

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

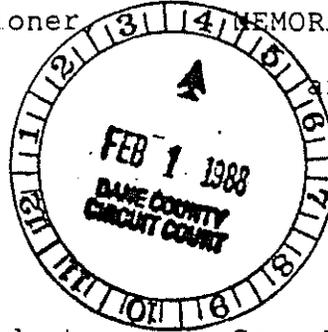
MAGNE-SCRIPT OF MADISON, INC.,

Petitioner MEMORANDUM DECISION

vs.

and ORDER

STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, LABOR AND INDUSTRY REVIEW COMMISSION, WENDY BOHNE, and KIM BRUCKBAUER,



Respondents.

Case No. 86-CV-2679

and 86-CV-1351

BEFORE HON. ROBERT A. DeCHAMBEAU, BRANCH #1, CIRCUIT JUDGE

This matter is before me on plaintiff's petition for judicial review, pursuant to Sections 108.09(7) and 102.23, Wis. Stats., of two consolidated unemployment compensation actions. In each case, the commission found that the employee quit her employment with good cause attributable to the employer, within the meaning of sec. 108.04(7)(b), Stats., and awarded each employee unemployment compensation benefits. Plaintiff disputes these awards and challenges the commission's findings that the employees quit for good cause when the employer offered them an employment contract containing a restrictive covenant not to compete as a condition of further employment. Based upon the

State of Wisconsin, the pleadings and submissions, as well as my independent County of Dane
 This document is a full, true and correct copy of the original on file and of record in my office and has been compared by me.
 and decisions in each case must be affirmed. The reasons for this

Attest 5/3, 1988
 CYNTHIA FORGAKILL
 Clerk of Courts

By Marcia Richard
 Deputy Clerk

FACTS

This matter arises out of plaintiff's termination of two employees who refused to sign a restrictive covenant not to compete as video tape court reporters. In 1985, the president of plaintiff Magne-Script of Madison, Inc. (Magne-Script), a videotape court reporting firm located in Madison, Wisconsin, presented two of its employees, Wendy J. Bohne and Kim Bruckbauer, with employment contracts. Each contract contained a non-compete agreement which provided, in part:

During the period of this Agreement and for a period of two (2) years after the termination of this Agreement, Employee will not at any time for herself, or on behalf of any other person, firm, partnership, or corporation, directly or indirectly own, manage, operate, control, be employed by, participate in or be connected in any manner with any business with an office or other business location in Dane County that provides videotape services on a regular basis to attorneys whose principal place of business is in Dane County. The covenant shall not be construed as prohibiting the Employee from providing non-videotape, stenographic services in Dane County or to attorneys in Dane County after termination of this agreement.

The agreement also contained a provision for \$125.00 per week liquidated damages for breach of the non-compete clause.

Each employee refused to sign the contract, apparently because of the non-compete clause. Shortly after refusing to sign the employment contract, Bohne and Bruckhauser "left" their employment at Magne-Script.

Bohne then filed a claim for unemployment compensation benefits. Following an initial investigation, Bohne was awarded benefits on the grounds that because the employer's

non-compete agreement was unreasonable, she quit with good cause attributable to the employer. Magne-Script filed a timely appeal of this determination and requested a hearing. Bohne cross-appealed on the grounds that she was discharged and did not quit.

On May 24, 1985, after conducting a hearing at which each party was represented by counsel, the examiner issued his decision which affirmed the earlier determination. Again, Magne-Script filed a timely appeal. On September 25, 1985, the Labor and Industry Review Commission (Commission) issued its decision modifying the examiner's decision and affirming the allowance of benefits on the grounds that Bohne quit for good cause attributable to the employer. On March 19, 1986, Magne-Script filed an action for judicial review of the Commission's decision and award.

Bruckhauser also filed for unemployment compensation benefits. Following an initial investigation, the deputy determined that the grounds under which she quit did not fall within any exception that would allow benefits, and her benefit eligibility was suspended. She filed a timely appeal and requested a hearing, arguing that she was discharged and did not quit.

On October 4, 1985, after conducting a hearing, the examiner issued his decision which affirmed the initial determination. Bruckhauser then filed a timely appeal. On April 30, 1986, the Commission issued its decision which reversed the examiner's determination and awarded benefits on the grounds that

Bruckhauser quit with good cause attributable to the employer. On May 29, 1986, Magne-Script filed an action for judicial review of the Commissioner's decision and award.

Subsequently, the parties agreed to consolidate these two actions for judicial review. On August 12, 1986, the court entered an order consolidating these cases, and they are before me today. Additional facts appear in the body of the decision, as are appropriate.

STANDARD OF REVIEW

The right of judicial review is entirely statutory. Sections 108.09(7) and 102.23, Stats., and not sec. 227.57, Stats., establish the nature and extent of judicial review of the Commission's decisions in unemployment compensation matters. Section 102.23 (1)(e), Stats., limits the reviewing court to either confirming or setting aside the Commission's order or award. Therefore, this court will treat plaintiff's request for judicial review under sec. 227.57, Stats., as a request for judicial review of the record, pursuant to secs. 102.23 and 108.09, Stats.

Questions of Law

Judicial review under Chapter 108, Stats., is primarily confined to questions of law. Holy Name School v. ILHR Dept., 109 Wis. 2d 381, 385, 326 N.W. 2d 121 (Ct. App. 1982). Section 108.09(7)(b), Stats., provides that:

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section . . .

This court is not bound by an administrative agency's determination of a question of law. Nottelson v. DILHR, 94 Wis. 2d 106, 115, 287 N.W. 2d 763 (1980). An administrative agency's conclusion of law will be sustained if it is reasonable, even if an alternative view is equally reasonable. Kenwood Merchandising Corp., et al. v. LIRC, 114 Wis. 2d 226, 230, 338 N.W. 2d 312 (Ct. App. 1983). Great weight is to be accorded to the construction and interpretation placed on a statute by the administrative agency charged with the duty to apply such statute. Wis. Environmental Decade v. ILHR Dept., 104 Wis. 2d 640, 644, 312 N.W. 2d 749 (1981). Some deference must be given to the agency in those areas in which it has specialized knowledge and expertise. Therefore, reviewing courts should not upset an agency's conclusions of law if any rational basis for it exists. Dairy Equipment Co. v. ILHR Dept., 95 Wis. 2d 319, 327, 290 N.W. 2d 330 (1980).

Findings of Fact

The standard of review differs as to an agency's findings of fact. An agency's findings of fact will not be disturbed on judicial review if supported by credible evidence in the record as a whole. Universal Foundry Co. v. ILHR Dept., 86 Wis. 2d 582, 588, 273 N.W. 2d 324 (1978); Section 102.23(1)(e), Stats. Such findings are conclusive if supported by credible and substantial evidence. Manitowoc County v. ILHR Dept., 88 Wis. 2d 430, 437, 276 N.W. 2d 755 (1979).

Section 102.23(6), Stats., provides that:

(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 and controverted finding of fact that is not supported by credible and substantial evidence.

Even with the complete record before it, a reviewing court has no authority to make its own findings of fact. R.T. Madden, Inc., v. DILHR, 43 Wis. 2d 528, 536, 169 N.W. 2d 73 (1969). Instead, the court must sustain the agency's findings if there is any credible and substantial evidence, or a reasonable inference from such evidence, sufficient to support the findings. Goranson v. DILHR, 94 Wis. 2d 537, 554, 289 N.W. 2d 270 (1980). The agency's findings must rest on facts, not on conjecture or speculation. Briggs & Stratton Corp. v. ILHR Dept., 43 Wis. 2d 398, 403, 168 N.W. 2d 817 (1969). For evidence to be credible, it must be evidentiary in nature and may not be a conclusion of law. Goranson, 94 Wis. 2d at 554. Findings supported by credible and substantial evidence must be upheld whether or not there is evidence that might lead to an opposite conclusion. Klein Industrial Salvage v. ILHR Dept., 80 Wis. 2d 457, 461, 259 N.W. 2d 124 (1977). This court may not second-guess the Commission's proper exercise of its fact-finding function even though, if viewing the case ab initio, it would likely reach another result. Employers Mutual Liability Insurance Co. v. ILHR Dept., 62 Wis. 2d 327, 332, 214 N.W. 2d 587 (1974).

Credibility of witnesses and the persuasiveness of the testimony rendered are for the agency to determine. Goranson,

94 Wis. 2d at 556; Section 102.23(6), Stats. The exercise of this fact-finding function is left exclusively to the Commission, not to the reviewing court. Briggs & Stratton, 43 Wis. 2d at 409. Thus, the Commission's findings must be upheld by this court even though they may be contrary to the clear preponderance and great weight of the evidence. Goranson, 94 Wis. 2d 554.

DECISION

I begin by noting that, in the caption of its summons and complaint, the plaintiff has named the State of Wisconsin, Department of Industry, Labor and Human Relations (DILHR) as a defendant to this action. Although the procedure whereby an aggrieved party may obtain judicial review of a Commission's decision and order has undergone several changes over the years, it is clear that in both March, 1986, and in May, 1986, when the complaints for this action were filed, the Commission, and not DILHR, was the proper party to this action. I therefore dismiss DILHR as a defendant to this action.

I now address plaintiff's request for judicial review of the record. Judicial review under sec. 108.09(7)(b), Stats., is confined to questions of law and the provisions of Chapter 102, Stats., with respect to judicial review of orders and awards. Pursuant to sec. 102.23(1)(e), Stats., this court is empowered to set aside an order or award of the Commission when it acted without or in excess of its powers, when the order or award was procured by fraud, or when the Commission's findings of fact do not support the order or award.

In the complaints and in its submissions to the court, plaintiff alleged that the Commission acted outside the scope of its authority when it awarded each employee benefits "under voluntary termination based on good cause attributable to the employer/plaintiff." Plaintiff also claimed that the Commission acted erroneously in making and determining certain findings of fact and conclusions of law. And plaintiff further alleged that the Commission exceeded and abused its discretion, since its findings are contrary to the great weight of the evidence introduced at the hearing.

Upon my careful and considered review of each record in this case, I must conclude that the evidence plaintiff relies upon in its arguments merely contradicts that which supports the Commission's findings, decisions, and awards. The record before me reveals substantial and credible evidence, and reasonable inferences therefrom, sufficient to support the Commission's findings of fact.

The fact that such evidence may be in conflict is not a sufficient basis for this court to reverse the Commission's findings. The law does not require that the evidence be subject to no other reasonable, equally-plausible interpretations. Conclusions regarding the credibility of witnesses and the weight of the evidence are the exclusive province of the Commission, this court has no authority to make its own findings of fact.

Although this court is not bound by the Commission's determination of a question of law, the agency's conclusion of

law will be sustained if it is reasonable, even if an alternative view is equally reasonable. This court must give some deference to the Commission in areas where it has specialized knowledge and expertise. Upon my review of the records in this case, I must conclude that the Commission has set forth a rational basis for its findings, decisions, and awards. Therefore, I will not upset the Commission's conclusions of law.

My review of the records fails to reveal any abuse of discretion by the Commission. Nor do the records contain evidence that the awards were procured by fraud.

This court is mindful of the extent and nature of judicial review of the Commission's decisions in unemployment compensation matters, pursuant to secs. 108.09 and 102.23, Stats. Given the above determinations, I therefore find that the records before me in this case contain credible and substantial evidence to substantiate the Commission's findings, decisions and awards. I also find that the Commission has set forth a rational basis for its conclusions of law in each case. And I further find that the Commission did not abuse or exceed its discretion in either matter, nor were the awards procured by fraud.

I therefore affirm the Commission's decision and award in each of the two consolidated cases. This decision shall stand as my findings of fact and my conclusions of law. IT IS SO ORDERED.

Dated this 1st day of February, 1988.

BY THE COURT:


Circuit Judge