

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 02

DANE COUNTY

MARLENE W. ALBRECHT,

Plaintiff,

vs.

Case No. 89 CV 6309

LABOR AND INDUSTRY REVIEW COMMISSION
and BORMAN'S, INC.,

Defendants.

MEMORANDUM DECISION AND ORDER

This is an action by Marlene W. Albrecht, plaintiff, for judicial review pursuant to §§ 108.09(7) and 102.23, Stats., of a decision of the Labor and Industry Review Commission ("LIRC") dated October 12, 1989. That decision affirmed the appeal tribunal's decision holding that plaintiff was ineligible for benefits because her refusal to accept her former employer's offer to rehire her was not for good cause as defined in §§ 108.04(8)(a) and (9)(b), Stats. The LIRC ordered plaintiff to repay benefits totalling \$328.00 to the Unemployment Reserve Fund. I conclude that the findings on which the LIRC rendered its decision are not supported by credible and substantial evidence. I therefore set aside the decision and remand this matter to the LIRC for further findings, as explained below.

FACTS

The LIRC adopted the appeal tribunal's findings of fact,

which are as follows: Plaintiff worked 1 1/2 years as a sales clerk for employer Borman's, Inc. ("Borman's") at its South Towne Mall store ("South Towne") in Madison. Her last day of work was April 22, 1989 and on April 25, 1989 she was dismissed for talking to coemployees rather than waiting on customers. Plaintiff lived about 2 miles from South Towne and commuted to work in her own automobile. She had previously worked in the Hilldale Mall ("Hilldale") and commuted to that job, a distance of 8 to 10 miles, which she was able to drive in 15 minutes. Around June 1, 1989, Borman's offered her a sales clerk position at its Middleton Springs Shopping Center Store ("Middleton Springs"). The pay and work schedule were the same (\$4.50 per hour and 30 to 40 hours per week) as for the position from which she was dismissed. Plaintiff testified before the appeal tribunal that she refused the offer for two reasons. First, Middleton Springs was, via her usual route of travel on the "Beltline" (Highway 12-18), 17 miles from her home. The travel time between her home and Middleton Springs was more than 30 minutes, longer than she wanted to drive. Second, because she was summarily dismissed from South Towne, she did not believe she could have a good working relationship with her employer at Middleton Springs. The LIRC found, however, that plaintiff's work hours would not have required her to travel during times when traffic was heaviest. The time required to commute to Middleton Springs would be less than 30 minutes since plaintiff needed only 15 minutes to drive to her

previous job at Hilldale and it would not take her another 15 minutes to drive from Hilldale to Middleton Springs. Therefore, travel distance or time did not differ significantly from what a majority of workers in plaintiff's labor market area experience. Further, the general manager who dismissed her from South Towne did not have any supervisory authority or managerial duties at Middleton Springs. Her immediate manager and coemployees at Middleton Springs would not be persons with whom she had previously worked. Therefore, she had an opportunity for a new beginning with her employer, without any bias or stigma regarding the circumstances of her dismissal.

The LIRC also adopted the appeal tribunal's conclusions of law, as follows: The wages, hours and other conditions of the new job were not substantially less favorable to her than those prevailing for similar work in her labor market area. Plaintiff was not justified for any other reason in failing to accept that work. She failed without good cause under ~108.04(8)(a) and (9)(b), Stats., to accept an offer of suitable work and was therefore not entitled to collect unemployment benefits.

DECISION

In reviewing the LIRC's findings of fact in an unemployment compensation case, a court must apply the following standard:

A reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence...

(I)f there is relevant, credible and probative evidence upon which reasonable persons could rely to reach a conclusion, the finding must be upheld...The finding should rest upon such evidence and not upon a mere scintilla of evidence or upon conjecture or speculation ... (T)he entire record can be brought before the court to determine whether or not evidence sought to be relied upon is so discredited as to be discarded as a matter of law. ~108.09(7), 102.23(6), Stats.; Princess House v. DILHR, 111 Wis. 2d 46, 53-55 (Ct. App. 1985).

Plaintiff first contends that the LIRC erred in concluding that the offer of work was not substantially less favorable than those prevailing for other people doing similar work. See: ~108.04(9)(b), Stats. The LIRC's record of the proceedings below ("Record") contains a "Report to Determine Labor Market Conditions ("Report")," prepared by a DILHR labor market analyst. The report states that the labor market for workers residing in the same community as plaintiff would be within 10-15 miles of their residences; the average one-way travel distance and time within plaintiff's labor market is 10-15 miles and 18 minutes; the maximum distance sales clerks earning \$4.50 per hour are customarily willing to travel for that work is approximately 10 miles. Transcript of Hearing No.89-002082 MD ("Transcript"), Exhibit 3, page 1, as contained in Record.

The LIRC found that plaintiff's estimate that commuting time to the new job was 30 minutes was excessive. Because of her work schedule, she would not be driving during periods of heaviest traffic. Also, since her commuting time to the previous job at Hilldale was 15 minutes, she would not have needed another 15 minutes to go the added distance to

Middleton Springs.

The LIRC focussed on the reasonableness of the commuting time to the new job, rather than the distance, as that commuting time compared to the time it took plaintiff to commute to her previous job at Hilldale. The Report states that the average distance any worker in the Madison labor market travels to work is 10 to 15 miles, while the maximum distance someone in plaintiff's wage category would customarily commute to work was 10 miles. According to the LIRC's findings, plaintiff's commuting distance to Middleton Springs would be 17 miles. This would be a 13-70 % increase over the average commuting distance for all workers in the Madison labor market, regardless of earnings, and a 70% increase over the maximum distance a worker in plaintiff's job and earnings category could be expected to commute to work.

A decrease in actual pay caused by an increase in travel distance to a job is good cause to quit attributable to an employer and does not render a worker ineligible for unemployment compensation benefits. *Farmer's Mill of Athens, Inc. v. DILHR*, 97 Wis. 2d 576, 582 (Ct. App. 1980). I see no distinction between good cause to quit attributable to an employer and good cause to refuse new work, at least regarding the issue of increased costs of travel and decreased actual wages. Thus, the effect of the increased commuting distance and costs on plaintiff's actual wage is

material to the issue of whether plaintiff had good cause to refuse the offered job and would be entitled to benefits. The LIRC's finding and conclusion that the 17 mile one-way commuting distance is not significantly different from what a majority of Madison-area workers experience and does not render the offered job unsuitable is not supported by any evidence presently in the record.

Plaintiff also contends that the LIRC erred in concluding that her claim that she was embarrassed and humiliated by the false accusation of misconduct was not good cause for refusing the new position. If only one reasonable inference can be drawn from the evidence, the drawing of that inference is a question of law, and the court is not bound by the determination of the LIRC. *Vocational, Technical & Adult Education District 13 v. DILHR*, 76 Wis. 2d 230, 240 (1977).

The LIRC found that plaintiff could have an "opportunity for a new beginning...without any bias or stigma regarding the circumstances surrounding her discharge." **Appeal Tribunal Decision, Record at 32.** The record as a whole shows that this finding is unreasonable as a matter of law. The employer himself testified that he discussed plaintiff's dismissal with the manager of the Middleton Springs store. According to the employer's testimony, the Middleton Springs manager assured him that if plaintiff were rehired, "either (the Middleton Springs manager) or (her) assistant is on the

floor at all times and there will be no problem as far as anybody visiting or so forth..." Transcript at 42. Because of the above discussion, it is reasonable to infer that the manager at Middleton Springs had a preconception of plaintiff as a person who talks to other employees instead of attending to customers and whose conduct must be monitored at all times. When drawing inferences from the evidence, a reviewing court applies the objective test of what a reasonable person would have intended by and what conclusion a reasonable person would have drawn from a statement in the evidence. See: *Universal Foundry Co. v. DILHR*, 86 Wis. 2d 582, 591-2 (1979). Applying that test to the Middleton Springs manager's assurance, I must conclude that plaintiff would have encountered bias and borne a stigma in her new job resulting from the circumstances of her dismissal. In light of the Middleton Springs manager's knowledge of plaintiff's dismissal, the facts that there were no organizational connections between Middleton Springs and South Towne, and that plaintiff had no previous contact with Middleton Springs management or employees are discredited as a matter of law as the basis for the LIRC's finding. The LIRC's finding that plaintiff would have an opportunity for a new beginning in the new job is not supported by any evidence presently in the record.

CONCLUSION AND ORDER

A court may set aside the LIRC's order and remand the case to

the LIRC if that order depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. ~102.23(6), 108.09(7), Stats. I conclude that the LIRC's order is based on material and controverted findings of fact not supported by credible and substantial evidence, as discussed above. Accordingly, I set aside the LIRC's order dated October 12, 1989 and remand the case to the LIRC to address the following issues:

1. Whether plaintiff's actual wage in the new job, adjusted for increased travel expenses, will make the conditions of that job substantially less favorable than those prevailing for similar work in plaintiff's labor market, and
2. Whether plaintiff, in light of the Middleton Springs manager's statement about her, would encounter any bias or suffer any stigma at Middleton Springs as a result of having been dismissed for alleged misconduct at South Towne.

Dated this 14 day of June, 1990.

BY THE COURT:


Michael B. Torphy, Jr.
Circuit Court Judge

cc: Attorney David A. Pearson
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