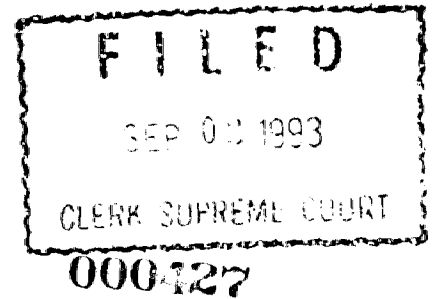


IN THE COURT OF APPEALS OF IOWA

No. 2-680 / 92-1022



JULIE J. MINTER,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and EMCO SPECIALITIES, INC.,

Appellees.

Appeal from the Iowa District Court for Polk County,
Richard A. Strickler, Judge.

The petitioner appeals the district court's judgment on
judicial review affirming the Board's decision she was not
entitled to unemployment benefits because she had been
discharged for misconduct. **AFFIRMED.**

Elizabeth Hart, Des Moines, for appellant.

William C. Whitten and Joe E. Smith, Des Moines, for
appellee Board.

Gary R. Fischer of Dreher, Simpson, Jensen, Sellers,
Harvey, Butters, Kaiser & Abels, P.C., Des Moines, for
appellee EMCO Specialties.

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

HAYDEN, J. 000428

Julie Minter was employed by EMCO Specialties, Inc. from April 1990 until July 24, 1991, as a full-time customer service representative. She was required to be at her job by 7:30 a.m. on each day she worked. Minter often reported late for work. In 1991 she was tardy thirteen times in January, six times in February, nine times in March, six times in April, eight times in May, nine times in June, and five times in July. Thus, she was tardy a total of fifty-six times in 1991.

Don Sindt, the customer service manager at EMCO, spoke to Minter about her repeated tardiness on March 4, 1991, April 22, 1991, and June 24, 1991. Sindt offered to allow Minter to change her starting time to 8 a.m., which would require her to work a half hour later. Minter stated she preferred the 7:30 a.m. starting time. On July 24, 1991, Sindt discharged Minter for excessive tardiness.

Minter filed a claim for unemployment benefits. A job service representative denied her benefits on the ground she had been discharged for misconduct. Minter appealed the decision. An administrative hearing was held on September 23, 1991.

The administrative law judge (ALJ) found Sindt's testimony he had talked to Minter three times about her tardiness was not very credible. The ALJ concluded the employer had acquiesced to a pattern of repeated tardiness. The ALJ also found Minter's tardiness was due

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in part to the fact she suffered from crohn's disease. The ALJ determined Minter was entitled to unemployment benefits.

EMCO appealed. The Employment Appeal Board reversed the ALJ. The Board found Sindt had discussed Minter's tardiness with her on three occasions. The Board also found Minter had not been diagnosed with crohn's disease until after she was discharged. Furthermore, at the time of her tardiness Minter did not use illness as an excuse. The Board concluded Minter had been discharged for misconduct and she was not entitled to unemployment benefits.

Minter filed a petition for judicial review. The district court affirmed the Employment Appeal Board. Minter appeals.

In cases arising out of the Iowa Administrative Procedure Act, our scope of review is limited to the correction of errors of law and is not de novo. Ray v. Iowa Dep't of Job Serv., 398 N.W.2d 191, 193 (Iowa App. 1986). In order to uphold the agency's decision, such decision must be supported by substantial evidence in the record before the agency when the record is reviewed as a whole. Id. Evidence is substantial to support an agency's decision if a reasonable person would find it adequate to reach the given conclusion. Id. The agency's findings are conclusive when the facts are in dispute or when reasonable minds may differ on the inferences to be drawn from the

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evidence. Harlan v. Iowa Dep't of Job Serv., 350 N.W.2d 192, 193 (Iowa 1984).

A person who is discharged for misconduct in employment is disqualified from receiving unemployment benefits. Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262, 264 (Iowa App. 1984). Misconduct connotes some deliberate act or omission or carelessness as to indicate wrongful intent. Id. at 265.

Habitual tardiness, particularly after an employee has been warned about the practice, may be considered misconduct. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 192 (Iowa 1984). Only absenteeism or tardiness which is unexcused is considered misconduct. Cosper v. Iowa Dep't of Job Serv., 321 N.W.2d 6, 10 (Iowa 1982). Absenteeism arising out of matters of purely personal responsibilities has been held not excusable. Higgins, 350 N.W.2d at 191. Excessive absenteeism caused by an incapacitating illness or other reasonable grounds for which the claimant is excused is not misconduct. Infante, 364 N.W.2d at 266.

We find there is substantial evidence in the record to show Minter was warned about her habitual tardiness. Sindt testified he talked to Minter on three occasions about her tardiness. Minter knew she was expected to report to work at 7:30 a.m. Although the employer offered to allow her to change her work schedule so she could come in later, Minter chose 7:30 a.m. as her start time.

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Minter did not report to her employer she was tardy because of illness. We find there is substantial evidence Minter was not diagnosed with crohn's disease until after she was discharged. We conclude her tardiness was unexcused and thus constituted misconduct.

We affirm the decision of the district court and the Employment Appeal Board. Costs of this appeal are assessed to Julie Minter.

AFFIRMED.