STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

JUDITH A. BENSKE,
VICKI L. BIGONIA,
KATHLEEN M. BRANTMAN,
BETTY A. EDWARDS,
MAYNARD J. ERDMAN,
SUSAN J. GRIFFITH,
TERI K. KELLY,
CONNIE J. KRIEFALL,
DIANN C. NOLAN,
RUTH M. PAJEWSKI,
ANGELA PIWARON,
SUSAN M. RYBARCZYK,
CINDY A. SOUTHWORKTH and
THERESA C. VAN DOSKE,

Plaintiffs,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
TNT HOLLAND MOTOR EXPRESS, INC. (Milwaukee) and
TNT HOLLAND MOTOR EXPRESS, INC. (Tomah),

Defendants.

Case No. 95-CV-006481

DECISION

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STATEMENT OF THE CASE

The plaintiffs are all office workers for the Milwaukee and Tomah offices of TNT Holland Motor Express ("TNT Holland"). TNT Holland is an interstate trucking company. The plaintiffs are non-union employees and receive an hourly wage.

From April 5, 1994, to April 29, 1994, the Teamsters Union went on strike against TNT Holland. The plaintiffs did not participate in the strike. On or about April 10, 1994,

TNT Holland notified the plaintiffs that as of April 11, 1994, they were laid off indefinitely due to lack of work.[1] At the conclusion of the strike, the plaintiffs were all recalled back to work. The plaintiffs applied for unemployment benefits for the weeks of 15/94 through 18/94.

HISTORY OF THE CASE

The initial determination of the Department of Industry, Labor and Human Relations ("DILHR"), held that the plaintiffs were ineligible for benefits due to an active labor dispute at their employer. The individual plaintiffs timely filed requests for hearings contesting DILHR's determinations. A contested hearing before an Administrative Law Judge ("ALJ") was held on September 28, 1994. The plaintiffs appeared *pro se* and TNT Holland appeared by Mark Kail, Terminal Manager at Milwaukee. Mr. Kail testified that TNT Holland's position is that the plaintiffs should be eligible for benefits. (Transcript, page 11, line 14-20). He also testified that the reason for the lay off was lack of work. (Transcript, page 20, line 15-23). Mr. Kail did state that there was no work available due to the strike. (Transcript, page 24, line 10-11). The ALJ stated that he would write a decision that would allow benefits to the plaintiffs. (Transcript, page 33, line 1-6). The ALJ did not take any testimony from the plaintiffs and stated that he did not want any testimony from them unless it would contradict Mr. Kail. (Transcript, page 33-34, line 15-5). This was despite an attempt by one of the plaintiffs to submit some research that showed they were eligible for benefits. On September 29, 1994, the ALJ issued a decision that reversed the initial

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[1]The salaried employees were not laid off and continued to work during the strike period.

determination and granted the plaintiffs unemployment benefits.

DILHR filed a timely petition for review of the ALJ's decision. On June 6, 1995, the Labor and Industry Review Commission ("LIRC") reversed the decision of the ALJ. The Commission stated, "the inference is inescapable that the lack of work was due to the strike." (LIRC Decision, page 2 and 3). The Commission declared that given this inference and the testimony before the ALJ, the plaintiffs were not eligible for benefits under Wis. Stats. sec. 108.04(10)(a). (LIRC Decision, page 2-3). Wis. Stats. sec. 108.04(10)(a) provides that,

> An employe who has left or partially or totally lost his or her work with an employing unit because of a strike or other bona fide labor dispute, other than a lockout, is not eligible to receive benefits based on wages paid for employment prior to commencement of the dispute for any week in which the dispute is in active progress in the establishment in which the employe is or was employed, except as provided in par. (b).[2]

The Commission then ordered the plaintiffs to repay the benefits they had already received. (LIRC Decision, page 3-4).

STANDARD OF REVIEW

Judicial review under ch. 108 shall be confined to questions of law and the provision of ch. 102 regarding judicial review shall also apply. Wis. Stats. sec. 108.09(7)(b). LIRC's findings of fact are conclusive if supported by substantial and credible evidence. Wis. Stats. sec. 102.23(6), and Jenks v. DILHR, 107 Wis.2d 714, 720 (Ct. App. 1982). Substantial evidence is defined as "evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion." Cornwell Personnel Associates v.

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[2]Paragraph (b) discusses an employee establishing a benefit year under sec. 108.06(2)(a).

LIRC, 175 Wis.2d 537, 544 (Ct. App. 1993). The test is whether reasonable minds could arrive at the same conclusion. Jenks, 107 Wis.2d at 720. The evidence will be construed most favorably to LIRC's findings. Cornwell Personnel Associates, 155 Wis.2d at 544. "A LIRC determination will not be overturned simply because it is against the great weight and clear preponderance of the evidence." Jenks, 107 Wis.2d at 720. The court must affirm the decision of LIRC "if there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to an opposite conclusion." Valadzic v. Briggs & Stratton Corp., 92 Wis.2d 583, 593-594 (1979).

LIRC's construction of a statute and the application of a statute to a particular set of facts is a question of law. Cornwell Personnel Associates, 175 Wis.2d at 544. LIRC's decisions on questions of law are not binding on this court, although the court will give deference to their legal conclusions. DILHR v. LIRC, 155 Wis.2d 256, 262 (Ct. App. 1990). "If the commission's statutory interpretation 'reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and court,' great weight will be accorded the commission's decision." Cornwell Personnel Associates, 175 Wis.2d at 544 (citations omitted). If the legal conclusions of LIRC are reasonable, the court will sustain LIRC's decision even though an alternative view may be equally reasonable. Kenwood Merchandising Corp. v. LIRC, 114 Wis.2d 226, 230 (Ct. App. 1983).

In this case, LIRC concluded that "the inference is inescapable that the lack of work was due to the strike," therefore, the lay offs were a result of the strike. (LIRC Decision, page 2.) The two possible inferences LIRC could have made were that the layoffs were a

result of lack of work, or a result of the strike. If there is more than one inference available to the Commission, a question of fact is raised, and the court must defer to LIRC's findings. Universal Foundry Co. v. DILHR, 86 Wis.2d 582, 589 (1979).

> [I]f only one reasonable inference can be drawn from the evidence, the drawing of the inference is a question of law, and a reviewing court is not bound by the Department's determination. If, however, the evidence allows more than a single reasonable inference, a question of fact is presented, and the Commission's findings, if supported by any credible evidence, are conclusive upon the court. Id. at 589.

Consequently, LIRC's decision that the lay offs resulted from the strike is a question of fact and if supported by credible and substantial evidence it is binding on this court. Wis. Stats. sec. 102.23(6), and DILHR, 155 Wis.2d at 262.

CONCLUSION AND FINAL ORDER

There is substantial and credible evidence to support LIRC's findings of fact. Based upon the testimony of Mr. Kail and the evidence taken by the ALJ, the Commission determined that the lack of work that precipitated the layoffs was a result of the strike. (LIRC Decision, page 2-3). This court will defer to the factual findings of LIRC and must affirm their decision. Valadzic, 92 Wis.2d at 593.

The Commission's application of their findings of fact to Wis. Stats. sec. 108.04(10) is a question of law and this court is not bound to their decision. Cornwell Personnel Associates, 175 Wis.2d at 544. In examining the relevant case law, this court has found that the Commission's decision is in accordance with the decisions of the Wisconsin Supreme Court. In Cook v. Industrial Comm., 31 Wis.2d 323 (1966), the Wisconsin Supreme Court upheld the denial of benefits to employees who did not participate in a union strike, but were

laid off due to the strike. Id. at 245. In Cook, 1800 machinists struck Ladish Co., however, the blacksmiths, clerical workers, die sinkers and electricians did not participate in the strike. Id. at 234-235. The worked performed by the machinists was critical to Ladish's production operation and the strike effectively stopped their operations causing Ladish to close its factory. Id. at 234. The non-striking employees were denied unemployment benefits under Wis. Stats. sec. 108.04(10). Id. at 236.

In upholding the Commission's decision, the Supreme Court remarked that Wis. Stats. sec. 108.04(10) is not limited to an employee who "left" his employment because of a strike, but also includes employees who "lost" employment due to a strike, and to restrictively interpret the statute would render the words "or partially or totally lost" superfluous. Id. at 239. The Cook court reviewed the legislative history of Wis. Stats. sec. 108.04(10) to ascertain if the legislature intended to exempt non-striking employees from the statute. The Court noted that in the twelve biennial sessions of the Wisconsin legislature prior to its decision, no substantive changes have been made to sec. 108.04(10) despite attempts to amend the statute. Id. at 242.

> It is clear that the bills presented to the legislature have attempted to modify the Wisconsin labor dispute provision to allow the payment of benefits to nonparticipants, which would result in a provision similar to those in many other state laws. The legislature, however, has not agreed to change the Wisconsin labor dispute provision to allow nonparticipants to be eligible for benefits. By failing to pass the bills attempting to allow benefits to nonparticipants, the legislature has actively indicated that it approved the construction placed on the labor dispute provision by the administrative agency charged with enforcement of the Wisconsin Unemployment Compensation Act. Id. at 243.

The legislative history of sec. 108.04(10) was reviewed again in Jenks. The Court of

Appeals noted that since the Cook decision, "the legislature has rejected similar amendments to sec. 108.04(10), Stats." Jenks, 107 Wis.2d at 722. The court concluded that the legislature is satisfied with LIRC's interpretation of sec. 108.04(10). Id. After the Jenks decision, the legislature still did not amend sec. 108.04(10). Because the legislature has failed to amend the statute, this court concludes that the legislature did intend a denial of benefits to employees that did not participate in the labor dispute, but nonetheless were laid off as a result of the dispute.

The plaintiffs argue that the legislative policy underlying sec. 108.04(10) is to protect employers against having to "subsidize a union-instigated work stoppage which would place the employer at an unfair disadvantage in negotiations with unions." Jenks, 107 Wis.2d at 725; *see also* Marathon Electric Mfg. Corp. v. Industrial Commission, 269 Wis.2d 394, 407 (1955). The plaintiffs contend that the statute creates a shield that an employer can cast off or surrender. However, there is no authority for this proposition. There is nothing in the legislative history, nor in the statute itself that indicates an employer has the freedom to chose when it wishes to invoke the statute, if at all. The statutory language is clear and unambiguous, consequently, the employer's intent has no bearing on the statute.

This court believes that there is a second public policy reason for the denial of unemployment benefits despite the employer's position. The Unemployment Reserve Fund is a general fund and all employers contribute to the fund. *See* Wis. Stats. secs. 108.16, 108.17 and 108.18. The monies once paid into the fund, no longer belong to the individual employers and are disbursed by the state pursuant to legal entitlement. Therefore, an employer is not able to concede entitlement to an employee contrary to express legal

entitlement. In light of the Cook and Jenks decisions, in addition to the legislative history of sec. 108.04(10), this court must affirm the decision of the Commission.

The plaintiffs make a final argument to remand the case for a new hearing. The plaintiffs state that they were denied their due process rights because they were not afforded a reasonable opportunity to be heard. They cite to the ALJ's refusal to let them speak at the hearing. The relevant portions of the transcript are as follows:

> ALJ: Given that and the company's position and your testimony I--I don't intend to take any employe testimony unless they want to give some testimony. Do any of you people--
> UNIDENTIFIED PERSON: I just have a couple statements that I'd like to--
> ALJ: For What purpose?
> UNIDENTIFIED PERSON: For what purposes--I have done some research that did show--did state that we were eligible for unemployment benefits.
> ALJ: Well?
> UNIDENTIFIED PERSON: I understand what you're saying.
> ALJ: I--I--yeah--I don't really want it--unless you have some testimony that's going to contradict him--
> UNIDENTIFIED PERSON: No.
> ALJ: I told you on the record already that you're going to be allowed benefits based on what he said.
> UNIDENTIFIED PERSON: Okay.
> ALJ: And that's their position. I don't see any reason for you to muddy the waters by--
> UNIDENTIFIED PERSON: Okay.
> ALJ: --offering extra testimony.

(Transcript, page 33-34, lines 15-16). The plaintiffs have not provided this court with an affidavit of what this additional testimony would be and how it would refute LIRC's inescapable inference that the lack of work was a result of the strike. Therefore, the court has no choice but to deny their request for a remand.

Accordingly, the complaint is hereby **dismissed** and the Decision and Order of the Labor and Industry Review Commission is **affirmed** in its entirety.

Dated at Milwaukee, this 15th day of February, 1996.

BY THE COURT:

Hon. Jacqueline D. Schellinger
Milwaukee Co. Circuit Court, Branch 34