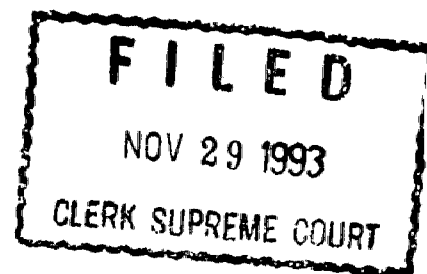


IN THE COURT OF APPEALS OF IOWA

No. 3-540 / 92-2026



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JEAN A. DONAHUE,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD
and EAGLE IRON WORKS, INC.,

Appellees.

Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Jean Donahue appeals the district court's ruling she
was properly disqualified from receiving unemployment
benefits due to instances of tardiness. **AFFIRMED.**

Emily L. Gosnell, Legal Services Corp. of Iowa,
Des Moines, for appellant.

William C. Whitten, Des Moines, for appellees.

Heard by Schlegel, P.J., Hayden, J., and Keefe, S.J.*
Donielson, J., takes no part.

*Senior judge from the 1st judicial district serving on
this court by order of the Iowa Supreme Court.

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HAYDEN, J.

Jean Donahue appeals a district court decision affirming an agency ruling denying her unemployment benefits on the ground of misconduct. The agency, Iowa Department of Job Service, decided Donahue was disqualified from receiving benefits because repeated tardiness, after warnings from her employer, constituted misconduct pursuant to Iowa Code section 96.5(2) (1991). This code section provides a discharged employee may be denied unemployment benefits if the employee was discharged for misconduct in connection with the individual's employment. Iowa Code § 96.5(2) (1991); see Sallis v. Employment Appeal Bd., 437 N.W.2d 895, 895 (Iowa 1989).

On December 3, 1991, Donahue was discharged from her secretarial position at Eagle Iron Works, Inc. She had been a secretary at Eagle Iron Works since February 1988. Her employment history revealed a series of tardy arrivals. Eagle Iron Works had a policy under which an employee could be disciplined for absences in excess of five percent. Donahue was required to report to work by 8 a.m. On June 24, 1991, Donahue received a verbal warning from her employer for being two minutes tardy. Donahue was three minutes late for work on October 7, 1991, and was given a written warning. She was again tardy on October 8, but did not receive a warning. On November 25, 1991, Donahue was two hours and thirteen minutes late for work due to car trouble. Donahue's son had called her employer

after 8 a.m. on November 25 to say his mother was experiencing car problems. Donahue was given a written warning and suspended for three days. Due to the Thanksgiving holiday, she did not return to work until December 2. The next day she was three minutes late for work and was discharged.

Donahue applied to the Iowa Department of Job Service for unemployment benefits. On December 11, 1991, a job service representative issued a decision finding Donahue was suspended and discharged because of unexcused tardiness and was disqualified from receiving unemployment benefits under Iowa Code section 96.5(2)(a). Donahue appealed, and an administrative hearing was held. The administrative law judge affirmed the finding Donahue was disqualified from benefits based on the discharge. On appeal to the Employment Appeal Board, the administrative law judge's decision was affirmed.

Donahue sought judicial review. The district court affirmed the denial of unemployment benefits. Donahue now appeals to this court.

The district court's review of an agency's finding is at law, not de novo. Harlan v. Iowa Dep't of Job Serv., 350 N.W.2d 192, 193 (Iowa 1984). The decisions of the agency are final if supported by substantial evidence and correct conclusions of law. Heatherly v. Iowa Dep't of Job Serv., 397 N.W.2d 670, 670 (Iowa 1986).

Our review is limited to the correction of errors at law. Roberts v. Iowa Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1983). In reviewing an agency's decision this court must decide whether there is sufficient evidence in the record to support the decision. Iowa Code § 17A.19(8)(f) (1991); Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 164 (Iowa 1983). The court must broadly and liberally apply the agency's findings in order to uphold rather than defeat the decision. Aluminum Co. of America v. Employment Appeal Bd., 449 N.W.2d 391, 394 (Iowa 1989) (citing Ward v. Dep't of Transp., 304 N.W.2d 236, 237 (Iowa 1981)). The substantial evidence test requires us to review the record as a whole to determine whether there is sufficient evidence to support the decision of the agency. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 190 (Iowa 1984) (citing Iowa Code § 17A.19(8)(f) [1991]; Woodbury County, 335 N.W.2d at 164). Specifically the issue on appeal is whether substantial evidence supports the agency's decision Donahue was disqualified from receiving unemployment benefits based on excessive unexcused absenteeism.

Excessive unexcused absenteeism constitutes misconduct under 345 Iowa Administrative Code section 4.32(1)(a). Higgins, 350 N.W.2d at 190. 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 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.

Iowa Admin. Code r. 345-4.32(1) (1988). Excessive unexcused absenteeism is defined as "an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer." Iowa Admin. Code r. 345-4.32(7) (1988).

Donahue's employment history reveals instances of tardiness resulting from car trouble, weather, and no excuse. Eagle Iron Works had warned Donahue she could be discharged if tardy again. Donahue admitted she understood this warning. On December 3, 1991, however, Donahue was late for work again. She alleged poor weather conditions caused her to be tardy and could not constitute grounds for disqualification from unemployment benefits. Donahue knew she could be discharged if she was late for work again. Donahue stated it took her one-half hour to travel from her home to work on a day when road conditions were good. She

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testified she would leave home on such days at 7:20 or 7:25 a.m. Despite weather conditions on December 3, Donahue stated she still did not leave home until after 7 a.m. Tardiness arising out of matters of purely personal responsibility such as transportation has been held not excusable. Higgins, 350 N.W.2d 191 (citations omitted); Harlan, 350 N.W.2d 194.

The Iowa Supreme Court has stated "[h]abitual tardiness, particularly after warning that a termination of services may result if the practice continues, is grounds for one's disqualification." Higgins, 350 N.W.2d at 192 (citations omitted). Past acts and warnings can be used to determine the magnitude of a current act of misconduct. Iowa Admin. Code r. 345-4.32(8); see Higgins, 350 N.W.2d at 192. Donahue provided no excuse for three of the five tardy arrivals at issue in this case.

We determine substantial evidence in the record supports the agency's decision. The agency decision properly determined Donahue was disqualified from receiving unemployment benefits. We affirm the district court's decision upholding the agency's ruling.

AFFIRMED.