

FILED
01-08-2019
Clerk of Circuit Court
Green County Wisconsin
2018CV000171

BY THE COURT:

DATE SIGNED: January 8, 2019

Electronically signed by Thomas J. Vale
Circuit Court Judge

STATE OF
WISCONSIN

CIRCUIT COURT

GREEN COUNTY

Ellen M. Broge

Plaintiff

Administrative
Agency Review

Labor and Industry Review
Commission, Department of
Workforce Development, and Wal-
Mart Associates Inc.

Case No. 18CV171

Defendant

Memorandum Decision

Procedure

The plaintiff filed an amended complaint in Green County Circuit Court on September 7th, 2018, asking this Court to reverse the decision of the Wisconsin Labor and Industry Review Commission dated August 10, 2018 in which she was denied unemployment compensation benefits. The Department of Workforce Development has answered the Complaint, asking this Court to affirm the decision of the Commission.

Facts

This Court has reviewed the transcript of the hearing before the ALJ as well as the statements of case set forth in each brief. There does not appear to be any real material and controverted facts, but rather the issues relate to an application of the law to the facts. These facts are relevant:

1. Ms. Broge was employed by Wal-Mart for 32 years and seven months, from June 10, 1985 to January 26, 2018. (Broge Tr. 33) 1 At the time of her discharge, she was a receiving clerk, earning \$18.47 per hour. Her job was to verify the delivery of merchandise by confirming that the delivered goods matched the invoice of the vendor. (Ovsak Tr. 16; Broge Tr. 34). Her performance reviews for her last three years of employment 2015, 2016 and 2017 rated her overall performance as "solid." (Exhibit 7; Broge Tr. 53-54). She enjoyed her job at Wal-Mart. (Broge Tr. 58).
2. She was discharged on January 26, 2018, by two assistant managers, Brian Huber and Maggie Craft, who told her the discharge was "due to two Frito Lay invoices, and a Mission chip invoice" that they said "were not checked in properly." (Broge Tr. 35).
3. After being terminated, Ms. Broge filed for unemployment benefits. Wal-Mart contested her claim. The DWD denied Ms. Broge her benefits and stated she "was discharged not for misconduct but for "substantial fault connected with her employment." Ms. Broge appealed and a hearing was held on April 26, 2018 at which she represented herself.
4. The employer presented one witness, Store Manager Josh Ovsak who identified the discharge document as setting forth the reasons for the discharge. (Ovsak Tr. 15; Exhibit 1). He testified she was discharged for "receiving issues dates January 13th, 23rd and 24th." (Ovsak Tr. 15)
5. The discharge document and Mr. Ovsak stated that termination is appropriate due to "3 coachings" that she had "already" received. (Osvak Tr. 15; Exhibit 1). Mr. Osvak testified that he had no knowledge with respect to two of the receiving issues the employer alleged as reasons for the discharge. He stated: I honestly, don't – I don't know what [the January 24th incident] was. The only one I was aware of was that one Frito. I do not have the Mission invoice concern either. (Osvak Tr. 20). He added that he was not present at the discharge meeting. (Osvak Tr. 15).

6. Like Mr. Osvak, Ms. Broge was able to offer no testimony concerning two of the reasons the employer gave for the discharge. He testified about the receiving or invoice issue that occurred on January 13th, but not the issues that allegedly occurred on January 23rd and January 24th.
7. The only one of the three incidents referenced in the discharge document that manager Osvak had any knowledge about was the receiving incident on Saturday, January 13, 2018. He knew about that incident because Ms. Broge came to him that day, and told him that the invoice could not be found, and as a result, she could not match it with the corresponding merchandise. (Ovsak Tr. 18). He stated that he believes she came to him because “she realized she made a mistake.” (Ovsak Tr. 19). Ms. Broge told him that she “didn’t have the invoice” for some goods. (Ovsak Tr. 18) He testified that there was nothing more to do until Monday when the employer would receive another copy of the invoice from Frito Lay, and then the check in process could be completed. (Osvak Tr. 15-16). As far as he knew she checked the merchandise off on Monday. (Osvak Tr. 19).
8. Similarly, Ms. Broge testified with respect to the January 13 invoice, that when she realized the invoice was missing, she contacted the co-manager Janelle Marty and ended up discussing the matter with the co-manager and manager Josh Osvak. (Broge Tr. 39). She believed that she “was scanning the invoices [that had to be matched that day] and one must have been stuck together [with another], and I missed that invoice.” (Broge Tr. 36). She said that as soon as she was done, she added them up and realized one was missed, but could not find it. (Broge Tr. 36, 38-39). She explained, that there was nothing more that could be done concerning that invoice on Saturday, until Frito-Lay provided a duplicate invoice on Monday.
9. Ms. Broge had received three earlier coachings. The first coaching occurred on August 26, 2017 for failing to lock a door. (Exhibit 3 at U15). Ms. Broge emphasized it was “not done intentionally.” (Broge Tr. 42). There were no further incidents of that kind. A second coaching occurred more than two months later on November 9, 2017 when Ms. Broge received a coaching about purportedly speaking inappropriately to co-workers. (Exhibit 3 at U16). Ms. Broge denied that she had done so and there were no further similar coachings. (Broge Tr. 43-44). And a third coaching occurred on November 20, 2017 when she was coached about miscounted inventory. The coaching document for that incident states that in the future, “If Ellen

needs help or is unsure of a process she needs to ask a peer or one of her managers so we can assist her and make sure everything is done correctly."

10. Following the hearing the administrative law judge (ALJ) issued a written decision which concluded Ms. Broge was ineligible for unemployment benefits because she was discharged for "substantial fault."
11. Ms. Broge, appealed the decision of the ALJ to the Commission, again without benefit of counsel. The Commission affirmed the decision of the ALJ with certain modifications. It deleted all references by the ALJ to the fact that the employer had failed to prove the January 24 allegation, as well as the ALJ's finding that the "employee was discharged, in part, for the January 13 incident, and the ALJ's statement that the burden rests with the employer to establish that the discharge occurred for qualifying reasons. The Commission instead substituted a statement that the employee was discharged "because of her continued unsatisfactory performance after receiving three coachings." It did not mention that the employer did not prove two allegations contained in the discharge document. It did not state that the remaining conduct constituted "substantial fault" within the meaning of the applicable statute.

Law

The burden is on the employer to show that the employee conduct amounted to disqualifying misconduct or substantial fault. Substantial fault is defined as follows:

Discharge for substantial fault. Wis. Stat. §108.04(5g)(a) An employee whose work is terminated by an employing unit for substantial fault by the employee connected with the employee's work is ineligible to receive benefits * **For purposes of this paragraph, "substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
2. One or more inadvertent errors made by the employee.
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

Judicial review is governed by 108.09(7).

Section 108.09(7)(c)(6), provides that the court may confirm or set aside the Commission's order on the following grounds:

- a. That the Commission acted without or in excess of its powers.
- b. That the order was procured by fraud.
- c. That the findings of fact by the Commission do not support the order. “

Issues

The plaintiff contends that the Commission acted without or in excess of its powers and the findings of fact do not support the order because they are not supported by substantial evidence. No deference is owed to the Commission as a result of the decision in *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. The court should grant the Commission's decision due weight.

Analysis

The plaintiff contends that the Commission's conclusion that Ms. Broge engaged in substantial fault is not supported by substantial evidence. The stated reasons for discharge were allegations that there were receiving issues on three separate dates in January of 2018. The store's witness said he was only familiar with the incident that occurred on January 13th. The employer must prove the allegations upon which the discharge was based. Standing alone, this court does not believe that the January 13th incident is substantial evidence of substantial fault.

The plaintiff stated that she believed two pieces of paper merely stuck together and that is the reason the invoice was not scanned properly. She realized on the same day that an invoice could not be matched to the inventory and the witness (Ovsak) said she came to him and explained the problem. Apparently the problem was resolved when they received another invoice from the supplier on the following Monday.

There is no argument or claim that the plaintiff did anything intentionally wrong. In fact, she discovered her error and reported it to her supervisor. It appears that the incident was an inconvenience for the employer, but nothing more. The Commission agreed with the ALJ that the employee's conduct did not rise to the

level of an intentional and substantial disregard of the employer's interest. There is no evidence that this single act was anything but an inadvertent error.

There was no evidence of a pattern of behavior that might suggest substantial fault. If there was evidence presented of two additional similar "omissions over which the employee exercised control" it may have shown more than an inadvertent error and substantial fault on the part of the plaintiff. But there was no evidence concerning the other alleged January acts.

The Commission modified the decision of the ALJ to fit the conclusion the ALJ wanted to reach. It decided that the January 13th incident, along with three prior coaching incidents during the second half of the fall of 2017, served as the reasons for discharge. Specifically, leaving a receiving door unlocked in August of 2017, an alleged incident of being belligerent and speaking with a raised voice on November 9th, and failing to accurately count some DVD's on November 22nd. The plaintiff says those earlier coachings are not relevant in determining whether the discharge after those coachings was for substantial fault where the employer has failed to prove the subsequent allegations that actually prompted the discharge.

The employer offered no proof at all of two of the three grounds alleged in the discharge document. While it offered proof that the January 13th, 2018 incident occurred, that act in the opinion of this court was not evidence of substantial fault. The Wisconsin Supreme Court has ruled that careless conduct does not equal substantial fault. *Operton v. LIRC*, 2017 WI 46, 375 Wis. 2d 1.

The Commission relied on the prior coachings in 2017 as well as the January 13th incident to justify the finding of substantial fault. The plaintiff does not argue that the Commission could not legally modify the findings of the ALJ. However, the mere fact that it did indicates that the Commission felt it necessary to essentially correct and bolster the findings of the ALJ in order to try and justify denying the plaintiff benefits.

Those prior coachings appear to be unrelated to the action on January 13th. They appear to be minor infractions and they did not lead to a dismissal standing on their own. The Commission cannot create evidence of substantial fault by adding the prior unrelated coachings to the January 13th incident.

The plaintiff may have been an unsatisfactory employee and she could have been discharged for that reason. But the employer failed to meet its burden to show that the plaintiff should be denied benefits. There is a strong public policy that favors compensating the unemployed. *Operton, Id.* The plaintiff should be entitled to benefits.

Oder

This court finds that the Commission acted without or in excess of its power in rendering its decision in finding that the plaintiff was discharged for substantial fault. Further, the findings of fact do not support the order because while the plaintiff may have simply made an inadvertent mistake on January 13th, or may have been careless, her actions did not equate to substantial fault. This case is remanded to the Commission for further action consistent with this decision.