IN THE COURT OF APPEALS OF IOWA

No. 7-235 / 96-1103

000287

FILED
MAY 29 1997
SUPREME COURT

THERESA RHODEN,
Petitioner-Appellant,

vs.

MSP RESOURCES, INC. and **EMPLOYMENT APPEAL BOARD,**
Respondents-Appellees.

Appeal from the Iowa District Court for Marshall County, M. D. Seiser, Judge.

The petitioner appeals the district court's ruling on judicial review affirming the respondent board's decision that she engaged in misconduct disqualifying her from receiving unemployment benefits. **AFFIRMED.**

Philip F. Miller, West Des Moines, for appellant.

William C. Whitten, Des Moines, for appellee Board.

David H. Goldman of Goldman & Carroll, P.C., Des Moines, and Judith Balson Salder, Houston, Texas, for appellee employer.

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

VOGEL, J. 000288

Appellant Theresa Rhoden appeals the denial of her petition for judicial review of final agency action of the Employment Appeal Board (EAB) disqualifying her from receiving unemployment insurance benefits. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On November 30, 1992, Rhoden began work with MSP Resources Inc. (MSP) as a full-time laborer. Beginning August 3, 1994, she began working a quality-control position that required her to monitor edible product on a conveyor belt for foreign matter. Her shift was Monday through Friday from 5:40 a.m. to 2:10 p.m.

On December 12, 1994, MSP's operations manager and three of his colleagues entered the room where Rhoden was working. He observed Rhoden sitting in a chair, motionless, with her head down and her eyes closed. After observing this for forty-five seconds to one minute, he yelled to get her attention and had another manager bring her to the office. At the office, Rhoden said she was having a migraine headache and was resting her eyes. MSP's personnel manager terminated her employment.

Rhoden applied for unemployment insurance benefits. A claims deputy denied benefits. An administrative law judge initially reversed the denial, but later denied benefits following a remand from EAB to develop a fuller record. EAB affirmed the denial. Rhoden filed a petition for judicial review, and from the district court's affirmance she appeals.

Our review is for errors of law, not de novo. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). EAB's findings of fact are binding if supported by substantial evidence. *Glowacki v. State of Iowa Bd.*, 516 N.W.2d 881, 884 (Iowa 1994).

Rhoden argues substantial evidence does not support EAB's decision and her conduct did not fall within the statutory definition of misconduct.[1]

Rhoden worked on an elevated platform and was charged with monitoring the product passing on the conveyor belt. Edible product was traveling on the belt to an auger. If any foreign matter was present and not removed, it could jam the auger and cause significant problems. The presence of foreign matter in the end product would also damage MSP's business. Although Rhoden was able to leave her station on December 5 without leaving it unattended, she did not take those steps when she claimed to have a migraine on December 12. The operations manager testified it was "just obvious she was sleeping" and detailed the importance of constant monitoring of the product. Rhoden told agents of MSP that she was "resting her eyes."

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[1] Rhoden also argues MSP's breach of a duty to provide a safe workplace estops MSP from resisting her claim. Rhoden has waived this argument for failure to cite any authority, Iowa R. App. P. 14(a)(3), and has failed to preserve error by not raising the argument in the proceedings below. *Welch v. Iowa Dep't of Employment Servs.*, 421 N.W.2d 150, 152 (Iowa App. 1988).

Although Rhoden claims she closed her eyes to maintain her balance, she neglected her monitoring duties and did not notify MSP of her condition on December 12. The evidence shows she knew how to do so, as she did on December 5. In any event, we are not free to substitute our own findings for those of the agency.

After EAB's remand, the ALJ ruled Rhoden was discharged because "she was inattentive to her duties, whether from a headache or from sleeping, conduct which is contrary to the employer's best interests." The ALJ noted Rhoden knew the nature of her work required her to be alert and attentive, and ruled MSP met its burden of proving her discharge was for misconduct. We find substantial evidence supports these findings.

AFFIRMED.