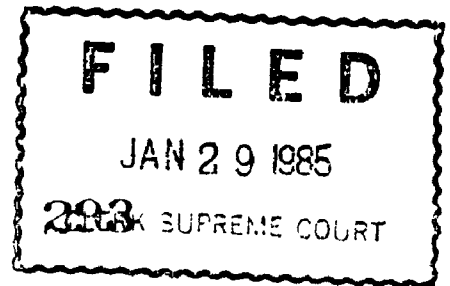


IN THE COURT OF APPEALS OF IOWA



SHEILA M. MICKENS,

)

Petitioner-Appellant,

)

Filed January 29, 1985

vs.

)

IOWA DEPARTMENT OF JOB SERVICE
and NOAH'S, INC.,

)

4-432
84-229

)

Respondents-Appellees.

Appeal from the Iowa District Court for Polk County - Ray Hanrahan,
Judge.

Petitioner appeals from the district court decision on judicial review affirming her disqualification from receipt of unemployment benefits, asserting that substantial record evidence fails to support a finding that she was guilty of misconduct. REVERSED.

Helen L. Stirling, Des Moines, for petitioner-appellant.

Blair H. Dewey, Walter F. Maley, and Joseph L. Bervid, Des Moines, for
respondents-appellees.

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

Petitioner appeals from the district court decision on judicial review affirming her disqualification from receipt of unemployment benefits. She asserts that substantial evidence fails to support a finding that she was guilty of misconduct. We reverse.

The claimant, Sheila M. Mickens, was employed as a salad maker at Noah's, Inc., a restaurant, on a full-time basis from November 9, 1979 until August 2, 1982, when she was discharged from employment. Respondent agency disqualified petitioner from receipt of unemployment benefits on the ground of misconduct and the decision was affirmed on judicial review. Sheila has appealed from this determination.

The principles governing review of administrative decisions are set forth in Gipson v. Iowa Dep't. of Job Service, 315 N.W.2d 834, 836 (Iowa Ct. App. 1981). Our review is limited to a determination of whether the district court made an erroneous decision as a matter of law when it exercised its power under section 17A.19 of the Iowa Code. Id. (citing Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979)). Pursuant to section 17A.19, the district court reviews the agency decision to determine whether there were any errors of law as specified in section 17A.19(8). Thus, as we recognized in Gipson,

[T]o determine whether the district court properly exercised its judicial review "this court applies the standards of section 17A.19(8) to the agency's action to determine whether this court's conclusions are the same as those of the district court."

Id. (citing Jackson County, 280 N.W.2d at 429-30).

The pivotal question on appeal is whether the agency's determination that misconduct existed is supported by substantial evidence. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. McConnell v. Iowa Dep't. of Job Service, 327 N.W.2d 234, 236 (Iowa 1982). "The mere possibility that the record would support another conclusion does not permit

the district court or this court to make a finding inconsistent with the agency findings so long as there is substantial evidence to support it." Peoples Memorial Hospital v. Iowa Civil Rights Comm'n., 322 N.W.2d 87, 91 (Iowa 1982) (citing Woods v. Iowa Dep't. of Job Service, 315 N.W.2d 838, 841 (Iowa Ct. App. 1981)).

In reviewing the record, we find insufficient evidence to support the agency's conclusion that misconduct existed. Misconduct is defined in 370 Iowa Admin. Code § 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 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 interest 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 in good faith errors in judgment or discretions are not to be deemed misconduct within the meaning of the statute.

(emphasis added). In light of this definition, we cannot agree with the hearing officer's decision. In his Reasoning and Conclusions of Law, the hearing officer set forth the evidentiary basis for his determination:

The duties of the Claimant required her to make salads for the customers of the Claimant. The Claimant would often not make her salads in a timely manner, would perform activities in preference to making salads, would show preference between the various waitresses and waiters of the employer, which resulted in various warnings to the claimant about her job performance. When the Claimant continued not to make her salads in a timely manner, the Claimant was terminated from her employment on August 12, 1982

We agree with the petitioner's assertion that the findings which would indicate misconduct are not supported by substantial evidence. There is little dispute that the claimant would often not make her salads in a timely manner and would

perform other activities in preference to making salads. Yet there was no evidence that this was done in an intentional manner or that the claimant was willfully or wantonly disregarding the employer's interests.

Furthermore, we do not believe the evidence supports a finding that claimant showed preference "between the various waitresses and waiters of the employer." Three witnesses offered testimony concerning the alleged favoritism. Lora Evans, a hostess, characterized the claimant's actions as favoritism "because a friend of hers never had any problems getting salads at all." The hostess's testimony reflects, however, that she had not actually observed the claimant holding up a salad for any particular reason. Nor did she point to any specific complaints by other employees to support her conclusion. Noah Lacona, the claimant's employer, testified that if Sheila "was sore at someone, she wouldn't put their orders up." However, he also testified that he had never personally observed this. One waitress testified that she had problems getting salads and that the claimant would make salads for other food servers who had turned in an order after her. She further testified that she did not know if the claimant's actions were intentional.

We cannot characterize this evidence as "substantial evidence" which would support a finding of intentional favoritism. Mr. Lacona and the hostess were the only witnesses who specifically made a claim to this effect. Yet their claims were unsubstantiated. They cited to no personal observations of favoritism. Furthermore, no details as to any specific occurrence were offered. A reasonably prudent person would not rely on bare assertions to support a finding of misconduct.

Finally, we cannot agree with the hearing officer's finding that the claimant received repeated warnings about her conduct. Mr. Lacona testified to this effect; however, he could not give a date of any such conversation or even an estimate of how long prior to her discharge such a conversation might have

occurred. When questioned by the claimant's representative, he stated that he had tried to help her with her work but "I wouldn't say I was warning her about it." The fact that Mr. Lacona made conflicting statements detracts from any conclusion that several warnings were given.

At best the record supports a conclusion that on one occasion the employer and claimant had a conversation about a complaint of one of the waitresses. The claimant herself testified about the situation saying that she told Mr. Lacona, "I felt that I was getting them out and as fast as I could get them out."

Essentially, the record reflects that the claimant was performing unsatisfactory work. Waitresses complained they weren't getting their salads fast enough, the claimant would not prepare the salads in the order they were requested, and she would perform other duties while waitresses were waiting for their orders. These findings alone are not sufficient to rise to the level of misconduct. Misconduct connotes some deliberate act or omission or carelessness as to indicate wrongful intent. Billingsley v. Iowa Dep't. of Job Service, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). A failure in good performance which results from inability or incapacity is not volitional and thus is not misconduct. Huntoon v. Iowa Dep't. of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Our decision in this case is not easily reached and is not intended to fault the employer for terminating claimant's employment. We recognize the inherent difficulty in proving that claimant's conduct was intentional. Certainly favoritism and intentionally failing to make the salads in a timely manner would seriously interfere with the employer's business and would constitute misconduct. However, we cannot assume that the claimant's poor performance was volitional or deliberate. The burden is on the employer to prove that the activity in question constitutes misconduct. This burden has not been met. While the record contains some testimony that would infer the existence of misconduct, we do not believe a reasonable person would accept the evidence as adequate to reach a conclusion.

Accordingly, we reverse the district court's determination.

REVERSED.