FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

VAN FOUTS,	)	
Petitioner-Appellant,	)	Filed August 29, 1985
vs.	)	
IOWA DEPARTMENT OF JOB SERVICE,	)	5-290 84-1296
Respondent-Appellee,	)	
and	)	
SWIFT INDEPENDENT PACKING COMPANY,	)	
Respondent-Employer.	)	

Appeal from the Iowa District Court for Polk County - Joel D. Novak, Judge.

Petitioner appeals from the district court's order affirming respondent agency's decision denying him unemployment benefits. AFFIRMED.

Carolyn S. Coleman, Des Moines, Iowa, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid, Des Moines, Iowa, for respondent-appellee.

Heard by Donielson, P.J., Snell, and Hayden, JJ.

HAYDEN, J.

Petitioner appeals from the district court's order affirming respondent agency's decision denying him unemployment benefits. He claims that the agency erred in not giving preclusive effect to a previous court finding, made with respect to an unemployment claim filed after an earlier discharge, that certain absences were not misconduct. He also claims that there is no substantial evidence in the record to support the agency's findings of misconduct. We affirm.

Petitioner began working for Swift Independent Packing in August of 1981. Under the company's attendance policy, an employee's first unexcused absence would result in a written warning notice; a second unexcused absence would result in written notice and a three-day work suspension; and a third would result in termination. An unexcused absence was defined as "any absence where an employee fails to notify the company at least 30 minutes prior to his starting time."

On April 24, 1982, petitioner did not appear for work. Prior to his work shift, he visited a doctor and received a prescription for medication. He contended that he was unable to call his employer before the start of his shift because the medication caused him to fall asleep. Pursuant to the attendance policy, petitioner received a written unexcused absence warning. Four days later, on April 28, he called in sick because he was taking the medication which caused drowsiness. The employer then gave him a written unexcused absence warning with a three-day work suspension. On May 27, 1982, petitioner failed to report to work or report his absence and was thus discharged for his third unexcused absence.

Petitioner filed a claim for unemployment benefits after this discharge. He sought judicial review after the final agency action disqualified him from receiving benefits.

As a result of negotiations between his union and the employer, petitioner was reinstated on September 7, 1982. Under the reinstatement, petitioner's attendance record included unexcused absences for the April 24 and May 27, 1982, incidents, but excluded that of April 28, 1982.

On March 15, 1983, petitioner advised the employer that he would be late to work because of a doctor's appointment. Petitioner contended that he did not feel well enough to go to work after the appointment and claimed that he did not notify employer because he felt a call was unnecessary. Pursuant to the attendance policy, petitioner was discharged for his third unexcused absence. He then filed a second claim for unemployment benefits.

While petitioner was pursuing his agency remedies on his second unemployment claim, the district court issued a ruling on July 1, 1983, with respect to his claim filed after the first discharge. The court reversed the agency by concluding that petitioner's three absences did not constitute misconduct. The court determined that the petitioner's actions on April 24, 1982, did not reflect evidence of misconduct and that his failure to call in sick on May 27, 1982, was a mistake which did not rise to the level of misconduct.

Petitioner sought judicial review after the agency denied benefits on his second unemployment claim on the grounds of misconduct. Petitioner asserted that the agency's inclusion of the absences on April 24 and May 28, 1982, in determining misconduct was in violation of the principle of res judicata. Petitioner also asserted that the agency's decision that petitioner was excessively absent on an unexcused basis was not supported by substantial evidence in the record.

The district court affirmed the agency's decision and determined that the agency was not bound by the prior court determination that two of the absences at issue in the present case did not constitute misconduct. The court also concluded

there was substantial evidence to support the agency's decision. Petitioner brought this appeal.

I. Petitioner first alleges that the agency erred in denying his second claim for benefits by not giving preclusive effect to the court's 1983 ruling, following his first claim for benefits, that the three 1982 absences were not misconduct. Petitioner claims that the agency is precluded from considering the April 24 and May 27, 1982, absences as two of the three that are required before he could be discharged under the employer's attendance policy, and thus that he could not be denied benefits on the basis of the March 15, 1983, incident alone.

We agree with the district court that issue preclusion is not applicable in this case. Four elements must be present before issue preclusion is established: the issue concluded must be identical, the issue must have been raised and litigated in the prior action, the issue must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143, 146 (Iowa 1983). Petitioner's assertion of issue preclusion in this case fails because the first element, i.e. identity of issue, is not satisfied. In the proceedings following petitioner's first claim for benefits, the district court, in its ruling of July 1, 1983, made a determination that the absences of April 24, April 28, and May 27, 1982, were not misconduct. In the proceedings following petitioner's second claim for benefits, the agency and the district court were called on to make a different factual determination; i.e. whether petitioner's March 15, 1983, absence, in conjunction with those of April 24 and May 27, 1982, constituted misconduct sufficient to deny him benefits. The structure of the employer's attendance policy required an examination in each of the two proceedings of the three relevant incidents together (since a third unexcused absence is to result in discharge).

Because a different combination of incidents was considered in each of the two sets of proceedings, the precise factual issue was not identical. There was thus no error in failing to give preclusvie effect to the court's 1983 ruling that the April 24 and May 27, 1982, incidents were not misconduct.

II. Petitioner also argues that, assuming the inapplicability of issue preclusion, the agency's finding of misconduct following the March 15, 1983, incident is not supported by substantial evidence in the record. The principles governing our review of administrative decisions such as is involved here are set forth in Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 189-90 (Iowa 1984), and need not be repeated here. According to agency rules, excessive unexcused absenteeism is considered misconduct sufficient to make one ineligible for benefits unless such absenteeism was "for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer." 370 I.A.C. § 4.32(7) (emphasis added). The agency's findings are conclusive when the facts are in dispute or when reasonable minds may differ on the inferences to be drawn from the evidence." Harlan v. Iowa Department of Job Service, 350 N.W.2d 192, 193 (Iowa 1984).

We believe the record contains substantial evidence to support the finding of misconduct. Petitioner does not contest the validity or applicability of the employer's policy of termination of employment after three unexcused absences. The agency found that petitioner's absence on April 24, 1982, was unexcused because he could have called his employer to inform them that he would not be at work because of the effects of his medication, but did not do so. Petitioner does not claim that the May 27, 1982, absence was excused. Regarding the absence of March 15, 1983, the agency concluded it was unexcused because petitioner did not properly notify the employer that he would not be in that evening to finish up his shift. The district court concluded that the agency's finding of misconduct due to

excessive unexcused absenteeism was supported by substantial evidence in the record Our own review of the record leads us to a similar conclusion.

The district court's order affirming the agency's denial of benefits is affirmed

AFFIRMED