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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DENVER E. FRANCIS,)
Petitioner-Appellant,)
vs.)
IOWA DEPARTMENT OF JOB SERVICE,)
Respondent-Appellee.)

Filed November 26, 1986

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Appeal from the Iowa District Court for Polk County (No. AA 3-864) - Ray A. Fenton, Judge.

Petitioner appeals from the district court's affirmance of a Job Service determination that he was not eligible for unemployment benefits on the ground that he had voluntarily quit his employment without good cause attributable to the employer, asserting that Job Service erred as a matter of law in determining that his request to be terminated constituted a voluntary quit. **AFFIRMED.**

Eric Borseth of Wright, Wright & Borseth, Des Moines, for petitioner-appellant.

Blair H. Dewey, Walter F. Maley, Joseph L. Bervid, and I. John Rossi, Des Moines, for respondent-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

SNELL, P.J.

Petitioner Denver Francis appeals the district court's affirmance of a Job Service decision which disqualified him from obtaining unemployment benefits based upon a finding that he voluntarily quit his employment without good cause attributable to his employer. As we believe there is substantial evidence in the record to support this finding, we affirm the district court.

Prior to the series of events which led to this action, Francis was employed by Git-N-Go Convenience Stores in Des Moines, Iowa. Francis testified at the administrative hearing that while at work on July 24, 1984, he was told by a fellow store manager and several customers that they had heard he had been fired. Previous to this date, Francis's employer had spoken with him concerning poor job performance. Upon hearing the rumors of his termination, Francis telephoned his employer. The substance of this telephone conversation forms the central issue in this case. Not surprisingly, the parties disagree as to what was said. In any event, as a result of this conversation, Francis's employment with Git-N-Go ended.

Francis applied for unemployment benefits on July 27, 1984. On August 13, 1984, a Job Service claims deputy found him qualified to receive unemployment benefits. The employer appealed that decision and, following a hearing, a hearing officer disqualified Francis from receiving benefits based upon a finding that he had voluntarily quit his employment without good cause attributable to the employer. That decision was affirmed by the Job Service Appeal Board, which later denied Francis's application for a rehearing. The district court affirmed the Appeal Board's decision and this appeal followed.

We deal first with an issue presented to us by Job Service. On August 13, 1985, Job Service filed an answer to Francis' petition for judicial review. This was followed by the filing of a special appearance on August 19 and an amendment

thereto on August 22. On September 6, 1985, the district court overruled the special appearance based on Iowa Rule of Civil Procedure 66. That rule states that

> [a] defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error.

The district court overruled the special appearance because Job Service had filed their answer prior to the special appearance, thus removing themselves from the ambit of rule 66. Job Service asserts this as error.

We agree with Job Service's contentions that the issue of subject matter jurisdiction may be raised at any stage of judicial proceedings, Cunningham v. Iowa Department of Job Service, 319 N.W.2d 202, 204 (Iowa 1982), and that a special appearance is most appropriate for that purpose. Id. We think, however, that in order to raise that issue at a special appearance, the requirements of rule 66 must be adhered to. By filing a pleading prior to the special appearance, Job Service took itself out of the express ambit of that rule. Accordingly, the district court was not in error in refusing to hear the jurisdictional question at the special appearance. Of course, as the issue of subject matter jurisdiction may be raised at any stage, Cunningham, 319 N.W.2d at 204, Job Service was free to argue the merits of that claim at both the district court level and on appeal. This it has opted not to do. We think, however, that as our authority to deal with this case is obviously challenged by the Job Service we should proceed sua sponte to determine the issue. This we have the authority to do. Tigges v. City of Ames, 356 N.W.2d 503, 510 (Iowa 1984).

Job Service challenges the jurisdiction of our courts in this matter on two theories. First, it is argued that a violation of Iowa Code section 17A.19(2) (1985) has resulted in our not having jurisdiction in this case. Secondly, we are told that a similar result has been reached by virtue of Francis's violation of Iowa Code section 17A.16(2) (1985). We note that in administrative appeals such as the present case, the right to judicial review is statutory. Kerr v. Iowa Public Service Company, 274 N.W.2d 283, 287 (Iowa 1979). Consequently, the procedure prescribed by the statute must be followed. Id. Compliance with the statutory appeal procedure is mandatory in order to confer subject matter jurisdiction upon the court. Id.; Kliege v. Iowa Employment Security Commission, 206 N.W.2d 123, 127 (Iowa 1973).

Proceeding to Job Service's claim under Iowa Code section 17A.19(2), we note that section reads, in pertinent part, as follows:

> Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional. (emphasis added)

Job Service contends that Francis violated the procedure by mailing the copies of the petition before the petition was filed. We find this argument unpersuasive. Although our courts do not acquire jurisdiction of a petition for judicial review in absence of substantial compliance with the statutory service requirements, Richards v. Iowa Department of Revenue, 362 N.W.2d 486, 487 (Iowa 1985), we feel there was complete compliance with the service requirement in this case. Section 17A.19(2) establishes a deadline before which copies of the petition must be served upon the parties, either by personal service or by mail. We read the section as providing that service must be had before the expiration

of a ten-day period following the filing of the petition. Job Service does not contend that this deadline was violated. The fact that the postmark on the copies predated the file stamp on the petition does not constitute a violation of this section.

Job Service next contends that we lack jurisdiction of this case by virtue of Francis's violation of Iowa Code section 17A.16(2) (1985). That section provides that:

> Any party may file an application for rehearing, stating the specific grounds therefor and the relief sought, within twenty days after the issuance of any final decision by the agency in a contested case. A copy of such application shall be timely mailed by the applicant to all parties of record not joining therein. Such an application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing. (emphasis added)

Job Service argues that as Git-N-Go Convenience Stores was a party of record not joining in the application for rehearing and did not receive a copy of the application, Francis violated this section and our jurisdiction consequently fails. Francis maintains he complied with the section by mailing a copy of the application to Git-N-Go's attorney, Mike Sellers.

The present issue of whether mailing a copy of the rehearing application to a party's attorney and not the party is sufficient to satisfy section 17A.16(2) was expressly left open by Cerro Gordo County Care Facility v. Iowa Department of Job Service, 374 N.W.2d 673 (Iowa 1985). We think that Francis's actions in mailing the petition to Git-N-Go's attorney is in substantial compliance with section 17A.16(2) and, as a result, does not defeat our jurisdiction. We base this result on the analogous case of Cowell v. All-American, Inc., 308 N.W.2d 92 (Iowa 1981). In Cowell, our supreme court was faced with the issue of whether a petitioner for judicial review of an administrative decision had substantially complied with section 17A.19(2) when he mailed copies of the petition to his

employer's attorney, in lieu of his employer. At that time, section 17A.19(2) read, in relevant part, that

> [w]ithin ten days after the filing of a petition for judicial review file stamped copies of the petition shall be mailed by the petitioner to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such mailing shall be jurisdictional and shall be addressed to the parties at their last known mailing address. (Emphasis added.)

The supreme court determined the petitioner's action to be reasonable and in substantial compliance with the statute. Id. at 95. Likewise, we think Francis's actions in the present case were reasonable and in substantial compliance with section 17A.16(2). Accordingly, we have jurisdiction over the present case and proceed to the merits of Francis's claim that the Job Service's decision is not supported by substantial evidence in the record.

In cases arising out of the Iowa Administrative Procedure Act, our scope of review is limited to the correction of errors at law. Iowa Code § 17A.20 (1985); Mary v. Iowa Department of Transportation, 382 N.W.2d 128, 131 (Iowa 1986). We must determine whether the district court made errors of law when it exercised its power of review of the agency decision under Iowa Code section 17A.19 (1985); Polk County Drainage District Four v. Iowa Natural Resources Council, 377 N.W.2d 236, 238 (Iowa 1985). In order to make that determination, this court applies the standards of Iowa Code section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as the district court. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Iowa Code section 17A.19(8)(f) provides that in a contested case the court shall grant relief from an agency decision which is not supported by substantial evidence in the record when that record is viewed as a whole. Evidence is sub-

stantial for the purpose of review when a reasonable mind would accept it as sufficient to support a conclusion. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). We do not make an independent determination concerning the preponderance of the evidence. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983).

Iowa Code section 96.5(1) (1985) provides that an individual is disqualified for unemployment benefits if that individual has left work voluntarily without good cause attributable to the individual's employer. The administrative rule defining this criterion for disqualification states that "[i]n general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated." 370 Iowa Administrative Code section 4.25(96) (1984). Validly adopted administrative rules have the force and effect of law. Anderson v. Iowa Department of Human Services, 368 N.W.2d 104, 108 (Iowa 1985). Our guide for interpreting the provisions of Iowa Code chapter 96, including section 96.5 dealing with voluntary quit situations, is contained in Iowa Code section 96.2 (1985). That section states in pertinent part that

> [t]he legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (emphasis added)

Francis's immediate supervisor testified to the substance of his July 24 telephone conversation as follows:

> Okay. Denver made a phone call to me at 3:00 p.m. During this phone call that he made from the store and in front of his employees and customers, Denver demanded to be fired immediately because he had heard rumors that he would be fired. I reminded Denver that I told him he would hear these rumors because we had, in fact, been interviewing for his position, but after

> our meeting on Wednesday, July 18, 1984, I believed him when he said he was going to make improvement in the store and I told him I was going to give him the opportunity to improve. I then suggested that he was put on [inaudible] because the store was getting worse and he became louder, saying he knew he was going to be fired anyway and again demanded to be fired immediately so that he could take the job that he was already offered. Again this call was made in front of customers, employees so I questioned that if it would do any good to give him the written at 3:00 since he was demanding to be fired. So at that time I recommended a staff meeting to be held at 8:00 a.m., July 25, 1984, in that meeting it was determined by Ron Flora, Security Manager, John Grenko, Supervisor, and myself, that after his phone call demanding to be terminated, witnessed by John Grenko on the speaker phone, any further attempts to help Denver improve would be useless. (emphasis added)

We think that this testimony, in addition to other record evidence referring to Francis's termination demand, is sufficient to support the Job Service decision that Francis's employment ended due to his voluntary quit without good cause attributable to his employer. A portion of Francis's dispute with this result is based upon his claim that he did not leave his employment or fail to appear for assigned duties. We agree the present case is not the typical "voluntary quit" situation wherein the employee ends the employment relationship by physically absenting himself or herself from the place of employment. See, e.g., Boyd v. Iowa Department of Job Service, 377 N.W.2d 1 (Iowa Ct. App. 1985). We think, however, that neither this distinction nor the cases compel us to adopt the result urged by Francis. We do not sanction a procedure which allows an employee to confront his employer, demand to be fired, receive the object of his desire, and then proceed to collect unemployment benefits. Such a result flies in the face of the legislative mandate that unemployment benefits are to inure to "the benefit of persons unemployed through no fault of their own." Iowa Code § 96.2 (1985).

Moreover, we fail to see a relevant distinction between an employee confronting his employer with an emphatic "I quit" and the same employee confronting his employer with an equally vehement demand "Fire me." Unemployment benefits are not determinable by the course of semantic gymnastics with their employers. To hold otherwise would permit employees to accomplish through manipulation of their employers that which they are prohibited from doing by themselves: voluntarily ending their employment without good cause attributable to their employer while retaining their eligibility for unemployment benefits.

The record contains substantial evidence in support of the conclusion that Francis demanded that his employment be discontinued because he no longer desired to remain an employee of Git-N-Go. The record shows that Francis's employer had no immediate intention of terminating Francis and would not have done so absent Francis's demand. As such, his actions resulted in a voluntary quit. See 345 Iowa Administrative Code section 425(96). Francis does not present us with any claims of "good cause attributable to the employer" which would render him eligible for benefits notwithstanding the voluntary quit, and no such claims are evident on the record. Accordingly, we affirm the decision of the district court.

AFFIRMED.

Hayden, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

The majority agrees the present case is not the typical voluntary quit situation wherein the employee stops coming to work. The majority says "we fail to see a relevant distinction between an employee confronting his employer with an emphatic 'I quit' and the same employee confronting his employer with an equally vehement demand 'Fire me.' " The point of this dissent is to assist them in so seeing.

In order to analyze the unusual situation when an employee requests the employer to fire him, the majority implies that even when an employee's act does not fall under one of the statutory or administrative code provisions, the act can be tantamount to a voluntary quit. I think the adoption of such a rationale for determining voluntary quit situations will lead to undesirable consequences. If we now say that a voluntary quit occurs when an employee's acts other than an actual resignation or leaving work or failing to appear led to his termination, I would guess employers are going to be finding quite a few voluntary quit situations. The employee was insubordinate; the insubordination meaningfully led to his termination; the employee voluntarily quit. Furthermore, I think many employees do not wish to remain employed at their current job. I think many employees probably express that feeling. I do not think evidence that an employee has made such a desire known, even directly to an employer, is enough to constitute a voluntary quit. Something more is needed. That "something more" is an actual resignation or the leaving of employment or the failure to appear for employment. Without one of these elements, the employer should not be permitted to rely on its interpretation of the employee's "desire" or on the employee's acts which are "tantamount" to voluntary quits. The Iowa Administrative Code does indeed define voluntary quit as discontinuing the employment because the employee no longer desires

to remain in the relationship of an employee with the employer. 345 Iowa Admin. Code § 4.25(96) (1986). The definition, however, goes on to indicate this "desire" is to be found on the part of the employee after the employee has separated from the employer. The majority would recast this administrative provision as a search for "desire" prior to separation from the employer.

I believe our statutes and case law in this area provide further support for the necessity of requiring an actual resignation or a leaving of work or a failing to appear before a voluntary quit may be imposed on an employee.

Iowa Code section 96.5(1)(a)-(i) (1985) looks at the reasons the employee actually leaves work. Section 1 contains the language, "If the individual has left work voluntarily . . . ." Exception (a) contains the language "left employment in good faith . . . ." Exception (c) contains the language, ". . . left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family . . . ." Exception (d) contains the language "left employment because of illness . . . ." Exception (e) contains the language "left employment upon the advice of a licensed and practicing physician." Exception (f) contains the language, "left the employing unit . . . ." Exception (g) contains the language "left work voluntarily without good cause . . . ." Section (i) contains the language "left employment in lieu of exercising a right to bump or oust a fellow employee . . . ." None of these statutory sections have any language relating to actions which are "tantamount" or "equivalent" to a departure from work. All of the situations listed in 345 Iowa Administrative Code 4.25(1)-(41) (1986) refer to voluntary quit situations where the employee left, was absent, or actually resigned. None of these administrative code sections have any language relating to actions which are "tantamount" or "equivalent" to a departure from work. Applying the salutary maxim, expressio unius exclusio alterius est, I do not believe that the statute or the administrative

code provisions are in fact directed toward "equivalent" acts or acts "tantamount" to a quit. Quitting means giving notice of a resignation or leaving work or not showing up for work. Unless the legislature otherwise defines them, we must ascribe to statutory terms their ordinary meaning. State v. Jackson, 305 N.W.2d 420, 422 (Iowa 1981). The legislature has not provided language which enables employers to specify employees' conduct as "tantamount" to a voluntary quit.

Our case law bears out the necessity that the element of an employee leaving work or failing to show up for work is an essential component in deciding whether a voluntary quit occurred. Cases which have found voluntary quits include Des Moines Independent Community School Dist. v. Department of Job Service, 376 N.W.2d 605, 611 (Iowa 1985), wherein the court found when a teacher left town and did not show up for work, this leaving was a voluntary quit. In Hedges v. Iowa Department of Job Service, 368 N.W.2d 862, 866 (Iowa Ct. App. 1985), an employee who left work voluntarily was not entitled to unemployment benefits when her disability was not caused or aggravated by factors and circumstances associated with employment. In Boyd v. Iowa Dept. of Job Service, 377 N.W.2d 1, 2 (Iowa Ct. App. 1985), an employee left a job site rather than perform assigned work as instructed. This was held to be a voluntary quit since the individual left work without good cause.

In cases which have found no voluntary quit, our courts also examine the circumstances surrounding the leaving of work or the failure to show up for work. In Central Foam Corp. v. Barrett, 266 N.W.2d at 35, when employees did not show up for work because of a strike, such failure to show up was not considered a voluntary quit. In Ellis v. Iowa Department of Job Service, 285 N.W.2d 153, 157 (Iowa 1979), a housekeeper leaving work because of allergy did not amount to a voluntary quit. In Cook v. Iowa Department of Job Service,

299 N.W.2d 688, 702 (Iowa 1980), a truck driver did not leave work but was rendered uninsurable because of repeated traffic violations. As the court pointed out, none of the forty-one types of situations listed in the Administrative Code in which the separation is not attributable to the employer, covered the facts of Cook. Id. at 701. Likewise, in the case at bar none of the situations listed in 345 Administrative Code section 4.25(96) (1986) apply to the undisputed facts of this case. In Cook, the Iowa Supreme Court found that self-inflicted damage to a worker's employability was not voluntary quitting. Id. at 702. Likewise, in the case at bar the employee's self-inflicted damage to his employability should not be thereby transformed into a voluntary quit. Neither our statutes nor our case law provide for a process by which unacceptable job performance is transformed into a voluntary quit. The employee here essentially dared the employer to fire him. Perhaps this was unsatisfactory conduct. It was not a voluntary quit. In fact, in Green v. Iowa Department of Job Service, 299 N.W.2d 651, 653-656 (Iowa 1980), the supreme court affirmed a district court's finding that an employee's acts which may be misconduct were not transformed into a voluntary quit.

I would point out, as an analogy, that in the situation of one terminally ill spouse requesting the other spouse terminate the life of the ill spouse, we do not provide that the request to terminate transforms the terminating act into a suicide. It is still a form of murder.

I would reverse the Job Service determination that the employee was not eligible for unemployment since the employee neither resigned, left work, or failed to show up for work.