STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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MAXINE WILSON,

Petitioner, Case No. 79-CV-2242

v.

MEMORANDUM DECISION

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and DELTA UPSILON FRATERNITY,

Respondents.

* *

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

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This is an action by petitioner to review a decision of the respondent Wisconsin Labor and Industry Review Commission (hereafter the Commission) dated April 16, 1979, entered in an unemployment compensation proceeding which adopted the findings of fact and conclusions of law of the appeal tribunal and affirmed the latter's decision. The appeal tribunal's decision determined that petitioner was ineligible for benefits and required her to repay $585 to the Unemployment Reserve Fund to cover benefits previously erroneously paid to her.

STATEMENT OF FACTS

The petitioner during the summer of 1977 received unemployment compensation benefits based on her employment with a prior employer. She began working for the respondent Delta Upsilon Fraternity at the beginning of the University of Wisconsin-Madison 1977-1978 school year in September, 1977, as a cook preparing meals for the university students who resided in the fraternity house. She did not sleep in the fraternity house.

She worked from 9:00 a.m. to 5:30 p.m. or 5:45 p.m. and was paid $600 per month. She did not work during the holiday/semester break

at the end of the first semester,which break began prior to Christmas, and was to have started working again on January 23, 1978 (Week 4). However, she was ill for two days and did not actually return to work until January 25, 1978 (Week 4). Her last day of work was April 28, 1978 (Week 17). She was then discharged. Thus she had only 14 weeks of employment subsequent to January 1, 1978.

The Department of Labor, Industry and Human Relations (DILHR) originally calculated petitioner's benefits so as to include her weeks of employment with respondent in 1977. Subsequently, DILHR determined this was error and that her period of covered employment only included the 14 weeks she was employed in 1978.

THE ISSUES

Did the Commission err in determining that the petitioner was employed in domestic service by a local chapter of a college fraternity?

Did the Commission err in failing to count the weeks prior to January 1, 1978, as weeks of employment?

Did the Commission err when it failed to count the weeks of semester break from January 1 to January 23, 1978,(Week 4) as weeks of employment?

Does the Commission's interpretation of sec. 108.02(4)(d), Stats., result in an unconstitutional discrimination against the petitioner in that it deprived her of equal protection of the law?

STATUTES INVOLVED

Section 108.02(4)

(d) Any employer of an individual or individuals in domestic service shall become an "employer" subject to this chapter as of the beginning of any calendar year if such employer paid cash wages of $1,000 or more during any calendar quarter in either the current or preceding calendar year for such domestic service.

Section 108.02(5)

(k) "Employment" as applied to work for a given employer other than a government unit, except as such employer duly elects otherwise with the department's approval, does not include service:

(2) As a domestic in the employ of an individual in such individual's private home, or as a domestic in the employ of a local college club or of a local chapter of a college fraternity or sorority, unless performed for an individual, club or chapter which is an employer subject to this chapter under sub. (4)(d) or (i);

Section 108.02(13) WEEKS OF EMPLOYMENT.

An employe's "weeks of employment" by an employer means all those weeks in which the employe has performed any wage-earning services for the employer in employment subject to this chapter and, when requested by the employe, all those weeks for which the employe's vacation pay or dismissal or termination pay was allocable as wages for benefit purposes and for which benefits were not paid.

Section 108.02(21) UNDEFINED TERMS

Any word or phrase used in this chapter and not specifically defined herein shall be interpreted in accordance with the common and approved usage thereof and in accordance with other accepted rules of statutory construction. No legislative enactment shall control the meaning or interpretation of any such word or phrase, unless such enactment specifically refers to this chapter or is specifically referred to in this chapter.

Section 108.04(4) QUALIFYING CONDITIONS

(a) An employe shall not be eligible to start a benefit year with any given week of unemployment unless he or she has had a total of 17 or more "weeks of employment" from one or more employers within the 52 weeks preceding that week or within those 52 weeks plus the number of any weeks over 7 (occurring within those 52 weeks) for which he or she received temporary total disability payments under ch. 102, or back pay within the meaning and limits of s. 108.05(6). The number of "weeks of employment" required to start a new benefit year is reduced to 16 weeks beginning in the 2nd week ending in 1977 and is reduced to 15 weeks beginning in the first week ending in 1978.

Section 108.05(4)

(b) An employe's vacation pay shall, for benefit purposes, be treated as wages for a given week only if it has by the close of that week become definitely allocated and payable to the

employe for that week and he has had due notice thereof, and only if such pay (until fully assigned) is allocated:

1. At not less than the employe's approximate full weekly wage rate; or

2. Pursuant to any other reasonable basis of allocation, including any basis commonly used in computing the vacation rights of employes.

THE COURT'S DECISION

A. Determination that Petitioner Was Employed in Domestic Service

For many years commencing in 1939 ch. 108, Stats., excluded from the statutory definition of covered employment "domestic service in the employ of a local college club or of a local chapter of a college fraternity or sorority." The term "domestic service" is not defined in the statutes, and thus is to be interpreted in accordance with sec. 108.02(21), Stats., which provides that any word or phrase not specifically defined in ch. 108 shall be interpreted in accordance with its common and approved usage.

Webster's Third New International Dictionary-Unabridged-1976 notes that an obsolete definition of "domestic" is "enjoying intimate status (as in a household)." The next definition is "relating to the household or the family: concerned with or employed in the management of a household or private place of residence-distinguished from public... connected with the supply, service and activities of households and private residences-distinguished from industrial...." (Emphasis supplied.)

Domestic science is defined by that dictionary as "instruction and training in domestic management and the household arts (as cooking and sewing) . . ."

Petitioner's brief quotes the definition of a "domestic servant" that is found in Black's Law Dictionary. However, that definition is similar to the definition that is called obsolete by Webster, and that definition has not been accepted by the courts in dealing with compensation programs for workers.

In its treatment of workers compensation programs, Corpus Juris Secundum notes that such legislative acts commonly exclude domestic or household employment from their operation. It states as follows:

> The view that residence in the employer's home is essential to classification as a domestic servant has been rejected, and the test declared to be whether or not the duties performed are directed to the maintenance of a home. 99 CJS Workers Compensation sec. 32, p. 189.

In the case of Anderson v. Ueland, 197 Minn. 518, 267 N.W. 517 (1936), the employee had worked as a caretaker and gardener for many years. He lived in an upstairs room in the garage on the premises. He was injured and eventually was told not to work about the premises. He applied for workmen's compensation and was awarded such benefits by the Minnesota Industrial Commission. On appeal to the court, the employee argued that he was not a domestic servant because he lived "without the house." In reversing the Commission's decision and denying benefits, the court stated that the test to be applied is based on the relation of the work to the upkeep of the home and the comfort of those dwelling therein. The court had no alternative but to "repudiate any arbitrary distinction based only on such an unimportant circumstance as the place wherein the employe happens to sleep. . . ." It found that the employee was a domestic servant even though he lived outside of the house.

Similarly in the case of Fingerson v. Zeta Tau Alpha Sorority, 197 Minn. 378, 267 N.W. 212 (1963), the employee, who was called in to do cleaning on an average of once a week, was held to be employed as a "domestic servant" and thus ineligible for workmen's compensation.

In both of the above cases the court distinguished the facts from cases in which a claimant was employed by a commercial club or a business carried on for profit. The cases cited by petitioner's brief are distinguishable from the instant case because of this principle.

The only unemployment compensation cases in Wisconsin which have dealt with this question are administrative decisions. They are found in the 1978 Wisconsin Unemployment Compensation Digest, Section ET (Employment) 483.05. The 1973 Commission decision cited there [73 A 5875(c)] quotes extensively from the Minnesota case of Anderson v. Ueland, supra, and holds that it is the nature of the employment, not the place that the employee lives, that controls the "domestic service" classification.

It is true that the employment in the present case might not meet the test of "private domestic service," but it is clear that the service provided for the fraternity residents was domestic service and sec. 108.02(5)(k) 2, Stats., clearly exempted such service from the unemployment compensation law when performed for a college fraternity.

The employment of the petitioner in this case meets both statutory tests for the exception. She was hired by the student residents of the fraternity house. She reported to them when she was unable to work (Form 10-18-78) and the cooking she did was for them. The student residents paid for their room and meals, and though the petitioner may not have received payment for her work from the individual residents, it is clear that she was being paid to provide meals to them. The establishment of a more effective and efficient payment system does not change the identity of the employer. 1978 Wisconsin Unemployment Compensation Digest, Section ET 483.05-Case 49-A-913(C) and Anderson v. Ueland, supra.

The practical administrative construction of a statute by a department charged with the task of applying it is entitled to great weight and will not be set aside by a court unless it can be said that the

construction is clearly contrary to the legislative intent. Trczyniewski v. Milwaukee, 15 Wis. 2d 236, 240, 112 N.W. 2d 725 (1961); A. O.Smith Corp. v. DILHR and Barbin, 88 Wis. 2d 262, 276 N.W. 2d 279 (1979); Bucyrus-Erie Co. v. ILHR, 90 Wis. 2d 408, 417, 280 N.W. 2d 142 (1979). 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. Chevrolet Division, GMC v. Ind. Comm., 31 Wis. 2d 481, 488, 143 N.W. 2d 532 (1966); Cook v. Ind. Comm. 31 Wis. 2d 232, 240, 142 N.W. 2d 827 (1966); Mednis v. Ind. Comm., 27 Wis. 2d 439, 444, 134 N.W. 2d 416 (1965).

The Wisconsin Supreme Court in Beloit Education Asso. v. W.E.R.C., 73 Wis. 2d 43, 68, 242 N.W. 2d 231 (1976), limited the application of the principle of according "great weight" to an administrative agency interpretation of statutes to situations where such interpretation was of some standing and, in a case of an initial interpretation, the test is to accord such an interpretation "due weight". The Court believes the effect of such distinction is to give the reviewing court wider discretion not to follow the agency's statutory interpretation than it possesses where the interpretation is one of some standing application. However, here the DILHR interpretation was of some standing, and the Court is of the opinion it should be followed. Therefore the Court concludes the Commission did not commit error in determining that petitioner was employed in domestic service by respondent fraternity.

B. Failure of Commission to Count Weeks Prior to January 1, 1978, as Weeks of Employment

Section 108.04(4)(a) requires an employee must have at least 15 "weeks of employment" within the base period commencing with the

first week ending in 1978. This was the basis for the determination made that petitioner was ineligible for benefits.

Petitioner's brief asserts:

> Section 108.02(4)(d), Stats., provides that an employer of an individual in domestic service becomes an employer subject to the chapter as of the beginning of any calendar year in which he paid the employe $1,000 in wages or if that amount in wages were paid in any quarter of the preceding year. The statute sets a date, the beginning of the calendar year, on which the employer becomes an employer subject to the chapter. It does not prescribe that the employe's base period for deaermining eligibility be calculated with reference to this date. The fact that the statute takes into account wages that were paid before the employer becomes subject to the chapter indicates that the weeks prior to the beginning of the calendar year should be included as "weeks of employment" for the purposes of sec. 108.04(4), Stats...."

As noted above, Wisconsin law had long excluded various domestic service situations, including that for a local chapter of a college fraternity, from the definition of employment for unemployment compensation purposes. That exclusion was modified by sections 7 and 11 of Chapter 133 of the Laws of 1977. Section 108.02(5)(k)2, Stats., as created by sec. 11 of that chapter provides that work in various domestic service situations is not employment unless it is for an individual, club or chapter who is an employer under the unemployment compensation act.

Section 108.02(4)(d), Stats., as created by sec. 7 of Chapter 133 provided that an employer of persons in domestic service became an employer under the unemployment compensation act if it paid cash wages of $1,000 in certain calendar quarters.

Section 34 of Chapter 133, Laws of 1977, provided that section 7 of the chapter was "effective with respect to employment after December 31, 1977."

The general rule is that a legislative act is presumed to apply prospectively only and retroactive effect will only be given when so specified. Feest v. Allis-Chalmers Corp., 63 Wis. 2d 760, 767, 229 N.W. 2d 651 (1974), Swanke v. Oneida County, 265 Wis. 92, 60 N.W. 2d 756 (1953).

Here, the legislature clearly specified that this legislation was to have effect only after December 31, 1977. Work in domestic service can only be employment under the unemployment compensation act if done for an employer subject to the chapter. A fraternity could not become an employer subject to the Chapter before January 1, 1978. Thus, no domestic service work done for a fraternity before January 1, 1978, could count as employment so as to meet the 15 week minimum requirement under sec. 108.04(4)(a), Stats. The statute therefore does prescribe that the employee's base period for determining eligibility be calculated from that date.

C. Whether Weeks of Semester Break From January 1 to January 23, 1978, Should Have Been Counted as Weeks of Employment

Petitioner was paid $100 by respondent fraternity as a Christmas bonus, and contends that this should be counted as compensation for the Christmas-semester break making the period from January 1 to January 23, 1978, weeks of employment the same as Easter vacation week. However, petitioner was specifically paid her regular pay during the latter vacation period.

Weeks of employment for which eligibility for benefits can be established are described and defined in sec. 108.02(13), Stats. Those weeks include weeks in which wage-earning services are performed plus weeks for which vacation, dismissal or termination pay was allocable and for which benefits were not paid.

Vacation pay can be treated as wages for a given week only if it was definitely allocated and payable for that week by the close of that week, with due notice. It must also be allocated at not less than the employee's approximate full weekly wage rate or pursuant to some other reasonable basis of allocation. Sec. 108.05(4)(b), Stats.

None of the conditions established by this statute to allow this payment to be treated as wages were met. There is no evidence to show that petitioner was notified that the payment was allocated to any weeks as vacation pay. The rate of $33.33 per week does not approach approximation of the employee's full weekly wage rate of $138.00 ($600.00 per month divided by 4 1/3 weeks) or relate to any other allocation system. The employer was apparently not bound to pay it at all, and it certainly was not definitely payable at the end of any of the weeks for which the petitioner wants it to count.

Finally, the DILHR record shows that the petitioner claimed, and received unemployment compensation benefits during weeks 2 and 3 of 1978. That fact clearly precludes any of those weeks from being counted as weeks of employment pursuant to sec. 108.02(13), Stats.

D. The Alleged Denial of Equal Protection of the Laws

Petitioner's claim of denial of equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution is based on the fact that under the Commission's holding she was not permitted to count any weeks of work prior to January 1, 1978, as part of her base period while cooks doing the same work in commercial establishments were. Petitioner points to the fact that her salary was not paid directly by respondent fraternity but by a housing corporation. This housing corporation, however, was apparently set up for the benefit of the fraternity.

As noted above, the domestic service exclusion which is currently found in sec. 108.02(5)(k)2, Stats., was effected by the provisions of ch. 133, Laws of 1977. That change was a direct result of, and virtually identical to, a change in the Federal Unemployment Tax Act. The changes in the Federal Unemployment Tax Act are found in secs. 3306(a)(3) and 3306(c)(2) of the Internal Revenue Code of 1954 as amended. The

federal law changes were made by secs. 113 and 114(a) of Public Law 94-566 and are effective with respect to wages paid after December 31, 1977, and for wages paid after December 31, 1977, for services rendered after December 31, 1977.

The exclusions which were enacted by the Wisconsin Legislature by Chapter 372 of the Laws of 1939 were also tied to changes in Federal law and the exclusions paralleled the Federal exclusions [Sec. 3306(c)(2) Internal Revenue Code of 1954 as amended (1977).]

Various classes of employers and employees have been excluded from coverage of the unemployment compensation program by the Congress from its initial enactment. Such classifications have been reviewed by the courts and found not to violate the Constitution. Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 57 SC 883, 81 L. Ed. 1279 (1936), Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 81 L. Ed. 1245 (1936). Distinctions between classifications of employees in the Wisconsin law have been reviewed and approved by the Wisconsin Supreme Court. The Dumore Co. v. Smader, 245 Wis. 300, 13 N.W. 2d 915 (1944).

The Minnesota Supreme Court has discussed the domestic service exclusion from worker's compensation programs. The court noted that the object of the act was "to place upon industries, which are carried on for profit, the burden of loss from injuries to the employees engaged in furthering their purposes, as part of their expenses; and that it was not intended to place this expense upon owners of houses, which, of course, are not maintained for pecuniary gain." Anderson v. Ueland, supra. Classifications based on the size of the employer were upheld by the U.S. Supreme Court in Carmichael v. Southern Coal & Coke Co., supra. There it was noted that a "legislature is not bound to tax every member of a class or none."

The legislature certainly was entitled to make the same distinctions with regard to the application of Wisconsin's unemployment compensation law. It has imposed the unemployment compensation program on employers who employ persons in domestic services for the purpose of making a profit and on those private employers who are determined, by the size of their payroll, to have an impact on the employment market. In Marmalejo v. DILHR, 92 Wis. 2d 674, 683-684, 285 N.W. 2d 650 (1979), the Supreme Court, citing Hams v. Kelley, 70 Wis. 2d 242, 234 N.W. 2d 628 (1975), said "that a classification, though discriminatory, is not arbitrary or capricious, and therefore not violative of the equal protection requirement, if any statement of facts reasonably can be conceived which will sustain it."

The lines drawn by the legislature may be less than perfect and may seem to be inequitable when the circumstances of individual employees are compared. Perfection is not a requirement, however, and the legislation being reviewed here should not be disposed of as unconstitutional due to a lack of such perfection.

As stated in State ex rel. Carnation M.P. Co. v. Emery, 178 Wis. 147, 160, 189 N.W. 564 (1922):

> "If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. The court cannot try the legislature and reverse its decision as to the facts. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court."

The above extract from the Carnation M. P. Co. case was quoted with approval in the recent case of State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis. 32, 46, 205 N.W. 2d 784 (1973). As pointed out above, a rational basis did exist for the classification made by the legislature in this instance.

The Court is of the opinion there was no violation of the equal

protection of the laws clause of the Fourteenth Amendment.

Let judgment be entered confirming the Commission's decision which is the subject of this review.

Dated this 28th day of April, 1980.

By the Court:

George G. Currie

Reserve Circuit Judge