IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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ROBERT A. VERSTEEGH,)
Appellant,)
vs.)
IOWA SOUTHERN UTILITIES,)
Appellee,)
and)
THE IOWA CIVIL RIGHTS COMMISSION,)
Appellee.)

2-76
2-66089

Appeal from Polk District Court - Harry Perkins, Jr., Judge.

Petitioner-claimant appeals from district court's judgment affirming respondent, Iowa Civil Rights Commission's, determination that termination of his employment by respondent, Iowa Southern Utilities, was not an unfair or discriminatory practice in violation of section 601A.6(1)(a), The Code 1979, asserting that there was not substantial evidence to support the district court's decision.

AFFIRMED.

Robert W. Pratt of Hedberg, Brick, Tan, Pratt & Ward, Des Moines, Iowa, for appellant.

William R. Clark, Jr., of Herrick, Langdon & Langdon, Des Moines, Iowa, for Iowa Southern Utilities, appellee.

Victoria Herring, Assistant Attorney General, for Iowa Civil Rights Commission, appellee.

Submitted to Oxberger, C.J., Carter and Johnson, JJ.

PER CURIAM

Petitioner-claimant, Robert A. Versteegh, appeals from district court's decision on judicial review affirming respondent, Iowa Civil Rights Commission's, determination that termination of his employment by respondent, Iowa Southern Utilities, was not an unfair or discriminatory practice in violation of section 601A.6(1)(a), The Code 1979. On appeal, petitioner asserts that there was not substantial evidence to support the district court's decision. We affirm.

Petitioner was an employee of respondent-company from November, 1955, through July, 1975. He worked as a meter reader until he received a promotion in 1963 to district serviceman. During his employment, he suffered two work-related injuries, which caused some impairment of his right and left shoulders. The first injury, to his right shoulder, occurred on or about November 21, 1973. The second injury was to his left shoulder, which occurred on or about October 24, 1974. On or about April 1, 1975, it was first determined that petitioner had an estimated ten percent disability in each shoulder as a result of these injuries. The disability decreased his arm strength and ability to do work over his head in a manner preferred by his employer. Petitioner filed for, and was awarded, worker's compensation disability benefits. Thereafter, his employment was terminated by respondent-employer. Petitioner filed a complaint with the Iowa Civil Rights Commission, alleging that respondent-employer wrongfully terminated his employment on the basis of disability, contrary to the provisions of section 601A.6(1)(a), The Code. Following a hearing on the merits, the Commission determined that respondent-employer was not guilty of disability discrimination and dismissed the complaint. Petitioner thereupon filed a petition for judicial review pursuant to chapter 17A, The Code. The district court determined that the Commission's decision was supported by substantial evidence and affirmed its decision. From this adverse judgment on judicial review, petitioner appeals.

I. Scope of Review. Pursuant to section 17A.20, The Code 1981, our review in this case is limited to a determination of whether the district court made errors of law when it exercised its powers of review of the agency action under section 17A.19. Foods, Inc. v. Iowa Civil Rights Comm'n., No. 66003, slip op. at 4-5 (Iowa, April 21, 1982). Jackson County Pub. Hosp. v. PERB, 280 N.W.2d 426, 429 (Iowa 1979); City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978). Section 17A.19 limits the district court's review to a determination of whether the agency committed any errors of law specified in section 17A.19(8); Foods, Inc., slip op. at 4. Thus, to determine whether the district court properly exercised its power of judicial review "this court applies the standards of section 17.19(8) 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. Our review is not de novo. Cook v. Iowa Dep't. of Job Serv., 299 N.W.2d 698, 700-01 (Iowa 1980).

II. Substantial Evidence. Petitioner argues that the Commission's determination is not supported by substantial evidence and that the district court erred in affirming that decision. We will first enumerate those general principles important to our review of this issue. Section 17A.19(8)(f) provides that the district court shall reverse or modify the agency action if such action is "unsupported by substantial evidence in the record made before the agency when the record is reviewed as a whole." Evidence is substantial if a reasonable person would find it adequate for reaching a decision. City of Davenport, 264 N.W.2d at 311. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative agency's findings from being supported by substantial evidence. Cook, 299 N.W.2d at 700; City of Davenport, 264 N.W.2d at 311. The fact that a different or opposite result may have been

fully justified by the record is of no importance. Carstensen v. Board of Trustees of the Police Ret. Sys., 253 N.W.2d 560, 562 (Iowa 1977). The question is not whether there is sufficient evidence to warrant a decision the Commission did not make, but rather whether there is sufficient evidence to warrant a decision it did make. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1969). We regard the Commission's findings as tantamount to jury findings; where the evidence presents a question which would be properly submitted to the jury, we are bound by the Commission's findings even though we might arrive at a different conclusion from the evidence. Auxier v. Woodward State Hosp. School, 266 N.W.2d 139, 143 (Iowa 1978); Staads v. Board of Trustees of the Firemen's Ret. Pension Fund, 159 N.W.2d 485, 491 (Iowa 1968); see also Ross v. Ross, 308 N.W.2d 50, 52 (Iowa 1981); Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979). We construe such findings broadly and liberally to support rather than defeat the Commission's decision. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 298 (Iowa 1974). We do not pass on the credibility of the witnesses or the preponderance of the evidence. Reisner v. Board of Trustees of the Fire Ret. Sys., 203 N.W.2d 812, 815 (Iowa 1973). With these principles in mind, we turn to our analysis of the instant case.

A. Ability to Perform Duties. Section 601A.6, The Code, states in pertinent part:

> 1. It shall be an unfair or discriminatory practice for any:
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> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair discriminating practices prohibited by this section.

The burden of proof in a hearing to determine whether a violation of section 601A.6 has occurred is upon the Commission prosecuting the complaint. § 601A.15, The Code.

The Commission determined that due to the nature of petitioner's occupation, his disability disqualified him from performing specific tasks associated with it. Petitioner initially argues that, since he was qualified by reason of training or experience, the nature of the occupation cannot be a basis for avoiding an unfair or discriminatory practice charge. Petitioner's argument is clearly without merit. Notwithstanding the fact that petitioner has sufficient training and experience to perform the duties involved in the occupation, he is unquestionably unqualified to engage in the particular operation if, at the time of discharge, he is incapable of performing the specific duties relating to it, in a reasonably competent and satisfactory manner. (emphasis supplied). See Foods, Inc., slip op. at 11.

Petitioner's second argument is that the record lacks substantial evidence to support a finding that petitioner is incapable of performing the duties associated with his occupation. While we note that there is some conflicting evidence on this issue, we find substantial evidence to support the Commission's and district court's determinations. Petitioner's personal physician testified that in March of 1974, while he believed petitioner would eventually be able to perform his employment duties, he might experience fatigue somewhat faster than he had previously while working with his arms above his head. His prognosis for returning to full functional ability was equivocal. Essentially, the doctor relied upon the patient's experience in performing his duties to determine if any incapacitation existed. In April, 1975, this physician determined, on the basis of petitioner's difficulty in working with his arms up in front of him, that petitioner had a ten percent permanent disability in both shoulders. This represented an overall disability of

12-15%. On May 19, 1975, petitioner was referred to a consulting physician by respondent-employer. This physician's diagnosis concurred with petitioner's personal physician's opinion. The consulting physician noted that petitioner had difficulty in reaching overhead or forward, but that he was performing his work activities satisfactorily by avoiding use of heavy tools in working with his arms above his head. This physician's prognosis was that residual functional impairment was anticipated. Respondent-employer's medical consultant testified that on the basis of these medical reports, but without having examined petitioner himself, petitioner would not have been able to pass the company's physical. Respondent-employer's director of personnel testified that the company's safety rules required an employee to work below the conductors rather than above to prevent electrical shock. He testified that, based upon petitioner's testimony, he was of the opinion that petitioner was not complying with the company's safety standards because he was not working in a safe position. On this record, we conclude the Commission's determination that petitioner was unable to perform the duties of his occupation is supported by substantial evidence. We are further convinced its conclusion, that respondent-employer's termination of petitioner's employment was not in violation of section 601A.6(1), The Code, is not in error.

B. Employer's Accommodation. Petitioner argues that the record lacks substantial evidence to support the Commission's finding that there was no workable accommodation which respondent-employer could have made. We agree with the district court's conclusion that there was substantial evidence to support the Commission's finding.

First, petitioner asserts that the burden of proof was upon the respondent-employer to prove that no accommodation could be accomplished. We do not believe this assertion properly states respondent-employer's burden. Commission

rule 7.2(6)[1], in effect at the time of petitioner's separation, provided:

> An employer must attempt to make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the employer can demonstrate that such accommodation would impose an undue hardship on the conduct of the employer's business. In determining the extent of an employer's accommodation obligations, the following factors shall be included (a) business necessity, and (b) financial cost and expenses. (emphasis added)

240 I.A.C. § 7.2(6). From our review of the record, we conclude that there is substantial evidence in the record to support the determination that a reasonable accommodation could not be made. Respondent-employer's personnel director testified that at the time of petitioner's discharge there were no openings for other positions in the geographical district in which petitioner works. There was no provision in the union collective bargaining agreement which permitted one employee to force another employee out of a job in such a situation. Further, the record reflects that petitioner was the sole company employee in the town where he lived and worked. Finally, the record as a whole indicates that petitioner was at all times insisting that he be employed in his former job as a district serviceman.

Finding no error by the district court, we affirm its decision.

AFFIRMED.

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[1] The comparable rule in the present code, rule 6.2(6), provides:

> Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

240 I.A.C. § 6.2(6).