STATE OF WISCONSIN | CIRCUIT COURT Branch 12 | DANE COUNTY

DALE V. ONSGARD,

Plaintiff,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and MILLIS TRANSPORT, INC.,

Defendants

Case No. 86CV2208

MEMORANDUM DECISION AND ORDER

The plaintiff in this action, Dale V. Onsgard, seeks judicial review, under secs. 108.09(7)1 and 102.23(1)2, Stats., of a decision by the defendant, Labor and Industry Review Commission ("Commission"), which suspended the plaintiff's unemployment compensation benefits. The Commission held the plaintiff did not quit his job with co-defendant Millis Transport, Inc. ("Millis") with the "same good cause" with which he could have initially refused to accept the job. As a result, the Commission found that his quitting Millis was not for a reason constituting an exception to the general rule barring benefits to employees who quit their jobs. For the reasons stated below, the decision of the Commission is affirmed.

FACTS

The facts, as found by a hearing examiner for the Department of Industry, Labor and Human Relations ("Department") and not disputed by the plaintiff, are straight forward. The plaintiff, Dale V. Onsgard, had worked for 13 years as a truck driver for Schweiger Industries ("Schweiger"). At Schweiger, he was paid 32 cents per mile plus he received fringe benefits under a labor agreement with the Teamsters' Union. His last day of work was Saturday, May 4, 1985 (in week 18) 3, and he was laid off as of Sunday, May 5, 1985 (week 19) when Schweiger terminated all their drivers. The plaintiff's last two paychecks show an average weekly wage of $961.46.

On Monday, June 3, 1985 (week 23), the plaintiff initiated a claim for unemployment benefits. He reported that no wages were paid or payable for the weeks ending June 8 and 15, 1985 (weeks 23 and 24, respectively), and he received $196 in unemployment benefits in each of those two weeks.

Following his last day of work at Schweiger, the plaintiff submitted applications for work as a truck driver with two trucking companies: Janesville Auto Transport Company ("JATCO") and Millis, the co-defendant. Millis, a non-union company, paid their drivers 19.6 cents per mile, and did not provide any fringe benefits or reimburse their drivers for meals or lodging. The plaintiff had told Millis when he interviewed with them that he had an application pending with JATCO and that if he were offered a job by JATCO he would "go there right away." The plaintiff explained that he wanted to work with a unionized company for at least three more years so that he could retire under the union

retirement fund. Millis asked the plaintiff if he wanted to work for them until he was called by JATCO, and he accepted because he had exhausted his savings. On June 9, 1985 (week 24), the plaintiff accepted work with Millis.

On June 20, 1985, JATCO notified the plaintiff that they would interview him the next day. The plaintiff notified Millis of the interview, and was told he would be given a short run, enabling him to be home for the interview. The plaintiff then went to Appleton to pick up a load. On his return trip, however, the plaintiff discovered the load was overweight, forcing him to return to Appleton to have some of the load removed. Because the forklift operators had finished their work for the day, the plaintiff had to wait until the next day, June 21, 1985, to have the load removed. As a result, the plaintiff missed the interview with JATCO.

The plaintiff was able to reschedule the interview for Monday June 24, 1985 (week 26). Rather than "mess around" and take a chance on missing this interview too, the plaintiff quit his job with Millis on June 24. At the time he had quit, the plaintiff had not yet been offered a job by JATCO. In addition, Millis did have work for the plaintiff, although he was not told by Millis that he would work on June 24. The plaintiff, however, believed that he would be "tied up someplace" on June 24 and would miss the interview.

The plaintiff listed several other reasons for wanting to quit Millis: JATCO paid more money (65 cents per mile), all insurance was paid through the union, through the Teamsters' Union retirement plan he could retire in three years, plus meals

and lodging were paid by JATCO. In addition, the plaintiff said he was unhappy sleeping in Millis' sleeper cabs where he could not shower or shave as he could in a motel.

JATCO hired the plaintiff on June 28 (week 26) to start a one-week school on July 8, 1985 (week 28). On July 15, he began working part-time as a trainee on the loading dock, and on August 21 he began driving full-time.

Between the date that he quit Millis and started with JATCO, the plaintiff filed a claim for unemployment benefits. An initial determination found that in week 26 of 1985, the plaintiff quit his job with Millis but not for any reason that would allow for the payment of benefits. The plaintiff was ordered to repay $392 to the Unemployment Compensation Fund, which was the amount that had been erroneously paid to the plaintiff. The plaintiff filed a timely appeal and requested a hearing.

A hearing was held on September 11, 1985. The examiner affirmed the initial determination, concluding that the plaintiff's quitting at Millis was not for a reason that would constitute an exception, under sec. 108.04(7)(a), Stats., to the general rule barring benefits to an employee who quits his job. The plaintiff then petitioned the Commission for review.

On April 2, 1986, the Commission affirmed the examiner's decision, but amended the examiner's "Findings of Fact and Conclusions of Law." Under the amended decision, the Commission found that the plaintiff would have had "good cause," within the meaning of sec. 108(8)(c), Stats., to have refused to accept the job with Millis. According to the Commission, the plaintiff

would have had "good cause" because the job with Millis was at a rate of pay substantially lower than his rate of pay with Schweiger and because he had been unemployed less than six weeks. However, in order for the plaintiff to be eligible for benefits after quitting Millis, his quitting must have been with the "same good cause" with which he could have refused to accept the job with Millis. In other words, the plaintiff would have been eligible for benefits if he had quit Millis because the rate of pay was substantially lower than his previous rate of pay with Schweiger and if he had quit Millis within six weeks of becoming unemployed. Although the amended decision is not free from ambiguity, the Commission apparently found that the plaintiff failed to satisfy either requirement. The Commission apparently found that the plaintiff's reason for quitting Millis was not related to working at a substantially lower rate of pay than his previous job. The Commission also found that the plaintiff quit his job at Millis after six weeks of becoming unemployed. The Commission's amended decision is the subject of this action for judicial review.

OPINION

The general rule in Wisconsin is that an employee who quits work is ineligible to collect unemployment compensation benefits. See sec. 108.04(7)(a), Stats.[4] However, sec. 108.04(7)(e)[5] provides for an exception if the employee who has quit work meets three conditions. First, the job the employee quit must be one which the employee could have refused to accept with "good cause," under sec. 108.04(8), Stats. Under (8)(c) an employee

shall have "good cause" in failing to accept a job if the "failure related to work at ... a significantly lower rate of pay" than the employee's previous job. In addition, (8)(c) limits the "good cause" available under this section to a period "not to exceed 6 weeks" after the employee became unemployed. Second, the employee must have quit the job "with the same good cause" that would have entitled him to initially refuse to accept the job. Finally, the employee must have quit the job within the prescribed time limit.

The Commission concedes that the plaintiff clearly satisfied the first requirement of (7)(e). The Commission found the plaintiff had "good cause" to refuse to accept the job with Millis, because the rate of pay at Millis was significantly lower than the plaintiff's previous rate of pay at Schweiger and because he had started working at Millis within six weeks of becoming unemployed.

At issue in this action, however, is the second requirement of (7)(e). The Commission held the plaintiff's quitting Millis was not with the "same good cause" that would have enabled him to refuse to accept the job, and gave two reasons to support its decision.

The Commission's first reason was that the plaintiff's quitting Millis was outside the six-week period allowed by (8)(c). The Commission found that the plaintiff became unemployed on May 5, 1985 (week 19) and quit Millis on June 24, 1985 (week 26). Thus, more than six weeks had elapsed since the plaintiff became unemployed and, as a result, (8)(c) no longer protected him. The plaintiff argues that when read together,

secs. (7)(a) and (e) and (8)(a) and (c), mean that an employee can quit a job he did not have to initially accept, so long as he quits within 10 weeks of starting work. This Court need not resolve the issue; the Commission's second reason is dispositive in this case.

The Commission also found that, although the plaintiff's underlying reason for quitting Millis was to secure a higher paying job, his immediate reason for quitting was to avoid the risk of missing an interview. Thus, the Commission found that the plaintiff did not quit Millis with the "same good cause" with which he could have initially refused to accept the job; rather, he quit for a reason unrelated to lower pay. The plaintiff contends that (8)(c) defines "good cause" in objective terms, and that an employee only has the burden of proving that the job he quit was in fact inferior to his previous job, but no burden of proving that his subjective reason for quitting was because the job was inferior. As a result, the plaintiff argues his quitting Millis was with the "same good cause" with which he could have initially refused to accept the job, because his rate of pay was in fact substantially lower than his rate of pay at Schweiger.

The issue of whether (7)(e) and (8)(c) set forth an objective, as opposed to subjective, standard for determining "good cause" is of course a question statutory construction. Although this Court is not bound by the Commission's interpretation, [See sec. 108.09(7)(b), Stats. and Wisconsin Environmental Decade, Inc. v. D.I.L.H.R., 104 Wis. 2d 640, 312 N.W. 2d 749, (1981)] neither does this Court possess unfettered discretion to set aside the Commission's interpretation. "In

general, the reviewing court should not upset an administrative agency's interpretation of a statute if there exists a rational basis for that conclusion." Id. at 644, 312 N.W.2d at 751 (emphasis added)

Clearly, there exists a rational basis for the Commission's interpretation. The plain language of 108.04(7) and (8) indicates that what constitutes "good cause" and the "same good cause" is a factual question to be left to the Department's expertise. The broad discretion accorded the Department is reflected in the statutory scheme. For example, under (7)(e), an employee is not barred from collecting unemployment benefits, "if the department determines that the employee accepted work which the employee could have refused with good cause. . . ." (emphasis added) Similar language is found in (8)(a) ("if the failure was without good cause as determined by the department. . . .") and in (8)(c) ("if the department determines that the failure related to. . . .") (emphasis added). Moreoever, the Supreme Court has indicated that the reason why an employee became unemployed is a question of fact. See Kansas City Star v. D.I.L.H.R., 60 Wis. 2d 519, 603, 211 N.W. 2d 488 (1973).

Aside from the plain language of 108.04(7) and (8), the plaintiff's interpretation of the statute would render meaningless the phrase "with the same good cause". Once an employee established that he had "good cause" to refuse to accept a job because the job is inferior -- either because it is "at a lower grade of skill" or at a "significantly lower rate of pay" than the employee's previous job -- he would be free to quit the

job so long as the job in fact remained inferior (subject to the appropriate time limitation). The effect of such an interpretation would be to judicially amend (7)(e) and eliminate the "same good cause" requirement. The plaintiff's interpretation would violate a cardinal principle of statutory construction that no word or clause be rendered surplusage. See Cook v. Industrial Commission, 31 Wis. 2d 232, 142 N.W. 2d 827 (1966).

Although there is some appeal to the argument that an employee should not be punished by denial of unemployment benefits for quitting a job the employee did not have to accept in the first place, this Court cannot say that the Commission's interpretation was without a rational basis.

Having determined that the Commission acted within its powers, I must then review the appropriateness of the Commission's decision to focus on the plaintiff's immediate, rather than underlying reason for quitting Millis. This decision by the Commission, in choosing one reason over the other, represents a conclusion of law. Any legal conclusion drawn from the facts is a conclusion of law. Kenwood Merchandising Corp. v. L.I.R.C., 114 Wis.2d 226, 230, 338 N.W.2d 312 (Ct. App. 1983). Here the Commission made two factual findings concerning the plaintiff's reason for quitting Millis. In choosing one reason over the other, the Commission thus came to a conclusion based on the facts. The standard of review in this area is well established: An administrative agency's conclusion of law will be sustained if it is reasonable, even if an alternate view is equally reasonable. Kenwood Merchandising Corp. v. L.I.R.C., 114

Wis. 2d 226, 230, 338 N.W. 2d 312 (1983 Ct. App.); see also Tecumseh Products Co. v. W.E.R.B., 23 Wis. 2d 118, 129, 126 N.W. 2d 520 (1964). The Commission concluded that the plaintiff's immediate reason for quitting Millis was to avoid missing an interview even though his ultimate reason was to secure a higher paying job. Given the alternatives the plaintiff had, such as asking Millis for time off so that he could attend the interview without having to quit his job, this Court cannot conclude that the Commission's conclusion of law was unreasonable.

ORDER

For the above stated reasons, it is hereby **ORDERED** that the decision of the Commisson is **AFFIRMED.**

BY THE COURT,

Mark A. Frankel

MARK A. FRANKEL
CIRCUIT JUDGE

DATED: 3-19-87

FOOTNOTES

1. Sec. 108.09(7), Stats.:

(a) The department or either party may commence action for the judicial review of a decision of the commission under this chapter after exhausting the remedies provided under this section if tthe party or the department has commenced such action in accordance with s. 102.23 within 30 days after a decision of the commission is mailed to a party's last-known address.

(b) Any judicial review under this chapter shall be confined to questions of law. . . .

2. Sec. 102.23, Stats.:

(1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or S. 801.02. . . .

(d) 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 factt by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission or department unless itt is made to affirmatively appear that the plaintiff was damaged thereby. . . .

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any findings of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

3. Section 108.02(27), Stats., defines a "week" as a "calendar week starting Sunday and ending Saturday. . . ."

4. Section 108.04(7)(a), Stats., provides:

> If an employee terminates his or her employment with an employing unit, the employee is ineligible for any benefits for the week of termination and thereafter until he or she has again worked at least 7 weeks in employment. . . .

5. Section 108.04(7)(e), Stats., provides:

> Paragraph (a) shall not apply if the department determines that the employee accepted work which the employee could have refused with good cause under sub. (8) and terminates such employment with the same good cause and within the first 10 weeks after starting work.

Section 108.04(8), Stats. provides:

> (a) An employee who fails either to apply for work when notified by a public employment office or to accept work when offered shall, if the failure was without good cause as determined by the department, be ineligible for benefits. . . .
>
> (c) An employee shall have good cause under par. (a) or (b) if the department determines that the failure related to work at a lower grade of skill or
>
> significantly lower rate of pay than applied to the employee on one or more recent jobs, and that the employee had not yet had a reasonable opportunity, in view of labor market conditions and the employee's degree of skill, but not to exceed 6 weeks after the employee became unemployed, to seek a new job substantially in line with the employee's prior job skill and rate of pay.