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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HARNISCHFEGER CORPORATION,

Plaintiff-Appellant,

vs.

ALLEN J. MEIER, Commissioner of Labor for the State of Iowa,

Defendant-Appellee.

Filed December 30, 1981

1-230
2-64863

Appeal from Linn District Court, Louis W. Schultz, Judge.

Plaintiff appeals the trial court's ruling dismissing the petition for declaratory judgment and injunction, which raised a constitutional challenge to the provisions of section 88.6(1), The Code 1979. AFFIRMED.

Patrick M. Roby and Thomas M. Collins, Jr., of Shuttleworth & Ingersoll, Cedar Rapids, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Thomas D. McGrane, Assistant Attorney General, for defendant-appellant.

Heard by Oxberger,C.J., and Donielson, Snell, and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Plaintiff appeals the trial court's ruling dismissing the petition for declaratory judgment and injunction, which raised a constitutional challenge to the provisions of section 88.6(1), The Code 1979. We affirm the trial court's dismissal of the petition for declaratory judgment.

A compliance Safety and Health officer of the Iowa Bureau of Labor attempted to inspect plaintiff's premises located in Cedar Rapids. After entry was refused, the officer sought a warrant to permit inspection, pursuant to the Iowa Safety and Health Act, in the Iowa District Court for Linn County. The district court judge executed a warrant to permit inspection of plaintiff's operations in Cedar Rapids. Under protest, plaintiff permitted the agent to inspect the premises. As a result of the inspection, Harnischfeger was cited for more than fifty violations of the Iowa Occupational Safety and Health Act. Penalties amounting to $21,360 were assessed against Harnischfegar.

Harnischfeger then filed an action pursuant to Iowa R. Civ. P. 261, 262, seeking a declaration that (a) section 88.6(1), The Code 1979, is unconstitutional if it allows an inspection without a warrant and (b), regardless of the constitutionality of section 88.6, the warrant was not authorized by Iowa law. Plaintiff also sought to have the inspection declared invalid and the defendant enjoined from seeking access to inspect the premises. The district court dismissed the action on the ground plaintiff failed to exhaust the available administrative remedies. Plaintiff appeals the ruling of the district court claiming there was no need to exhaust the administrative remedies for the following reasons: (a) since the constitutional question presented in this case was not within the realm of the agency's expertise, the issue need not have been resolved in the first instance by the agency; (b) the constitutional question was within the exclusive jurisdiction of the district court; and (c) an agency ruling would not obviate the need for a ruling on the constitutional issue. We affirm the trial court's conclusion plaintiff's petition should be dismissed for failure to exhaust his administrative remedies.

Judicial review of agency action pursuant to section 17A.19(1) is normally available only after all adequate administrative remedies are exhausted. A failure to exhaust the available administrative remedies is a jurisdictional defect in the district court. Richards v. Iowa State Commerce Commission, 270 N.W.2d 616, 619 (Iowa 1978); Elk Run Telephone Co. v. General Telephone Co., 160 N.W.2d 311, 315 (Iowa 1968). The trial court

below dismissed plaintiff's claim, finding the court lacked subject matter jurisdiction due to plaintiff's failure to exhaust the available administrative remedies. Cf. Myers v. Cople, 258 N.W.2d 301, 303 (Iowa 1977)(which indicates a failure to exhaust administrative remedies goes to the question of subject matter jurisdiction.) Our review of a dismissal for lack of subject matter jurisdiction is on errors assigned. Kalo Brick and Tile Co. v. Chicago and Northwestern Transportation Co., 295 N.W.2d 467, 468 (Iowa App. 1979); Moraveck v. Davenport Community School District, 262 N.W.2d 797, 800 (Iowa 1978); cf. Berkely International Co., Ltd. v. Devine, 289 N.W.2d 600, 602 (Iowa 1980)(a case concerning appellate review of the denial of a special appearance contesting the trial court's jurisdiction). Consequently, the findings of the trial court have the force and effect of a jury verdict. Id. We are not, however, bound by the trial court's application of legal principles or its conclusions of law. Id.

The rule prohibiting judicial review until all administrative remedies have been exhausted does not control unless two conditions are present. Rowen v. Le Mars Mutual Insurance Company of Iowa, 230 N.W.2d 905, 909-10 (Iowa 1975). Those conditions are (a) an administrative remedy must exist for the claimed wrong; and (b) the statute must expressly or impliedly require that remedy be exhausted before resort to the courts. Id.

After reviewing chapter 88, The Code 1979, we conclude the agency has primary and exclusive jurisdiction over the administrative remedies, which implies a party must exhaust adequate administrative remedies. Section 88.8, The Code 1979, provides the procedure for enforcement of citiations issued under section 88.7, The Code 1979. Section 88.8 contemplates notice being given to the cited employer for any penalty assessments. § 88.8(1), The Code 1979. The employer then has a period of time to file with the agency a notice of contest of the penalties. Section 88.8(3) requires the agency to hold a hearing if the employer contests the citations. The agency is authorized to affirm, modify or vacate the citation or proposed penalty. Section 88.9(1) provides for judicial review of an agency order under section 88.8(3). By its own terms, section 88.9(1) requires judicial review be sought in accordance with the Iowa Administrative Procedure Act, with the exception of different venue restrictions. According to section 17A.19(1), The Code 1979, judicial review of the agency action in the district court is permitted only by "[a] person or party who has exhausted all adequate administrative remedies. . . ." By the relatively comprehensive procedure for contesting a citation through the agency hierarchy, we conclude the legislature intended

the agency in this case be the exclusive forum to initially be exhausted prior to resort to the judiciary.

Our conclusion on that issue leads to the plaintiff's contention the agency is incapable of providing an adequate remedy. Plaintiff maintains the agency is without power to provide relief due to the constitutional nature of the claim. The thrust of plaintiff's claim is the notion plaintiff is required to pursue only those administrative remedies that exhibit a potential for providing adequate relief. Plaintiff's theory is since a constitutional question is presented, which the administrative agency is without authority to resolve, redress to the agency would be, in this case, futile. See Oliver v. Iowa Power & Light Co., 183 N.W.2d 687, 691 (Iowa 1971). Being futile, prior resort to the agency should not be required.

In Matters v. City of Ames, 219 N.W.2d 718 (Iowa 1974), the supreme court embraced the notion administrative agencies cannot resolve constitutional questions, which plaintiff in this case has asserted. Id. at 719. The court in Matters noted, however, exhaustion of administrative remedies will still be required, notwithstanding the existence of constitutional claims, if administrative action might make judicial determination of the constitutional question unnecessary. Id. at 719-20. We are of the opinion the administrative agency has the ability and power to provide adequate relief to plaintiff without resolving the constitutional questions. See § 88.8(3), The Code 1979. Since the constitutional challenges asserted by plaintiff may be mooted by agency action (see Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 837 (Iowa 1979); Iowa Industrial Commissioner v. Davis, 286 N.W.2d 658, 662 (Iowa 1979)), we conclude plaintiff has an adequate administrative remedy that must be exhausted prior to resort to the judiciary, unless an exception is applicable, which is plaintiff's next argument.

Plaintiff contends even if the agency has the power to resolve the claims asserted, plaintiff is entitled to immediate review of the claims notwithstanding the exhaustion doctrine. Essentially, plaintiff is arguing irreparable injury will be sustained unless the district court bypasses the administrative remedies and exercises its jurisdiction, citing Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830 (Iowa 1979), as authority. Under Salsbury Laboratories "a litigant who would suffer irreparable harm from administrative litigation delay may proceed to court without exhausting administrative remedies." Id. at 837. Plaintiff claims the expense of litigation and the possibility of continuing searches in violation of plaintiff's fourth amendment rights constitutes irreparable harm.

In Salsbury Laboratories, the court noted "under most circumstances, monetary losses caused by litigation expenses or deprivations of earnings are insufficient to be considered irreparable injury." Id. The trial court found in this case no unusual circumstances that would elevate plaintiff's litigation expenses to the dignity of irreparable harm, and we agree. Regarding plaintiff's fear of future searches, we hold the plaintiff's speculative fear of such searches is not a sufficient showing of irreparable harm under Iowa Industrial Commissioner v. Davis, 286 N.W.2d 658, 661-62 (Iowa 1979). See St. Regis Paper Co. v. Marshall, 591 F.2d 612, 615 (10th Cir. 1979). There is no clear showing of irreparable injury from anticipated agency action that justifies judicial intervention prior to exhaustion of administrative remedies. We are in agreement with the trial court that judicial intervention was premature. We affirm the trial court's dismissal of the complaint and remand the case for further agency action.

AFFIRMED.