

STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

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SYLVIA M. LUBOW,

Petitioner,  
vs.

Case No.: 91-CV-427

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent.

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DECISION  
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This appeal is filed pursuant to §108.09(7) which mandates use of the judicial review procedure found in §102.23.

Plaintiff has filed an affidavit. There are no provisions for such filing in §108.09(7) or §102.23. This review is based upon the record presented to the Labor and Industry Review Commission. The statutes limit the Court in what it can consider on review. They provide that I must determine whether the Commission acted within its powers, whether the Order was procured by fraud, and whether the findings of fact do support the Commission's order or award (§102.23(1)(c)). This must be found from the evidence presented to the Commission. No new evidence may be presented to the Court. I will not consider the affidavit.

§108.09(7)(b) provides that judicial review is "confined to questions of law, and the provisions of Chapter 102 with respect to judicial review of orders and awards..." There is no indication that fraud is involved in this case. The issue is whether the Commission acted in excess of its powers or if its findings do not support the award. If the Commissioner's

findings are not supported by the facts before it, then it is acting in excess of its powers.

This Order was issued pursuant to §108.04(11) based on a finding that the plaintiff's receipt of unemployment compensation was fraudulent. The allegations were that she did not seek work during certain weeks when she was receiving unemployment compensation under §108.04(11) but indicated she had on her reporting card. Under these circumstances the Department of Industry, Labor & Human Relations may seek not only return of the benefits paid, but a forfeiture of up to four times the weekly benefit. The Administrative Law Judge indicated that the Department's determination was to assess "a forfeiture of 32 times the claimant's weekly benefit rate of \$158 for 17 weeks of concealments." It would appear, however, that what the Department actually did was assess a forfeiture of twice the weekly benefit for 16 weeks. Although the Administrative Law Judge's characterization far exceeds the authority of the Department, when taken in context with what was actually done, it does make sense.

When an agency attempts to impose a forfeiture upon an individual certainly the burden of proof is upon the agency to prove that the individual violated the statute in question. The burden of proof when fraud is alleged is the middle civil burden, that is, proof which is clear, satisfactory, and convincing. (Wis JI-Civil 205). While the issue was not addressed by counsel

in their briefs I noted that plaintiff raised this issue in her petition for review dated April 19, 1991 (see p. 4-5).

While the appeal is from the Order of the Commission, its Order simply confirmed the decision of the Administrative Law Judge. Therefore, it is necessary to review his decision to determine if it meets proper standards. I have reviewed the transcript of the hearing at which the plaintiff appeared pro se. The Department appeared by one of its employees.

The plaintiff received unemployment compensation for the weeks 20 through 36 in 1989. For each of those weeks she signed the appropriate form indicating that she was seeking work. She did not obtain employment until after this period of time.

Contained in the record is a form "UCB-157A" which is entitled "U.C. Claim Investigation Record Continuation" which indicates that her former employer's bookkeeper, on October 12, 1989, gave information to someone in the Department indicating that she did not believe plaintiff was properly seeking employment during the summer months. She claimed that plaintiff told her she was not going to seek employment and also that plaintiff was on vacation for part of the time. Obviously this document would not have been received into evidence in Court since it is pure and simple hearsay. It was referred to by Sorenson, the Department employee, in his testimony (transcript p. 4). It was the basis for the initial determination which ultimately went before the Administrative Law Judge and is here

on appeal. The bookkeeper was never called as a witness.

Plaintiff denied that she had ever said these things.

The plaintiff did nothing to protect herself. The Department on several occasions requested that she come in to give information; she failed to do so. After the initial determination she did not file a timely appeal. The initial determination was that she had not sought work and, therefore, had been overpaid in the amount of \$2,528. Thereafter, the fraud determination was made doubling the amount. After that determination she requested a hearing which was held on April 1, 1991. Plaintiff was not represented by counsel. It was only after the adverse decision by the Administrative Law Judge that she obtained counsel.

I have reviewed the transcript of the hearing. The plaintiff's testimony is certainly unclear. Being charitable, she appears to be a scatterbrain. She has lost the documentation which was needed to substantiate her claims. I cannot fault the Administrative Law Judge's determination that she was not a credible witness.

The decision of the Administrative Law Judge is based upon plaintiff's lack of cooperation in the Department hearing process. I certainly can understand the Department's conclusion that she had improperly received unemployment compensation when she ignored the notices sent to her which specifically spelled out what could happen if she did not show up for hearings. Under those circumstances the Department could only conclude that she

was conceding the employer's allegations and therefore was not eligible.

On the other hand, to jump to the conclusion that she fraudulently received compensation requires something more than her lack of cooperation. The Department has the burden of proof to establish the fraud. The mere lack of cooperation by the plaintiff is not sufficient to meet that burden. The Administrative Law Judge's findings of fact focus entirely on her failure to respond to the Department's request for information on "three separate occasions..."

I have concluded that the Commission acted in excess of its authority in affirming the forfeiture penalty under §108.04(11). Neither the Department or the Commission had the necessary proof to show that she acted fraudulently. The Administrative Law Judge entirely discounted the testimony of the plaintiff which, I recognize, is his right, but he did so without having adequate evidence presented by the Department upon which to make his finding of a fraudulent claim. For this reason I am reversing the decision of the Commission.

Plaintiff's counsel shall prepare an Order consistent with this decision.

Dated at West Bend, Wisconsin, this 30th day of  
Jan., 1992.

BY THE COURT:

  
Richard T. Becker  
Circuit Judge, Br. III

Copies of the foregoing Decision were mailed to the following on the 30th day of January, 1992:

Atty. Douglas E. Swanson  
Borgelt, Powell, Peterson  
& Frauen, S.C.

Atty. Earl G. Buehler  
State of Wisconsin  
Labor & Industry Review Comm.

Caroline M. Schraufnagel  
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