IN THE COURT OF APPEALS OF IOWA

No. 1-582 / 91-917

FILED
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CLERK SUPREME COURT

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CHERYL DAVIS,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD OF THE IOWA DEPARTMENT OF INSPECTIONS, JOB SERVICES DIVISION OF THE IOWA DEPARTMENT OF EMPLOYMENT SERVICES, and MSP RESOURCES, INC.,

Appellees.

Appeal from the Iowa District Court for Tama County, L. Vern Robinson, Judge.

Davis appeals a district court ruling affirming the agency decision denying her claim for unemployment benefits. **REVERSED.**

Daniel Shinkle of Legal Services Corporation of Iowa, Cedar Rapids, for appellant.

William C. Whitten and Joe E. Smith of Employment Appeal Board, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

Cheryl Davis was discharged from her employment with MSP Resources on August 6, 1990. MSP claimed she was discharged for excessive unexcused absences. According to company policy, employees had to personally call in if they were going to be absent from work. Prior to her discharge, Davis had three times either called in late following car trouble or had another person call concerning her absence from work. Davis does not have a phone. Davis received two written warnings, the last in January 1990, concerning her improper reporting of her absences.

In August 1990 a job service representative found Davis was entitled to unemployment benefits since she was not discharged for misconduct. MSP appealed. Following a hearing an administrative law judge determined Davis's absences were unexcused and constituted misconduct. The Employment Appeal Board affirmed the decision denying benefits. Davis then filed a petition for judicial review. The district court affirmed the agency; Davis now appeals.

Our scope of review is limited to the corrections of errors at law. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982). The district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. The scope of review encompasses a review of the entire record and is not limited to the agency's findings.

Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984). Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence. Eaton v. Iowa Dep't of Job Serv., 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917.

First, we find the district court erred as a matter of law in assessing costs against Davis. "An individual claiming benefits shall not be charged fees of any kind in any proceeding under this chapter by the division of job service or its representatives or by a court or an officer of the court." Iowa Code § 96.15(2) (1991). This prohibition includes court costs. Geiken v. Lutheran Home for the Aged Ass'n, 468 N.W.2d 223, 227 (Iowa 1991).

Second, we determine the administrative law judge and the trial court made an error of law in concluding Davis's actions fit the legal definition of misconduct. See Iowa Code § 17A.19(8)(f) (1991) (agency decision affirmed when there is no error of law and decision is supported by substantial evidence). We find as a matter of law Davis's actions were not intentional, and as such, do not meet the definition of misconduct.

The Iowa Administrative Code defines misconduct 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.

Iowa Admin. Code r.345-4.32(1)(a) (1988). Davis's failure to personally report absences was not a "deliberate violation" of MSP's rules.

Davis lives in the country, and the closest telephone is fifteen miles away. The assistant administrator for the employer, Rick Wood, testified Davis was discharged due to three unexcused absences. The first was on August 19, 1989, and was unexcused because Davis had someone other than herself call to report this absence. The second, on January 18, 1990, was unexcused for the same reason. The third, on July 27, 1990, was unexcused for the same reason and because the call was late.

Wood testified Davis was discharged on July 30, 1990. When questioned later, he stated Davis's last day of work was July 30. He then said she had also worked on July 30 and 31 and August 1, 2, and 3. When asked why it took so long to discharge her, the employer stated the last

unexcused absence was on August 2 and the unexcused absence on July 27 was of some other individual. He stated Davis was discharged due to the absence on August 2 when her father-in-law called on time on her behalf. He further claimed she had called late on July 31 and August 1. Davis testified she did not have someone call for her on July 31 and August 1 because she planned to call herself. She then called late due to problems with her car.

The administrative law judge found the employer's testimony concerning August 1989, and January and August 1990, was so "disjointed and confused" that it should be disregarded. The administrative law judge further concluded:

> The three instances, however, within one week [(July 31 and August 1 and 2)] when the claimant called late to report her absences, are misconduct. The claimant twice had it within her power to arrange for her husband to make a timely phone call, but she did not do so, and she instead relied upon the reliability of her motor vehicle. The claimant's failure to make a timely call was because of the failure of her car to operate which is culpable on the part of the claimant. The claimant is disqualified from benefits.

We note that "[f]ailure to perform a specific task does not constitute misconduct if such failure is in good faith or for good cause." Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731, 737 (Iowa App. 1986) (citation omitted). To determine intent when absences are not properly reported, we must look to the reason for the failure. Quenot v. Iowa Dep't of Job Serv., 339 N.W.2d 624, 627 (Iowa App. 1983). The administrative law judge specifically found Davis's

failure to personally call her employer did not amount to misconduct since her illness and the distance to a telephone prevented her from personally making a call. He relied, however, on the three instances where Davis tried to call herself while ill. The administrative law judge felt Davis should have had her husband call for her, which also would have been treated by the employer as an unexcused absence.

After examining the underlying circumstances, we find Davis's failure to promptly report the absences was not intentional. See id. As the agency itself noted, the fact Davis was ill and would have to travel fifteen miles to a telephone gave her good cause to have someone else call for her. In addition, we find the motor vehicle malfunction in this situation was not misconduct. "'[M]isconduct connotes volition. A failure in good performance which results from inability or incapacity is not volitional and is thus not misconduct.'" Floyd v. Iowa Div. of Job Serv., 338 N.W.2d 536, 538 (Iowa App. 1983) (quoting Huntoon v. Iowa Dep't of Job Servs., 275 N.W.2d 445, 448 (Iowa 1979)). There is no evidence Davis intentionally caused the malfunction, willfully allowed it to occur, or knew it would occur.

The findings of fact support Davis's contention she had good cause for failing to comply with the employer's rules. We affirm the initial decision of the job service representative finding Davis entitled to benefits. We thus reverse the agency and the district court determinations of

misconduct. Davis is awarded unemployment benefits from the date of application. All costs are assessed to the appellees.

REVERSED.