FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed May 31, 1983

OPAL TOOMER, et al.,

Plaintiffs-Appellants,

vs.

IOWA DEPARTMENT OF JOB SERVICE and **COLLEEN SHEARER**, in her official capacity as Director,

Defendants-Appellees.

3-26
2-68866

Appeal from Polk District Court, Harry Perkins, Jr.

Plaintiffs appeal from the district court decision overruling their motion for partial summary judgment and sustaining defendants' motion for summary judgment in an equitable action challenging as invalid rulemaking two memos circulated within defendant agency. APPEAL DISMISSED.

Lois Cox and Diane L. Dornburg, Des Moines, for plaintiffs-appellants.

Walter F. Maley, Blair H. Dewey and Edmund Schlak, Jr., Des Moines, for defendants-appellees.

Heard by Oxberger, CJ., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

PER CURIAM

Plaintiffs appeal from the district court decision overruling their motion for partial summary judgment and sustaining defendants' motion for summary judgment in an equitable action challenging as invalid rulemaking two memos circulated within defendant agency. We dismiss the appeal in part, vacate the judgment of the district court in part, and remand with directions to dismiss.

Two memos circulated within defendant agency urged retroactive application of certain legislation relating to calculation of unemployment benefits (S.F. 373). Plaintiffs are a group of ten individuals whose contested case claims for unemployment benefits were adversely affected by the retroactive application urged in the memos. In 1979 plaintiffs filed a petition in equity seeking declaratory and injunctive relief, which petition asserted that the two memos constituted invalid rulemaking due to the undisputed fact that the rulemaking procedures of Iowa Code chapter 17A were not followed. Defendants special appearance was sustained by the district court, and plaintiffs appealed. On appeal, we remanded for further proceedings on the merits of plaintiffs' claim that the memos constituted invalid rulemaking.

Eight of the ten plaintiffs had filed timely appeals of the adverse decisions taken in their contested cases. The retroactive application of S.F. 373 was found to be invalid by the Iowa Supreme Court in Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), and each of the eight appeals was ultimately decided in accord with Cook, and in favor of the claimant. Two of the plaintiffs did not file timely appeals, with the result that the contested case decisions that became final as to them incorporate an erroneous retroactive application of S.F. 373.

Upon remand, plaintiffs filed a motion for partial summary judgment seeking to establish that the memos at issue constituted a rule not validly adopted in accordance with Chapter 17A procedures. Defendants also filed a motion for

summary judgment, asserting that plaintiffs lacked standing and that the case was moot. The district court sustained defendants' motion and overruled plaintiffs' motion on mootness grounds.

I. The Cook Decision

The merits of the present controversy have already been decided by the Iowa Supreme Court in Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980). In that case the court held that the retroactive application of S.F. 373 is invalid. The principle of stare decisis operates to make this issue nonjusticiable for us.

The only issues which we might properly address concern the invalid applications of S.F. 373 to individual plaintiff's contested cases. However, in the present case, both jurisdictional and standing problems bar our review.

II. Standing

The eight plaintiffs who sought further review of the adverse decisions in their contested cases obtained relief in accord with the standards enunciated in Cook. They have already received all that they are entitled to receive, and no longer have any real personal stake in the outcome of the controversy. They therefore lack standing to challenge the agency's action.

The central principle is elementary: One who has been adversely affected in fact by agency action has standing to challenge that action, and one who is not adversely affected in fact lacks standing. While a trifling injury may often suffice to confer standing (See U.S. v. SCRAP, 412 U.S. 669, 689 (1973), there is still a requirement that plaintiff suffer some discernible injury which separates him from the public at large, and which is capable of redress through the judicial process.

Plaintiffs point out that the district court erred procedurally in granting defendants' motion for summary judgment. They are correct. Mootness and

standing issues, which relate to the status of the parties as litigants, may properly be raised either by a motion to dismiss under Iowa R. Civ. P. 104(b), or by a motion for summary judgment. However, Iowa R. Civ. P. 237(h) requires a party moving for summary judgment to annex a supporting statement and memorandum of authorities to his motion. Absent such an annexation, summary judgment cannot properly be granted. In the present case, defendant failed to annex a supporting statement and memorandum to its motion. Under these circumstances, summary judgment was procedurally improper. We therefore vacate the judgment of the district court as it relates to these eight plaintiffs. Because these plaintiffs lack of standing, we dismiss their appeals.

III. Jurisdiction

The two plaintiffs who did not file timely appeals in their individual contested cases have sustained injury in fact due to defendant-agency's invalid application of S.F. 373 to their claims. However, we do not have jurisdiction to review the final decisions in their contested cases which are res judicata.

Iowa Code § 96.6(2) provides that a claimant has ten days after notification of the agency's decision to file an appeal from that decision. A claimant is not entitled to seek judicial review of the agency's decision unless a timely appeal has been filed. See Franklin v. Iowa Department of Job Service, 277 N.W.2d 877, 881 (Iowa 1979). Failure of the claimant to file a timely appeal deprives both the agency and the court of jurisdiction to review the decision.

> The statute prescribing the time for notice of appeal clearly limits the time to do so. At least in the absence of [nonreceipt of the agency's notice of decision], compliance with the appeal notice provisions is jurisdictional.

Bearcslee v. Iowa Department of Job Service, 276 N.W.2d 373, 377 (Iowa 1979).

Because we lack jurisdiction to entertain the appeals of these two plaintiffs, we dismiss their appeals.

APPEAL DISMISSED.