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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CARLOS HEATHERLY,	)	
Plaintiff-Appellant,	)	Filed September 25, 1986
vs.	)	
IOWA DEPARTMENT OF JOB SERVICE,	)	45
Defendant-Appellee,	)	6-273 85-1898
and SULLY CO-OP EXCHANGE,	)	
Intervenor-Appellee.	)	

Appeal from the Iowa District Court for Jasper County (97-188) - Jack D. Levin, Judge.

Plaintiff appeals the district court's affirmance of the Iowa Department of Job Service decision which denied him unemployment benefits on the basis of misconduct. **AFFIRMED BY OPERATION OF LAW.**

Mark A. Otto of Brierly, McCall, Girdner, Chalupa & McCall, Newton, Iowa, for plaintiff-appellant.

Joseph L. Bervid, Walter F. Maley, Blair H. Dewey and David M. Keenen, of Iowa Department of Job Service, Des Moines, Iowa, for defendant-appellee Iowa Department of Job Service.

James Tyler and John T. Matthias of Matthias, Tyler, Nuzum, Johnson & Matthias, Newton, Iowa, for intervenor-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.; but decided en banc.

On this appeal the judges have evenly divided on the result they would reach. Chief Judge Oxberger and Judges Schlegel and Hayden would reverse; Judges Donielson, Snell, and Sackett would affirm. Accordingly, the decision of the trial court is affirmed by operation of law.

Judge Schlegel would reverse for the following reasons:

The plaintiff, Carlos Heatherly, worked for defendant, Sully Cooperative Exchange, in Sully, Iowa, for approximately sixteen years as a carpenter prior to his discharge on June 1, 1983. Heatherly was discharged as a result of a verbal exchange he had with Jerald Kunce, the general manager of the Sully Cooperative Exchange. This discussion took place during nonbusiness hours at an estate auction being held at a private residence in Sully. Heatherly had approached Kunce in order to discuss an insurance letter, received by Heatherly, implying that Heatherly had been malingering while receiving worker's compensation for an injury.

On June 16, 1983, a Job Service claims deputy disqualified Heatherly from receiving unemployment compensation because Heatherly's actions constituted misconduct pursuant to Iowa Code section 96.5(2)(a). On August 1, 1983, a hearing was held wherein the hearing officer affirmed the claims deputy's decision. On February 22, 1984, the Appeal Board vacated the decision and remanded for a new notice, hearing, and decision based upon a full and complete record. On April 11, 1984, a hearing officer granted Heatherly benefits. On November 28, 1984, the Appeal Board reversed this decision. On December 2, 1985, the district court affirmed the Job Service's denial of benefits to Heatherly.

Iowa Code section 96.5(2)(a) (1985) provides that an individual is disqualified for unemployment benefits if that individual is discharged for misconduct.

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The administrative rule defining misconduct reflects legislative intent. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979). That rule, 370 Iowa Administrative Code section 4.32(1)(a), provides:

> Misconduct is defined 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 other negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Abusive language as a basis of misconduct was dealt with in this jurisdiction by Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa Ct. App. 1983). Budding said that in some circumstances the use of vulgarity and abusive language can amount to misconduct. Id. at 222. However, Budding clearly stated, "it is unreasonable to expect employees to be entirely docile and well mannered at all times . . . Where the use of vulgar language is an isolated incident in an environment where decorous language is not required, and is not occasioned by a deliberate refusal to obey a reasonable directive, we are inclined to view it as a minor peccadillo." Id.

Initially, though there is a dispute over whether the word "hell" was used, it is unreasonable to describe the phrase, "Why in the hell didn't somebody tell me about this?" as an "obscene utterance" as respondents wish to do. Paraphrasing Justice Stewart's famous dictum concerning obscenity, "we know it

when we hear it." This was not it. The same person who heard this particular sentence also testified that "I didn't hear anything Jerry [Kunce] said, I could just hear Mr. Heatherly speak loudly once in a while." Another witness testified that Mr. Heatherly "seemed to be perturbed and spoke in a loud voice to Mr. Kunce and had this letter in his hand . . . he [Kunce] started to back away then. And Mr. Heatherly followed him and was talking to him continually." Both parties claim each other yelled. Heatherly claims additionally that his partial hearing loss causes him to talk louder than normal.

The district court agreed that Heatherly's conduct violated standards of behavior which an employer has a right to expect from his employee and that Heatherly's actions and conduct were clearly inappropriate. However, there was no substantial evidence in the record that would permit a reasonable mind to think that the evidence presented was adequate to reach the conclusion that Heatherly's conduct constituted misconduct. Heatherly's discussion with Kunce was not excessively volatile. It is regrettable that Kunce felt embarrassed. It is regrettable that Kunce felt himself to be humiliated. However, no evidence in the record indicates that Heatherly was "stalking" Kunce, as the respondents' brief states and, as agreed to by the district court; no evidence in the record indicates that Kunce was "forced" to retreat, as stated in respondents' brief and agreed to by the district court. The evidence suggests that they walked together, engaged in a moderately heated discussion (the volume of which was noted by nearby witnesses but not the context), and the word "hell" was spoken. This is not enough to constitute misconduct. The Sully Co-op Exchange could not have been harmed by such a discussion. The bruising of the tender sensibilities of an individual employer does not rise to the level of misconduct on the part of an employee.

Respondents cite Zeches v. Iowa Department of Job Service, 333 N.W.2d 735 (Iowa Ct. App. 1983), and Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984), for the proposition that foul language can be a sufficient ground for misconduct. However, in both Zeches and Warrell, there was actual name-calling, "stupid mother fuckers" and "fucking son of a bitch," respectively. In the instant case there was no name calling. Furthermore, in both Zeches and Warrell, the name calling was on company property and time. This was not true in the instant case. Finally, there is a measurable distance in the embarrassment/humiliation barometer between being called a "stupid mother fucker" or a "fucking son of a bitch" and being asked "why in the hell didn't somebody tell me about this?"

Under Budding, we must consider this incident to have occurred in an environment where decorous language is not required. (Heatherly is presumed to not be the only individual at a Saturday public auction that used the word "hell" that day.) Nor did Heatherly deliberately refuse to obey a reasonable directive. Under Messina v. Iowa Dept. of Job Service, 341 N.W.2d 52 (Iowa 1983), we cannot agree that Heatherly's off-duty conduct caused any harm to the employer. Heatherly's conduct was not similar to encouraging an illegal work stoppage as in Messina. Heatherly's alleged misconduct took place within a private discussion overheard by bystanders. Kunce argues that the overheard discussion infected employees' morale and the image of the company. No evidence was introduced to substantiate such a claim. Were we to agree with the district court's conclusion that the subjective individual embarrassment of a company manager caused by a private discussion with an employee on non-company time at a private function rose to the level of employee misconduct, we would be extending far too much discretion to individual managers to determine the fate of employees that were found to be socially unacceptable. It

would not then be a large step for an employer to be embarrassed and humiliated over the company an employee kept, over the entertainment an employee enjoyed, or over the politics an employee practiced. We will not here extend the definition of misconduct to reach such overheard private discussions in which the word "hell" was used.

We find no merit in respondents' contention that even if Heatherly's conduct was not legally sufficient in itself to be grounds for misconduct, it was legally sufficient as the "last straw" concerning his attitude problem. The Iowa Administrative Code clearly states that a discharge for misconduct cannot be based on past acts. The termination of employment must be based on a current act of misconduct. 370 Iowa Admin. Code 4.32(8) (1986). If it can be shown that an employee's course of conduct is sufficient to manifest an intentional and substantial disregard for the employer's interest, a relatively minor infraction may evidence sufficient disregard for the employee's intent to constitute misconduct. Budding, 337 N.W.2d at 223 (emphasis added). We should find that the act in question did not constitute misconduct. No substantial evidence was introduced proving an intentional disregard for the employer's interest as evidenced by Heatherly's course of conduct. Therefore, Heatherly should not be denied unemployment benefits based on his past acts.

Since the record does not contain substantial evidence supporting the agency's claim that Heatherly was discharged for misconduct, Heatherly should be entitled to unemployment benefits.

Donielson, J., would affirm for the following reasons:

The major issue to be decided in the present case is whether the actions of Heatherly taken as a whole were such as to constitute misconduct under the definition provided in 370 Iowa Administrative Code section 4.32(1)(a) (1985). In construing those actions we must remember that our scope of review is limited to the correction of errors at law and not de novo. In order to uphold the decision of the Job Service Appeal Board, such decision must be supported by substantial evidence in the record made before the agency when the record is viewed as a whole. Fernandez v. Iowa Dept. of Human Services, 375 N.W.2d 701, 705 (Iowa 1985). Evidence is substantial to support an agency's decision if a reasonable person would find it adequate to reach the given conclusion. Meads v. Iowa Dep't of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). Though two inconsistent conclusions may be drawn from the record, such a possibility does not prevent the agency's finding from being supported by substantial evidence. Contract Services, Ltd. v. Iowa Department of Job Service, 372 N.W.2d 212, 215-16 (Iowa 1985). That the fact findings of the agency are to be afforded great weight is evidenced by the recent decision of the Iowa Supreme Court in Hurtado v. Iowa Dep't of Job Service, No. 85-1040, slip op. at 6 (Iowa filed September 17, 1986), where the court held that even if the petitioner's statement that he fell asleep on the job due to fatigue and recurring back pain was believed, the agency still could have found misconduct, and it was therefore error for the district court to reverse the agency finding.

The definition of misconduct is embodied in Iowa Code section 4.32(1)(a) (1985). Under this definition, misconduct is 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 . . . an intentional and substantial disregard of

the employer's interests . . . ." The judges who would reverse the decision of the district court base their argument largely on the basis of whether the word "hell" is an obscenity and that the incident in question occurred when both Kunce and Heatherly were off-duty. I would place much less emphasis on these facts. Rather, I believe that when interpreting section 4.32(1)(a), it is the manner in which such incident took place and the surrounding circumstances as a whole that are important to our consideration of whether Heatherly's actions could be defined as misconduct. See Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587, 590 (Iowa Ct. App. 1984) (where court held that while vulgar language alone was sufficient to find misconduct, it was entire record which evidenced misconduct).

The record taken as a whole contains substantial evidence to support a finding of misconduct. Heatherly had been warned by his employer several weeks before the incident that Heatherly's bad attitude at work was dampening company morale and that it was incumbent that he improve his public image on the job due to a large number of complaints regarding his argumentative nature and poor workmanship. While discharge of an employee generally must be based on a current act of misconduct, our courts have held that such past behavior may be considered in determining the magnitude of the current act. Flesher v. Iowa Dep't of Job Service, 372 N.W.2d 230, 234 (Iowa 1985) (repeated violations of a rule may indicate more than ordinary negligence but may represent a substantial disregard of the employer's interests). Concerning the incident at the public auction sale, the record shows that approximately 150 people were in attendance, a number of whom were past members of the board of directors of the Sully Co-Op and member-owners of the Co-Op. Heatherly, who had been at the sale but had gone home to check his mail and found the letter from the Co-Op's insurance company, returned to the sale. Heatherly pulled right into

the driveway of the house where the sale was being held. Heatherly proceeded to confront Kunce, the general manager of the Co-Op, who was standing with a group of people attending the auction. Though there is some dispute as to what exactly was said by Heatherly at this point, testimony of the witnesses who were present described Heatherly's manner and language as loud and disruptive at best, abusive and insulting at worst. Heatherly himself admitted that his actions and language were loud and disruptive. Kunce, in order to avoid further public confrontation, backed away from the crowd and requested that the matter be taken up in his office. Heatherly, however, continued to be loud and abusive. Testimony revealed that numerous people attending the sale turned around to watch the argument, and for a short while the auction was stopped.

From an overall analysis of the entire record, it is abundantly clear that Heatherly's actions constituted misconduct. Both Heatherly and Kunce were widely known within the small community of Sully, population 800. Heatherly's actions were clearly intended to create a public fracas and such behavior obviously reflected upon his superior, Kunce, and the employer Sully Co-Op. It is also important to note that Heatherly admitted that the argument at the sale concerned a matter involving Kunce in his capacity as an employer. See Budding v. Iowa Dep't of Job Service, 337 N.W.2d 219, 223 (Iowa Ct. App. 1983) (court holding that profane language used by claimant was not misconduct because it was not made in the course of an argument with her supervisor). Accosting an employer in an indisputably loud and abusive manner in a public gathering before members of the business community and former members of the board of directors is without question misconduct and undeniably undermines his authority, particularly so after having been previously warned of his attitude reflecting on his employment. Heatherly's misconduct went beyond an isolated incident of poor judgment, failure of good performance, or inadvertent negligence.

In light of Heatherly's past record and warnings concerning his relations with customers, plus the public forum in which Heatherly chose to air his grievances, I find that Heatherly's actions amounted to inexcusable misconduct, and I would therefore affirm the decision denying unemployment benefits.