

STATE OF WISCONSIN : CIRCUIT COURT : ROCK COUNTY

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GAZETTE PRINTING COMPANY,

Plaintiff,

MEMORANDUM DECISION

vs

DIANA PARKER; DEPARTMENT  
OF INDUSTRY, LABOR &  
HUMAN RELATIONS REVIEW  
COMMISSION OF WISCONSIN,

Defendants.

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Case No. 91 CV 331

The Plaintiff, Gazette Printing Company (GAZETTE), appealed the decision of the Department of Industry, Labor & Human Relations Review Commission of Wisconsin (COMMISSION) which reversed the decision of the Department of Industry, Labor & Human Relations Appeal Tribunal dated October 19, 1990. This matter relates to the employment relations between defendant Diana Parker (PARKER) and employer GAZETTE. PARKER was employed by the GAZETTE as a data input operator whose job responsibilities related to inputting information into computers. The court will not at this time recite the facts as were found by the COMMISSION for, in the most part, they are undisputed. Suffice it to say at this point, however, that PARKER was given permission to take unpaid leave during the period of August 13 to the 20th of 1990. Her supervisors at the GAZETTE on three previous occasions approved this unpaid leave and, PARKER, in reliance of this permission, expended substantial funds and made plans to attend a music festival in Michigan. On approximately August 10, 1990, a supervisor at the GAZETTE (Sipe) indicated to her that unless the work on the real estate book was completed, she would not be able to take her vacation. On August 15, 1990, PARKER completed her work on the real estate book and went on her unpaid vacation. She returned on August 20, 1990, to find that she had been terminated because the GAZETTE advised her that she had "abandoned" her job. The Department of Industry, Labor & Human Relations (DILHR) initially determined that PARKER had quit her job by abandoning it without permission by decision dated August 29, 1990. PARKER timely appealed which resulted in the decision of the Appeal Tribunal upholding the Department's initial determination by decision dated October 19, 1990.

This is essentially a judicial review of the determinations of the

COMMISSION. The Court is limited in its review by statutory provisions contained in Chapters 108 and 102 which state in pertinent part:

"Section 108.09(7)(b). Any judicial review under this Chapter shall be confined to questions of law, and the provisions of Chapter 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the COMMISSION reviewed under this Section.

Section 102.23(1)(e). Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereupon; 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). . . 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 Findings 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."

From this Court's review of the COMMISSION's findings of fact, all findings of fact found by the COMMISSION were supported by the record. While the record contained conflicting testimony concerning several key areas of factual dispute, this court will not and cannot substitute its determination of the evidence's weight or credit or the witnesses' credibility. Princess House, Inc. vs DILHR, 111 Wis.2d 46 at page 54;

"A reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence. . . . if there is relevant, credible and probative evidence upon which reasonable persons could rely to

reach a conclusion, the findings must be upheld."

"It is the function of the COMMISSION, not the reviewing court, to determine the credibility of witnesses and it is for the COMMISSION to weigh conflicting testimony and decide who should be believed . . . We are bound to accept the findings of the COMMISSION unless the evidence was insufficient or incredible as a matter of law. Link Industries, Inc. vs LIRC, 141 Wis.2d 551, 558 (1987)."

The next question raised on appeal by the plaintiff GAZETTE was whether the COMMISSION's conclusions of law are supported by the record. The Plaintiff claims PARKER's failure to report to work on August 16 and 17 constituted a voluntary termination under Sec. 108.04(7)(a) and cited the case of Shudarek vs ILHR, 114 Wis.2d 181 (1983). The factual findings as made by the COMMISSION indicated that PARKER on three separate occasions obtained permission to take the 1 week's unpaid vacation in order to attend the musical festival in Michigan. These notifications to her employer occurred from January, 1990 to late July, 1990. Her supervisors gave her permission to take the week of August 13th to the 20th, 1990 as unpaid vacation. It was not until her supervisor was on vacation on August 10, 1990 that another supervisor advised her that there might be a problem with her vacation unless the real estate book was completed. As a result, PARKER worked on the real estate booklet on August 11, 13, 14 and 15 instead of going on vacation. No person in management at the GAZETTE told her anything other than the matter of her vacation would have to be reevaluated after the real estate booklet was completed. At no time was the employee notified that she could not take her vacation if she completed the real estate book and, at no time was she advised that her vacation would have to be canceled altogether. It is uncontroverted in the testimony that PARKER did in fact complete the work on the real estate book and all other special projects which were then pending. She then left at mid-day on August 15, 1990.

In Shudarek, supra, the employee took steps (leaving the religious order) which made her ineligible to hold her position because of the withdrawal of the Bishop's endorsement, which was required for her position. Prior to her taking the step of leaving the religious order, Shudarek had been advised that she would lose the Bishop's endorsement. Thus the cases are not similar in that in Shudarek, the employee was advised that the steps she was taking would make her ineligible for her position and, in the case at hand, PARKER, upon being

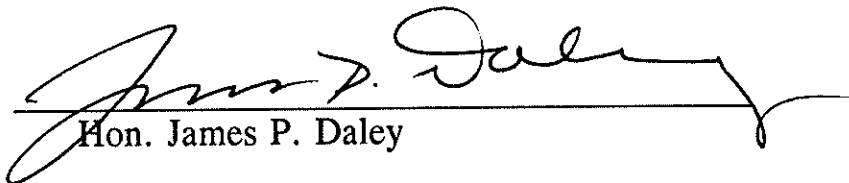
told what had to be done, complied with all of the requirements which had been placed upon her so that she could go on vacation, i.e., completing the real estate book. The court cannot find that as a matter of law PARKER engaged in conduct which showed that she intended to leave her employment and indicated such intention by some action or conduct which was inconsistent with the continuance of the employee-employer relationship so that she could be found to have voluntarily terminated her employment. Nottelson vs ILHR Dept., 94 Wis.2d 106, 119, (1980). This court is satisfied that the conclusion of the COMMISSION is more than adequately supported by the record.

Next, plaintiff GAZETTE alleges that PARKER's failure to show up to work on August 16, 1990 constituted misconduct. While this also is a conclusion of law, it must be supported by the facts as found by the COMMISSION and which were supported in the record. As previously stated, PARKER met all of the requirements placed upon her by Michael Sipe, the Retail Advertising Manager of the GAZETTE. The COMMISSION chose to believe the testimony of PARKER and Karlene Hildebrand who testified that the defendant had completed all of the work on the real estate book and other pending projects which she was qualified to do. When PARKER left on vacation on August 16, 1990, the only work left to be done on the book was the paste up which PARKER was not qualified or trained to do. Because PARKER had completed the work that her supervisor told her had to be accomplished before she could take a vacation, and because she was not told she could not take a vacation if she did complete that work, her conduct cannot be considered to reflect an intentional and substantial disregard of the employer's interests or the employee's duties. McGraw-Edison Co. vs DILHR, 64 Wis.2d 703, 712 (1974).

Because the court cannot find that the COMMISSION's order depends upon a material or controverted fact which was not supported by credible and substantial evidence in the record and because the legal conclusions of the COMMISSION were more than adequately supported by these findings of fact, and because the COMMISSION acted within its powers and the order was not procured by fraud, the appeal of the plaintiff is denied. The defendant is ordered to draft an order consistent with this decision.

Dated this 10<sup>th</sup> day of October, 1991.

BY THE COURT:



Hon. James P. Daley