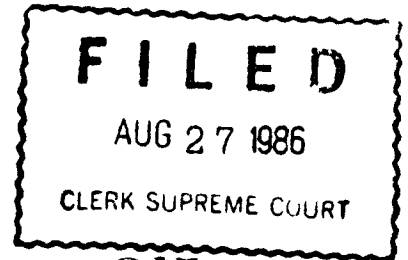


IN THE COURT OF APPEALS OF IOWA



CARMEN K. PARKHURST,

)

Petitioner-Appellant,

) Filed August 27, 1986

vs.

)

6-166
85-1510

IOWA DEPARTMENT OF JOB SERVICE
and BAVARIAN HAUS LIMITED,

)

)

Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Rodney Ryan, Judge.

Petitioner appeals from the district court's affirmance of the Job Service decision which had denied her unemployment benefits on the ground of misconduct. **REVERSED.**

Donna J. Henderson of Legal Aid Society of Polk County for petitioner-appellant.

Blair H. Dewey, Walter F. Maley, and Joseph L. Bervid of Iowa Department of Job Service, for respondent-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

OXBERGER, C.J.**246**

Petitioner appeals from the district court's affirmance of the Job Service decision which had denied her unemployment benefits on the ground of misconduct. Petitioner asserts that there was insufficient evidence to support a finding of misconduct under the agency rules. Petitioner also asserts that Job Service erred when it made a witness credibility determination at the appeal level without authorizing a rehearing or remand to rehearing officer. We reverse.

Petitioner-appellant Carmen Parkhurst worked as a cook for the Bavarian Haus Restaurant from July 30, 1980, until her termination on August 10, 1984. On August 10 the kitchen manager, Mike Henry, believing there was an argument between Carmen and another cook, intervened to end the dispute. Carmen, feeling there was no reason for the intervention and subsequent reprimand, walked away and whispered to herself, "Phooey on you." Mr. Henry, however, understood her to say, "Fuck you," which conveys a much stronger message. The petitioner was then terminated for using profane and abusive language.

The hearing officer ruled that even if Carmen had used abusive language, her actions did not amount to misconduct so as to disqualify her from receiving unemployment benefits.

The appeal board ruled that the petitioner had directed a vulgar comment to her employer. The board also found that petitioner had been previously warned about her attitude with other employees. The board noted that petitioner denied using the vulgar language, but determined that the employer's testimony, saying that she did use abusive language was more credible. The board reversed the hearing officer by concluding that petitioner's insubordination constituted misconduct, and denied her unemployment benefits.

Petitioner filed a petition for judicial review asserting that the Job Service decision was contrary to the hearing officer's findings of fact and the law

regarding agency decisions. The district court affirmed by concluding that substantial evidence supports the determination made by Job Service. Petitioner appeals the ruling.

I. Scope of Review

Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited to correcting errors of law made by the district court. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429 (Iowa 1979). The district court in this instance was itself acting in an appellate capacity. When we review decisions of the district court which were rendered in its capacity as an appellate body under § 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 Ct. App. 1983). "To make that determination, this court applies 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, 280 N.W.2d at 429-30. Section 17A.19(8)(e) and (f) provides that:

8. The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:

- e. Affected by other error or law;
- f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole;

Thus, since the facts are in dispute, we will only adopt the factual determination made by the agency if they are supported by substantial evidence when the record is viewed as a whole. Budding, 337 N.W.2d at 221.

II. Misconduct

Defendant argues that the district court erred in finding the appellant's conduct constituted misconduct under 370 I.A.C. 4.32(1) and that the Agency's

denial of benefits should be reversed by this court.

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A. Abusive Language as a Basis of Misconduct

This issue was dealt with in this jurisdiction by Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa Ct. App. 1983). In that case, after receiving what he considered to be an unfair reprimand, the petitioner blew off a little steam and referred to his supervisor as a "dirty bitch." This language was not accompanied by a refusal to obey any directives given him by his superiors nor was it held to evidence a "willful or wanton disregard" of his employers interests. The comment was not made in the course of an argument with his supervisor was said in a factory setting, and was held not to have undermined her authority, even though it was said within earshot of other employees. The Iowa Court of Appeals ruled that such behavior did not constitute misconduct justifying the denial of unemployment benefits. While it is unreasonable to expect employees to be docile and well mannered at all times, repeated incidents of abusive language directed at a supervisor may amount to misconduct. Id., citing Avery v. B & Rental Toilets, 97 Idaho 611, 549 P. 2d 270 (Idaho 1976).

Where the use of vulgar language is an isolated incident in an environment where decorous language is not required and is not occasioned by a deliberate refusal to obey a reasonable directive, we are inclined to view it as a minor peccadillo. This is in accord with our oft-stated position that Code provisions which operate to work a forfeiture of benefits are strictly construed in favor of the claimant.

Id.

The facts of the case at bar and Budding are very similar. Here, after receiving what she deemed to be an unjustified reprimand, Carmen responded to her supervisor using nondecorous language. This was a single isolated instance of insubordination since Carmen at no other time had directed abusive language toward her employer. The setting at the time of the conversation was in a

kitchen, where vulgar language had been used freely in the past. The language used by Carmen was not shown by the record to be accompanied by a refusal to obey any direct order by her supervisor, nor did it evidence a willful and wanton disregard of her employer's interest. Although Carmen's language was overheard by one other employee, the stern but appropriate disciplinary action taken should act as an effective deterrent to steer others away from following her wayward path. Thus, the employer's argument asserting that her actions caused him to lose respect and control among the entire staff was unfounded. Therefore, even though we do not condone Carmen's behavior, we hold that this isolated act of unsubordination is a minor peccadillo, not justifying the deprivation of all unemployment benefits.

B. Cumulative Acts as the Basis for Misconduct

[8] 370 I.A.C. 4.32(8) provides that "past acts and warnings can be used to determine the magnitude of a current act of misconduct." The fact that the prior acts were remote in time from the one for which the employee was discharged, or different in nature, does not preclude a finding of misconduct. Giddens v. Appeal Board of Michigan Employment Security Commission, 4 Mich. App. 526, 145 N.W.2d 294, 298 (1966). However, this course of conduct must be sufficient to manifest an intentional and substantial disregard for the employer's interests.

In the present case, the employer alleges that Carmen's termination was also the result of her previous misconduct: that this last act of defiance was "the straw that broke the camel's back" resulting in her termination. Her employer maintains that Carmen had been graded very poorly in her previous two reviews because of her bad attitude and moodiness. He asserts that Carmen also had been warned that she needed to work on her disposition.

The record, however, shows that Carmen had never received any formal written warnings from her supervisors about her attitude. During the course of her employment, Carmen had filled out two self-evaluations where she had

rated her attitude as "fair" on both occasions. The remainder of the criteria were either "good" or "very good." Upon discussing these self-evaluations, her employer remarked that she was pretty hard on herself and that she was a better employee than she had given herself credit for. In fact, Mr. Henry testified that "her work capabilities were very good." There was only one instance where Carmen had received any negative feedback from her employer regarding her attitude; this was merely a small discussion indicating they thought she should work on improving her attitude. Other than that one discussion, the record does not indicate any other acts or warnings upon which the Appeal Board based its finding that her work attitude had consistently been rated as poor.

In Budding, as previously discussed, one employee was discharged for directing a vulgar comment toward his superior after having received two prior class-two warnings. In ruling that the employee should retain his unemployment benefits, this court allowed the claimant to retain his unemployment benefits in a situation where the previous conduct was much worse than the present situation. Therefore, since the forfeiture of unemployment benefits is strictly construed in favor of the claimant, we do not agree with the district court's conclusion that there was substantial evidence to support the deprivation of Carmen's unemployment benefits.

Carmen's behavior was in violation or disregard of the standard of behavior her employer had the right to expect; and, as a result, she was terminated. However, her conduct was not sufficient to establish misconduct according to Iowa Administrative Code § 370-4.32(1); thus, her unemployment benefits should not be withheld.

Because of our holding, we need not address petitioner's further argument that the district court erred in affirming the agency's reversal of the credibility determination of the hearing officer.

REVERSED.

Schlegel, J., concurs; Sackett, J., concurs specially.

SACKETT, J. (specially concurring)

I concur with the result only.