STATE OF WISCONSIN | CIRCUIT COURT | SHAWANO-MENOMINEE COUNTY, BR II
SHAWANO COUNTY DIVISION

WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT
Plaintiff,
vs.
WISCONSIN LABOR AND
INDUSTRY REVIEW COMMISSION,
RUSSELL A. TOURTILLOTT and
WAL-MART ASSOCIATES INC.
Defendants.

DECISION and ORDER

Case No. 14 CV 230

INTRODUCTION

Plaintiff Wisconsin Department of Workforce Development (Department) filed for judicial review of a March 31, 2014, decision of Defendant Wisconsin Labor and Industry Review Commission(Commission) pursuant to Wis. Stats. § 108.09(7) and § 102.23.

Defendant, Russell Tourtillott (Employee) was employed by Defendant Walmart Associates, Inc. (Employer or Walmart) as a manager, for approximately four years. The Employer has an attendance policy that required the employees to notify the employer of an intended absence; additionally, the employee was required to notify the store manager of the absence. Employee was absent for work on the dates of October 22, 23, and 26, of 2013, and failed to report said absences as required by the work rules as alleged by the Employer. The Employer considered the Employee's absence as a voluntary resignation of his position and terminated his employment. The Employee disagreed that he quit and claimed that he did properly notify the Employer of his intended absence. Employee applied for Unemployment Compensation Insurance and was denied by the Department in its initial determination that

Employee voluntarily quit his employment under Wis. Stat. § 108.04(7)(a). In its initial determination, the Department notified Employee that he was ineligible for unemployment benefits until four weeks passed since the end of the week in which he was terminated and he earns wages thereafter equal to at least four times the employee's weekly benefit rate under the unemployment insurance law. Employee requested a hearing on the Department's initial determination pursuant to Wis. Stat. § 108.09. Department held a hearing and the appellate tribunal issued its decision on February 6, 2014, affirming the initial determination of the Department that Employee voluntarily quit his employment and would be ineligible for unemployment insurance benefits until four weeks elapsed since the end of the week in which he was terminated, and earned wages thereafter equaling at least four times the employer weekly benefits under the Unemployment Insurance Law. Employee petitioned the Commission for a review of the above decision pursuant to Wis. Stat. § 108.09(6).

On March 21, 2014, the Commission affirmed the tribunal decision and the Department's initial determination in part. The Commission affirmed the tribunal and the Department's decision that Employee voluntarily quit his employment pursuant to Wis. Stat. § 108.04(7)(a); however, the Commission applied the requalification language as amended by Act 20 instead of the prior law; therefore, it determined that Employee was ineligible to receive benefits until he earned wages after the week in which he quit at least six times the employee's weekly benefit rate under the unemployment insurance law. The Department petitioned this court to review said decision on the grounds that the Commission's application of Act 20 to this case was erroneous.

DISCUSSION

STANDARD OF REVIEW

Judicial review pursuant to Wis. Stats. §108.09(7) and § 102.23, requires the court to apply the appropriate level of review to an agency's decision. Depending upon the issue to be determined, the level of expertise the agency had with interpreting such issues, and the consistency in which the agency has had with interpreting such issues, the court is to apply one of three levels of review; that is, "no deference", "due deference", or "great weight deference".

The Department argues the court should apply the "no weight" or "due weight deference" standard, but not the "great weight deference" standard to the Commission's determination and application of recent legislation to the agreed upon facts. The Department advocates for this standard of review because they argue that while the Commission has expertise in interpreting unemployment statutes generally, this is a matter of first impression regarding this particular issue. The Department further argues that since this is a case of first impression, the Commission is not in a better position that the court to interpret the statute.

The Commission argues that the court should apply the "great weight deference" standard to the Commission's determination and application of provisions of 2013 Wis. Act 20 to the instant case. The Commission advocates for this standard because they claim; 1) "long-standing expertise in interpretations of provisions setting effective dates and initial applicability dates for legislative changes to the statutes it administers...", and (2) that the Commission had already interpreted and applied the initial application of the statute in questions on the case of *DuFour v. Sweet Home of Madness LLC*, UI Dec. Hearing NO. 1400226MW (LIRC Mar. 18 2014). The Commission argues in the alternate, that even if the court rejects the Commission's

argument and applies the "due weight deference" standard, the Commission's interpretation of the applicable statute should be upheld by the court, since it is reasonable and the Department has provided no alternative interpretation of the statute in their initial brief.

The court is to apply no deference to an agency's decision when: "(1) the issue is one of first impression; (2) the agency has no experience or expertise in deciding the legal issues presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance." See *Racine Harley-Davidson v. State Div. of Hearings & Appeals,* 2006 WI 86, ¶ 19, 292 Wis.2d 549, 717 N.W.2d 184.

The court is to apply great weight deference when: "(1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." *Id.* at *¶ 16.*

The court is to apply due weight deference "when the agency has some experience in an area but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute. *Id.* at ¶ 18.

"The appropriate level of scrutiny a court should use in reviewing an agency's decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue." *Brown v. LIRC,* 267 Wis.2d 31, ¶13

In the instant matter, the Commission applied Wis. Stat. § 108.04(7)(a) as amended by 2013 Wis. Act 20. In essence, the amendment changed the period of time an employee who

quits his employment is ineligible to receive benefits and the amount of wages he or she needs earn before he or she is again eligible . Prior to Act 20, § 108.04(7)(a) required an employee who quit employment to wait until four weeks elapsed since the end of the week in which the termination occurred and earned wages after the week of termination equal to four times the employee's weekly benefit rate. The amended language removed the four week waiting period, but increased the wage requirement to six times the employee's weekly benefit rate. The issue before the court is not the interpretation of the above language, but rather the effective date of the above provision to the Employee's instant case.

The Wisconsin Court of Appeals has acknowledged LIRC's "longstanding experience, technical competence and specialized knowledge in administering the unemployment insurance statutes..." *Hubert v. LIRC,* 186 Wis.2d 590, 597, 522 N.W.2d 512 (1994). Normally, an agency's interpretation of a statute relating to such matters should receive great weight; however, it is inappropriate to apply that standard in cases of first impression and there is no precedent for the agency's determination. *See, Sauk County v. Wisconsin Employment Relations Commission, 165 Wis.2d 406, 414*

In the instant case, Commission has significant experience in administering the unemployment insurance statutes, including § 108.04(7)(a) and normally the court would grant great deference to their interpretation of said statute; however, this matter revolves around the interpretation of an *effective date* of the statute rather than the language of the statute itself. The Commission cites no precedent with regards to the interpretation of the effective date as applied to unemployment insurance benefits regarding this matter, except for their decision in *DuFour v. Sweet House of Madness, LLC,* UI Dec. Hearing No. 14600226MW (LIRC

Mar. 18 2014). Other than, the above cited decision, this is a case of first impression; therefore, the court should not apply great deference to the Commission's interpretation to the effective date of the statute in this case. This is a case of very nearly first impression. Under such circumstances, it is appropriate "to give the agency's conclusion 'due weight,' or 'great bearing' but not 'great weight.'" *Beloit Education Asso. v. WERC*, 73 Wis.2d 43, 68, 242 N.W.2. Since the Commission has an extensive experience in interpreting employee insurance benefits, and that they have reviewed the issue at hand in only one other case, this court will apply the due weight standard of review in this matter. The Commission's experience in interpreting employee insurance matter is long-standing and their prior interpretation of this matter in *Dufour* shows consistency in their application of the law; this merits giving the Commission's interpretation of the statute some deference; however, this being a matter of nearly first impression that deference should be less than great. Accordingly, The court will give due deference to reasonable interpretations of the statute at issue in this matter. Nonetheless, It is the purview of the court to determine that reasonableness through use of a "critical eye". *Racine Harley-Davidson v. State*, 717 N.W.2d 184, 2006 WI 86, 292 Wis.2d 549 (Wis., 2006).

INTERPRETATION OF THE STATUTE

Commission's Interpretation and Department's Opposition

The main issue before this court on review is whether the Commission correctly interpreted the initial applicability provision in 2013 Wis. Act 20, section 9351(2q) which applies to unemployment insurance upon voluntary termination of work. The Department agrees with the Commission's determination that Employee voluntarily quit his employment within the meaning of Wis. Stat. 108.09, but disagrees with the Commission's interpretation of Act 20's

specific applicability requirements as provided in § 9351(2q) of that Act. § 9351(1q) and (2q): provide the following:

> (1q) UNEMPLOYMENT INSURANCE; MISCONDUCT AND SUBSTANTIAL FAULT. The treatment of sections 108.02 (3), (9), and (9m) and 108.04 (5g) of the statutes, the renumbering and amendment of section 108.04 (5) of the statutes, and the creation of section 108.04 (5) (a) to (g) of the statutes first apply with respect to determinations issued under section 108.09 of the statutes on January 5, 2014, or, with respect to determinations that are appealed, to decisions issued under section 108.09 of the statutes on January 5, 2014.
>
> (2q) UNEMPLOYMENT INSURANCE; VOLUNTARY TERMINATION OF WORK. The treatment of sections 108.02 (15m) (intro.), 108.04 (7) (a), (d), (e), (g), (h), (j), (k), (L) (intro.), (m), (n), (o), (p), (r), and (t), 108.14 (8n) (e), and 108.141 (7) (a) of the statutes first applies with respect to determinations issued under section 108.09 of the statutes on January 5, 2014, or, with respect to determinations that are appealed, to decisions issued under section 108.09 of the statutes on January 5, 2014.

The Commission argues that the above "language means that the new law first applies to appeal tribunal decisions and commission decisions issued under Wis. Stat. § 108.09(4) and (6) [and by extension judicial decisions under Wis. Stat. § 108.09(7)] that arise from department determinations issued before January 5, 2014, if they are appealed by hearing requests filed on or after January 5, 2014." The Department disagrees with the above interpretation for reasons including: (1) that it "produced an absurd result by changing the Department's correct determination and increasing Tourtillott's [Employee] statutory penalty; and, (2) "Even if Commission correctly applied Act 20, its depravation of Tourtillott's [Employee] benefit rights is contrary to constitutionally required due process."

While Department disagreed with Commission's interpretation of the statute, for reasons stated above, it did not provide a the court with a different interpretation in their initial

Brief.[1] The Commission referenced their reasoning for their interpretation in their prior decision in *DuFour v. Sweet House of Madness LLC,* UI Hearing Dec. No. 14600226MW (LIRC Mar, 18, 2014). In that decision the Commission found that the second clause of the applicability section can be interpreted two separate ways; that is, in addition to the "department determinations issued on or after January 5, 2014, consistent with the first clause, the statutory changes also apply, consistent with the second clause, to:

> (1) Those appeal tribunal decisions and commission *arising from department determinations that are appealed* on or after January 5, 2014; or, alternatively,
>
> (2) *All appeal tribunal decisions or commission decisions issued* on or after January 5, 2014, even if the underlying department determination was appealed before that date.

The Commission correctly determined that the above statutory provision was ambiguous because it could be reasonably understood by reasonably well-informed individuals in one or more manners; therefore it was appropriate to look extrinsically to sources including legislative history and to find the legislative intent of the provision. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 50, 271 Wis.2d 633, 681 N.W.2d 110.

The Commission cited a May 29, 2013, drafting request from the Legislative Fiscal Bureau as evidence of the legislative intent. That request stated that the provisions "would first apply on January 5, 2014, with respect to determinations of benefit claims issued, or, with respect to decisions issued on determinations that are appealed on that date." The Commission further cited the Legislative Fiscal Bureau's 2013 Analysis of Act 20 where it was stated that the provisions in question would first "apply on January 5, 2014, with respect to

[1] Department offered an alternative interpretation of said statute in their reply brief, to which Commission objected to on procedural grounds and otherwise.

determinations of benefit claims issued, or, with respect to decisions issued on determinations that are appealed on that date." The Commission argues that the above history shows that the purpose of the effective date in the second clause was meant to be the date of the appeal of the underlying determination, and not the date of the issuance of subsequent appeal tribunal decision or commission decision. The Commission further argues that interpreting the second clause as applying to all appeal tribunal decisions and the commission decisions issued on or after January 5, 2014, regardless of the date of appeal, would result in an absurd and unreasonable result – that is, because applying the Act 20 changes to all tribunal and commission decisions delivered on or after January 5, 2014, would necessitate the Commission to "issue decisions under the new laws based upon a record that is insufficient to perform the necessary legal analysis." *DuFour v. Sweet House of Madness LLC, infra.*

The Commission explained the reasoning for their interpretation of the second clause for the following: (1) it was consistent with the legislative intent expressed in the May 29, 2013, drafting request from the Legislative Fiscal Bureau; (2) it was procedurally logical, because determining that changes applied to any appeal determination regardless of when the hearing request was made, could require two separate evidentiary hearings, if the appeal had been held under the old law; and, (3) the Commissions interpretation of the second clause works to "give effect to all the words in the initial applicability provision, while at the same time avoiding absurd results."

Department's Constitutional Arguments

The Department argues in their brief that the Commission's decision penalized the Employee because he exercised his right to a hearing by: 1) creating an absurd result by

increasing the Employee's statutory penalty; and, 2) the Act, if properly interpreted, impermissibly burdened the Employee's right to a due process hearing. The Department argues, in effect, that the interpretation of Act 20 by the Commission, correctly or incorrectly, places an impermissible burden upon the Employee's constitutionally protected due process rights to a review hearing. Department further argues that the burden was compounded by the fact that the Employee was not given notice of the possibility of an increased penalty.

The Commission argues: 1) that the Department lacks standing to raise this constitutional objection; 2) that legislatively enacted laws are strongly presumed to be constitutional and the Department has the burden to show unconstitutionality by the standard "beyond a reasonable doubt"; and, 3) classifications or distinctive classes were not created by the legislative enactments.

State agencies are creatures of the state and as such, they generally lack standing to challenge a statutes constitutionality. *Silver Lake Sanitary Dist. v. DNR,* 2000 WI App 19, ¶8, 232 Wis.2d 217, 221, 607 N.W.2d 50, (Wis. App., 1999). An exception exists to the no standing rule for matters between a private litigate, and a state agency or municipality; it does not apply to litigation between agencies. *Id.* In the present case, the appeal is between two state agencies or subdivisions of the state; the private litigant (Employee) is not an active participant in the appeal and he has not raised any constitutional arguments. It seems clear enough that an agency created by and ascribe powers by the state does not have standing to challenge the actions of that entity which created them; this includes calling into question the constitutionality of laws that have been created by the state legislature. *Id.* Additionally, the exception to the standing rule does not apply in this case, since the Defendant has not joined in

this appeal, nor does this appear to be an issue of great public concern. The argument in this case is between two agencies or subdivisions of the state; the public parties effected by a decision in this matter would be very small due to the small amount of individuals who would potentially be effected by this appeal. Nonetheless, the Department argues in effect that interpretation of the Act by the Commission creates constitutionally impermissible results; this would be relevant (but not determinative) to the Department's argument that the Commission's interpretation of the statute is incorrect. It is presumed that legislators know how to enact constitutionally valid statutes and do so; therefore, one could argue that it is more likely that a statute is interpreted in an unconstitutional manner rather than it was intentionally written in an unconstitutional fashion. To that extent, the standing limitation does not prohibit the Department from raising the issue related to the interpretation of the statute; however they do not have standing to directly attack the constitutionality of the statute as written.

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution limits arbitrary government action that would deprive an individual of their life, liberty, and property without due process of law. The Wisconsin Constitution in article 1, section 1, contains language that "is not identical [to the United States Constitution]...the two provide identical procedural due process protections." *County of Kenosha v. C & S Management, Inc.*, 223 Wis.2d 372, 393 (1999). Due process requires, at a minimum, that government action be substantively and procedurally fair. Substantive due process dictates that government invasion into the rights and liberties of the citizens be fair, reasonable and in

furtherance of a legitimate state purpose.[2] Governmental depravation of life, liberty, and property, requires procedural fairness to be in conformity with due process. At the very least, this requires that the individual who's life, liberty, or property interest are sought to be deprived, are proceeded against in the usual manner of law, that the procedure is fair, and it gives the individual a right to be heard. See, *Hagar v. Reclamation Dist.,* 111 U.S. 701, 708 (1884). Equal protection and due process are closely related; equal protection requires that individuals who are similarly situated should be treated similarly.

In the present case, the statutory amendments created by Act 20 do not create distinctive classifications with respect to quit requalification provision of the amended law. The law, as it is written, applies to all individuals who voluntarily terminate their employment and apply for unemployment insurance - while it is true that requalification conditions differ based on the time of the appeal to the Commission, all individuals who would fall within those statutory time-lines are treated similarly. Individuals who quit their employment, apply for unemployment benefits, are denied, and appeal their decision to the Commission during a certain time-period are all treated similarly; no special classes or classifications were created to unreasonably treat individuals differently. The government has a legitimate state interest in administering unemployment benefits in an efficient, fair, and prudent manner; the statutory changes including the effective dates are reasonably related to that legitimate state purpose. Nonetheless, a party claiming a violation of substantive due process rights, has the burden show that they have a constitutionally protected liberty or property interest. While the

[2] Government interference with "fundamental" rights, such as those specifically identified in the United States Constitution and Bill of Rights, are given a heightened scrutiny. See, *Wisconsin v. Yoder*, 406 U.S. 205; *Employment Division, Department of Human Resources of Oregon vs. Smith,* 494 U.S. 872 (1990 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Department has shown that employees have a statutory right to unemployment insurance, they have not met the burden to show that there exists a constitutionally protected right to such insurance. Although an employee may have a statutory right to unemployment insurance, the noted change in the law does not diminish that right, all it does is change the requalification rules before the person is eligible to receive it after they quit. The conditions for requalification do not diminish any right to insurance; they merely change the statutory time period for requalification. Additionally, the Department has not demonstrated that the requalification period diminishes any right to the Employee enjoyed to unemployment insurance after requalification by virtue of the changes to the law. While the law requires that the employee earn six times the unemployment benefits rather than the prior four times, it does away with the statutory four week waiting period. This may act as a benefit to an individual rather than a detriment, as it allows an individual to qualify for benefits as soon as that individual earns the requisite wage; since these benefits are to act as insurance, it is an advantage to be covered sooner than later. At the very least, it is hard to classify the change in the law as either a benefit or detriment; the change is basically a wash. Accordingly, the burden has not been met to show that the Employee had a constitutionally protected property interest in the requalification of his unemployment benefits, and if he did, that those rights were violated.

The employee's due process rights were not violated by the change in the statutes nor by the interpretation of that statute by the Commission. Act 20 was published on July 1, 2013, and the Wis. Stat. § 108.04(7) took effect on the first Sunday thereafter. The Employee quit his employment on or about October 26, 2013; this was *after* the Act was published. The law change was properly published; therefore the Employee had proper notice of that change. The

heavy burden to show procedural due process rights have been violated has not been met and this court does not so find.

Department's Interpretation – Reply Brief

The Department in its reply brief offered its interpretation of the second clause of the initial applicability provision at 2013 Wis. Act 20, § 9351(2q). The Commission objects to the Department first raising this issue in it reply brief when it was not raised in its main brief.

Wisconsin courts generally do not consider arguments first raised in an appellant's reply brief. *Roy v. St. Lukes Medical Center*, 741 N.W.2d 256, 2007 WI App 218, 305 Wis. 2d 658 (Wis. App., 2007), *Fouts v. Breezy Point Condo. Ass'n*, 355 Wis.2d 487, 851 N.W.2d 845, 2014 WI App 77 (Wis. App., 2014). In the instant matter, while the Department, disagreed with the Commission's interpretation of the second clause of the initial applicability provision in question, they provided no interpretation in their initial brief. Department argues in their reply brief that:

> "initial applicability section should be interpreted to first apply to Act 20 to an appeal filed on or after January 5 that requires the correction of an erroneous determination of the Department. The initial application provision should not force the application of Act 20 to determinations that – consistent with the first clause of the initial applicability provision – properly applied the pre-Act 20 substantive unemployment laws."

The Department argues that their interpretation is correct because: (1) it give effect to the second clause while staying in accord with the first clause; (2) that it is consistent with the Legislative Reference Bureau drafting request; (3) it avoids the increasing penalty to the Employee for filing an appeal; and, (4) it is consistent with the rule that an ambiguous unemployment statute is to be liberally construed in favor on an employee to qualify for benefits earlier than later."

The Department's interpretation of the initial applicability section is not a better clarification of the section, in fact, it poses additional difficulties: (1) it raises the problem of changing the law during appeal process; (2) it could require appeal tribunals to hold hearing under both the old and new laws; and, (3) the second clause does not contain language that limits that clause to appeal determinations that are later found to be "erroneous" or reversible under the old law.

The Department argues in their reply brief that the Commission's interpretation violates the "liberal construction rule" since it increases the quit requalification conditions during the time of an appeal. The court rejects this argument since as stated above, it is not clear that the requalification conditions actually work to the disadvantage of an employee. As stated before, the requalification change made by Act 20 eliminates the four week waiting period while adding an increase in wage to be earned. In certain instances, the elimination of the four weeks time period could be a benefit to an employee rather than a detriment; at the very least, it is not clearly a detriment an employee.

The Commission is given due deference to their interpretation of the initial applicability section in questions. Under that standard of review, their reasonable interpretation of that statute should be accepted by the court, unless there is a more reasonable interpretation available. The Department's late interpretation of the section in question is not more reasonable and would require the addition of words to the explicit language of the second clause which do not exist. For these reasons the court accepts the Commission's interpretation of the initial applicability sections as reasonable and consistent with their unemployment insurance decision of March 21, 2014,.

CONCLUSION

For reasons stated above, the court gives due deference to the Commission's interpretation of the statute and finds that their interpretation is reasonable and does not create an unconstitutional effect. The court finds that the Department's interpretation of the statute in question is not superior to that of the Commission and that the Commission's interpretation is more reasonable than that of the Department. Therefore, for reasons stated above, the court confirms the Commission's unemployment insurance decision of March 21, 2014, in its entirety.

ORDER

It Is Ordered that, the Commission's unemployment insurance decision of March 21, 2014, is affirmed by the court in its entirety. Accordingly, the employee is ineligible for benefits until the employee earns wages in covered employment after the week in which the quitting occurred equal to at least six times the weekly benefit rate which would have been paid had the quitting not occurred.

THIS DECISION IS FINAL FOR PURPOSES OF APPEAL

Dated: March 16, 2015

By the Court:

William E. Kussel Jr.
Circuit Court Judge
Shawano-Menominee Circuit Court, BR II

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