STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 8

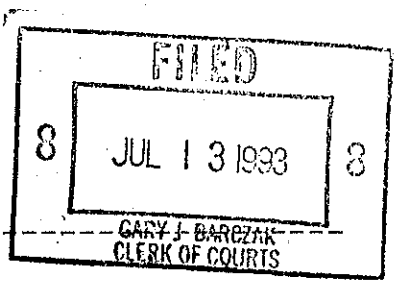
CAROL L. PETERSON,

Plaintiff,

v. Case No. 92-CV-017798

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and MARQUETTE UNIVERSITY,

Defendants.



DECISION AND ORDER

The above Ms. Peterson has requested judicial review under s. 102.23 Stats. regarding a decision denying her unemployment compensation benefits by the Labor and Industry Review Commission [LIRC] on December 4, 1992. That decision had upheld an administrative law judge's written ruling of October 6, 1992 following an evidentiary hearing three weeks earlier on September 15th.

A briefing schedule was set by this Court on April 20th following the reassignment of the case on March 29th to this branch and the receipt of the record on April 16th. The last brief was filed July 12, 1993.

This Court is using very little of the brief filed by defendant Marquette University since it:

1. Did not focus on the issue of whether it was "good cause" under s. 108.04(7)(b) for Ms. Peterson to voluntarily terminate her employment with the University [instead it focused on "constructive discharge" as defined in Federal

cases]; and

2. Failed to supply the Court with copies of cited authorities that are not published Wisconsin Court of Appeals and Supreme Court opinions as required under Local Rule No. 366. This rule has been in effect since August 1, 1990.

Nonetheless, the brief filed by LIRC along with the record amptly demonstrate that Ms. Peterson is entitled to no relief.

Carol Peterson commenced her employment with Marquette in July 1980 as Assistant Dean of Residence Life [formerly Assistance Director] and held that same position until submitting her letter of resignation on April 27, 1992, and effective May 31, 1992, [Exh. No. 2].

Her normal yearly contract ran from September 1st through August 31st. Usually she was notified in late winter or early spring that same would be renewed.

However, in December 1991 Ron Orman, an Associate Dean of Residence Life [a higher position than assistant dean] was appointed as dean to succeed James Forrest effective July 1, 1992.

Dean Orman made known his intention not to renew Peterson's contract. However, after meeting with his superiors it was decided that he should first evaluate her performance.

On March 3rd [or 2nd] 1992, Orman drafted up 'performance expectations' [Exh. No. 3] and met with Peterson concerning same. Some of Orman's concerns came from reviewing comments from Residence Hall Directors, one of which was in writing

from a Barb Kelly [Exh. No. 6]. Peterson had supervised these directors and their feedback was mostly unsatisfactory according to Orman [T.P. 48].

Peterson then responded on March 9, 1992, [Exh. No. 4] to Orman's 'expectations'. A more complete 'preformance expectation' was later submitted to Peterson on April 24th [Exh. No. 1]. Therein, inter alia, was the offer of a provisional contract for four months running from September 1st [at the conclusion of the existing yearly contract] until the end of 1992. This would give Orman an opportunity to review Peterson's performance and meet with her monthly to discuss same.

However, Peterson decided not to even complete the contract she had and as indicated, supra, resigned almost immediately after reviewing Exhibit No. 1. She did work a few more weeks and took the balance of May as accumulated vacation.

S. 108.04(7) provides ineligibility for unemployment compensation benefits to someone who resigns a job unless the employee can show good cause attributable to the employer.

Kessler v. Industrial Commission 27 Wis.2d 398, 134 N.W.2d 412 (1964) relates that this cause must involve real and substantial fault on the part of the employer. Accord Farmers Mill of Athens, Inc., v. ILHR Dept. 97 Wis.2d 576, 294 N.W.2d 39 (Ct. App. 1980).

Herein, the administrative law judge found no substantial fault on the part of the University. To the contrary he found it reasonable to (1) discuss with Peterson criticisms

Orman received as to her, (2) provide Peterson with his performance expectations, and (3) offer her a four month contract to give him time to evaluate her performance and determine if the criticisms had validity. He determined this was a normal employer/employee relationship, albeit a different one than she had been used to under Dean Forrest who had recommended renewal of her yearly contract.

LIRC found no objection to any of Orman's 'expectations' and that same were reasonable in an employing relationship involving management personnel. This Court has no power to substitute its judgment on that determination made by the Commission.

The standard of review is well-known to this Court and citations for same is unnecessary. Suffice it to say that the familiar rules are applied herein by the Court. Basically they concern the upholding of the Agency's determination if there is substantial evidence to support same, that the Court should search for evidence to support the Agency's decision rather than evidence opposing same, and that credibility of the witnesses is the exclusive province of the Agency.

Thus it is irrelevant that Dean Forrest would have renewed Peterson's contract. When employees are faced with a new boss whose management style is different from the predecessor, the employee has to adjust to that style as long as the new rules are not unreasonable.

Peterson was given that opportunity to 'prove herself' to Orman over the last six months of 1992, but decided it

would be too stressful to her and quit effectively three months before her yearly contract expired. That is not 'real substantial' fault on the part of Marquette.

Peterson cites Kovalic v. Dec International, Inc. 161 Wis.2d 863, 469 N.W.2d 224 (Ct.App. 1991) to support her position. Reliance thereon is misplaced.

Kovalic did not concern an administrative agency review, but rather a trial involving an employment termination due to an alleged Federal age discrimination violation. Our Court of Appeals, in dismissing the action, determined that for an employee to be successful he had to prove that the employer's stated reasons for termination were actually a pretext for discrimination. Therein the causal link between pretext and discrimination had not been established.

Thus, Kovalic has no relevance to an unemployment compensation agency review where an employee voluntarily quits [not being terminated] and has to establish real and substantial fault on the part of the employer as a reason for quitting.

In her reply brief, Peterson argues that that initial determination by the investigating deputy was favorable to her. What petitioner ignores is that the Court does not review that initial determination.

Rather it is the Commission's Order and to some extent the Findings by the administrative law judge that is subject to review in the circuit court. This Court is bound to construe the evidence in a light most favorable to the findings by the Commission, not those initially made by an

investigating officer. Thus Deputy Besch's determination is irrelevant.

Peterson also cites Cornwell Personnel Associates v. LIRC 175 Wis.2d 537, ____N.W.2d ____ (Ct.App. 1993) for the proposition that alteration of working conditions are to be construed as 'good cause' attributable to the employer justifying an employee voluntarily quitting employment. Again, reliance thereon is misplaced.

Cornwell concerned an individual [Robert E. Linde] who had been employed by a temporary help employer. Linde refused to take three different job assignments after a different assignment had expired because the new choices involved considerably less remuneration.

LIRC determined that Linde's refusal was justified and 'good cause attributable to Cornwell' since all three assignments paid at least 15% less than Linde had been making at his most recent assignment and that the three "offers were all substantially lower than prevailing wage rates for similar work in the employee's labor market, according to department policy in effect at the time the job offers were made." Id.p. 547.

In contrast the case at bar concerns no reduction in Peterson's salary, but rather an extended evaluation period to give Orman an opportunity to determine if Peterson should be retained. That opportunity, of course, never occurred since Peterson did not give it a chance to so happen.

Further in both cases it is the court deferring to the expertise and determination of the Agency as long as there

is substantial evidence in the record to support the conclusion made by LIRC. Unless an error of law has occurred this Court is powerless to overturn the Agency's Order. The same was true in Cornwell.

In summary, this action is dismissed and LIRC's Determination and Order is affirmed.

Dated at Milwaukee, Wisconsin, this 13th day of July, 1993.

By the Court:

Michael J. Barron
Circuit Judge