STATE OF WISCONSIN CIRCUIT COURT Br. 2 DANE COUNTY

Lauren K. Pennell,
Plaintiff/Petitioner
vs.
Drake & Company of Madison, Inc. and
Labor and Industry Review Commission,
Defendants

Case No. 03-CV-17

DECISION AND ORDER

BACKGROUND

The petitioner in this unemployment insurance case, Lauren K. Pennell, seeks judicial review of a Labor and Industry Review Commission (LIRC, or "Commission") decision overturning a decision granting her unemployment benefits. The LIRC decision, dated December 4, 2002, further ordered Pennell to repay $4605.00 to the Unemployment Reserve Fund, such sum representing the amount by which Pennell was overpaid in unemployment benefits.

Pennell worked for defendant Drake & Company, a temporary staffing and employment agency, starting on February 19, 2002 (R. at 32). She was assigned work in a temp-to hire position as an administrative assistant for Swanson, a food service business. On May 28, 2002 (R. at 32), Drake & Company informed Pennell that Swanson was seeking to hire her directly. Pennell accepted Swanson's offer of employment, and worked for Swanson from May 29, 2002, until June 13, 2002, when she was let go without explanation.[1] (R. at 32). The following week, Pennell started claiming unemployment benefits, which were allowed against Drake & Company by the

[1] Pennell was not let go as a result of any wrongdoing on her part. (R. at 16, fn. 1).

Department of Workforce Development, Division of Unemployment Insurance (DWD) (R. at 30), which determined that "[t]he employer, in accordance with the employer's agreement with the client, initiated the change in employment." (R. at 30).

Drake & Company appealed the DWD's decision awarding Pennell benefits on July 16, 2002. (R. at 28). As a result, an unemployment insurance hearing was held before Administrative Law Judge (ALJ) David P. Jenkins on August 13, 2002.

In a written decision dated August 15, 2002, ALJ Jenkins determined that "[t]he primary issue for decision is whether the employee's transfer from the employer's payroll to the food service company's payroll was a quitting of her unemployment with the employer," noting that "[i]f it was, she had not earned enough subsequent wages from the food service company to regain benefit eligibility when she started her claim" under the provisions of Wis. Stat. § 108.04(7)(a). (R. at 16). [2]

Relying on Reppen v. Trillium Staffing Solutions,[3] a LIRC case that addresses the particular "issue of whether an employee who begins working for a temporary help employer, and later transfers to employment with the client of the employer has quit," ALJ Jenkins ultimately concluded that Pennell "did not voluntarily terminate work with [Drake & Company], within the meaning of section 108.04(7)(a) of the statutes" by accepting direct employment with its client, Swanson. (R. at 17). Accordingly, the ALJ

---

[2] This determination is premised upon Wis. Stat. § 108.04(7)(a), which reads, in pertinent part:

> (7) VOLUNTARY TERMINATION OF WORK.
> (a) If an employee terminates work with an employing unit, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 4 times the employees weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employees weekly benefit rate shall be that rate which would have been paid had the termination not occurred.

[3] UI Hearing Dec, N. 01401899MN (LIRC Nov. 14, 2001), accessible at http://www.dwd.state.wi.us/lirc/ucdecsns/1231.htm.

agreed with the DWD's earlier determination that unemployment benefits should be allowed.

Drake & Company appealed the ALJ's decision on August 27, 2002 to LIRC. (R. at 13). In a decision dated December 4, 2002, LIRC reversed ALJ Jenkins's decision. (R. at 2-4). In essence, LIRC found that Pennell did, in fact, quit Drake & Company when she agreed to be employed directly by Swanson. LIRC noted that under Reppen, "a transfer from a temporary staffing employer to its client is a quitting if the employee had the option to continue working for the temporary employer and the employee was aware that such [an] option existed." (R. at 2). Finding that Pennell understood that she could continue working for Drake & Company instead of leaving to work for Swanson, LIRC determined that Pennell had "voluntarily terminated her employment within the meaning of Wis. Stat. § 108.04(7)(a) and not for any reason constituting an exception to that section." (R. at 3). The Commission also ordered that Pennell repay $4605.00 to the Unemployment Reserve Fund. (R. at 3).

On January 3, 2003, Pennell sought judicial review of the LIRC decision in this court.

STANDARD OF REVIEW

Judicial review of an agency decision is limited in scope. Wis. Stat. § 102.23 governs the scope of judicial review in unemployment insurance cases[4] and reads, in pertinent part,

> (e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

[4] Wis. Stat. § 102.23, which generally applies to worker's compensation claims, applies to unemployment insurance cases by virtue of Wis. Stat. § 108.09(7).

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.

Essentially, the test to be applied by the courts is whether the findings of fact made by the Commission are supported by credible and substantial evidence. Abbyland Processing v. LIRC, 206 Wis.2d 309 (Ct. App. 1996). In the absence of fraud, the factual findings of the Commission are conclusive if they are supported by credible and substantial evidence, which is such evidence that a reasonable mind would accept as supporting a conclusion reached by the Commission. RT Madden, Inc. v. DILHR, 43 Wis.2d 528, 547 (1969).

The application of a statute to a certain set of facts, as here, presents a legal question for the agency. The reviewing court will accord either "great weight" deference, "due weight" deference, or will perform *de novo* review of such decisions, depending upon the agency's historic role in the administration, interpretation, and application of the statute in question. Margoles v. State Labor & Indus. Review Comm'n, 221 Wis. 2d 260, 265 (Ct. App. 1998). A great weight standard, where "an agency's interpretation or application of a statute will be upheld if it is reasonable, even if another interpretation or application is more reasonable," is appropriately applied where

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the agency's interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id.

In the case of unemployment insurance, the supreme court has stated that "the reviewing courts of this state should accord deference to the findings of the Commission," Department of Industry, Labor & Human Relations v. Labor & Ind., 161 Wis. 2d 231, 241, 245 (1991), acknowledging that the Commission has "experience, technical competence, and specialized knowledge in interpreting and applying the [unemployment compensation] statutes" Id. at 241. Moreover, LIRC has already addressed the special situation of employees of temporary help agencies that have accepted jobs with the clients of those agencies.[5] Granting deference to LIRC in this matter will allow for uniform decisions in this type of circumstance. Since all of these criteria are met in this case, the court here applies "great weight" deference to the legal conclusions made by the Commission.

LAW AND ANALYSIS

There are two considerations before the court in this administrative review action. The first is to determine whether the factual conclusions made by LIRC were, in fact, supported by credible and substantial evidence. The second is to ascertain whether Pennell's actions vis-à-vis Drake & Company constituted a "voluntary termination" under the definition provided under Wis. Stat. § 108.04(7)(a).

Turning first to the Commission's factual determinations, LIRC found, based on the hearing transcript, that Drake & Company would have allowed Pennell to continue working for it, and that Pennell understood that she had such an option when she accepted Swanson's job offer. The court finds that these conclusions were supported by substantial and credible evidence.

[5] See, e.g. Reppen v. Trillium Staffing Solutions, UI Hearing Dec, N. 01401899MN (LIRC Nov. 14, 2001).

First of all, Drake & Company's accountant, Beth Eaton, testified that if Pennell had turned down Swanson's job offer, she would have been permitted to continue working for Drake & Company, either at the same assignment, or at another. (Tr. At 21, lines 7-10). Secondly, Pennell herself admitted that if she had declined Swanson's offer of employment, "[she] would assume that [she] would continue with Drake & Company." (Tr. at 13, lines 13-14). She also believed that she had the option of continuing to work without interruption if she had turned down the job at Swanson. (Tr. at 13, lines 19-22). Although Pennell's position with Swanson was a temp-to-hire position with a 90-day trial period, after which Swanson would have had the option to hire Pennell directly, (Tr. at 11), the Commission gleaned from the record that *Pennell* was never under any obligation to accept an offer of employment from *Swanson*. Nor did Pennell apparently believe that she was under any such constraint.

Based on these findings of fact, the Commission next determined that Pennell's actions constituted a "voluntary termination" of her job with Drake & Company, within the meaning of Wis. Stat. § 108.04(7)(a). It stated:

> [t]he employer would have allowed the employee to continue working for it if she did wish to transfer to the food service company. The employee testified that she assumed she had the option to continue working for the employer. Accordingly, the Commission finds that the employee quit her employment when she transferred to the food service company.

(at 2.) Applying the "great weight" deference that is appropriate in this case, the court agrees that Pennell voluntarily terminated her position with Drake & Company, with the consequence that she was ineligible to receive unemployment insurance benefits when her position with Swanson was terminated two weeks later.[6]

[6] Under Wis. Stat. § 108.04(7)(a), Pennell was "ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 4 times the employees weekly benefit rate under s. 108.05 (1)

In making its determination, LIRC relied on its earlier decision in Reppen, where it concluded that in the special case of staffing agencies, a quitting occurs when an employee accepts permanent employment with one of the agency's clients provided that the client understands that he could continue working for the agency if he so desired. Having already found that Pennell knew that she had the option to stay with Drake & Company and left its employ nonetheless, LIRC found that she "terminate[d] work with [her] employing unit" under Wis. Stat. § 108.04(7)(a).

To be sure, this interpretation of the facts under Reppen is not the only possible one. Pennell would have the court find, as did ALJ Jenkins, that she was in a position where she had no option but to accept the Swanson position, rendering her departure from Drake & Company not "voluntary."[7] It is not, however, within this court's province to weigh the reasonableness of one decision over the other; the court must look to the Commission's decision, and decide whether it was reasonable on its own.

At the very least, the supposition that Pennell would have been able to continue working without interruption had she remained with Drake & Company is just as reasonable as the supposition that she would have not been able to continue working. But this question does not appear to be the real issue here—instead, the appropriate question under Reppen as interpreted by LIRC seems to be Pennell's *objective* understanding of her rights to continue working through Drake & Company. She did

---

in employment or other work covered by the unemployment insurance law of any state or the federal government."

[7] In his decision, ALJ Jenkins wrote:

> Although the employer asserted that the employee could have remained working for it instead of accepting direct employment by its client, there is no evidence that the food service company would have permitted her to continue in the assignment on the employer's payroll. In addition, whether the employer could have offered another assignment, particularly without any interruption of work, is entirely speculative. Moreover, the employer never explicitly told her that she had the choice to continue working for the employer without interruption.

acknowledge that she could stay on at Drake & Company, and yet decided to work directly for Swanson—with a 50-cent-per-hour raise (Tr. At 13, lines 9-10) and the prospect of having permanent employment. Given these factors, the court finds it credible to conclude not only that Pennell's hand was not forced in accepting a job from Swanson directly, but rather that it was a logical move for her to have made.

Based on the foregoing, the court affirms LIRC's decision that Pennell voluntarily terminated her employment with Drake & Company under the meaning of Wis. Stat. § 108.04(7)(a).

ORDER

For the reasons stated herein, LIRC's decision finding that Pennell was ineligible for unemployment benefits following her termination from Swanson is affirmed.[8]

Dated this 14th day of August, 2003

BY THE COURT

Maryann Sumi, Judge
Circuit Judge Branch 2

Cc: Atty Richard Rice
Atty David Nance
Atty Peter Albrecht

[8] In its decision, LIRC calculated the amount of the overpayment of benefits to Pennell, and concluded that there was no circumstance as described under Wis. Stat. § 108.22(8)(c) that would allow for waiver of the recovery of the sums owed (R. at 3). Since Pennell did not challenge these determinations in her initial Brief to the court, the court will not review this portion of LIRC's decision (see, e.g., County of La Crosse v. La Crosse, 108 Wis. 2d 560, 572 (the court " need not decide issues not specifically argued")).