No. 272
August Term, 1964
STATE OF WISCONSIN: IN SUPREME COURT

FILED
Apr 27 1965
Franklin W. Clarke
Clerk of Supreme Court
Madison, Wisconsin

EMIL KESSLER,

Plaintiff-Appellant,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN and KICKHAEFER MANUFACTURING CO.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane county: EDWIN M. WILKIE, Circuit Judge. Affirmed.

The appeal is from a judgment affirming a decision of the Industrial Commission of Wisconsin which held the plaintiff was ineligible for unemployment benefits.

From 1954 to the end of November, 1962, the plaintiff Emil Kessler was employed as a plant superintendent for the defendant Kickhaefer Manufacturing Co. On November 5, 1962, he submitted his resignation effective at the end of the month and later filed a claim for unemployment compensation on the ground he had quit work with good cause attributable to the employer and for a compelling personal reason. The initial determination, the decision of the appellate tribunal and the decision of the industrial commission all found in effect that the reason for quitting was not good cause attributable to the employer or for any compelling personal reason as those terms are used in sec. 108.04(7), Stats., but rather because of the plaintiff's dissatisfaction with the policies of the employer.

HALLOWS, J. The plaintiff recognizes the findings of the industrial commission cannot be set aside on appeal in the absence of fraud if there is sufficient credible evidence or reasonable inferences which support the findings. Grant County Service Bureau, Inc. v. Industrial Comm. (1964), 25 Wis. (2d) 579, 131 N.W. (2d) 923; Cooper's, Inc. v. Industrial Comm. (1962), 15 Wis. (2d) 589, 113 N.W. (2d) 425; and Marathon Electric Mfg. Corp. v. Industrial Comm. (1955), 269 Wis. 394, 69 N.W. (2d) 573. The plaintiff also recognizes the equally well-established rule that where the evidentiary facts are not in dispute but permit of different inferences the drawing of one of such inferences is a finding of fact within the province of the industrial commission. Gant v. Industrial Comm. (1953), 263 Wis. 64, 56 N.W. (2d) 525. This court has held, however, and the plaintiff rests his case on the proposition that if the evidentiary facts are not in dispute and permit of only one reasonable inference, the drawing of that inference is a question of law and not of fact. Brown v. Industrial Comm. (1960), 9 Wis. (2d) 555, 101 N.W. (2d) 788; Gregory v. Anderson (1961), 14 Wis. (2d) 130, 109 N.W. (2d) 675; Cutler-Hammer, Inc. v. Industrial Comm. (1961) 13 Wis. (2d) 618, 109 N.W. (2d) 468.

It is contended on this record by the plaintiff that only one reasonable inference can be drawn, namely, that his quitting of his job was with good cause attributable to the employer. The "compelling personal reason" basis was not stressed below or on this appeal and in fact is based on identical facts constituting the alleged good cause attributable to the employer.

Good cause attributable to the employer as a basis for unemployment compensation under sec. 108.04(7)(b), Stats., has been the subject of prior decisions of this court. In Western Printing & Litho. Co. v. Industrial Comm. (1951), 260 Wis. 124, 50 N.W. (2d) 410, we stated the resignation must be occasioned by "some act or omission by the employer" constituting a cause which justifies the quitting. Good cause for quitting attributable to the employer as distinguished from discharge must involve some fault on his part and must be real and substantial. 81 C.J.S., Social Security and Public Welfare, sec. 167, pp. 253-256. A transfer or shift in jobs occasioned by decreased work in an assembly department due to the reduction in demand for defense production is not a good cause for quitting even though there would be a temporary reduction in salary, but the employee's seniority would be unaffected. Dentici v. Industrial Comm. (1953), 264 Wis. 181, 58 N.W. (2d) 717. Similarly a transfer in job status necessitated by lack of work in a welding department which shift would reduce the salary but not affect seniority was not a good cause for quitting in Roberts v. Industrial Comm. (1957), 2 Wis. (2d) 399, 86 N.W. (2d) 406. In that case we pointed out that one of the purposes of the unemployment compensation statute was to minimize the loss of income from unemployment due to the fault or the misfortune of the employer but the statute was not intended to provide relief when reasonable work was available which the employee can but will not do.

The plaintiff claims the record shows that when he commenced his employment as plant superintendent in the small manufacturing plant of the defendant he devoted about 75 percent of his time to plant duties and 25 percent to so-called paper work; that over the years the paper work demanded considerably more time and encroached on his plant supervision. Plaintiff was in charge of safety in the plant. Several serious accidents occurred because of the failure of machine operators to use safety devices. In 1962 the president wrote a memo to the plaintiff which in effect held the plaintiff responsible for the lack of safety practices and threatened discharge if another serious accident occurred. The plaintiff also claims a lack of communication had developed between him and the president.

Sometime in 1960 a Mr. Norton was hired as sales manager and on November 1, 1962, he was promoted to vice-president in charge of sales and production, thus making him in effect the plaintiff's superior. On November 3rd at the plaintiff's request a conference was held with the president. During this conference the plaintiff was told he would receive no further bonuses. Bonuses had been paid the plaintiff and nonproduction employees since 1958 in varying amounts. They were not a part of the salary contract but were paid at the discretion of the board of directors. It was after this conference the plaintiff resigned.

At the hearing a statement (Exhibit 4) of the plaintiff, given in an interview with the commission concerning his reasons for quitting the company, was put in evidence. It is quite apparent from this statement the plaintiff disliked Mr. Norton, did not consider him a good sales manager, was disturbed when Mr. Norton's name was mentioned and disappointed when Mr. Norton was promoted and made the plaintiff's superior. Without detailing any further evidence it is quite clear the evidentiary facts give rise to reasonably conflicting inferences and are not of such a compelling nature that only the plaintiff's version could be reasonably inferred.

The industrial commission drew the inference the plaintiff was dissatisfied with the action of the employer in promoting Mr. Norton, in criticizing him for plant accidents, and in discontinuing bonuses. We cannot hold this was an unreasonable inference or that the facts compelled the drawing of a contrary inference. Cheese v. Industrial Comm. (1963), 21 Wis. (2d) 8, 123 N.W. (2d) 553. These activities of the defendant employer were within the prerogative of management and do not constitute a good cause for the plaintiff's quitting his employment.

At the hearing the plaintiff was refused permission to call the president of the defendant adversely before he himself took the stand. The plaintiff contends he was entitled to adversely examine the defendant's president at the start of the proceeding, the same as he would in a civil trial in a court of record. The industrial commission in its decision recognizes the procedure relating to adverse examination of the parties as established and followed in proceedings before courts of record in an efficient procedure and an acceptable practice at hearings under ch. 108 of the statutes. However, the commission considered the time when an opposing party might be adversely examined in a hearing to be within the discretion of the hearing examiner. In this case the trial examiner allowed the plaintiff to adversely examine the president of the defendant after the plaintiff testified.

Since the conduct of the hearings is governed by general commission rules under sec. 108.09(5)(a), Stats., and such rules (Sec. Ind-UC 140.05 of the Wisconsin Administrative Code) provide the rules of practice at hearings shall conform generally to those used in equity proceedings, we would consider the plaintiff did have a right to examine the defendant's president adversely prior to the plaintiff's taking the stand on his own behalf. Under these rules it is not discretionary with the examiner to control the order of presenting witnesses. However, the plaintiff has not shown any prejudice from the procedure adopted by the examiner. The basis for the commission's finding rests essentially on the plaintiff's own statement of his reasons for quitting given to the commission on January 22, 1963 (Exhibit 4) rather than on the testimony of the president of the defendant.

Plaintiff contends the commission erred in refusing to grant his request for an adjournment of the hearing in order to subpoena the minute book of the employer. The president of the defendant then testified he had told the plaintiff at the conference he was not going to receive further bonuses. At the

hearing the president testified the bonuses were under study by the board of directors and no action had been taken with respect to 1962-63 bonuses. In hopes of impeaching the president's statement that there would be no bonuses, the plaintiff asked for an adjournment of the hearing and for permission to obtain a copy of the board of director's minutes and resolution, if any. The proposed examination of the corporate minutes was in the nature of a fishing expedition, the request for which under the circumstances the examiner could refuse without abusing his discretion.

By the Court. -- Judgment affirmed.

STATE OF WISCONSIN :: CIRCUIT COURT :: DANE COUNTY

EMIL KESSLER,

Plaintiff,

vs.

KICKHAEFER MANUFACTURING CO. and INDUSTRIAL COMMISSION OF WISCONSIN,

Defendants.

MEMORANDA OPINION

#113-385

Before: Hon. Edwin M. Wilkie, Circuit Judge.

We confirm the Industrial Commission's decision and order.

Plaintiff was employed as plant superintendent for defendant Kickhaefer Manufacturing Co. On November 5, 1962, he submitted his resignation effective November 30, 1962. He left work on that date and filed a claim for unemployment compensation upon the ground that he had quit work "with good cause attributable to the employer" or "for a compelling personal reason." Sec. 108.04(7) Wis. Stats.

When plaintiff was hired his work as plant superintendent involved a relatively small amount of paper work. As time went on, his paper work increased and time spent in actual supervision of plant production decreased. Mr. Kickhaefer withdrew from active management and a Mr. Davis became president of the company. Davis hired a Mr. Norton who became sales manager. There were some serious accidents in the plant and in June, 1962, an employe lost some fingers because proper safety guards were not in use on the machine the employe was operating. Davis informed plaintiff by letter that if there was another similar incident plaintiff would be discharged. Plaintiff considered this unfair because of the increased load of paper work assigned him which kept him out of the plant and unable to watch the workmen a good share of the time.

On November 1, 1962, the company promoted sales manager Norton to the position of vice-president in charge of sales and vice-president in charge of production. In this position Norton was over the plaintiff, who did not receive any promotion despite the fact that he had been with the company longer than Norton. Plaintiff had a conference with Davis on November 3, 1962, and inquired about his status. His testimony was that he did not express dissatisfaction over Norton's promotion. Davis' testimony was to the contrary. Plaintiff testified that in this conference Davis told him that the company was going to cut off his bonus. Davis testified that the board of directors had agreed to discontinue the previous bonus plan and was studying another bonus plan and that he told plaintiff that as of that time no bonuses were to be paid to anybody.

The appeal tribunal and the commission found that the reason plaintiff quit was because the sales manager was promoted over his head and he was displeased about it and unwilling to accept the supervision of Norton as vice-president. The appeal tribunal and the commission found specifically that Davis had told plaintiff on November 3, 1962, that as of that time no bonuses were to be paid to anybody for the year 1962-1963. While the appeal tribunal and the commission made reference to the bonus discussion between plaintiff and Davis and made reference to the June letter from Davis to plaintiff indicating that plaintiff would be discharged if there was another serious accident in the plant, the appeal tribunal and the commission attached no controlling significance to these matters and found the reason for plaintiff's action in quitting his employment as follows:

> "The reason the employe quit his employment was that on November 1 the sales manager was promoted to the position of vice-president in charge of sales and vice-president in charge of production. In this position he was the employe's supervisor. The employe was displeased because he considered that he should have been designated vice-president in charge of production and he was unwilling to accept the supervision of the new vice-president."

The commission found that plaintiff "was not justified in quitting his employment and that the employer's actions were not unreasonable and were clearly within the prerogative of management". Accordingly the commission found that plaintiff "failed to establish that his termination was with good cause attributable to the employer or for a compelling personal reason."

We are obliged to confirm the commission. The question was one of fact and the inferences were for the commission. The inference drawn by the commission is a reasonable inference and we cannot upset it. The credibility of the witnesses was for the commission, which chose to believe Davis' testimony with respect to the bonus discussion with plaintiff and to reject plaintiff's testimony with respect thereto. The bonus that had been paid by the employer over the years was not a contractual obligation of the company; it was not a part of plaintiff's earned wages or salary. It was a "true"bonus and the employer could grant it or not as the employer chose. Plaintiff would not have been justified in quitting because of a company change in bonus policy for all employes. He did not establish that he was singled out for unfair and discriminatory treatment with respect to bonus. The safety letter incident occurred back in June and it was reasonable for the commission to infer that it was not a factor in plaintiff's quitting the employment in November.

Plaintiff simply failed to sustain his burden of proof. The evidence supports the commission's ultimate finding that he did not establish that his termination of employment was due to either "good cause attributable to the employer" or "for a compelling personal reason".

See: Coopers Inc. vs. Industrial Comm. and Edward F. Blanchette (1962) 15 Wis 2d 589.

Kohler Co. vs. Industrial Comm. (1956) 272 Wis 310.

Western Printing and Lithographing Co. vs. Industrial Comm. (1951) 260 Wis 124.

In plaintiff's petition to the commission for review of the appeal tribunal's decision he complained of two rulings on evidence by the appeal tribunal. The first of these was the appeal tribunal's refusal to continue the hearing and make arrangements for production of minutes of the employer's board of directors and a resolution of such board with respect to bonus payments, incident to Davis' testimony that as of November 3, 1962, no bonuses were contemplated for any of the employes for the year 1962-1963. Plaintiff had not subpoenaed the minutes or the resolution and a continuance of the hearing would have been necessary to accomodate plaintiff's demand for this documentary material which he sought to use to show "bias and prejudice" in the witness (Tr 91). The appeal tribunal's ruling was clearly discretionary and we cannot say that it abused its discretion.

The second ruling of the appeal tribunal of which plaintiff complains is the tribunal's refusal to permit plaintiff to examine Davis adversely before calling plaintiff himself to the stand. It is evident that the appeal tribunal felt that it could not pass upon the admissibility of Davis' testimony intelligently until plaintiff had testified and a foundation for Davis had been laid. Plaintiff's contention is that he had the right to present his case in the order he saw fit and call his witnesses in the order he saw fit. We believe the appeal tribunal was within its discretion in ruling that the foundation called for should be laid first through plaintiff's testimony.

Viewing the record as a whole, we are satisfied that plaintiff enjoyed a full and fair hearing and that neither the appeal tribunal nor the commission erred to the plaintiff's prejudice in rulings on evidence or otherwise in the conduct of the proceedings. The rules of evidence in such proceedings are controlled by 3 Wis Adm Code Sec. Ind 80.01:

> "Ind 80.01 General. The rules of practice at hearings before the industrial commission will conform generally to the rules of practice before courts of equity. The aim is to secure the facts in as direct and simple a manner as possible."

We are impressed with the fact that the appeal tribunal followed these rules and addressed itself to the ultimate fact in issue. The tribunal was not obliged to go further.

> See: Levitan, Practice before the Industrial Commission, 1950 WLR 252, 260, citing First National Bank vs. Industrial Comm. (1915) 161 Wis 526, 528.

The commission did not abuse its discretion in denying plaintiff's petition for further hearing.

Moore vs. Industrial Comm. (1957) 4 Wis 2d 208, 217.

Counsel for the commission may prepare a formal judgment in accordance herewith and submit the same to opposing counsel for approval as to form and to the court for signature.

Dated September 28, 1964.

BY THE COURT

/s/ Edwin M. Wilkie
Circuit Judge.