

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY J. MEEKER,

Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF JOB SERVICE and
WASHINGTON CARE CENTER, INC.,**

Respondents-Appellees.

Filed April 30, 1985

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84-570

Appeal from the Iowa District Court for Washington County - Harlan W.
Bainter, Judge.

Appellant appeals the district court's affirmance of the denial of her
unemployment benefits following her termination of employment. **AFFIRMED.**

Debra J. Tharp of Day & Meeker, Washington, Iowa, for petitioner-appellant.

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

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

DONIELSON, P.J.

Mary Meeker appeals the district court's affirmance of the denial of her unemployment benefits following her termination of employment. She claims there was no substantial evidence in the record to support Job Service's conclusion that she committed acts of misconduct in connection with her employment. We affirm.

Meeker has limited intellectual and cognitive abilities. Two separate tests taken several years apart placed her I.Q. at 73 and 74 respectively, which, according to a report prepared by the Social Welfare Department, indicates "she is functioning in the borderline range of intelligence." Another part of that report states:

This client is a "fooler" in that she looks so much better than she is able to perform. It is very difficult not to expect more from her than she is able to deliver The results of the psychological examination and the results of the evaluation performances support the fact that Mary is extremely intellectually and academically limited.

Meeker commenced working as a full-time nurse's aide with the employer, Washington Care Center, Inc., in August of 1978. During her employment she received several evaluations which were critical of her work and specifically pointed out that she was in need of close supervision. Those evaluations indicated that she lacked good judgment and that she would temporarily improve following criticism by her supervisors.

The record shows that Meeker received verbal warnings from her employer concerning rough treatment of patients. She received a written warning for her "unbecoming conduct" for being discourteous to a family member in the presence of a terminally ill resident. That warning also mentioned that she was careless and rough in handling residents.

Following a hearing before a job service hearing officer, the hearing officer found that on or about February 15, 1982, the employer received a complaint that

the claimant "had an incident with two of the residents who had involuntary stool movements and the claimant told the residents that they would remain unattended in this respect until they had finished their lunch." The hearing officer found that when Meeker was confronted by her employer, she "did not deny the allegations, but replied that she was 'sorry,' which resulted in the discharge of the claimant on February 17, 1982." On this finding, the hearing officer found that "The claimant was discharged for misconduct in connection with her employment and the claimant is not entitled to receive unemployment benefits."

The findings of the hearing officer were affirmed by the Appeal Board of the Iowa Department of Job Service on August 10, 1983, and Meeker filed for judicial review in the district court. The decision of the hearing officer and of Job Service was affirmed by the court. Meeker has appealed 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) (1983) 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). As stated in Budding, 337 N.W.2d at 221:

We note at the outset that we do not question the employer's right to terminate petitioner's employment. The issue we address relates solely to whether or not petitioner is entitled to unemployment compensation.

Misconduct is defined by 370 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, 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. 370 Iowa Admin. Code 4.32(4). See also Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).

We believe there is substantial evidence in the record to support the agency finding that Meeker was guilty of misconduct:

for permitting two of her residents to remain sitting in their "stool" during the lunch period, which does show a willful and wanton disregard of her employers interests . . . and constitutes misconduct within the meaning of section 96.5-2-a of the Iowa Code

There is sufficient evidence from which the hearing officer could find that Meeker told one patient that she could sit in her urine, and that she told another patient that she could sit in her involuntary stool until she was done with lunch. *Allowing patients to sit in urine or stool is nothing short of appalling and constitutes an obvious breach of the claimant's duties.*

Evidence would also support the conclusion that claimant's conduct was volitional, as required by Huntoon v. Iowa Dep't of Job Service, 275 N.W.2d at 448.

In Huntoon, the Iowa Supreme Court stated:

Misconduct connotes volition. A failure in good performance which results from inability or incapacity is not volitional and thus is not misconduct.

Id. While the record reflects that the claimant had limited intellectual ability, it does not support the conclusion that the claimant lacked the ability to act deliberately and willfully under the facts of this case. It is apparent that Mary had been repeatedly warned and had demonstrated the ability to improve her

behavior. Furthermore, as the district court indicated, it was obvious that Mary was aware her conduct was wrong since she apologized. Essentially, we believe that the flagrant misconduct evidenced in the record is simply not the type of behavior that would result from inability or incapacity. The mere fact that the claimant has limitations in intellectual ability does not excuse her behavior; nor should it serve to discount evidence which would support a finding of willfulness. The district court's conclusion that Mary knew what she was doing is reasonable and supported by the record. We affirm the denial of unemployment benefits.

AFFIRMED.

Snell, J., concurs and Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. I believe that the hearing officer, the district court, and the majority have been swayed by the repulsive nature of the alleged misconduct, and have thereby relieved the employer of its burden to prove misconduct. See 370 Iowa Admin. Code 4.32(4); Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).

The only evidence relating to the conduct of Meeker that led to discharge was hearsay evidence that Meeker "had told a resident that she could sit in the ur-
- in her urine until she was finished with lunch and also told another resident that had a loose stool, that she could sit in the stool until her lunch was finished." The statements attributed to Meeker cause, by their very nature, people to become repulsed. Unless such statements are explained, the inescapable picture that they create in the mind will be unfairly prejudicial. As an example of such prejudice, the hearing officer has decided that Meeker's alleged statements alone, without any evidence of the circumstances surrounding the conduct which took place, are a basis for finding misconduct that disqualifies Meeker from receiving unemployment benefits.

Meeker's statements (assuming the truth of the hearsay repetition of them), as gross and as repulsive as they sound, may have been made at a time, or under such circumstances as to have been completely justified, and in accordance with appropriate needs of the time. Or, as assumed by the hearing officer without proof, they may have been totally improper. The point that the hearing officer and the reviewing court both seem to have missed, is that under 370 Iowa Administrative Code 4.32(4), the employer has the burden to prove that claimant's conduct was a deliberate breach of her duties and obligations, or that it was conduct evincing such willful or wanton disregard of her employer's interest as is found in deliberate violation or disregard of standards of behavior which her employer had the right to expect of her. While hearsay evidence is generally

admissible at administrative hearings, McConnell v. Iowa Department of Job Service, 327 N.W.2d 234, 237 (Iowa 1982) (citations omitted), it is subject to the same requirements of substance to sustain the burden imposed upon the employer. The hearsay statements alone, without additional evidence of the attendant events, do not meet the employer's burden of showing misconduct.

The record here, made entirely from statements attributed to others who were not parties to the hearing, provides us with no insight into the conduct of the claimant that is claimed to constitute misconduct sufficient to disqualify her from receiving unemployment benefits. The record, with its evidence of Meeker's low mental capacity and the job evaluations showing she lacked good judgment, more nearly supports a finding of "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" which are not to be deemed misconduct within the meaning of the statute. See 370 Iowa Admin. Code 4.32(1)(a) (emphasis added).

There is no evidence from which it can be found that the claimed conduct was volitional, as required by Huntoon v. Iowa Department of Job Service, 275 N.W.2d at 448, where the Iowa Supreme Court has said:

Misconduct connotes volition. A failure in good performance which results from inability or incapacity is not volitional and thus is not misconduct.

Under the record in this case, the agency's finding of misconduct is not supported by substantial evidence.

Upon judicial review, the district court stated, "It is obvious that Mary knew what she had done was wrong because she said she was sorry." There is no justifiable conclusion that because Meeker said she was sorry, she knew what she had done was wrong. Considering the evidence of Meeker's limited abilities, including the employer's own evaluations of her, it would be a more appropriate conclusion that she was sorry because she had displeased her superiors. The

statement, "I'm sorry," in the context used in this matter is not substantial evidence of an admission of misconduct or of Meeker's knowledge of the wrongful nature of her conduct.

The agency erred in finding that Meeker was guilty of misconduct of such a nature as to disqualify her from receiving unemployment benefits, because there was not, in the record of the hearing, substantial evidence to support such a finding. See Iowa Code § 17A.19(8)(f) (1983). Accordingly, the ruling of the trial court on judicial review, affirming the decision of the hearing officer and of the appeal board, is hereby reversed and the claimant's entitlement to unemployment benefits is reinstated.

REVERSED.