IN THE COURT OF APPEALS OF IOWA

No. 7-164 / 96-1032

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FILED
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CLERK SUPREME COURT

BARBARA BANKS,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and CLAIRE'S BOUTIQUE, INC.,

Appellees.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

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

Cynthia A. Rybolt, Waterloo, for appellant.

William C. Whitten, Des Moines, for appellees.

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

STREIT, J.

Claimant appeals denial of unemployment benefits after she was discharged from her employment at a retail store for allowing a nonemployee behind the counter ringing up sales in the cash register. She claims this was an isolated incident of poor judgment but it was not done with intentional disregard of her employer's interests.

Barbara Banks was employed by Claire's Boutiques, Inc. since November 1990. She worked at a store in a Waterloo mall as an assistant manager. Her duties included selling jewelry, accessories, and ear piercing.

On August 10, 1995, Banks was piercing a customer's ear, when several customers came up to the cash register to purchase goods. A former employee was in the store, and she volunteered to help out. Banks permitted the nonemployee to run the cash register. The store manager, walking by the store, saw the former employee at the cash register. Banks was fired for allowing a nonemployee to use the cash register in violation of the company's loss prevention policy.

Banks filed a claim for unemployment benefits with Job Service. At the fact finding stage, the hearing officer for Job Service granted benefits. The employer appealed the decision to an administrative law judge and a hearing was held. At the hearing, the store manager testified Banks was terminated based on this one incident. She also testified about an incident in April 1995, where Banks had received a verbal warning for leaving the store unattended. Banks testified she had no intention of violating the store's policies. She claimed she had been trying to keep the store from

losing money. She stated she felt the store could have lost customers if the former employee had not helped out.

The ALJ concluded Banks was discharged for misconduct and reversed the hearing officer's award of benefits. The ALJ found the August 1995 incident was not isolated due to the April 1995 warning for violating company policy. Banks appealed the decision to the Employment Appeal Board. The board affirmed the ALJ's decision. On judicial review, the district court found the board's decision was supported by substantial evidence and affirmed. Banks appeals the district court's decision.

The scope of review in cases arising out of the Iowa Administrative Procedure Act, Iowa Code chapter 17A, is limited to the correction of errors at law. *Savage v. Employment Appeal Board,* 529 N.W.2d 640, 641 (Iowa App. 1995). We accord an agency only limited deference on matters of law, but an agency's findings of fact are binding on this court if supported by substantial evidence in the record when the record is viewed as whole. *Swanson v. Employment Appeal Board,* 554 N.W.2d 294, 296 (Iowa App. 1996). In the present case, there is little disagreement concerning the facts. The issues on appeal concern the legal consequences of Banks' conduct.

Banks contends the Employment Appeal Board improperly found she had engaged in misconduct. She states there was no evidence to show she had a wrongful intent or substantial disregard of her employer's interests. Banks believes the board

should not have considered the April 1995 incident because Nelson admitted the employer did not rely on this incident in its decision to discharge her.

Under section 96.5(2)(a), an individual may be disqualified for unemployment benefits if that individual is discharged for misconduct. *Henecke v. Iowa Dept. of Job Service,* 533 N.W.2d 573, 575 (Iowa App. 1995). The employer has the burden of proving misconduct. *Id.* Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits. *Kelly v. Iowa Dept. of Job Service,* 386 N.W.2d 552, 554 (Iowa App. 1986). Misconduct is defined by Iowa Administrative Code r. 345-4.32(1) (1988) as:

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provisions 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 of 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.

See also Fairfield Toyota, Inc., 449 N.W.2d 395, 398 (Iowa App. 1989) (citation omitted).

Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Myers v. Employment Appeal Board,* 462 N.W.2d 734, 737 (Iowa App. 1990). The focus is on deliberate or intentional acts by an employee. *Newman v. Iowa Dept. of Job Service,* 351 N.W.2d 806, 808 (Iowa App. 1984). To show misconduct, there must be evidence of a deliberate intention or culpable act by the employee. *Savage,* 529 N.W.2d at 642.

The Employment Appeal Board concluded Banks had deliberately violated company policy by allowing a nonemployee to use the cash register. We determine the evidence supports the conclusion Banks intentionally and substantially disregarded the employer's interests.

Good faith errors in judgment or misunderstandings do not constitute misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 737 (Iowa App.1986); The administrative code makes it clear that acts of carelessness or negligence must be sufficiently recurrent and not merely isolated to rise to the level of culpable or intentional misconduct. *Henry v. Iowa Dept. of Job Service,* 391 N.W.2d 731, 735 (Iowa App. 1986). Intentional acts which result in work not being performed correctly, and continue after warnings by the employer, can constitute misconduct. *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 646-47 (Iowa App. 1995).

The boutique's work rules allowed only employees behind the counter or in the cash drawer. Banks had a copy of the work rules. While Banks' action could be

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interpreted to be an innocent act, we doubt the situation would be thus interpreted if we were dealing with a cash drawer of a bank or an fine jewelry store. Just because the store in this case was a boutique does not mean it is any less important to the owners to protect the integrity of their cash drawer.

Banks received a warning in April 1995 for violating company policy when she left the store unattended. This incident is sufficiently similar to the August 1995 incident to be relevant to Banks' intent. We determine even if Banks' conduct of letting a nonemployee use the cash register is considered an act of carelessness or negligence, it is still misconduct. *Id.* (misconduct may be shown by acts constituting such carelessness as to indicate a wrongful intent).

The employer asserts there was substantial evidence to show Banks knew her conduct was contrary to her employer's interests. At the administrative hearing, Banks said if she were an assistant manager working with another employee, she would not permit an employee to let a friend to use the cash register. Banks understood the consequences of her actions and the seriousness of the situation. This was not merely an act of negligence. *See Richers v. Iowa Dep't of Job Service*, 479 N.W.2d 305, 312 (Iowa 1991) (court found employee who failed to maintain an audit of deposit accounts and properly train or hire sufficient personnel were negligent acts). While Banks claims her intentions were good, her action was intentional, had been previously warned about, and was in disregarded of her employer's interest. She should not have allowed the nonemployee to handle the cash register.

Even though the employer admitted Banks' discharge was based solely on the August 1995 incident, it is still recurrent in nature to satisfy the code's definition of intentional misconduct. It was appropriate for the Board to consider the April 1995 incident even though it was not a factor in Banks' discharge, since it was of the same nature and bears on the issue of misconduct. *Cf. Larson v. Employment Appeal Bd.*, 474 N.W.2d 501, 572 (Iowa 1991) (employee fired for incompetence and later employer added deceit in applying for employment as grounds for her discharge on appeal to the administrative law judge after hearing officer allowed benefits). The nature of the grounds for Banks' termination were not different from those of the April 1995 warning. Both times Banks acted with intentional and substantial disregard of her duties and obligations and her employer's interest which rise to the level of misconduct disqualifying her from unemployment benefits.

We affirm the decision of the district court and the Employment Appeal Board.

AFFIRMED.

Sackett, P.J., concurs; Huitink, J., dissents.

HUITINK, J. (dissenting)

I dissent.