108.04(9) applicable to transfers

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 DANE COUNTY

CONTINENTS TRAVEL AGENCY, INC.,

Plaintiff

vs.

Case No. 88-CV-5764

LABOR AND INDUSTRY REVIEW COMMISSION and MARY J. PIOTROWSKI,

Respondents

MEMORANDUM DECISION AND ORDER

This is an action for judicial review of the decision of the Labor and Industry Review Commission (Commission) which determined that Mary J. Piotrowski was eligible for unemployment compensation benefits. The Commission determined that the applicable statute was sec. 108.04(9)(b) Stats., which relates to whether the offer of work was substantially less favorable than those prevailing for similar work in the locality. The plaintiff asserts that the Commission should have applied sec. 108.04(7) Stats., which allows benefits to an employee who terminates employment because the employee was transferred to work paying less than two-thirds of his or her immediately preceding wage rate. Because I find that the Commission applied the proper statute, I affirm the Commission's decision. Plaintiff further contends that even if Sec. 108.04(9)(b) stats., is the appropriate statute, the defendant has failed to prove that the work offered was substantially less favorable than

that prevailing for similar work in the locality. The Commission's decision on this issue is also affirmed.

APPLICABLE STATUTES

Sec. 108.04(9) stats., states (in relevant part);

Protection of labor standards. Benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(b) If the wages, hours, (including arrangement and number) or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

Sec. 108.04(7) stats., states (in relevant part);

(a) If an employe terminates work with an employing unit, the employe is ineligible to receive benefits . . .

(f) Paragraph (a) does not apply if the department determines that the employe terminated his or her work because the employe was transferred by his or her employing unit to work paying less than two-thirds of his or her immediately preceding wage rate with the employing unit . . .

FACTS

The defendant-employe, Mary J. Piotrowski, began working for the plaintiff-employer in August, 1985. The employer operates a travel agency and had two branches in Madison, Wisconsin and one in Janesville, Wisconsin. In August, 1986, Ms. Piotrowski became the manager of the Janesville branch. As manager, she earned $7.00 per hour, of which $2.00 per hour was for travel-related expenses.

On May 18, 1987, the employer advised Ms. Piotrowski that it would sell its Janesville branch on June 1, 1987. The employer told her that there were no other manager

positions and offered her a job as a sales agent at its Madison East Towne Branch. The employer offered Ms. Piotrowski $5.25 per hour if she accepted the position.

Ms. Piotrowski last worked for the employer on May 29, 1987. She applied for unemployment compensation benefits during the week ending June 6, 1987. The employer objected to her application for benefits. On June 20, 1987, a deputy for the Department of Industry, Labor and Human Relations determined that Ms. Piotrowski was eligible for benefits because she had good cause attributable to the employer for refusing to accept an offered job transfer. The employer appealed that determination on June 30, 1987.

Pursuant to the appeal, hearings were held on February 25, 1988 and March 24, 1988. On April 14, 1988, the Administrative Law Judge (ALJ) issued a decision, concluding that Ms. Piotrowski was ineligible for benefits because she terminated her employment not for a reason which constituted an exception to the termination disqualification provisions of sec. 108.04(7)(a) Stats.

On May 4, 1988, Ms. Piotrowski petitioned the Commission for review of the ALJ's decision. The Commission mailed its decision to the parties on September 30, 1988. The Commission found that the plaintiff offered Ms. Piotrowski new work, that the wage offered for the new work was in the lowest quartile in the pay range for the work offered, that the wages in the lowest quartile of the pay range are not prevailing and the employee quit rather than accept the

transfer to the new work. The Commission concluded that benefit eligibility could not be denied in accordance with the provisions of sec. 108.04(9)(b) Stats.

DECISION

Although Wisconsin's unemployment compensation program was created by the Wisconsin legislature, its statutory provisions are substantially influenced, and in some cases controlled, by provisions of federal law.

One of the conformity provisions of the federal legislation for all states, 26 U.S.C. Section 3304(a)(5)(B), is identical to sec. 108.04(9)(b) Stats., in all pertinent respects. The federal agency charged with the approval, implementation and enforcement of the states' unemployment compensation programs is the United States Department of Labor (USDL). USDL periodically issues instructions to help assure a uniform interpretation of the law.

After reviewing the history, public policy and intent of the legislation, the USDL stated that an offer of new work includes (1) an offer to an unemployed individual by an employer with whom there has been no prior contract of employment, (2) an offer of re-employment to an unemployed individual by an employer with whom no employment contract exists at the time of the offer and (3) an offer by an individual's present employer (a) different duties from those which exist in the current employment contract or (b) different terms or conditions of employment from those which

exist in the current employment contract. It summarized the definition as requiring the determination of the existence of an offer of new work to depend on whether it is an offer of a new contract of employment. Limiting the meaning of work for an employer for whom an individual has never worked would largely nullify the purpose of the federal legislation which is intended to prevent the unemployment compensation program from exerting downward pressure on wage rates or working conditions. UIPL (Unemployment Insurance Program Letter) No. 984, September 20, 1968, p.3.

In Allen-Bradley Co. v. ILHR Dept., 58 Wis. 2d 1, (1973), the court, although ultimately resolving a different issue, indicated that it did not restrict the definition of new work to the situation where an applicant goes to a new employer for a new job. It also applies to "indefinitely laid-off employees recalled to work. In such situations, the work is new even though the worker is not." Allen-Bradley, 58 Wis. 2d at 6.

In the present case, the employer offered the employee what was, in essence, new work. Ms. Piotrowski supervised several people, was responsible for the operation of the office, including hiring and firing staff, reviewing personnel performances. She also placed ads in newspapers and developed strategy to improve office sales. The new job offered by the employer consisted mainly of selling tours and tickets, and encompassed more undesirable hours because Ms. Piotrowski would have been expected to work weekends and

evenings. Thus, the employer made an offer of new work to Ms. Piotrowski and the provisions of sec. 108.04(9)(b) Stats., were properly applied to this case.

Because the USDL has set up an objective standard to determine whether an offer of new work can be refused without sacrificing benefits, the subjective reason for refusal to accept new work is not material to the resolution of this case.

The USDL makes this clear:

> Inasmuch as the labor standards provisions are mandatory, they impose a duty on those administering the State act to assure themselves that the work offered meets these minimum standards before denying the claimant benefits for refusing work, regardless of whether he raises the issue. Inasmuch as they are minimum standards, they apply to all denials of benefits for refusal of offers of, or referrals to, new work regardless of his reasons for refusing the job.
> UCPL (Unemployment Compensation Program Letter) No. 130, January 6, 1947, p. 2.

In the present case, the Department correctly applied the objective standard of sec. 108.04(9)(b), Stats., and did not, nor was it required to, consider the employee's motives for refusing the job. Even though the ALJ dealt with the reasons for refusing the offer of work, the Commission is not required to do so. In reviewing the appeal tribunal, the commission is not limited in the scope of its review, but is to make its own decision on the merits. Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis. 2d 576, 580 (Ct. App. 1980). In the present case, this is especially true because the ALJ initially applied a different statute, sec. 108.04(7)(a) Stats., in which motive was an issue. The

Commission reversed the ALJ and applied a different statute; therefore the employee's motive became irrelevant.

Plaintiff argues that the Commission's decision in the present case causes sec. 108.04(7)(f) Stats., to be mere surplusage. However, because the purpose of the statute is to prevent the Unemployment Compensation program from exerting downward pressure on wage rates and working conditions, the statute uses the more objective standard of the prevailing rate for a job rather than the amount of wage reduction for the particular claimant.

Paragraphs (b) and (f) of sec. 108.04(7), Stats., address different situations and apply different remedies in the administration of the unemployment compensation program to determine a benefit applicant's attachment to the job market. Paragraph (f), though allowing benefits despite refusing a job transfer with a wage reduction of more than one-third, imposes a five week benefit suspension. Under paragraph (b) benefits may be allowed when the reduction is significantly less than 25 percent, depending on other conditions. The Commission's application of sec. 108.04(9)(b) Stats., to the facts of the present case is mandated and does not have the effect of rendering any of the other legislation superfluous.

The plaintiff further contends that even if sec. 108.04(9)(b) Stats., is applicable to the present case, there is not sufficient evidence to determine what constitutes a prevailing wage. It is clear from the record that Ms.

Piotrowski was making $7.00 per hour and was offered a new job with a pay rate of $5.25 per hour.

The evidence regarding the wage range for the work offered by the employer is contained in a report which was prepared by a labor market analyst and the testimony of the analyst. The data on travel agents was from the Wisconsin Career Information System because the Department of Industry, Labor and Human Relations does not include a travel agent category.

The analyst indicated that the employee's labor market area was Eastern Dane County. The report states that the pay range for travel sales agents within that market was from $10,500 to $17,000 per year. This annual salary broken down into an hourly wage would range from $5.05 to $8.17. The midpoint to this range is $6.61 per hour and the lower quartile is from $5.05 per hour to $5.83 per hour. Thus, if the data is accepted, the $5.25 per hour which was offered to the employee falls within the lowest quartile.

A review of the record indicates that there are some problems with some of the data supplied by the analyst. Some of his opinions regarding working conditions are speculative. Further, the analyst did not collect the data and did not know how the information was obtained. However, the USDL indicated in UCPL No. 130, January 30, 1947, that it may be difficult to get truly accurate data in a field such as this where wages are constantly in flux. The USDL therefore suggests that the source of the data could be from labor and

employer organizations or from Government agencies responsible for the collection of such data. UCPL No. 130, p. 13. The report indicates that a reasonably accurate approximation can be used to make a prevailing wage determination. UCPL No. 130, p. 13.

The report further indicates that in borderline cases:

> the general rule that remedial legislation is to be liberally applied and interpreted in favor of those it was intended to aid would indicate that the claimant be given the benefit of the doubt. Similarly, when the facts cannot be precisely determined, the claimant would not be subject to denial of benefits for refusing work unless it is reasonably certain that the conditions on the job are not substantially less than those prevailing.
> UCPL No. 130, p. 15.

This is in keeping with Wisconsin's policy toward granting unemployment compensation benefits. Wisconsin law presumes that an employee is not disqualified from unemployment compensation, and it places on the employer the burden of introducing credible evidence sufficient to convince the Department of Industry, Labor and Human Relations that some disqualifying provision should bar the employee's claim. Holy Name School of Congregation of the Holy Name of Jesus of Kimberly v. Department of Industry, Labor and Human Relations, 109 Wis. 2d 381, 387 (Ct. App. 1982). Thus, it is apparent that the commission was convinced by the analyst's testimony and studies, and that the employer has failed to produce sufficiently compelling data to convince the Department otherwise.

The Commission's determination that wages in the lowest

quartile of a range for a certain job are not prevailing is an application of facts to the law and as such constitutes a mixed question of fact and law. When a legal question is intertwined with factual determinations, value or policy determinations or when an administrative agency's interpretation and application of a statute is longstanding, the reviewing court should defer to the agency which has primary responsibility. Wisconsin Department of Revenue v. Lake Wisconsin County Club, 123 Wis. 2d 239 (Ct. App. 1985), rev. denied,123 Wis. 2d 548 (9185).

Therefore, because there is a presumption in favor of eligibility and because the court should defer to the Commission in a matter in which it has primary responsibility, the Commission's finding of a nonprevailing wage will not be disturbed.

CONCLUSION AND ORDER

For the reasons stated above, and based on the record herein, the Commission's decision is affirmed.

Dated this 27 day of April, 1989

BY THE COURT:

Michael B. Torphy
Circuit Judge

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