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RONALD BERRY, et al.,

Plaintiffs,

vs.

LABOR AND INDUSTRY REVIEW  
COMMISSION and DEPARTMENT OF  
MILITARY AFFAIRS, THE ADJUTANT  
GENERAL,

Defendants.

MEMORANDUM OF DECISION  
AND ORDER

CASE NO. 95 CV 263

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**BACKGROUND**

The matter before the court is a review of a decision of the Labor and Industry Review Commission (hereinafter "LIRC"). The relevant facts as found by the LIRC are as follows: All plaintiffs were federal funded employees of the Department of Military Affairs, the Adjutant General (hereinafter employer) with federally controlled funding. The employer received notice from the National Guard Bureau that there would be a shortage of federal funding commencing in the 1995 fiscal year. The National Guard Bureau authorized funds for voluntary early retirement authority and voluntary separation incentive pay to federally funded employees that met certain criteria. The employer notified qualified employees offering the voluntary early buyouts or voluntary separation incentive pay, or both. The plaintiffs in this case met the criteria involved and voluntarily chose to accept the employers' offer for early retirement or a buyout package, or both, and terminated their employment. The voluntary terminations occurred during the period between December 31, 1994, and February 4, 1995. Thereafter plaintiffs filed for employment benefits and during the months of February and March, 1995, the Department

of Labor and Industry Human Relations (hereinafter "DILHR") determined that each plaintiff had terminated employment in lieu of termination of another employee within the meaning of Section 108.04(7)(am) of the Wisconsin Statutes. The employer appealed such initial determinations and after a hearing before the administrative law judge on June 5, 1995, an appealed tribunal decision was issued on June 12, 1995, affirming the initial DILHR determinations. That decision was appealed to the LIRC and on November 9, 1995, and in an amended decision of November 15, 1995, the LIRC issued a decision and memorandum opinion reversing the appeal tribunal. The LIRC found that plaintiffs terminated their employment within the meaning of Section 108.04(7)(a), Stats., and that plaintiffs "quitting was not for any reason constituting an exception to that section." Plaintiffs filed a summons and complaint appealing the commission's decision.

The issue before this court is whether or not the LIRC erred in concluding that each of the plaintiffs failed to demonstrate that his or her work with the employer was suspended or terminated in lieu of suspension or termination by the employer of any other employee's work, within the meaning of Section 108.4(7)(a), Stats.; and whether plaintiffs' eligibility for unemployment compensation benefits was suspended for voluntarily terminating their employment with employer within the meaning of Section 108.04(7)(a), Stats. Thus the issue is whether the plaintiffs resigned voluntarily rendering themselves ineligible for unemployment compensation or whether plaintiffs' resignations fell within one of the exceptions to the ineligibility for voluntary termination rules.

Relevant statutes include the following:

Section 102.23(1) JUDICIAL REVIEW

(a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02. Within 30 days after the date of an order or award made by the commission either originally or after the filing of a petition for review with the department under s. 102.18 any party aggrieved thereby may by serving a complaint as provided in par. (b) and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for the review of the order or award, in which action the adverse party shall also be made a defendant. If the circuit court is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a copy of any finding or order, it may extend the time in which an action may be commenced by an additional 30 days. The proceedings shall be in the circuit court of the county where the plaintiff resides, except that if the plaintiff is a state agency, the proceedings shall be in the circuit court of the county where the defendant resides. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees.

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

#### Section 102.23(6) JUDICIAL REVIEW

If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Section 108.04(7) VOLUNTARY TERMINATION OF EMPLOYMENT

(a) If any employee terminates work with an employing unit, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 4 times the employee's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment compensation law of any state of the federal government...

(am) Paragraph (a) does not apply if the department determines that the suspension or termination of the claimant's work was in lieu of a suspension or termination by the employer of another employee's work. The claimant shall not be deemed unavailable for the claimant's work with the employer by reason of such suspension or termination.

Section 108.09(7) JUDICIAL REVIEW

(a) The department or either party may commence action for the judicial review of a decision of the commission under this chapter after exhausting the remedies provided under this section if the party or the department has commenced such action in accordance with s. 102.23 within 30 days after a decision of the commission is mailed to a party's last-known address.

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section...

As provided in sec. 102.23(1)(a), Stats., the findings of fact made by the commission in the absence of fraud are conclusive on this court. Section 102.23(1)(a), Stats., provides that the court may confirm or set aside a commission decision but if the commission acted without or in excess of its powers; that the order or award was procured by fraud; or that the findings of fact by the commission do not support the order or award. Section 102.23(6), Stats., provides that the court is not to substitute its judgment for that of the commission as to the weight or

credibility of the evidence on a finding of fact. Furthermore, the commission's findings of fact must be upheld if they are supported by credible and substantial evidence, Princess House Inc. v. DILHR, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983); Nottleson v. ILHR Dept., 94 Wis. 2d 106, 114, 287 N.W.2d 763 (1980). It is not within the purview of the reviewing court to weigh the evidence presented, Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis. 2d 576, 579-80, 294 N.W.2d 39 (Ct. App. 1980); VandeZande v. ILHR Dept., 70 Wis.2d 1086, 1097, 236 N.W.2d 255 (1975). The inferences drawn by the commission are considered acts of fact finding and the inference derived by it is conclusive. Wehr Steel Co. v. ILHR Dept., 106 Wis. 2d 111, 118, 315 N.W.2d 357 (1982); Universal Foundry v. ILHR Dept., 86 Wis. 2d 582, 589, 273 N.W. 2d 324 (1979). The reviewing court is not to ascertain whether additional findings should have been made or could have been sustained by the evidence. Appleton Electric Co. v. Minor, 91 Wis. 2d 825, 829, 284 N.W.2d 99 (1979).

The judicial standard of review of an agency's application of a statute which is administered is to apply the "great weight" standard to the agency's decision. Sauk County v. WERC, 165 Wis. 2d 406, 413, 477 N.W. 2d 267 (1991); DILHR v. LIRC, 161 Wis. 2d 231, 243, 467 N.W.2d 545 (1991); State of Wisconsin v. LIRC, 113 Wis. 2d 107, 109, 334 N.W. 2d 279 (1983).

The reviewing court may not substitute its judgment for the administrative agency's application of a statute to the specific facts where reasonable basis exists in law for the agency's interpretation. Klusendorf Chevrolet-Buick, Inc. v. LIRC, 110 Wis. 2d 328, 331-332, 328 N.W.2d 890 (Ct. App. 1982); Pabst v. Department of Taxation, 19 Wis. 2d 313, 323-24, 120 N.W.2d 77 (1963).

Furthermore, if the commission's conclusion is reasonable, the reviewing court shall sustain that conclusion even though an alternative view may be equally as reasonable. United Way of Greater Milwaukee, Inc. v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 85 (Ct. App. 1981); Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis. 2d 576, 580 294 N.W.2d 39 (Ct. App. 1980). The reviewing court should not disturb the commission's judgment concerning a question of law if there exists a rational basis for the commission's conclusion. Dairy Equipment Company v. ILHR Dept., 95 Wis. 2d 319, 327, 290 N.W.2d 330 (1980); Milwaukee County v. ILHR Dept., 80 Wis. 2d 445, 446, 259 N.W.2d (1977).

### DECISION

Section 108.04(7)(a); Stats., provides that an employee is ineligible for unemployment compensation benefits if the employee voluntarily terminates his or her employment with the employer, unless the quitting falls within a statutory exemption permitting immediate unemployment compensation benefit payment. Plaintiffs' argument is that the statutory exemption provided under Section 108.04(7)(am), Stats., allows them to collect unemployment compensation benefits because they voluntarily chose early retirement or buyouts and terminated their employment to save the jobs of other employees.

The evidence in the record does not establish that plaintiffs' termination of employment was in lieu of the suspension or termination of another employee's work. The plaintiffs' quitting did not involve a direct tradeoff off their employment in lieu of the suspension or termination of another identified employee. The record establishes that the employer did not specifically target any employee for termination or suspension and, in fact, no employee was ever suspended or terminated. Plaintiffs would have continued in their employment had they not accepted the

employer's offer of a voluntary early retirement or buyout or both, which included a significant financial benefit to them. Plaintiffs' decision to terminate their employment was a voluntary action which amounts to quitting.

The record indicates the employer engaged in a reduction of force exercise which was required by the National Guard Bureau to economically justify buyouts and early retirements to individuals meeting specific criteria. The record shows that the employer was not required to implement a reduction of force or to suspend or terminate any employee. The employer successfully used alternatives to avoid the necessity for involuntary termination or suspension of any employees. Furthermore, there is no evidence in the record that even if the employer had been forced to suspend or terminate employees due to budgetary constraints, that any of the plaintiffs had been targeted for suspension or termination in lieu of other employees.

Section 108.04(7)(am), Stats., sets forth a specific exception to the general quitting disqualification and provides:

Paragraph (a) does not apply if the department determines that the suspension or termination of the claimant's work was in lieu of a suspension or termination by the employer of another employee's work. The claimant shall not be deemed unavailable for claimant's work with the employer by reason of such suspension or termination.

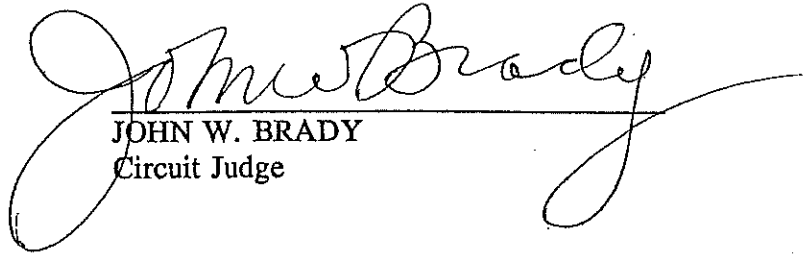
That statutory exception can be rationally and reasonably interpreted to require a direct correlation between the employment of the individual claiming benefits and a person identified for suspension or termination. The LIRC found credible and reasonable evidence that the plaintiffs had an option to continue employment with the employer but chose instead to accept the offer of voluntary buyout or retirement. Plaintiffs fail to establish that another employee had been identified for suspension or termination at any point if they continued employment with the

employer. Thus, there was a rational and reasonable basis for the commission's decision.

Since the commission's interpretation of the statute is reasonable, rational and consistent with the legislative intent, it will not be disturbed by this court. Therefore, the decision of the commission is confirmed in all respects.

Dated at Mauston, Wisconsin, this 21<sup>st</sup> day of November, 1996.

BY THE COURT:

  
JOHN W. BRADY  
Circuit Judge