IN THE COURT OF APPEALS OF IOWA

No. 3-079 / 12-1462
Filed March 13, 2013

CHRISTINA DUCHENE,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEALS BOARD and WELLS FARGO BANK, NA,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Christina Duchene appeals from the district court order affirming the Employment Appeal Board's finding that she is disqualified from receiving unemployment benefits following her separation from Wells Fargo Bank. **AFFIRMED.**

Robert Oberbillig, Drake Legal Clinic, Des Moines, for appellant.

Richard Autry, Employment Appeal Board, Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Christina Duchene appeals from the district court order affirming the Employment Appeal Board's finding that she is disqualified from receiving unemployment benefits following her separation from Wells Fargo Bank (Wells Fargo). She contends Wells Fargo's failure to provide her with a reasonable accommodation was a justifiable reason for her to quit her employment. Finding the agency's decision was not unreasonable, arbitrary, or capricious, and it did not abuse its discretion, we affirm the decisions denying Duchene unemployment benefits.

I. Background Facts and Proceedings.

Duchene began working for Wells Fargo as a part-time loan servicing specialist in 2009. Duchene, who was diagnosed with Hepatitis C in 2003, had a number of absences, which she claims are related to her illness.[1] Wells Fargo's attendance policy lists a maximum number of days an employee is allowed to be absent from work. Duchene received a final written warning for absences on December 14, 2010. Duchene was then absent from work February 15, 16, and 19 of 2011.

On February 19, 2011, Duchene submitted a Family Medical Leave Act (FMLA) request form to Wells Fargo. The form stated it was necessary for her to work reduced hours of twenty to twenty-four hours per week, four hours per day. Attached to the form was a September 15, 2009 letter from her physician stating he "would endorse her wish to limit her work schedule to 20 to 24 hours per week

[1] Wells Fargo was aware Duchene suffered from Hepatitis C at the time she was hired.

for the foreseeable future." Approval of her FMLA request would have excused Duchene's February absences. The request was pending when Duchene voluntarily terminated her employment with Wells Fargo on April 7, 2011, because she was fearful of being terminated for exceeding the number of absences allowed by Wells Fargo's attendance policy.

Duchene filed a claim for unemployment benefits and was denied. She appealed the denial of her request.

A June 11, 2011 hearing was held before an administrative law judge (ALJ). Duchene was unrepresented at the hearing. She stated that although her Hepatitis C was not caused by Wells Fargo, her work was exacerbating her symptoms, which led to her absences. Duchene claimed she was looking for work but was unable to find part-time work. She stated, "I resign[ed] not only because of my failing health but also due to the constant fear of being terminated by my employer." Duchene admitted that her physician had not advised her to resign her position with Wells Fargo. The Wells Fargo representative agreed that if Duchene had not resigned and was not approved for FMLA leave, she would have been terminated.

The ALJ issued a decision denying Duchene unemployment benefits. The ALJ found Duchene failed to prove she is able and available for work based on the following:

> Claimant has Hepatitis C and has been restricted to working 20-24 hours per week by her physician, Bret McFarlin, D.O. She was able to work within these restrictions for Wells Fargo until April 7, 2011. Since that time the claimant has filed a claim for benefits effective April 24, 2011. She has been seeking work but is only able to work at home. She has been advised by a private

> employment agency that had placed her with Wells Fargo that there is no work available in her area of residence with her restriction to work at home part time.

The ALJ concluded, "This record does not establish that she is able and available for work. Her self-imposed limitation to work at home only does not on this record reflect that she is able and available for work."

The ALJ also found the denial of benefits was correct because she voluntarily left her employment and was not advised by a physician to resign:

> Claimant was employed with the employer from November 2009 through April 7, 2011. She voluntarily quit her employment because she was experiencing stress waiting for a response on her FMLA request. If her request was not granted she was going to be terminated but the employer was allowing the claimant to continue to work while the request was pending. Claimant saw a physician before she resigned but the physician did not recommend that she quit her employment due to stress.

The ALJ found Duchene's separation was without good cause attributable to Wells Fargo and denied benefits.

Duchene then appealed to the Employment Appeal Board. With regard to the decision to deny her benefits request based on not being able and available for work, Duchene stated she is available and ready for work "even though my illness limits me to working from my home." She stated she made an error on an online job search claim and checked the wrong box about being able and available to work. With regard to the denial of benefits for voluntarily quitting, Duchene stated the stress she was experiencing at work was due to her attending physician not returning the FMLA documents back in the time allotted by Wells Fargo, leading to Wells Fargo putting her on "pending termination." She stated her ongoing and permanent illness was being aggravated due to the

stress she was experiencing while on pending termination status. In its decision dated September 20, 2011, the board affirmed the ALJ's decisions, adopting his findings of facts and conclusions of law.

The board granted Duchene a rehearing on October 5, 2011, because she was not allowed to present a written argument based on the agency's oversight. Duchene, then represented by counsel, submitted a written argument in response to the September 20, 2011 decision. In it, she alleged the ALJ should have been alerted to the fact that Duchene's illness "was at least a potential disability as defined under 42 U.S.C.A. § 12102(1)(A)" and that "if she did have a disability, she should have been reasonably accommodated by Wells Fargo" with a part-time or modified work schedule. Duchene requested the case be referred back to the ALJ to allow development of the record regarding her potential claims of medical disability and reasonable accommodation. In its decision, issued on November 22, 2011, the board again affirmed the ALJ.

Duchene filed a petition for judicial review on December 20, 2011. She claimed her substantial rights had been prejudiced because the agency failed to consider "a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action." She also claimed the agency's decision was unreasonable, arbitrary, capricious, or an abuse of discretion.

Following a June 12, 2012 hearing, the district court entered its July 18, 2012 ruling affirming the board. The court found that substantial evidence

supported the ALJ's fact-findings. The court rejected Duchene's claim that the board abused its discretion in refusing to remand the case to develop the record regarding her claim that Wells Fargo violated the Americans with Disabilities Act by not accommodating her disability. The court noted Duchene presented "all the relevant evidence" that existed regarding her medical condition at the time of the hearing; "She does not say now what other evidence she would have presented if given a chance." The court also found Duchene made "no credible argument that the facts remotely support a finding that Wells Fargo violated the ADA by failing to accommodate her disability" which, apparently, "is to work part time from home with no restrictions on work absences." The court noted she failed to seek any such accommodation from Wells Fargo prior to voluntarily quitting her employment, and that the restriction that she must work from home is self-imposed. The court concluded "the evidence clearly shows that she did not quit for lack of accommodation in any case but instead for fear that her request for family leave would be denied."

Duchene appeals.

II. Scope and Standard of Review.

The Iowa Administrative Procedure Act, set forth in Iowa Code chapter 17A (2011), governs our review of unemployment benefits cases. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 664 (Iowa 2000). We apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255-56 (Iowa 2012). If the agency action has prejudiced the substantial rights of the petitioner

and the agency action meets one of the enumerated criteria set forth in section 17A.19(1)(a) through (n), the district court may grant relief. *Id.* at 256.

III. Analysis.

Iowa Code section 96.5(1) provides that, typically, an individual shall be disqualified for unemployment benefits if she has left work voluntarily without good cause attributable to the employer. The claimant has the burden of proving that a voluntary quit was for good cause attributable to the employer. Iowa Code § 96.6(2).

Iowa Administrative Code rule 871-24.26, which was promulgated pursuant to section 96.5(1), sets forth the reasons for a claimant leaving employment with good cause attributable to the employer. Included is separation because of illness, injury, or pregnancy. Iowa Admin. Code r. 871–24.26(6). Section 24.26(6)(a) relates to nonemployment-related separation, in which a claimant left employment "because of illness, injury or pregnancy *upon the advice of a licensed and practicing physician.*" Iowa Admin. Code r. 871–24.26(6)(a). Because Duchene did not leave her employment upon the advice of a physician, her quitting does not fall within this definition of good cause attributable to her employer.

An employee also has good cause for separation of employment because of illness, injury, or pregnancy where the separation is employment-related. Iowa Admin. Code r. 871–24.26(6)(b). In order to qualify for unemployment benefits under this section, a claimant must show:

> [t]he claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the

> employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

Id. Duchene concedes her illness was not caused by her employment. Rather, she claims her employment exacerbated her condition.

Assuming the exacerbation of her illness was attributable to her employment, Duchene does not qualify under this definition of good cause attributable to the employer because she has failed to show a serious danger to her health. Furthermore, this definition requires:

> In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; 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. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

Id. While Duchene requested FMLA leave, she did not inform Wells Fargo she intended to quit unless the problem was corrected or she was reasonably accommodated. Duchene's argument can be dismissed without any further development of the record regarding the reasonableness of any accommodation as none was requested.

Rule 871-24.26(4) also includes "intolerable or detrimental working conditions" as a reason for a claimant leaving employment with good cause

attributable to the employer. A notice of intent to quit does not apply to cases of voluntary termination due to intolerable or detrimental working conditions. *Hy-Vee, Inc. v. Emp't Appeal Bd.*, 710 N.W.2d 1, 5 (Iowa 2005).

Any claim that Wells Fargo's working conditions were intolerable or detrimental is premised on its failure to reasonably accommodate Duchene's disability. Duchene argues on appeal that she did not seek an accommodation allowing her to work from home. Rather, she argues she should have been accommodated by modifying her work schedule and exempting her from the absence policy.

The evidence in the record shows the only limitation placed on Duchene's working conditions by her physician was that she work part-time, which she did at Wells Fargo. Duchene testified she was not under any medical restrictions since April 24, 2010, because she had been unable to see her physician. She also testified at the hearing, "In fact, . . . now, my only option now is to work from home due to my illness. That's my only option. When I go into see him in October I would have a letter stating that." As the district court found, there is no authority to support the conclusion that an accommodation allowing her to work part-time from home with no restrictions on work absences would be required under the ADA. Duchene has failed to carry her burden of showing she quit her job for good cause attributable to the employer.

A finding Duchene quit for good cause attributable to the employer is only one part of her burden in proving eligibility for unemployment benefits. Section 96.4(3) also requires a claimant be able to work and available to work. The

claimant bears the burden of proving her ability to work for the purposes of receiving unemployment compensation. *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 723 (Iowa 1993). An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides. *Id.*

The ALJ found Duchene had failed to prove she was available and able to work because "there is no work available in her area of residence with her restriction to work at home part time." The district court did not specifically address the finding that Duchene was not available or able to work. Duchene does not raise this issue in her brief on appeal. Accordingly, this claim is not preserved for our review. *See* Iowa R. App. P. 6.903(2)(g)(3); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) (holding we will not speculate on the arguments a party might have made and search for legal authority and comb the record for facts to support such arguments).

Finally, Duchene argues that this court should remand this case for presentation of additional evidence on her claims. The presentation of further evidence after filing a petition for judicial review of agency action in a contested case is governed by Iowa Code section 17A.19(7), which provides in relevant part:

> Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding

> before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.

Duchene did not make an application for remand before the case was submitted in district court. If she had done so, she could have asserted her excuse for failing to present the additional evidence before the board in support of her burden of showing "good reasons for failure to present it in the contested case proceeding before the agency." *See Huntoon v. Iowa Dep't of Job Servs.*, 275 N.W.2d 445, 448 (Iowa 1979). Her failure to do so do precludes her from raising the issue on appeal. *See id.*

The agency decision was not unreasonable, arbitrary, capricious, or an abuse of discretion. We affirm the denial of Duchene's request for unemployment benefits.

AFFIRMED.