

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1983

CLERK SUPREME COURT

KEITH A. SHIELDS,

)

Petitioner-Appellee,

)

Filed January 26, 1983

00157

vs.

)

CITY OF CEDAR RAPIDS AND IOWA
DEPARTMENT OF JOB SERVICE,

)

2-398
2-68200

)

Respondents-Appellants.

)

Appeal from Linn District Court - William R. Eads, Judge.

Respondents appeal from the district court's order on judicial review reversing the agency's finding that petitioner was discharged from his employment for misconduct and was therefore ineligible to receive unemployment compensation. AFFIRMED.

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

Dennis Groenenboom, Cedar Rapids, Iowa, for petitioner-appellee.

Considered en banc.

PER CURIAM

Respondents appeal from the district court's order on judicial review reversing the agency's finding that petitioner was discharged from his employment for misconduct and was therefore ineligible to receive unemployment compensation. They allege that there is substantial evidence to support respondent agency's finding that petitioner was guilty of misconduct. We affirm.

This is the second time this case has come before us. In our prior disposition, Shields v. City of Cedar Rapids, No. 2-65294 (Iowa Ct. App. Aug. 25, 1981), we set forth the following factual background:

Claimant filed a petition on November 27, 1979, seeking judicial review of respondent agency's denial of his application for unemployment benefits. The agency appeal board decided on October 19, 1979, that he was discharged for misconduct. Claimant was employed by respondent city as a laborer and driver from June 1, 1977 to June 13, 1979 when he was discharged for allegedly failing to comply with his employer's rule prohibiting employees from writing on or altering their time cards. In this case, he wrote on his card that he thought he was entitled to additional sick pay.

The agency appeal board found that the employer had a policy barring the entering of information on the back of employee time cards, that claimant was told about that rule and he deliberately and willfully disregarded that rule. His claim for unemployment benefits was thus denied. In its ruling of June 17, 1980, the district court rejected the agency's conclusion, noting that the evidence presented to the agency contained a statement written by a Mr. Lockhart on the employer's behalf. This statement referred to the rule regarding the ban on writing on time cards and the fact that notice of the rule was posted. The court found that the statement was received into evidence without giving claimant a chance to cross-examine its author pursuant to section 17A.14(3), The Code. The court found the agency relied on this statement, that there was not substantial evidence to support the agency's decision and remanded the case to the agency to determine by substantial evidence whether petitioner's actions were tantamount to misconduct warranting dismissal. Respondents were granted permission to appeal that ruling on August 4, 1980.

In that prior appeal, we reversed the trial court and held that it should have considered the statement of Mr. Lockhart in determining whether claimant was

guilty of misconduct. On remand, the trial court again reversed the agency's finding of misconduct, concluding that it was not supported by substantial evidence in the record viewed as a whole. Specifically, the court found that the employer had not sufficiently established the existence of the alleged rule prohibiting employees from writing on their time cards and therefore rejected the agency's conclusion that claimant deliberately violated such rule. Respondents again appealed.

Our review of agency action is governed by Iowa Code § 17A.19(8). One ground upon which we may reverse an agency action is if it is "unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole." § 17A.19(8)(f). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). In this case it is alleged that petitioner is disqualified from receiving benefits because he was discharged for misconduct. "Misconduct" is defined in 370 I.A.C. § 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.

(emphasis added.) The employer has the burden of proving misconduct. 370 I.A.C. § 4.32(4); Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).

We agree with claimant and the district court that employer did not sustain its burden of proving misconduct. The critical language in the agency's decision which found misconduct on claimant's part is as follows: "[t]he claimant writing an entry on his time card, the effect of which is to increase the amount due on his time card by \$35.02, shows . . . a deliberate violation of the employer's rules." Claimant testified without contradiction that the reason he made that notation on his time card was to reflect the day of sick pay that his supervisor said he was entitled to and that he had not yet received. Concerning the alleged rule prohibiting employees from writing on their time cards, both claimant and the union shop steward testified at the hearing that they had no prior knowledge of any such rule or prohibition. They also stated that the only posted notices concerned a prohibition against punching in someone else's time card. Even the employer's representative who attended the hearing testified that he did not know whether the rule in question had ever been explained to the employees; he did admit that the posted notices said nothing about writing on time cards. Under these circumstances, claimant cannot be charged with the "deliberate" violation of a rule, the existence of which he was not aware.

The only contradictory evidence in the entire record is the written statement of Mr. Lockhart which was the subject of the prior appeal. That statement contains the following language: "[e]mployees are not authorized to write on timecards. Any notations are to be made by supervisors only. There are notices posted and all employees are informed on the maintenance of time cards." Initially, it must be noted that the record contains no further information on the content of these "notices" or in what terms "all employees are informed." In addition, it is not even stated that the "notices" and "information" pertain to the purported rule against writing on time cards; for all that appears in the record, Lockhart may have been referring to the notices prohibiting the punching in of another's time card. In any event, we cannot agree that Lockhart's equivocal

statement is such that a reasonable mind would accept it as adequate to reach the conclusion that all employees were aware of the rule against writing on time cards. This is especially true in light of the unequivocal testimony of claimant, the union shop steward and the employer's representative to the contrary.

The agency's decision finding claimant guilty of misconduct is not supported by substantial evidence in the record when that record is viewed as a whole. The district court was correct in rejecting that decision and in holding that claimant is entitled to receive unemployment benefits.

AFFIRMED.