IN THE COURT OF APPEALS OF IOWA

No. 7-713 / 07-0463
Filed November 15, 2007

DENISE L. ARMEL,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD
and KATECHO, INC.,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Denise L. Armel appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment benefits based on discharge for misconduct. **AFFIRMED.**

Laura E. Lockard of Iowa Legal Aid, Des Moines, for appellant.

Richard Autry, Des Moines, for appellee Employment Appeal Board.

Gary Fischer of Dreher, Simpson & Jensen, P.C., Des Moines, for appellee Katecho, Inc.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Denise L. Armel appeals from the district court ruling that upheld the decision of the Employment Appeal Board (Board) denying her claim for unemployment compensation benefits. We affirm the district court.

I. Background Facts and Prior Proceedings

Armel began employment as a full-time assembler at Katecho, Inc., in November 2001. In early 2005 she obtained custody of her grandson due to pending child in need of assistance proceedings involving her daughter. Her five-year-old grandson went to day care while Armel and her husband worked during the day.

Armel was absent from work on October 3, 2005, because her car would not start. She was also absent on November 9 and 10 because she was ill and December 2 and 7 because her grandson was ill. On December 8 she received a written warning for excessive absenteeism.

Armel was absent from work on March 6, 2006, because of a staffing meeting with the Iowa Department of Human Services (DHS). On March 8 she received a second written warning for absenteeism. This warning stated, in pertinent part:

> The Attendance Policy at Katecho, Inc. states that any employee accumulating seven (7) points in six (6) rolling months will be subject to discharge. Further absences in either a 30 day or 6 month period may lead to termination under the Katecho, Inc. Attendance and Punctuality Policy.
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Attendance History Detail:			**Points**
Oct. 3, 2005	Mon	Transportation	1.00
Nov 9, 2005	Wed	Sick (Unpaid)	0.50
Nov 10, 2005	Thu	Sick (Unpaid)	0.50
Dec 2, 2005	Fri	Sick (Family)	1.00
Dec 7, 2005	Wed	Sick (Family)	1.00

Mar 6, 2006	Mon	Personal	1.00
		Total Points:	**5.00**

On May 2, 2006, Armel left work early when the day care called and told her that her grandson had a temperature of 101 degrees. The next day, on May 3, she did not return to work because her grandson was still sick. Armel did not call Katecho to tell her supervisors that she was not coming to work. On May 4 she called Katecho and learned her employment was terminated.

Armel filed a claim for unemployment compensation benefits. An Iowa Workforce representative determined that she was eligible to receive benefits. Katecho appealed the decision, and an administrative law judge (ALJ) found she was not eligible for benefits because she was discharged for misconduct. The Board adopted the ALJ's decision as its own. Armel filed a petition for judicial review, and the district court affirmed the Board's decision.

Armel appeals, claiming the Board incorrectly applied the law to the facts. She also contends there was not substantial evidence to support the Board's factual findings because she did not have a willful and wanton disregard for her employer's interests.

II. Standard of Review

The Iowa Administrative Procedure Act, Iowa Code section 17A.19(10) (2005), governs our review of agency action. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003). Our review of an agency finding is at law and not de novo. *Id*. The agency, not the court, weighs the evidence; we are obliged to broadly and liberally apply those findings to uphold rather than defeat the agency's decision. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). On

review, the question is not whether the evidence supports a different finding, but whether the evidence supports the findings the agency actually made. *Id.* In other words, the agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Id.*

III. Merits

An employee may be denied unemployment insurance benefits if the employee was discharged for misconduct in connection with his or her employment. *See* Iowa Code § 96.5(2). The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *See Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989).

Misconduct is defined in the Iowa Administrative Code 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. 871-24.32(1)(a) (emphasis added). While this section requires proof that the employee had an intentional disregard for the employer's interests, section 871-24.32(7) goes on to state that excessive unexcused absenteeism constitutes misconduct in and of itself:

> Excessive unexcused absenteeism is *an intentional disregard* of the duty owed by the claimant to the employer *and shall be considered misconduct* except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

(Emphasis added.)

Armel argues her absences to care for a sick child were not "unexcused" because they constituted illness or other reasonable grounds that were properly reported to her employer. In the alternative, she argues the Board's conclusion that she was discharged for misconduct "flies in the face of the evidence in the record considered as a whole."

Regardless of whether her employer classified her eight absences between October 3, 2005, and May 3, 2006, as excused or unexcused, we find that three of the eight absences were properly classified as unexcused under our case law interpreting section 871-24.32(7) of the Iowa Administrative Code. Because we find the three absences constitute excessive unexcused absenteeism, we need not address Armel's claim that properly reported absences to care for a sick child are, as a matter of law, excused.

"[A]bsenteesim arising out of matters of purely personal responsibilities such as child care and transportation have been held not excusable." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 191 (Iowa 1984). Armel was absent on October 3, 2005, because she could not secure transportation to work. This constitutes an unexcused absence. *See id.* (citing *Spence v. Unemployment Comp. Bd. of Review*, 409 A.2d 500 (Pa. Commw. Ct. 1979) (noting absenteeism resulting from car trouble, babysitting problems, and a washing machine breakdown amounted to chronic tardiness sufficient to sustain a finding of willful

misconduct)). She was also absent on March 6 because she did not fill out appropriate paperwork in a timely manner to request time off for a scheduled DHS staffing meeting.[1] This also constitutes an unexcused absence. *See id.*

The fighting issue in this case is whether the no-call/no-show on May 3 constituted an unreported, unexcused absence. Armel contends her failure to contact her employer was justified because she did not have a telephone in her home. In support of this contention, Armel cites to our decisions in *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36 (Iowa Ct. App. 1992), and *Floyd v. Iowa Department of Job Service*, 338 N.W.2d 536 (Iowa Ct. App. 1983), where we found two employees who did not own telephones were improperly denied benefits when they did not call in to report their absences. We find these two cases are readily distinguishable from the present case.

In *Floyd*, the employee missed three days of work because he had scarlet fever. 338 N.W.2d at 537. The employee was seriously ill and under the care of a visiting nurse. *Id.* At some point, the employee attempted to send word to his supervisor through a coworker, but the supervisor never received the message. *Id.*

In *Gimbel*, the employee had an asthma attack, and his live-in girlfriend had to go to a pay-phone to call him in sick for work. 489 N.W.2d at 38. The employer had a policy that the employee had to call in thirty minutes before the

[1] Armel contends she did not fill out this form because someone from human resources misinformed her about the policy. Katecho presented evidence that she was informed of the proper policy when she was hired and she did not make timely efforts to fill out the appropriate paperwork before the day of the absence. We find there is substantial evidence to support the conclusion that she did not follow the proper procedure to make this an excused absence.

start of the shift to report an absence. *Id.* The phone call came ten to fifteen minutes before the start of his shift. *Id.* Less than two hours later, when the asthma attack was under control, Gimbel himself called his employer to report the absence. *Id.*

The present case is markedly different than the facts set forth in *Gimbel* or *Floyd*. Armel made no attempt to notify her employer until the day after her absence. Also, the evidence in *Floyd* and *Gimbel* was that the employees' illnesses incapacitated them so that they were unable to leave their home to get to a telephone. *See id.* at 39 ("Gimbel's failure to report his illness as required by the employer's rules was due to inability or incapacity, and was not volitional conduct."). Armel did not suffer from any such incapacity, and she was not incapable of leaving her home to get to a telephone. We find these decisions inapplicable to the case at hand.

At the hearing, Armel gave two reasons why she did not report her May 3 absence: (1) she assumed she was terminated because she believed she had accumulated enough points to warrant termination under the attendance policy and (2) she was not going to take her grandson out of the home to find a telephone because he had a sore throat and a fever.

The Board found these reasons were insufficient and did not excuse her failure to report her absence to Katecho. While we sympathize with the plight of a parent caring for a sick child, we find there is substantial evidence to support

the Board's conclusion that this no-call/no-show was an unexcused and unreported absence.[2]

The only remaining issue is whether these three unexcused absences were sufficiently "excessive" to constitute misconduct. As noted by our supreme court in *Higgins*, 350 N.W.2d at 192, "the determination of whether 'unexcused absenteeism' is 'excessive' necessarily requires the consideration of past acts and warnings." *See also* Iowa Admin. Code r. 871-24.32(8) ("[P]ast acts and warnings can be used to determine the magnitude of a current act of misconduct. . . ."). The record indicates Armel received two warnings for excessive absenteeism in the five months leading up to her final unexcused absence. These two written warnings gave her sufficient notice that her employment was in jeopardy because of excessive absenteeism. In light of her past conduct and past warnings, we find there was substantial evidence to conclude that the three unexcused absences were sufficiently excessive to constitute misconduct.

IV. Conclusion

Based on the entire record, we hold that sufficient evidence of excessive unexcused absenteeism is present to constitute misconduct under section 871-24.32(7) of the Iowa Administrative Code. The district court decision upholding the denial of benefits is affirmed.

AFFIRMED.

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[2] We reject Armel's claim that her case is similar to a Minnesota case where a mother caring for her sick child did not lose her unemployment compensation benefits. In *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721, 723-25 (Minn. App. 1991), there was no evidence the claimant's absences were unreported, and the court specifically found the claimant had made substantial efforts to find alternative care for her sick child. The present case is distinguishable because Armel did not make any efforts to find alternative care and did not properly report her final absence.