IN THE COURT OF APPEALS OF IOWA

No. 1999-39 (9-194) / 98-1023
Filed July 23, 1999

TODD PEDERSEN,

Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and EATON CORPORATION,

Respondents-Appellees.

FILED
JUL 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Petitioner appeals the denial of his request for unemployment insurance benefits. **REVERSED.**

Joseph G. Basque of Legal Services Corp. of Iowa, Council Bluffs, for appellant.

Alan H. Bjork, Des Moines, for appellee-Eaton Corporation.

Richard R. Ramsey, Des Moines, for appellee-Employment Appeal Board.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

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MAHAN, J.

Todd Pedersen appeals the denial of his request for unemployment insurance benefits. Pedersen contends the agency decision is not supported by substantial evidence. We reverse.

Pedersen was hired by Eaton Corporation as a machine operator on November 12, 1993. As an employee at Eaton, he was expected to follow the terms of the "work place safety policy." Said policy required he contact his supervisor or anyone in Human Resources if he had trouble with another employee. Pedersen acknowledged he was fully aware of this policy. Pedersen was discharged on April 10, 1997. His discharge was the result of an incident at work on April 7, 1997 with another employee, Randy Wagamon.

Wagamon can be best described as a problem employee. He had been a problem for approximately six to eight months before the incident in question. He had been disruptive to the work place and displayed a variety of inappropriate behaviors.[1] Pedersen reported these incidents to his supervisor on more than one occasion. The supervisor admitted observing some of these incidents but refused to take action. Instead, he advised Pedersen that he and Wagamon should "try to work things out for ourselves."

On the evening of April 6, 1997, Wagamon began harassing Pedersen. He was told by Pedersen to "please leave me alone." He stated to Wagamon he should just

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[1] His actions were sometimes directed at Pedersen individually and sometimes at other employees.

mind his own business and everything would be alright. Wagamon was then observed approaching other employees and stating he "was going to try to get" Pedersen's job. No physical altercation occurred.

On April 7, 1997, Wagamon began disrupting the work place at the beginning of his shift. He loudly beat his hammer on a steel table and called Pedersen names.[2] Wagamon then hung a cardboard sign with a "cry baby face" and the words "cry baby" on the bottom. Pedersen ignored these actions. Wagamon again began beating the hammer on the table and threw ball bearings at Pedersen. He approached Pedersen's work station and called him names. At that time, Pedersen approached Wagamon and told him to get back to work. Wagamon cursed at him. Pedersen pointed for Wagamon to go back to his own work area at which time Wagamon raised his hand and hit the bottom of Pedersen's hand. Wagamon turned and went directly to the office of Rena Mackie, a human resource employee. Wagamon informed Mackie that Pedersen "threatened to kill him." Pedersen adamantly denied this occurred.

On April 10, 1997, Pedersen was discharged for violating the employer's "work place safety policy" by failing to report the incident to his supervisor before confronting Wagamon.[3] Eaton also discharged Wagamon in a small part because of

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[2] All of these events occurred in front of at least two other employees.

[3] This discharge was the result of Mackie's investigation which was comprised solely of input from Pedersen and Wagamon.

this incident. However, his discharge was mainly based on absenteeism, misconduct, misbehavior, and the accumulation of prior incidents.

Pedersen filed a claim for unemployment benefits. A hearing was held at which Pedersen and Mackie were the only witnesses.[4] Pedersen was found ineligible for benefits and appealed to the Employment Appeal Board, which upheld the decision without comment. The district court affirmed on judicial review. Pedersen appeals.

I. STANDARD OF REVIEW. Review of an agency finding is at law and not de novo. *Diggs v. Employment Appeal Bd.*, 478 N.W.2d 432, 433 (Iowa App. 1991). Agency decisions may be reversed if an individual's substantial rights have been prejudiced and if the action is unsupported by substantial evidence or affected by errors of law. Iowa Code § 17A.19(8) (1997). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Aluminum Co. of America v. Employment Appeal Bd.*, 449 N.W.2d 391, 394 (Iowa 1989). The reviewing court should liberally apply the agency's findings in order to uphold rather than defeat the decision as long as the record shows the agency did not act in an arbitrary or capricious manner, commit an error of law, or otherwise violate Iowa Code section 17A.19(8). *Dubuque Community Sch. Dist. v. Public Employment Relations Bd.*, 424 N.W.2d 427, 431 (Iowa 1988).

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[4] Two other employees who witnessed the incident were not present.

Iowa Code section 96.5(2) provides a claimant is disqualified for unemployment benefits "[i]f the division of job service finds that the individual has been discharged for misconduct in connection with the individual's employment." "Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa App. 1995)(citing *Breithaupt v. Employment Appeal Bd.*, 453 N.W.2d 532, 535 (Iowa App.1990)). An employer has the burden of proving a claimant is disqualified for benefits because of misconduct. *Id.* at 646-47 (citing *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989)).

II. SUBSTANTIAL EVIDENCE OF MISCONDUCT. Pedersen contends there is not substantial evidence in the record to support the agency decision. We agree.

The primary concern of the employer in this case is Pedersen's failure to first report the incident to his supervisor. Pedersen testified concerning the events which took place on April 7, 1997, as well as the events which led up to that exchange. Part of that testimony included Pedersen's assertion he had attempted to follow the "work place safety policy" on several occasions without success. Eaton relied solely on the testimony of Rena Mackie, who admittedly did not observe the incident. Eaton, although it had the burden of proof, did not call the two employees who had personally observed the incident. Thus, Eaton's evidence was composed solely of hearsay.

When the record is composed solely of hearsay evidence, we must examine the evidence closely in light of the entire record. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607 (Iowa App. 1990). We believe we must evaluate the quantity and quality of the evidence, *id.* (citing *Gifford v. Iowa Mfg. Co.*, 243 Iowa 145, 170, 51 N.W.2d 119, 132 (1952)), to see whether it rises to necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. *See* Iowa Code § 17A.14(1). In making this evaluation, we will conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

In the case at bar, we conclude Mackie's hearsay testimony lacks sufficient indicia of reliability to constitute substantial evidence: she did not speak to all of the alleged witnesses to the confrontation, she relied upon Wagamon's version of events although he had a well-documented history of problems at work, her testimony at times lacks detail or is mistaken, and the direct testimony could have been received from the declarants themselves rather than being submitted as hearsay testimony.

In summary, we have reviewed the record and determine Eaton Corporation did not meet its burden of proving Pedersen was disqualified for benefits because of misconduct.

For these reasons, we reverse.

REVERSED.