IN THE COURT OF APPEALS OF IOWA

No. 1-383 / 10-2098
Filed June 15, 2011

MINDY M. MILLIGAN,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Darrell Goodhue, Judge.

Mindy Milligan appeals from a district court ruling upholding the Employment Appeal Board's decision that she was not eligible for unemployment benefits. **AFFIRMED.**

Karin Rene Zeigler of Pendleton, Zeigler & Herbold, L.L.P., West Des Moines, for appellant.

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

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

A fired worker appeals from a district court ruling upholding the Employment Appeal Board's decision that she was not eligible for unemployment benefits. She contends her employer discharged her for a past act of misconduct. Unemployment benefits can only be denied based on a current act of misconduct. Because the employer interviewed her about the misconduct the next working day after it was reported and expeditiously investigated the matter, we do not think her transgression became a past act during the two weeks that elapsed before the employer fired her. Accordingly, we uphold the agency's determination.

I. Background Facts and Procedures

Wells Fargo employed Mindy Milligan as a full-time loan adjuster from August 18, 2003, until January 19, 2010. Rather than punching a time clock, Milligan and her colleagues would indicate when they had arrived at work by logging into an automated telephone system. On December 31, 2009, Milligan's supervisor, Camille Sheridan, learned that two of her team members had been seen logging each other into the phone system. On January 4, 2010—after the New Year's holiday—Sheridan interviewed both employees. Milligan admitted that Diane McDonough had twice called from her cellular telephone in the parking lot and asked Milligan to log her into the phone system to prevent McDonough from being counted as late to work. Milligan admitted that she had once unsuccessfully tried to log McDonough into the system, but explained that

the second time Milligan could not accommodate McDonough's request because Milligan was busy on her own telephone.

Sheridan notified the human resources department about what she had learned during the interview with Milligan. On January 8, 2010, a human resources official advised Sheridan to re-interview both Milligan and McDonough in the presence of another supervisor. Sheridan and another supervisor, Andy Miller, interviewed the women on January 8, 2010. In that second interview, Milligan again admitted she had tried once, unsuccessfully, to log in McDonough and had not been able to get off the phone to do so the second time McDonough asked. Sheridan referred the matter back to the human resources department. On Friday, January 15, 2010, human resources instructed Sheridan to discharge Milligan for violation of company policy. The office was closed on Monday, January 18, 2010, for the Martin Luther King holiday. Sheridan fired Milligan on January 19, 2010.

Milligan applied for unemployment insurance benefits. On February 10, 2010, an Iowa Workforce Development representative found her eligible for benefits because Wells Fargo did not furnish sufficient evidence to show misconduct. Wells Fargo appealed the decision and an Administrative Law Judge (ALJ) conducted a telephonic hearing. On April 7, 2010, the ALJ reversed the Work Force Development decision, concluding:

> The claimant was aware her co-worker was attempting to defraud the employer by having someone else log her into the phone/time keeping system. She also knew this was a violation of company policy. Rather than refuse to do this, or report Ms. McDonough to the supervisor, Ms. Milligan attempted to abet this

> fraud and only failed to do so by not being able to successfully complete the logging in for her co-worker.

Milligan then appealed to the Employment Appeal Board. Her pro se notice asserted:

> I think it is unfair that I am the one being punished for this misconduct. Diane McDonough was also terminated at the same time for the same reason and she is still receiving her benefits. Also during the appeal process my supervisor Camille Sheridan said that 'I did' log Diane McDonough into her phone on several occasions which is not true.

The EAB affirmed the ALJ decision on June 9, 2010, with one member dissenting. The dissenting member sua sponte raised the concern that Wells Fargo terminated Milligan based on a past act of misconduct. Milligan—through counsel—sought judicial review, arguing that Wells Fargo did not discharge Milligan for a current act of misconduct.

The district court affirmed the administrative ruling on November 22, 2010, finding that the agency's decision was supported by substantial evidence. The district court also determined that the evidence supported the agency's conclusion that the dismissal was based on a current act. Milligan appeals the district court's ruling.

II. Standard of Review

Our review of unemployment benefit cases is governed by the Administrative Procedure Act, Iowa Code chapter 17A (2009). *Dico, Inc. v. Iowa Emp't Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). In appeals from 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 court. *Univ. of Iowa Hosps. & Clinics v. Waters,* 674 N.W.2d 92, 95 (Iowa 2004).

The agency's findings of fact are binding on appeal 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 tied to 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). Where an administrative agency is clearly vested with the authority to interpret an issue of law, such as the question of what constitutes a current act of misconduct, the agency's interpretation will only be reversed if it is "irrational, illogical, or wholly unjustifiable." *See* Iowa Code § 17A.19(10)(m).

III. Preservation of Error

To preserve error for appeal, a party must raise the issue before the agency. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (Iowa 1990). This error preservation rule exists to ensure that the agency has an opportunity to consider and decide the issue. *Soo Line R.R. Co. v. Iowa Dep't. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994). Raising an issue for the first time in a petition for judicial review does not preserve error.

Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 382 (Iowa 1986).

Milligan did not specifically raise the past act issue in her appeal to the EAB, arguing only that the ALJ decision was unfair because McDonough was declared eligible for benefits. The issue was raised for the first time sua sponte in the EAB dissent. The State argues that issues raised sua sponte in a dissent should not be deemed raised before the agency because doing so would imply that the majority of the board actually considered the issue and rejected it, despite the fact the parties did not have the opportunity to weigh in on that argument.

But the administrative code includes an exception to the rule that a party must raise an issue to preserve it for appeal. Iowa Administrative Code rule 486-3.1(6) states:

> The employment appeal board may consider any issue raised by the action pertaining to the eligibility of an individual for unemployment insurance benefits. If new issues appear, different from those which are noticed in the appeal, the board may remand such issues to an administrative law judge for appropriate action, or in the interest of prompt administration of justice and without prejudicing the substantive rights of any party, may hear and decide any issue material to the appeal, even if not specifically indicated as a ground for appeal or not noticed for the administrative hearing.

Rule 486-3.1(6) allows EAB members to address any issues material to the case as necessary to the prompt administration of justice. This exception protects pro se claimants in the administrative process from inadvertently waiving a viable ground for appeal.

In this case, although the past-act issue was not explicitly raised before the ALJ or EAB, the parties detailed the time line and course of events leading to Milligan's termination. The sufficiency of the record made before the ALJ enabled the EAB to consider the past-act issue and, as authorized by rule 486-3.1(6), the dissent considered that ground. We conclude the past-act issue may be resolved on appeal without prejudicing the substantive rights of any party, despite Milligan's failure to raise that precise ground in her appeal to the EAB.

Furthermore, the ALJ's decision focused on whether Milligan's actions constituted misconduct, and the requirement of a current act is a factor within the determination of whether an employer discharged an employee for misconduct. Iowa Admin. Code r. 871-24.32(96)(8). In this respect, whether an action is a current act is a sub-issue within the broader misconduct determination. As a prerequisite to concluding that Wells Fargo discharged Milligan for misconduct, the ALJ must have also decided that Milligan was discharged for a current act.

Finding that error was adequately preserved, we next consider the merits of Milligan's claim for benefits.

IV. Analysis

Iowa law disqualifies employees from receiving unemployment compensation for various reasons including discharge for misconduct. *See* Iowa Code § 96.5; *Freeland v. Emp't Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992). The term misconduct is not defined in the statute, but is described by agency rules as a "deliberate act or omission by a worker which constitutes a material breach of duties and obligations arising out of such worker's contract of

employment." Iowa Admin. Code r. 871-24.32(96)(1); *Freeland*, 492 N.W.2d at 196. The supreme court has held the agency rule definition to be an accurate reflection of legislative intent. *Freeland*, 492 N.W.2d at 196 (citing *Kleidosty v. Emp't Appeal Bd*., 482 N.W.2d 416, 416-17 (Iowa 1992)); *Larson v. Iowa Dep't of Job Serv*., 474 N.W.2d 570, 571-72 (Iowa 1991).

Within the "discharge for misconduct" section of the administrative code is a provision requiring that employees be discharged based upon current misconduct. Iowa Admin. Code r. 871-24.32(96)(8). The administrative code does not define "past act" or "current act," but only provides:

> While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Id.

We believe the purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts. We do not see any sign that Wells Fargo was motivated to save up acts of misconduct to terminate Milligan at a later date. There is nothing in the record to indicate Wells Fargo terminated Milligan for a reason other than her current misconduct.

Our court addressed the distinction between a past act and a current act of misconduct in *Greene v. Employment Appeal Bd.*, 426 N.W.2d 659, 662 (Iowa Ct. App. 1988). In deciding *Greene,* we considered the time between the employer's awareness of the misconduct and the employer's contact with the

employee concerning the misconduct. *Greene*, 426 N.W.2d at 662. Our court concluded the date the employee was notified that his conduct provided grounds for dismissal was the proper date for determining if the act was past or current. *Id.* Therefore, when the employer notified the employee that his conduct provided grounds for dismissal two business days after learning of the misconduct, the termination was for current conduct, despite the fact that he was not terminated until seven business days after the employer learned of the misconduct. *Id.*

Under the analysis in *Greene*, Milligan's termination was not based upon a past act. A Wells Fargo supervisor contacted Milligan regarding the misconduct on the next business day after learning of her actions, even sooner than in *Greene*. Although Wells Fargo may not have explicitly told Milligan her actions were grounds for dismissal, the gravity of the matter should have been evident to her from the two interviews Sheridan conducted. In addition, Milligan testified before the ALJ that she had access to the Wells Fargo employee handbook and was familiar with the company's code of ethics. Her familiarity with Wells Fargo policy should also have alerted her to the fact that her misconduct was grounds for dismissal. The circumstances in this case closely mirror those of *Greene*, supporting the view that Wells Fargo terminated Milligan for current acts.

Although *Greene* did not address how long between employee notification and termination is too long, we believe ten business days is a reasonable amount of time, especially when the employer conducted a second interview with both

employees under investigation. In addition, it is reasonable to allow a company time for its human resources department to assess the situation.

We also find the State's policy argument compelling. Imposing an impractically short limitations period between notification and termination would place undue pressure on employers to rush into termination decisions. Employers should be encouraged to follow a process and investigate misconduct before terminating an employee, which Wells Fargo appears to have done in this case. The underlying policy of the Iowa Employment Security Law is to balance providing benefits for "persons unemployed through no fault of their own," Iowa Code § 96.2, with "fundamental fairness to the employer, who must ultimately shoulder the financial burden of any benefits paid." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing Iowa Code § 96.7). Under this balancing test, employers should not be punished for carefully considering termination decisions.

Under the circumstances of this case, it was not irrational, illogical, or wholly unjustifiable for the EAB to conclude that Milligan was terminated for a current act of misconduct. We affirm the district court.

AFFIRMED.