IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUCIO M. REYES,

Plaintiff,

OPINION and ORDER

v.

92-C-0920-C

LABOR AND INDUSTRY REVIEW COMMISSION, and PAMELA I. ANDERSON, RICHARD T. KRUEL, and JAMES R. MEIER, in their official capacities as Labor and Industry Review Commissioners,

Defendants.

- -

This is a civil action for declaratory relief brought pursuant to 42 U.S.C. §1983 in which plaintiff challenges the decision of the Labor and Industry Review Commission that plaintiff was ineligible to receive unemployment compensation benefits of $1,575. The defendant commission found plaintiff ineligible because he was not "residing permanently in the United States under color of law" within the meaning of 26 U.S.C. §3304(a)(14)(A) at the time that he earned the wages upon which his benefits were based. Plaintiff contends that the decision violates federal unemployment compensation laws, 42 U.S.C. §§501, et seq. and 26 U.S.C. §3304(a)(14)(A), and the equal protection clause of the Fourteenth Amendment.

The case is before the court on the parties' cross-motions for summary judgment. I conclude that the Eleventh Amendment bars plaintiff's claim against the defendant Labor and Industry Review Commission, but does not preclude plaintiff from suing defendants Anderson, Kruel and Meier in their official capacities. I conclude also that plaintiff has failed to establish that he was a permanent resident under color of law between July 2, 1986 and October 9, 1987 or that it was improper for defendants to rely on a United States Department of Labor program letter in interpreting the applicable statutes and that plaintiff has failed also to establish that he was a member of a suspect class before October 9, 1987. Accordingly, I will grant summary judgment in favor of defendants.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th

Cir. 1991). The opposing party cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish the existence of a genuine issue for trial. Celotex, 477 U.S. at 324 Also, if a party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the opposing party is proper. Celotex, 477 U.S. at 322.

For the purpose only of deciding the parties' cross-motions for summary judgment, I find from the parties' proposed findings of fact that the following material facts are undisputed.

UNDISPUTED FACTS

Plaintiff is an adult citizen of Mexico and a permanent resident of the United States, residing in Wautoma, Wisconsin. Defendant Labor and Industry Review Commission is an agency of the state of Wisconsin located in Madison, Wisconsin. It is responsible for the final administrative review of unemployment compensation appeals. Defendants Pamela I. Anderson, Richard T. Kruel and James R. Meier are commissioners of the Wisconsin Labor and Industry Review Commission.

Plaintiff entered the United States in 1980 from Mexico without a visa or legal documentation and without notifying the

United States Immigration and Naturalization Service. On July 2, 1986, plaintiff married a United States citizen. On the same day, plaintiff and his wife filed a Petition for Alien Relative with the Immigration and Naturalization Service, asking that plaintiff be granted permanent resident status in the United States on the basis of his marriage to a United States citizen. Once the Petition for Alien Relative was filed, the Immigration and Naturalization Service was aware that plaintiff was in the United States and had several contacts with him and his wife regarding his application while it was pending. The Immigration and Naturalization Service never took any action to deport plaintiff after he filed the Petition for Alien Relative and never told him during its contacts with him in 1986 and 1987 that he had to leave the country. Plaintiff was granted permanent resident status in the United States on October 9, 1987.

Prior to the grant of permanent resident status, plaintiff was employed by Leach Farms in Wisconsin from July 30, 1986 to October 18, 1986 and from July 17, 1987 to October 1, 1987. On the basis of his earnings and employment record at Leach Farms, plaintiff received $1,575 in unemployment compensation benefits in 1987 and 1988.

On April 27, 1991, the Wisconsin Department of Industry, Labor and Human Relations determined that plaintiff had not been eligible

for the $1,575 in unemployment compensation benefits he had received in 1987 and in 1988 and that plaintiff would have to repay $1,575 to the state of Wisconsin. Plaintiff appealed, and an administrative law judge affirmed the decision denying benefits on June 21, 1991. Plaintiff appealed this decision to defendant Labor and Industry Review Commission, which issued a decision on March 13, 1992, affirming the administrative law judge's decision.

OPINION

Eleventh Amendment

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state . . . " This constitutional provision has been interpreted to bar suits against a state by its own citizens as well as by citizens of other states unless the state has waived its immunity or Congress has overridden it. Kentucky v. Graham, 473 U.S. 159, 169 (1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). Specifically, the Eleventh Amendment prohibits states from being sued in federal court for monetary damages or equitable relief except that the state may consent to suit in federal court, or Congress may use its enforcement powers under the

Fourteenth Amendment to abrogate the states' immunity. Pennhurst State School & Hosp. v. Halderman, 465 U.S. at 98 (jurisdictional bar of Eleventh Amendment applies "regardless of the nature of the relief sought"); MSA Realty Corp. v. Illinois, 990 F.2d 288, 291 (7th Cir. 1993).

Plaintiff has named the Labor and Industry Review Commission of the state of Wisconsin as a defendant in this case. The Labor and Industry Review Commission is an agency of the state and is protected by the Eleventh Amendment. Wis. Stat. §§15.06, 101.01, 108.02; Florida Dept. of Health & Rehabilitative Service v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463 (1945) (suit against state agency equivalent to suit against the state). Wisconsin has not waived its immunity from suits under 42 U.S.C. §1983, and the United States Supreme Court has held that Congress did not abrogate the states' Eleventh Amendment sovereign immunity when it enacted 42 U.S.C. §1983. Quern v. Jordan, 440 U.S. 332, 339-346 (1979); Alabama v. Pugh, 438 U.S. 781 (1978); Rucker v. Higher Educ. Aid Bd., 669 F.2d 1179, 1184 (7th Cir. 1982); Parents for Qual. Ed. v. Ft. Wayne Comm. Schools, 662 F. Supp. 1475, 1480 (N.D. Ind. 1987). Therefore, plaintiff is barred under the Eleventh Amendment from suing the defendant commission. Summary judgment will be granted for defendant commission.

Under Ex parte Young, 209 U.S. 123 (1908), state officials may be sued in their official capacities for injunctive relief, although they may not be sued for money damages. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10 (1989); Kentucky v. Graham, 473 U.S. at 167 n.14; MSA Realty Corp., 990 F.2d at 291. Plaintiff is not suing the defendant officials for any money damages; he is suing only for a declaration that it was proper for him to receive the unemployment compensation that was paid to him in 1987 and 1988. A judgment against the defendants will not require a disbursement of state funds to plaintiff; the state will simply be prevented from getting back the money paid to plaintiff more than five years ago. Although the net effect on a state treasury is the same whether the state is ordered to pay out funds in the future or prohibited from collecting funds that were paid out improperly in the past, the Eleventh Amendment consequences are not necessarily the same.

It is not always easy to determine the kind of federal court order that violates the Eleventh Amendment. "[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night." Edelman v. Jordan, 415 U.S. 651, 667 (1974). The amendment permits federal court orders that will have fiscal consequences on state treasuries in the future as "the

necessary result of compliance with [federal court] decrees which by their terms [are] prospective in nature," id. at 667-68, but it prohibits orders requiring the use of state funds to make retroactive payments of improperly withheld benefits to persons whose constitutional or federal statutory rights were violated by the state. A payment of retroactive benefits "is in practical effect indistinguishable in many aspects from an award of damages against the State." Id.

In my view, allowing plaintiff to keep his benefits would be more like the form of relief permitted under Ex parte Young than like an award of compensatory damages. Plaintiff is not asking for retrospective relief. Therefore, his claim does not resemble an award of damages for the alleged loss he sustained as a result of a constitutional violation by the defendant officials. A judgment in his favor would not be measured "in terms of monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," Edelman, 415 U.S. at 668; it would simply keep in place the payments the state made to plaintiff in 1987 and 1988, which were designed to compensate him for the time he was unable to work. Plaintiff's claim does not raise the concern expressed in Rothstein v. Wyman, 467 F.2d 226, 235 (2d Cir. 1972), that retroactive benefits become compensatory rather than remedial as time goes by and "the coincidence between previously

ascertained and existing needs becomes less clear") (quoted in Edelman, 415 U.S. at 666 n.11). When the unemployment compensation payments were made to plaintiff, the coincidence between his ascertained and his existing needs was clear.

The second and determining point is that an order allowing plaintiff to keep his unemployment compensation benefits would not have the effect of inserting the federal court into the state's political decisions on the allocation of its limited fiscal resources. The state's decision to spend its money on unemployment compensation and to budget the money for plaintiff's payments was made over six years ago. The state has operated without the funds ever since. This makes plaintiff's situation different from that in Edelman, 415 U.S. 651, and other cases seeking the payment of retroactive benefits. These cases reflect the Supreme Court's view that requiring the states to make payments for retroactive benefits wrongfully withheld or make specific payments in the future as a remedy for past wrongs injects the federal courts into the political decision making of the states that is shielded by the Eleventh Amendment. See, e.g., Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 29 (1981).

In sum, although it is a close question, I conclude that plaintiff's request for declaratory relief against the defendant state officials escapes the bar of the Eleventh Amendment.

Merits of Plaintiff's Claim

Plaintiff's complaint raises two issues: whether defendants interpreted the applicable statutes properly in determining that he was not a permanent resident "under color of law," for purposes of 26 U.S.C. §3304(a)(14)(A), from July 2, 1986 to October 9, 1987, and whether defendants' ruling violated the Fourteenth Amendment.

Statutory Eligibility Claim

Both federal and Wisconsin law exclude aliens from receipt of unemployment benefits unless the alien (1) has been admitted lawfully to the United States for permanent residence; (2) was present lawfully in the United States for the purpose of performing work; or (3) was residing permanently in the United States under color of law. 26 U.S.C. §3304(a)(14)(A). The states are required to follow federal law in the administration of federally funded unemployment compensation programs. In interpreting the "color of law" ground for qualification, defendants relied on a Department of Labor Unemployment Insurance program letter (No. 1-86) that was published in the Federal Register on August 20, 1986.[1] Program

[1] The Court of Appeals for the Seventh Circuit has held that, under the exception provision of the Administrative Procedure Act, 5 U.S.C. §553(b)(A), the Department of Labor does not have to publish its letters regarding administration of federally funded unemployment compensation programs for notice and comment to give

Letter No. 1-86 §3 (drafted in 1985), 51 Fed. Reg. 29,713 (1986). Program letters contain the Department of Labor's interpretation of statutes and instructions to states for the administration of unemployment compensation programs. 51 Fed. Reg. 29,713 (1986). In Program Letter No. 1-86, the Department of Labor provided that "[u]nless the INS has affirmatively exercised its discretion against deportation or authorized an alien to work the alien is not entitled to work and cannot be considered available for work." Id. at §4(d). Moreover, "[u]nder the laws of all [s]tates a claimant must be 'able and available' to work to be eligible for unemployment compensation. . . Therefore an alien without current, valid authorization to work from the INS is not eligible for benefits." Id. at §4(a)(2).[2] Defendants read Program Letter No.

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those letters force of law. Cosby v. Ward, 843 F.2d 967, 980 (7th Cir. 1988). In relevant part, 5 U.S.C. §553(b)(A) provides:

> General notice of proposed rule making shall be published in the Federal Register . . . Except when notice or hearing is required by statute, this subsection does not apply (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .

[2] As of January 1, 1993, an alien who has filed an application for adjustment of status to lawful permanent resident must apply for work authorization. 8 C.F.R. §274a.12(c)(9) (1993). Today, in order for an alien to be considered authorized to work, he or she must be a lawful permanent resident as evidenced by Form I-151 or Form I-155 issued by the Immigration and Naturalization Service. 8 C.F.R. §274a.12(a)(1) (1993); See also 8 C.F.R. §274a.13(b) (1993).

Furthermore, under §274A(a)(1) of the Immigration Reform and

1-86 as requiring an alien seeking unemployment compensation benefits to produce evidence that the Immigration and Naturalization Service has issued him an official work authorization or a written assurance that he would not be deported.

Plaintiff contends that defendants misinterpreted 26 U.S.C. §3304(a)(14)(A) when they adopted the requirements of Program Letter No. 1-86. He argues that the interpretation is invalid because it adds an additional requirement of written assurance that is not authorized by §3304(a)(14)(A) and that is counter to congressional intent.

In determining the permissibility of defendants' reliance on the Department of Labor's interpretation of §3304(a)(14)(A), I must engage in a two-part inquiry. The first question is "whether Congress has directly spoken to the precise issue in question. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron v. Natural Res. Defense Council, 467 U.S. 837, 842-43 (1984). However, if the statute is silent or ambiguous with respect to the specific issue,

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Control Act of 1986, 8 U.S.C. §1324a(a)(1), Congress made it unlawful for an employer to hire an alien who lacks work authorization or other formal government authorization from the Immigration and Naturalization Service. Thus, it appears that aliens lacking such authorization would be foreclosed from seeking unemployment relief. Esparza v. Valdez, 862 F.2d 788, 792 (10th Cir. 1988), cert. denied, 492 U.S. 405 (1989).

"the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. If the answer is "yes," the agency's legislative regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

In the present case, neither the Federal Unemployment Tax Act nor any other act of Congress provides a definition of the phrase, "permanently residing in the United States under color of law," that could be evidence of the "unambiguously expressed intent of Congress." Chevron, 467 U.S. at 843. In the face of congressional silence as to the meaning of the phrase, the Department of Labor's construction of 26 U.S.C. §3304(a)(14)(A) controls, so long as it is reasonable. Chevron, 467 U.S. at 844-45.

Plaintiff puts forth no convincing argument that the Department of Labor's construction is "arbitrary, capricious, or manifestly contrary to the statute." The department's interpretation does not run counter to current case law. Indeed, its interpretation is supported by Holley v. Lavine, 553 F.2d 845, 849 (2d Cir. 1977), cert. denied sub. nom. Shang v. Holley, 435 U.S. 947 (1978), on which plaintiff relies. In Holley, the Immigration and Naturalization Service sent a letter informing an otherwise deportable alien with six children who were United States citizens that she would not be deported at least until the children

were grown. This "formal letter," written by an Immigration and Naturalization Service official, gave "color of law" to Holley's status as a resident of the United States. Holley, 553 F.2d at 849. This is consistent with Program Letter No. 1-86.

Moreover, it appears that Congress is satisfied with the department's interpretation, because it has amended the Federal Unemployment Tax Act on several occasions since 1986 without defining the phrase "permanently residing in the United States under color of law." This inaction by Congress evidences an intent to leave to the Department of Labor the interpretation of "permanently residing in the United States under color of law." NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

Plaintiff has produced no evidence that he received a work authorization or a written assurance from the Immigration and Naturalization Service that he would not be deported. Without evidence of a work authorization, he cannot meet the prerequisite for eligibility for unemployment compensation benefits: a showing that he was "legally available for work." §3304(a)(14)(A); Program Letter No. 1-86 §4(a)(2).

I find unpersuasive plaintiff's argument that the Immigration and Naturalization Service's inaction or its purported policy against deporting aliens married to citizens amounts to a valid

authorization for unemployment insurance purposes.[3] Not only is this argument contrary to the Department of Labor's published program letter; it is counter to common sense. INS inaction is a weak basis on which to claim a change of status. Indeed, some of the cases on which plaintiff relies support this interpretation, rather than attack it. See, e.g., Industrial Commission of Colorado v. Arteaga, 735 P.2d 473, 476 (Colo. 1987) (aliens who had filed petitions for adjustment of status based upon their marriage to United States citizens and who had received work authorization from the Immigration and Naturalization Service were persons "permanently residing in the United States under color of law"); Gillar v. Employment Division, 300 Or. 672, 675, 717 P.2d 131, 134 n.4 (1986) (where claimant presented testimony that he was issued work authorization and Miami INS records did not reflect that this authorization was issued, but claimant's INS records have been lost on other occasions and referee made no finding of fact with respect to this dispute, claimant was "permanently residing in the United States under color of law"); Lapre v. Department of Employment Security, 513 A.2d 10, 12-13 (R.I. 1986) (INS had acceded to alien's permanent residence in the United States under color of law when it told her that her permanent resident status had expired but

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[3] Here, plaintiff relies on Immigration and Naturalization Service Operations Instructions 245.1a, 245.2a, and 245.3b (illegal aliens may file an application for adjustment of status).

at the same time took pains to instruct her how to regain that status).

I conclude that, although plaintiff was married to a United States citizen on July 2, 1986, he did not become a permanent resident under color of law until October 9, 1987, when he was granted permanent resident status, and therefore, he was ineligible to receive unemployment insurance for the period from July 2, 1986 to October 7, 1987.

Fourteenth Amendment Claim

Plaintiff makes the additional argument that aliens are a "suspect class" under the equal protection clause of the Fourteenth Amendment and that statutes infringing upon aliens' rights and privileges must meet a strict scrutiny standard. Plaintiff is correct that a restriction on lawfully resident aliens is subject to strict scrutiny if it affects economic interests primarily. Sugarman v. Dougall, 413 U.S. 639, 642 (1973); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982). However, when the challenged classifications are among subclasses of aliens, the classifications are evaluated under the rational basis test. Berroteran-Melendez v. I.N.S., 955 F.2d 1251, 1258 (9th Cir. 1992); see also Mathews v. Diaz, 426 U.S. 67, 82 (1976) ("[I]t is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits

provided to citizens"). Federal classifications distinguishing among groups of aliens are valid unless "wholly irrational." Sudomir v. McMahon, 767 F.2d 1456, 1464 (9th Cir. 1985). Furthermore, if the federal government has "by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the states may, of course, follow the federal direction." Plyler v. Doe, 457 U.S. 202, 219 (1982).

In Mathews v. Diaz, 426 U.S. 67, the issue was whether it was constitutionally permissible for Congress to condition an alien's eligibility for Medicare on residence in the United States for five years.[4] Because not all aliens are placed in a single classification, id. at 78, the Court applied a rational basis level of scrutiny to the regulation and held that the Medicare requirements were not "wholly irrational." Id. at 83, 87.

In the present case, there is a rational basis for the requirements set forth in §3304(a)(14)(A) that an alien be "permanently residing in the United States under color of law" and in the Immigration Reform and Control Act that an alien have formal government authorization. Such acts encompass a legitimate state interest in avoiding the depletion of unemployment compensation funds by aliens who enter the country illegally and then file a

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[4] Although analyzed under the Fifth rather than the Fourteenth Amendment, the facts of Diaz and the equal protection argument advanced there are similar to those in this case.

petition with the Immigration and Naturalization Service without actually being eligible for permanent residency.[5] Defendants' use of the Department of Labor's interpretation of §3304(a)(14)(A) is rationally related to this legitimate state purpose. Plaintiff has offered no support for the proposition that requiring formal authority is irrational. I conclude that plaintiff was not a member of a "suspect class" from July 2, 1986 to October 7, 1987 and that defendants did not violate the Fourteenth Amendment in their reliance on the Department of Labor's interpretation of "permanent resident under color of law."

Accordingly, plaintiff's motion for summary judgment will be denied, and defendants' motion for summary judgment will be granted.

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[5] "Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." Mathews v. Diaz, 426 U.S. at 80.

ORDER

IT IS ORDERED that plaintiff's complaint against defendant Labor and Industry Review Commission is DISMISSED for lack of subject matter jurisdiction; the motion for summary judgment of defendants Pamela I. Anderson, Richard T. Kruel and James R. Meier is GRANTED; and plaintiff's motion for summary judgment is DENIED. The clerk of court is directed to enter judgment accordingly and to close this case.

Entered this 11th day of August, 1993.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

DOCKET NUMBER 23

U.S. DISTRICT COURT
WEST. DIST. OF WISCONSIN

UNITED STATES DISTRICT COURT

Western District of Wisconsin

AUG 13 1993

FILED
JOSEPH W. SKUPNIEWITZ, CLERK

LUCIO M. REYES,

Plaintiff(s),

vs.,

LABOR AND INDUSTRY REVIEW COMMISSION, ET AL.,

Defendant(s).

JUDGMENT IN A CIVIL CASE

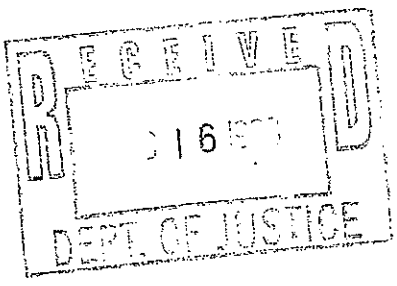
CASE NUMBER

Case No.: 92-C-920-C

This action came for consideration before the court with JUDGE BARBARA C. CRABB DISTRICT JUDGE presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff's complaint against defendant Labor and Industry Review Commission is dismissed for lack of subject matter jurisdiction; the motion for summary judgment of defts Pamela I. Anderson, Richard T. Kruel and James R. Meier is granted; and plaintiff's motion for summary judgment is denied. Judgment is entered accordingly and this case is closed.



Copy of this document has been provided to: Attys Magee + Cottier

this 13th day of Aug, 1993

By V. Berlin
Deputy Clerk

Joseph W. Skupniewitz, Clerk

WARREN H. NELSON, CHIEF DEPUTY

by Deputy Clerk

AUG 13 1993

Date