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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BARBARA K. BURRICHTER,

)

Petitioner-Appellee,

)

Filed November 30, 1983

vs.

)

IOWA DEPARTMENT OF JOB

)

SERVICE and FAREWAY STORES, INC.,

)

3-253

83-80

Respondents-Appellants.

Appeal from Washington District Court - James P. Reilly, Judge.

Respondent agency appeals from the district court decision on judicial review reversing the agency's disqualification of petitioner from receipt of unemployment benefits. AFFIRMED.

Walter F. Maley, Blair H. Dewey, and Edmund Schlak, Jr., Des Moines, for respondents-appellants.

Lois Cox, Iowa City, for petitioner-appellee.

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

SCHLEGEL, J..

Respondent agency appeals from the district court decision on judicial review reversing the agency's disqualification of petitioner from receipt of unemployment benefits. We affirm.

Petitioner, a checker at a grocery store, was terminated for checking out her own merchandise in violation of the store's rules. Under the store's rules, employees are not permitted to check out their own or a close relative's groceries. Petitioner had been informed of this policy informally by a co-employee but had not been notified of the rule by the employer. Petitioner worked at the store from May 26, 1980, to December 3, 1981, on which date she was discharged. No store meetings were held during her employment to discuss company policies.

Petitioner rang up three packs of cigarettes for herself on December 3, 1981, in order to save time prior to leaving the store for lunch. She had several errands to run over the lunch hour and the other checkers were busy with store customers. She left the cigarettes on the rack and placed the money in her cash register. When she left at noon, she forgot to take the cigarettes, but she did take the receipt. Once at home, she cleaned out her pockets and threw away the receipt for the cigarettes.

Petitioner returned to the store after lunch and worked the remainder of her shift. She placed the cigarettes next to the register so she wouldn't forget them. At the end of the shift, she placed the cigarettes in a sack and did some other shopping in the store. While she waited in a checkout line to pay for her groceries, the assistant manager motioned her to an empty register where he checked out her purchases. The assistant manager asked her if she wanted to put her groceries in the same sack she already had. She agreed and started putting the groceries in the sack with the cigarettes. The assistant manager asked her if she had a receipt for the purchase in the sack. She replied, "yes," but she replied

"no" when he asked if the receipt was in the sack. Petitioner also said that she didn't remember who had checked her out or at what register in response to the assistant manager's questioning. At this point the assistant manager had become very loud and attracted the attention of customers and other checkers. Petitioner became nervous and flustered and left the store. She, however, returned the cigarettes to the rack before leaving the store.

Petitioner returned to the store the same evening to inform the assistant manager as to exactly what happened. Prior to seeing the assistant manager, she refused to accept an offer by a co-employee who volunteered to say that she had rung up petitioner's cigarette purchase. Upon her informing the assistant manager that she had rung up the cigarettes herself, he told her that she had violated a company rule, and that she was discharged.

The initial decision by the hearing officer held that willful and deliberate misconduct was not established by the record. The employer did not appear at the hearing so the hearing officer's decision was based upon petitioner's testimony. The Appeals Board reversed the hearing officer, holding petitioner was discharged for misconduct when she knowingly violated company policy in checking out her own purchase and when she lied to the employer when asked whether she had followed company policy. Petitioner then filed for judicial review in the district court. The district court reversed the denial of unemployment benefits to petitioner concluding from the record made "that petitioner did not commit any act which 'evinced wanton or willful disregard of her employer's interest.'" The district court found petitioner's conduct in violating a company rule a "mistake in judgment" but not conduct which warrants denial of unemployment benefits. The district court also found that although petitioner's actions in dealing with the assistant manager were a "mistake in judgment," her actions were justified by the conduct of the assistant manager. Respondent agency appeals the district court decision.

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. 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. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. 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. 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. Temple v. Vermeer Mfg. 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. Green v. Iowa Department of Job Service, 299 N.W.2d 651, 655 (Iowa 1980). We are limited to the record before the hearing officer in making this determination. Id.

II. Misconduct. Iowa Code section 96.5(2) (1981) provides that a claimant is disqualified from unemployment benefits "[i]f the department finds that the individual has been discharged for misconduct in connection with the individual's employment." The sole issue before us is whether the department erred in holding that petitioner's conduct constituted misconduct as that term is contemplated under section 96.5(2). The facts are not in dispute. The employer presented no contradictory evidence. We note at the outset we do not question the employer's

right to terminate the petitioner's employment. See Budding v. Iowa Department of Job Service, 337 N.W.2d at 221. The issue we address relates solely to whether or not petitioner is entitled to unemployment compensation.

Misconduct is defined by 370 Iowa Administrative Code section 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 isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

See also Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979).

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. The burden is on the employer to prove employee misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982); Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 770 (Iowa Ct. App. 1982); 370 I.A.C. 4.32(4).

We agree with petitioner and the district court that employer did not sustain its burden of proving misconduct. The agency found in its decision that petitioner's actions in checking out her own purchases and in not fully disclosing that fact to her employer when questioned were volitional and deliberate. See Huntoon v. Iowa Department of Job Service, 275 N.W.2d at 448. The agency also found that these actions constituted a material breach of duties that the petitioner owed her employer. Claimant testified without contradiction, however, that although she knew of the rule through informal contacts with other employees, she had never been apprised of the rule or the consequences of violation of that rule by her employer.

We do not believe that under these facts substantial disregard for the employer's interest is shown. That showing is essential for a finding of misconduct. Woods v. Iowa Department of Job Service, 327 N.W.2d at 770. Cumulative acts may be used to establish a course of conduct sufficient to manifest an intentional and substantial disregard for the employer's interest even though the triggering event for the dismissal is a relatively minor infraction. Budding v. Iowa Department of Job Service, 337 N.W.2d at 223. There was no evidence that petitioner had previously violated any of the employer's policies. We believe that petitioner's action in checking out her own purchase was an isolated incident, a mistake in judgment, which does not justify denial of unemployment benefits. See Williams v. Unemployment Compensation Board of Review, 32 Pa. Commw. 641, 649-50, 380 A.2d 932, 936 (1977). We emphasize that there is absolutely no evidence of theft in this case.

The agency also asserts on appeal that petitioner's action in failing to disclose that she had checked out her own purchases upon questioning constitutes dishonesty, which taken together with the violation of the employer's policy is sufficient to show misconduct. A deliberate attempt by an employee to mislead

his employer constitutes willful misconduct. Blessings v. Unemployment Compensation Board of Review, 34 Pa. Commw. 345, 347, 383 A.2d 580, 581 (1978). The uncontroverted evidence shows, however, that petitioner became flustered by the assistant manager's actions in drawing attention to the petitioner during the incident at the checkout line. See Woods v. Iowa Department of Job Service, 327 N.W.2d at 771 (an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause). The district court found there was insufficient evidence to show that petitioner had deliberately mislead her employer. We agree. The uncontroverted record discloses that she returned that evening to the store and disclosed the fact that she had checked out her own purchase to the assistant manager. We hold as a matter of law that under these circumstances, the petitioner's conduct did not rise to the level of willful misconduct.

Accordingly, we affirm the decision of the district court.

AFFIRMED.

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

DONIELSON, J. (dissenting)

I believe the agency's decision disqualifying petitioner from jobless benefits due to misconduct is supported by substantial evidence. I therefore dissent.

The majority properly recites the definition of "misconduct" as including the "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees" The record in this case makes clear that petitioner was aware of the company rule against checking out one's own purchases, violated that rule, and then lied to one of her supervisors about the incident. This appears to me to be precisely the kind of "deliberate violation or disregard" of an employer's standards that our administrative rules contemplate. The fact that petitioner may have had no bad intent in taking those actions in no way mitigates the uncontested fact that she knowingly and deliberately violated one of her employer's rules and then lied about it for whatever reason. I would affirm the agency's denial of jobless benefits.