IN THE COURT OF APPEALS OF IOWA

No. 0-820 / 10-0900
Filed November 24, 2010

GREGORY L. BARBER,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and
CONTRACT TRANSPORT, INC.,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Petitioner appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment insurance benefits. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Andrew Joseph Stoltze and Bruce H. Stoltze of Stolze and Updegraff, P.C., Des Moines, for appellant.

Richard Autry, for appellee Employment Appeal Board.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Gregory Barber appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment insurance benefits. We reverse and remand this case to the district court for consideration of whether Barber voluntarily quit with good cause attributable to his employer because of a change in the contract of hire.

***I. Background Facts and Proceedings*.**

Claimant Gregory Barber was hired by employer Contract Transport, Inc. (Transport) on March 5, 2008, as an on-call truck driver. Transport's operation required its on-call drivers be available for work seven days a week, 365 days a year. Transport referred to a driver's on-call status as being "on the wheel." Being "on the wheel" required drivers to call in to Transport's dispatch to inquire whether there was work available for the driver that day. While Barber was "on the wheel," his work hours, pay, days off, and driving route varied. Barber stated he generally worked fifteen to thirty hours a week while he was "on the wheel." Although on-call drivers were required to call in daily, they were not paid for that time if there was no work available for them that day.

Two to three months after Barber began working for Transport, Barber bid for and received a full-time route at Transport. This route was pursuant to a contract Transport had with the United States Postal Service. The postal route had a set route, work hours, days off, and pay. Because the postal route had a set schedule, Barber was no longer "on the wheel" and not required to call into dispatch daily. Barber worked this route for about ten months, working approximately fifty-seven hours a week.

About one week prior to March 29, 2009, Transport's dispatcher Jorge Harwood informed Barber that Transport's contract with the postal service was coming to an end on March 29, 2009, because another transportation company had been awarded the contract. Harwood advised Barber that pursuant to a presidential executive order, Barber had "the right of first refusal" with the new contractor for the postal route.

There was conflicting testimony as to what happened next. Harwood testified he told Barber that if Barber wanted to remain a Transport employee, he would have to go back "on the wheel" and start calling in daily after March 29. Barber testified that Harwood told him he was being laid off for lack of work and that Harwood referred him to the other trucking contractor that had won the postal contract. Barber testified he talked to someone in Transport's payroll department and was told Barber would have his vacation pay deposited into his account on March 31.[1] Barber testified the payroll employee wished him luck. He testified he did not begin calling in daily to inquire if there was work available for him at Transport. On March 29, 2009, Barber filed a claim for unemployment benefits.

From April 1 through April 3, Transport noted that Barber had not called in to dispatch. A Transport employee in human resources called Barber on April 3 and informed Barber that Transport's dispatch had been trying to reach him. Barber stated to the employee that he had been laid off. The employee told

[1] It is undisputed that Barber's vacation time was paid out to him by Transport. Transport's corporate treasurer testified that Barber's vacation time was paid out pursuant to a company policy which paid a driver's vacation time to the driver at the end of the month of the employee's employment anniversary, and not because it laid Barber off.

Barber that he had not, in fact been laid off, and that he was required to go back "on the wheel" and call in daily if he wanted to continue working for Transport, and the call was ended. Transport then mailed Barber a letter stating he had not called in since March 29 and that he was required to call in each day. The letter stated that at no time did Transport inform Barber that he had been laid off. It also informed Barber of his right of first refusal for employment with the new postal contractor. The letter further advised Barber that he was to call in everyday by 10:00 a.m. for work and that three consecutive days of unauthorized absences was grounds for discipline and/or termination pursuant to Transport's policies. Barber did not call dispatch thereafter.

On April 7, 2009, Transport mailed Barber a letter informing him Transport had terminated his employment with Transport because of his failure to contact dispatch resulting in unauthorized absences violations. Transport requested that Barber turn in all of his company issued property, and Barber complied.

On April 23, 2009, a representative of Iowa Workforce Development found Barber to be ineligible for benefits, finding Barber "failed to produce evidence showing that [he] had good cause for voluntarily leaving [his] employment." Barber appealed this decision to Iowa Workforce Development's Unemployment Insurance Appeals Section, and a hearing was held before the administrative law judge (ALJ). Barber testified he contacted the other trucking contractor that had won the postal contract immediately after receiving their number, and he applied for a position with that company. Barber stated the company said they were offering him a job, but not immediately. At the time of the hearing before the ALJ, Barber was still waiting to hear from the new contractor. Barber testified that

after his status was changed back to "on the wheel," he was not willing to continue working for Transport, because the hours and pay would not be the same.

Thereafter, the ALJ affirmed the ineligibility determination on the basis Barber had voluntarily quit his employment without good cause attributable to Transport. Specifically, the ALJ concluded:

> [Barber] did not intend to continue working for [Transport] even though work was available to him. It was the same work for which he had been hired back in March 2008. The fact that he never informed the employer he was quitting does not mitigate this. He left in the expectation of accepting another job which did not materialize. Under [Iowa Code section 96.5(1)(a)] his quit in anticipation of another job does not constitute good cause attributable to the employer for quitting.

Barber then appealed to the Employment Appeal Board (EAB) and submitted a brief asserting he had satisfied his burden to establish that good cause for a voluntary quit of employment existed, because he suffered a substantial change to his contract of hire, among other things. The EAB affirmed the ALJ's result, but modified the ALJ's reasoning and conclusions of law to include a dual analysis stating: "This case could be analyzed as a discharge for which the employer has satisfied their burden of proving disqualifying misconduct." The EAB did not address Barber's assertion that he suffered a change to his contract of hire.

After the EAB's decision, Barber filed a petition for judicial review with the district court. In its ruling affirming the EAB's decision, the court did consider Barber's assertion that his change in status to back to "on the wheel" constituted a "change in the contract of hire," which would make him eligible for benefits.

However, the court concluded that, regardless of whether the change of status was a "change in the contract of hire," Barber was required to give Transport notice of his objections to, or problems with, the change of status. Because Barber failed to give such notice, the court found that he did not meet this "condition of entitlement to unemployment benefits." The court found there was sufficient evidence in the record for a reasonable person to conclude that Barber voluntarily quit his employment in anticipation of accepting other employment but did not accept such employment or perform services in the new employment, and thus there was sufficient evidence to find that Barber voluntarily quit his employment without good cause attributable to Transport pursuant to section 96.5(1)(a). The court also found that under Iowa Administrative Code rule 871-24.25(4), Barber's three-day no call/no show was deemed to be a quit without good cause attributable to the employer. Finally, the district court found that the EAB's consideration of the additional reason for denying benefits was properly considered and sufficient evidence supported the EAB's conclusion that Barber was discharged for disqualifying conduct.

Barber appeals.

***II. Scope and Standards of Review*.**

Iowa Code Chapter 17A (2009), the Administrative Procedure Act, governs our review of claims concerning unemployment benefits. *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d 752, 754 (Iowa 2002). "On appeal from judgment entered on judicial review of agency action, our review is limited to the correction of errors at law." *Gaffney v. Dep't of Employment Serv.*, 540 N.W.2d 430, 433 (Iowa 1995). We review the district court's decision by applying

the standards of section 17A.19 to agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). We are bound by the agency's findings of fact if those findings are supported by substantial evidence when the record is reviewed as a whole. *Sharp v. Employment Appeal Bd.*, 479 N.W.2d 280, 282 (Iowa 1991). We are not, however, bound by the agency's legal conclusions; we may correct misapplications of the law. Iowa Code § 17A.19(10)(c).

Evidence is substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *Eaton v. Employment Appeal Bd.*, 602 N.W.2d 553, 554 (Iowa 1999). Evidence is not insubstantial merely because it would have supported contrary inferences. *Freeland v. Employment Appeal Bd.*, 592 N.W.2d 193, 197 (Iowa 1992). The ultimate question is not whether the evidence supports a different finding, but whether it supports the finding the agency actually made. *Id*. The court should broadly and liberally apply agency findings to uphold, rather than defeat, an agency's decision. *Titan Tire Corp*., 641 N.W.2d at 754.

***III. Discussion*.**

A worker is typically not eligible for unemployment benefits if he or she voluntarily quits without good cause attributable to the employer. *See* Iowa Code § 96.5(1). A voluntary quit generally "means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated." Iowa Admin. Code r. 871-24.25(96). "[T]he claimant has the *initial* burden to produce

evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs 'a' . . . ." Iowa Admin. Code r. 871-24.25 (emphasis added). "The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5." *Id*.

Iowa Administrative Code rule 871-24.26 was promulgated pursuant to Iowa Code section 96.5(1). According to rule 871-24.26(1)-(28), good cause attributable to the employer includes, among other things:

> 24.26(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.
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> 24.26(2) The claimant left due to unsafe working conditions.
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> . . . .
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> 24.26(4) The claimant left due to intolerable or detrimental working conditions.
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> . . . .
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> 24.26(6) Separation because of illness, injury, or pregnancy. . . .

Of the numerous conditions stated in rule 871-24.26 subsections (1) through (28) that allow one to attribute good cause for leaving to the employer, only one condition expressly requires notice to the employer of the problem before voluntarily quitting. *See* Iowa Admin. Code r. 871-24.26(6)(b) ("In order to be eligible under this paragraph . . . an individual must . . . before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated.").

In *Hy-Vee, Inc. v. Employment Appeal Board*, 710 N.W.2d 1, 5 (Iowa 2005), our supreme court was faced with the question of whether a claimant was required to give notice of her intent to quit because she voluntarily quit as a result of intolerable working conditions as set forth in rule 24.26(4), not health problems as set forth in rule 24.26(6)(b). The court noted that the Iowa Administrative Code had been amended in 1995 to add an intent-to-quit requirement to rule 24.26(6)(b). *Hy-Vee, Inc.*, 710 N.W.2d at 5. A proposal to add the notice requirement to rule 871-24.26(4) was later considered by the agency, but it elected not to do so. *Id*. (citing 26 Iowa Admin. Bull. 234 (Aug. 6, 2003)). Because the agency had considered but chose not to add a notice requirement to that subsection, the court concluded "that a notice of intent to quit is not required when the employee quits due to intolerable or detrimental working conditions." *Id*.

We find the court's reasoning in *Hy-Vee, Inc*. to be applicable here. The proposal considering a notice addition to rule 871-24.26(4) also proposed amending rule 871-24.26(1) to include the following notice requirement language: "The claimant must notify the employer of the problem and that the claimant will be forced to quit if the problem is not corrected." 25 Iowa Admin. Bull. 1634 (June 11, 2003). However, the agency also elected not to add the notice requirement language to rule 871-24.26(1). *See* 26 Iowa Admin. Bull. 234 (Aug. 6, 2003). Consequently, we, like our supreme court, can only conclude that a notice of intent to quit is not required when the employee quits due to a change in the contract of hire.

Here, the district court did not consider Barber's assertion that he was entitled to benefits because he voluntarily quit with good cause attributable to Transport based upon a change in his contract of hire, finding notice of such condition to the employer was a prerequisite for benefit eligibility. However, because we conclude a notice of intent to quit is not required when the employee quits due to a change in the contract of hire, we find the district court erred in determining notice in this circumstance was required. Accordingly, we reverse the decision of the district court upholding the decision of the EAB and remand for consideration of whether Barber voluntarily quit with good cause attributable to Transport because of a change in his contract of hire.

REVERSED AND REMANDED WITH INSTRUCTIONS.