

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JEFFREY J. DROESSLER,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION
and BENTON PUBLIC SCHOOL,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Reversed and remanded.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Jeffrey Droessler appeals from a judgment affirming a decision of the Labor and Industry Review Commission that limited his unemployment compensation benefits. The issue on appeal is whether LIRC erroneously construed § 108.04(9)(b), STATS. We conclude that it did and therefore reverse.

During the 1992-93 school year, Droessler taught and coached basketball for the Benton school district, in an 85% of fulltime position. In June 1993, the district offered Droessler a 62.5% of fulltime position for the following year. As a result, Droessler qualified for unemployment compensation because the offer of substantially reduced hours and wages did not provide reasonable assurance of similar teaching employment. *See* § 108.04(17)(a), STATS.; WIS. ADM. CODE § ILHR 132.04(2).

On July 15, Droessler received an offer to teach fulltime and coach basketball for the Scales Mound school district in Illinois, for an annual salary of \$20,740. He refused that offer. On August 3, he received and accepted Benton's offer of a three-quarter position, for roughly the same salary he would have earned working fulltime for Scales Mound. At that point, Droessler's unemployment compensation eligibility undisputedly ended.

This proceeding began when Droessler appealed the determination that he lost unemployment compensation eligibility when he refused the Scales Mound offer, rather than three weeks later after he accepted Benton's. The department's hearing notice defined the issues on the appeal as "whether the employee was erroneously paid unemployment benefits [after July 11] that must be repaid to the department," and "whether an employee of an educational institution ... has reasonable assurance of employment during the next academic term," under § 108.04(17), STATS.

As noted, an educational employee is ineligible for unemployment compensation during the summer recess if he or she has a reasonable assurance of similar employment during the following school year. Section 108.04(17)(a), STATS. However, under § 108.04(9)(b), STATS., entitled "Protection of Labor Standards," "[b]enefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work ... [i]f the wages, hours (including arrangement and number) or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality." All parties agree that the tests under each section are separate and unrelated.

At the hearing, Droessler appeared with an expert witness prepared to testify that the conditions of the Scales Mound job were

"substantially less favorable" to Droessler, under § 108.04(9)(b), STATS. However, the hearing examiner excluded all evidence on that issue. The sole issue addressed was whether the Scales Mound job satisfied § 108.04(17)(a), STATS., by offering Droessler a reasonable assurance of work similar to that he performed the year before. The hearing examiner then denied the appeal on that basis.

On administrative review of that decision, LIRC addressed Droessler's labor standards argument in the following manner:

The commission agrees that under § 108.04(9), Stats., the "Protection of Labor Standards" provision, benefits cannot be denied under chapter 108 for work that meets a condition contained therein. However, the employee's objection to the offered work in this case is not one of the listed conditions. The employee objected to the offered work because of the distance from his residence to the employer's workplace. This is essentially an argument regarding excessive commuting distance. Excessive commuting distance is not a "condition" of offered work as defined in section 108.04(9)(b), Stats.

LIRC then affirmed the hearing examiner's decision requiring repayment of unemployment compensation benefits received after July 11. Droessler takes this appeal from the trial court's order affirming LIRC's decision.

We review the commission's decision, not the trial court's. *Keeler v. LIRC*, 154 Wis.2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990). We are not bound by the commission's legal conclusions, although we will give them due weight in certain circumstances that are not applicable here. *Nottelson v. DILHR*, 94 Wis.2d 106, 114-15, 287 N.W.2d 763, 767 (1980).

The commission erroneously construed § 108.04(9)(b), STATS. Under the commission's reasoning, the individual's stated rationale for refusing the job determines the labor standards issue. However, the statute plainly requires that the commission examine the wages, hours and other conditions of

the employment, not the individual's stated motivation for refusing it. Therefore, LIRC should have addressed whether the conditions of the Scales Mound job were substantially less favorable to Droessler than those prevailing for similar work in the locality, not the specific reasons Droessler gave for refusing that job.¹ A rehearing is therefore necessary because the hearing examiner denied Droessler the opportunity to present evidence on that issue.

The respondents contend that Droessler waived the labor standards issue by failing to provide notice that he intended to raise it before the hearing. We disagree. The hearing notice identified the issue as whether Droessler was "erroneously paid unemployment benefits." That very broad statement allowed Droessler to raise any issue under § 108.04, STATS., which is entitled "Eligibility for Benefits."²

The respondents also contend that Droessler waived the issue because he failed to make an offer of proof when the hearing examiner excluded testimony from his expert witness. An offer of proof is required to preserve evidentiary issues in judicial proceedings. Section 901.03(1)(b), STATS. In unemployment compensation hearings "[s]tatutory and common law rules of evidence and rules of procedure applicable to courts of record are not controlling" WIS. ADM. CODE § ILHR 140.12(1).

Droessler refused a job offer from Scales Mound that would have paid him 75% of the rate for a comparable fulltime teaching job at Benton. By our decision, he is entitled to introduce evidence and obtain a decision on whether the Benton wages are those that prevail in the locality and whether an

¹ Even if it were relevant, the commission's finding as to why Droessler refused the Scales Mound offer is not supported by the evidence. Droessler testified that it was both the lower pay and the commuting distance that caused him to refuse the job. Section 108.04(9)(b), STATS., expressly defines wages as a relevant condition of work. The commission gave no explanation why it considered only part of Droessler's explanation.

² Additionally, WIS. ADM. CODE § ILHR 140.06(3) provides, "The administrative law judge may take testimony and render a decision on issues not listed on the notice of hearing if each party is so notified at the hearing and does not object." Even though there was no objection when Droessler raised the protection of labor standards issue, the hearing examiner failed to exercise his discretion under this section.

offer at 75% of the Benton rate constitutes a "substantially less favorable" wage condition under § 108.04(9), STATS. Accordingly, we reverse the trial court's order and remand for an order directing LIRC to conduct further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.