



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

January 22, 2014

To:

Hon. Lisa K. Stark
Circuit Court Judge
721 Oxford Avenue
Eau Claire, WI 54703

Kim T. Castelaz
LIRC
P.O. Box 8126
Madison, WI 53708-8126

Kristina Aschenbrenner
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703-5496

Helzberg Diamond Shops
Thomas & Thorngren
P.O. Box 280100
Nashville, TN 37228

Tammy J. Jarecki
560 Poppy Lane
Altoona, WI 54720

You are hereby notified that the Court has entered the following opinion and order:

2012AP2632

Tammy J. Jarecki v. Labor and Industry Review Commission
(L.C. # 2012CV153)

Before Lundsten, Higginbotham and Sherman, JJ.

Tammy Jarecki appeals an order of the circuit court that affirmed a decision of the Labor and Industry Review Commission requiring Jarecki to repay \$1,316.00 in extended training benefits received in 2011. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We conclude that the circuit court's decision identified and applied the proper legal standards to the relevant facts to reach the correct conclusion. Specifically, we agree with the circuit court that the Commission did not err when it concluded that, due to legislation that applied retroactively, *see* 2011 Wis. Act 42, § 4, Jarecki no longer met the statutory requirements under WIS. STAT. § 108.06(7) for the payment of extended training benefits because she did not begin receiving those benefits within 52 weeks after the end of the applicable benefit year. We therefore incorporate into this order the circuit court's decision, which we are attaching, and summarily affirm on that basis. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2012).

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN

CIRCUIT COURT
Branch 1

EAU CLAIRE COUNTY

TAMMY J. JARECKI,

Plaintiff,

DECISION AND ORDER

vs.

Case No. 12CV153

LABOR AND INDUSTRY
REVIEW COMMISSION and
HELZBERG DIAMOND SHOPS,

Defendants.

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY

NOV 7 2012

KRISTINA L. HIGGINS
CIRCUIT COURT CLERK

Tammy Jarecki (hereafter "plaintiff") seeks judicial review of a decision of the State of Wisconsin Labor and Industry Review Commission (hereafter "Commission"). On February 9, 2012, the Commission found that Ms. Jarecki was not eligible for extended training benefits (hereafter "ETB") commencing in week 28 of 2011. She was required to repay the sum of \$1,316.00 into the Unemployment Reserve Fund for ETB deemed overpaid. Ms. Jarecki asks the Court to set aside the Commission's decision, arguing that it is in violation of federal law, and also makes a claim under theories of breach of contract and promissory estoppel.

STATEMENT OF FACTS AND PROCEDURAL POSTURE

Plaintiff was employed for Helzberg Diamonds in Eau Claire, Wisconsin for approximately nine months. Her last day of work was July 9, 2009. On June 22, 2009, plaintiff initiated a claim for unemployment benefits. Plaintiff's regular unemployment benefits ended with the calendar week ending December 12, 2009 (week 50 of 2009).

Plaintiff then applied for and received several tiers of emergency unemployment and extended benefits (hereafter "EB"). Plaintiff's claim for the emergency unemployment benefits and EB was exhausted as of the calendar week ending April 30, 2011 (week 18). As of the following week, plaintiff began receiving ETB as she had been attending school since September of 2009,

working toward a degree in social work.

Plaintiff received ETB until August of 2011, when the Wisconsin Legislature enacted legislation allowing EB to be paid retroactively to individuals who qualified for such benefits. Plaintiff was one of those individuals. As the law was applied retroactively, the plaintiff was paid EB rather than ETB for the calendar weeks ending May 7, 2011 (week 19) through the calendar week ending July 2, 2011 (week 27).

During the calendar week of July 9, 2011, plaintiff filed another claim for ETB. However, by this time the plaintiff was not deemed eligible for ETB because she no longer met the statutory requirements of § 108.06(7), Wis. Stats. That statute requires claimants must begin receiving ETB within 52 weeks after the end of their applicable benefit year in addition to exhausting all other rights to state and federal unemployment benefits. Because the plaintiff had received ETB for weeks 28 through 34 of 2011 to which she was not entitled, the Department of Workforce Development (hereafter "Department") determined the plaintiff was responsible for repaying \$1,316.00 deemed overpaid.

Plaintiff requested a hearing before an administrative law judge (hereafter "ALJ") upon receiving this determination. ALJ Leann Prock affirmed the determination of the Department that plaintiff was ineligible for ETB as of the calendar week ending July 9, 2011. That decision was issued on November 11, 2011. The ALJ also affirmed the Department's decision that the plaintiff was responsible for the payment of \$1,316.00 and this could not be waived pursuant to Wisconsin Statute § 108.22(8).

Plaintiff requested a review by the Commission. On February 9, 2012, the Commission affirmed the ALJ's decision.

Thereafter, the plaintiff filed an appeal from the decision of the Commission for circuit court review pursuant to § 108.22, Wis. Stats. The Court has considered the record filed from the Commission, including the transcript and original exhibits, the submissions of the plaintiff received

by the Court on June 18, 2012, and July 23, 2012, and the submission on behalf of the defendants dated July 2, 2012.

Plaintiff asks the Court to overturn the decision of the Commission and find that she is not responsible to repay \$1,316.00 received in benefits. Grounds for her position are:

1. State and federal law provide that anyone attending college under the Workforce Investment Act should not be required to repay an overpayment that was made through no fault of the recipient.

2. If overpayment is required, but contrary to equity and good conscience, recovery should be waived.

In addition to relying upon provisions of state and federal law, the plaintiff also believes she is entitled to the requested relief under a theory of breach of contract or promissory estoppel. It is her position that there was an agreement between she and persons with whom she worked at the Department that if she was fully compliant with all rules and guidelines she would receive assistance for at least two years of her retraining and education. She further indicates that she has extraordinarily difficult financial circumstances which should be considered by the Court in determining whether a repayment is required.

STANDARD OF REVIEW

Judicial review of a decision made by the Commission is very limited and is defined in § 102.23 of the Wisconsin Statutes. The Court may set aside an order or award of the Commission only for the following reasons:

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 fact by the Commission do not support the order or award.

[Section 102.23(1)(e), Wis. Stats.]

The findings of fact made by the Commission acting within its powers are, in the absence of fraud, conclusive upon this Court. The Court is not permitted to substitute its judgment for that of the Commission as to the weight or credibility of the evidence on any finding of fact. The Court may set aside the Commission's order or award and remand the case to the Commission if the order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. [Section 102.23(6), Wis. Stats.]

DECISION

The plaintiff does not claim that the order of the Commission was procured by fraud. It also does not appear that the plaintiff claims any of the findings of fact made by the Commission were not supported by credible and substantial evidence. She does not claim that the findings of fact of the Commission do not support the order. Based upon the submissions of the plaintiff, it appears that she contends that the Commission acted without or in excess of its powers. She claims the Commission failed to follow what she understands is state and federal law which provides that no overpayment of benefits must be repaid if it was not due to any fault on the part of the recipient. In addition, she claims that if a repayment is required, the Commission erred when it concluded the overpayment could not be waived under § 108.22(8), Wis. Stats. under the circumstances of this case.

1. The Commission correctly determined that reimbursement of overpayment was required despite the fact the overpayment was not due to any fault on the part of the plaintiff.

Wis. Stat. § 102.23(1)(a) provides that the findings of fact made by the Commission acting within its powers are conclusive, in the absence of fraud. The plaintiff does not claim any fraud on the part of the Commission. Therefore, if the Commission acted within its powers, its findings of fact are conclusive on this Court's review.

The Commission characterizes the first issue for the Court's determination as to whether the Commission erred when it concluded that Ms. Jarecki no longer met the statutory requirements under Wis. Stat. § 108.06(7) permitting the payment of ETB. The Court finds that the Commission did not err in making that conclusion. The Commission's findings of fact are supported by substantial and credible evidence, and therefore, as indicated above, are conclusive. It does not appear the plaintiff disagrees.

In July of 2009, plaintiff was separated from her employment with her former employer, Helzberg Diamond Shops. Plaintiff has provided the Court with a copy of 22 pages from a notebook that was used to journal/document the mistreatment she claims she suffered while working at Helzberg Diamonds. The Court appreciates the difficult circumstances experienced by the plaintiff during her employment. However, while providing a background for the reason for her leaving her employment, it does not provide any evidence which is of assistance to the Court in deciding the issues in this case. The issues raised by the plaintiff about her treatment at Helzberg Diamonds must be handled in a different forum. In addition, the documentation provided in this lawsuit was not provided to the Commission or the Department. Therefore, the issues raised concerning the plaintiff's employment with Helzberg Diamonds are not properly before this Court.

Plaintiff's claim for unemployment insurance benefits began in week 26 of 2009 and was exhausted at the end of week 50 of 2009. Thereafter, the plaintiff continued her claim and collected several tiers of emergency employment insurance benefits including EB through week 18 of 2011 (calendar week ending April 30, 2011).

Beginning in week 19 of 2011, plaintiff applied for ETB, governed by Wis. Stats. § 108.06(7). Plaintiff received ETB during weeks 19 through 34 of 2011.

ETB are available to claimants who have exhausted their claim for unemployment insurance benefits and are enrolled in approved training. After the plaintiff left employment with Helzberg Diamonds, she enrolled in school to become a social worker and graduated in December of 2011. It

is quite likely that she was advised by several persons from the Department that she would likely be eligible for ETB until November or December of 2011 as claimants in approved training may receive up to 26 additional weeks of unemployment insurance benefits pursuant to § 108.06(7), Wis. Stats. provided they meet certain conditions. They must have exhausted all rights to other state and federal benefits, be enrolled in approved training, and must begin to receive ETB within 52 weeks after the end of the applicable benefit year.

In August of 2011, after the plaintiff began receiving ETB, the Wisconsin legislature enacted legislation that permitted EB to be paid retroactively to individuals who qualified for those benefits. Plaintiff had exhausted her EB in April of 2011. This legislation required the retroactive extension of EB with respect to her weeks of employment beginning on or after December 17, 2011. As a result, the Department changed the characterization of plaintiff's ETB beginning in week 19 of 2011 through week 27 of 2011 to EB as was required under the retroactive application of the new legislation. Therefore, plaintiff's eligibility for EB ended in week 27 of 2011 rather than week 19.

As of week 27 of 2011, the only benefits potentially available to plaintiff in week 28 of 2011 were ETB. Plaintiff was still pursuing an approved course of education, and had exhausted all of her other benefits. However, she could not begin receiving ETB at this point pursuant to the conditions of § 108.06(7), Stats. She would not begin receiving the ETB within 52 weeks after the end of her applicable benefit year (here week 25 of 2010). This is because the ETB first became available to her in week 28 of 2011 due to the retroactive application of the EB. Essentially, she missed the deadline by three weeks. This resulted in plaintiff being ineligible for ETB in week 28 of 2011.

Plaintiff had received ETB for weeks 28 through 34 of 2011 before the retroactive application. She was not eligible to receive them pursuant to § 108.03(1) of the statutes. Therefore, the Department and Commission correctly determined the plaintiff did not meet the statutory

requirements under the Wisconsin Statutes permitting the payment of ETB.

The Department and Commission also determined that the plaintiff was required to reimburse benefits that she had received for weeks 28-34 of 2011 totaling \$1,316.00 (\$188.00 per week). Plaintiff was not eligible for nor entitled to those benefits. The Department correctly determined that the overpayment was not due to any fault on the part of plaintiff and agreed with plaintiff's position that she had done everything required pursuant to Department employee recommendations. Plaintiff filed her weekly claims in a timely fashion. She was engaged in the appropriate schooling through the Workforce Investment Act Program and her training was automatically approved because it was a DWD administered program. However, due to the change in legislation, the Department was required to recharge or recharacterize weeks that had originally been assigned as ETB to EB. This was done retroactively and the unfortunate effect was to cause the plaintiff to be ineligible for ETB at the exhaustion of her extended benefits.

The plaintiff did not receive benefits from the Department pursuant to a contract. She received them pursuant to legislation. Therefore, she cannot make a claim against the Department for breach of contract. Similarly, the plaintiff cannot make a claim against the Department for promissory estoppel. She claims she relied upon representations made by Department employees about the timing of benefit payments to her detriment. However, any representations made were pursuant to then existing legislation. Changes to that legislation do not give rise to a claim for promissory estoppel as the Department is required to follow the law.

2. The Commission correctly concluded the overpayment could not be waived.

The plaintiff urges the Court to find that the Department and Commission incorrectly determined that the reimbursement of the overpayment could not be waived. It is plaintiff's burden to show that the Commission's interpretation was unreasonable. Under the circumstances of this case, the Court is to provide great weight to the Commission's decision applying the facts to the

unemployment compensation statutes. Although, this is a novel set of facts, the Commission is charged by the legislature with administering the statutes at issue. The Commission has expertise and special knowledge concerning the interpretation of the statutes at issue and the agency's interpretation will provide uniformity in the application of the statute. Frankly, application of the facts to the statutes at issue is not particularly difficult and the legislation is clear on its face.

The statute at issue with respect to a waiver is § 108.22(8)(c), Wis. Stats. It provides that the Department shall waive an overpayment if the overpayment was the result of Departmental error and the overpayment did not result from the fault of the claimant. Clearly, the overpayment did not result from the fault of the claimant/plaintiff in this case. However, it also did not result from any Departmental error.

Department error is defined in § 108.02(10e)(a) and (b), Wis. Stats. It is an error made by the Department in computing or paying benefits which results from a mathematical mistake, miscalculation, misapplication, or misinterpretation of the law or mistake of evidentiary fact, by commission or omission, or from misinformation provided to a claimant by the Department, on which the claimant relied.

The overpayment here was not due to any fault on the part of the Department under the above definition. The Department correctly relied upon the law as it existed prior to August of 2011 in paying unemployment benefits, emergency unemployment and EB, and then ETB to the plaintiff. However, legislation passed in August of 2011 retroactively affected the EB payable. As a result, a recalculation of the benefits and their timing was required. In making that recalculation due to the passage of new legislation, the plaintiff received a longer period of EB. When they were exhausted, she was no longer eligible to receive ETB.

The Department and Commission are required to follow state and federal law governing the sequencing of benefits from different unemployment insurance programs, and payments must be made under that particular sequencing even if a claimant would be better off financially were

benefits paid in a different order. The statutes did not require a waiver of the reimbursement.

The plaintiff provided the Department, Commission, and now provides the Court with a significant amount of information concerning her difficult financial circumstances. In part, those have resulted from her inability to locate a position as a social worker, difficulties she had with an internship, and other reasons. Some of the information provided to the Court was not included in the record nor presented to the Department or Commission, and cannot be properly considered by the Court. Regardless, the Court is aware of and sympathetic to the plaintiff's difficult financial circumstances.

Plaintiff argues under § 106.19(2)(a), Stats., that the overpayment should be waived not only because it was not her fault that she received it, but requiring her to repay it would be contrary to equity and good conscience. The plaintiff seems to ask the Court to exercise its discretion in reaching a different conclusion than that reached by the Commission. The Court cannot do so given its limited standard of review.

The Department was required to follow legally enacted statutes and although this may result in less than a desirable outcome for the petitioner, that is not contrary to equity and good conscience. The new legislation was validly enacted due to economic conditions existing at the time and was unrelated to plaintiff's personal financial situation. Since the overpayment was the result of a change in legislation requiring repayment, despite the adverse effect to the plaintiff's financial situation, it cannot be said to be against equity and good conscience. By enforcing enacted legislation, the Commission and Department are not acting without or in excess of their powers. In fact, they are acting pursuant to the requirements of the law.

There is no legal basis requiring the Commission to waive the reimbursement. Pursuant to Wisconsin Statute, the Court may not substitute its judgment for that of the Commission as to weight or credibility of the evidence on any finding of fact. The Court is also to grant the Commission's application of those facts to the law great deference. As a result the Court cannot

exercise its discretion and reach a different conclusion than that made by the Commission under the facts of this case.

It is most unfortunate and ironic that the passage of the legislation in August of 2011 was intended to assist people similarly situated to the plaintiff, yet unfortunately for her, resulted in exacerbating difficult financial circumstances. Nonetheless, the Commission's decision is supported by the evidence and the law. The Court hereby affirms the decision requiring the plaintiff to repay \$1,316.00 in benefits received during weeks 28 through 34 of 2011. Plaintiff's Complaint is ordered dismissed, without costs.

Dated this 6th day of November, 2012.

BY THE COURT:



Lisa K. Stark
Circuit Court Judge, Branch 1

cc: Tammy J. Jarecki
Kim T. Castelaz