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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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EARNEST D. ATTWOOD,	)	
Plaintiff-Appellant,	)	Filed June 4, 1986
vs.	)	6-130 85-1418
IOWA DEPARTMENT OF JOB SERVICE,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Linn County (No. LA 13133) - L. Vern Robinson, Judge.

Petitioner appeals the district court's affirmance of an Iowa Department of Job Service ruling denying unemployment compensation benefits. **AFFIRMED.**

Kenneth F. Dolezal, Cedar Rapids, of Dolezal & Miller, for plaintiff-appellant.

Walter F. Maly, Blair H. Dewey and Joseph L. Bervid, Iowa Department of Job Service, for defendant-appellee.

Heard by Snell, P.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Petitioner Earnest D. Attwood appeals the district court's affirmance of an Iowa Department of Job Service ruling denying unemployment benefits. Attwood contends the district court erred: (1) in holding that Attwood's actions showed a willful and wanton disregard of his employer's interest; and (2) in holding there was substantial evidence in the record to support the agency's finding of misconduct. We disagree.

Attwood worked as a janitor for Acme Investment Company. In November, 1983, Attwood fell while dusting the stairwell at work and injured his back. He was hospitalized in traction for two weeks as a result of the fall. While Attwood was hospitalized, Acme hired a new maintenance worker who performed some of Attwood's duties plus other tasks.

When Attwood returned to his employment, Acme president Harold Becker told Attwood he was to be laid off. Attwood contacted his doctor and attorney about his layoff and about the fact he had not received workers' compensation benefits as a result of his back injury. After Attwood's attorney and doctor each contacted Becker, Attwood was reinstated in his janitorial position. Although prior to Attwood's injury Acme had employed only two janitors, the newly hired maintenance worker continued to work for Acme even after Attwood's return. On January 5, 1984, Attwood's hours were reduced from 40 to 35 per week. On February 9, 1984, his hours were again reduced to 30 hours per week.

On June 29, 1984, Attwood was discharged after a building tenant complained that Attwood had sprayed her with a garden hose.

Attwood filed for unemployment benefits following his discharge. A claim's deputy decision dated July 16, 1984, held that Attwood had been discharged for conduct not in the best interest of his employer and benefits were denied.

Attwood appealed and a hearing was held on September 11, 1984. At the hearing, evidence of eight separate incidences of alleged misconduct was presented, three of which had occurred during the two-month period prior to Attwood's discharge. These included:

1. A November 19, 1979, complaint that Attwood was walking into the women's restroom without knocking and following women into the restroom.

2. A March 12, 1981, complaint by a bank officer tenant that Attwood had deliberately held shut the stairway door so the officer was unable to exit. Attwood signed and acknowledged this complaint.

3. A May 15, 1981, complaint by a tenant that Attwood was being a nuisance and causing embarrassment. At this time Attwood signed and acknowledged a warning that he improve his relationships with the tenants of be discharged.

4. A February, 1984, complaint that Attwood had been walking into the women's restroom without knocking.

5. A February 21, 1984, complaint that Attwood had been knocking too loudly on the women's restroom door and had used an overpowering solution when cleaning the women's restroom.

6. A May 2, 1984, complaint by a tenant that Attwood had harassed her by refusing to let her use the elevator and by belching and spitting when she was riding the elevator with him. At this time Attwood signed and acknowledged a warning that he would be discharged if such actions continued.

7. A May 29, 1984, complaint by a co-worker that Attwood had harassed him and was stealing items such as cigarettes. At this time Becker told Attwood this was his final warning.

8. A June 29, 1984, complaint by a tenant that Attwood had deliberately sprayed her with a garden hose.

The hearing officer affirmed, holding Attwood's actions showed willful and wanton disregard of the employer's interest. Accordingly, the hearing officer denied benefits on the ground that Attwood's actions constituted misconduct within the meaning of Iowa Code §96(a)(2) (1985). This decision was upheld by the agency appeal board and the district court upon review, which found there was substantial evidence to support the agency's findings. This appeal followed.

On appeal, Attwood contends the evidence adduced at the hearing fails to rise to the level of willful or wanton disregard of Acme's interests. Rather, he argues the evidence supports the view that Attwood's conduct, while inefficient and unsatisfactory, was the result of his inabilities and good faith errors in judgment. Attwood claims economic motivations led to his discharge which, when balanced against his behavior violations, is not sufficient to constitute misconduct under Iowa Code §96.5(2) and 320 Iowa Administrative Code §4.32(1)(a).

I. Scope of Review

Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited under Iowa Code § 17A.20 (1985) to the correction of errors of law. Boyd v. Iowa Department of Job Service, 377 N.W.2d 1, 2 (Iowa App. 1985). We review the decision of the district court, also rendered in an appellate capacity, and determine whether the district court applied the law correctly. Endicott v. Iowa Department of Job service, 367 N.W.2d 300, 302 (Iowa App. 1985). To make that determination this court must apply the standards of Iowa Code §17A.19(8) (1985) to the agency action to determine whether this court's conclusions are the same as those of the district court. Boyd, 377 N.W.2d at 2. Iowa Code §17A.19(8)(f) (1985) provides in a contested case the court

shall grant relief from an agency decision which is not supported by substantial evidence in the record made before the agency when that record is viewed as a whole. Myers v. Iowa Department of Job Service, 373 N.W.2d 507, 509 (Iowa App. 1985). In making this determination we are limited to the record made by the hearing officer. Boyd, 377 N.W.2d at 2. We do not make an independent determination concerning the preponderance of the evidence. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983).

Evidence is substantial when a reasonable person would accept it as adequate to reach a conclusion. Eaton v. Iowa Department of Job Service, 376 N.W.2d 915, 916-17 (Iowa App. 1985). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Boyd, 377 N.W.2d at 2. The fact two inconsistent conclusions can be drawn from the evidence does not mean one of those conclusions is unsupported by substantial evidence. Myers, 373 N.W.2d at 509.

II. Misconduct

Iowa Code §96.5(2) (1985) provides a claimant is disqualified from unemployment benefits if Job Service finds the individual has been discharged for misconduct in connection with the individual's employment.

The Iowa Administrative Code 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.

370 Iowa Administrative Code § 4.32(1). The Iowa Supreme Court has accepted this definition as accurately reflecting the intent of the legislature. Myers, 373 N.W.2d at 510.

Misconduct must be substantial in order to support a disqualification from unemployment benefits. Newman v. Iowa Department of Job Service, 351 N.W.2d 806, 808 (Iowa App. 1984). The employer has the burden of proving misconduct. Eaton 376 N.W.2d at 917. Misconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits. Id. As such, we do not examine the employer's right to discharge Attwood. Rather, our sole task is to determine whether Attwood is entitled to unemployment benefits. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa App. 1983).

The focus of the administrative code definition of misconduct is on acts or omissions by the petitioner which rise to the level of being deliberate, intentional or culpable. Eaton, 376 N.W.2d at 917. In order to establish misconduct that will disqualify petitioner from benefits, the employer must prove the acts culminating in discharge satisfy the requirements of the administrative code definition. As such, the acts must show:

1. Willful and wanton disregard of an employer's interest as is found in:
   - A. Deliberate violation of standards of behavior which the employer has the right to expect of employees, or
   - B. Deliberate disregard of standards of behavior which the employer has the right to expect of employees;

or

2. Carelessness or negligence of such degree of recurrence as to:
   A. Manifest equal culpability, wrongful intent or evil design,
   or
   B. Show an intentional and substantial *disregard of*:
      1. The employer's interest,
      or
      2. The employee's duties *and obligations* to the employer.

370 Iowa Administrative Code §4.32(1) (emphasis added).

Misconduct which does not rise to the level of culpability sufficient to be deemed misconduct may be due to:

1. Insufficiency
2. Unsatisfactory conduct
3. Failure in good performance as a result of:
   a. Inability
   b. Incapability
   c. Inadvertencies
   d. Ordinary negligence in isolated incidences
   e. Good faith errors in judgment or discretion.

Id. (emphasis added).

The administrative code also provides that "past acts and warnings can be used to determine the magnitude of a current act of misconduct." 370 Iowa administrative Code §4.32(8). This provision has been referred to as the "last straw doctrine," since a relatively minor infraction, when viewed in the light of prior transactions, may evidence sufficient disregard for the employer's interests to constitute misconduct. Budding, 337 N.W.2d at 223. The fact the prior acts were remote in time or different in nature from the one for which the employee was discharged does not preclude a finding of misconduct. Id. However, the employee's course of conduct must be sufficient to manifest an intentional and substantial disregard for the employer's interests. Id.

Attwood cites several cases to support his contention his actions did not amount to misconduct within the meaning of the administrative code definition. In Budding, the court reversed an employee's denial of benefits for using abusive language during an argument with his supervisor. Budding, 337 N.W.2d at 222-23. The court held the abusive language was an isolated incident which did not undermine the supervisor's authority. Id. In addition, the court found the combination of that incident plus prior incidences, including excessively sharpening a tape knife and operating a plant bicycle in an unsafe manner, did not constitute a material breach of the duties and obligations arising out of said employment. Id., at 223.

In Eaton, another case Attwood cites, a telephone operator was fired after two warnings for failure to promptly disconnect telephone calls. Eaton, 376 N.W.2d at 916. The court held her failure to follow switchboard rules on three occasions over a three-year period was not sufficient to be considered recurring carelessness to such a degree as to constitute disregard of her employer's interests.

The instant case can be distinguished from Budding and Eaton. In both Budding and Eaton, the prior incidences of misconduct were negligent or careless acts rather than willful or deliberate violations of employment standards. Attwood's prior acts, however, were not isolated incidences of failing to properly clean the building or to take out the garbage. Rather, Attwood's actions were marked by their deliberateness and willfulness. Prior to the incident resulting in his discharge, Attwood had been disciplined for holding shut the stairwell door when a tenant was trying to exit. He had purposefully refused to allow another tenant to use the building elevator. Also, after being warned, Attwood continued to enter the women's restroom without knocking. In addition, there were three complaints of deliberate harassment by Attwood.

Unlike Eaton's discharge for negligently failing to disconnect the phone, Attwood finally was discharged based on a complaint he purposefully sprayed a tenant with a garden hose. Although Attwood claims he accidentally sprayed the tenant, there was sufficient evidence produced at trial, coupled with Attwood's past course of conduct, from which the hearing officer could find Attwood deliberately sprayed the tenant. Attwood's past course of conduct also supports the hearing officer's determination that the magnitude of the final incident was wanton and willful disregard of the employer's interests rather than isolated negligence or carelessness. In addition, the nature of Attwood's course of conduct supports Acme's argument that it no longer could afford to jeopardize its business by maintaining an employee who was continuously abusive to tenants, the "lifeblood" of Acme's real estate business. The fact Becker felt empathy for Attwood does not alter that Attwood committed misconduct within the administrative code definition and was discharged for that reason.

Attwood also argues Budding holds that prior acts cannot be used to show a final event rises to the needed degree of willfulness to amount to misconduct unless each of the prior acts themselves rise to the level of "legal misconduct." He contends the prior acts did not amount to misconduct, therefore, they must be disregarded in determining whether there is sufficient evidence to show a deliberate disregard of the employer's interests.

Attwood misstates Budding. In Budding the court held the entire course of conduct, not each separate prior act, must be sufficient to manifest intentional disregard for the employer's interests. Budding, 337 N.W.2d at 223. While Attwood's prior acts taken individually do not constitute legal misconduct nor raise his final act to a willful and wanton act, Attwood's prior course of conduct taken as a whole shows the magnitude of his final act was willful and wanton disregard of his employer's interests.

Attwood also claims his misconduct must be considered in accordance with his abilities and job requirements. He asserts the fact he was a minimum wage employee with Acme for five years attests to the fact that he had limited abilities. Attwood further asserts that Acme was aware of his behavior limitations throughout his employment without doing anything about them and that Becker felt "empathetic" toward Attwood. Therefore, Attwood argues Acme should be estopped from relying on the exhibits of past misconduct to support Acme's allegations he was discharged for misconduct. Attwood, however, offers no authority to support this argument. We are under no compulsion to review any assignment of error when the complaining party cites no authority, therefore, the assignment is deemed waived. Newman v. City of Indianola, 232 N.W.2d 568, 574 (Iowa 1975).

Attwood contends the exhibits documenting his disciplinary record at Acme are "merely statements prepared by the employer to corroborate his testimony and support Attwood's argument he was discharged for economic reasons." Attwood claims a disciplinary record on him was kept only when Acme was in need of a reason to terminate his employment. However, two of three disciplinary reports he signed were 1981 complaints, well before Attwood was injured and another employee was hired. This defeats Attwood's argument that his discharge was motivated primarily by economic concerns. In addition, Attwood did not object at trial to introduction of the disciplinary records or to their authenticity. Since Attwood failed to preserve his objection, we need not consider his objection here.

Finally, we are not persuaded by Attwood's alternative contention the spraying incident was an isolated error in good judgment. Attwood had been warned before about his relationship with and treatment of tenants. He had

signed three previous complaints about his behavior. On May 29, 1984, Attwood was given a final warning for harassing a co-worker. As such, Attwood's claim of another good faith error after those warnings is not supported by the evidence.

Based on the entire record, we hold there is sufficient evidence of willful and wanton disregard of the employer's interests to constitute misconduct under Iowa Code §96.5(2) and 370 Iowa Administrative Code 4.32(1). Further, we hold that Attwood was discharged for misconduct rather than economic reasons. Therefore, we affirm the district court decision upholding the agency's denial of unemployment benefits to Attwood.

AFFIRMED.