

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1986

CLERK SUPREME COURT

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CONNIE BENSON, )

Petitioner-Appellant, )

Filed January 29, 1986

vs. )

IOWA DEPARTMENT OF JOB SERVICE )  
and WESTVIEW ACRES CORPORATION, )

5-567  
85-611

Respondent-Appellees.

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Appeal from the Iowa District Court for Polk County - Dick Strickler,  
Judge.

Claimant appeals an adverse judicial review ruling upholding the denial  
of unemployment benefits due to alleged misconduct. **AFFIRMED.**

Helen L. Stirling and Carolyn F. Coleman, Des Moines, Iowa, for petitioner-  
appellant.

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

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

Claimant Benson appeals an adverse judicial review ruling upholding the denial of unemployment benefits due to alleged misconduct. We affirm.

Claimant was discharged from her employment as a laundry worker at Westview Acres Corporation on October 13, 1983, for allegedly slapping a co-worker while at work. Claimant was working in a separate building with another employee on the day of the alleged misconduct when a former roommate and co-worker, Terri Petty, entered the building and began to argue with claimant. Petty was not scheduled to work that day and it is unclear exactly why she came to work that day. The argument between claimant and Petty stemmed from strictly personal disagreements. Shortly after the argument, Terri Petty reported to Carolyn Thompson, the Director of Nursing, that claimant had just slapped her across the face. Claimant was discharged that same day due to misconduct.

Claimant filed for benefits and was originally awarded them based on a claims deputy's decision. The employer appealed and a telephone hearing was held on January 4, 1984.

At the hearing, Carolyn Thompson and Terri Petty testified for the employer and claimant testified on her own behalf. Petty stated that she and claimant had argued and that claimant slapped her across the face. Thompson corroborated Petty's testimony and further testified that claimant admitted to Thompson that she slapped Petty. Claimant, however, denied that she hit Petty or that she admitted such an act to Thompson. Thompson further stated that claimant had previously been warned about profanity and vulgarity at work. However, the single reason for dismissal stated on her termination report dated October 13, 1983, and on administrator Stan Birchem's letter to Job Service on November 29, 1983, was abusive conduct toward co-worker, or striking her co-worker. Claimant

testified that previous warnings about profanity and vulgarity were directed toward a group of employees rather than her personally.

On January 10, 1984, the hearing officer reversed the claims deputy and denied claimant benefits, citing that the more "accurate testimony is that of the employer . . . ." Claimant then appealed to the agency appeal board. On appeal, claimant provided a lengthy letter explaining her position more clearly and also added two letters by Terri Petty retracting the allegation that claimant had ever struck her. Petty stated in her letters that the reason she testified against claimant at the hearing was because she was afraid of losing her job. The appeal board found this additional evidence material and not available to claimant at the time of the hearing. It offered the employer the opportunity to respond to this new evidence but the employer refused. Even with this additional evidence, the appeal board, with one member dissenting, affirmed the hearing officer's denial of benefits. Claimant's application for rehearing was denied and she applied for judicial review of the agency action.

The district court noted Petty's recantation and the dissent's position on agency appeal board decision. However, the district court affirmed the appeal board stating, "This Court cannot on review, in this case, decree a certain witness as being completely unbelievable. The test is whether minds would differ on the same evidence: is there substantial evidence in the record to support the majority decision. If so, in this case, this Court is bound thereby."

It is the function of the agency as trier of fact to determine what part of the testimony at the hearing to accept or reject, and to determine the credibility of witnesses. Iowa law provides:

The court should look to the entire record to determine whether substantial evidentiary support exists for the agency decision. Courts do not hear those cases de novo. The district court reviews the case to ascertain whether

the agency . . . committed an error of law, or otherwise violated [Iowa Code] section 17.19(8).

Cook v. Iowa Department of Job Service, 299 N.W.2d 698, 700-01 (Iowa 1980) (citations omitted).

The court should not make an independent determination of the preponderance of the evidence, but should only see if the decision made is supported by substantial evidence. See Reisner v. Board of Trustees of Fire Retirement System, 203 N.W.2d 812, 814 (Iowa 1973). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84, 87 (Iowa 1979).

The court views the evidence in a light most favorable to the party in whose favor the decision has been rendered, and if there is substantial evidence in the record so that a reasonable trier of fact could find for that party, the decision is binding upon the reviewing court. See Poulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981).

Despite her employer's allegations that claimant had received other warnings for her conduct at work, the record shows that claimant had received a passing evaluation recommending continued employment just prior to the incident with Terri Petty. As we have noted earlier, the solitary reason given for claimant's discharge was the alleged slapping incident. Therefore, the record must provide substantial evidence of only one crucial allegation: whether or not claimant hit Terri Petty. Evidence of any other alleged misconduct by claimant is irrelevant.

Petty is the key witness because she is the only eyewitness who testified that claimant struck her. An argument between claimant and Petty took place and shortly thereafter Petty told Thompson that claimant slapped her. Petty testified, under oath, to the hearing officer that claimant slapped her. The

evidence presented to the appeal board was that Petty, once again under oath, wished to retract her previous testimony because she then maintained claimant did not strike her. Petty claimed that she told the hearing officer claimant hit her because she was fearful that the employer would retaliate against her if she did not say this. The inescapable conclusion is that Petty misrepresented the facts to a judicial tribunal under oath at some point in the proceedings because she either was or was not struck by claimant.

Even though Petty's testimony seems to be contradictory, the reason given for retracting her prior testimony is not consistent with the other evidence. The employer denies putting any pressure on Petty to testify that claimant hit her. Assuming, arguendo, that the employer did put pressure on Petty (which does not appear to be the case) Petty's retraction statement still does not explain why she initially told Thompson immediately after the incident that claimant had struck her. Petty certainly was under no fear of losing her job when she initially informed the employer of the incident. Petty's retraction does not address why she reported the incident in the first place if it was untrue, so her retraction statement should be discounted accordingly.

By viewing the evidence in the light most favorable to the employer, the hearing officer gave credibility to Petty's original testimony and the appeal board discounted her retraction. We are not in a position on appeal to determine witness credibility. Thus, substantial evidence existed to hold that Petty was struck by claimant.

For these reasons, the decisions of the appeal board and district court are affirmed.

**AFFIRMED.**

Sackett, J., concurs; Schlegel, J., dissents.

I respectfully dissent.

With the recantation of the testimony of Petty, the substance of the testimony at the hearing changed, and the record is left with only the employer's unsubstantial word against claimant's word. This is not substantial evidence to support the employer's position.

I would reverse the trial court and the agency and would award the claimant her benefits.