

DONALD L. NUSBERGER

Plaintiff,

CASE NO. 667-550

-vs-

MEMORANDUM DECISION

THE STATE OF WISCONSIN, LABOR AND
INDUSTRY REVIEW COMMISSION, and
SILVERSTEIN & HICKS, S.C.,

Defendants.

This is an action for judicial review pursuant to Sections 108.09(7) and 102.23(1) Wis. Stats. of a Labor and Industry Review Commission decision denying the plaintiff unemployment compensation benefits.

The plaintiff, Donald L. Nusberger, was employed by the law firm of Silverstein & Hicks, S.C. as an investigator and paralegal. He was initially employed by the law firm in 1976. His duties were that of an investigator, but over the years his knowledge and skills increased to the point where he functioned as a paralegal. By mid 1984 Nusberger did virtually all of the firm's intake and initial contact with potential clients. On July 5, 1984, Nusberger was discharged for alleged unauthorized outside activities connected with the legal profession.

After a hearing, the following Findings of Fact and Conclusions of Law were made which were ultimately affirmed by the Commission:

In 1982 and again in the spring of 1984, the employe had been informed by the employer that he was not to engage in any outside activities connected with the legal profession without their authorization. That is a reasonable requirement for a law firm to impose on its employes to avoid any potential conflict of interest.

The employer later became aware that the employe had established some sort of business relationship with another attorney. Without the employer's knowledge or permission he had worked on personal injury cases for the other attorney. He had taken personal injury forms belonging to the employer to the offices of the other attorney. He informed the employer that he intended to refer cases to the other attorney that the employer did not wish to handle.

Under the circumstances, the employe's actions in engaging in outside business activities connected with the legal profession without the employer's authorization evinced a wilful, intentional and substantial disregard for

the employer's interests and for the standards of conduct that the employer had a right to expect of him.

Sections 108.09(7) and 102.23(1) Stats. provide for the judicial review of such findings and conclusions.

Section 102.23(1)(d) provides:

Upon such hearing, the Court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside 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.

The plaintiff has submitted to the Court considerable supplementary materials outside of the record. This Court cannot consider those materials as this review is to be based upon the record. Section 102.23(1)(c) Stats.

The test used by a Court in reviewing the sufficiency of the evidence to support the findings is whether there is any credible evidence in the record to support the finding made. Under this test, a Court upon review will affirm the Findings if there is any credible evidence to sustain those Findings. It is the function of the Department and not the reviewing Court to determine the credibility of evidence or witnesses and it is for the Department to weigh the evidence and decide what should be believed. Estex Packaging v. DILHR, 89 Wis. 2nd, 739 (1979).

The plaintiff in his reply brief contends that the Findings should be set aside because fraud was involved. "Fraud" to the effect that an order may be set aside only upon the ground that it was procured by fraud means fraud of the Commission and not fraud on the part of the parties or attorneys. Boles v. Industrial Commission, 5 Wis. 2nd, 392 (1958). This Court is satisfied that there is substantial credible evidence to support the factual findings and therefore this Court is bound by those findings.

Section 108.04(5) Stats. provides that an employe discharged for misconduct is to be denied unemployment compensation benefits. The determination that an employe was discharged for misconduct is a legal conclusion.

This Court is not bound by the Commission's determination of a question of law, but the Court will not independently redetermine every legal conclusion of the Commission. If several rules, or applications of a rule, are equally consistent with the purpose of a statute, the Court will accept the Commission's formulations and application of the standards. Tecumseh Products Co. v. W.E.R.B., 23 Wis. 2nd, 118, 126 N.W. 2nd, 520 (1964); Milwaukee Transformer Co. v. Industrial Comm., 22 Wis. 2nd, 502, 126 N.W. 2nd, 6 (1964); C.L. Cheese v. Industrial Comm., 21 Wis. 2nd, 8, 123 N.W. 2nd, 553 (1963).

The case of Boynton Cab Co. v. Neubeck, 237 Wis. 249 (1941) discussed the factors to be considered in determining misconduct under Section 108.04(5) Stats. The Court set down four separate basis for concluding that an employe's conduct was misconduct under the statute. These four are: (1) conduct evincing such wilful or wanton disregard of an employer's interests as found in deliberate violations of standards of behavior which the employer has the right to expect of his employe, (2) conduct evincing carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, (3) conduct showing an intentional and substantial disregard of the employer's interests and (4) conduct showing an intentional and substantial disregard of the employe's duties and obligations to his employer.

The Commission has concluded that the employe Nusberger's actions evinced a wilful, intentional, and substantial disregard for the employer's interests and for the standards of conduct that the employer had a right to expect of him. Given the factual determinations which this Court is bound by, this Court must necessarily agree; and, therefore, the decision of the Commission is affirmed.

Dated at Milwaukee, Wisconsin, this 14th day of February, 1986

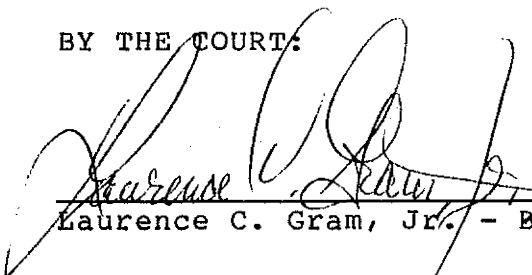
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LABOR & INDUSTRY
WISCONSIN COMMISSION

cc: Donald L. Nusberger

BY THE COURT:


Laurence C. Gram, Jr. - Br. #33