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IN THE COURT OF APPEALS OF THE STATE OF IOWA

ROBERT J. PERSINGER,

Appellant,

v.

IOWA DEPARTMENT OF JOB SERVICES
and CONTINENTAL WESTERN INSURANCE
COMPANY,

Appellees.

Filed March 29, 1978

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2-66378

Appeal from Polk District Court - James F. Denato, Judge.

Appeal from decision affirming the denial of unemployment benefits. Affirmed in part, vacated in part, and remanded.

Roger D. Forman, Des Moines, for appellant.

Walter F. Maley and Blair H. Dewey, of Iowa Department of Job Services, for appellees.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

This case involves the judicial review of two decisions by respondent, Iowa Department of Job Services. The first decision denied claimant, Robert J. Persinger, three weeks of unemployment benefits for misconduct; the second disqualified him from receiving any further unemployment compensation after he rejected a job referral.

On March 8, 1976 claimant was discharged from his job as grounds keeper at Continental Western Insurance Company for refusing to spray a pre-emergent herbicide on the lawn. Persinger's refusal to apply chemicals was based upon a moral and ecological belief that the use of such chemicals is harmful to people, animals and plant life. Persinger was disqualified from three weeks of unemployment benefits on the ground that his refusal to apply herbicides constituted "misconduct." Section 96.5(2)(a), The Code; 370 Iowa Administrative Code § 4.32(1)(a).

On April 2, 1976 Persinger was telephoned by a job service interviewer and given a referral for a job with Pingrey Spray Service. The hearing examiner found that the job referral was for work as a yard laborer. Persinger refused to apply for or to inquire about this job and was thereafter disqualified from receiving any further unemployment benefits on the ground that he failed to apply for "suitable work." Section 96.5(3), The Code; 370 I.A.C. § 4.24.

These two decisions were affirmed by the hearing officer and the appeal board. Persinger then petitioned for judicial review in district court. Sections 96.6(8) and 17A.19, The Code. That court affirmed both decisions.

Our review is confined to correction of errors assigned. Section 17A.20, The Code; rule 4, Rules of Appellate Procedure; *Kliege v. Iowa Employment Security Commission*, 206 N.W.2d 123, 126 (Iowa 1973). We accord the findings of fact of the job service the deference given to jury verdicts, *Wallis v. Iowa Employment Security Commission*, 219 N.W.2d 539, 540 (Iowa 1974), if based upon substantial evidence in the record considered as a whole. Section 17A.19(8)(f), The Code. The burden is on the claimant to prove his entitlement to unemployment compensation. *Ritchey v. Iowa Employment Security Commission*, 216 N.W.2d 580, 584 (Iowa 1974).

I. Initially, Persinger argues that his refusal to spray herbicides at Continental Western Insurance Company did not constitute "misconduct" justifying the denial of unemployment benefits for three weeks. The term "misconduct," defined in 370 I.A.C. §

4.32(1), should be construed in an industrial sense, not a criminal one. See Barnum v. Williams, 436 P.2d 219, 222 (Nev. 1969); cf. 370 I.A.C. § 4.52(3)(a).

In his brief, Persinger cites Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1970, 10 L.Ed.2d 965 (1963), as support for the proposition that the first amendment protects individuals from being penalized by the state for advocating any specific moral or religious views. His reliance upon that case is misplaced. Sherbert dealt with religious beliefs, not moral and ecological precepts such as those espoused by claimant. Persinger is not being required to choose between religious beliefs and unemployment benefits. There is substantial evidence in the record considered as a whole to support the conclusion that Persinger's refusal to spray chemicals constituted industrial "misconduct." Respondent was justified in reducing claimant's entitlement to benefits.

II. Claimant also argues that his failure to follow up on the job service referral to Pingrey Spray Service should not disqualify him from receiving unemployment benefits. His argument is that the job with Pingrey was not "suitable work" within the meaning of § 96.5(3), The Code, and the administrative rules implementing that section.

Persinger's testimony was that when he received the April 2, 1976 telephone call from the job service he was informed that the job was to spray chemicals on lawns. Such work would, of course, violate his moral and ecological views.

In its present posture this portion of the case presents two questions. The first is a legal issue: whether work which would require a claimant to violate his moral standards is "suitable work" within the meaning of the Iowa Employment Security Law. The second question is one of fact, consideration of which we must postpone momentarily.

On the legal question, we find no Iowa authority. We are guided, however, by In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956). There, the Supreme Court of North Carolina considered the question of whether a job which required a Seventh Day Adventist to work on her sabbath was "suitable work" within the meaning of that state's Employment Security Law. The court held that "work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute." Id. at 514, 91 S.E.2d at 245. The court did not concern itself with whether the beliefs of the claimant in Miller were entitled to first amendment protection. The decision was based upon a construction of the statute alone. In re Watson, 273 N.C. 629, 638, 161 S.E.2d 1, 9

(1968). The statute which we must construe, § 96.5(3)(a), The Code, provides that, "[i]n determining whether or not any work is suitable for an individual, the department shall consider . . . morals. . . ." Because the statutory language construed in Miller is essentially identical to that contained in § 96.5(3)(a), see 243 N.C. at 513, 91 S.E.2d at 244, Miller is highly persuasive authority for Persinger's position. Our holding in division I that Persinger's moral and ecological beliefs are not protected by the first amendment is not relevant to the present question. Therefore, if claimant was correct in concluding that the job to which he was referred would require him to spray chemicals on lawns, that job was unsuitable, and he should not be disqualified.¹

Because the hearing officer found as a matter of law that the offered work was suitable, the second issue, the fact question, did not arise. None of the administrative agency's decisions indicate whether claimant knew that the Pingrey job would require violation of his moral standards. While there is substantial evidence in the record which could support such a finding, the finder of fact is not bound to accept even uncontroverted evidence. Cf. Daboll v. Hoden, 222 N.W.2d 727, 736 (Iowa 1974). Therefore, we cannot ourselves determine that Persinger had such knowledge. Consequently, we must remand the cause for hearing and fact-finding by the Iowa Department of Job Services on whether Persinger was justified in claiming to know that he would be required to spray chemicals on lawns. The decision denying benefits for failure to accept suitable work is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part, vacated in part, and remanded.

OXBERGER and CARTER, JJ., concur; DONIELSON and SNELL, JJ., dissent.

¹ We also note that 370 I.A.C. § 4.24(15) indicates that the Pingrey Spray Service offer would not constitute suitable work because the \$120 gross weekly pay which Pingrey offered would have resulted in a net take home pay of less than the \$107 weekly benefit to which claimant was entitled. This argument was made before the job service, but without citation to the administrative rule. However, that rule had not yet been promulgated at the time of the hearings in question.

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DONELSON, J. (dissenting)

Because I disagree with the result reached by the majority in Division II, I must respectfully dissent. As a result of the majority's decision, coverage under Iowa's unemployment compensation law is unjustifiably expanded far beyond what I believe the legislature and supreme court of our state and all others which have enacted legislation dealing with this subject ever intended or envisioned.

My disagreement stems from the majority's resolution of both the legal and factual issues posed by this portion of the case. In essence, the majority indicates that our inquiry must focus upon whether work which requires a claimant to violate his moral standards is "suitable work" within the meaning of the Iowa Employment Security Law. On the basis of the record in this case, I do not believe that the majority has properly identified the legal issue which we must consider and resolve.

From the very beginning, claimant stated in his separation statement that while he was employed as a grounds keeper/landscape gardener he was told to apply herbicides to the grass but refused to do so "due to my own personal convictions." In claimant's next written statement to Job Service, he indicated that he "[r]efused referral through DMES for personal reasons." During the first hearing on the misconduct matter, Persinger testified that he would not spread herbicides because of "[j]ust my ecological beliefs." He also indicated that although he was only a landscape gardener, he felt that the company was wrong in making a lawn out of the approximately 28 acres surrounding the building and that the grounds should have been maintained as a field.

At the hearing on the termination of benefits, Persinger testified that he would absolutely refuse to work and make money for a company which deals in spreading chemicals and fertilizers on lawns, irrespective of whether the specific job he was given entailed the actual application of herbicides. On the basis of this statement and Persinger's testimony that he doesn't eat meat and "wouldn't deal in anything such as that," one might logically infer that, assuming he were qualified, he would also refuse to work for a packing plant or meat processing company as a truck driver, janitor, landscape gardener, or in any other capacity because of his personal convictions.

The law is settled, at least in other jurisdictions, that a claimant is not entitled to unemployment compensation where he unduly limits or restricts his availability for work because of personal reasons unrelated to employment. *Dubkowski v. Administrator*,

Unemployment Compensation Act, 150 Conn. 278, 138 A.2d 658, 659 (1953); Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S.Ed.2d 624, 627 (1951); see 76 Am.Jur.2d Unemployment Compensation §§ 68-69 (1975). He may not arbitrarily limit the character of work, the area within which employment is sought or would be taken, or the wage which would be acceptable. Blackman v. Industrial Commission, Div. of Emp. Sec., 491 S.W.2d 13, 24 (Mo. App. 1973). Further, a claimant is not entitled to compensation if he attaches conditions or limitations on employment which are not usual and customary in that occupation and which he may desire because of his particular needs or circumstances, Virginia Employment Commission v. Meredith, 206 Va. 206, 142 S.Ed.2d 579, 581 (1965); Willard v. Vermont Unemployment Compensation Commission, 122 Vt. 398, 173 A.2d 843, 848 (1961); Clark v. Board of Review of Employment Sec. Division of Labor Dept., 187 Kan. 695, 359 P.2d 856, 859-860 (1961), and which serve to effectively detach him from the labor market in his community. Texas Employment Commission v. Hays, 360 S.W.2d 525, 530 (Tex. 1962); Department of Labor and Industry, Bureau of Employment Sec. v. Unemployment Compensation Bd. of Review, 203 Pa.Super. 336, 201 A.2d 310, 314 (1964).

On the basis of the record in this case, I believe that both the hearing officer and the district court correctly terminated Persinger's benefits. I wish to make it clear that I do not personally find Persinger's beliefs to be objectionable; on the contrary, I respect his views and his right to express them. However, I do not believe that the public should be forced to subsidize those beliefs while Persinger searches for a job as a landscape gardener which he deems personally acceptable. In view of the nature of gardening work, it seems highly unlikely to me that Persinger will be able to readily find a landscape job that doesn't have some involvement with chemicals or fertilizers. In my view, the conditions which he places on his employment are not usual and customary in this occupation and these limitations may very well serve to restrict his access to most jobs in his field and, for all practical purposes, serve to detach him from the labor market entirely. In addition to these considerations, I believe that the sincerity and intensity of Persinger's "ecological beliefs" were seriously undermined by his statement at the hearing that the job to which he was referred was an inadequate one because it paid only \$120 gross salary per week while he would be entitled to \$107, tax free, in unemployment benefits weekly.

The majority correctly observes that § 96.5(3)(a), The Code, provides that in determining whether or not any work is suitable for an individual, the department shall consider, *inter alia*, morals. However, I do not feel that the personal convictions held by Persinger constitute the type of moral standards which merit consideration in accordance with the terms of the statute. However, even assuming that they do, there is nothing in the record in this case which would indicate that the department didn't consider morals in making its decision. It would appear that the majority would read § 96.5(3)(a) in such a manner as to require a finding of unsuitability on the basis of this single factor in the event that the claimant has a moral-based objection to the job. There are many other factors to be considered under that section.¹ To me, the statute clearly represents a valid delegation of authority from the legislature to the department to decide whether given work is suitable or not. The construction given the statute by the majority would seem to deprive the department of the ability to make an independent determination based upon a consideration of all evidence pertaining to the various factors enumerated in the statute.

Furthermore, I am not convinced that the authority relied upon by the majority, *In re Miller*, 243 N.C. 509, 91 S.Ed.2d 241 (1956), is dispositive of the instant case. Although the majority observes that that case was decided under the statutory provisions regarding moral standards and not upon the basis of the First Amendment religion guarantees, I think it is rather unrealistic to assume that the First Amendment considerations did not enter into the resolution of the case and thereby affect the decision of the court to regard Miller's beliefs as personal moral standards worthy of protection. However, I contend that the type of religious-oriented beliefs espoused by the claimant in *Miller* are far different from the "personal" ecological beliefs held by Persinger. In my opinion, the inclusion of the type of personal convictions held by

¹ Section 96.5(3)(a), The Code, provides:

In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence, and any other factor which it finds bears a reasonable relation to the purposes of this subsection.

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Persinger in the category of moral standards justifying coverage is an unreasonable and unwarranted extension of the applicability of the unemployment compensation laws which, in my judgment, should not be sanctioned by the judiciary in the absence of a clear and definitive expression by the legislature. I would affirm the district court.

SNELL, J., joins in this dissent.