IN THE COURT OF APPEALS OF IOWA

No. 2-305 / 11-1442
Filed June 13, 2012

GEORGIA NITSOS,
Plaintiff-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Georgia Nitsos appeals the district court's order granting her employer's and the Employment Appeal Board's pre-answer motion to dismiss. **AFFIRMED.**

Bradley T. Boffeli of Kurt Law Office, P.C., Dubuque, for appellant.

David Pillers of Pillers Law Offices, DeWitt, and Richard Autry of the Employment Appeal Board, Des Moines, for appellee.

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

DOYLE, J.

Wisconsin resident Georgia Nitsos filed a petition for judicial review in the Iowa District Court for Dubuque County, following an adverse decision by the Employment Appeal Board (EAB) concerning her claim for unemployment benefits. Her petition was dismissed for lack of jurisdiction because she failed to comply with Iowa Code section 10A.601(7) (2011), which requires nonresidents to file petitions for judicial review in the Iowa District Court for Polk County. On appeal, Nitsos asserts this requirement violates the Privileges and Immunities Clauses of the Iowa and United States Constitutions. We affirm.

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

Georgia Nitsos, a Wisconsin resident, applied for unemployment insurance benefits with the Iowa Workforce Development after her employment with Frontier Dubuque Hotels (Frontier), located in Dubuque, Iowa, was terminated. Nitsos followed the applicable administrative remedies in pursuing her claim before the agency. Ultimately, the EAB affirmed the administrative law judge's decision limiting Nitsos's right to collect unemployment benefits.

Nitsos then filed a petition for judicial review of her claim in the Iowa District Court for Dubuque County. Shortly thereafter, Frontier, as intervener, filed a pre-answer motion to dismiss. Frontier argued the Dubuque County District Court lacked jurisdiction to hear her claim pursuant to Iowa Code section 10A.601(7), which requires out-of-state residents to file judicial review petitions in the Iowa District Court for Polk County. The EAB filed an answer and later joined in Frontier's motion to dismiss.

Not disputing she failed to comply with the statute, Nitsos resisted Frontier's argument, asserting section 10A.601(7) was unconstitutional under the Privileges and Immunities Clauses of the Iowa and United States Constitutions. She argued her access to the courts is a fundamental right and restricting her to filing a petition in Polk County violated that right, particularly in light of the fact that had she been an Iowa resident, she could have filed in Dubuque County. She maintained that the nonresident filing requirement would not meet either the strict scrutiny or rational basis tests, and she requested that part of the statute be ruled unconstitutional and struck down.

Following an unreported hearing, the district court found section 10A.601(7) was not unconstitutional. The court then determined it lacked jurisdiction under that section and dismissed Nitsos's petition. *See Anderson v. W. Hodgeman & Sons, Inc.*, 524 N.W.2d 418, 421 (Iowa 1994).

Nitsos appeals. She contends the district court erred in dismissing her petition, asserting the same arguments she made before the district court.

II. Scope and Standards of Review.

"The grant or denial of a motion to dismiss is reviewed for errors at law." *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010). However, "[t]o the extent that we review constitutional claims, our review is de novo." *Id*. at 116-17.

III. Discussion.

Iowa Code section 10A.601(7) provides, in relevant part:

> Notwithstanding the petitioner's residency requirement in section 17A.19, subsection 2, a petition for judicial review may be filed in the district court of the county in which the petitioner was last employed or resides, *provided that if the petitioner does not reside*

> *in this state, the action shall be brought in the district court of Polk county, Iowa* . . . .

(Emphasis added.) Because the statute allows a resident to file a petition for judicial review in "the district court of the county in which the petitioner was last employed or resides," but restricts a nonresident to filing only in Polk County, Nitsos asserts the section denies her fundamental right to access to the courts, thereby violating the Privileges and Immunities Clauses of the Iowa and United States Constitutions. Before discussing the merits of Nitsos argument, we note that "statutes are cloaked with a presumption of constitutionality." *State v. Tripp*, 776 N.W.2d 855, 857 (Iowa 2010) (internal quotation marks omitted).

***A. United States Constitution Claim*.**

The Privileges and Immunities Clause of the U.S. Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 2; *see also* U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

> The guaranty contained in the federal constitution as originally adopted merely limits the power of a state to exclude citizens of other states from the privileges granted to its own citizens, and does not deprive the states of their power to deal with the rights of residents or of ingress or egress therein except to the extent of that limitation. The privileges and immunities so protected are the fundamental privileges of citizenship.

State v. Ronek, 176 N.W.2d 153, 156-57 (Iowa 1970); *see also United Bldg. & Constr. Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208, 215-16 (1984) (noting the federal privileges and immunities clause "was designed to place the citizens of each State upon the same footing with citizens

of other States, so far as the advantages resulting from citizenship in those States are concerned").

Although some interests or rights do not rise to the level of being fundamental, and accordingly, equality of treatment is not required, the United States Supreme Court has long held the Privileges and Immunities Clause of the federal Constitution protects the right of a citizen of one state to access the courts of another state. *See Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978) ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920) (recognizing the "right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of another"). Nevertheless, like several other constitutional provisions, the Privileges and Immunities Clause is not absolute in the protections it affords citizens, and a state need not extend to a visitor all of the same rights accorded to a resident. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *see also Baldwin*, 436 U.S. at 383 ("[A] State [need not] always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do."). The Clause does not require that a nonresident be given precisely identical rights in the courts of a state as resident citizens have. *Canadian N. Ry. Co.*, 252 U.S. at 561.

We agree with the district court that *Canadian Northern Railway Co. v. Eggen* is dispositive here. In that case, the Supreme Court explained:

> From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been

> imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many states may be attached under conditions which would not justify the attaching of a resident citizen's property. . . .
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> The . . . constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

Id. at 561-62. Thus, although the right of access to the courts is clearly a fundamental right that is protected by the Privileges and Immunities Clause, the Court's interpretation of the Clause's application in *Canadian Northern Railway Co.* plainly establishes the right is not impermissibly infringed merely because nonresidents are subject to more restrictive litigation requirements than residents, so long as the state provides access to the courts that is reasonable and adequate. *Id*. As one commentator noted:

> The Privileges or Immunities Clause . . . does not protect as a right of national citizenship civil litigants' right to particular procedural mechanisms guaranteeing access to the court, so long as it does not wholly preclude court access. Indeed, such a conclusion makes sense intuitively, as the Due Process Clause of the Fourteenth Amendment safeguards procedural protections. Yet, as the discussion above suggests, court access, in some form, is protected as a privilege or immunity of national citizenship. While not guaranteeing specific procedural devices or mechanisms, the Citizenship Clause and the Privileges or Immunities Clause may nevertheless protect individuals from court access barriers not recognized by due process concerns alone.

Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenshi*p, 40 Conn. L. Rev. 1477, 1498-99 (2008).

Iowa Code section 10A.601(7) clearly imposes a restriction on where out-of-state residents can file a petition for judicial review, and such restriction is not similarly imposed on Iowa residents. However, the distinction between where residents and nonresidents may file does not ipso facto constitute a violation of a nonresident's fundamental right to access to the courts as asserted by Nitsos. *See Canadian N. Ry. Co.*, 252 U.S. at 561-62. Rather, Nitsos's right of access is not impermissibly infringed upon unless the terms of access are unreasonable or inadequate to secure her right. *Id*. at 562.

Nitsos makes no showing or claim on appeal that the statutory restriction of her access to Iowa courts is either unreasonable or inadequate. At best, she makes an unsupported conclusory statement that "by forcing nonresidents to take judicial review only in Polk County, the nonresident incurs significant costs in the form of travel, time, and perhaps attorney fees that are typically higher in urban areas versus rural areas." Such a complaint simply cannot sustain Nitsos's heavy burden to prove the statute is unconstitutional. Further, she has not asserted that the Iowa District Court for Polk County has any deficiencies or inadequacies that would prevent her from instituting and maintaining her judicial review request. Nor has she suggested she cannot receive a fair hearing in Polk County. Additionally, all proceedings to date have occurred in Polk County without complaint. The administrative law judge who telephonically heard the appeal from the decision of the Iowa Workforce Development representative is an employee of the Administrative Hearings Division of the Iowa Department of

Inspections and Appeals, which is located in Polk County. The EAB, which telephonically heard the appeal of the administrative law judge's ruling is located in Polk County. On judicial review of an agency action in a contested case, the district court does not hear any further evidence. Iowa Code § 17A.19(7). Hearing on the matter, if any, may be held telephonically.

Nitsos failed to establish the statute's restriction of her access to Iowa courts is unreasonable or inadequate. We therefore conclude Nitsos did not prove Iowa Code section 10A.601(7) impermissibly infringes upon her fundamental right of access to the courts as protected by the federal Privileges and Immunities Clause.

***B. Iowa Constitution Claim*.**

Citing to *Perkins v. Board of Supervisors of Madison County*, 636 N.W.2d 58, 71 (Iowa 2001), Nitsos argues that Iowa Code section 10A.601(7) violates the Privileges and Immunities Clause[1] of the Iowa Constitution because "the statute makes a distinct classification based upon state residency." Article I, section 6 of the Iowa Constitution provides that "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Our supreme court has explained the purpose of privileges and immunities portion of the clause "is to prevent the state

[1] Our supreme court recently noted, "[w]e have regularly referred to article I, section 6 as the 'equal protection clause' of the Iowa Constitution. On a few occasions, none more recent than 2001, we have referred to it as the 'privileges and immunities clause.'" *King v. State*, ___ N.W.2d ___, ___ n.18, 2012 WL 1366597, at *14 n.18 (Iowa Apr. 20, 2012) (internal citations omitted).

from denying its citizens the privileges and immunities of national citizenship." *Perkins*, 636 N.W.2d at 72.

> Under this provision, the legislature must not act arbitrarily when it classifies citizens. "One who challenges [a] statute on this constitutional ground must negate every conceivable basis which may support the classification, and the classification must be sustained unless it is patently arbitrary and bears no relationship to a legitimate governmental interest."

Id. at 71-72 (internal citations omitted). Therefore, the burden is on Nitsos, not the EAB, to prove section 10A.601(7) is unconstitutional. She must demonstrate beyond a reasonable doubt the statute violates the Privileges and Immunities Clause and to point out with particularity the details of the alleged invalidity. *Id*. at 72. "Every reasonable doubt is resolved in favor of constitutionality." *Id*.

Nitsos asserts the statute makes a distinct classification based on state residency. The EAB does not challenge this assertion. So, we must determine whether the classification is arbitrary or bears no rational relationship to a legitimate governmental interest. *Id*.

We employ a traditional equal protection analysis when testing a challenge under the Privileges and Immunities Clause. *Id*. at 73. Nitsos urges us to apply a strict scrutiny test on the theory that the statute deprives her of a fundamental right of reasonable access to court. We apply instead the traditional rational basis test as venue does not implicate or affect fundamental rights. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992). Because this case does not involve a fundamental right or suspect class, any classification by the venue statute need only have a rational basis. *Perkins*, 636 N.W.2d at 73. Moreover, we believe that section 10A.601(7) does not abridge Nitsos's right of

access to the courts; it merely establishes reasonable procedural requirements in the exercise of that right. *See Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990) (addressing time limitation to designate expert witnesses in malpractice cases). We therefore reject Nitsos's strict scrutiny argument and apply the traditional rational basis test.

> Under this level of scrutiny,
>
> > a legislative classification is upheld if any conceivable state of facts reasonably justify it. Additionally, the guarantee of equal protection does not exact uniformity of procedure. The legislature may classify litigants and adopt certain procedures for one class and different procedures for other classes, so long as the classification is reasonable. All that is required is that similarly situated litigants be treated equally.

Id. (citation omitted). The classification must be sustained under the rational basis test "unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *Utilicorp United Inc. v. Iowa Utils. Bd.,* 570 N.W.2d 451, 455 (Iowa 1998) (citation omitted).

Before the district court, Nitsos contended "there is no conceivable legitimate government interest in treating non-residents different than residents in determining the appropriate county in which petitions for judicial review are to be filed." The EAB countered that "determining the location of businesses and the last county of employment is more complicated as businesses have become more complex and diverse." The district court agreed and found "[d]esignating one county for filing is intended to simplify, not obstruct, the process for out-of-state workers." The court concluded this "streamlining" of the process for out-of-state workers was a legitimate state interest and a Polk County venue was rationally related to that purpose.

On appeal, the EAB suggests "by allowing for a single safe haven for appeals the General Assembly simplified the process for what is inherently a complicated process, that of dealing with interstate claims." It argues:

> Again the place of last employment for the claimants who do not render services at a single fixed place is difficult to determine. Allowing such [out-of-state] claimants to file in the county of last employment is a recipe for confusion. If such a claimant picks a county thought to be the place of last employment, the parties can easily be caught in the dispute over the true locus of the employment. This unnecessary confusion, which is more likely with out-of-state claimants, is eliminated by having a single safe haven county in which to appeal.

In response, Nitsos contends "similarly situated litigants, (unemployed individuals seeking judicial review from an adverse [EAB] decision) are treated differently based upon residency. That is where the constitutional violation exists." But, Nitsos "must go beyond mere conclusions about the constitutionality of the statute; [she] must negate every reasonable basis on which the classification may be sustained." *Thomas*, 456 N.W.2d at 172. She has not done so, nor has she demonstrated the statute's classification is absurd or purely arbitrary and capricious. *See Koch v. Kostichek*, 409 N.W.2d 680, 684 (Iowa 1987). Nitsos has fallen short in meeting her heavy burden to overcome the strong presumption of constitutionality of the legislative enactment.

We therefore affirm the district court's dismissal of Nitsos's petition for judicial review for lack of jurisdiction.

AFFIRMED.