STATE OF WISCONSIN : CIRCUIT COURT : ROCK COUNTY

WISCONSIN DEPT. OF INDUSTRY, LABOR & HUMAN RELATIONS - UNEMPLOYMENT COMPENSATION DIVISION,
Plaintiff,
vs
WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION & CONSTANCE C. WILEMAN,
Defendants.

MEMORANDUM DECISION

Case No. 93 CV 0677

This is an action brought by the Wisconsin Department of Industry and Labor and Human Relations - Unemployment Compensation Division (DILHR) for judicial review of the decision of the Labor & Industry Review Commission (LIRC) reversing a determination of DILHR that concluded defendant Constance C. Wileman (WILEMAN) did not have good cause for failing to accept an offer of work, and was therefore ineligible to receive benefits under unemployment compensation. LIRC ruled that the position offered WILEMAN was not suitable for her because the wage offered was less than half her former rate of pay and entailed duties significantly different to those she had performed in her most recent employment as head cashier.

All parties agree that the facts are undisputed, and are adequately set forth in the initial briefs of DILHR and LIRC. However some bear emphasis here. Defendant WILEMAN ended her employment relationship with Piggly Wiggly

on October 3, 1992. That job paid $12.10 per hour, together with health benefits and vacation pay. She received severance pay for the next 8 weeks, and applied for nineteen jobs in her area. She was offered a job by Hufcor Corporation on November 25, 1992 as a mail clerk, and it paid $6.00 per hour. On December 3, 1992, she called Hufcor Corporation and declined the mail clerk position. All parties agree that the issue presented turns upon the question of whether the provisions contained in Sec. 108.04(8)(a) are modified by Sec. 108.04(8)(d), and if so, to what extent.

Sec. 108.04(8)(a) states in the pertinent part:

> (a) If an employee fails, without good cause, to accept suitable work when offered, the employee is ineligible to receive benefits . . .
>
> . . . . . .
>
> (d) An employee shall have good cause under pars. (a) to (c) if the Department determines that the failure related to work at a lower rate of skill or significant lower rate of pay that applied to the employee on one or more recent jobs, and that the employee had not yet had a reasonable opportunity, in view of labor market conditions and the employee's degree of skill, but not to exceed 6 weeks after the employee became unemployed, to seek a new job substantially in line with the employee's prior job skill and rate of pay.

The scope of review by this court of a determination made by the LIRC is well settled and is:

> "Sec. 108.09(7), Stats., provides that judicial review under Chapter 108 is confined to questions of law, and that the provisions of Chapter 102, Stats., with respect to judicial review of orders and awards apply to any decision of the commission reviewed under sec. 109.09(7). Sec. 102.23(1), Stats., provides that "(t)he findings of fact made by the

commission acting within its powers shall, in the absence of fraud, be conclusive," and sec. 102.23(1)(d), Stats., states that an order or award of the commission or a judgment rendered thereon "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.

Sec. 102.23(6), Stats., further state:

> "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 finding 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 fact that is not supported by credible and substantial evidence."

Nottelson v. ILHR Department, 94 Wis. 2d 106, 113-114 (1980).

Both plaintiff DILHR and defendant LIRC claim that deference should be given to their respective determinations. However, this question was answered by the Supreme Court in DILHR vs LIRC, 161 Wis.2d 231 at page 245:

"Based upon the above, we hold that the reviewing courts of this state should accord deference to the findings of the Commission, rather than those of the Department, where deference to an agency's decision is appropriate." (Emphasis supplied)

Because the facts are undisputed in this case, the question becomes whether or not the Commission's legal determinations in this particular case should be accorded deference. Interpretation of a statute and the application of

that statute to undisputed facts presents a question of law. Bratz vs LIRC, 174 Wis.2d 286, 293 (1993). Any legal conclusion drawn by the LIRC from its findings of fact is subject to judicial review. The court is not bound by the agencies determination of a question of law. Wehr Steel co. v. ILHR Dept., 106 Wis 2d 111, 117(1982); Nottelson v. ILHR Department, Supra, p.115. However, a court should not upset the department's judgment concerning questions of law if there exists a rational basis for the department's conclusion. Dairy Equipment Co. v. ILHR Department, 95 Wis 2d 319, 327 (1980); Milwaukee County v. ILHR Department, 80 Wis 2d 445, 455-56 (1977); Pabst v. Dept. of Taxation, 19 Wis 2d 313, 322 (1963). The Court must sustain LIRC's conclusion of law if it is reasonable, even if an alternative view is equally reasonable. Bruns Volkswagen, Inc. v. DILHR, 110 Wis 2d 319, 322 (1982); United Way of Greater Milwaukee v. DILHR, 105 Wis 2d 447, 453 (1981); Farmers Mill v. DILHR, 97 Wis 2d 576, 580 (1980).

LIRC argues that Sec. 108.04(8)(d) is ambiguous and urges the court to resort to statutory interpretation to clear up the ambiguity between Sec. 108.04(8)(a) and 108.04(8)(d). LIRC further argues that it had made a "value judgment" and the agency's expertise is "significant" as it relates to value judgments in the resolution of legal questions. (p. 12, LIRC brief)

In this case, the Court concludes that the application of a clear,

unambiguous statutory provision is not a value judgment. Further, because LIRC's construction of Sec. 108.04(8)(d) is unreasonable under the circumstances of the facts of this case, the court owes no deference to LIRC's determination.

Ch. 108 does not give a definition of "good cause". However, Sec. 108.04(8)(d) does provide a description of what good cause can be under specific circumstances. This statute specifically provides that the employee shall have good cause to refuse work if the refusal is based upon either one of two reasons, and the refusal is made within six weeks of the last date of employment. Those reasons are (l) a job at a lower grade of skill or, (2) significantly lower rate of pay. Either would be a sufficient reason to refuse to accept a offered job if the refusal is made within 6 weeks after the employee became unemployed. This is the "canvassing provision" and the language used to describe this provision clears any possible ambiguity:

> ".....the employee had not yet a reasonable opportunity, in view of labor market conditions and employee's degree of skill, but not to exceed 6 weeks after the employee became unemployed, to seek a new job substantially in line with the employee's prior job skill and rate of pay."(Emphasis supplied)

This statutory section is unambiguous and clearly applicable, by its express terms, to sec. 108.04(8)(a) through (c) Stats. It provides a canvassing period of 6 weeks during which the employee has the right to refuse a job offered if in fact that job contained either a significant lower rate of pay or

lower grade of skill or job responsibilities. However, this right is limited to the first 6 weeks of unemployment. LIRC would argue that the ambiguity in this statute is contained in the phrase "or" which connects with phrases "a lower grade of skill" and "significant lower rate of pay". However, this claimed ambiguity is clarified by the last portion of the statutory section. It is clear that this statutory section was intended to permit an employee to seek a job which had both the similar rate of pay and similar job responsibilities. Either or both of these provisions could be used by an employee to avoid having to accept a job which did not favorably compare with the one the employee left. However, the statute provides a good cause "window" that remains open only 6 weeks after the last day of employment.

LIRC's interpretation of 108.04(8)(d) would leave that statutory section at best superfluous, and at worst, meaningless. Sec. 108.04(8)(a) requires the employee to accept suitable work when offered except under conditions when the employee had "good cause" to refuse to do so. There may be many reasons why an employee may be found to have had "good cause" to refuse suitable work when offered, and only two of these possible reasons are lower job responsibilities or skill requirements of the job and lower rate of pay. Plaintiff DILHR identified several other conditions which could be identified, such as "commuting distance, shift assignment, actual work duties, and physical

demands of employment." (p. 19, Plt's Brief) Sec. 108.04(8)(d) only limits the employee from the use of two of the possible reasons for finding "good cause" after the first six weeks of unemployment. In this sense, Sec. (d) of that statute does modify Sec. (a). That modification, however, does not "gut" Sec. (a) in its entirety as LIRC would maintain. Unless there is ambiguity contained in a statute, the court cannot apply the rules of statutory construction to ascertain legislative intent. National Amusement Co. vs Dept. of Revenue, 41 Wis.2d 261, 266, (1969). Because there is no ambiguity in this statute, the words of the statute must be given their obvious and ordinary meaning. Schoolway Transp. Co. vs Div. of Motor Vehicles, 72 Wis.2d 233, 228 (1976).

The position of LIRC is untenable. The only two reasons given by defendant WILEMAN for refusing the work offered by Hufcor were that the pay was too low (p. 13, Tr.) and she was concerned about the difference in job responsibilities (p. 26-27, Tr.). Both of these stated reasons are the specific reasons contained in the canvassing provision of Sec. 108.04(8)(d). Because the stated reasons are squarely within the provisions of 108.04(8)(d), the 6-week canvassing provision is applicable and this court and LIRC are bound to apply the 6-week time period.

Because it is undisputed that WILEMAN's refusal to accept the job offered by Hufcor was beyond the 6-week canvassing period, this court must

conclude that LIRC's failure to apply statutory Sec. 108.04(8)(d) was an error of law. There appears to be no rational basis to support LIRC's conclusions of law, the conclusion of law is unreasonable and the findings of LIRC do not support the order. As a result, the determination of the LIRC is reversed and the matter is returned to LIRC for the entry of an order consistent with this decision.

Dated this 3rd day of June, 1994.

BY THE COURT:

Hon. James P. Daley
Circuit Court Judge