STATE OF WISCONSIN CIRCUIT COURT CLARK COUNTY

REBECCA J. FAUDE
Plaintiff/Petitioner
vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION
Defendant/Respondent

CIRCUIT COURT
CLARK COUNTY WISCONSIN
FILED
APR 06 2017
HEATHER BRAVENER
CLERK OF COURT

ORDER AFFIRMING WERC

Case No. 2016CV130

[re: WERC Dec. No. 35793-B]

Petitioner filed this matter seeking review of a final order from the Wisconsin Employment Relations Commission (respondent) dated August 18, 2016. Basic facts are as follows:

1. The county (employer) placed petitioner on administrative leave on August 27, 2014.
2. On November 19, 2014, petitioner's employment was terminated.
3. On February 4, 2016, petitioner filed a prohibited practices complaint with respondent.
4. Respondent, through examiner Millot, conducted a hearing on the complaint on July 21, 2015.
5. Hearing examiner Millot issued her decision on March 21, 2016, finding in favor of petitioner.
6. On August 18, 2016, respondent issued its decision reversing the hearing examiner. Specifically, the decision stated:

> A. The Examiner's Findings of Fact are set aside and the following Findings are made:
>
> 1. Rebecca J. Faude was employed by Clark County at its Health Care Center from approximately 2006 until her November 16, 2014 termination.
>
> 2. For at least three years prior to her termination, Rebecca J. Faude and fellow employee Bernard Rusch met with Health Care Center management representatives as union stewards to present and discuss employee workplace concerns.
>
> 3. In June and July 2014, Rebecca J. Faude engaged in workplace misconduct.
>
> 4. When it terminated Rebecca J. Faude, Clark County did not act out of any hostility toward the activity described in Finding of Fact 2.
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> B. The Examiner's Conclusions of Law are set aside and following Conclusions are made:
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> 1. By her conduct described in Finding of Fact 2, Rebecca J. Faude was exercising her right under § 111.70(2), Stats., to engage in lawful concerted activity for the purpose of mutual aid or protection.

2. By terminating Rebecca J. Faude's employment, Clark County did not commit a prohibited practice within the meaning of §§ 111.70(3)(a)1 or 3, Stats.

C. The Examiner's Order is set aside and the following Order is made:

The complaint is dismissed.

The substance of the basis for this decision is as follows:

Examiner Millot concluded that although there were "legitimate bases for Faude's termination," the County was partially motivated[3] to terminate her by hostility toward her lawful concerted activity as a union steward and thereby violated §§ 111.70(3)(a)1 and 3, Stats. On review, we conclude otherwise and have dismissed the complaint.

The record establishes that Faude was an aggressive advocate when raising workplace issues. But the record also establishes that she had been so without negative employment consequences for at least three years prior to being placed on leave in August 2014 and ultimately terminated in November 2014. Further, as found by Examiner Millot, during the months immediately prior to being placed on leave, Faude had engaged in workplace misconduct by disrupting shift change meetings and vocally criticizing the medical judgments of the Health Care Center physician. Given the foregoing, we conclude that the County did not act out of hostility toward Faude's lawful concerted activity when it terminated her employment and have dismissed the complaint.[4]

Petitioner did not provide a summary of the issue in her main brief. Respondent sums up the issue presented as follows (respondent brief, filed 1-26-17):

MERA makes it a prohibited practice to discharge a municipal employee because she engaged in lawful concerted activities for mutual aid or protection. *See* Wis. Stat. § 111.70(2) and (3)(a)1 and 3. Faude claims that Clark County terminated her employment because she engaged in protected concerted activities as a union steward. Clark County claims that it terminated Faude's employment because she engaged in workplace misconduct and not because she engaged in protected concerted activities. Could WERC reasonably find that Clark County terminated Faude's employment because she engaged in workplace misconduct and not because she engaged in protected concerted activities?

The issue appears reasonably stated. Specifically, both parties have set forth the legal standards they believe apply. Overall, they are similar. From petitioner (brief filed January 26, 2017)

"An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence." *Milwaukee Bd. of Sch. Dirs. v. WERC*. 2008 WI App 125. ¶7. 313 Wis. 2d 525 [citing Wis. Stat. §102.23(6)]. "Credible evidence is that evidence which excludes speculation or conjecture." and "[e]vidence is substantial if a reasonable person relying on the evidence might make the same decision." *Id.*

Or, as respondent has put it (respondent brief, ++++):

> **WERC may designate an examiner to conduct an administrative hearing and to issue a proposed decision. *See* Wis. Stat. § 227.46(1). WERC retains the ultimate responsibility, however, for finding the facts and making credibility determinations. *See* Wis. Stat. § 227.46(2) and (4); *Hakes v. LIRC*, 187 Wis. 2d 582, 589, 523 N.W.2d 155 (Ct. App. 1994).**
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> **On judicial review, the court reviews WERC's findings and not those of the examiner. *See Anheuser Busch, Inc. v. Indus. Comm'n.*, 29 Wis. 2d 685, 692, 139 N.W.2d 652 (1966). The court "cannot ignore and jump over the findings of the . . . [WERC] to reach those of the examiner which were set aside." *Id.***
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> **When WERC overturns the examiner's findings, however, WERC first must consult with the examiner to glean the examiner's impressions of the demeanor and credibility of the witnesses. *See Hamilton v. ILHR Dep't.*, 94 Wis. 2d 611, 621, 288 N.W.2d 857 (1980). WERC also must provide a memorandum opinion explaining the basis of its disagreement with the examiner. *See id.*; Wis. Stat. § 227.46(2).[5] WERC is not required, however, to indulge in the elaborate opinion procedure of an appellate court. *See Daniels v. Chiropractic Examining Bd.*, 2008 WI App 59, ¶ 6, 309 Wis. 2d 345, 750 N.W.2d 951.**

The critical part in all of this is that petitioner's submittals are in essence, and almost directly, asking this court to substitute the hearing examiners decision for the decision of respondent as more properly or fully supported by the evidence. But that is not the law.

See *Anheuser Busch, Inc. v. Indus. Comm'n.*, 29 Wis.2d 685, 692 (1966) As the foregoing recitals show, the following questions arise in examining this matter:

1. Did respondent consult with the examiner to obtain the examiner's impressions of the demeanor and credibility of the witnesses?

   The court's answer is "yes." See respondent's decision/order dated August 18, 2016, page 1.
2. Did respondent provide a memorandum opinion explaining the basis of its disagreement with the hearing examiner?

   The court's answer is "yes." See respondent's decision/order dated August 18, 2016. In summary, the respondent's decision/order concluded that because petitioner had engaged in protected activity for a number of years without consequence such protected activity was not a factor (in whole or in part) for the termination but instead the termination was based on workplace misconduct in June and July of 2014.
3. Are the respondent's (not the hearing examiner's) findings of fact supported by credible and substantial evidence?

   The court's answer is "yes." The court will now go into the details of this conclusion.

Petitioner's assertion is that the county was motivated, at least in part, by her protected activities. However, a statutory violation is not established by the petitioner "merely proving the presence of protected activity. The employee must show that the employer was motivated, at least in part, by anti-union hostility." *ERD v. WERC*, 122 Wis.2d 132, 142 (1985). As noted in the cited case, triers of facts cannot read minds, so often must rely on inferences as to motive. Legitimate reasons for actions taken by an employer can weaken the strength of any inferences which the employee asks to be drawn as to improper motives. Id., p. 143. With this backdrop, the court turns to the ultimate question.

The question: Are respondent's findings of fact supported by credible and substantial evidence? The court is not looking to determine that there is or is not clear and satisfactory evidence of a violation.

The hearing transcript shows the following. Petitioner calls Jamie Faude, petitioner's daughter; Linda Jasmer, coworker; Arlene Framke, coworker; David Holtzhausen, county board member; Bernard Rusch, coworker and union steward; petitioner elected not to testify, and then rested. After further discussion, the examiner let petitioner call additional witnesses. Petitioner then called Jane Schmitz and then rests. Petitioner's offered exhibits include C-1, C-2, C-5, and C-8. The examiner received all but C-8. Respondent calls Jane Schmitz, administrator of the facility. Respondent offered exhibits R-2, R-3, R-4, and R-5 which were all received.

Respondent calls Carrie Anderson, registered nurse at the facility. Respondent offered exhibit R-6 which was received.

The answer: Respondents findings of fact are supported by credible and substantial evidence. Petitioner has asserted that her termination was motivated at least in part by her union activities. In support, petitioner relies on her own beliefs made through her pursuit of this action, although she elected not to testify. Petitioner also relies on circumstantial evidence. Specifically, that she was a union steward, that she engaged in protected concerted activities, and that the employer was aware of such facts. From this she infers that she was terminated, in part, for such activities. To prevail on this mixed motive theory, petitioner must show (1) that she engaged in protected concerted activity, (2) that the employer was aware of said activity, (3) that the employer was hostile to such activity, and (4) that the employer's action was based at least in part upon such hostility. *ERD v. WERC*, 122 Wis.2d 132, 140 (1985).

As respondent has pointed out, (respondent's brief, page 14) case law has long established that:

> **WERC's findings of fact must be affirmed if they are supported by substantial evidence in the record. *See Muskego-Norway*, 35 Wis. 2d at 562. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion after considering all the record evidence. *See Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't. of Revenue*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674. Substantial evidence does not mean a preponderance of the evidence. *Id.* An agency's findings of fact may be set aside only when a reasonable fact-finder could not have reached the findings from all the evidence before the agency, including the available inferences from that evidence. *Id.***

Petitioner has established points 1 and 2 and they are not in real dispute. Petitioner has not established points 3 and 4 by either direct or circumstantial evidence (inferences). More significantly, however, as to points 3 and 4, as the review standard above points out, there is substantial evidence in the record to support respondent's findings of fact[1]. Respondent reasonably found from the evidence of record that petitioner's employment was terminated solely because of workplace misconduct.

The persons involved in making the decision to place petitioner on leave and then terminate her employment testified that the actions were taken solely because of workplace misconduct. (Hearing Transcript, pp. 64-65, 92-93, 102) The transcript shows petitioner was disruptive during shift changes to an extent that her actions affected

[1] This court would reach the same conclusion even if it were to review the record *de novo*. There is simply in sufficient evidence to conclude that the employer acted, even in part, from an improper motive.

resident care and caused overtime expense. (Hearing Transcript, pp. 23-24, 26, 75, 96-98, 111-121) Petitioner caused additional issues by openly and negatively questioning a physician's patient care orders which negatively impacted the views of other workers. (Hearing Transcript, pp. 86-88, 96-99, 115-118) Respondent could also reasonably conclude that petitioner made negative remarks regarding one Simington during a meeting of June 28, 2014 with Schmitz. While Faude's witness provided a different view of whether petitioner made the comments, petitioner did not testify. (Hearing Transcript, pp. 40, 100-101) When judging credibility, respondent reasonably could have concluded that Schmitz's testimony was more credible. This would be a reasonable conclusion in light of petitioner's negative comments about the physician referenced above.

Faude's also argues that she was treated differently than other workers when placed on paid administrative leave for three months during the investigation process and because an attorney was used in the investigation process. However, there is evidence that other employees had been placed on administrative leave and that lawyers had been consulted in regards to other disciplinary cases. (Hearing Transcript, pp. 93-94) More importantly, however, is Schmitz testified that the reason the investigation was conducted in such manner was to avoid the appearance of a conflict of interest because Schmitz and other managers were the focus of some of petitioner's complaints. Respondent's acceptance of this assertion would be entirely reasonable. (Hearing Transcript, pp. 62, 92-95, 105-106)

It was reasonable for respondent not to find that the employer was hostile to petitioner's protected activity and then acted on that hostility, even in part (parts 3 and 4 of the test outlined above). The record shows that petitioner had been a vocal union steward for at least three years without any prior adverse employment decisions. Rather, the actions taken occurred after the issues described above. Schmitz and petitioner's witness Rausch testified that no union steward had ever been disciplined for participating in meetings with Schmitz or the county board. (Hearing Transcript, pp.46-50, 89-90) Specifically, during the entire time frame in question, spanning several years, there had always been 5 union stewards at the facility. No other union steward's employment was terminated. (Hearing Transcript, p. 46) Rausch also testified that he and other stewards always acted as a team, and matters were discussed as "the joint concerns the two of you were raising." Id., p. 47. It is reasonable to infer that petitioner's termination was unrelated to protected activities when only she was terminated when others raised the same issues.

Petitioner references question 1 in the survey used to gather information as evidence of hostility. Petitioner's brief, p. 6. The question reads: "In the course of daily conversation has Becky Faude and/or Jamie Faude talked about union issues while on duty?" The record shows employees on both sides of the issue were disciplined for just such matters on a previous occasion. (Hearing Transcript, p. 90) It can be inferred that

management's position was to keep union issues, both pro and con, out of work time. As the question is qualified with the phrase "while on duty" it was reasonable for respondent to conclude that this question was not evidence of hostility, but rather investigating potential violations. Petitioner then references reasons 4 and 5 of the termination letter[2] (Exhibit C-1, page 5) as "overt" evidence of the employer acting in part with hostile motive. The court does not see the same. As noted above, respondent could easily conclude that Schmitz was credible as to petitioner making the statements about Simington. Such disparagement is not protected. The record also shows evidence of petitioner going beyond the normal review chain of command. On the evidence presented, respondent's conclusions were reasonable. Respondent could, on the evidence presented and available, reach the conclusions that it did. Its findings are supported by credible and substantial evidence.

The court concludes that respondent WERC's findings and conclusions are supported by the record in this matter. Respondent is ordered to prepare the appropriate order/judgment.

This is not a final order for purposes of appeal.

Dated: April 5, 2017

By the Court:

Jon M. Counsell
Circuit Court Judge

[2] There is some issue as to whether these issues are even proper for review given the petitioner's pretrial limitations of her claims. The court agrees with respondent that petitioner did so limit her claims. Such is clear from a plain reading of petitioner's submittals on the issue and the hearing examiner's order.