

FILED

JAN 29 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RANDY L. WIESE,

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414

Petitioner-Appellant,

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Filed January 29, 1986

vs.

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IOWA DEPARTMENT OF JOB SERVICE,

)

5-436

85-93

Respondent-Appellee.

)

Appeal from the Iowa District Court for Polk County - Van Wifvat, Judge.

Petitioner appeals the district court's affirmance of the respondent's decision which denied his unemployment benefits. **REVERSED AND REMANDED.**

Donna J. Henderson, Des Moines, Iowa, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid of the Iowa Department of Job Service, Des Moines, Iowa, for respondent-appellee.

Heard by Snell, P.J., Schlegel, and Hayden, JJ., but considered en banc.

Randy Wiese was employed as a carpenter by Johnston Development Company, commencing in November, 1981. His last day of employment with that company was on October 13, 1983, when he quit his job. Randy terminated his employment because he was being required to work out of state and had to spend extended time away from his family. He was willing to continue working for the employer, Johnston Development Company, provided he could work in the Des Moines metropolitan area. He claims that quitting his job was for good cause attributable to his employer because of changes made by the employer in the contract of hire, and that there is insufficient evidence to support a finding by the court that Randy "left by refusing to transfer to another location when it was known at the time of hire that it was customary for employees to transfer as required by the job."

The agency found that "[T]he claimant voluntarily terminated his employment without good cause attributable to the employer because of his refusal to transfer to another location for a temporary job when it was known near the time of hire that it was customary for employees to transfer as required by the job." On appeal, the trial court concluded that there was a conflict in the testimony as to when claimant became aware of the employer's requirement that his job might be done outside the state. The court found that claimant, approximately one to two months after he commenced working, became aware that the company had worked out of state upon previous occasions, and that "[T]he Claimant was then aware that potentially there might be out-of-state work, if the need arose."

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code section 96.5(1) (1983).

Rule 370 Iowa Administrative Code 4.26 provides, in part:

The following reasons for a claimant leaving employment with good cause attributable to the employer:

4.26(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

Rule 370 Iowa Administrative Code 4.25 sets out many situations which do not represent "good cause attributable to the employer:"

4.25(32) The claimant left by refusing a transfer to another location when it was known at the time of hire that it was customary for employees to transfer as required by the job. (Emphasis added.)

Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited to the correction of errors in law. Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983). We review the decision of the district court, also rendered in an appellate capacity, and determine whether the district court correctly applied the law. Endicott v. Iowa Dept. of Job Service, ___ N.W.2d ___, ___ (Iowa Ct. App. 1984). "In order to make that determination, 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." Jackson County Public Hospital v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). Iowa Code section 17A.19(8)(f) (1985), provides that in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. Evidence is substantial when a reasonable person would accept it as adequate to reach

a conclusion. Gipson v. Iowa Dept. of Job Service, 315 N.W.2d 834, 837 (Iowa Ct. App. 1981). The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. Ward v. Iowa Dept. of Transportation, 304 N.W.2d 236, 237-38 (Iowa 1981). In making this determination, we are limited to the record made before the hearing officer. Gipson, 315 N.W.2d at 837. The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

Randy is disqualified from receiving unemployment benefits, if the record supports the finding of Job Service, that he left work voluntarily without good cause attributable to his employer, Johnston Development Company. "... The burden of proof establishing the separation as a voluntary leaving of employment without good cause attributable to the employer shall be the responsibility of the employer with whom the separation occurred. . . ." 370 I.A.C. 4.25(96).

The record of the hearing before the hearing officer reveals that the employer required Randy to work in Frisco, Texas, for a period of at least two months. During that time, Randy would be transported to Texas, and be required to remain there for nine days. At the end of each nine-day period, Randy would be returned to Iowa for five days. All transportation and living expenses would be provided by the employer, and Randy would be paid \$2.00 more per hour on the job. After the job in Texas started, Randy worked one nine-day period there, and when he was transported home for the five days off, he told his employer of his dissatisfaction with working in Texas and having to be away from his family. There was no work in Iowa at that time, so he quit the job rather than to return to work in Texas.

Randy testified that at the time he was hired, he was not told there might be out-of-state work. There was no direct evidence to contradict that testimony.

However, the witness for the employer, Lowell Andeberg, testified, when asked the following question:

Q. All right. Now, at the time the claimant was hired or during his period of employment with the employer, was he ever told that he might have to be out of the Iowa area on jobs to the best of your knowledge?

EMPLOYER: To the best of my knowledge, yes. Bob—my—my boss—before he started, we'd been working in Grand Island, Nebraska, and so we knew that things could come up out of—out of state. And I was not in on the hiring, but Bob said he had been telling people—you know—that out of town work does come up.

In his ruling on the case, the Job Service hearing officer found that approximately one to two months after he commenced working for the employer, Randy became aware that the company had worked out of state previously. From this finding, the hearing officer found that "The claimant was then aware that potentially there might be out of state work, if the need arose." The hearing officer concluded that Randy voluntarily terminated his employment without good cause attributable to the employer because of his refusal to transfer to another location for a temporary job when it was known "near the time of hire" that it was customary for employees to transfer as required by the job.

There is insufficient evidence in the record to support a finding that Randy knew of the possibility of out-of-state work "at the time of hiring." The hearing officer made no such finding. There is also insufficient evidence in the record to support a finding that merely because Randy knew one or two months after he was hired, the company had done work out of state before, that the job for which he was hired involved the potentiality of out-of-state work for him. Randy's quitting was not a voluntary termination of his employment without good cause attributable to the employer on account of his refusal to transfer, under the provisions of Rule 370 Iowa Administrative Code 4.25(32).

Randy claims there is sufficient evidence in the record to support a finding that the employer changed the contract of hire, and that such changes caused his leaving the employment to be with good cause attributable to the employer.

Under Rule 370 Iowa Administrative Code 4.26(1), quoted in this opinion, a change in the contract of hire is a reason for a claimant leaving employment with good cause attributable to the employer. That rule requires the change to be substantial in nature, such as working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. It cannot be said that the removal of the location of employment by one thousand miles, the change in the schedule of work (nine days working, and five days off), and the requirement to live in quarters other than one's home, and away from one's family are insignificant or insubstantial changes in the contract of hire.

To the extent the agency failed to find that the circumstances set out in the record of hearing constituted a change in the contract of hire, it committed an error of law.

On the whole record in this case, the agency erred in denying unemployment benefits to Randy. He left the employment of employer for good cause attributable to the employer. Accordingly, this matter should be remanded to the agency for the appropriate award of unemployment benefits.

REVERSED AND REMANDED.

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

This case involves a question of law, not social policy. Our job is to determine if the law, as established by the legislature, was properly applied by the administering agency and reviewed by the district court.

Here the employee is disqualified from receiving unemployment benefits if the agency finds he knew at the time of hire that it was customary for employees to transfer as required by the job. No such finding was made because the agency improperly applied the law. The agency's finding focused on what the employee found out about the job requirements one or two months after he started. The hearing officer failed to follow the agency's own rule, which requires a finding of what were the job conditions known "at the time of hire." To gloss over this legal standard by deeming "near the time of hire" to be the equivalent of "at the time of hire" simply fails to apply the law.

There is no suggestion, let alone a direction, from the legislature that the legal standards of the Employment Security Act to be applied by the courts are flotation devices moving with the currents of economic condition. Whether the economy is flourishing or floundering is not the legal issue. Nor does the law deny benefits to employees of "good guy" employers and give benefits if the employer is a "bad guy." There is no test fixed by legislative enactment or administrative rule that conditions eligibility for benefits on who is the most accommodating—the employer or employee.

Law works best, and needs less fixing, when it is properly applied. When fixing is needed, appeals to the legislature should come from the politicians not the courts.

I would remand this case to the administering agency for correct application of the law and redetermination of the employee's eligibility.

Hayden, J., joins this special concurrence.

I respectfully, but vigorously, dissent. It is indeed admirable that the petitioner-employee has such a strong desire to spend more time with his family. However, weighing all of the factors together, it is my view that this unusually strong desire then should be borne by the employee, not by the employer and at public expense.

While the majority contends the narrow legal issue is whether the employee knew at the time of hire that it was customary for employees to transfer to new locations as provided in 370 Iowa Administrative Code section 4.25(32), I feel a much broader perspective is necessary to properly address the issue presented. In my view the facts of this case present a direct conflict between section 4.25(32) of the administrative code and the spirit and purpose of employment security as embodied in Iowa Code chapter 96. Iowa Code section 96.2 provides, in relevant part:

The achievement of social security requires protection against this greatest hazard of our economic life [involuntary employment]. This can be avoided by encouraging employers to provide more stable employment Unemployment reserves [are established] for the benefit of persons unemployed through no fault of their own.

Thus, inquiring into whether the employer provides stable employment and whether any fault for the unemployment is attributable to the employee is not tantamount to using impermissible factors to express one's social policy views as Judge Snell suggests. The legislature enacted the Declaration of State Public Policy, § 96.2, as a guide to judicial tribunals so that unwarranted results, as I fear the majority reaches, could be avoided.

Given the apparent tension between the purpose of chapter 96 and the result in this case from literally applying Iowa Administrative Code section 4.25(32), the bottom-line question I pose is to what extent must an employee

go to accommodate an employer who cannot find work contracts in his field within this state.

The employer did everything possible to accommodate the employee under the circumstances. The fact remains, especially in a troubled economy such as Iowa's, that Iowa employees who have opportunities to work elsewhere, but choose not to do so, should not be able to receive unemployment compensation solely because of their strong personal preferences. In an ideal economy, the employee would be able to work in the same geographic location in which his family lives. However, this possibility does not exist in all cases under the current state of economic affairs.

The employer did more than his share to adapt to this situation. He found work in Texas, provided free air fare to Texas for petitioner, gave petitioner a \$2.00 an hour raise, and allowed petitioner to work nine consecutive days with five consecutive days off so that petitioner could spend more time with his family. After all these concessions and sacrifices were made by the employer, the employee, without any accommodation, quit his job. I believe an employee who makes choices like the petitioner did acts at his own peril and should not be able to receive unemployment benefits when he quits a good job. Given strains already placed on the unemployment compensation fund, an expenditure under these circumstances is unwarranted and contrary to what I believe to be sound public policy as embodied in Iowa Code section 96.2.

I have no difficulty whatsoever in taking judicial notice of a faltering and badly bruised economy within this state. Under such circumstances, the government and the employer, as well as the employee, must make some extra efforts in difficult times to do their part in alleviating the financial stresses of all parties. Consistent with the mandate of Iowa Code section 96.2, the employer did all he could reasonably be expected to do and perhaps more; the

employee did not do what was reasonable under the economic circumstances of the times, so I would affirm the decision of the agency and the trial court.

Iowa Code section 96.2, Declaration of State Public Policy Guide for interpretation provides:

96.2. Guide for interpretation. As a guide to the interpretation and application for this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and the worker's family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. 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, 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 supplied]

Wiese's employer found it necessary to temporarily assign him to Texas for an approximate two-month period because of the poor economic climate in Iowa.

In responding to Wiese's claim, the employer wrote the following letter describing the conditions under which Wiese would work in Texas:

Job Service of Iowa
1000 E. Grand
Des Moines, Iowa 50319

Re: Randy L. Weise unemployment benefits.

Randy Wiese was hired November, 1981, and has been in our employment until October 15, 1983. When hired he was informed that there would be some out-of-town work. This project has been known to all the men since June of 1982. We feel this was ample notice. We feel we did all that was possible to make this job worth while for the men.

1. Men to be paid \$2.00 per man more than their regular salary when working out of town.
2. Men to be flown to and from job site, if they drove a company vehicle or elected to drive, they would be paid

- the air fare. This would be more than an hourly wage if they were paid driving time.
3. All meals were furnished, with a choice of evening dinner locations with no limit on dinner cost.
 4. A near new 4 bedroom 2 bath home was rented in Frisco, Texas for the crew, with all new beds and linens furnished, maid service to clean, change bedding and laundry was provided.
 5. Work days were scheduled to be from Wednesday through Saturday with Sunday off; then Monday to Thursday noon. They would then fly home, giving them a five day week-end.
 6. If any man wished to stay over the 5 day week-end, he would be given the round trip air fare (approximately \$250.00), the use of the house and vehicle.
 7. One television was furnished and 1 telephone call home per day at no expense to the men.

The first few days the Television and phone were not in the home, but were shortly there after.

Randy worked 1 period then elected not to return, this left our firm with a project started and needing more labor to continue.

We have tried to be fair to our employees even to the point of paying the complete cost of health insurance (Blue-Cross&Blue Shield) even when the men are layed off due to lack of work.

With all of these benefits and considerations we feel unemployment compensation is unwarranted.

Sincerely

/S/ ROBERT E. JOHNSTON

Robert E. Johnston, Pres.

Johnston Development Company

Wiese quit because he couldn't be away from his family so much. Wiese was inconvenienced by his employer's attempt to keep him gainfully employed in difficult economic times.

Common sense tells me this is not what the legislature intended in Iowa Code section 96.2 when they set forth their guide for interpretation and talked of unemployment reserves being used for the benefit of persons unemployed through no fault of their own and the need to encourage employers to provide more stable employment. As Judge Donielson tells us in his dissent and we all recognize, Iowa is in serious economic difficulty. Johnson Development, the employer here, provided a reasonable alternative to keep its employees working. They are trying to provide stable employment. In a state where many

people are unable to find employment and businesses are closing daily, it makes little sense to penalize employers who seek reasonable ways to provide stable employment. This employer will be penalized by having to pay higher unemployment taxes by virtue of this decision. See Iowa Code § 96.7(3)(2).

There is no justification for penalizing an employer who reasonably modifies working conditions but keeps his employees employed. Nor is there justification for jeopardizing the availability of adequate benefits to those truly unemployed through no fault of their own. This is true no matter what the economic conditions.

I challenge our legislature to consider legislation to correct this inequity so employees will not be able to utilize reasonable and justified work modifications as just reason for terminating their employment and drawing benefits. A strong and solvent employee security system is important to this state. Employees truly unemployed through no fault of their own must be assured of adequate benefits.

I dissent because, unlike the majority, I do not believe Wiese is entitled to benefits under current law.

The hearing officer determined:

Section 96.5-1 of the IOWA CODE provides:

"An individual shall be disqualified for benefits: If he or she has left his or her work voluntarily without good cause attributable to his or her employer, if so found by the department."

The record indicates that the claimant voluntarily terminated his employment without good cause attributable to the employer because of his refusal to transfer to another location for a temporary job when it was known near the time of hire that it was customary for employees to transfer as required by the job. See Iowa Administrative Code Section 370-4.25(32). The claimant contended that it was a personal hardship to him to be away from his family; however, it is the position of the hearing officer that the temporary nature of the job and the fact that the employer was providing all expenses to the claimant while away from the state of Iowa is an overriding

factor which must be considered. It is the position of the hearing officer that the claimant voluntarily terminated his employment without good cause attributable to the employer and benefits shall be denied to the claimant.

I determine there is evidence in the record that Wiese knew when he was hired there would be out-of-town work. (See letter of Johnston set forth earlier in this dissent). The agency found the facts against Wiese on the issue of voluntarily terminating his employment. It found against him on the issue of good cause. It did so on a record showing Wiese was a carpenter who would work at different locations and he had been told he would work out of town when he took the job. I determine the agency reasonably and properly applied the law and made a finding consistent with the evidence.

I would make the same decision irrespective of the economic conditions. However, unlike Judge Snell, I do not feel the courts should operate in a vacuum. We must be sensitive to all issues. Iowa's current economic conditions should not be ignored.

I would affirm the trial court's decision.