STATE OF WISCONSIN | CIRCUIT COURT BRANCH 5 | DANE COUNTY

BARBARA J. WITCHARD,

Plaintiff,

v. Case No. 96CV1188

LABOR AND INDUSTRY REVIEW COMMISSION, STATE OF WISCONSIN and COMPCARE HEALTH SERVICES INSURANCE CORP., Case Code: 30607

Defendants.

DECISION AND ORDER

This is an administrative review pursuant to sec. 102.23(1), Stats., of an April 24, 1996, decision by the Labor and Industry Review Commission ("LIRC") which denied unemployment compensation benefits to plaintiff Barbara J. Witchard.

On December 27, 1995, Plaintiff terminated her employment as a claims examiner with Compcare Health Services Insurance Corporation after she and her husband decided to move to Arkansas. Plaintiff was found to be ineligible for unemployment compensation benefits after voluntarily quitting her job within the meaning of sec. 108.04(7)(a), Stats., and not qualifying for the subsection (c) exceptions. Plaintiff appealed the deputy's initial determination to the Appeal Tribunal which affirmed the Initial Determination in a written decision on March 1, 1996. Subsequent to Plaintiff's petition for review, on April 24, 1996, LIRC affirmed the Appeal Tribunal's decision and adopted the Tribunal's findings of fact and conclusions of law.

As a general rule under sec. 108.04(7)(c), Stats., an employee who voluntarily

terminates employment is ineligible for unemployment compensation unless he or she qualifies for a statutory exception. Plaintiff claims that she qualifies for unemployment compensation pursuant to the exception of sec. 108.04(7)(c), Stats. That statute reads in part "Paragraph (a) does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative . . . because of the health of a member of his or her immediate family." She challenges LIRC's interpretation of this language and its denial of benefits.

Plaintiff submits that the statute should be interpreted to allow an employee to receive benefits for voluntarily quitting a job to relocate with a family member who has voluntarily elects to move for any health related reason. LIRC argues that the exception only applies if the employee leaves employment when an immediate family member's medical condition requires attention from the employee or relocating is a medical necessity.

The ultimate goal of statutory interpretation is to ascertain the intent of the legislature. Rolo v. Goeres, 174 Wis. 2d 709, 715 (1992). If the statute is ambiguous and an administrative agency has been charged with the statute's enforcement, a court may also look to the agency's interpretation. Although this Court is not bound by LIRC's interpretation, courts do defer to agency interpretations in certain situations. UFE Inc. v Labor and Indus. Review Comm'n, 201 Wis. 2d 274 (1996). An agency decision may be granted one of three distinct levels of deference: great weight, due weight or de novo review. Jicha v. DILHR, 169 Wis. 2d 284, 290 (1992). The amount of deference given to an agency "depends on the comparative institutional capabilities and qualifications of the court and the administrative agency." Parker v. Sullivan, 184 Wis. 2d 668, 699 (1994). Here the Plaintiff argues that the agency has no right to play God (Reply Br. at 2), and "has not exercised any expertise or

drawn upon any experience that deserves the deference of this court." (Id. at 8) Therefore, plaintiff concludes that the Court should apply a *de novo* standard of review. The Court disagrees with these assertions.

First, de novo review is appropriate in cases of first impression. UFE, *citing* Kelley Co. Inc. v. Marquardt, 172 Wis. 2d 234, 244-45 (1992). This is not such a case. LIRC has had direct experience interpreting the statute at issue. LIRC previously interpreted sec. 108.04(7)(c), Stats., in Weber v LIRC, 123 Wis.2d 545, 1985 WL 188049 (Wis. App.) Although as an unpublished decision the legal conclusions regarding LIRC's interpretation are of no precedential value, the case does document LIRC's prior interpretation of sec. 108.04(7)(c), Stats.

Second, de novo review would also be appropriate if "an agency's position on an issue has been so inconsistent so as to provide no real guidance." UFE *citing* Marten Transp., Ltd. v. DILHR, 176 Wis. 2d 1012, 1018-19 (1993). In the present case, de novo review would not be appropriate under such standards. LIRC's interpretation of sec. 108.04(7)(c), Stats., in Weber is consistent with LIRC's interpretation in the present case. In Weber, the statute was interpreted by LIRC to permit benefits in cases where the claimant moves only if the claimant shows that the move is necessary, essential, or required by the condition of the immediate family member's health and not merely preferable, desirable, or beneficial.

In the present case, LIRC found that the Plaintiff did not qualify under sec. 108.04(7)(c), Stats., because her presence was not required for her husband's medical care and the family's move to Arkansas was a preference, not a medical necessity. Thus the interpretation in this case is based on the same analysis of the relationship between the illness

and the necessary, essential or required of the employee's termination. In contrast, the Plaintiff's interpretation of sec. 108.04(7)(c), Stats., is inconsistent with the historical application and text of the current statute.

Third, the Plaintiff's reliance on Western Printing & Lithograph Co. v. Indus. Comm'n, 260 Wis. 124 (1951), is misplaced. The court in Western was interpreting a version of sec. 108.04(7)(c), Stats., which no longer exists and a version of the statute which is not before this Court. The Plaintiff suggests that this Court apply Western's interpretation of the "compelling circumstances" language in the old statute. However, since Western was decided the legislature has removed the broad "compelling circumstances" language and provided more specific conditions requiring a finding that the employee had *no reasonable alternative* but to voluntarily terminate employment because (1) the employee was unable to do his or her work or (2) because of the health of a member of his or her immediate family. The facts in Western do not comply with the current 108.04(7)(c) exceptions and the analysis is inapplicable to this case.

In Western, the court found that an unemancipated minor had no reasonable alternative than to leave her employment when her parents insisted she move out of state with the family. Id. at 127. The court only looked at an unemancipated minor's decision to move with her family. There was no immediate family member's medical condition in question, an element which is unambiguously included in the current statute. Moreover, applying a 1951 interpretation of a statute which no longer exists would ignore the legislature's intent and its deliberate revision of the statute.

LIRC argues it is entitled to great deference. However, despite citing the necessary criteria for great weight deference, the LIRC has failed to provide evidence of adequate on

point interpretations of sec. 108.04(7)(c), Stats. LIRC only provided examples of three cases in which the agency had previously interpreted the statute. (Def.'s Br. at 9). This Court found only one case involving LIRC's interpretation of the statute involving the issue of an employee moving because of a family member's health. Although the agency's position in the previous case, Weber, is consistent with it's position in the case being reviewed, "one holding hardly constitutes the type of expertise and experience needed by an agency for it to be afforded great weight deference by a court." UFE, at 61.

The remaining standard of review is due weight deference. Under the due weight standard, "a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable." UFE at 62, *quoting* Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660 n.4 (1995). Due weight deference is based more upon the fact that the legislature has charged an administrative agency with the enforcement of the statute than the agency's knowledge or skill. Id. When an agency "has had at least one opportunity to analyze the issue and formulate a position, a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." Id. Under a due weight deference, "an equally reasonable interpretation of a statute should not be chosen over the agency's interpretation." Id. at 63, n. 3.

Plaintiff suggests that the statute should be interpreted to allow unemployment compensation when an employee voluntarily quits a job because a family member decides to move for any medically related reason, even if the move is merely a preference. Plaintiff's interpretation would allow compensation in every case involving moving with any relation to a medical condition, without consideration of the necessity of the medical treatment in

question. No legislative history has been provided to support its interpretation. Plaintiff relies solely upon the 1951 Western decision which interprets a previous version of 108.04(7)(c). Plaintiff has provided no evidence that the legislature intended to retain the broad Western exception when it chose to eliminate the statutory language Western interprets.

In contrast, the LIRC interpretation focuses on the current language of the statute. LIRC's interpretation evaluates whether the move is necessary or required by the condition of the immediate family member's health, and not merely a preferable or beneficial option. The legislature has chosen to make the sec. 108.04(7)(c), Stats., exception contingent upon an employee's inability to work or the medical needs of a family member. Plaintiff's interpretation minimizes the importance of the family member's medical condition so long as any related choice is "reasonable" and argues that the necessity of and alternatives to treatment are "not at issue." (Pet.'s Reply Br. at 2) LIRC's interpretation makes the medical condition an essential element of evaluation, just as it is an essential element of the statutory exception. Providing financial benefits when an employee has no alternative but to support a medically necessary need of a family member is consistent with the intent of providing a medical exception to 108.077(a). LIRC's interpretation is the most reasonable under the statute.

Denial of the Plaintiff's benefits was based upon the Plaintiff's own claims and statements. LIRC found that the Plaintiff and her husband decided that a warmer climate and family supervision would be beneficial because the Plaintiff's husband engaged in non-compliant behavior and shoveled snow against doctor's orders. However, the Plaintiff did not indicate that the doctor stated that a warmer climate was medically necessary. A warmer

climate only reduced options for noncompliance via snow shoveling.

The Plaintiff's own testimony also established that her husband could provide his own care - clothing himself, feeding himself and remembering to take his medication. Thus her presence at home was not medically necessary. LIRC's findings are supported by the record and reiterated and confirmed in the Petitioner's briefs. Any medical corroboration that the Petitioner's spouse was noncompliant in engaging in excessive physical activity and did not require medical assistance at home will only further support LIRC's findings.

For the reasons stated above, LIRC's decision is AFFIRMED.

IT IS SO ORDERED.

Dated this 13TH day of January, 1997.

BY THE COURT:

Hon. Robert R. Pekowsky
Circuit Judge, Branch 5

cc: Atty. A. Steven Porter
Atty. William Cassel