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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LOUIS KELLOGG,)

Petitioner-Appellant,) Filed January 29, 1986

vs.) 156

IOWA DEPARTMENT OF JOB SERVICE,) 5-547
85-289

Respondent-Appellee.)

Appeal from the Iowa District Court for Monroe County - James D. Jenkins, Judge.

Claimant appeals the trial court's affirmance of his disqualification from unemployment benefits under Iowa Code section 96.4(3). **REVERSED.**

Sarah Wenke, Des Moines, Iowa, for petitioner-appellant.

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

Heard by Oxberger, C.J., Snell, and Schlegel, JJ., but considered en banc.

Claimant Louis Kellogg appeals the trial court's affirmance of his disqualification from unemployment benefits under Iowa Code section 96.4-3. We reverse.

The essential facts underlying claimant's disqualification from unemployment benefits are not disputed. In February, 1984, claimant's wife started a trash hauling business in Albia, Iowa, called Kellogg's Sanitation. Claimant's father-in-law had owned a trash hauling business for sixteen years and Mrs. Kellogg, claimant's wife, hoped to use her past experience as well as her father's good will to establish her own business.

The title to the company truck was under both claimant's name and his wife's name due to insurance considerations. Mrs. Kellogg purchased advertisements promoting the business in both the radio and newspapers. The radio announcement was read by a male announcer, other than claimant; and the newspaper ad read, in part, "KELLOGG'S SANITATION" ... "I have bought my own truck and am in business for myself." But there was no mention in either ad of claimant's name or any indication of claimant's ownership or membership in the business. Mrs. Kellogg also used a separate business number for the business and provided free garbage pickup for a neighbor who answered calls. The Kellogg's home phone number was also provided in the ads and consequently at night business calls were received at home. In addition, Mrs. Kellogg personally solicited customers by going door to door in Albia.

Other than being co-title holder of the truck, claimant was personally involved in "Kellogg Sanitation" when he attended an Albia city council meeting on an evening when their child was ill and Mrs. Kellogg stayed at home to care for the child. He also drives the truck two hours a day, five days a week, without pay.

During the first week that Kellogg Sanitation was in operation, a local Job Service employee heard the radio commercial for Kellogg Sanitation and reported the circumstances to her superiors, which eventually led to claimant's disqualification from benefits. Claimant appealed this decision in a telephone hearing on March 19, 1984, but the hearing officer affirmed the disqualification based upon the above facts, with the understanding that claimant drove ten hours a day, instead of ten hours a week. The Department of Job Service Appeal Board modified the facts to show the correct driving time spent by claimant, but still affirmed the hearing officer. Claimant filed for judicial review of the agency decision but the district court affirmed his disqualification of benefits. Claimant alleges on appeal that the agency's decision is not supported by substantial evidence, and, in the alternative, that the agency erred in its application of law.

I. **Scope of Review.** Our review under Iowa Code section 17A.20 is limited to a determination of whether the district court made errors of law when it reviewed the agency action under section 17A.19. Woods v. Iowa Department of Job Service, 315 N.W.2d 838, 840 (Iowa App. 1981). In order to make that determination this court applies the standards of section 17A.19(8) to the agency decision to determine whether this court's conclusions are the same as those of the district court. Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87, 91 (Iowa 1982). We are bound by the agency's findings of fact if they are supported by substantial evidence. Evidence is substantial if a reasonable mind could accept it as sufficient to reach the same findings. However, neither this court nor the district court is bound by the agency's legal conclusions. Green v. Iowa Department of Job Service, 299 N.W.2d 651, 655 (Iowa 1980).

The ultimate finding of fact by the agency in this case is that claimant, by his acts, is attempting to become self-employed and is therefore unavailable for work. If this is so, 370 Iowa Administrative Code 4.23(7) would apply and he would be disqualified from receiving benefits. The conclusion that claimant is attempting to become self-employed and is consequently unavailable for work must be supported by substantial evidence.

We pause, however, to reemphasize the focus of our factual review in this matter. We are not concerned with the factual dispute raised between the parties concerning whether indeed the business was claimant's or his wife's. Under our standard of review we must accept the agency's findings on that particular issue. Our review focuses rather, upon whether there is substantial evidence to support the agency's finding that Mr. Kellogg was unavailable for work due to efforts attempting to become self-employed.

The relevant Administrative Code section is entitled, "Availability Disqualifications," and is prefaced, "The following are reasons for a claimant being disqualified for being unavailable for work." (Emphasis ours.) Under this heading, the particular rule states simply, "Where an individual devotes time and effort to becoming self-employed." It doesn't say how much time, or how much effort is required to be disqualified. It is logical, therefore, to look to the preface quoted above and conclude that the amount of effort and time devoted to self-employment activities must also necessarily preclude the claimant on the basis of being unavailable. In other words, a mere finding that the claimant has spent some time, or some effort in self-employed activities would not be a sufficient basis for disqualification from benefits. The amount of activity must necessarily rise to the point where the claimant can no longer be said to have been "available for work" under the agency's definition of those terms.

Job Service has defined availability for work in its regulations at 370-4.22(1). To be available, an individual must be willing, able, and ready to accept suitable work. He must be genuinely attached to the labor market. 370-4.221(b). As this court has already noted, availability restrictions and guidelines need not require the claimant be available for a particular shift. 370 Iowa Admin. Code 4.22(1)(d); see also Savage v. Iowa Dept. of Job Service, 361 N.W.2d 329 (Iowa App. 1984). Indeed, if a claimant is available for the major portion of the work week, he will generally be considered available for work. See 370 Iowa Admin. Code 4.22(1)(q).

It is worth noting the step-by-step analysis of the hearing officer, the appeal board, and the trial court concerning the application of the facts to 370 Iowa Administrative Code 4.23(7). The hearing officer erroneously concluded that claimant was working 10 hours a day instead of 2 hours a day, and concluded "... the claimant would not be able to do both the garbage route and a regular job and maintains [sic] that he is still seeking full-time employment." The Appeal Board corrected this factual error but still adopted the hearing officer's conclusion with no independent rationale or discussion. Significantly, however, one member of the Appeal Board dissented stating, "The Claimant has indicated he is available and seeking full-time work." This dichotomy in the appeal board decision is extremely important because it provides us with an insight as to how the agency itself interprets the short phrase contained in 370-4.23(7). This dissent clearly demonstrates that despite facts that might be construed as proving a claimant is making some effort, and devoting some time to becoming self-employed, the focus on the factual consideration was still whether the claimant can be considered available within the meaning of Iowa Code section 96.4(3) and 370 Iowa Admin. Code 4.22(1). The upshot of all this is simply that the criteria used by the agency in disqualifying claimant from benefits under

rule 4.23(7) was claimant's availability timewise due to his self-employment activity.

The trial court alluded also, not merely to whether claimant was factually becoming self-employed, but also to whether, as a consequence, he was available for work. It said:

> Petitioner insists that this was his wife's business and that his interest was only peripheral and incidental. He claims he was available for and looking for work. The agency and the Appeal Board chose to disregard Petitioner's self-serving assertion, and to instead consider that the facts as herein recited precluded petitioner's availability for other work. . . .
>
> The agency had adequate evidence before it to determine that petitioner was unavailable for work, and was not earnestly and actively seeking work as required by Section 96.4(3). Petitioner's appeal must accordingly be dismissed.

It appears, therefore, that all of the forums below have based their affirmation of disqualification, at least in part, upon whether or not claimant was available for work, and not solely upon the fact that at least a portion of the business belonged to claimant. If they had not done so, our review would necessarily be on errors of law and not upon the substantial evidence standard.

Neither party has cited, nor have we found an Iowa case that addresses the specific issue of what level of involvement in a family member's business leads to disqualification of benefits on the basis of unavailability. We have previously held that the mere fact that a claimant is unavailable for a period of up to four hours a day does not necessarily mean that he is disqualified from benefits. See Savage v. Iowa Dept. of Job Service, 361 N.W.2d 329 (Iowa App. 1984). But that decision is not dispositive of this case for it did not deal with the accompanying self-employment issue before us today. It does, however, shed some light upon the amount of time a claimant must be available for work each day to retain his benefits.

Looking at all the evidence, the findings of unavailability are not supported by substantial evidence. As provided in Iowa Code section 17A.19(8)(f), the entire record must be considered in determining whether the challenged finding has substantial support. City of Davenport v. P.E.R.B., 264 N.W.2d 307, 311 (Iowa 1978). The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Id. "These principles governing review of agency action must not be confused with those applicable to appellate review of a jury verdict or findings of fact of a trial judge in a law action tried to the court. We have said only supporting evidence need be considered in those cases." City of Davenport v. P.E.R.B., at 312; see Hunt v. State, 252 N.W.2d 715, 717 (Iowa 1977); Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975); Meade v. Roller, 212 N.W.2d 426, 429 (Iowa 1973). The only evidence relating to restrictions on claimant's availability for work is the two hours a day he spends driving the truck. The question then is, whether claimant's restriction of being on the route two hours per day prevents claimant from being available for full-time employment. There is certainly nothing in the record to contradict claimant's assertion that he is still actively seeking full-time employment and would in fact quit the route if and when full-time employment would arise. In considering the availability requirement "the labor market must be described in the terms of the individual" seeking compensation. 370 Iowa Admin. Code § 4.22(1)(b). There is no evidence to indicate claimant is seeking anything other than "blue collar" work. Availability for such work is not usually precluded merely on the basis of being unavailable two hours a day. See Savage at 322.

We hold that there is not substantial evidence to support the agency's finding that claimant is unavailable for work. We therefore reverse the trial court and award benefits to claimant.

REVERSED.

Oxberger, C.J., and Snell, J., concur; Donielson, Hayden, and Sackett, JJ., specially concur.

DONIELSON, J. (specially concurring)

I concur with the result of the majority given the facts presented, but it is my position that the precedential value of this holding should be narrowly construed.

The facts of this case present a degree of tension between Iowa Code § 96.4(3) (1983), 370 Iowa Administrative Code 4.22(1), and 370 Iowa Administrative Code 4.23(1) because the claimant, who drove a garbage truck two hours a day for a business operated by his wife, was available for other work which satisfies § 96.4(3) and rule 4.22(1) while, on the other hand, the claimant devoted some time to becoming self-employed which is a ground for disqualification under rule 4.23(7). If the evidence did not indicate that the claimant's wife was operating the sanitation service which claimant lent his free services to two hours a day to assist his wife's newly-formed business, then the result could have been different. It is not the purpose of the Employment Security Act to pay claimants while they start their own businesses. Had the claimant been shown to have controlled the operation of the business and that his wife only operated the business as a "front" so that he would not be deemed self-employed, then claimant should have been disqualified. Furthermore, if the claimant worked more than two hours daily, the result could very well have been different. Under the facts, however, I have little difficulty in awarding benefits to a claimant who gratuitously helps his wife's business for only two hours a day, and otherwise would not have undertaken any productive endeavors during the day.

It is also important to note that a claimant can conceivably work only two hours a day and be disqualified from receiving benefits should the time the claimant devotes to such activity interfere with his duty to seek other gainful employment while being jobless.

Hayden and Sackett, JJ., join this special concurrence.