

IN THE COURT OF APPEALS OF IOWA

No. 0-520 / 90-300

FILED

JUN 25 1991

CLERK SUPREME COURT

CARILLA S. RICHERS,

Appellee,

vs.

**IOWA DEPARTMENT OF JOB SERVICE and MARSH & McLENNAN GROUP
ASSOCIATES, INC.,**

Appellants.

Appeal from the Iowa District Court for Johnson County,
L. Vern Robinson, Judge.

Employer appealed decision of district court reversing
Employment Appeal Board's denial of unemployment benefits
based on finding petitioner was discharged for misconduct.
REVERSED.

William C. Whitten, Des Moines, for appellant Iowa
Department of Job Service.

Patricia A. Shoff and Deborah M. Tharnish of Davis,
Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines,
for appellant Marsh & McLennan Group Associates.

Alanson K. Elgar and W. Kent Thompson of the Elgar Law
Office, Mt. Pleasant, for appellee.

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

DONIELSON, P.J.

Petitioner Carilla Richers was employed by Marsh & McLennan Group Associates, Inc. (MMGA), an insurance brokerage and employee benefit plan administrator, for seventeen years. She advanced to the position of assistant vice president and was head of a department which administered group insurance trusts. Richers' department experienced several problems during 1987, including incorrect bank statements, employee turnover, and a new computer system which suffered from numerous malfunctions. Furthermore, Richers discovered that two employees were planning to sabotage the information system. An audit of the department was conducted which revealed errors totaling \$136,000 in the trust accounts. Richers was discharged for mismanaging her department.

Richers filed a claim for unemployment compensation. A Job Service representative awarded her benefits. However, after an administrative hearing, the hearing officer determined that Richers had engaged in misconduct by permitting an accumulation of errors to continue for an extended period of time and by concealing the problems in her department from the employer. The hearing officer reversed the award of benefits. The Employment Appeal Board affirmed the hearing officer.

Richers filed a petition for judicial review. The district court noted that there was no evidence that Richers' poor performance was intentional. The court

concluded her inability to reconcile the trust accounts was not volitional, but was mere inefficiency or unsatisfactory conduct. The court reversed the board's decision and remanded for computation of unemployment benefits. The employer and the board appealed.

I. Our scope of review was well set out in Henry v. Iowa Department of Transportation, 426 N.W.2d 383, 385 (Iowa 1988):

In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. (Citations omitted.)

II. Appellants first contend that the court did not properly limit its scope of review as required by Iowa Code section 17A.19. They believe the court improperly substituted its view of the facts for that of the agency, instead of giving due deference to the agency fact-finding.

A court must affirm an agency's findings of fact unless the findings are unsupported by substantial evidence when the record is considered as a whole. Hill v. Iowa Department of Employment Services, 442 N.W.2d 128, 132-133 (Iowa 1989). Substantial evidence is defined as "that which a reasonable mind would accept as adequate to reach a given conclusion." Meads v. Iowa Department of Social

Services, 366 N.W.2d 555, 558 (Iowa 1985). The question for a reviewing court is not whether the evidence might support a different finding, but whether evidence supports the findings actually made. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 908 (Iowa 1987).

The district court set forth these principles in its decision. We believe the district court applied the correct standard of review in this case.

III. Appellants also contend that the court erred in finding there was not substantial evidence in the record to support the agency decision. They point out that Richers was acting in a fiduciary capacity in regard to the trust funds and that she knew the accounts had not been reconciled. They assert that Richers willfully misled the employer concerning the state of her department. The employer has the burden to show misconduct. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa App. 1983).

Iowa Administrative Code § 345-4.32(1) defines misconduct 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.

Because inability or incapacity to perform well is not volitional, it cannot be deemed misconduct. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218, 222 (Iowa 1984). The district court found there was no evidence Richers' poor performance was intentional. The court found that her inability to reconcile problems in her department was not volitional, but was merely inefficiency or unsatisfactory conduct. We disagree with the district court's conclusion.

When the facts are in dispute or when reasonable minds may differ on the inferences to be drawn from the evidence, an agency's findings are conclusive. McConnell v. Iowa Department of Job Service, 327 N.W.2d 234, 236 (Iowa 1982). The agency is in the best position to determine the credibility of witnesses and to draw the proper inferences from the testimony. Id. Furthermore, we have no obligation to accept Richers' testimony as a verity concerning her reasons for her actions. Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309, 311 (Iowa 1986).

We find that the decision of the Employment Appeal Board was supported by substantial evidence on the record. In the present case there was a dispute as to whether

Richers had the ability to manage her department. Because the facts are in dispute on this issue, the agency's findings are conclusive.

We believe Richers' conduct evinced a willful and wanton disregard for her employer's interests. She was aware of the problems in her department, but did not seek help from her supervisors or from other departments. Her action of concealing her department's problems from the employer should be considered intentional, and therefore constitutes misconduct.

We reverse the decision of the district court and reinstate the decision of the Employment Appeal Board denying petitioner unemployment benefits.

REVERSED.

Sackett, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I agree with the district court that there is not sufficient evidence to show an intentional act on the part of the claimant

Although I am not prepared to find that the claimant was incapable of doing her job, the difficulty with the management of her department was not an intentional lapse. It was the kind of problem that is not misconduct.

I would affirm the trial court