IN THE COURT OF APPEALS OF IOWA

No. 0-886 / 10-0678
Filed February 9, 2011

ELIZABETH M. NOLAN,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and IOWA WORKFORCE DEVELOPMENT,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

A former employee appeals from the district court's decision affirming the Board's conclusion that she engaged in misconduct significant enough to disqualify her from receiving unemployment benefits. **REVERSED.**

Elizabeth Nolan, Davenport, appellant pro se.

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

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A fired employee asks us to decide whether she engaged in misconduct significant enough to disqualify her from receiving unemployment benefits when she twice referred to her boss as a “bitch” in private phone conversations with former and current colleagues. Because misconduct in this context must rise to the level of a deliberate act constituting a material breach of work duties and this employee did not intend for the indelicate references to be shared with her boss, we reverse the denial of benefits.

I. Background Facts and Procedures

Handicapped Development Center (HDC) is a non-profit organization supporting people with disabilities; the center operates eight group homes in Davenport. HDC hired Elizabeth Nolan on February 28, 2008. Nolan was working as a residential case manager on October 31, 2008, when HDC program director Courtney Brankovic fired her for what the employer termed “insubordination and gross misconduct.”

The events leading to Nolan’s discharge unfolded at a Halloween dance where another HDC employee, Patricia Overbeck, asked Nolan to speak with a troubled client who was assigned to a different case manager. Nolan spoke to the young woman both at the dance and later visited the client at her apartment after she told Nolan she had thoughts of suicide. On October 30, 2008, director Brankovic called Nolan into her office to present her with a memorandum advising her that she needed to “focus on [her] own work” and should refrain from consulting with clients who were not on her caseload. Brankovic testified at

the administrative hearing that the memorandum was just "a reminder" regarding appropriate contact with program participants and was not a disciplinary action that would go into Nolan's personnel file. During their meeting, Brankovic asked Nolan if she had called Brankovic a "bitch" in a voice mail message left for Katie Wymore, a former HDC case worker who had moved to a position with the Department of Human Services (DHS) on October 24, 2008. The DHS is a funding source for HDC.

Nolan acknowledged that she had used the derogatory term for her supervisor. Nolan explained in her testimony at the administrative hearing that "it was no hidden secret that [Wymore] and [Brankovic] did not get along" and that Wymore left HDC because she was frustrated with Brankovic. Nolan considered Wymore to be her friend and recounted that "we had ongoing conversations about the difficulties we were having with [Brankovic]." Nolan did not intend for the message to be shared with Brankovic: "It was just a statement between [Wymore] and I." Wymore nevertheless shared the voice mail with another HDC case manager, who in turn brought the information to Brankovic's attention.

The morning after she met with Brankovic,[1] Nolan called Patricia Overbeck on her cell phone before work hours. Nolan wanted to inform Overbeck, who was a resident counselor, that Brankovic was upset with Nolan for visiting the program participant who was not on her caseload—because Overbeck "was the one who initiated the whole thing to begin with." Nolan

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[1] The administrative law judge noted that Nolan spoke to other HDC staff concerning her "discontent with the instruction she had received regarding spending time with non-assigned clients." Support staff member Gale Sherwood testified that she felt the conversation in front of clients was "unprofessional" but noted that no inappropriate language was used.

complained to Overbeck that Brankovic was treating her unfairly and again referred to Brankovic as a "bitch." Overbeck reported the phone call to her own supervisor because she "was not comfortable" with being put in the middle of the personnel situation. Overbeck's supervisor passed the information on to Brankovic. At Brankovic's request, Overbeck wrote a statement memorializing Nolan's phone call. Brankovic fired Nolan that afternoon.

Nolan filed a claim for unemployment insurance benefits on November 2, 2008. On December 1, 2008, Iowa Workforce Development (IWD) informed her that she was not eligible for benefits because she was discharged from work for insubordination. Nolan appealed the denial and requested an "in person" hearing before the agency. Brankovic submitted a letter on behalf of HDC asserting that Nolan's termination was based on "gross misconduct and insubordination" and seeking to uphold the denial of benefits. An administrative law judge (ALJ) with IWD's unemployment appeals section held a hearing on January 5, 2009.

On January 9, 2009, the ALJ affirmed the denial of unemployment benefits. The decision relied on *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990), in reaching the following conclusion:

> The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or in incidents where the target of the offensive name-calling is not physically present to directly hear the comment. . . . The claimant's insubordination toward her supervisor and unprofessional conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer.

Nolan appealed the ALJ decision to the Employment Appeal Board (the Board). On February 27, 2009, the Board adopted the ALJ's findings of fact and affirmed the denial of unemployment insurance benefits. Nolan petitioned for judicial review, arguing that the ALJ's reliance on *Myers* was misplaced because the facts in this case are "totally different" from the facts found to constitute misconduct in *Myers*.

On March 22, 2010, the district court found that the agency's finding of misconduct was supported by substantial evidence and affirmed the Board's denial of benefits. The court found:

> [S]ubstantial evidence in this record supports the finding that the Petitioner referred to her direct supervisor by a derogatory word, beginning with the letter "b" and usually meaning a female dog, by two instances, one to a former employee who worked for a government agency with which the employer had a business relationship. There is substantial evidence in the record that also supports a finding that the Petitioner made the same reference on the day after she was confronted by her supervisor about the previous statement to the former employee, calling her by the same name.

The district court also found substantial evidence that Nolan "violated a work rule by speaking to a client who was not assigned to Petitioner's supervision."[2]

Nolan now appeals from the district court's ruling.

II. Scope of Review/General Principles

We review claims concerning unemployment benefits under the rubric of the Administrative Procedure Act, Iowa Code Chapter 17A (2009). *Titan Tire Corp. v. Emp't Appeal Bd.*, 641 N.W.2d 752, 754 (Iowa 2002). On appeal from a

[2] The ALJ did not rely on this action by Nolan as a basis for its finding of misconduct and the employer testified that Nolan was not disciplined for that interaction. On appeal, the Board does not advance this "work rule" violation as an alternative ground for affirming and we do not consider it.

judgment entered on judicial review of agency action, our task is to determine whether the district court correctly applied the law. *See Gaffney v. Dep't of Emp't Servs.*, 540 N.W.2d 430, 433 (Iowa 1995). We review the district court's decision by applying the standards of section 17A.19 to agency action to determine if our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

We are bound by the agency's findings of fact if they are supported by substantial evidence when the record is reviewed as a whole. *Sharp v. Emp't Appeal Bd.*, 479 N.W.2d 280, 282 (Iowa 1991). Conversely, we are not bound by the agency's legal interpretations and may correct misapplications of the law. *See Ellis v. Iowa Dep't of Job Serv.*, 285 N.W.2d 153, 156 (Iowa 1979). When the question is how to apply the law to the facts, "[w]e allocate some degree of discretion in our review of this question, but not the breadth of discretion given to the findings of fact." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

When searching for the operable standard of review, the *Meyer* court highlighted the importance of pinpointing the precise claim of error on appeal:

> [I]f there is no challenge to the agency's findings of fact or interpretation of the law, but the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence. *See* Iowa Code § 17A.19(10)(i), (j). In sum, when an agency decision on appeal involves mixed questions of law and fact, care must be taken to articulate the proper inquiry for review instead of lumping the fact, law, and application questions together within the umbrella of a substantial-evidence issue.

Id.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

III. Analysis

In her pro se brief, Nolan raises four issues: (1) whether her conduct disqualified her from unemployment benefits; (2) whether HDC's submission of an "extra-judicial" letter and supporting documents shortly before the administrative hearing calls for reversal; (3) whether HDC fired her without due process of law; and (4) whether she was denied due process by the fact that the Board's decision affirming the ALJ displayed stamped, rather than original, signatures for two of the employment appeal board members. Because we grant relief on the core issue concerning misconduct, we do not reach her remaining claims.

A. Governing Law

We turn first to the law governing denial of unemployment compensation benefits. Unemployment benefits are not available to an individual who was

discharged for misconduct in connection with his or her job. Iowa Code § 96.5(2). Courts have recognized a distinction between the word "misconduct" in labor law and "misconduct" as defined for unemployment compensation purposes. Misconduct serious enough to warrant an employer to fire an employee is not necessarily serious enough to warrant the forfeiture of compensation benefits. *Breithaupt v. Emp't Appeals Bd.*, 453 N.W.2d 532, 535 (Iowa 1990). Misconduct sufficient to disqualify a claimant from receiving unemployment benefits "connotes some deliberate action or omission or such carelessness as to indicate a wrongful intent." *Billingsley v. Iowa Dep't of Job Serv.*, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). "The focus is on deliberate, intentional or culpable acts by the employee." *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While the term "misconduct" is not defined in chapter 96, a full definition of "misconduct" is set out in the administrative code. *See Freeland v. Emp't Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992).

> "Misconduct" 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).

Our supreme court has deemed this definition to accurately reflect the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa), *cert. denied*, 444 U.S. 852 (1979).

Our court has previously faced the question whether an employee's use of vulgar or offensive language rises to the level of misconduct sufficient to deny benefits. In *Myers*, a divided court held that an employee of a meat packing plant engaged in misconduct when he called the head of quality assurance for his company's biggest customer a "dumb bitch" and subsequently threatened to make his workplace "so miserable" that he would be fired. *See generally Myers*, 462 N.W.2d 734. The court found that Myers's offensive comment made openly to a subordinate employee in the workplace "could have damaged the business relationship" between the two companies. *Id.* at 738. The majority opined:

> The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made.

Id.

Myers overruled *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa Ct. App. 1983), to the extent that case allowed a court to make factual findings reserved for the agency. In *Budding*, a factory worker referred to his supervisor as a "dirty bitch" after he was reprimanded for conduct during his shift. *Budding*, 337 N.W.2d at 222. The *Budding* court acknowledged that the use of

vulgar language in the workplace may constitute misconduct, but found that when this employee "blew off a little steam" it did not evince a willful or wanton disregard of his employer's interest. *Id.* at 222–23. The *Myers* dissent criticized the overruling of *Budding* as "an unwarranted and needless attack on a precedent that has served as a backstop against zealous denial of benefits to individuals who have committed, as *Budding* terms it, a 'minor peccadillo,' that is, a petty sin." *Myers*, 462 N.W.2d at 739 (Schlegel, J., dissenting).

B. Findings of Fact and Application of Law

With this governing law in mind, we turn to the ALJ's weighing of the evidence and ultimate conclusions. The ALJ found—and the Board adopted the finding—that on two occasions Nolan referred to her supervisor, Courtney Brankovic, as a "bitch" in telephone conversations, the first instance with a former colleague and the second time with a current co-worker. The ALJ did not find that Nolan anticipated or desired that these profane references get back to Brankovic or to anyone else in the workplace. With respect to the first conversation, the ALJ credited Nolan's testimony that she was well-acquainted with Katie Wymore, that they previously exchanged complaints about Brankovic, and that Nolan "viewed her comment on the voice mail as simply a continuation of a friendly, private communication." As for the second conversation, the ALJ found that Nolan's venting of her frustrations with Brankovic made Overbeck feel uncomfortable, but did not make a finding that Nolan placed the call with the intent to create such discomfort or with the expectation that Overbeck would repeat the conversation to other HDC employees. The ALJ also found that Nolan

spoke to several coworkers regarding her discontent with Brankovic's instruction that she not communicate with non-assigned clients, creating an uncomfortable situation for at least one support staff member.

The ALJ concluded that Nolan's "insubordination toward her supervisor and unprofessional conduct" showed both "a willful and wanton disregard for the standard of behavior the employer had the right to expect from an employee" and "an intentional and substantial disregard for the employer's interests and of the employee's duties and obligations to the employer." While we defer to the ALJ's factual findings, which are largely undisputed by Nolan, we decide today that the agency's application of the governing law on misconduct to these facts was unreasonable and an abuse of its discretion. *See* Iowa Code § 17A.19(10)(n).

In its judicial review decision, the district court stated: "The Petitioner's main claim in this case is that the Administrative Law Judge found that other witnesses were more credible than Petitioner." We disagree that Nolan is challenging the ALJ's assessment of witness credibility. Rather, the crux of Nolan's appeal is the ALJ's conclusion that her use of the word "bitch" in two private telephone communications rises to the level of substantial misconduct triggering the forfeiture of benefits. This is not a question whether the record contained substantial evidence to support the agency's findings of fact, but whether the agency properly concluded that the employer's evidence satisfied the legal definition of misconduct. We agree with Nolan that it was unreasonable for the agency to conclude that her indiscretions during private telephone

conversations rose to the level of willful misconduct warranting the denial of benefits.

Whether the use of improper language rises to the level of misconduct depends on "the context in which it is said" and the "general work environment." *See Myers*, 462 N.W.2d at 738. In her testimony before the ALJ, director Courtney Brankovic did not deny that she called one of the HDC clients a "jerk" and a "prick"—explaining, "in my role as supervisor I have to be honest about the things that the participants do." The director's own use of derogatory names to describe program participants suggests a tolerance for less than decorous discourse in this particular workplace. Nolan's use of similar epithets about Brankovic—in phone conversations Nolan intended to be confidential—did not constitute a willful disregard of her employer's interest.

The context surrounding Nolan's use of the term "bitch" is critical to determining whether she engaged in substantial misconduct. Iowa courts have found that an employee's use of vulgar language can rise to the level of substantial misconduct if it is uttered in front of customers, *Zeches v. Iowa Department of Job Service,* 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), if it is accompanied by a refusal to obey supervisors, *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587, 590 (Iowa Ct. App. 1984), if it is done repeatedly, *Carpenter v. Iowa Department of Job Service*, 401 N.W.2d 242, 245–46 (Iowa Ct. App. 1986), if it is done in a confrontational manner, *Henecke v. Iowa Division of Job Service*, 533 N.W.2d 573, 576 (Iowa Ct. App. 1995), or if it is accompanied by a threat, *Myers*, 462 N.W.2d at 738; *Deever v. Hawkeye Window Cleaning,*

Inc., 447 N.W.2d 418, 420 (Iowa Ct. App. 1989). Courts from other jurisdictions have not found misconduct where an employee used bad language in a private conversation. *See, e.g.*, *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665, 667 (Fla. Dist. Ct. App. 1992) (holding no misconduct where an employee called branch manager a "fucking son of a bitch" in a private telephone conversation held out-of-earshot of fellow employees and customers); *Kennedy's Piggly Wiggly Stores, Inc., v. Cooper*, 419 S.E.2d 278, 281–82 (Va. Ct. App. 1992) (holding no misconduct where an employee told chief executive officer he was "full of shit" in a private meeting outside the presence of any customers or other employees).

Nolan did not confront her supervisor with the rude epithets. She did not use bad language in front of clients or generally at the workplace. She did not make any threats. The only factor that weighs toward deciding Nolan's conduct was willful was the fact that she described her boss as a "bitch" in two separate conversations, one of which came after she was cautioned that doing so was inappropriate. Although this is a close case, we are not persuaded that the second indiscreet reference rises to the level of misconduct. Nolan called Overbeck after the meeting with Brankovic because it was Overbeck who suggested Nolan consult with the client assigned to a different case manager. Nolan naturally felt that Overbeck would be interested and sympathetic that their supervisor was critical of this action. Nolan placed the call to Overbeck's private cell phone before Overbeck arrived at work. Nolan's description of her boss as a "bitch" in the conversation with Overbeck was not calculated to interfere with the operation of HDC's business. The use of bad language during the phone call

was undoubtedly an error in judgment, but it did not rise to the level of willful misconduct evincing an intentional disregard for the employer's interest.

Our decision today should not be taken as an endorsement of the unsavory language used by Nolan. Nor should it be interpreted as our court backing away from the recognition in *Myers* of "an employer's right to expect decency and civility from its employees." *Myers*, 462 N.W.2d at 738. But at the same time, we accept the reality that "employees are not expected to be entirely docile and well mannered at all times." *Carpenter*, 401 N.W.2d at 246. Complaining about one's boss during off-hours is an ubiquitous American tradition: from Johnny Paycheck's lament in "Take this Job and Shove It" that "the foreman he's a regular dog, the line boss he's a fool," to Dagwood's precarious relationship with Mr. Dithers in the comic strip Blondie, to Homer's venting about Mr. Burns on The Simpsons. Not all dissent by an employee should result in the denial of unemployment benefits.

In reaching our decision, we do not hold that an employee is entitled to revile her supervisor without consequence. The right of an employer to fire an insubordinate employee is not at issue. We merely hold that the facts of this case do not support a finding of willful misconduct so as to result in the forfeiture of unemployment compensation. Nolan's description of her boss as a "bitch" in two private telephone conversations occurring outside of work hours is not the kind of substantial misconduct that justifies a denial of benefits.

REVERSED.

Danilson, J., concurs; Mansfield, J. dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. Although the majority's opinion is thoughtful and well-written, I believe they are ultimately doing the agency's work, rather than our own. In my view, the legislature did not ask us, as an appellate court, to establish detailed rules for when and where an employee can use offensive language and still receive unemployment benefits upon termination. I believe such decisions are entrusted to the agency. *See Myers*, 462 N.W.2d at 738 (stating that "[t]he question of whether the use of improper language in the workplace is misconduct is nearly always a fact question . . . . Therefore, whether the event is misconduct is most generally a decision for the agency."). Our job is merely to look at the record as a whole and decide whether substantial evidence supports the finding that claimant was discharged for misconduct, i.e., a deliberate act or omission which constitutes a material breach of the employee's duties and evinces willful or wanton disregard of the employer's interest. Iowa Code § 96.5(2); Iowa Admin. Code r. 871-24.32(1).

Here the administrative law judge, in a thorough decision adopted by the Employment Appeal Board, found the following facts:

> The claimant started working for the employer on February 28, 2008. She most recently worked full time as a residential case manager in the employer's organization providing services to persons with disabilities. Her last day of work was October 31, 2008. The employer discharged her on that date. The stated reason for the discharge was insubordination and unprofessional conduct.
>
> On or about October 29 the claimant had some discussions with a program participant/client who was not one of her assigned participants; the participant had expressed a wish to speak to the claimant. The claimant's supervisor, Ms. Brankovic, learned of this and prepared a memorandum of instruction for the claimant as to

> her contact with non-assigned clients, seeking to direct the claimant's activities and work priorities. On October 30 Ms. Brankovic called the claimant in for a meeting to discuss the memorandum and other issues; Ms. Hamm was also present. During the meeting the claimant expressed her disagreement with the conclusion of the memorandum that she should avoid spending her time speaking with non-assigned clients.
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> Also during the meeting Ms. Brankovic inquired of the claimant as to whether the claimant had left a voice mail message for a former employee who had gone to work for a government agency with which the employer has a business relationship in which the claimant made the comment that Ms. Brankovic was a "b-----." The claimant admitted that she had. Ms. Brankovic responded that this was inappropriate and that there would be further consideration as to whether some disciplinary action should be taken due to the comment.
>
> The claimant was well-acquainted with the former coworker and had previously exchanged complaints with regard to Ms. Brankovic when the coworker was still employed with the employer; she therefore viewed her comment on the voice mail as simply a continuation of a friendly, private communication. However, the former coworker shared the claimant's voice mail with another residential case manager with the employer, who then brought the information to Ms. Brankovic's attention.
>
> After the October 30 discussion the claimant spoke to several coworkers, including subordinate support staff, regarding her discontent with the instruction she had received regarding spending time communicating with non-assigned clients. At least one of those support persons, Ms. Sherwood, felt very uncomfortable with the claimant's discussion of her frustrations with Ms. Brankovic, including in the presence of participant/clients. On the morning of October 31 she continued this by calling a subordinate resident counselor, Ms. Overbeck, and venting her frustrations regarding Ms. Brankovic and the memorandum. During that conversation she again referred to Ms. Brankovic as a "b----." Ms. Overbeck was very uncomfortable with this conduct and reported it to her direct report manager, who reported it to Ms. Brankovic. As a result of this repeated conduct the day after being advised this was inappropriate, the employer determined to discharge the claimant.

My colleagues accept those findings, although they focus on the offensive language alone, perhaps giving insufficient attention to Nolan's overall pattern of

insubordination and unprofessionalism. Based on those findings, the ALJ further concluded:

> The claimant's insubordination toward her supervisor and unprofessional conduct shows a willful or wanton disregard of the standard of behavior the employer has a right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

I believe these findings are supported by substantial evidence and would affirm.