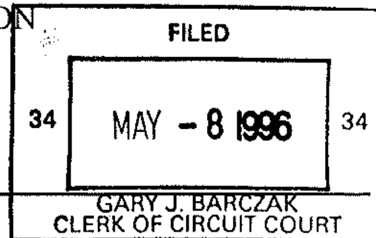
STATE OF WISCONSIN : CIRCUIT COURT : BRANCH 34 MILWAUKEE COUNTY

ROY REYNOLDS,
Plaintiff,
-vs-

AMERICAN TV DISTRIBUTION CENTER
and
LABOR AND INDUSTRY REVIEW COMMISSION,
Defendants.

Case No. 95-CV-005668
DECISION



DECISION

STATEMENT OF THE CASE

Plaintiff Roy Reynolds quit his job and seeks Unemployment Compensation (UC) benefits, alleging that harassment by a superior and a coworker caused him to terminate his employment. The following facts are based on the testimony given on March 16, 1995 at a hearing before an Unemployment Compensation Administrative Law Judge (ALJ).

On December 2, 1994, plaintiff punched in for work at American TV's Milwaukee warehouse where he had worked for about four months. The schedule indicated that he should work with Rick, which he did for a while. Although plaintiff alleged he had been harassed since his first day in the department, the only specific example of harassment given by plaintiff apparently occurred at this time when Tom, a supervisor, said to him "Stop bitching. You [sic] coming and nagging me every day. I'm tired of it. Go work with John." Apparently John did not want to work with plaintiff for very long. Plaintiff told John, a coworker, but not his supervisor, that he was quitting. Later, at home, he called a supervisor and told him that he had left work. Plaintiff did not give American anything in writing regarding quitting.

A supervisor, Michael Gescheidle testified that he was never aware of plaintiff feeling he

was harassed at work, nor had he observed plaintiff being treated differently than other employees. He also testified that plaintiff should have known from an earlier event that Gescheidle supervised plaintiff's supervisors and that plaintiff could come to him with his problems. The hearing's evidentiary record included American's employee handbook, which described how employees were to report perceived harassment to their supervisors or how to go through or bypass the chain of command and complain directly to a human resources or payroll representative. There is also a procedure for complainants to remain anonymous. Plaintiff had contacted Human Resources in the past because the department he had been in changed its hours, conflicting with his personal needs.

HISTORY OF THE CASE

The initial determination of the Department of Industry, Labor, and Human Relations (DILHR) held that plaintiff Reynolds was ineligible for Unemployment Compensation benefits because he "quit but not for a reason which would allow the payment of benefits." Plaintiff timely filed for a hearing contesting DILHR's determination. At the contested case hearing before an ALJ on March 16, 1995, the facts stated above were elicited. Plaintiff appeared pro se. Two representatives of American TV testified.

On March 24, 1995 the ALJ issued his decision holding that plaintiff's contentions that he was harassed at work by a supervisor saying "Stop bitching, you come in here everyday nagging me" and by the fact that a coworker did not seem to want to work with him were not good cause attributable to the employer. Therefore, plaintiff was held ineligible to receive Unemployment Compensation benefits because he had quit his job under Wis. Stats. sec. 108.04(7)(a) and the quitting was not for any reason constituting an exception to that section.

The plaintiff appealed the ALJ's decision to the Labor and Industry Review Commission

(LIRC). Plaintiff alleged that he was confused at the hearing and that the did not introduce all the evidence he wished to because he felt the ALJ would have prohibited it as argumentative and because his wife was reprimanded by the ALJ. He also complained because the three employees of American TV at the hearing were whispering among themselves.

On May 17, 1995 the LIRC issued its decision adopting and affirming the ALJ's decision. In its memorandum opinion the LIRC noted that it is common for multiple representatives to whisper and that the plaintiff failed to give specific examples of his other allegations.

Plaintiff timely filed for judicial review.

STANDARD OF REVIEW

Judicial review under ch. 108 shall be confined to questions of law and the provisions of ch. 102 regarding judicial review shall also apply. Wisconsin Statutes sec. 108.09(7)(b). LIRC's findings of fact are conclusive if supported by substantial and credible evidence and in the absence of fraud. Stats. sec 102.23 and *Jenks v. DILHR*, 107 Wis.2d 714,720 (Ct. App. 1982). Substantial evidence is defined as "evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Associates v. LIRC*, 175 Wis.2d 537, 544 (Ct. App. 1993). The test is whether reasonable minds could arrive at the same conclusion. *Jenks*, 107 Wis.2d at 720. The evidence will be construed most favorably to LIRC's findings. *Cornwell Personnel Associates*, 155 Wis.2d at 544. "A LIRC determination will not be overturned simply because it is against the great weight and clear preponderance of the evidence." *Jenks* at 720. The court must affirm the decision of LIRC "if there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to an opposite conclusion." *Valadzic v. Briggs & Stratton Corp.*, 92 Wis.2d 583, 593-94 (1979).

Judicial review is of the LIRC's decision, not the ALJ's decision. *State v. Industrial Comm.* 233 Wis. 461, 465 (1940). However if the Commission adopts and affirms the ALJ's findings and conclusions, it makes them its own. *Appleton v. DILHR*, 67 Wis.2d 162, 168-72 (1975).

Judicial review of a UC claim decision shall be confined to questions of law. Wis. Stats. sec. 108.09(7)(b). The reviewing court has no authority to make its own findings of fact. *McGraw-Edison Co. v. DILHR & Walker*, 64 Wis.2d 703, 710 (1974).

Although the court is not bound by the LIRC's determination of questions of law, it will not independently redetermine every legal conclusion of the Commission. Statutes sec. 108.09(7)(b), *Milwaukee Transformer Co. v. Industrial Comm.*, 22 Wis.2d 502, 510 (1964). Although courts are not bound by the Commission's determinations of questions of law, and the conclusion as to whether there is "good cause attributable to the" employer which would justify paying UC benefits to an employee who has quit, has been called a legal conclusion, the Wisconsin Supreme Court has said that:

> "[m]erely labeling [that]question as a conclusion of law does not mean that the court should disregard the commission's determination. Determination of voluntary termination or good cause attributable to the employing unit calls for a value judgment, and judicial review of such a value judgment, though a question of law, requires the court to decide in each type of case the extent to which it should substitute its evaluation for that of the administrative agency. We have recognized that when the expertise of the administrative agency is significant to the value judgment (to the determination of a legal question), the agency's decision, although not controlling, should be given weight. *Milwaukee Co. v. DILHR*, 48 Wis.2d 392, 399 (1970)."

CONCLUSION AND FINAL ORDER

As an initial matter, because the reviewing court cannot make its own findings of fact. *McGraw-Edison Co. v. DILHR & Walker*, 64 Wis.2d 703, 710 (1974). it cannot consider the

communications of factual matters which the plaintiff has attempted to make to this court in letters filed on September 6, 1995 and November 6, 1995. This court can consider only the factual record created at the hearing and adopted by the LIRC and must disregard any other factual matters.

Plaintiff admitted that he quit his employment at American TV. (Tr. 7) He would be disqualified from receiving UC benefits under Wis. Stats. sec. 108.04 (7)(a).

Plaintiff would not be disqualified if he terminated his work "with good cause attributable to the employing unit." Wis. Stats. sec. 108.04(7)(b). Good cause is an act or omission by the employer justifying the employee's quitting; it involves some fault on the part of the employer which is real and substantial. *Nottelson v. DILHR*, 94 Wis.2d 106, 120 (1980). At the hearing plaintiff bore the burden of showing that a statutory exception would apply, making him eligible for benefits. *Chicago & Northwestern R.R. v. LIRC*, 91 Wis.2d 462, 467 (Ct. App. 1979). Plaintiff cannot rely upon the presumption of entitlement to UC benefits, because the record includes facts which are inconsistent with this entitlement (his quitting). *Neff v. Industrial Comm.*, 24 Wis.2d 207, 214 (1964).

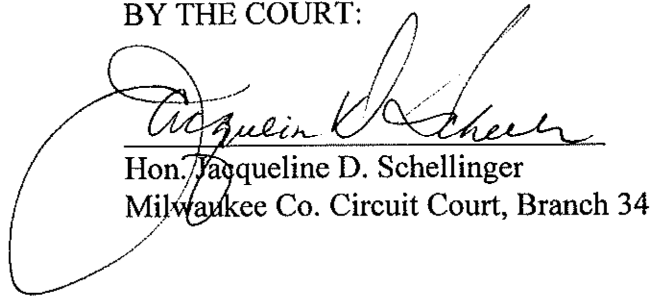
The only specific reason given by plaintiff for quitting was when his supervisor said "Stop bitching. You [sic] coming and nagging me every day. I'm tired of it Go work with John." (Tr. 19) Plaintiff testified that his quitting was not motivated by an apparent change in the schedule nor by being moved to work with someone else. (Tr. 18-19)

The supervisor's reprimand of plaintiff was only a single occurrence. The ALJ's decision that plaintiff's quitting was not the fault of the employer was bolstered by the fact that plaintiff admitted he knew he could have complained to Mr. Gescheidle, but did not take such action.

Accordingly, the complaint is hereby **dismissed** and the Decision and Order of the Labor and Industry Review Commission is **affirmed** in its entirety.

Dated at Milwaukee, this 8 day of May, 1996.

BY THE COURT:



Hon. Jacqueline D. Schellinger
Milwaukee Co. Circuit Court, Branch 34