

IN THE COURT OF APPEALS OF IOWA

No. 1999-301 (9-531) / 99-318

Filed November 23, 1999

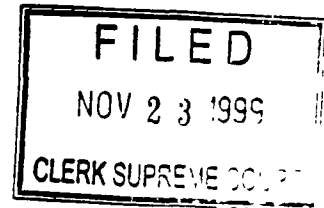
AMANDA M. MARSELL,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and TODAY'S TEMPORARY, INC.,

Appellees.



Appeal from the Iowa District Court for Polk County, Robert D. Wilson,
Judge.

Amanda Marsell appeals from a district court ruling on judicial review affirming the decision of the Employment Appeal Board denying her application for unemployment benefits. **AFFIRMED.**

Robert C. Oberbillig of Legal Aid Society, Des Moines, for appellant.

Richard D. Ramsey, Des Moines, for appellees.

Heard by Sackett, C.J., and Zimmer, and Miller, JJ.

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ZIMMER, J.

Petitioner, Amanda Marsell, appeals from a district court ruling on judicial review affirming the decision of the Employment Appeal Board denying her application for unemployment benefits. We affirm.

Amanda Marsell commenced employment with Today's Temporary, Inc. ("Today's Temporary") in December 1994. Marsell was assigned to Rain & Hail Insurance Company. Today's Temporary gives its employees assignments of varying duration to area businesses. The individual is considered an employee of Today's Temporary, not of the business where work is done. Marsell's employment at Rain & Hail was ended by the employer on November 13, 1997, without any allegation of misconduct. She then filed for unemployment benefits. Marsell at all relevant times continued to be an employee of Today's Temporary.

Today's Temporary resisted Marsell's application for unemployment benefits, claiming Marsell was not 'available' for work from the time she left Rain & Hail until mid-January, 1998. Today's Temporary called Marsell about new positions on six occasions between November 20, 1997, and January 12, 1998, but usually reached a recording. Marsell would call back within a day, but due to the nature of the 'temping' business, the positions were often filled by the time she called back. On two of the six occasions, Marsell declined the assignments. She never called Today's Temporary on her own initiative. She finally took another assignment on January 16, 1998.

Marsell was initially awarded unemployment benefits on December 22, 1997. Today's Temporary appealed. On February 13, 1998, an administrative law judge ("ALJ") overturned the initial approval of Marsell's unemployment benefits, concluding she had not made herself available for work according to Today's Temporary's rules. The Employment Appeal Board affirmed. Marsell then petitioned for judicial review. The district court affirmed the Board, finding a factual basis for the agency to conclude that Marsell was unavailable for work during a two-month time period after she left Rain & Hail.

On appeal, Marsell argues the district court erred in affirming the Board's conclusion regarding her availability. She contends she was permitted to turn down job offers the first few weeks that were not comparable to her previous ten-dollar per hour wage. She notes the Today's Temporary employee handbook did not require her to call in every day. Marsell next contends she did not have the burden of proof to establish her availability to work pursuant to Iowa Code section 96.4(3) (1997), since Today's Temporary raised the issue. Marsell also urges the agency erroneously received evidence of her conduct occurring after November 26, 1997, the date the employer first protested her claim. She argues inadequate notice of the time frame that would be covered in the hearing violated her due process rights.

I. Scope of Review. In appeals from agency action, our review is at law, not de novo. *Henecke v. Iowa Div. of Job Service*, 533 N.W.2d 573, 575 (Iowa App. 1995); see *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992). We grant relief where substantial rights of a party have been prejudiced because the

~~agency action is in excess~~ of the agency's statutory authority, unsupported by substantial evidence, unreasonable, arbitrary or capricious, or affected by other error of law. *See* Iowa Code § 17A.19(8) (1997); *Dico, Inc. v. Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). We do not interfere with factual findings unless the evidence is uncontradicted and reasonable minds could not draw different inferences. *See Norland v. Iowa Dep't of Job Service*, 412 N.W.2d 904, 908 (Iowa 1987).

II. Marsell's Availability for Work. Marsell contends the district court and the agency erred by finding she was 'unavailable' for work from November 13, 1997, to January 16, 1998. The ALJ found Marsell did not call Today's Temporary, as required, and inform them that she was available to accept assignments during this two-month time period. On judicial review, the district court found a substantial factual basis for the agency conclusion that Marsell was aware of her employer's requirement that she make contact regarding her availability and failed to do so. Neither a discharge nor a voluntary quit are at issue in this case.

Iowa Code section 96.4 governs eligibility for unemployment compensation:

~~An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that: . . .~~

~~3a. The individual is able to work, available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c." . . .~~

See also Iowa Admin. Code r. 871-24.22(96) (1997).

~~We conclude~~ substantial evidence supports the finding Marsell was not available for work. The evidence demonstrates Marsell was aware of Today's Temporary's requirement that its employees call in on a regular basis. Marsell testified she read the employee handbook. The employee handbook states in relevant part:

It is your responsibility to call us and let us know when you are able to accept work assignments. We will attempt to place you in positions for which you are qualified. We must know when you can work and how to reach you. As soon as you know you'll be available, or that your current assignment is nearing completion, call to let us know. New assignments come in all day long, every day, and we call our clients back within 45 minutes of the time they place an order [sic]. So it's important that we know when you're available and where we can reach you quickly.

Beth Andersen, an operations manager at Today's Temporary, testified that the company employs over 400 people. Some of those people want long-term positions, others like the flexibility of working when they choose. It is difficult to know who is available on a given day unless the employees call in regularly. Andersen also testified she reminded Marsell of the need for frequent contact after her stint with Rain & Hail ended.

~~Marsell~~ also exhibited a pattern of behavior during this two-month time period which ~~suggests~~ ~~its~~ she did not want to be available for work. Marsell did not contact Today's Temporary on her own initiative, but only in response to its calls. Andersen testified she always reached Marsell's machine. Although it is clear from the handbook and the nature of the 'temping' business that jobs come up quickly, Marsell delayed responding to such messages, often calling back a day after the message was

~~received and the position~~ had already been filled. On two occasions, she turned down the assignments offered. We find substantial evidence of unavailability. Although there may be evidence to the contrary, 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. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa App. 1995). The relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Id.* We affirm on this issue.

III. Burden of Proof on Availability Issue. Marsell contends she did not bear the burden of proof on the issue of availability, since the employer was the first to raise it. We find this argument without merit. It is well established that an unemployment benefits claimant bears the burden of showing initial entitlement to benefits. Iowa Code § 96.6(2); *Norland*, 412 N.W.2d at 910. This threshold includes a showing that the employee was available for work. *See* Iowa Code § 96.4(3). The claimant has the burden of proof on availability. *Savage v. Iowa Dept. of Job Service*, 361 N.W.2d 329, 330 (Iowa App. 1984); *see* Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22(96). ~~Neither the agency nor the district court committed any error with respect to the burden of proof.~~

IV. Admissibility of Evidence of Availability Occurring after Employer's First Protest. Marsell argues the agency erred in admitting and considering evidence of her availability which occurred after the employer's first protest was filed on

November 26, 1997. She claims this deprived her of her ability to properly prepare for the hearing, in violation of her due process rights.

When the questioned evidence was introduced at the agency hearing, claimant's counsel made no specific objection. He simply stated the following:

CLAIMANT'S ATTORNEY: Judge, may I point out that the protest is filed on 11/26 and we're talking about events that occurred on December [sic].

Q [ALJ]: Okay. In light of the fact the issue is able and available we are going to take the evidence though.

CLAIMANT'S ATTORNEY: How many times are we going to take it though? I assume these are subjects of other protest (Inaudible)?

Q: I have no idea. I only have this one.

No mention is made of due process at any other point in the transcript.

We conclude this issue was not preserved for our review because it was raised for the first time before the district court. *See Peterson v. Iowa Dept. of Transp.*, 508 N.W.2d 689, 692 (Iowa 1993) (holding a party's facial challenge to an ordinance, raised for the first time on judicial review, was not preserved for supreme court's review); *Chicago and Northwestern Transp. Co. v. Iowa Transp. Regulation Bd.*, 322 N.W.2d 273, 276 (Iowa 1982) (same). A party is precluded from raising issues in the district court that were not raised and litigated before the agency, even if those issues are of constitutional dimension. *See Interstate Power Co. v. Iowa State Commerce Com'n*, 463 N.W.2d 699, 701 (Iowa 1990); *Fisher v. Iowa Bd. of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991). We decline to address it.

AFFIRMED.