

IN THE COURT OF APPEALS OF IOWA

No. 3-592 / 12-2300
Filed July 10, 2013

EARL HILAND,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge.

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

Bradley T. Boffeli of Kurt Law Office, P.C., Dubuque, for appellant.

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

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Earl Hiland appeals the district court's ruling on judicial review, which affirmed the Employment Appeal Board's (EAB) decision to deny his unemployment benefits. He contends his absences were not sufficient to constitute statutory misconduct and thus, he is not disqualified from receiving unemployment benefits. We affirm the denial of unemployment benefits because we determine the EAB's decision was not unreasonable and find there is substantial evidence in the record to support the decision. We agree with Hiland that the district court should not have assessed court costs against him, and vacate that portion of the district court judgment.

I. Background and Proceedings.

Hiland started his employment as a full-time sales associate with Turpin Dodge on May 19, 2006, and continued his employment until he was terminated on January 2, 2012. His scheduled hours were from 8:30 a.m. to 5:30 p.m.

On May 28, 2011, Hiland missed work because he had been arrested. He received a warning for the absence on June 1, 2011. Again on December 28, 2011, Hiland was absent from work after being arrested. He first notified his manager, Patrick Turpin, about his absence at 3 p.m. when he called and requested bail money. Turpin refused to provide him with bail money. Hiland was then absent again on December 29, 2011; he did not call or provide any notification. On January 2, 2012, Hiland contacted his employer and was terminated.

Hiland filed a claim for unemployment benefits. On February 3, 2012, Iowa Workforce Development Center issued a decision that Hiland was ineligible for benefits because he voluntarily quit his employment without good cause attributable to the employer. Hiland filed an appeal on February 7, 2012. A telephone hearing was held by an administrative law judge (ALJ) on February 28, 2012, in which the parties stipulated that Hiland did not voluntarily quit. However the ALJ determined that Hiland was discharged for disqualifying misconduct. Benefits were again denied.

Hiland appealed the decision to the EAB on March 9, 2012. The EAB issued a unanimous decision affirming the ALJ's decision.

Hiland then filed a petition for judicial review. On November 27, 2012, the district court entered an order affirming the EAB and denying unemployment benefits. Hiland appeals.

II. Standard of Review.

On appeal from judicial review, the standard we apply depends on the type of error allegedly committed. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. Iowa Code § 17A.19(10) (2011). Here, Hiland raises two issues.

One of Hiland's claims of error is the contention that the EAB's decision in denying unemployment benefits was unreasonable, specifically because his absences were due to incarceration. See *id.* § 17A.19(10)(n).

The second claim of error raised in Hiland's petition for judicial review and raised on appeal is that the EAB's decision is not supported by substantial

evidence in the record when reviewing the record as a whole. See *id.* § 17A.19(10)(f). Specifically, Hiland contends that his absenteeism was not “excessive or unexcused.”

“Substantial evidence” is statutorily defined as:

[T]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Id. § 17A.19(10)(f)(1). When reviewing a finding of fact for substantial evidence in the record as a whole, we judge the finding “in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.” *Id.* § 17A.19(10)(f)(3). “Our review of the record is ‘fairly intensive,’ and we do not simply rubber stamp the agency finding of fact.” *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)). Thus, we review Hiland’s allegations of error to determine if the factual findings of the agency regarding disqualification based upon misconduct are supported by substantial evidence in the record as a whole. See *id.*

III. Discussion.

A. Disqualification by Incarceration.

Hiland contends that his absence caused by “mere arrest and pretrial detention” should not be deemed a disqualifying separation denying him

unemployment benefits. We first note that the parties stipulated that Hiland was discharged and that his loss of employment should not be viewed as a voluntary quit. Therefore, we only consider his contention that his absences were not disqualifying misconduct because they were for “reasonable grounds.” See Iowa Admin. Code r. 871-24.32(7). However, in order to be excluded from disqualifying misconduct under excessive unexcused absenteeism, the absence must be both “for illness or other reasonable grounds for which the employee was absent” *and* be “properly reported to the employer.” See *id.* Hiland failed to notify his employer and report his absence on two of the three occasions. On the third, he did not call his employer until approximately 3 p.m.—more than six hours after he was to begin his shift. Even if his reason for missing work was reasonable, his failure to report his absence precludes the absences from being excused. Accordingly, we need not decide whether incarceration is a “reasonable ground” for which excessive absences can be excused.

B. Disqualification by Misconduct.

Hiland argues there is not substantial evidence in the record to support the decision he was disqualified from receiving unemployment benefits due to statutorily-defined misconduct. See Iowa Admin. Code rs. 871-24.32(1), 871-24.32(7). In making his argument, he relies on *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). In *Sallis*, the court was presented with the question whether a single instance of absenteeism constitutes misconduct. See 437 N.W.2d at 897. The court first noted that the language of Iowa

Administrative Code rule 871-24.32(7)¹ “indicates that there is a level of unexcused absenteeism which is not excessive. Although absenteeism may be grounds for discharge, it is not necessarily misconduct under Iowa Code section 96.5(2).” *Id.* The court next noted that jurisdictions are split regarding the question of a single absence and that the determinations have been based on “the facts and circumstances of the individual case.” *Id.* In making their decisions, the courts have considered “certain contributing factors,” including “the nature of the employee’s work; the effect of the employee’s absence; dishonesty or falsification by the employee in regard to the unexcused absence; and whether the employee made any attempt to notify the employer of their absence.” *Id.* (internal citations omitted). The court determined that, in the specific case before it, none of the considered factors weighed against Sallis. *Id.* Furthermore, both parties agreed that it was an isolated instance and that Sallis had promptly notified his employer of his absence. *See id.* For all of the reasons above, the court determined that the single instance of absenteeism was not disqualifying misconduct in Sallis’ case. *See id.*

Hiland argues that because the ALJ failed to make any findings in the present case regarding the four factors considered in *Sallis*, there is not substantial evidence in the record to uphold the determination of misconduct. However, the present case is readily distinguishable from *Sallis*. Unlike in *Sallis*, Hiland was fired after three separate absences. There was no dispute that Hiland missed worked without calling to notify his employer on May 31, 2011,

¹ The Iowa Administrative Code numbers have changed since *Sallis*, but the rule considered has had no substantive changes.

and that he promptly received a warning about his absence. It was also undisputed that, after receiving the warning, he missed work again on December 28, 2011, and December 29, 2011. Although the record does not contain evidence the ALJ considered all of the factors outlined in *Sallis*, because Hiland's absences consisted of more than one isolated incident, were not properly reported, and because he did receive a warning regarding the issue of his absenteeism, we conclude the ALJ did not need to consider the enumerated factors in order to find misconduct. See *Sallis*, 437 N.W.2d at 897; see also *Higgins v. Iowa Dep't of Job Service*, 350 N.W.2d 187, 192 (Iowa 1984) ("We note that the determination of whether 'unexcused absenteeism' is 'excessive' necessarily requires the consideration of past acts and warnings.")

Hiland further argues that there is not substantial evidence in the record his absences were conduct which constituted "willful or wanton disregard of the employer's interest" or "evil design" against his employer. See Iowa Admin. Code r. 871-24.32(1).² While that is true, Hiland's conduct was not found to be

² Iowa Administrative Code rule 24.32(1) defines misconduct 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.

disqualifying under the general statutory misconduct rule, but rather under the more narrowly defined rule of excessive unexcused absenteeism. See Iowa Admin. Code r. 871-24.32(7) (“Excessive unexcused absenteeism is 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.” (emphasis added)). There is undisputed evidence in the record that Hiland was absent from work three times. Comparably, in *Clark v. Iowa Department of Job Services*, 317 N.W.2d 517, 518 (Iowa Ct. App. 1982), our court found that an employee’s one tardy and two full-day absences from work was sufficient to find misconduct disqualifying claimant from receiving unemployment benefits. There is substantial evidence in the record as a whole that Hiland was “excessively” absent.

In this case, we conclude there is substantial evidence in the record as a whole to support the conclusion Hiland was disqualified from receiving unemployment benefits due to misconduct. Furthermore, none of his absences could be considered excused because, even if there were reasonable grounds, the absences were not properly reported to the employer. We therefore affirm the ruling of the district court in regard to the denial of unemployment benefits.

C. Assessment of Court Costs.

In its judgment entry, the district court assessed court costs against Hiland. Iowa Code section 96.15(2) provides, “An individual claiming benefits

(Emphasis added.)

shall not be charged fees of any kind in any proceeding under this chapter . . . by a court or an officer of the court.” “Fees” include court costs. *Hall v. Emp’t Appeal Bd.*, 815 N.W.2d 408 (Iowa 2012). Accordingly, we vacate the portion of the district court judgment that requires Hiland to pay court costs. We likewise do not assess court costs on appeal against Hiland.

AFFIRMED IN PART AND VACATED IN PART.