

MILWAUKEE COUNTY,

Case No.  
520-373

Plaintiff,

MEMORANDUM  
DECISION

vs.

STATE OF WISCONSIN, LABOR AND INDUSTRY  
REVIEW COMMISSION and DOROTHY  
HATCHER,

Defendants.

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This is an action by plaintiff-employer for judicial review under sections 102.23 and 108.09(7), Stats., of a decision of the Labor and Industry Review Commission, dated April 10, 1980, which affirmed the appeal tribunal decision dated November 6, 1979, and held that the employe-defendant was eligible for benefits on the ground that her suspension was not for misconduct or other good cause connected with her employment, within the meaning of sec. 108.04(6), Stats.

Defendant-employe Hatcher worked for the plaintiff as a clinical assistant at the High Blood Pressure Center, County General Hospital, from October of 1974 through June 11, 1979.

Hatcher's husband died as the result of a homicide committed by her on June 13, 1979. She was arrested on June 13, 1979, and incarcerated in jail until August 27, 1979. Her employment was immediately suspended by the employer. The employer filed written charges against her on July 18, 1979.

Following Hatcher's release from jail on August 27, 1979, she initiated a claim for unemployment benefits. She was paid unemployment benefits for two weeks ending September 8, 1979, and on September 10, 1979, Hatcher commenced new employment at Sacred Heart Rehabilitation Center. A very short hearing was held before the Job Service Division - Unemployment Compensation of the Department of Industry, Labor and Human Relations at Milwaukee, Wisconsin, on October 31, 1979, at 10:05 a.m. Kevin Carr, an examiner, appeared for the Appeal Tribune. The employee appeared in person, and the employer appeared by A. Frank Putz of the Milwaukee County Corporation Counsel's Office.

A summary of the testimony taken at that hearing discloses only the period of employment by the county employer of Mrs. Hatcher, the nature of her work, that her husband died June 13, 1979, as the result of a homicide committed by her; that as a result she was arrested June 13th and was incarcerated until August 27, 1979; that the charges on the criminal matter are still pending. The charges were filed against her by the hospital administrator for violation of civil service rule 7, which relates to discharge for commission of a criminal act. No hearing has been held by the Personnel Review Board because they were going to wait to hear how the criminal charges turned out.

At the very close of the testimony, it was brought out that she started to work at Sacred Heart Rehabilitation Center on September 10, 1979.

The employe initiated a claim for unemployment benefits in the week ending August 27, 1979. The employer filed an objection to her eligibility for benefits on Form UC-203, Request for Work Record, as follows:

Section 108.04(6)

Suspension - Violation of Civil Service Rule VII,

Section 4 (bb) - Commission of a Criminal Act.

After an investigation, a deputy of the Milwaukee Job Service Office of the Department of Industry, Labor and Human Relations, issued on September 13, 1979, an initial determination which allowed benefits on the ground that her suspension was not for misconduct or other good cause connected with her employment.

The employer appealed, and hearing was held on October 31, 1979, before Kevin Carr, Examiner, acting as an appeal tribunal. On November 6, 1979, the appeal tribunal issued its decision which affirmed the initial determination.

Plaintiff employer seeks judicial review of the commission decision.

The issues are:

1. Are the commission's findings of fact and conclusions of law supported by credible evidence?
2. Did the commission act without or in excess of its authority?

The finding by the commission is that the employe's suspension was not for misconduct connected with her employment or for other good cause connected with her employment.

It would seem not open to argument that her misconduct, if any, was not connected with her employment. Misconduct connected with her employment could involve such things as embezzlement from her employer, abuse of co-workers, refusal to carry out orders, and the like.

The employer relies upon State ex rel. Gudlin v. Civil Service Comm., 27 Wis. (2d) 77. In that case it was held that conduct of municipal employees, with tenure, in violation of important standards of good order can also reasonably be deemed cause for suspension or discharge even though it has no direct bearing upon the performance of duties where such conduct is so substantial, oft repeated, flagrant or serious that his retention in service, of the employee, will injure public confidence in the municipal service.

Also, a city is not required to keep persons in its employ whose conduct is embarrassing or inimical to the interests of the city.

There is nothing in the record that would support a finding that the employe's act has undermined public confidence in the county service. Apparently the employer relies upon the seriousness of the act, homicide, as proof without anything further. The commission held: "The seriousness of the matter alone is not determinative. The question which is operant is whether or not the retention in service of the employe would undermine public confidence in the municipal service. The employer provided no evidence that there would be such a result, apparently relying on an inference that such

a result, given the nature of the act, is in common experience. It is not. To infer such a result would be to deny any validity of the hiring of ex-offenders. Moreover, any such inference (none such is found), is adequately rebutted by the employe's subsequent rapid employment doing similar duties for a different employing unit. The employer alleged and showed no other cause for the suspension."

The court shall set aside an order of the commission only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

(Per Sec. 102.23 (1)).

The employer appears to rely entirely on an inference to be drawn from the seriousness of the act. Section 108.02 (18), Stats., creates a presumption that an employe is eligible for benefits unless disqualified by a specific provision of the law. Under that statute it would appear that the employer has the burden of proving that "misconduct." In the instant case the employer did not refute the presumption of eligibility and offered nothing remotely bearing on an intentional and substantial disregard of the employer's interests.

A homicide, nothing further being shown, is not such misconduct. The question before the court is whether there was evidence to support the finding of the commission. The findings of the


commission should not be distrubed unless it appears that it acted arbitrarily, capriciously, or without reasonable basis, or that the statute would not permit the conclusion reached.

The findings of fact and permissible inferences therefrom support the conclusion that the employe's suspension was not for misconduct or other good cause connected with her employment within the meaning of section 108.04 (6), Stats.

The commission's decision is affirmed.

Dated at Milwaukee, Wisconsin, this 3rd dav of June, 1982.

BY THE COURT:



Elliot N. Walstead  
Reserve Circuit Judge