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FILED
JAN 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LAMOND A. PETERSEN,

Appellant,

vs.

IOWA EMPLOYMENT SECURITY COMMISSION and DAVE ARMSTRONG, INC.,

Appellees.

Filed January 28, 1977

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No. 2-57876

Appeal from Shelby District Court -- Leroy H. Johnson, Judge

Appellant appeals a trial court's disqualification of unemployment benefits under Section 96.5, The Code, 1973.

AFFIRMED

Louis, Moore & Kohorst, of Harlan, for appellant.

Walter F. Maley, of Des Moines, for appellees.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Essentially two questions are presented with regard to the appellant's appeal resulting from his disqualification of unemployment benefits for a voluntary termination of employment under Section 96.5, The Code, 1973. Those questions are essentially: Did the work leave the worker (appellant) thusly causing his unemployment? Secondly, must the appellant have actual employment under that section or does he comply if he is available for work in that position but not actually working?

The appellant timely appeals the trial court's affirmation of the Iowa Employment Security Commission's split decision upholding the hearing officer's denial of benefits * .

We affirm the trial court.

The essential facts are that the appellant, Petersen, was a 23-year-old single male living at home near Harlan, Shelby County. He has worked for the Dave Armstrong, Inc. contractors at various job locations within Shelby County as a heavy equipment and scraper operator at $4.80 per hour plus 60 cents an hour for fringe benefits. His normal working period was 44-48 hours per week. His employment with that firm commenced the 12th of June, 1972, and his last day of work for them was on Saturday, November 3, 1973.

Dave Armstrong, Inc. contractors moved to Indianola, Iowa, south of Des Moines, on approximately the 3rd of November, 1973. The appellant could have continued employment with the company but instead was hired on Monday, the 5th of November, 1973, and

*The appellant applied for unemployment compensation on the 25th of November, 1973, and was denied benefits on the 17th of January, 1974. Whereupon an appeal was taken on the 27th of February, 1974 pursuant to 96.6--5 where the commission affirmed its hearing officer by a split vote of two to one. An appeal to the district court was taken pursuant to 96.6(8) which affirmed the commission on the 2nd of December, 1974. Thereafter timely appeal was taken to the Supreme Court on the 17th of December, 1974.

commenced working on Tuesday, the 6th of November, 1973, with the Green Construction Co. working north of Des Moines doing the same type of work at $6.25 per hour with no benefits. This work encompassed 45-60 hours per week.

Appellant states he would not have continued with Dave Armstrong, Inc. contractors even had he not secured the new position with Green Construction Co. because of the distance involved. The appellant alleges he would have continued working for Dave Armstrong, Inc. contractors only in Shelby County. He alleges, therefore, the work left him alleging the consideration of 96.5(3)(a).

I

The record reflects the appellant's view as it applies to the Indianola Armstrong job. *"I would have had to move south of Des Moines, way down in Indianola."*

The trial court found that he drove back and forth to home from his Green Construction Co. job, and the record reflects that it is 90 miles from Harlan to the west edge of Des Moines. The record does not reflect the additional mileage south to the Indianola job site nor to his new position with Green Construction Co. at the north of Des Moines job site.

The appellant was hired on Monday, the 5th of November, 1973, and commenced work on Tuesday, the 6th of November, 1973, and worked continuously until the 19th of November, 1973, when he was laid off for the winter, and thereafter reemployed in 1974 by the Green Construction Co. at the same job site north of Des Moines commuting back and forth to his home in Harlan.

Our appellate standard of review is clear. See Wilson Trailer Co. vs. Iowa Employment Security Commission, 168 N.W.2d 771, 775 (Iowa 1969) where it states:

> "[2] II. It is a thoroughly established principle that fact findings by the Iowa Employment Security Commission are binding upon the courts on appeal when supported by substantial and competent evidence. Section 96.6, paragraph 9, Code of 1966; McComber vs. Iowa Employment Sec. Comm., 254 Iowa 957, 958, 119 N.W.2d 792, 793, and cases cited therein; McCarthy vs. Iowa Employment Sec. Comm., 247 Iowa 760, 764, 76 N.W.2d 201, 204; Gatewood vs. Iowa Iron & Metal Co., 251 Iowa 639, 644, 102 N.W.2d 146, 150, and citations. See also 81 C.J.S. Social Security and Public Welfare §232; 48 Am.Jr., Social Security, Unemployment Insurance, Etc., §49. We have also said that each case of this character must turn upon its own facts. McCarthy vs. Iowa Employment Sec. Comm., supra; Wolfe vs. Iowa Unemployment Comp. Comm., 232 Iowa 1254, 1257, 7 N.W.2d 799, 800."

The trial court quite accurately stated the standard of review. See Ritchey vs. Iowa Employment Security Commission, 216 N.W.2d 580, 585 (Iowa 1974).

> "For the trial court to overturn the commission's holding, the court would have to say claimant proved this claim as a matter of law. This the court could not say, for at best claimant generated a question of fact; had the matter been tried to a jury, the court would have had to submit the question to the jury. Seldom does a party having the burden of proving a proposition establish it as a matter of law. Hepp vs. Zinnel, 199 N.W.2d 68 (Iowa). The commission's findings on fact questions are binding on the courts. Wolfe vs. Iowa Unemployment Comm'n, 232 Iowa 1254, 7 N.W.2d 799."

We hold that substantial and competent evidence supports the fact finding by the Employment Security Commission hearing officer, the Iowa Employment Security Commission and that the trial judge was correct in his opinion. Any provisions that relate to unemployment compensation should have a broad and liberal construction in aid of accomplishing the objective of the enactment. See Moorman Manufacturing Company vs. Iowa Unemployment Compensation Commission, 230 Iowa 123, 130, 296 N.W. 791 (1941). See also the

Declaration of State Public Policy, §96.2, The Code, 1973, and Construction of Statutes, §4.2--4--6.

II

The trial court found that the appellant was not unemployed at all because the time lapse was only over Sunday and that the essential disqualifications §96.5(1) came into force. *"An individual shall be disqualified for benefits: 1. Voluntary quitting. If he has left his work voluntarily without good cause attributable to his employer, if so found by the commission. ..."*

The appellant was found to have moved from job to job in Shelby County. Also, that he was aware that moving from job to job was necessary in his construction line of work. This might well carry him beyond the boundaries of his own home county. The appellant claims that he did not quit the job, but rather the job quit him by moving their construction site over 125 miles away.

The appellant worked Saturday and started his new position on Monday at the increased salary and proceeded to commute to his new job north of Des Moines during this two-week period and also commuted the following year when reemployed by the same construction company. This lends little credence to his claim as indicated by the trial judge that the job left him. That portion of the statute which indicates that the lay-off must be *"attributable to the employer"* is quite adequately answered by the trial judge where he held the appellant simply found a better job as the appellant has repeatedly asserted and further that Dave Armstrong, Inc. contractors in fact had nothing to do with the lay-off of this appellant.

Section 96.5(1), The Code, 1973, indicates that an individual shall not be disqualified for voluntary termination if he left his work due to good cause attributable to his employer. Good cause for which an employee may voluntarily quit work must involve some fault on the part of the employer. Gatewood vs. Iowa Iron & Metal

Company, 251 Iowa 639, 102 N.W.2d 146 (1960). This court in this instance cannot find any evidence presently at fault on the part of the employer. Essentially the appellant has not demonstrated any aversion to travel with respect to employment, in fact quite to the contrary, as found to be true by the trial court.

III

That brings the court to the other question on the appeal relating to the exception to the qualifications as stated in 96.5(1)(a):

> "a. He left his employment in good faith for the sole purpose of accepting better employment, which he did accept, and that he remained continuously in said new employment for not less than six weeks. ..."

That the appellant was employed from the 5th or 6th of November, 1973, to November 19, 1973, is undisputed. So the question remains is the exception satisfied by the fact that the defendant worked two weeks in this employment rather than six weeks by the fact that he was ready and willing to be employed and the fact that he did return to the Green Construction Co. in the spring of 1974 for employment. That is his assertion under the second question presented in this appeal.

The plaintiffs overlook both 96.19(7):

> "a. Except as otherwise provided in this section 'employment' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied. ..." (emphasis added)

and 96.19(10)(a) which states: *"An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services."*

The appellant cites 96.5(3)(a) and 96.5(3)(b)(2) as a part of his Brief, however, as correctly stated by the district court,

these provisions deal with finding suitable employment when the individual is unemployed. The appellant in the case before this court was not unemployed after leaving his job with Dave Armstrong, Inc. contractors. Essentially only one day had passed before he commenced his association with the Green Construction Co.

An additional thrust to this case is provided by the fact that 96.5(1)(a) was the subject of the district court order on appeal entered on the 2nd day of December, 1974, and thereafter that particular section was amended effective July 1, 1975. The previous version read:

> "But he shall not be disqualified if the commission finds that:
>
> "a. He left his employment in good faith for the sole purpose of accepting better employment, which he did accept, and that he remained continuously in said new employment for not less than six weeks. ..." (emphasis added)

July 1, 1975, it was amended to read as follows:

> "But he shall not be disqualified if the commission finds that:
>
> "a. ... In those cases where he left his employment in good faith for the sole purpose of accepting better employment, which he did accept and such employment is terminated by the employer, or he is laid off after one week but prior to the expiration of six weeks. ..." (emphasis added)

This was brought to our attention, but we fail to see the relevance since the six weeks' provision is unmistakably clear and that the subsequent amendment does not lend itself to assisting this court in the interpretation of the statute. This is merely an outright change of the law, and we are not at liberty to make the law retrospective as it relates to the legislature's wishes. The plain words of the statute cannot be disregarded under the

pretext of accomplishing a given purpose. See Hansen vs. Iowa Employment Security Commission, 239 Iowa 1139, 1142, 34 N.W.2d 203 (1948); Des Moines Independent Community School District vs. Armstrong, 250 Iowa 634, 95 N.W.2d 515 (1959); and Deere Manufacturing Co. vs. Iowa Employment Security Commission, 249 Iowa 1066, 90 N.W.2d 750 (1958).

AFFIRMED.

ALLBEE, C.J., and SNELL, J., concur in Divisions I and II and join in the special concurrence of CARTER, J. OXBERGER, J., dissents.

CARTER, J. (specially concurring):

I concur in the result achieved in the opinion of Donielson, J. but feel it necessary to state my reasons for so doing.

The initial issue of whether the appellant left his employment or the employment left him presents an issue of fact and we are therefore bound by the Commission's findings. There is no suggestion of any good cause for leaving the employment with Armstrong other than the change of location and the Commission's finding that this was an insufficient reason has support in the evidence.

The second issue involving the construction to be placed upon section 96.5 (1) (a), The Code, is much more difficult. It presents an issue of first impression. Appellant argues persuasively that the provision for employment of "not less than six weeks," as a prerequisite for qualifying for benefits as a result of leaving existing employment for "better employment," should be applied only with respect to termination of the new employment by the employee. He points out that to construe the provision as being applicable to layoffs or other employer termination forces the worker to gamble his unemployment benefits in order to better himself in the job market. Despite the apparent truth of this observation the source of eligibility is the statutory scheme enacted by the legislature. Neither the Commission nor the courts may expand upon these statutory provisions whatever may be the policy considerations for so doing.

I am forced to conclude that it was the intention of the legislature that the six-week qualifying period must be satisfied even when the new employment is terminated by a layoff. The provision in question has been in the statute since 1945

(51st G.A., ch. 86). From 1945 until 1959 (58th G.A., ch. 112), the qualifying period was twelve weeks instead of six. At all times that the qualifying period has been contained in this legislation it has been preceded by the general "voluntary quitting" provision of the act. That provision standing alone is broad enough to disqualify from benefits most employees who changed jobs and then quit their new jobs. Thus, it is much more likely that the qualifying period was aimed specifically at those employees who changed jobs and were then laid off.

Subsequent legislative history also supports this conclusion. In 1975, the legislature (1st Sess., 66th G.A., ch. 92, §5) deleted the six-week qualifying period and substituted therefor the following:

> "In those cases where he left his employment in good faith for the sole purpose of accepting better employment, which he did accept and such employment is terminated by the employer, or he is laid off after one week but prior to the expiration of six weeks, the claimant, provided he is otherwise eligible under this chapter, shall be eligible for benefits and such benefits shall not be charged to any employer's account." (Emphasis added.)

This latest legislation of course refers directly to layoffs and other employer termination -- the prior legislation did not. But I submit that it would come as a great surprise to the legislature which adopted the 1975 amendment to be told that the effect of this legislation was to make qualification by laid-off employees more difficult than it had been prior to the amendment. This would be the result if we were to accept appellant's argument that there was no qualifying period under the prior law.

The 1975 amendment quoted above also provided that benefits paid to laid-off employees who qualified thereunder "shall not be charged to any employer's account." This, too, is significant

in construing the prior law. As the trial court observed in its decision, prior to the 1975 amendment, the new employer's account could be charged for benefits paid employees who qualified under section 96.5 (1) (a). This appears to be a likely reason for the enactment of a six-week qualifying period applicable to laid-off employees. I believe the effect given to this provision by the Commission and the trial court was correct.

Oxberger, J. (dissenting).

The majority denies unemployment benefits to the appellant employee who is unemployed through no fault of his own. He was temporarily laid off by his employer due to a lack of work. This is exactly the type of contingency for which the legislature provided assistance.

The majority say the employee is somewhat at fault in that he voluntarily quit his former employer and has not worked six (6) weeks for the new employer as required by Section 96.5(1)(a), The Code. However, the legislature has encouraged employees to quit their job for a better job. It does not make sense to believe the legislature intended employees to gamble that the new employer would not lay them off before the six (6) weeks had expired. The clear legislative intent was to provide protection to the employee and to deny the protection only if he was at fault. Here the employee is unemployed through no fault of his own and yet he is unprotected.

The court in McCarty v. Iowa Employment Security Commission, 247 Iowa 760, 762, 76 N.W.2d 201, 202 (1956) said:

> " . . . We must, if reasonably possible, avoid a result clearly contrary to the avowed purpose of the entire chapter."

McCarty looked to the intent and purpose of the whole legislation and reiterated that the fundamental core of the legislation was redress for the employee who through no fault of his own was unemployed.

I believe the majority opinion is clearly contrary to the purpose of the chapter. The issue is whether a reasonable interpretation can be made of the words: " . . . he remained continuously in said employment for not less than six weeks.", Section 96.5(1)(a), The Code, to permit payment of benefits to the employee.

In this case, the employee has not been fired, nor has he

quit. Rather, he finds himself subject to a temporary layoff. He is still employed. He will be recalled for work when work is available. He has done all that is humanly possible to comply with the law. The next subsection 96.5(1)(b) should be read with subsection (a). The legislature apparently was concerned that the voluntary quitting of the temporary job during a layoff not be considered as a disqualification. This necessarily implies that during a layoff an employee is still employed but eligible for unemployment benefits. Time during a layoff is considered for seniority purposes. Employees still are eligible for group insurance coverage. Layoffs should be treated the same as other situations over which the employee has no control, such as illness.

I would interpret the words "he remained" to speak of his, the employee's, conduct, i.e., that he remained available for work. This is in keeping with the intent of the act that says:

> "The 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 . . . to be used for the benefit of persons *unemployed* through *no fault* of *their* own." Section 96.2, The Code. (emphasis added)

Therefore, I respectfully dissent.