

MICHAEL T. PETERSON,
Plaintiff-Appellant,

vs.

MEMORANDUM DECISION

Case No. 92-CV-228

LABOR & INDUSTRY REVIEW COMMISSION
and OSSEO SALES & SERVICES
Defendants-Respondents.

Before the Honorable Richard D. Galstad, Circuit Judge

Plaintiff-Appellant seeks review pursuant to sec. 108.09(7) and 102.23, Wis. Stats., of a December 11, 1992 decision of the Labor and Industry Review Commission, which held that the plaintiff failed to accept an offer of suitable work, without good cause, within the meaning of sec. 108.04(8)(a), Wis. Stats., affirming the decision of the administrative law judge, that the plaintiff was not eligible for unemployment benefits.

The basic issue in this case is whether the record sustains the finding that the plaintiff did not have good cause within the meaning of sec. 108.04(8)(a), Stats. to refuse the offer of employment by Osseo Sales and Service. Having thoroughly reviewed the briefs submitted by the parties, cases and statutes cited, the transcript, applicable records and evidence submitted, the Court finds that this issue must be decided in the affirmative, and the order of the Commission must be affirmed.

The plaintiff was employed as a finance and insurance manager for Osseo Ford, Inc. from October 1989 to July 17, 1992. Mr. Peterson received a salary of

\$1,000.00 per month and a ten percent commission on the gross income of the finance and insurance department (F & I Department). In addition, Mr. Peterson received a bonus of three percent if the average income on each unit sold exceeded \$300.00. A demo car was provided to Mr. Peterson without restriction and Osseo Ford, Inc. paid a portion of his health insurance premiums.

Osseo Ford, Inc. ceased business on July 11, 1992. Osseo Sales & Service took over the dealership during the week commencing July 13, 1992. Mr. Peterson's employment with Osseo Ford, Inc. terminated as of July 17, 1992.

During the week of July 6, 1992, Mr. Peterson was asked to complete an application for employment with Osseo Sales & Service. He was also asked to submit a proposed pay plan to Osseo Sales & Service. Mr. Peterson worked the week of July 13, 1992, but apparently did not receive compensation from either Osseo Ford, Inc. or Osseo Sales & Service.

Osseo Sales & Service offered Mr. Peterson a position on July 17, 1992. The terms of that offer initially were a \$1,500.00 monthly draw with a 20 percent commission rate. Alternatively, Mr. Peterson was offered a \$1,000.00 monthly draw with a 25 percent commission rate. Regardless of the commission rate, the following terms applied: 1) A 90-day probationary period was imposed. 2) A demo vehicle was provided only after the F & I Department grossed \$7,500.00 per month. 3) The employee's contribution to health insurance increased by \$30.00 over the Osseo Ford employment. 4) Additional duties (in the areas of sales, paperwork, etc.) were required of Mr. Peterson when he had time available. Mr. Peterson was also advised that with volume increases in the future, his commission rate would decrease. Mr. Peterson rejected that offer of employment on July 18, 1992.

Mr. Peterson applied for unemployment benefits on July 20, 1992. He designated Osseo Ford, Inc. as his most recent employer. By an initial determination dated August 11, 1992, M. J. Enerson found Mr. Peterson ineligible for unemployment compensation benefits.

Mr. Peterson appealed the initial determination of M. J. Enerson, and a hearing was held September 8, 1992 before Administrative Law Judge Leann R. Prock. Judge Prock, by decision dated September 11, 1992, found Mr. Peterson eligible for unemployment compensation benefits as a result of Osseo Ford's cessation of business. However, Judge Prock went on to find Mr. Peterson ineligible for unemployment compensation benefits because he failed to apply for suitable work of which he was notified by the public employment office within the meaning of sec. 108.04(8)(b), Wis. Stats.

On September 28, 1992, Mr. Peterson appealed to the Labor and Industry Review Commission (the Commission). The Commission rendered a memorandum opinion December 11, 1992, adopting, with minor modification, the findings of fact of the appeal tribunal. The Commission determined that the Administrative Law Judge did not commit reversible error when she applied an improper statutory provision [Wis. Stat. sec. 108.04(8)(b) with regard failure to apply for suitable work when notified of a job opportunity by a public employment office] to render Mr. Peterson ineligible for benefits. The Commission also upheld Judge Prock's determination that Mr. Peterson did not have good cause to reject the offer of employment by Osseo Sales & Service.

On December 28, 1992, the Plaintiff filed this appeal.

The plaintiff argues that the Commission acted without, or in excess of its powers; that the findings of fact by the appeal tribunal and the Commission do not support the decision; and that the decision of the Commission is erroneous as a matter of law.

As stated in the often cited case of Princess House, Inc. v. DILHR, et al, 111 Wis. 2d 46, 330 N.W. 2d, 169 (1983), our Wisconsin courts have consistently held that findings of fact made by the Commission under Chapter 108, Wis. Stats., are conclusive on the Court if there is any credible, relevant and probative evidence which, if construed most favorably, would justify men of ordinary reason and fairness to make such findings. Also of importance, particularly in this case, is the holding

in L & H Wrecking Co. v. LIRC, 114 Wis. 2d 256, 306 N.W. 2d, 344 (Ct. App. 1983), stating that in upholding the decision of the Commission, it is only necessary to find sufficient evidence to avoid speculation and conjecture.

Plaintiff's main argument is that under the provisions of sec. 108.04(8)(d), Wis. Stats., plaintiff had good cause to refuse the offer of Osseo Sales & Service because plaintiff had not yet had a reasonable opportunity to seek a new job substantially in line with his prior job skill and prior rate of pay. To make such a determination would require speculation.

The compensation package proposed by the plaintiff was different than the compensation package he had with Osseo Ford, Inc., and the record contains no information regarding his actual prior income from Osseo Ford, Inc. The record does indicate, however, that his position, regarding job skill, would have been the same with both employers, although he would have been expected to perform other duties when he had available time. Even though the offer from Osseo Sales & Service provided compensation based on commission only, rather than salary plus commission as provided by Osseo Ford, Inc., because the Commission rates were different, it is not possible to determine actual earnings or rates of pay without engaging in speculation. The record does indicate, that at least for his first full month of employment with Osseo Sales & Service, which would have been August of 1992, Plaintiff's income would have been greater under the Osseo Sales & Service compensation package than it would have been under the former Osseo Ford, Inc. compensation package, because of the difference in commission rates. Whether or not that sales volume would continue, and whether or not plaintiff's commission rate would subsequently be reduced would, again, be a matter for speculation.

Plaintiff places much emphasis on the six-week canvassing period allowed by sec. 108.04(8)(d), Wis. Stats., but this canvassing period applies only if the rate of pay is significantly lower than applied to the employee on one or more recent jobs. The rate of pay offered by Osseo Sales & Service was different than that previously in place with Osseo Ford, Inc., but not necessarily significantly lower, as indicated

above. Also, the compensation package proposed by plaintiff, was different than the one he had from Osseo Ford, Inc.

The record clearly shows that the plaintiff refused the job offer because he was not sure that he would make as much money, and he was not sure that the compensation package would remain the same. The record does not indicate that the offered job was at a lower grade of skill or at a significantly lower rate of pay than applied to the plaintiff on one or more recent jobs.

A full and complete review of the record in this case clearly reveals the existence of substantial evidence supporting the findings of the appeal tribunal and the Commission.

From the record in this case, the Court finds that the plaintiff had a full and fair hearing; that there is no legal cause or justification to return the matter for further hearing; and that the decision of the Labor and Industry Review Commission of December 11, 1992, affirming the appeal tribunal be approved and affirmed.

Concluding papers in accordance with this memorandum Decision may be prepared and submitted.

Dated this 9th day of September, 1993.

BY THE COURT:



Richard D. Galstad
Circuit Court Judge