

IN THE COURT OF APPEALS OF IOWA

No. 1-469 / 11-0149
Filed August 24, 2011

PAMELA TOMPKINS-KUTCHER,
Claimant-Appellant,

vs.

**EMPLOYMENT APPEAL BOARD and
CASEY'S MARKETING COMPANY,**
Respondents-Appellees.

Appeal from the Iowa District Court for Iowa County, Paul Miller, Judge.

Tompkins-Kutcher appeals the district court's denial of her petition for judicial review. **AFFIRMED.**

John S. Allen, University of Iowa College of Law, and Amber Fricke and Ryan Cwach, Student Legal Interns, Iowa City, for appellant.

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

Heard by Sackett, C.J., and Vogel and Danilson, JJ.

SACKETT, C.J.

Claimant, Pamela Tompkins-Kutcher, appeals the district court's denial of her petition for judicial review. She claims the district court erred in upholding the decision of the Employment Appeals Board that she was terminated from her job for misconduct preventing her from receiving unemployment benefits. We affirm.

I. BACKGROUND AND PROCEEDINGS. On December 14, 2009, Tompkins-Kutcher removed two-day-old soup from the Casey's store where she worked and took it out to the dumpster per company policy. The soup was what the company called "wasted" because of its age and could no longer be sold to customers. Tompkins-Kutcher put the soup in the garbage and then immediately removed it and put it in her car to take home to feed to her dog. When questioned by her employer, Tompkins-Kutcher admitted to taking the soup and not paying for it. Based on this action, the employer terminated Tompkins-Kutcher, and also opposed her claim for unemployment benefits based on misconduct.

Tompkins-Kutcher was initially awarded unemployment benefits by the agency, but the employer appealed and a phone hearing was held before the administrative law judge on February 25, 2010. At the hearing, the employer asserted Tompkins-Kutcher violated a policy in the employee handbook which read in part,

Employees are not to remove company property which includes cash, merchandise, and supplies without management authorization. . . . With the exception of fountain drinks, you are required to pay for any other item you intend to consume, use, or remove from the store. This includes payment for products pulled from the food warmer, stale donuts, or damaged and outdated

items. . . . An employee who fails to properly pay for the product or, as required by this policy, or fails to properly handle his/her receipts, will be subject to immediate disciplinary action up to and including termination.

It was also revealed at the hearing the employer had an employee meeting on August 10, 2009, to review this policy and Tompkins-Kutcher was present. The employer's witness asserted she spoke about wasted food at this meeting, and told the employees if they wanted wasted food, they had to purchase it. The employer's witness admitted no employee had ever approached her about purchasing wasted soup, only the day-old donuts that were sold to customers. At the hearing, the employer placed a value of ten dollars on the soup.

On February 26, 2010, Administrative Law Judge Scheetz filed her decision with the following findings of fact:

Claimant was hired on May 11, 2006, as a full-time cashier. The claimant signed for receipt of the employer's handbook on May 10, 2006. The claimant signed but did not read the handbook. On August 10, 2009, the employer had a training meeting that the claimant attended regarding wasted foods. The employer informed the claimant and others that all food removed from the business had to be paid for. The claimant did not listen to the training.

On December 14, 2009, the claimant removed wasted soup from the business and put it in her car. She did not pay for the \$10.00 container of soup. The claimant admitted to taking the soup without paying for it. The employer terminated the claimant on December 15, 2009.

Scheetz then concluded the claimant was discharged for misconduct as she clearly disregarded the standards of behavior which an employer has a right to expect of its employees and that the claimant's actions were volitional in that she intentionally took the soup for her own purposes.

Tompkins-Kutcher appealed the decision to the Employment Appeals Board who, on May 18, 2010, affirmed and adopted Scheetz's decision as its own in a 2-1 decision. The dissenting opinion found Tompkins-Kutcher's actions did not amount to misconduct but were, at worst, an isolated instance of poor judgment. Tompkins-Kutcher applied for a rehearing, which was rejected.

On July 7, 2010, Tompkins-Kutcher filed a petition for judicial review with the district court. The district court filed its ruling December 20, 2010, finding the testimony clearly established Tompkins-Kutcher signed for and received the employee handbook, attended the August 10, 2009 training, and understood wasted items were to be wasted. According the deference required by law, the court found substantial evidence to support the decision that Tompkins-Kutcher was discharged for misconduct. It therefore affirmed the Employment Appeals Board.

Tompkins-Kutcher appeals this decision claiming the court's ruling was in error as substantial evidence did not establish her employer had an interest in the abandoned soup, the act was not a material violation of her employment agreement, and she lacked the intent to harm her employer's interest. Thus, she asserts her action in taking the wasted soup does not amount to misconduct.

II. SCOPE OF REVIEW. Our review of unemployment benefit cases is governed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A (2009). *Titan Tire Corp. v. Emp't Appeal Bd.*, 641 N.W.2d 752, 754 (Iowa 2002). When a party has been prejudiced by an agency decision, the party can seek judicial review of that decision. Iowa Code § 17A.19. We review the district

court's decision rendered on a petition for judicial review to determine if we would reach the same result as the district court when applying the rules of Iowa Code section 17A.19. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

Our review is for correction of errors at law, and an agency's decision is binding if it is supported by substantial evidence and not the result of incorrect conclusions of law. *Freeland v. Emp't Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992). We do not reweigh the evidence as the weight to be given to evidence is within the exclusive jurisdiction of the agency, but look to see whether substantial evidence exists to support the agency's decision based on all of the evidence in the record. *Titan Tire Corp.*, 641 N.W.2d at 755. Substantial evidence means evidence that a reasonable mind would accept as adequate to reach the same findings. *Id.*

III. MISCONDUCT. An employee is not eligible for unemployment benefits if the agency finds the employee was terminated for misconduct. Iowa Code § 96.5(2). The employer bears the burden of establishing an employee is disqualified for benefits based on misconduct. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). Misconduct that justifies the termination of an employee is not necessarily serious enough to justify the denial of unemployment benefits. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). For the purpose of determining eligibility for unemployment benefits, 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(96)(1)(a).

Tompkins-Kutcher claims, while her actions in removing the soup from the dumpster were deliberate, her conduct does not meet the definition of misconduct because her employer had no interest in the wasted soup, her act was not a material breach of her employment agreement, and she lacked the intent to harm her employer. At the heart of Tompkins-Kutcher's arguments is the belief that the soup was garbage, abandoned property, and by taking the abandoned property she did not demonstrate an intent to harm her employer. However, the agency's decision did not turn on whether or not the soup was garbage.

The agency's decision was based on Tompkins-Kutcher's violation of the company's policy that all items removed from the store, regardless of whether the item is outdated, must be paid for. There is substantial evidence to support the agency's decision. Tompkins-Kutcher admitted she ignored or did not read the rules. She intentionally disregarded the standards of behavior the employer had a right to expect of its employees. Tompkins-Kutcher was either aware of or

should have been aware of the company policy on the removal of items from the store, and the violation of that policy constituted misconduct.

AFFIRMED.