



STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

RACINE COUNTY

RICHARD KAFAR,

Petitioner,

RECEIVED

vs.

SEP 05 1995

Case No. 93 CV 1985

PERSONNEL COMMISSION,
OF THE STATE OF WISCONSIN

PERSONNEL COMMISSION

Respondent.

FILED

DECISION

JUN 10 1994

CLERK OF CIRCUIT COURT
RACINE COUNTY

The petitioner, Richard Kafar (Kafar), seeks relief from a decision of the State Personnel Commission (SPC) which dismissed his complaint for discrimination under the Wisconsin Fair Employment Act (WFEA) against the Department of Health and Social Services (DHSS) for lack of jurisdiction. He argues that the Commission erred because his previous claim under the Worker's Compensation Act (WCA) was for a different injury and because there were inadequate facts before the Commission from which they could conclude that the WCA injury caused his loss of employment and the WCA injury was too remote to be directly causal. The respondent, SPC, represented by the Attorney General, argues that the exclusive-remedy provision of the Worker's Compensation Act applies to bar the petitioner's discrimination action and asks that the SPC decision be confirmed. Because this court concludes that the exclusive-remedy provision does apply and does bar the discrimination action of Kafar, the SPC decision is confirmed and this matter is dismissed.

THE FACTS

Kafar was employed at Southern Wisconsin Center (SWC) as a Building Maintenance Helper doing janitorial work. He developed carpal tunnel syndrome, left wrist tendinitis, and lateral epicondylitis, which were determined to be work related. His employment continued for five years as a Building Maintenance Helper. Kafar had been offered other positions at SWC, which he did not accept. To accommodate his condition, he was assigned to jobs that did not involve mopping and he was assigned to work with another employee when a job required mopping. Kafar and SWC entered into an agreement dated January 22, 1992, which resolved Kafar's Worker's Compensation Act claim. The agreement excepted any WCA claim by Kafar for unreasonable refusal to rehire. DHSS terminated Kafar on March 27, 1992, because the petitioner was not able to perform the mopping duties identified by his position description. Kafar filed a discrimination complaint with the SPC on April 7, 1992, alleging a violation of the WFEA. By an order dated July 22, 1993, the State Personnel Commission dismissed his complaint reasoning that the exclusive-remedy provision of the WCA deprived the Commission of subject matter jurisdiction. From the decision Kafar seeks relief.

THE LAW

This is a review of an administrative decision to the circuit court pursuant to the provisions of Ch. 227. Pertinent portions of Sec. 227.57, Wis. Stats., describe the scope of

this court's review and the weight to be given to agency determinations of policy, interpretations of law, and fact finding:

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

The scope of this review is limited by statute. The review is confined to the record of the proceedings before the agency. Sec. 227.57 (1), Wis. Stats. The reviewing court must separately treat issues of interpretations of law and determinations of fact. Sec. 227.57 (3), Wis. Stats.

Statutes and case law require that this court give deference to the decision of the agency. Sec. 227.57(10), Wis. Stats., states in part:

Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it....

Case law recognizes that weight should be given the decision of an agency when the issue presented is purely an issue of law:

The application of facts to a statute is a question of law. The black-letter rule is that a court is not bound by an agency's conclusions of law. However, in some cases, it is

appropriate for a court to give deference to an agency's interpretation of a statute....

...when the expertise of the administrative agency is significant to the determination of a legal question, the agency's decision, although not controlling, should be given weight. (citations omitted) Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 421, 464 N.W. 2d 111 (Ct. App., 1990)

Wisconsin Courts have drawn a distinction between "due weight" and "great weight" standards to be given an administrative agency's decision. In West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 357 N.W. 2d 534 (1984), the Supreme Court of Wisconsin noted that the "due weight" standard applies to an issue of law and the "great weight" standard to mixed issues of fact and law:

...Generally questions relating to interpretation and application of statutes are labeled questions of law, and the blackletter rule is that a court is not bound by an agency's conclusions of law. Courts, however, frequently refrain from exercising the power to substitute their interpretation or application of a statute for that of an agency charged with the administration of the law.

...Sec. 227.20(10), Stats. 1979-80, provides that upon review of an agency's determination, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved...." Our cases similarly recognize that if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy. (footnotes omitted) (pp. 11-12)

Wisconsin courts have long recognized that where the administrative agency is charged by the legislature with the duty of applying it, then the agency's construction and interpretation of the statute is entitled to great weight. Beloit Education Asso. v. WERC, 73

Wis. 2d 43, 67, 242 N.W. 2d 231 (1976)

In Marson v. LIRC, 178 Wis. 2d 118, 503 N.W. 2d 582 (Ct. App. 1993), the court considered what standard to apply when reviewing an administrative decision dismissing a discrimination claim in light of a compromise agreement settling a worker's compensation claim. The court concluded that the administrative decision was entitled to due weight or great bearing:

...When reviewing a question of law, we are not bound by an administrative agency's conclusions....Our supreme court has applied three levels of deference to conclusions of law and statutory interpretation in agency decisions....First, if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight."...The second level of review is a mid-level standard that provides if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing."...The third level of review is de novo and is applied when the case is clearly one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented....(at p. 124)

In the Marson case, the court determined that since previous appellate decisions had dealt with the exclusivity provision of the WCA as a bar to a discrimination claim for a work-related injury, but not with whether a compromise agreement would preclude such a claim, that issue was very nearly one of first impression, and, therefore, the administrative decision was given due weight or great bearing. (at p. 124)

The Worker's Compensation Act contains an exclusivity provision. Sec. 102.03(2),

Wis. Stats., states:

Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's

compensation insurance carrier.

And the Act provides a remedy for an employee not rehired after an injury in the course of employment. Section 102.35(3), Wis. Stats., states:

Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitation, [must] pay to the employe the wages lost during the period of such refusal not exceeding one year's wages....

DISCUSSION

The issue to be resolved here is whether the exclusivity provision of the WCA is a bar to the discrimination claim the petitioner brought under provisions of the WFEA.

This court concludes that due weight or great bearing is to be accorded the administrative decision reviewed in this case. As a result of the development of a body of law and consideration of cases interpreting a statute, regulation or given set of facts, a decision of an administrative agency becomes entitled to more weight. This explains why the Court of Appeals in Schachtner v. DILHR, 144 Wis. 2d 1, 5, 422 N.W. 2d 906 (Ct. App. 1988) determined that the administrative resolution of the exclusivity issue was not entitled to deference by the reviewing court, and the Marson court five years later concluded that the issue of whether the exclusivity provision bars a discrimination claim for a work-related injury was "very nearly one of first impression" and gave the administrative decision due weight or great bearing. Marson, supra at p. 124. In this court's opinion, based upon the body of case law that exists on this issue and the experience of the SPC in interpreting and

applying the exclusivity provision to factual situations, that the administrative decision under review here is entitled to due weight or great bearing.

This court further concludes that the facts of Marson are so close to those in this case that its finding is binding on this court. Marson suffered a work-related back injury and was given a permanent lifting restriction and he was terminated from his employment. He filed a WFEA discrimination claim alleging he was handicapped based on the work related back injury. Marson also filed a Worker's Compensation Act claim and entered a compromise agreement in settlement of the claim. The Appellate Court applied the ruling of Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988) to the facts in Marson, and concluded:

...that because the Worker's Compensation Act contains an exclusivity provision, sec. 102.35(3), Stats., provides the exclusive remedy for an employer's refusal to rehire because of a job-related injury even if the injury creates a perceived handicap. (at p. 125)

The reasoning of exclusivity to a recovery under the WCA is based on legislative intent. In Norris v. DILHR, 155 Wis. 2d 337, 341, 455 N.W. 2d 665 (Ct. App. 1989) the court stated:

We conclude that to the extent that coverage of employers' acts overlaps under both Acts, the Worker's Compensation Act provides the exclusive remedy. To hold otherwise would give precedence to an Act which does not contain an exclusivity provision over an Act that does. The legislature is unlikely to have intended such a result.

As in Marson, Kafar has entered into a compromise agreement resolving his WCA claim. His WFEA remained pending. Based on Marson, and giving due weight to the

decision of the SPC, the exclusivity provision of the WCA precludes Kafar's WFEA claim.

Kafar argues that the Commission erred when it concluded that the injury in the WFEA case was identical to the injury in the WCA case. In its decision the Commission wrote:

There is no contention that the termination decision was based on some medical condition other than the one which was the basis for the complainant's Worker's Compensation claim. (at p. 2)

Based on the record before the Commission, this conclusion was reasonable and will not be upset by this court.

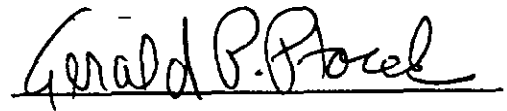
Kafar further argues that the record before the Commission was insufficient to support the conclusion that the WCA injury caused Kafar's loss of employment and that the WCA injury was too remote in time to be directly causal of Kafar's loss of employment. The Commission was reasonable in its analysis by comparison to earlier decisions of the Commission. It relied upon Johnson v. DHSS, 89-00890-PC-ER, 4/30/93, where it was noted that a "but for" causation existed between denial of a transfer due to handicap discrimination and missed work in connection with work related injuries that occurred several months before the transfer denial. Pursuit of the WFEA claim was allowed. Here the Commission was reasonable in its conclusion that Kafar's employment was terminated because of his medical condition, which was the subject of the WCA claim, the equivalent of a failure to rehire which is covered by the WCA, which is the exclusive remedy.

CONCLUSION

The exclusive remedy provision of the WCA applies to bar the WFEA discrimination claim of Kafar. Therefore, the decision of the State Personnel Commission is confirmed and this matter is dismissed.

Dated: June 10, 1994

By the Court:

A handwritten signature in cursive script, reading "Gerald P. Ptacek", is written over a horizontal line.

Gerald P. Ptacek
Circuit Judge