

**OPPORTUNITIES INDUSTRIALIZATION
CENTER OF GREATER MILWAUKEE, INC.,**

Petitioner,

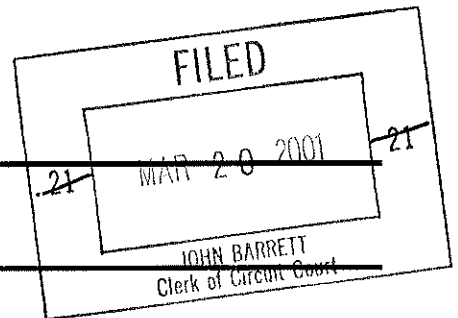
v.

Case No. 00-CV-007743

**LABOR AND INDUSTRY REVIEW COMMISSION,
BARBARA A. DATES,**

Respondents.

DECISION AND ORDER



Plaintiff Opportunities Industrialization Center (OIC) appeals from a decision of Respondent Labor and Industry Review Commission (LIRC) finding that, because Respondent Barbara Dates (Dates) had good cause attributable to the employer for voluntarily terminating her employment, she was eligible for unemployment compensation benefits. Because the LIRC decision was based upon findings of fact supported by substantial credible evidence and was not procured by fraud, the LIRC decision is upheld and the appeal dismissed.

BACKGROUND

Hearing transcripts indicate the following facts: Barbara Dates was an employee of OIC until May 28, 1999, when she voluntarily terminated her employment. Dates testified that her quitting was due to sexual harassment by a supervisor. Details of several incidents are given, about which Dates complained to other supervisors. After several complaints, Dates was transferred to a new work location. The harassing supervisor, however, continued to initiate inappropriate interactions with Dates on his biweekly visits to the new location. Dates again complained. Over a course of several months, Dates complained several times and was given various responses concerning what would be done about the problem, but no concrete action was taken.

Dates quit, and subsequently filed for unemployment compensation. This compensation was initially denied because Dates had quit, and the ALJ indicated that Dates should have pursued action against her harasser more vigorously and followed the complaints to their conclusion before quitting. On appeal, LIRC decided that OIC had not taken appropriate action in the face of Dates' complaints and ordered that Dates was eligible for compensation. OIC appeals from that decision.

DECISION

The parameters of judicial review of LIRC's decision are set forth in § 102.23, Stats. This section allows any party "aggrieved" by the decision to file a petition for review in circuit court. LIRC's decision may be confirmed or set aside. If the court sets aside LIRC's decision, however, it may do so 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." §102.23(1), Stats. In its complaint, OIC alleges the second and third grounds, that the order was procured by fraud and that the finding of fact do not support the order. OIC's brief argues all three grounds, and additionally alleges denial of due process.

Regarding the argument that LIRC acted in excess of its powers, it is sufficient to note that it is unquestionably within LIRC's powers to decide disputes relating to unemployment compensation. OIC cites a case in which the basis for LIRC's exceeding its authority was that an issue was decided, even though it was not fully litigated before LIRC. See Wright v. LIRC, 210 Wis. 2d 289 (Ct. App. 1997). Since the issue was not fully litigated, deciding it constituted a denial of due process. See id. at 296.

That is not the case here. OIC alleges LIRC exceeded its powers because OIC was not "given an opportunity to fairly address the merits" of Dates' complaint. The record does not substantiate this claim. OIC appeared at the hearing and argued its case. OIC argued that Dates had not complained of harassment in writing and did not direct her complaints to the person with the administrative responsibility for resolving sexual harassment claims. Therefore, OIC claims it did not have notice of the complaints and could not have addressed them. LIRC disagreed, after

hearing Dates' testimony concerning her oral complaints made to various supervisors. This disagreement with OIC's position does not constitute action in excess of LIRC's powers or a denial of due process.

The second possible ground for setting aside LIRC's decision is that the decision was procured by fraud. See § 102.23(1)(e)(2), Stats. OIC argues this ground by submitting an exhaustive account of the facts as it sees them, alleging Dates perjured herself before LIRC and committed fraud by presenting false evidence.

OIC misconstrues the statute. The fraud contemplated in the statute is only fraud on the part of LIRC. In Borello v. Industrial Commission, 26 Wis. 2d 62 (1965), the Wisconsin Supreme Court stated,

Past judicial construction of sec. 102.23, Stats., does not bear out appellant's position. ... Whether extrinsic or intrinsic fraud was alleged is immaterial. The cases clearly hold that neither form of fraud is a ground for reopening a judgment or order of the Industrial Commission. Fraud *on the part of the commission* is the only basis for reopening the judgment.

Borello, 26 Wis. 2d at 67 (emphasis added). Discussion in Borello cites legislative history showing that "it was the legislative intent that perjured testimony or concealment of material facts were not such fraud as the statute contemplates." Id. at 69. This is because LIRC bears the responsibility for evaluating the facts and weighing credibility. The court may not substitute its own judgment for that of LIRC's concerning the "weight or credibility of the evidence on any finding of fact." § 102.23(6), Stats. No fraud on the part of LIRC is alleged, and fraud committed by Dates, if any existed, would be immaterial to this decision. Therefore, LIRC's decision cannot be set aside due to fraud.

Lastly, OIC argues LIRC's findings of fact do not support its order. . See § 102.23(1)(e)(3), Stats. Upon review of Dates' case, LIRC decided she was eligible for unemployment compensation benefits, based upon § 108.04(7). Stats. This section concerns voluntary termination of employment, and states,

- (a) If an employe terminates work with an employing unit, the employe is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employe 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 or the federal government...

- (b) Paragraph (a) does not apply if the department determines that the employee terminated his or her work with good cause attributable to the employing unit.

§ 108.04(7), Stats. Based upon its findings of fact, LIRC ruled that Dates' voluntary termination of her employment with OIC was due to "good cause attributable to the employing unit," and that she was therefore entitled to unemployment compensation benefits.

LIRC's findings of fact are conclusive under § 102.23(1), Stats. This Court may set aside LIRC's decision on the grounds of error in findings of fact only if LIRC's decision is based upon a material, controverted finding of fact that is not supported by substantial and credible evidence.

§§ 102.23(1)(e)(1), 102.23(6), Stats. If more than one inference may be drawn from the facts, LIRC's interpretation is binding upon the court. See Universal Foundry Co. v. DILHR and Clark, 86 Wis. 2d 582, 589 (1978).

LIRC must have "substantial and credible evidence" upon which to base its conclusions. LIRC concluded that Dates' quitting was due to "good cause attributable to the employing unit," given the following findings of fact: on one occasion in which a group of employees were on a trip, Dates' supervisor, upon being admitted to her hotel room by her roommate, jumped on top of Dates, who was lying on the bed. She reported this to her supervisor's supervisor, who stated he would talk to Dates' supervisor. Later in the same trip, Dates' supervisor, in the presence of his supervisor, attempted to grope Dates and kiss her. Dates' supervisor's supervisor told him to desist.

The next month, Dates' supervisor took her personal keys and hid them. Dates complained, and her supervisor was told to desist. The same thing happened the next month, and Dates was transferred to another location.

The next month, the same supervisor, although he no longer supervised Dates, visited the location in which she now worked. He entered her cubicle and began feeling her back and

shoulder. Dates told him to keep his hands to himself and reported the incident to her supervisor, who said she would talk to the offender.

About two months later, Dates saw the offending supervisor at a conference, where he grabbed her around the waist. Dates again complained to her supervisor.

Finally, when Dates was at a nightclub during non-working hours, the offender approached her and stated that her complaints were ruining his career. Dates responded that her career was ruined. The offender then told Dates to “lighten up” and began rubbing her back. Dates had him removed from the nightclub and again complained, this time to a person in the human resources department. The human resources person stated she knew of the situation and that it would be addressed. Dates later asked what was being done, and was told that the matter was being investigated. Dates did not hear more before she quit.

All of the above findings are supported by testimony in the record. While OIC disputes Dates’ credibility, LIRC and the ALJ both considered the testimony credible. The court does not assess credibility. “The credibility of the witnesses and the weight of the evidence lie exclusively within the powers of the commission.” Neff v. Industrial Commission, 24 Wis. 2d 207, 213 (1964).

LIRC’s conclusion that a certain set of facts constitutes “good cause attributable to the employing unit” is a conclusion of law, and therefore reviewable by the court. However, where an administrative agency has been given the duty of administering a statute, has a long history of interpreting the statute, employs specialized knowledge and expertise in making its decisions, and provides uniformity and consistency in statutory application, the court will give the agency’s conclusions of law great weight. See UFE Inc. and Pacific Indemnity Co. v. LIRC and Huebner, 201 Wis. 2d 274, 284 (1996).

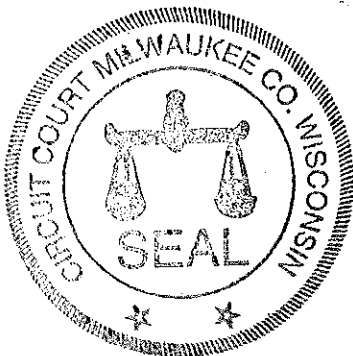
“Good cause attributable to the employing unit” means “some act or omission by the employer justifying the employee’s quitting; it involves some fault on the part of the employer which must be real and substantial.” Nottelson v. DILHR, 94 Wis. 2d 106, 120 (1980). Dates made repeated complaints over several months about the same person’s actions. LIRC decided that

OIC's failure to take corrective action under these circumstances constituted good cause for Dates' quitting. In its decision, LIRC stated that the transfer to a new location was not a reasonable corrective action, as shown by the fact that the harasser still had access to Dates and the harassment continued. LIRC stated that "[t]he employee had a right to work in an environment free from sexual harassment," and that "once having been placed on notice of the problem, it was the employer's obligation to investigate and take prompt corrective action." Because OIC failed to do so, Dates had good cause attributable to OIC to quit. See Dates v. OIC (LIRC, August 18, 2000), at 3.

Section 102.23(6), Stats., requires that LIRC's decision be "supported by credible and substantial evidence." Given the facts, found and set forth above, it appears there is no question that LIRC's decision was supported by substantial evidence. The record reveals that Dates endured repeated unwanted inappropriate actions by her harasser, complained each time, and did not get results from her complaints. It has already been stated that credibility is for LIRC to determine, and that LIRC found Dates credible. LIRC's application of the facts to the "good cause attributable to the employing unit" standard comports with public policy discouraging sexual harassment and with common sense. Faced with a record showing repeated complaints, about which no effective action was taken, LIRC concluded that OIC had given Dates good cause to quit. This court cannot find fault with LIRC's conclusion of law.

ORDER

Based upon the foregoing and for the reasons stated, IT IS ORDERED that the LIRC decision determining Dates' eligibility for unemployment compensation benefits is confirmed, and the petition for review is DISMISSED.



BY THE COURT:

STANLEY A. MILLER

Stanley A. Miller
Circuit Court Judge, Branch 21
Case No. 00-CV-007743

MAR 20 2001