STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

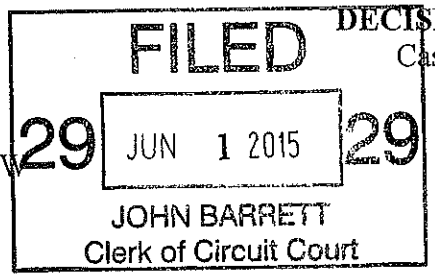
RICHARD S. NOVELL,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW COMMISSION, et al.,

Defendants.



DECISION AND ORDER
Case No: 14CV003713

This case comes before me on the petition of Richard S. Novell to review a decision of the Labor and Industry Review Commission concerning his unemployment benefits. Mr. Novell was forced to quit a job, for serious medical reasons. A worker who quits is entitled to requalify for benefits, but the Commission ruled that Mr. Novell did not requalify, because after quitting he did not earn the required amount of wages. Mr. Novell disputes this conclusion. He contends that certain severance payments he received after quitting satisfy the requalification requirement.

For the following reasons, however, I conclude that severance payments do not count for purposes of requalifying. Accordingly, I must affirm the Commission's decision.

Brief background

Because the issue the case presents is narrow and because there is little the parties dispute other than the question I just framed, only a brief bit of background is necessary to understand the court's analysis:

For 41 years, Mr. Novell worked for Robert Baird & Company. He was let go in March, 2012. He received a severance package that provided him with more than a year's worth of "transition compensation." Starting in May, 2012, Mr. Novell began to receive twice-per-month payments of approximately $1,336.75. These payments continued through August 6, 2013.

Although he was receiving severance from Baird, Mr. Novell began to work again, as a computer programmer for a temporary staffing agency. However, after only two days of work, he was forced to quit. He was undergoing chemotherapy and began to suffer gastrointestinal bleeding. He was forced into the hospital every four days to receive blood transfusions. His official quit date was June 10, 2013. He was not available for work again until after August 31, 2013.

Mr. Novell sought unemployment insurance benefits. Because he left work voluntarily, though, he was not entitled to the immediate payment of benefits. Mr. Novell does not dispute this. What Mr. Novell disputes is a different point declared by the Department of Workforce Development: that he would not become eligible again for unemployment benefits until he satisfied the requalification requirements of WIS. STAT. § 108.04 (7)(a), which provides a worker must earn four times his or her weekly benefit rate before becoming eligible again for benefits.[1] The Department ruled that Mr. Novell would not be eligible again until he earned additional wages of at least $1,452.00.

[1] This case was commenced in 2013, before the 2014 amendments to WIS. STAT. § 108.04 became effective. Accordingly, this decision refers to the 2011-2012 version of WIS. STAT. § 108.04(7)(a), the version that was in effect when the case was commenced., which states, in relevant part:

> If an eligible 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 employee's weekly benefit rate under s.

Mr. Novell appealed the determination that he was ineligible. In his appeal he raised the argument that he pursues here, that the severance payments he was receiving from Baird should be counted for purposes of requalifying. The Commission rejected his argument and upheld the Department's determination.

On April 30, 2014, Mr. Novell commenced this action for judicial review.

Analysis

1. Standard of Review

Judicial review of a decision of an executive agency, such as the Commission, usually begins with a determination as to how much deference the court owes the agency's decision. Typically courts defer to one degree or another to the agency whose decision is under review, affording such a decision great weight, due weight, or no weight at all. *See, e.g.*, WIS. STAT. § 227.57(6); *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶ 33, 324 Wis. 2d 68, 781 N.W.2d 674. To what degree the court will defer to the decision of an executive agency depends on the "comparative institutional qualifications and capabilities of the courts and the agency," *id.*, in other words, the agency's duties, experience, technical competence, and specialized knowledge of the issue in dispute.

In this case, the Commission contends that because of its experience in administering the laws governing unemployment compensation and the rules governing the preconditions to requalifying for benefits, its decision deserves great weight. Mr.

> 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government.

WIS. STAT. § 108.04 (7)(a) (2011-2012).

Novell does not disagree – to the contrary, he affirmatively states in his brief that the court should give great weight to the Commission's legal analysis. Plaintiff's Brief, filed September 4, 2014, at 2.

Mr. Novell is unrepresented, and therefore one might doubt whether he understands the significance of what he has conceded. But I need not dwell long on this topic. The Commission does indeed have considerable experience with the issues I must confront here, so Mr. Novell's concession is reasonable. Furthermore, no matter what level of deference is applied, I agree with the Commission's conclusion that Mr. Novell's severance pay does not satisfy the requalification requirements of WIS. STAT. § 108.04(7)(a).

2. *Was it reasonable of the Commission to conclude that Mr. Novell's severance pay does not satisfy the requalification requirements of WIS. STAT. § 108.04 (7)(a)?*

The only wages that count for purposes of requalifying are wages that the worker "earns . . . after the week in which the termination occurs." WIS. STAT. § 108.04(7)(a). For quite a few weeks after he quit his work at a temporary agency, Mr. Novell received payments which appear to him like wages. The question, then, is whether these payments can be deemed "earned" in the weeks during which they were received rather during Mr. Novell's employment with Baird.

The Commission argues that as a matter of fact and as a matter of law Mr. Novell's severance payments were earned by him long before he received them, when he worked for Baird. With regard to the facts, the Commission points out that the letter from Baird submitted by Mr. Novell which describes his termination benefits explains that the payments were made to him "as remuneration for personal services to the firm." But Mr.

Novell did not perform any personal services for Baird after May, 2012, long before he quit the computer programming job he held in 2013.[2]

With regard to the law, the Commission demonstrates that the ruling it made in this case is the same as the ruling it has made previously in analogous cases. In *Schaden v. Valley Trucking LLC*, Hrg. No. 06401737GB (LIRC, October 27, 2006), the Commission interpreted the same statute in a dispute over whether vacation pay received from a former employer counts as wages earned after quitting. The Commission concluded that vacation pay does not count for purposes of requalifying wages.

Similarly, in *In re Lichtwalt,* Hrg. No. 93606080 MW (LIRC, Feb. 25, 1994), the Commission was confronted with the question of when dismissal pay, vacation pay and holiday pay should be considered "earned" for purposes of determining whether such pay is earned after the start of the most recent benefit year. The Commission concluded that even though the worker's payment was received after the start of the benefit year, it was earned before the start of the benefit year, when the worker was still working for the tool and die company from which he was dismissed. "The wages the claimant has after [the date his employment terminated]," the Commission wrote, "were not wages earned in employment or other work after [the date his employment terminated]." I agree that Mr. Novell's severance payments are analogous to the payments in these two cases and that the Commission in these cases correctly construed the statutory term "earns."

For these reasons, I conclude that the Commission ruled correctly that the severance payments received by Mr. Novell do not qualify as "wages" Mr. Novell

[2] Mr. Novell argues that his "personal services" to Baird include refraining from filing suit against Baird. Refraining from filing a lawsuit does not constitute the kind of "personal services" which are understood as part of earning a wage.

"earn[ed] . . . after the week in which the termination occurs," WIS. STAT. § 108.04(7)(a), and therefor that he had not requalified for unemployment benefits.

Mr. Novell's arguments to the contrary are unavailing.

Mr. Novell argues that he did not even have to satisfy the requalification requirement in the first place, because he "was continuously employed by his previous employer during the period of Novell quitting his subsequent employer . . . " Plaintiff's Brief at 2. In support of this contention he points out that he was continuing to receive bi-monthly payments, just like paychecks. In other words, Mr. Novell equates receiving pay with continued employment.

This equation is dubious, given the clear statement in the December 7, 2011 letter from Baird to Mr. Novell that the "termination of [Mr. Novell's] employment from Robert W. Baird & Co. [became] effective March 31, 2012." Mr. Novell himself refers to Baird as his "former employer." R.8.

But even if Mr. Novell's equation is legitimate, it is beside the point. The question is not when Mr. Novell was employed, and not when he received his pay, but when he "earned" that pay. The Commission's interpretation of WIS. STAT. § 108.04(7)(a) is sound: "Wages are 'earned' when the work is performed, not when the pay is handed out." Brief of Defendant, filed October 1, 2014, at 19.

Mr. Novell's next argument is that the Commission's interpretation of WIS. STAT. § 108.04(7)(a) puts it at odds with WIS. STAT. §§ 108.05(3)(c)3. and (5). These latter statutes concern eligibility for partial unemployment benefits, for which an employee is rendered ineligible by virtue of receiving severance pay. Thus, under one statute severance pay is counted as of when the employee is working for it, but under the other

statutes severance pay is counted at the time it is received. Mr. Novell contends that this constitutes a double standard. He urges me to interpret the statutes consistently, and hold that severance pay doesn't count until it is received.

I asked the parties for additional briefing on this question, and in particular whether the difference in approach taken under each of these statutes might be explained by differences in the language of each statute. The Commission addressed the language of these various statutes and why the language calls for different interpretations. Mr. Novell does not come to grips with my question or with the Commission's analysis.

I agree with the Commission that the reason that the statutes work differently is because they are worded differently. WIS. STAT. § 108.04(7)(a) speaks in terms of when "the employee earns wages," but in neither WIS. STAT. §§ 108.05(3)(c)3. nor (5) does the word "earn" appear; the operation of the latter statutes does not hinge on when severance pay is earned, only when it is received. Because the statutes address different circumstances, it is not necessary that severance pay be treated the same by each, and accordingly Mr. Novell's argument must be rejected.

Finally, Mr. Novell argues that the Commissions interpretation "demonstrates a systematic denial of unemployment benefits to higher wager earners and older workers that creates an inequity for Wisconsin residents who are similarly situated." Plaintiff's Brief at 4. But if the laws are as inequitable as Mr. Novell urges, it seems to me that what is needed is a change in the way our statutes are written, not how they are interpreted. The court's duty is to understand the meaning of the statutes as written, not to rewrite them. Rewriting the law is the province of the Legislature, not the courts. Mr. Novell's

argument about the inequities the Legislature may have created does not persuade me that the Commission has misinterpreted the law as it is written.

Conclusion

For all of the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. The decision of the Labor & Industry Review Commission is affirmed.
2. The petition is dismissed.
3. This order is the final document for purposes of appeal under WIS. STAT. § 808.03(1).

Richard J Sankovitz

Richard J. Sankovitz
Circuit Court Judge

Dated: 6.1.2015