IN THE COURT OF APPEALS OF IOWA

No. 17-0560
Filed November 22, 2017

RUSSELL BUNGER,
Plaintiff-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Andrea J. Dryer, Judge.

Russell Bunger appeals the district court's affirmance of the Employment Appeal Board's denial of his request for unemployment benefits. **AFFIRMED.**

Bradley M. Strouse of Redfern, Mason, Larsen & Moore, P.L.C., Cedar Falls, for appellant.

Rick Autry of Employment Appeal Board, Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ.

VAITHESWARAN, Presiding Judge.

Russell Bunger sought judicial review of an Employment Appeal Board decision denying his claim for unemployment compensation benefits after determining he voluntary quit without good cause attributable to the employer. The district court affirmed the agency decision. This appeal followed.

I. Agency Decision

An administrative law judge found that Bunger worked as a part-time "sandwich artist." After his last day of work on July 12, 2013, "his availability changed." Bunger moved from Fort Dodge to Cedar Falls to attend college and "requested to be scheduled one day a month" thereafter. The ALJ further found:

> [T]he employer scheduled him for one day in August 2013, but he was a no-call/no-show. The employer never heard from the claimant after July 12, 2013, until after he filed his claim for unemployment insurance benefits effective January 5, 2014. The claimant admitted that he never contacted the employer after his last work day, because he was waiting for [the] co-manager . . . to contact him when she had work available.

The ALJ made the following determination:

> The evidence in this case establishes that the claimant initiated the separation of employment. If he truly wanted to continue working, it was his duty to contact the employer to get on the schedule. Quitting to relocate and/or to go to school is presumed to be a voluntary separation without good cause attributable to the employer. *See* 871 IAC 24.25(2) and (26).

In a final agency decision, a majority of the Employment Appeal Board affirmed the decision in its entirety.

II. Analysis

Bunger takes issue with the agency's fact findings and its determination that he voluntarily quit without good cause attributable to the employer. Our review of

the fact findings is for substantial evidence. *See* Iowa Code § 17A.19(10)(f) (2014). We review the Employment Appeal Board's application of law to fact to determine whether it is "irrational, illogical, or wholly unjustifiable." *Id*. § 17A.19(10)(m).

There is no dispute that Bunger left Fort Dodge for college and his last day of work was July 12, 2013. There also is no real dispute that the employer scheduled Bunger to work in August and Bunger did not appear for work.[1] Finally, it is undisputed Bunger failed to contact his employer to check on his work schedule after July 2013.

The only real dispute centers on whether Bunger was to be personally contacted by the employer about shift postings. Bunger testified he stopped in every weekend to check on his schedule but it was the employer's practice to phone or text him about the days he was to work and he did not receive this type of communication with respect to the August schedule. The employer, in contrast, stated it was not "[the employer's] responsibility to call [Bunger] and tell him when he is scheduled. It's [Bunger's] responsibility to stop in and/or call the store and check to see when he works." The agency accepted the employer's testimony on this score. This was its prerogative. *See Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 468 (Iowa 2017) ("The law is well-settled. It is the agency's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue." (citations omitted));

[1] Although the employer did not provide a hard copy of the work schedule listing Bunger in August and Bunger implies the employer never really scheduled him, he did not furnish any evidence to controvert the agency finding that he was scheduled to work a shift in August.

Mosher v. Dep't of Inspections & Appeals, 671 N.W.2d 501, 508 (Iowa 2003) ("An agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence." (citation omitted)).

Bunger nonetheless argues the agency failed to consider his "inten[t] to maintain his employment" and his employer's "inten[t] to continue scheduling him." This may well have been the intent of both on Bunger's last day of work, but the agency discerned a contrary intent after that date. The record supports the agency findings. When Bunger did not appear for his scheduled shift in August and did not contact the employer, the employer surmised he quit and stopped putting him on the schedule. Substantial evidence supports the agency's fact findings.

We turn to the agency's application of law to fact. Our unemployment compensation law states, "An individual shall be disqualified for benefits . . . [i]f the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department." Iowa Code § 96.5(1). "[A] voluntary quit as a matter of law requires a volitional act on the part of the employee." *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179, 209 (Iowa 2016). Bunger argues the agency relied on his failure to act and any disqualification for "*failing to act . . .* renders the volitional act requirement meaningless and contrary to both law and the policy goals related to Iowa's unemployment protection system."

True, Bunger's non-appearance for his August shift and his lack of initiative in calling his employer could be deemed a failure to act. But, as the court stated in *Irving*, "the volitional act of refusing to" do something may "be considered a voluntary quit." *Id.* The agency essentially determined that Bunger's failure to make contact with the employer in August, September, October, November,

December, and January amounted to a volitional act. *See Brockway v. Emp't Appeal Bd.*, 469 N.W.2d 256, 258 (Iowa Ct. App. 1991) (affirming determination that employee voluntarily quit without good cause attributable to the employer where he failed to return to his employer and offer to perform services after recovering from an injury). We cannot conclude the Employment Appeal Board's application of law to fact was irrational, illogical, or wholly unjustifiable.

We affirm the judgment of the district court affirming the decision of the Employment Appeal Board.

AFFIRMED.