STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION

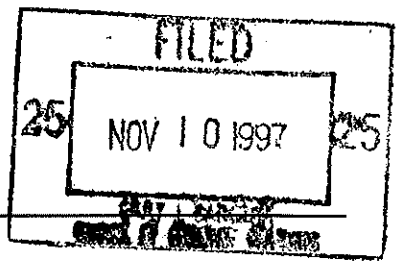
SCHOK'S AUTO REFINISHING INC.,

Plaintiff,

-vs- Case No. 96-CV-007580

LABOR AND INDUSTRY REVIEW COMMISSION AND TIMOTHY M. PRYAL,

Defendants.



DECISION AND ORDER

SUSTAINING THE COMMISSION'S DECISION

On October 4, 1996, plaintiff filed a complaint seeking judicial review of a decision of the Labor and Industry Review Commission which had determined that Timothy Pryal was eligible for unemployment benefits. For the reasons established below, the decision of the Commission is sustained.

Background

The plaintiff, Schok's Auto Refinishing, Inc., is an automobile body repair and paint shop owned by Randy Kuhn and Michael Schmidt. Timothy Pryal was employed as an automotive body repairman and painter by Schok's for approximately two years. Pryal quit on April 11, 1996, following a dispute with Randy Kuhn regarding whether Pryal would work the following Saturday and a threat by Kuhn of a decrease in pay. Pryal then sought unemployment compensation benefits, claiming that he had been subject to verbal and physical harassment from Randy Kuhn throughout his tenure at Schok's.

A hearing was held at which Pryal, both owners, and three other witnesses testified. In a written decision issued July 10, 1996, the administrative law judge concluded that the Pryal's resignation was not with good cause, and that he was not eligible for unemployment compensation benefits. On September 20, 1996, the Commission reversed the this decision, concluding that the defendant voluntarily terminated his employment with good cause attributable to the plaintiff.[1]

Standard of Review

The Commission's decision encompasses both findings of fact and conclusions of law. The Commission's findings of fact are binding on the court provided that there is substantial and credible supporting evidence, drawing all reasonable inferences in favor of the findings. Wis. Stat. 102.23(6); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 50-55 (1983).

The court is not bound by the statutory interpretations and legal conclusions of an administrative agency, but it must provide one of three levels of deference to such conclusions. *Sauk County v. WERC*, 165 Wis. 2d 406, 413 (1991); *Local 695 v. LIRC*, 154 Wis. 2d 75, 82 (1990). The general rule is that an agency's determination is entitled to great weight. *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 244 (1992). This standard applies if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of a statute. Under this level of review, the court will uphold an agency's reasonable statutory interpretation that is not contrary to the clear meaning of the statute or to the legislative intent, even if the court feels that an alternative interpretation is more reasonable. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 287 (1996). The

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[1] The Department proceedings were assigned case no. 96603586MW, and the record filed with the circuit court consists of various documents consecutively numbered as pages 1 through 42 and a transcript of the hearing before the administrative law judge. These will be cited as the *Record* and *Transcript*.

burden of proof is on the party seeking to show that an agency's interpretation is unreasonable. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661 (1995).

A second level of review, identified as due weight deference, is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position than the court to make judgments regarding statutory interpretation. *UFE Inc.*, 201 Wis. 2d at 286. The third level involves a *de novo* review, applicable only when the issue presented is clearly one of first impression and the agency lacks special expertise or experience with the issue. *WSEU v. WERC*, 189 Wis. 2d 406, 411 (Ct. App. 1994).

The Commission has extensive experience technical competence and specialized knowledge on which to base its conclusions of law and interpretations of Wis. Stat. § 108.04 (7)(a). Thus, the first level of review applies and the Commission's conclusions of law are entitled to be given great weight.

Discussion

1. The Commission Was Not Required to Consult Directly With the ALJ.

The plaintiff's principal contention is that the Commission's failure to consult directly with the administrative law judge about his credibility assessments violated due process requirements set forth in several Wisconsin cases. Plaintiff is correct as to the general principle:

> It is the rule in Wisconsin that where the department differs with its hearing examiner, acting as an appeal tribunal, in regard to material findings of fact based on an appraisal of the credibility of witnesses, it must (1) consult of record with the examiner to glean his impressions of the credibility of witnesses and (2) include in a memorandum opinion an explanation of its disagreement with the examiner.

Carley Ford Lincoln Mercury, Inc. v. Bosquette, 72 Wis. 2d 569, 576 (1976); see also *Hamilton v. DILHR*, 94 Wis. 2d 611, 621 (1980). However, the Commission is not required to consult with the ALJ when the disagreement is not about facts but involves the legal consequences of those facts. *Carley Ford Lincoln Mercury, Inc.*, 72 Wis. 2d at 576.

In this case, there was no material disagreement as to the facts or as to the credibility of witnesses. While the Commission stated some findings of fact in slightly different language, these differences are not material. Plaintiff complains that the Commission made reference to "the unresponsiveness of the other owner to the employee's complaints . . . ," a matter not mentioned by the administrative law judge. *Record,* at 9. However, this finding is consistent with the facts found by the ALJ and with his view of the credibility of the witnesses, and it is supported by evidence in the record. See, for example, *Transcript*, at 22.

Both the ALJ and the Commission considered the same basic series of "pranks," and both found that Pryal quit because of the harassment and the threat of a pay cut. *Record,* at 9, 26. The different result reached by the Commission did not concern the basic facts or credibility of witnesses, but rather reflected a different view as to the significance of the two-month period of time between the last documented act of harassment and Pryal's resignation. The ALJ found that although the "pranks" justified resignation at the time of the last incident, they did not constitute good cause for quitting two months later. *Id.*, at 26. The Commission found that the combination of circumstances was sufficient to constitute good cause, that while the threat of a pay cut did not justify quitting, the abusive comments made by Randy Kuhn in connection with that threat were sufficient to cause Pryal to believe that the harassment would continue. *Id.*, at 4.

2. The Commission's Decision Was a Reasonable Application of the Law to the Facts.

This case involves the application of Wis. Stat. § 108.04(7), which provides, in pertinent part:

> (a) If an employe terminates work with an employing unit, the employe is ineligible to receive benefits.
>
> (b) Paragraph (a) does not apply if the department determines that the employe terminated his or her work with good cause attributable to the employing unit. In this paragraph, "good cause" includes, but is not limited to, a request suggestion or directive by the employing unit that the employe violate federal or Wisconsin law.

The phrase "good cause attributable to the employing unit" has been held to mean some act or omission by the employer which justifies an employee's resignation. It involves fault on the part of the employer which must be "real and substantial." *Nottelson v. DILHR*, 94 Wis. 2d 106, 120 (1980); *Kessler v. Industrial Comm.*, 27 Wis. 2d 398, 401 (1965). For the exception to apply, the voluntary termination must be "occasioned by" some act of the employer which constitutes good cause. *Hanmer v. DILHR*, 92 Wis. 2d 90, 98 (1979).

Plaintiff attempts to argue that the administrative law judge correctly concluded that Pryal voluntarily terminated his employment without good cause, however, the only issues for judicial review are whether substantial and credible evidence supported the Commission's finding to the contrary and whether the Commission's interpretation of the law was reasonable. Even as developed by caselaw, the notion of "good cause" remains a broad and subjective concept, and involves an assessment of the reasonableness of the employer's conduct and reasonableness of the employee's response.

Pranks and horseplay have their place in the workplace, and benefits should not be given to the overly sensitive employee who cannot take a joke. However, both the ALJ and the Commission properly found that things in Schok's body shop had gone beyond harmless

fun. This case turns on whether the "good cause" remained viable at the time Pryal quit. I agree with the ALJ that the date of Pryal's resignation was too far removed from the last prank so as to allow the pattern of harassment to constitute good cause. I am also troubled by the employee's failure to loudly and clearly say "Cut it out!", a failure which diminishes the reasonableness of his response. I certainly cannot say, however, that the Commission's interpretation of the "good cause" requirement and its application to the facts are unreasonable. Nothing about its conclusions is contrary to the plain meaning or intent of the statute. Given the considerable deference to be accorded to the Commission's interpretation of the statute, its decision must stand.

Conclusion

The Commission was not required to confer with the administrative law judge on questions of witness credibility, and substantial and credible evidence supported the conclusion that the defendant had good cause to voluntarily terminate his employment which was attributable to verbal and physical harassment by the employer. Accordingly, the decision of the Commission is affirmed.

Dated November 7, 1997.

BY THE COURT:

John Franke
Circuit Court Judge
Branch 25