IN THE COURT OF APPEALS OF IOWA

No. 8-280 / 97-1137

MARK A. WHARFF,

Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,

Respondent-Appellee,

STOREY-KENWORTHY COMPANY-ADP,

Employer/Intervenor-Appellee.

FILED
AUG 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Glenn Pille, Judge.

Mark Wharff appeals from the district court order on judicial review affirming the denial of unemployment insurance benefits by the Employment Appeal Board.

AFFIRMED.

Kevin M. Kirlin of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Anita Garrison, William C. Whitten, and Richard R. Ramsey, Des Moines, for appellee-Employment Appeal Board.

Joseph A. Quinn of Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for appellee-employer.

Heard by Sackett, P.J., and Huitink and Mahan, JJ., but decided en banc.

CADY, C.J.,

This is an appeal by Mark Wharff from a decision by the district court affirming a prior decision by the employment appeal board which had denied his claim for unemployment benefits. We affirm the district court.

Wharff was employed as a furniture installer for Storey-Kenworthy Company, an office supply business in Des Moines. On April 17, 1996, he was installing office furniture for the Principal Financial Group in the Principal building in downtown Des Moines. Wharff took his lunch break around 8 p.m. During the unpaid break, Wharff left the building and went to a nearby lounge where he ate a pizza and drank a "couple" of beers. He then returned to work.

The following day an employee of the Principal Financial Group informed Storey-Kenworthy they suspected Wharff was under the influence of an alcoholic beverage after he returned to work following his lunch break. A Storey-Kenworthy employee confronted Wharff with the complaint. Wharff denied he was intoxicated, but acknowledged drinking beer during his lunch break. On April 22, 1996, Wharff was terminated from his employment with Storey-Kenworthy for "consumption of alcoholic beverages during working hours."

Wharff subsequently filed a claim for unemployment benefits. A claims officer determined Wharff had been discharged for misconduct and denied the claim. Wharff filed an administrative appeal. An administrative law judge determined Wharff did not engage in misconduct because Storey-Kenworthy had no specific

policy prohibiting the consumption of alcoholic beverages during unpaid lunch breaks. On further appeal, the employment appeal board found Wharff's consumption of beer during his lunch break constituted misconduct and denied benefits. The district court affirmed the board's decision.

On appeal from the district court order Wharff maintains the legal consumption of alcoholic beverages during unpaid, off-premises lunch breaks cannot constitute misconduct as a matter of law. He also claims there was no evidence presented at the hearing he drank beer to the point of intoxication, and the findings of the administrative agency were not supported by the evidence.

Our review is on error at law. Iowa Code § 17A.19(8) (1995). The agency decision is binding on appeal if supported by substantial evidence and based on correct conclusions at law. *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991).

An individual is disqualified from unemployment benefits if the individual has been discharged for misconduct in connection with employment. Iowa Code § 96.5(2)(a). Misconduct is a deliberate act or omission which constitutes a material breach of duties arising out of employment. Iowa Admin. Code r. 345-4.32(1)(a); *see Larson*, 474 N.W.2d at 571-72 (approving of misconduct definition). It is comprised of conduct evincing a willful or wanton disregard of an employer's interest, including conduct involving the deliberate disregard of standards of behavior which the

employer has the right to expect of an employee. *Id.; see Kleidosty v. Employment Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992).

The Storey-Kenworthy handbook prohibited the consumption of alcoholic beverages during work hours. It also made it a violation to be under the influence of alcohol while at work. Wharff claims neither policy was violated because he did not actually consume the beer during work hours, and there was insufficient evidence he was intoxicated after returning from lunch.

We acknowledge the record contains little evidence concerning Wharff's state of sobriety following the lunch break. Nevertheless, Wharff acknowledged drinking beer, which the customer was able to detect. This was the conduct which resulted in his termination, and which forms the issue on appeal.

The thrust of Wharff's claim is the conduct which resulted in his termination was outside the control of his employer. He relies on the workers' compensation principle that control exercised by an employer over employment is normally suspended during an off-premises lunch break, and an employer is relieved of responsibility for the conduct of an employee during this time. *See Halstead v. Johnson's Texaco,* 264 N.W.2d 757, 759-60 (Iowa 1978) (workers' compensation law generally not applicable during off-premises lunch period). Thus, Wharff concludes the law may not deny him unemployment benefits based on conduct which is not prohibited by the law. We respond to this claim three ways.

First, misconduct to support disqualification from unemployment benefits is not limited to acts which take place in the work environment or done in the furtherance of an employer's business. *See Kleidosty,* 482 N.W.2d at 418-19 (sale of cocaine on employee's own premises and on own time constituted misconduct). Instead, misconduct includes acts occurring outside the workplace, as long as they are connected to the employment. *See* Iowa Code § 96.5 2(a); James McLoughlin, Annotation, *Conduct or Activities of Employees During Off-Duty Hours as Misconduct Baring Unemployment Compensation Benefits,* 35 A.L.R. 4th 691, § 11 (1981).

Secondly, misconduct to support the denial of unemployment benefits is not limited to the violation of a specific rule. It is also not limited to the violation of a law. To the contrary, it includes the wanton or willful disregard of standards which an employer has the right to expect of employees. *Kleidosty,* 482 N.W.2d at 418.

Finally, a rule which prohibits the consumption of alcoholic beverages during working hours properly includes the lunch break. The basic rationale behind a prohibition against drinking alcoholic beverages during working hours is the same for drinking alcoholic beverages during a lunch break. The consequences and effects of consuming alcoholic beverages do not stop when the consumption stops. Thus, an employer who articulates a specific rule prohibiting the consumption of alcoholic beverages while working should reasonably expect employees to understand it also includes breaks during the work period.

Drinking beer while on a lunch break falls within the parameter of the definition of misconduct. It shows a disregard of the standards of behavior an employer has the right to expect of employees. We have considered all the arguments raised by Wharff. The decision of the agency was supported by substantial evidence. We affirm the district court.

AFFIRMED.

All judges concur except Sackett, and Huitink, JJ., who dissent.

SACKETT, J. (dissenting)

I cannot agree with the majority's rule that a fired employee should be denied unemployment benefits because he or she "violates a standard of behavior which such employer has the right to expect of its employees without the need for the employer to provide a specific prohibition." This is contrary to the definition provided by the Department of Employment Services:

> *Misconduct* is defined 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.

345 Iowa Admin. Code 4.32(1)(a) (1988), which definition has been approved by the supreme court. *See Kleidosty v. Employment Appeal Bd.*, 482 N.W.2d 416, 417-18 (Iowa 1992); *Larson*, 474 N.W.2d at 571-72; *Anderson*, 469 N.W.2d at 689; *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 189-90 (Iowa 1984); *Huntoon v. Iowa Dep't of Job Servs.*, 275 N.W.2d 445, 447-48 (Iowa 1979).

It is also contrary to the Employment Security Law, which is to be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment. *Dehmel v. Employment Appeal Bd.*, 433 N.W.2d 700, 703 (Iowa 1988); *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218, 221 (Iowa 1984); *Cosper*

v. Iowa Dep't of Job Serv., 321 N.W.2d 6, 10 (Iowa 1982); *Brumley v. Iowa Dep't of Job Serv.*, 292 N.W.2d 126, 129 (Iowa 1980).

The majority opinion refers to an alleged statement by an unidentified employee of Principal that petitioner was under the influence of alcohol. There was no proof of such a statement. The facts are basically without dispute. Petitioner admittedly had one or two beers during his unpaid lunch break. There is no contention by the employer the firing was the result of petitioner coming to the job in an intoxicated condition, or drinking while being paid or on company premises or on the premises of a customer. Petitioner admits if either of these conditions existed, the firing would have been for misconduct as defined by the Department.

Had there been evidence admitted to prove petitioner returned to work impaired by his non-working-hours conduct, I would have concurred with the finding petitioner should be denied benefits.

HUITINK, J. (dissenting)

I respectfully dissent. In denying Wharff's unemployment benefits, the majority fails to distinguish between misconduct sufficient to terminate employment and misconduct sufficient to disqualify the discharged employee from benefits.