

FILED

MAR 20 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CURTIS C. MILLER,

)

Petitioner-Appellant,

)

Filed March 20, 1984

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vs.

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**IOWA DEPARTMENT OF JOB SERVICE
and JOHN DEERE & COMPANY,**

)

)

4-27
83-754

Respondents-Appellees.

Appeal from the Iowa District Court for Polk County - George W. Bergeson,
Judge.

Petitioner-employee appeals from the district court decision on judicial
review affirming his disqualification from receipt of unemployment benefits.
AFFIRMED.

Jack Kegel, Ames, Iowa, for petitioner-appellant.

Walter Maley and Blair H. Dewey, Des Moines, Iowa, for respondent-appellee
agency.

Greg A. Naylor of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des
Moines, Iowa, for respondent-appellee employer.

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

Petitioner-employee appeals from the district court decision on judicial review affirming his disqualification from receipt of unemployment benefits. The issue in this case is whether a probationary employer is guilty of "misconduct" as that term is defined in 370 Iowa Administrative Code section 4.32(1)(a), when he permits, in a single instance, a co-employee to clock him out in violation of a known company rule. We must also determine whether it is improper to consider the probationary status of the employee in determining if an employee's conduct rises to the level of "misconduct" sufficient to deny unemployment benefits. We hold that the employee's actions rise to the level of misconduct as a matter of law and that past acts and warnings can be used to determine the magnitude of a current act of misconduct.

Petitioner was employed as an arc welder on a full-time basis from June 24, 1974, until May 26, 1982, the date of his discharge. On May 24, 1982, the petitioner was working with a co-employee who requested that petitioner allow him to perform the petitioner's "labor transactions" at the end of the day in order to save time as they were leaving. "Labor transactions" consist of checking out on the company time clock and recording labor performed for the workday. After initially refusing, petitioner finally agreed to allow his co-employee to perform those functions for him. This action was in violation of a company rule which provided that "[p]unching clock card (attendance record or job record) of another employee" would subject an employee to disciplinary action, including discharge. The rule was contained in a bulletin and the bulletin was continuously posted in employee areas throughout the factory. The bulletin also provided that the list of rules was not an exhaustive list of all the rules, and that an employee was to use his own judgment.

As a result of excessive unexcused absenteeism prior to 1980, petitioner had signed an agreement in 1980 with his employer that allowed him to retain his

seniority and job. In exchange, petitioner was put on probationary status for two years. Because of his probationary status at the time of the present offense, petitioner was discharged. Petitioner's co-employee, a nonprobationary employee, was suspended without pay for five days.

The petitioner testified at the hearing that he knew it was against company rules to allow someone else to perform his "labor transactions" at the end of the workday, but that his co-employee had "aggravated" him into allowing him to perform those functions. He also testified that he knew he could be disciplined for allowing someone else to perform his "labor transactions" but that he did not believe he would be discharged for the rules violation. There is nothing in the record to indicate the petitioner received any unearned compensation in this case nor any allegations of fraudulent conduct. There is no evidence that petitioner had violated this company rule on any other occasion.

The agency found that the petitioner "did deliberately and intentionally violate the spirit if not the letter of a known company rule, and that such act does, in fact, constitute an act of misconduct pursuant to Iowa Code Section 96.5-2-a." The agency also found that the petitioner "was aware that he was on probation at the time of the occurrence and, nevertheless, acceded to the requests of his co-worker in order to 'get him off his back.' "

I. Scope of Review. Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited under Iowa Code section 17A.20 to the correction of errors in law. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 165 (Iowa 1982). The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is whether the district court correctly applied the law. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983). In order to make that

determination, we apply the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Where the facts are disputed, we will adopt the factual determinations made by the agency as long as they are supported by substantial evidence in the whole record. Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979). Where the facts and inferences fairly to be drawn therefrom are undisputed, as they are in this case, however, the issue becomes one of law. Green v. Iowa Department of Job Service, 299 N.W.2d 651, 655 (Iowa 1980). We are limited to the record before the hearing officer in making this determination. Id.

II. Misconduct. Iowa Code section 96.5(2) (1981) provides that a claimant is disqualified from unemployment benefits "[i]f the department finds that the individual has been discharged for misconduct in connection with the individual's employment." The sole issue before us is whether the department erred in holding that petitioner's conduct constituted "misconduct" as that term is contemplated under section 96.5(2). We address the issue of petitioner's discharge only as it relates to whether or not petitioner is entitled to unemployment benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d at 221.

Misconduct is defined by 370 Iowa Administrative Code section 4.32(1)(a) 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.

This definition accurately reflects the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 447-48 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105, 62 L. Ed. 2d 68 (1979).

The misconduct, in order to support a disqualification from unemployment benefits, must be substantial. Budding v. Iowa Department of Job Service, 337 N.W.2d at 222. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits. Id. The focus of 370 Iowa Administrative Code section 4.32(1)(a) is on deliberate or intentional acts by an employee. Holt v. Iowa Department of Job Service, 318 N.W.2d 28, 29 (Iowa Ct. App. 1982). Misconduct is defined in terms of "deliberate act[s] or omission[s]," "willful or wanton disregard of an employer's interest," "deliberate violations or disregard of standards of behavior" and "culpability, wrongful intent or evil design." Id. The burden is on the employer to prove employee misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982); Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 770 (Iowa Ct. App. 1982); 370 I.A.C. 4.32(4).

A. Consideration of Probationary Status in Dismissal. Petitioner asserts that the agency decision denying him benefits is in violation of the agency rule that a discharge for misconduct cannot be based on past acts. Iowa Administrative Code section 370-4.32(8) provides: "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act." The purpose of this rule is to prevent the denial of benefits to an employee as a result of a discharge based on stale acts. It does not prevent the consideration of those past acts in

determining whether a current act manifests an intentional and substantial disregard for an employer's interests sufficient to constitute misconduct which results in denial of unemployment benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d at 223. The fact that the prior acts were remote in time from the one for which the employee was discharged, or different in nature, does not preclude a finding of misconduct. Id.

In this case, petitioner was still on probation as a result of his past actions. This probationary status was imposed after a hearing before the company at which petitioner was represented by union personnel. Petitioner does not deny the accuracy of those findings. We believe the fact that a claimant is still on probation as a result of prior acts is evidence that his current infractions manifest an intentional and substantial disregard for his employer's interests. We hold that it was proper to consider the fact that petitioner was on probation in determining whether or not his current actions constituted misconduct which will deprive an employee of unemployment benefits.

B. Allowing Co-employee to Clock Out as the Basis of Misconduct. The petitioner does not claim that he was unaware of the company rule prohibiting an employee from punching the clock card of another employee. Nor does he deny that the employer's policies also forbid employees from allowing others to punch their clock cards. It is unquestioned that petitioner intentionally violated a known company rule. Petitioner's assent to another punching his clock card was clearly volitional. Huntoon v. Iowa Department of Job Services, 275 N.W.2d at 448. Petitioner instead argues that his conduct did not display willful or wanton disregard for the interests of his employer, that his conduct was a single isolated incident not rising to the level of "misconduct," and that his violation of the company rule was only a good faith error in judgment or discretion.

We agree with petitioner that there may be isolated instances of improper conduct that fail to evince the "willful or wanton disregard" of his employer's

interest that is essential to a finding of misconduct. Budding v. Iowa Department of Job Service, 337 N.W.2d at 222-23; Woods v. Iowa Department of Job Service, 327 N.W.2d at 770. However, we do not agree that this is such a case. An employer purchases and installs a time clock for the purpose of recording information as to the employees' presence on the employer's premises. Although in the instant case the employer suffered no monetary loss, the approval of the practice of allowing one employee to punch in and out for fellow employees would totally defeat the purpose of a time clock. See Schooley v. Commonwealth Unemployment Compensation Board of Review, 43 Pa. Commw. 383, 385, 402 A.2d 1109, 1110 (Pa. Commw. Ct. 1979). We also see no distinction between an employee performing these "labor transactions" for a co-employee and an employee allowing a co-employee to perform those functions for them. Both actions are in clear violation of known company rules.

Moreover, the petitioner's misconduct occurred while he was on probation as a result of a finding of excessive unexcused absenteeism at a hearing before company officials where petitioner was represented by a union representative. Petitioner had been on probation for nearly two years and was aware of the fact that he could be dismissed for violation of company rules without subjecting the company's disciplinary decision to the grievance procedure. We believe that petitioner's actions, in light of his tenuous employment status, evidence sufficient disregard for the employer's interests to constitute misconduct. See Budding v. Iowa Department of Job Service, 337 N.W.2d at 222-23.

Accordingly, we affirm the decision of the district court.

AFFIRMED.