

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 02

EFREN SANCHEZ,

Plaintiff,

vs.

Case No. 89 CV 5935

LABOR AND INDUSTRY REVIEW COMMISSION
and MCKAY NURSERY COMPANY,

Defendant.

MEMORANDUM DECISION AND ORDER

Plaintiff appeals from a decision of the Labor and Industry Review Commission ("the Commission") affirming the appeal tribunal's decision finding plaintiff ineligible to receive unemployment benefits for work performed before October 27, 1987 and ordering plaintiff to repay \$4,986 to the unemployment reserve fund. I find that plaintiff was ineligible to receive benefits before October 27, 1987 because he did not meet the eligibility criteria of Wisconsin's unemployment statute. Accordingly, I affirm the Commission's decision.

FACTS

Plaintiff, a Mexican citizen, received unemployment compensation totalling \$4,986 during the years 1986 to 1988. On October 27, 1987, Plaintiff received permanent resident alien status from the INS. On January 28, 1989, a Department of Industry, Labor and Human Relations ("DILHR") deputy made

two determinations that during the period on which Plaintiff's benefits had been based, he did not meet the eligibility requirements under ~108.04(18)(a), Stats., for aliens claiming for unemployment compensation. The deputy ordered plaintiff to repay to the unemployment reserve fund the benefits he received in 1986-1988, totalling \$4,986. See Record at 137-139. Plaintiff appealed the deputy's determinations to the appeal tribunal and a hearing was held. An INS representative testified that plaintiff never applied for legal resident status and was not granted such status until he received permanent resident status as the spouse of a permanent resident alien on October 29, 1987. Transcript of Appeal Tribunal Hearing ("Transcript") at 10-14.

Plaintiff testified that he received a work permit in 1981, enabling him to reside and work legally in the U.S., but lost it on the job in 1985. The appeal tribunal found plaintiff's claim not credible because Plaintiff did not produce the work permit ("green card") at the hearing and the INS file had no record of any work permit ever being issued to plaintiff. Record at 94-6. The appeal tribunal concluded that plaintiff did not have legal work or residence status during the benefits computation period and affirmed the deputy's decision. Plaintiff then appealed to the Commission, making the following arguments: He was prima facie eligible for temporary resident status and work authorization under the Immigration Reform and Control Act of 1986 ("IRCA"); he was permanently residing in the United States under color of law;

public policy considerations militate in favor of allowing plaintiff to receive benefits; and, his entitlement to benefits should be determined by reference to whether he was eligible at the time of his application for benefits, rather than by reference to his status during the benefits computation period. The Commission rejected these arguments and affirmed the appeal tribunal. The Commission found that plaintiff did not get authorization to live and work in the United States before October 29, 1987; that he did not make a prima facie showing that he was eligible for temporary resident alien status under IRCA because he was neither lawfully admitted for temporary residence nor lawfully present in the U.S.; that he was not eligible for benefits because he never applied for temporary resident status under IRCA; that he was not permanently residing in the U.S. under color of law so as to be eligible for unemployment benefits because the INS did not give him written assurance that he would not be deported; that the Commission could not decide the case on public policy grounds; and that plaintiff's eligibility for benefits had to be determined by his residence status when he was working, rather than his residence status when he applied for benefits, to comply with federal and state eligibility requirements. Plaintiff appealed the Commission's decision and now asks that the Commission's decision be set aside and judgment entered for plaintiff or that the case be remanded to DILHR for additional evidence from plaintiff with assistance of

counsel. This appeal presents only a question of law, specifically whether IRCA and federal and state unemployment law require affirmative action by the alien and the INS to create temporary resident status and eligibility for benefits. See Reply Brief at 4, note 2.

DECISION

In reviewing questions of law under the unemployment compensation statute, the court must defer to a certain extent to the Commission's legal construction and application of the statute. *DeLeeuw v. DILHR*, 71 Wis. 2d 446, 449 (1976) (citations omitted). The court may not reverse the Commission's determination where such an interpretation is one among several reasonable interpretations that can be made, equally consistent with the statute's purpose. *Id.* (citations omitted.) The court may not upset the Commission's judgment concerning questions of law if there exists a rational basis in law for the Commission's conclusion. *Bliss v. DILHR*, 101 Wis. 2d 245, 246-7 (Ct. App. 1981).

Federal and state unemployment compensation law provides that an alien is not eligible for unemployment compensation unless, during the period on which benefits are based, the alien was lawfully admitted for permanent residence, was lawfully present for the purpose of performing work, or was permanently residing in the United States under color of law.

26 U.S.C.A. ~3304(a)(14)(A); ~108.04(18)(a), Stats. The Immigration Reform and Control Act of 1986 established criteria under which undocumented aliens could live and work legally in the United States and thereby meet the eligibility requirements of federal and state unemployment compensation law. IRCA granted prima facie legal status to any alien who (1) had applied for legal status; (2) had resided in the U.S. in an unlawful status since January 1, 1982; (3) had a continuous physical presence in the U.S. since November 6, 1986; and (4) was admissible as an immigrant. 8 U.S.C.A. ~1255a(a); Mercado v. Ataco Steel Products Corp., No. 88-605072 WV, LIRC, April 11, 1989, Record at 69-72. For aliens engaged in seasonal agricultural work, a showing of 90 "man-days" of work in the U.S. between May, 1985 and May, 1986 created the same status. 8 U.S.C.A. ~1160(a).

In Mercado, the Commission awarded unemployment benefits to an alien who had resided illegally in the U.S. since 1973 and had applied for and received legal status under IRCA. The Commission found that he was prima facie eligible for legal residence under IRCA because of his residence here since 1973. Mercado, supra. Based on his applying for and receiving legal status under IRCA, the Commission also found that the alien was lawfully present for the purpose of performing work, the second criterion for eligibility under ~108.04(18)(a), Stats. Id.

In *Castillo v. Karem, Inc.*, No. 88-605345 MW, LIRC, August 11, 1989, the Commission denied benefits to an alien who claimed eligibility under the third criterion for eligibility under ~108.04(18)(a), Stats., permanently residing under color of law ("PRUCOL"). The Commission concluded that an alien claimant could not achieve PRUCOL status unless the INS knows of his presence in the U.S. and provides him with written assurance that he will not be deported. *Id.*; U.S. Department of Labor Unemployment Insurance Program Letter 1-86, February 16, 1989, Defendant's Brief, Appendix D. Since Castillo did not receive any assurance from the INS that he would not be deported, the Commission found that he was not PRUCOL and could not receive unemployment benefits. Thus, the Commission construes the "lawfully present" eligibility criterion of ~108.04(18)(a) to require that an alien be prima facie eligible for legal status under IRCA and apply for and receive such status before he can receive unemployment compensation. The Commission construes the "PRUCOL" criterion of ~108.04(18)(a) to require the INS to give an alien written assurance of its intent not to deport him before he can receive unemployment compensation.

In the case of Mr. Sanchez, the parties agree and the Commission found that he was prima facie eligible for legal status under IRCA, because of his residence in the U.S. since 1981 and his continuous physical presence here since November 6, 1986. Plaintiff's Brief at 10-11; Defendant's Brief at 1-

3, 18-20; Commission's Decision, Record at 11. However, both the INS representative and Mr. Sanchez himself testified before the appeal tribunal that he never applied for legal status under IRCA. Transcript of Hearing at 12, 19-20. Similarly, although the INS acquiesced in his presence in the U.S., Mr. Sanchez does not contend, nor does the record reflect that the INS ever gave him written assurance that he would not be deported. Consequently, because of his failure to apply for legal status under IRCA and INS's failure to provide him with written assurance of no intent to deport, Mr. Sanchez does not comply with ~108.04(18)(a), Stats., as the Commission construes the statute.

Plaintiff at least implies that he may have had a valid alternative INS work permit (an "I-94", Arrival-Departure Record) which would make him eligible for benefits under ~108.04(18)(a). See: Plaintiff's Brief at 6-7. However, the INS representative's testimony clearly shows that plaintiff had no work authorization before October 29, 1987. See: Transcript at 8-12. The appeal tribunal found this evidence credible and the Commission adopted that finding. I agree that this is credible evidence that plaintiff did not have legal status before October 29, 1987 and I must therefore affirm the Commission's finding. *Princess House Inc. v. DILHR*, 111 Wis. 2d 46, 50-54 (1983).

The record also does not support plaintiff's argument that he

could not present evidence of his legal status because he could not comprehend the proceedings. He had a translator at his hearing, he himself understands some English, and he could recognize the correct spelling of his name, even though he could not spell it himself. See: Transcript at 5, 15. Therefore, I cannot grant plaintiff's request to remand the case to present further evidence with assistance of counsel.

This case is especially difficult in view of the fact that on three occasions during the years 1985 through 1987, official determinations were made through the INS's anti-fraud "SAVE" program that plaintiff was eligible for benefits. See: Record at 151-3. Moreover, the rigid application of precedent will cause great hardship for plaintiff.

Nevertheless, my review of the Commission's decision is limited to whether that decision was consistent with the statute's purpose and whether there was a rational basis in law for the decision. DeLeeuw, supra; Bliss, supra. I may not address the questions of whether the Commission's decision is sound public policy, or whether Wisconsin should adopt a more lenient construction of the PRUCOL provision, requiring only that the INS acquiesce in an alien's presence to work in the U.S. See Plaintiff's Letter Brief, Record at 17-19.

The purposes of the unemployment compensation statute are to mitigate economic loss to a worker and his family and to

sustain general purchasing power and thus serve the interests of the economy at large. ~108.01, Stats.; *Milwaukee Transformer Co. v. Industrial Commission*, 22 Wis. 2d 502, 511 (1964). However, the public policy declarations of the statute may not be used to supersede, alter or modify its specific provisions. *Salerno v. John Oster Mfg. Co.*, 37 Wis. 2d 433, 441 (1967). The statute must be administered as written, even though its application in some situations denies benefits to an employee who is ineligible through no fault of his own. *Spielmann v. Industrial Commission*, 236 Wis. 240, 246 (1940). DILHR has broad discretion to carry out the provisions of Chapter 108, Stats. *Brooks v. LIRC*, 138 Wis. 2d 106, 112 (Ct. App. 1987). Consequently, the Commission's construction of the statute to specifically provide that Mr. Sanchez be eligible for benefits only if he applied for legal status and the INS affirmatively stated its intent not to deport him does not conflict with the statute's purpose.

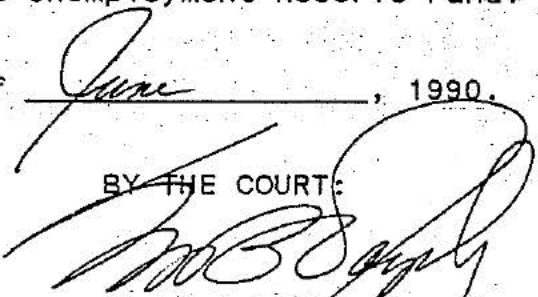
Excluding some classes of workers from eligibility enables the state to maintain the unemployment compensation fund's fiscal integrity and employers to comply with the Federal Unemployment Tax Act and thus remain eligible for tax credits. *Id.* at 111. Therefore, the Commission's decision to order Mr. Sanchez to repay the benefits also has a rational basis in law.

CONCLUSION AND ORDER

For the reasons stated above and based on the record herein, I affirm the Commission's decision dated September 26, 1989, finding plaintiff ineligible for unemployment benefits based on work done before October 29, 1987 and ordering him to repay those benefits to the Unemployment Reserve Fund.

Dated this 9th day of June, 1990.

BY THE COURT:


Michael B. Torphy, Jr.
Circuit Judge

cc: Attorney Susan Carter Pearsall
Legal Action of Wisconsin

Attorney Robert C. Reed
Labor and Industry Review Commission