IN THE COURT OF APPEALS OF IOWA

No. 3-382 / 12-1825
Filed May 30, 2013

KIMBERLY GOODWIN,
Appellant,

vs.

IOWA EMPLOYMENT APPEAL BOARD,
Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

An employee appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment benefits. **AFFIRMED.**

Nathaniel R. Boulton of Hedberg & Boulton, P.C., Des Moines, for appellant.

Rick Autry of the Employment Appeal Board, Des Moines, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

Kimberly Goodwin appeals the district court's ruling on judicial review, which affirmed the Employment Appeal Board's (EAB) decision to deny her unemployment benefits. The denial was based on excessive unexcused absenteeism, which the EAB concluded amounted to misconduct. Goodwin claims that her absences from work were excused as a matter of law and thus, cannot support a finding of misconduct.

Goodwin had at least three prior instances of absenteeism that were unexcused. She had been warned three times regarding her excessive absenteeism and acknowledged she was on probation at the time of the termination. The final absence was in direct contravention to the warning of the employer. These facts, when applied to the law, satisfy the definition of "excessive unexcused absenteeism" under Iowa Administrative Code rule 871-24.32(7). Because we find the agency's application of law to fact was not irrational, illogical, or wholly unjustifiable, we affirm the district court's ruling upholding the agency's decision to deny Goodwin unemployment benefits.

I. BACKGROUND FACTS AND PROCEEDINGS.

Goodwin started her employment with Broadlawns Medical Center on March 4, 2008. She was terminated on May 11, 2011, when she left in the middle of her shift for a thirty-minute smoke break without informing anyone she was leaving and after being denied a request to leave. Goodwin sought unemployment benefits, which were denied following an initial phone interview. Goodwin appealed and presented her case at a hearing in front of an

administrative law judge (ALJ). Goodwin's request was again denied. The ALJ filed a decision in which he concluded:

> Claimant was discharged on May 11, 2011 by employer because claimant left work for [a] break without authorization. Claimant asked to leave early. Her request was denied because it would leave the department shorthanded. Claimant was upset with her coworker. Claimant asked if she would face discharge if she left. Claimant was told that she would face discharge. Claimant left for a 30-minute smoke break and then came back, notwithstanding the warning. Claimant did not tell anyone that she was leaving for break. Claimant did not leave for the day.
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> Claimant had a prior tardy and two prior long lunch breaks on her unexcused absence record. Claimant had many absences on her record, but all were properly reported and due to illness.

After setting out the applicable law, the ALJ concluded:

> In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy.
>
> The last incident, which brought about the discharge, constitutes misconduct because claimant violated a known company rule with knowledge that discharge could result. The warning weighs heavily toward a finding of intentional conduct. The prior tardy and two long lunches make this excessive unexcused absenteeism. The break of May 11, 2011, is not excused, because claimant did not inform anyone she was leaving. This is an absence without authorization. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment benefits.

Goodwin appealed again to the EAB. In a two-to-one, the board decision adopted the fact findings and conclusions of the ALJ as its own. The dissenting board member stated:

> I would find that the claimant was upset about the alleged harassment she received from a co-worker and wanted to go home. She inquired if an occurrence would be assessed if she went home to which the employer told her she would be terminated. The claimant clocked out (instead) for her regular smoke break without permission, as she had done for the past three years, which the employer does not dispute. The claimant merely wanted 'to cool

> off.' All the claimant's prior absences were due to illness, and excusable. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Although the employer may not have realized that she was just taking her usual break, I find her testimony credible and would allow benefits provided the claimant is otherwise eligible.

Goodwin filed for judicial review. The district court affirmed the EAB decision denying Goodwin benefits, stating:

> A review of the Appellant's employment records shows that she had an ongoing pattern of unexcused absences from her position at Broadlawns and that she had repeatedly been disciplined for these actions. This alone is sufficient support for Ms. Goodwin to be terminated for cause and thus ineligible for unemployment benefits. And the fact that she left because she was upset due to a dispute with a fellow employee does not excuse the last instance of her being absent without permission.
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> The agency's decision is clearly supported by substantial evidence as discussed above. Furthermore, the court has not been persuaded that the decision was unreasonable, arbitrary, capricious, an abuse of discretion and/or a product of illogical reasoning. For these reasons this appeal is denied.

Goodwin appeals asking us to reverse the district court's ruling and remand her case to the agency with instructions to award her unemployment benefits.

II. SCOPE AND STANDARD OF REVIEW.

We apply the standard of review provided in Iowa Code section 17A.19(10) (2011), when we review the district court's ruling on a petition for judicial review. *City of Des Moines v. Emp't Appeal Bd.*, 722 N.W.2d 183, 189 (Iowa 2006). If our conclusions are the same as the district court, we affirm, and if not, we reverse. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 556 (Iowa Ct. App. 2007).

The standard of review depends on the type of error alleged. *Jacobson Transp*. *Co*. *v*. *Harris*, 778 N.W.2d 192, 196 (Iowa 2010). "Because of the widely varying standards of review, it is 'essential for counsel to search for and pinpoint the precise claim of error on appeal.'" *Id.* (citation omitted). Goodwin asserts on appeal that the agency erred in its application of the law to the facts of this case. With this type of error, we will reverse the agency's decision only if it is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(m); *Burton v*. *Hilltop Care Ctr*., 813 N.W.2d 250, 256 (Iowa 2012). We accord some deference to the agency's determinations, but less than we give to the agency's findings of fact. *Larson Mfg*. *Co*. *v*. *Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. MISCONDUCT.

Iowa Code section 96.5(2) provides, in part, an individual is disqualified from obtaining unemployment benefits if the person is discharged for misconduct. "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). Subsection (7) of that provision defines "excessive unexcused absenteeism" as "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." *Id.* r. 871-24.32(7). The question in this case is whether Goodwin's absences from work qualify as "excessive unexcused absenteeism" under the administrative code.

In *Sallis v*. *Employment Appeal Board*, the supreme court found a single unexcused absence does not qualify as "excessive" under the administrative code. 437 N.W.2d 895, 897 (Iowa 1989) ("This language indicates that there is a level of unexcused absenteeism which is not excessive."). However, seven unexcused absences "resulting from personal problems or predicaments other than sickness or injury" in *Higgins v*. *Iowa Department of Job Service*, was determined to be excessive. 350 N.W.2d 187, 191–92 (Iowa 1984) (noting that the seven absences at issue resulted from "oversleeping, delays caused by tardy babysitters, car trouble, and no excuse"). Our court found one tardy and two full day absences from work, which were unexcused, amounted to misconduct in *Clark v*. *Iowa Department of Job Service*, where the worker had been warned about his unexcused absences four months before his discharge, and he had sought and been denied permission to be absent for the days at issue. 317 N.W.2d 517, 518 (Iowa Ct. App. 1982) (finding "Petitioner's actions were not good faith errors in judgment or discretion").

Absences due to illness that have been properly reported to the employer do not qualify as unexcused absences under the administrative rule. *See* Iowa

Admin. Code r. 871-24.32(7); *Gaborit*, 743 N.W.2d at 558 (finding the final absence was due to illness and properly reported to the employer so the employee was not disqualified from receiving benefits due to excessive unexcused absenteeism as a matter of law). The agency in this case found that Goodwin had many absences in her record but that they were all properly reported and due to illness. This finding was based on Goodwin's testimony, and the employer at the hearing was unable to provide any evidence to refute this assertion. We note the record indicates she had thirteen days of unscheduled/unexcused absences in a twelve-month period prior to her termination. The agency did not count these absences against Goodwin in concluding she had "excessive unexcused absences."

The absences the agency focused on included what it termed a "prior tardy and two prior long lunch breaks." *See Higgins*, 350 N.W.2d at 190 (stating that the terms "absenteeism" and "absences" used in the administrative code were intended to refer to any time an employee is not at work when scheduled and expected to be there including being tardy and being absent from a full day of work). These three incidents were in advance of the May 11, 2011 incident that resulted in her termination. Goodwin had been warned of her excessive unscheduled absenteeism on April 16, 2010, December 16, 2010, and February 28, 2011. She was advised May 11, 2011, that if she left the shift, she would be terminated. At the hearing, Goodwin acknowledged that she knew on May 11, 2011, she was on probation as a result of her excessive absences from work. Nonetheless, she left for a thirty-minute smoke break without informing anyone.

Her supervisor was gone that day, and she acknowledged she did not tell her coworkers she was leaving.

Goodwin claims that when she inquired of the employer whether she could leave, she was asking if she could leave for the day. When the employer told her no, she assumed she could still have her regular thirty-minute off-the-clock smoke break. The employer and the employer's witness both contradicted this testimony at the hearing, stating that Goodwin asked if she could leave the shift, and Goodwin had informed them she had already taken all her breaks for the day. Because she had taken her breaks, the employer informed her that any subsequent absence from the shift would be considered an "unscheduled occurrence" and result in termination. It appears the agency clearly believed the employer's testimony when it found that Goodwin asked to leave early, was denied, left in spite of the denial for a smoke break, and did not tell anyone.

Goodwin makes clear on appeal that she is not making a substantial evidence challenge under Iowa Code section 17A.19(10)(f). Even if Goodwin challenged the substantial evidence, we find the record supports the agency's factual findings. *See Cedar Rapids Cmty*. *Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 845 (Iowa 2011) ("Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.").

We conclude the agency's application of law to the facts of this case is not "irrational, illogical, or wholly unjustifiable." *See* Iowa Code § 17A.19(10)(m). In reaching its decision that Goodwin was disqualified from unemployment benefits, the agency stated the warning not to leave "weighs heavily toward finding of

intentional conduct." Goodwin had at least three prior instances of absenteeism that were unexcused. The final absence was in direct contravention to the warning of the employer. Goodwin had been warned three times regarding her excessive absenteeism and knew she was on probation at the time of the termination. These facts, when applied to the law, satisfy the definition of "excessive unexcused absenteeism" under Iowa Administrative Code rule 871-24.32(7). We therefore affirm the district court's ruling upholding the agency's denial of unemployment benefits.

AFFIRMED.