IN THE COURT OF APPEALS OF IOWA

No. 9-356 / 88-1728

FILED
OCT 05 1989
CLERK SUPREME COURT

DAWN RUSSO,

Petitioner-Appellant,

442

vs.

EMPLOYMENT APPEAL BOARD, NURSING CARE MANAGEMENT, LTD., a Corporation, and **HARMONY HOUSE CARE CENTER,**

Respondents-Appellees.

Appeal from the Iowa District Court for Black Hawk County, C. W. Antes, Judge.

Petitioner challenges the denial of her unemployment benefits. **AFFIRMED.**

David R. Gault of Legal Services Corporation of Iowa, Waterloo, for petitioner-appellant.

Blair H. Dewey and William C. Whitten of Employment Appeal Board, for respondents-appellees.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J. 113

Russo had been employed with the Harmony House Care Center for six years. Her work hours were 8:00 a.m. until 4:30 p.m.

At the administrative hearing, the employer's witnesses testified as to dissatisfaction with Russo's attendance record from December of 1986 to March 1987. On April 24, 1987, Russo received a written warning which listed numerous dates on which she was late for work or had checked into work but had left the facility. On June 5, 1987, the employer issued Russo a second written warning which documented Russo's unsatisfactory work performance and reassigned her work duties so she would no longer be in a supervisory role. On June 23, 1987, Russo received a counseling session with regard to her care for two residents. Documentation for this session indicates Russo was argumentative during the discussion. A month after this counseling session, on July 23, 1987, Russo called the center at approximately 7:50 a.m. and left a message with the director of nursing stating she would be late to work. When Russo reported to work at 9:55 a.m., her supervisor asked her to explain the reason for the tardiness. Russo refused to give an explanation because she felt the supervisor was needlessly prying into her personal life. The manner in which Russo told the supervisor not to pry seemed to the supervisor to be one of defiance. The employer then terminated Russo.

After a hearing and appeal, the agency denied Russo unemployment compensation. The district court affirmed the agency's action. The district court felt the employer met its burden of proof in establishing employee misconduct. Russo now appeals from the district court's decision.

I. **Standard 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 at 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 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).

II. **Misconduct**. Iowa Code section 96.5(2) provides a claimant is disqualified from unemployment benefits "[i]f the department finds that the individual has been

215

discharged for misconduct in connection with the individual's employment." The sole issue before us is whether the department erred in holding petitioner's conduct constituted misconduct as that term is contemplated under section 96.5(2). We note at the outset that we do not question the employer's right to terminate petitioner's employment. The issue we address relates solely to whether or not petitioner is entitled to unemployment compensation.

Misconduct is defined by 345 Iowa Administrative Code 4.32(1) 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 a 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 has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dept. of Job Service, 275 N.W.2d 445, 448 (Iowa 1979), cert. denied, 444 U.S. 852 (1979).

146

As the definition suggests, misconduct must be substantial in nature to support a disqualification from unemployment benefits. Misconduct serious enough to warrant the discharge of an employee, is not necessarily serious enough to warrant a denial of benefits. Budding, 337 N.W.2d at 222.

Excessive unexcused absenteeism can constitute misconduct. Harlan v. Iowa Dept. of Job Service, 350 N.W.2d 192, 193 (Iowa 1984). There is an administrative rule which specifically addresses this issue:

> Excessive unexcused absenteeism is 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.

345 Iowa Admin. Code 4.32(7). The Iowa Supreme Court has held the term "absenteeism" also encompasses conduct of an employee that is more accurately referred to as "tardiness." Higgins v. Iowa Dept. of Job Service,350 N.W.2d 187, 190 (Iowa 1984).

> As traditionally used in the area of employment, the term "absent" refers to an employee who has missed a full day's work whereas the term "tardy" means an employee who reports to work late. As a practical matter, an absence is an extended tardiness and a tardiness is a limited absence. In any event, we believe the terms "absenteeism" and "absences," . . . were intended to refer to the time in which an employee is not at work when he or she is scheduled and expected to be there, irrespective of the length of such time.

Id. See also Harlan v. Iowa Dept. of Job Service, 350 N.W.2d at 193-94 (the Higgins decision on absenteeism is

also applicable to tardiness). The determination of whether unexcused absenteeism or tardiness is excessive, necessarily requires the consideration of past acts and warnings. Higgins, 350 N.W.2d at 192.

The record in this case reveals Russo received a written warning on April 24, 1987, with regard to over forty separate incidents between December 1986 and March 1987 in which she was either late to work or had left the workplace during her scheduled working hours. After this warning, Russo was no longer allowed to check in and out on her own. She was subject to the supervision of an administrator when she checked in and out of work.

Russo called her employer on July 23, 1987, and informed the director of nursing she would be late. She offered no reason for this tardiness. When she arrived at work and was questioned by her supervisor as to why she was late to work, she replied only that she had had personal business to attend to. She was informed a more specific answer was necessary so her supervisor could determine if her tardiness was excused or unexcused. Russo informed her supervisor she had had personal business to attend to and it was none of her supervisor's business. Russo was then terminated because her unexcused tardiness constituted a third warning within a six-month period, and pursuant to her employer's policies this warranted her discharge.

Russo is correct in that a single, isolated incident of absenteeism cannot constitute misconduct. Sallis v. Employment Appeal Bd., 437 N.W.2d 895, 897 (Iowa 1989).[1] However, Ms. Russo's tardiness on July 23, 1987, was not an isolated incident. In determining the magnitude of this current act, the court may consider past acts and warnings. 345 Iowa Admin. Code 4.32(8). The extent of Russo's past record of tardiness and failure to be at the workplace when scheduled, convinces this court her tardiness on July 23, 1987, constituted misconduct. There was substantial evidence to sustain the agency and district court decisions.

Russo contends the trial court erred in relying on evidence of the April 24, 1987, warning, because neither witness for the employer had first-hand knowledge regarding the facts surrounding the issuance of the warning. She argues her explanation about the incidents leading up to the warning was unrefuted by the employer's witnesses, and should have been accepted as proof that her past behavior did not constitute misconduct. Russo testified her past absences from the workplace were authorized by her supervisor. She said Barbara McNamara had directed her to run work-related errands, some of which took her out of the

---

1. Since the term "absenteeism" encompasses "tardiness," Higgins, 350 N.W.2d at 190, this court assumes the principle enunciated in Sallis applies equally as well to an isolated incident of tardiness.

facility, and others she performed on her way to work, causing her to arrive later than her scheduled work time of 8:00 a.m. Russo submitted an affidavit from Ms. McNamara which corroborated her explanation of the events.

Russo argues there is no evidence in the record to contradict her explanation, and, therefore, these past incidents and the April 24, 1987, warning cannot be considered misconduct. The court disagrees. On August 4, 1987, Harmony House Health Care Center filed its protest to Russo's claim for unemployment benefits. This protest was accompanied by employment records regarding Ms. Russo and a letter from Mr. Larmore, the administrator for the center. The letter described the details of Ms. Russo's receipt of written disciplinary warnings. Mr. Larmore was directly involved in the disciplinary warning given to Ms. Russo on April 24, 1987. Both Mr. Larmore's letter and the copy of the warning issued to Russo provide valuable information and insight as to Russo's past conduct at work. This letter and the copies of Ms. Russo's personnel records become part of the record submitted for consideration by the agency. Administrative agencies are not bound by technical rules of evidence. McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234, 237 (Iowa 1982). Findings may be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence

even if it would be inadmissible at trial. Iowa Code § 17A.14 (1987). The agency and trial court did not err in relying on this information as evidence of Russo's past misconduct. The credence given Russo's evidence was probably diminished by the fact that her prior supervisor was her close friend and roommate. It is not unreasonable that these factors would cause the hearing officer to give less weight to the affidavit of Ms. McNamara. There was substantial evidence from which one could reject Russo's explanation for her past work attendance record.

Even if Russo's explanation was accepted, she had been given a serious warning on April 24, 1987, with regard to her tardiness. Despite this written warning and the restriction that she check in and out with her supervisor in the future, Russo still arrived at work late on July 23, 1987. She did not give her employer an hour's notice that she would be late as was required by her employer's policy, nor did she provide a reason for her absence when she called her employer. When she arrived late, she would provide no explanation for her absence other than she had had personal business she needed to do. This uncooperative attitude made it impossible for her employer to determine whether her tardiness was excused or unexcused. In light of the warning she was given on April 24, 1987, Russo had to know the serious regard her employer attached to

151

tardiness. The circumstances of her tardiness on July 23, 1987, in light of the warning she received on April 24, 1987, caused the tardiness to rise to the level of misconduct.

Finally, Russo contends the trial court erred in finding misconduct because it premised its finding on the fact that Russo had received her third disciplinary warning in six months, and pursuant to her employer's policy that warranted her discharge. Conduct sufficient to warrant a discharge does not necessarily constitute misconduct. Budding v. Iowa Dept. of Job Service, 337 N.W.2d at 222. A review of the agency and trial court decisions convinces this court that neither substituted the employer's policy for a separate and independent finding of misconduct. Substantial evidence existed to establish misconduct in this matter. The decision of the district court is affirmed.

AFFIRMED.