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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BERNARD C. CARR,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE and JOHN DEERE & COMPANY,

Respondents-Appellees.

Filed November 29, 1982

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2-315
2-67862

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Petitioner-claimant appeals from the district court's decision on judicial review affirming respondent-agency's denial of unemployment benefits asserting 1) that the record fails to show substantial evidence that he voluntarily quit without good cause attributable to his employer and that, in any event, pursuant to Iowa Code § 96.5(1)(d) (1981), no disqualification should have been imposed; and 2) that the record failed to show substantial evidence that he was discharged for misconduct. AFFIRMED.

John S. Allen, Waterloo, Iowa, for petitioner-appellant.

Walter F. Maley, Des Moines, Iowa, for respondent-appellee Iowa Department of Job Service.

John W. Rathert of Beecher, Beecher, Holmes & Rathert, Waterloo, Iowa, for respondent-appellee John Deere & Company.

Heard en banc.

JOHNSON, J.

Petitioner-claimant, Bernard C. Carr, appeals from the district court's decision on judicial review affirming respondent-agency's, Iowa Department of Job Service, denial of unemployment benefits. He asserts 1) that the record fails to show substantial evidence that he voluntarily quit without good cause attributable to his employer and that, in any event, pursuant to Iowa Code § 96.5(1)(d) (1981), no disqualification should have been imposed; and 2) that the record failed to show substantial evidence that he was discharged for misconduct. We affirm.

A collective bargaining agreement between the employer, John Deere & Company, and the union required employees who had been absent over a three day consecutive period to notify the employer of the reason for the absence or to present a satisfactory reason for the absence to the employer. Claimant's employment was terminated on July 9, 1980, after he had been absent from work on July 7, 8 and 9, 1980. The evidence shows that he was under a doctor's care between July 7 and July 21 for depression resulting from family problems which was manifested by physical symptoms. Claimant stated that he periodically informed the employer by telephone of the progress of his illness. He did not, however, present his doctor's certification of his illness to the employer until July 18. Because of claimant's failure to supply documentation, his employment was terminated for an alleged failure to provide a satisfactory reason for his absence from work as of July 9, 1980.

The claimant filed a claim for job insurance benefits which the employer protested. A claims deputy for the agency found that claimant had left his employment for reasons not attributable to his employer. As a consequence, claimant was disqualified from receiving job insurance benefits. On appeal, the hearing officer affirmed the disqualification, holding that claimant had voluntarily quit his employment without good cause attributable to his employer. The agency appeal board subsequently affirmed the decision of the hearing officer with one

member dissenting. Claimant then sought review in district court. The district court affirmed the final agency action and this appeal ensued.

I. Scope of Review. Pursuant to Iowa Code section 17A.20 (1981), our review in this case is limited to a determination of whether the district court made errors of law when it exercised its power of review of the agency action under section 17A.19. Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979). Section 17A.19 limits the district court's review to determination of whether the agency committed any errors of law specified in section 17A.19(8). Thus, to determine whether the district court properly exercised its power in this review, "this court applies the standard in section 17.19(a) to the agency action to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order. If they are not, reversal may be required." Jackson County, 280 N.W.2d at 429-30. Section 17A.19(8) provides that the district court shall reverse or modify the agency action if such action is effected by error in the application of law or administrative rule, or is not supported by the substantial evidence in the record made before the agency when the record is viewed as a whole. Iowa Code § 17A.19(3)(f).

II. Voluntary Quit. Claimant argues that the record made before the agency, when viewed as a whole, lacks substantial evidence to support the agency's conclusion that petitioner voluntarily quit his employment without good cause attributable to the employer. We disagree.

Iowa Code § 96.5(1) (1981) 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 agency is entitled to presume an individual has voluntarily quit employment without good cause attributable to the employer where the individual misses three consecutive days of work in violation of a company rule. 370 Iowa Admin. Code 4.25(96)(4). " 'The burden of proof is upon a claimant seeking unemployment compensation.' " Brumley v. Iowa Department of Job Service, 292 N.W.2d 126, 128 (Iowa 1980).

The hearing officer found that the claimant was employed as a full-time material handler at a wage rate of $9.17 and that claimant's employment was terminated pursuant to a provision in the collective bargaining agreement between United Auto Workers Local 838 and the employer requiring employees who are absent over a three day consecutive period to notify the employer of the reason for the absence, or to present a satisfactory reason for the absence to employer. He also found that: claimant did not go to work on July 7, 8, and 9, 1980, because of depression arising out of marital problems; claimant did see a physician during the three days, however, he did not present any certification that he had been seen by a physician until July 18, 1980, some eleven days later; claimant was sent a letter on July 9, 1980, notifying him that his employment would be terminated unless he immediately provided the industrial relations department with a satisfactory reason for the absence. The hearing officer further found that claimant did not contact the employer until July 18, 1980.

The hearing officer concluded that claimant's failure to notify the employer immediately pursuant to the collective bargaining agreement was, in effect, a constructive quit. The officer further concluded that claimant failed to overcome the presumption of voluntary quit contained in 370 Iowa Admin. Code 4.25(96)(4), by presenting substantial evidence that he had good cause for a separation which was actually attributable to his employer.

Our duty is to determine whether there is substantial evidence in the record made before the agency to support its decision. The principles governing questions of substantial evidence are well developed. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978). In making this determination, we are limited to the record made before the hearing officer. § 17A.19(7). The mere possibility that the record would support another conclusion does not permit the district court or this court to make a finding inconsistent with the

agency's findings so long as there is substantial evidence to support it. See City of Davenport, 264 N.W.2d at 312; see also Carstensen v. Board of Trustees of the Police Retirement System, 353 N.W.2d 560, 562 (Iowa 1977). Nor does the possibility of drawing two inconsistent conclusions from the evidence prevent an administrative agency's finding from being supported by substantial evidence. Cook v. Iowa Department of Job Service, 299 N.W.2d 698, 701 (Iowa 1980); City of Davenport, 264 N.W.2d at 311. The question is not whether there is sufficient evidence to warrant a decision the agency did not make, but rather, whether there is substantial evidence to warrant the decision it did make. See Deaver v. Armstrong Rubber Co., 170 N.W.2d 454, 455 (Iowa 1969).

Applying these principles, we are convinced that the record on the whole substantiates the agency's finding that the claimant voluntarily quit his employment without good cause attributable to the employer. At the hearing before the agency's hearing officer, claimant testified that the employer had two telephone numbers which could be called in order to report a medical absence. The claimant's testimony was vague concerning what number he called and precisely when any calls were made concerning this particular absence. It is the function of the agency as trier of fact to determine what part of the testimony at the hearing to accept or reject, and to determine the credibility of witnesses. That determination is not to be overturned unless the court can say that the hearing examiner erred. See Russell v. Gardner, 256 F. Supp. 1022, 1023 (D.C. Iowa 1966). The hearing officer concluded that claimant failed to notify the employer in a timely fashion, thereby implicitly rejecting claimant's vague testimony. We find that the hearing officer did not err on this matter.

III. Disqualification. Claimant argues that, if it is determined he quit his employment, no disqualification should have been imposed since he met the criteria of Iowa Code § 96.5(1)(d) (1981). Respondents argue that section 96.5(1)(d)

was not raised by claimant before the administrative agency but was raised for the first time on appeal to the district court, thereby precluding its consideration.

Section 96.5(1)(d) provides that a claimant shall not be disqualified on the basis of a voluntary quit if the department finds that:

> The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Section 96.5(1)(d) was first mentioned in the dissent by the appeal board member, prior to judicial review. Claimant argues that the hearing officer found he was absent because of illness. The hearing officer also found that claimant saw a physician during the three days of July 7, 8 and 9. From these findings, claimant argues that there was substantial evidence on which a hearing officer could base a conclusion that 96.5(1)(d) was applicable to his case.

The fact that the hearing officer could have reached a different result does not warrant our reversal on appeal. Even if section 96.5(1)(d) should have been considered, we find no notice was given the parties concerning its potential applicability. Unlike the court in Green v. Iowa Department of Job Service, 299 N.W.2d 651, 655 (Iowa 1980), we find no waiver of notice. Appellate review is limited to those matters raised and litigated before the agency. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 184 (Iowa 1980). Likewise, we see no merit in remanding this case to the agency for this determination in light of the hearing officer's finding, which we accepted above, that claimant did not notify his employer.

IV. Misconduct. Claimant argues that the record made before the agency, when viewed as a whole, lacks substantial evidence to support a conclusion that claimant was discharged for misconduct. Respondents argue that under the authority set forth in division II of this opinion, leaving work because of an illness is disqualifying under section 96.5 unless the illness is attributable to the employment or the employer. In the alternative, respondents argue that claimant's failure to comply with the collective bargaining agreement provision regarding a three day absence which requires notification to the employer, constitutes misconduct. We agree with the State's former position. There is no need to unnecessarily extend this opinion discussing matters disposed of in previous portions of this opinion.

AFFIRMED.