IN THE COURT OF APPEALS OF IOWA

No. 8-802 / 08-0789
Filed October 29, 2008

PHANOMKEO PONGDARA,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and IOWA GAMING COMPANY/BELLE OF SIOUX CITY,
Respondents-Appellees.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Petitioner seeks judicial review of the district court's decision affirming the Employment Appeal Board's final decision denying her unemployment benefits.

AFFIRMED.

Jennifer H. Cerutti of Iowa Legal Aid, Sioux City, for appellant.

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

Lorraine May, Des Moines, for appellee Iowa Gaming Company.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

Petitioner, Phanomkeo Pongdara, appeals the district court's decision affirming the Employment Appeal Board's final ruling denying her unemployment benefits.

I. BACKGROUND AND PROCEEDINGS.

Pongdara was hired by the Belle of Sioux City Riverboat Casino on May 11, 2005 and worked as a card dealer. While working she met and became friends with Chuck Topp, a patron. In December 2006, Pongdara asked Topp for two loans to purchase Christmas gifts. Topp loaned Pongdara $800 and Pongdara agreed to make monthly payments of $200 and pay off the remaining balance with her tax return expected in the spring of 2007. Pongdara paid $100 in February 2007 and made no further payments. Frustrated by Pongdara's failure to repay the loan, Topp contacted the casino's operations manager on March 20, 2007, and notified them of the loan and Pongdara's default.

On March 21, 2007, the casino placed Pongdara on administrative leave pending an internal investigation. The casino determined Pongdara violated its conflicts of interest policy by obtaining a loan from a patron and terminated her employment on March 27, 2007. She filed a claim for unemployment benefits which was denied on April 12, 2007. The decision noted benefits would not be awarded because she was discharged for conduct not in the best interest of her employer. Pongdara appealed and a hearing was held before an administrative law judge on May 9, 2007. The judge determined that though the casino's policy did not specifically forbid employees from obtaining loans from patrons, a

reasonable employee would understand that it would be inappropriate to do so. The judge concluded Pongdara was therefore not entitled to unemployment benefits because she was terminated for misconduct.[1]

Pongdara appealed this decision to the Employment Appeal Board. Two members of the board affirmed and adopted the administrative law judge's decision, and one member dissented. Pongdara's rehearing request was denied and she sought judicial review at the district court. On review, the district court noted the case was difficult but found substantial evidence supported the board's decision. The court pointed out that Pongdara acknowledged she knew of the policy and did not disclose the loan to the casino. It found Pongdara's failure to disclose the loan to the casino for several months after the loan agreement was made was an ongoing act of misconduct. Pongdara appeals again, urging there is not substantial evidence to prove she engaged in misconduct that would disqualify her from unemployment benefits.

II. STANDARD OF REVIEW.

Iowa Code Chapter 17A (2007), the Administrative Procedure Act, governs our review of claims concerning unemployment benefits. *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d 752, 754 (Iowa 2002); *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). Under the act,

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[1] Pongdara has also asserted throughout the proceedings that the casino's real reason for terminating her was because she was assisting a relative, also employed by the casino, with filing a complaint against it with the Iowa Civil Rights Commission. The agency determined there was no evidence the casino was aware that Pongdara was listed as a contact person on the complaint form and found the complaint played no role in the termination decision. A review of the record shows substantial evidence supports these findings and we will not disturb them.

we review to correct any errors of law that may have occurred at the agency level. *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 586 (Iowa 2003). We can grant relief if Pongdara's substantial rights have been prejudiced due to any reason listed under Iowa Code section 17A.19(10).

Pongdara asserts she is entitled to relief because the agency's decision is an incorrect application of law to undisputed facts. In other words, she contends the board's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(m). We will therefore analyze whether the district court correctly applied the law by applying section 17A.19(10)(m) to the agency action to determine whether our conclusions are the same as the district court's. *Weishaar v. Snap-On Tools Corp.*, 506 N.W.2d 786, 789 (Iowa 1993); *Langley v. Employment Appeal Bd.*, 490 N.W.2d 300, 302 (Iowa Ct. App. 1992). We do grant a limited degree of discretion to the agency's application of law to fact but will reverse if it was irrational, illogical, or wholly unjustifiable. *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173 (Iowa 2006); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218-19 (Iowa 2006). We are also instructed to give appropriate deference to the agency's view when particular matters have been vested by law in the agency's discretion. Iowa Code § 17A.19(11)(c). The determination of whether an employee has been discharged for misconduct has been vested in the agency. *See* Iowa Code § 96.5(2) ("*If the department finds* that the individual has been discharged for

misconduct in connection with the individual's employment . . . .") (emphasis supplied).

III. ANALYSIS.

Pongdara identifies four ways the agency misapplied this law to the facts to reach the conclusion she was ineligible for benefits. She contends (1) she did not violate the policy and therefore she did not engage in misconduct, (2) even if she violated the policy, her actions do not satisfy the definition of misconduct in the administrative code, (3) her actions did not constitute off-duty misconduct warranting denial of benefits, and (4) any misconduct she did engage in was months prior to the termination, and was not a current act of misconduct as is required to deny benefits on the basis of disqualifying misconduct.

A. Policy Violation.

Pongdara's initial argument that she did not violate the policy is essentially a challenge to a factual determination rather than to the application of law. We are bound by the agency's fact findings if supported by substantial evidence in the record as a whole. *Meyer*, 710 N.W.2d at 218. If a reasonable person could accept the evidence as adequate to reach the same conclusions as the agency, then the evidence is substantial. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006); *see also* Iowa Code § 17A.19(10)(f)(1) (defining substantial evidence as that which a neutral, detached, and reasonable person would find sufficient in both quality and quantity to establish the fact in issue). In analyzing a factual determination, we look to whether the evidence supports the

findings the agency actually made, not considering whether we would have made the same findings. *Meyer*, 710 N.W.2d at 218.

The casino had a policy stating that employees had "an obligation to conduct business within guidelines that prohibit actual or potential conflicts of interest." The policy did not specifically forbid loans with patrons, but encouraged employees to seek clarification with the casino's compliance officer for questions concerning specific conflicts of interest. The policy provided, in relevant part, that

> [a]n actual or potential conflict of interest occurs when an employee is in a position to influence a decision that may result in a personal gain for that employee or for a relative as a result of the Company's business dealings or in a situation making it difficult for the employee to perform their duties.

A reasonable person could find, from the circumstances presented in the record, that Pongdara violated her employer's policy by making a loan agreement with Topp without first consulting with her employer to determine whether it would be an actual or potential conflict of interest prohibited under the policy. There is substantial evidence supporting the agency's finding of a policy violation.

However, even if the policy violation was sufficient to warrant Pongdara's discharge, this may not be a sufficient reason for denial of unemployment benefits. These are two different inquiries and "[m]isconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Gaborit v. Employment Appeal Bd.*, 743 N.W.2d 554, 557 (Iowa Ct. App. 2007); *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct. App. 1995). Application of the administrative code definition

of misconduct to the facts determines whether Pongdara is ineligible for benefits due to her violation of the casino's policy.

B. Disqualifying Misconduct.

An employee who is terminated for misconduct is disqualified from receiving unemployment benefits. Iowa Code § 96.5(2)(a); Iowa Admin. Code r. 871-24.32(1)(b). Misconduct for this purpose is defined 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). As required by this definition, to deny unemployment benefits on the ground of misconduct, there must be proof that the misconduct was intentional, and not just due to negligence. Iowa Admin. Code r. 871-24.32(1)(a); *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 666 (Iowa 2000). The misconduct must be substantial, requiring proof of acts or omissions that are deliberate, intentional, culpable, or that show a carelessness indicating a wrongful intent. *Henecke v. Iowa Div. of Job Serv.*, 533 N.W.2d 573, 575 (Iowa Ct. App. 1995); *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986).

In some cases, an employee's failure to follow an employer's policies or procedures has been deemed intentional misconduct that disqualifies the employee from receiving unemployment benefits. *See, e.g., Flesher v. Iowa Dep't of Job Serv.*, 372 N.W.2d 230, 234 (Iowa 1985) (finding repeated failure to follow security procedures, even absent a dishonest motive, was a willful and wanton disregard of employer's interest); *Porth v. Iowa Dep't of Job Serv.*, 372 N.W.2d 269, 273-74 (Iowa 1985) (stating that an employee who breaches the duty of loyalty to an employer by soliciting co-employees to work for a competing business could be considered misconduct); *Kehde v. Iowa Dep't of Job Serv.*, 318 N.W.2d 202, 207 (Iowa 1982) (finding substantial evidence supported the conclusion that employee deliberately violated rightful expectations of employer by smoking marijuana on work premises even though employee purportedly was unaware of rule prohibiting working while under the influence of drugs because it was an obvious safety hazard). However, the violation of a rule has also been held to not be disqualifying conduct. *See, e.g. Billingsley v. Iowa Dep't of Job Serv.*, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983) (finding bank employee's violation of rule prohibiting employees from repeatedly overdrawing their personal accounts with the bank unintentional and not misconduct even when employee was aware of the rule).

We agree with the district court that the policy at issue is vague and ambiguous as to what types of financial transactions are contemplated to be conflicts of interest. Yet, it plainly warns against entering into transactions that could be *potential* conflicts of interest and provides a contact person for

questions relating to specific situations. It is undisputed that Pongdara knew of the policy and did not disclose the loan to the casino. In her position as a dealer, playing on behalf of the casino, it was especially important for her to remain impartial and personally detached from the gambling transactions at her table. Her entry into a loan agreement with a patron conflicted with this duty and gave her a motive to deal cards improperly. This is the very harm the casino's policy seemingly seeks to avoid. We agree with the agency's application of the law. Pongdara's violation of the policy was conduct evincing willful or wanton disregard of an employer's interest and a deliberate disregard of the casino's standards of behavior which it has the right to expect of its employees.

Pongdara also contends the agency erroneously found the definition of "disqualifying misconduct" satisfied when Pongdara made the loan outside of work and several months prior to her termination. The parties disagree whether the loan agreement was made at the casino or elsewhere. We find the location irrelevant to the issue. To be disqualifying, the misconduct need only be "in connection with the individual's employment." Iowa Code § 96.5(2). The casino's conflicts of interest policy is not limited to on-duty or on-premises employee activity. Pongdara's misconduct was connected to her employment due to how the loan agreement may have influenced her performance as a dealer, not by when and where the agreement was made. *See and cf. Kleidosty v. Employment Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992) (finding employee's selling of cocaine while off duty and off work site to be connected to

work because it was a deliberate violation of employer's rule prohibiting immoral or illegal conduct).

The fact that Pongdara was terminated several months after the loan agreement was made is also not relevant. To be disqualified from benefits on misconduct grounds, the termination must be for a current act of misconduct, not past acts. Iowa Admin. Code r. 871-24.32(8). It is undisputed that the loan remained unpaid at the time of Pongdara's termination. The casino would have learned of the loan earlier had Pongdara abided by the policy. The district court noted this was a continuing act of misconduct until it was disclosed to the employer. It is undisputed that Pongdara was terminated as soon as the casino completed its investigation of the matter. The district court correctly determined that the termination was based on a current act of misconduct.

We affirm the district court. The agency correctly found Pongdara ineligible for unemployment benefits because she was terminated for misconduct.

AFFIRMED.