

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1983

CLERK SUPREME COURT

CHARLES T. BROGAN,)

Petitioner-Appellant,)

Filed January 26, 1983

vs.)

IOWA DEPARTMENT OF JOB SERVICE)

and SUMNER PONTIAC,)

2-3432-67705

Respondents-Appellees.

Appeal from Polk District Court - Van Wifvat, Judge.

Petitioner appeals from the district court decision on judicial review affirming respondent agency's denial of his claim for unemployment benefits.

REMANDED WITH DIRECTIONS.

Linda S. Pettit of Pettit & Mann, Des Moines, for petitioner-appellant.

Joseph L. Bervid, Walter F. Maley & Blair H. Dewey, Des Moines, for respondent-appellee agency.

Heard en banc.

JOHNSON, J.

Petitioner, Charles T. Brogan, appeals from the district court decision on judicial review affirming respondent agency's denial of his claim for unemployment benefits. On appeal he contends (1) that he was denied various statutory and constitutional rights when the agency hearing officer failed to inquire more fully into the details of his allegations; (2) that he was denied his right to cross-examination of adverse witnesses; and (3) that substantial record evidence fails to support the agency decision. We reverse and remand this case to the agency.

Pursuant to Iowa Code § 17A.20 (1981), our scope of review is limited to a determination of whether the district court made errors of law when it exercised its power of review of the agency action under Iowa Code § 17A.19 (1981). Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979). Section 17A.19 limits the district court's review to a determination of whether the agency committed any errors of law specified in section 17A.19(8). Thus, to determine whether the district court properly exercised its power of judicial review "this court applies the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order. If they are not, reversal may be required." Jackson County, 280 N.W.2d 429-30. Section 17A.19(8) provides that the district court shall reverse or modify the agency action if such action is based on error in the application of law or administrative rule, or is not supported by substantial evidence in the record made before the agency when the record is viewed as a whole.

I.

Claimant worked for the employer, Ramsey Pontiac,¹ selling cars strictly on a commission basis. He quit his job on February 21, 1981, claiming that the job conditions had become intolerable to him. He had injured his back in a work-

¹ There is an inconsistency between the caption of this case naming Sumner Pontiac as a defendant and petitioner's contentions that he was employed by Ramsey Pontiac. In this opinion the employer shall be referred to as Ramsey Pontiac.

related fall in September, 1979. As a result, he took a medical leave from November, 1979, to January, 1980. When he returned to work he was required to perform all of the physical tasks associated with the job but not directly related to selling cars. These tasks included brushing snow off of cars, moving cars on and off of the showroom floor and dusting cars. Claimant performed these tasks but asserts that he did so while experiencing physical pain associated with his back injury. His commission salary was decreased on the sale of certain smaller cars. Claimant then quit his job and sought unemployment benefits.

Claimant appeared pro se at the agency hearing. The hearing officer relied primarily on the parties' written statements and did not conduct a detailed inquiry into the basis for claimant's allegations. The hearing officer did not mention the parties' right of cross-examination and no cross-examination was conducted. However, claimant was asked at the conclusion of the hearing if he had anything else to add. The agency appeal board affirmed the hearing officer's decision disqualifying claimant from receiving benefits and denied claimant's request to present additional evidence. Claimant then sought judicial review of the appeal board's decision.

II.

We first consider claimant's contention that the procedures followed in this case denied him due process of law. Specifically, he asserts that he was not afforded a full and fair hearing because the hearing officer failed to inquire fully into his allegations and failed to notify him that he had a right of cross-examination. He urges that, at the very least, the case should be vacated and remanded for the taking of additional evidence regarding the allegations of intolerable working conditions. We agree.

In denying petitioner benefits, the hearing officer stated that "claimant has not established that the actions of the general manager were so intolerable as to be good cause for his leaving," and that petitioner left employment without good cause attributable to his employer. Petitioner asked to reopen the evidence both

prior to the appeal board decision and after the decision in his application for rehearing. The agency refused to admit the evidence on the basis that there was "[n]o good cause for reopening the appeal" Petitioner sought to introduce a daily log sheet, the statements of several co-employees, and requested that J. S. Ramsey, the general manager of Ramsey Pontiac, be subpoenaed to testify.

In support of his application to reopen the evidence, the petitioner presented a letter from a co-employee, John Marturello, who stated that the general manager, J. S. Ramsey, emotionally abused his employees. Co-employee Richard Deuben supplied a letter stating "[J. S. Ramsey] was verbally abusive to anyone who had the courage to stand up to him." Co-employee James Harty wrote "In [J. S. Ramsey's] handling of salesman Charles Brogan in particular, I feel that many times he went beyond his normal (or abnormal) behavior just because Mr. Brogan had the courage to stand up and argue when he knew that J. S. Ramsey was wrong in his demeaning tactics." These attitudes were also reflected by co-employee Palmer Spadafora. Additionally, petitioner sought to introduce log sheets wherein J. S. Ramsey had made derogatory comments about customers.

As his reason for not presenting such evidence until after the hearing, petitioner stated that the co-employees feared reprisal from J. S. Ramsey. However, by the time the appeal board considered petitioner's appeal, none of the co-employees were employed by Ramsey Pontiac, thus alleviating the co-employees' fear of reprisals.

The Iowa Administrative Code § 6.2(5)(a) provides that a "hearing officer may reopen the record on the hearing, for the receipt of relevant and material evidence which has not been presented at the scheduled hearing at any time prior to mailing notice of the decision upon written application" Additionally, sections 6.4(1)(g)(1), (2), (3), provide a means for introducing additional evidence before the appeal board. The petitioner, in his or her application to the appeal board, must "state the nature of the evidence, the materiality of the evidence,

and the reasons why such evidence was not introduced at the hearing before the hearing officer." Iowa Admin. Code § 6.4(1)(g)(2). These provisions are analogous to Iowa Code § 17A.19(7) (1981). For the purposes of taking additional evidence under "section 17A.19(7) [the] application must show (1) materiality and (2) good reasons for failure to present the evidence earlier." Cedar Valley Leasing, Inc. v. Iowa Department of Revenue, 274 N.W.2d 357, 362 (Iowa 1979).

On the record we believe the additional evidence that petitioner sought to introduce was both material and was not presented originally for good cause. The evidence was material in the sense that it is pertinent to an issue in dispute. See Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 862 (Iowa 1974). The credibility of the co-employees who have also left the employ of Ramsey Pontiac may be suspect, but this does not negate the materiality of the evidence in question. Additionally, we believe find the co-employees' refusal to testify while in the employ of Ramsey Pontiac was "good cause" for not presenting such evidence before the hearing officer. Accordingly, we find that the agency abused its discretion in excluding petitioner's additional evidence.

We find it unnecessary to address petitioner's other contentions based upon the foregoing. We remand this case to the agency for a decision in which all of petitioner's material evidence is considered.

REMANDED WITH DIRECTIONS.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent.

I disagree with the majority's conclusion that the agency abused its discretion in excluding petitioner's additional evidence. An application under section 17A.19(7) must show both materiality and good reason for failure to present the evidence earlier. Cedar Valley Leasing Inc. v. Iowa Department of Revenue, 274 N.W.2d 357, 362 (Iowa 1979). Claimant's written statement, testimony and arguments made before the hearing officer outlined extensively what he believed to be intolerable working conditions. While his appeal to the Job Service Appeal Board was pending, various persons, most of whom were past employees as well, submitted letters in support of claimant. This evidence became part of the evidence submitted to the appeals board along with claimant's written brief and argument.

Moreover, this evidence is merely cumulative of that already on the record. The authors of the letters merely recited that the general manager was hard to get along with and told ethnic or indecent jokes, the same information that Brogan himself had testified to before the hearing officer. In addition, the majority of the letters address the authors' personal relationships with the general manager to a much greater extent than they discussed Brogan's situation.

Claimant's request for oral argument was denied and the hearing officer's decision was affirmed. It appears from the record that claimant fully appreciated the informal nature of the agency hearing. The sales manager for the employer attended the hearing and submitted a written statement. Claimant submitted a lengthy account of the reasons he quit and was asked specifically by the court whether there was anything further he would like to add to the record. Claimant then made his final argument. I believe claimant was afforded a full opportunity to make his record and cross-examine the evidence regarding what he asserts to

be intolerable working conditions. The record was fairly made and claimant's due process rights were adequately protected. I believe there was no violation of his due process rights in the denial of his motion to present additional evidence.