aff'd Butzlaff v DHSS, 90-0097-PC-ER, 1-23-96

STATE OF WISCONSIN CIRCUIT COURT Branch 6 DANE COUNTY

RECEIVED

MAY 27 1997

PERSONNEL COMMISSION

STEVEN G. BUTZLAFF,

Petitioner,

vs.

STATE OF WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER (Admin. Review)

Case No. 96-CV-0431

This is a judicial review of a decision by the State Personnel Commission denying petitioner Butzlaff's claim that his former employing agency violated his rights under the Family and Medical Leave Act. Because the Commission's decision is free from material legal error and supported by substantial evidence, the decision is affirmed.

REVIEW OF RECORD

On May 2, 1990, petitioner Steven Butzlaff was fired from his probationary position as a Security Officer 3 at the Mendota Mental Health Institute, a mental health facility operated by the Department of Health and Social (now Family) Services. On June 15, 1990, he filed a complaint with respondent Personnel Commission alleging that he was fired in violation of the Family and Medical Leave Act (FMLA), sec. 103.10, Stats. The Commission granted the Department's motion to dismiss the complaint on the grounds that Butzlaff had not been on the job long enough to be protected by FMLA. That decision was reversed following judicial review and a published decision by the Wisconsin Court of Appeals.

Butzlaff v. Personnel Commission, 166 Wis.2d 1028 (Ct. App. 1992). The only question before the Court of Appeals was whether Butzlaff had been employed for more than 52 consecutive weeks by the same employer within the meaning of the Act. The Court of Appeals concluded that Butzlaff satisfied that condition and the matter was returned to the Commission for hearing on the merits.

The matter was heard before a commissioner acting as hearing examiner on March 7 and 8, May 4, 5 and 6, June 30, and July 1 and 22, 1994. Butzlaff testified as did all of the other key figures involved in the termination with the significant exception of Julius Grulke, Butzlaff's supervisor, who died before the hearing.

The following evidence was received: Butzlaff had been employed as a Security Officer for the University of Wisconsin from November 1984 to June 1989. He was then employed briefly by the Dane County Sheriff's Department. On January 29, 1990, Butzlaff was hired to a Security Officer 3 position at the Mendota Mental Health Institute with a six month probation period. Butzlaff had been interviewed for the position by Grulke, Mendota's Chief of Security, who would become his supervisor.

Butzlaff was trained in the usual manner for a person for his position and with his experience. This training included training on fire drills.

On March 8, 1990, Butzlaff reported to work 3.5 hours after the scheduled beginning of his shift, having first had his wife inform Grulke that he would be delayed because his

son had suffered a seizure.

On April 4, 1990, Butzlaff's wife gave birth to their second child. Because of complications she remained in the hospital until mid-April. Upon her release, Butzlaff requested four days of sick leave and one day of personal leave to care for her. The request was approved by Security Officer Schweiger as Grulke was on vacation.

Butzlaff testified that Grulke had stated during his job application interview that having a young son and a pregnant wife might interfere with the Security Officer position. Butzlaff also testified that Grulke considered use of sick leave to take care of family members to be unnecessary and possible grounds for discipline. Butzlaff also testified that Grulke expressed his disapproval of Butzlaff taking sick leave to care for his wife. The Commission found that Grulke did not make these statements.

The Commission did find that a co-worker had asked Grulke whether Butzlaff could take leave. Grulke referred the matter to the personnel department which informed him that the leave was permissible.

Butzlaff also testified that he told Grulke that he would need to take four weeks of leave in June when his daughter was to be released from the hospital. Grulke purportedly objected. The Commission found that this objection was not made.

Security Officers were required to conduct periodic fire drills according to an established procedure. Conducting the drill in each of ten buildings took about five to ten minutes

per drill. Ordinarily, the Officer should be able to conduct the drill after observing the procedure. Butzlaff observed the procedure at some buildings of the Institution's Central Wisconsin Center for the Developmentally Disabled (CWC) on February 1 and 26 and March 23, 1990.

Kay Spaulding (now Anderson) had been hired as a Security Officer 3 about four weeks prior to Butzlaff. Her training was similar to his. She was able to conduct fire drills after observing two. In March 1990, Spaulding complained to Grulke about notes Butzlaff had written to her which were critical of her work and were regarded by her as harassing. Grulke declined to reassign Spaulding but advised Butzlaff not to write any more notes to her.

On April 30, 1990, Butzlaff and Spaulding were assigned to work the second shift together. Grulke ordered Butzlaff to complete all the fire drills at CWC. According to Butzlaff, Spaulding would assist him by showing how to do the drills. According to Spaulding, Grulke ordered her to do the other second shift tasks, as if she were on the shift alone, and not to do any fire drills unless she had time. Tr. at 1213. Grulke advised that job action would result if the fire drills were not completed. Tr. at 45.

During the shift, according to Spaulding, Butzlaff told her that he did not know how to do the fire drills and asked her to do them with him. Spaulding advised him of Grulke's orders but agreed to show him how to do one, after which he was on his own. Butzlaff insisted on having her along. After arguing, he and Spaulding agreed to contact Grulke to

resolve their dispute. Grulke could not be reached so Spaulding contacted Security Officer Robert Newlun instead. She told Newlun that she was upset over Butzlaff's insistence that they violate Grulke's order. Newlun believed that the dispute created a security risk so he suggested that Spaulding go home. Spaulding finished the first fire drill and left. Tr. at 1213-17.

Butzlaff then performed Spaulding's assigned duties but did not do the other fire drills. He testified that he would have attempted to complete the drills had Spaulding remained. Tr. at 47.

When, on May 1, 1990, Grulke learned that the fire drills had not been completed, he ordered Butzlaff to prepare a report and scheduled a meeting at which Butzlaff's continued employment would be discussed.

On May 2, 1990, Grulke met with Butzlaff. Also present was Marie Carlin, the shop's union steward. Mendota's personnel manager, Dennis Dokken, appeared at the end of the meeting. Butzlaff explained that he could not finish the fire drills because there was not enough time, he did not feel comfortable doing them on his own, and Spaulding was too busy to help. On Grulke's recommendation, Butzlaff was discharged effective May 2, 1990, for failing to carry out a supervisor's order.

The Commission issued its final decision on January 23, 1996, denying Butzlaff's complaint. The Commission found that the Department, as Butzlaff's employer, had not interfered with Butzlaff's rights under the FMLA nor had it

retaliated against him for exercising his rights under that Act. In doing so, the Commission discredited Butzlaff's testimony and, to a certain extent, the testimony of his now ex-wife. This judicial review ensued.

CONCLUSIONS OF LAW

Butzlaff asserts that the Commission erred in its determination that the Department of Health and Human (now Family) Services did not violate the Family and Medical Leave Act (FMLA). This review is governed by ch. 227, Stats. Sec. 103.10(12)(b), Stats. The Court's authority on review is strictly limited by sec. 227.57, Stats. Review is limited to the record. Sec. 227.57(1), Stats. The Court shall set aside the agency's action if it determines that the agency has made a material error in interpreting the law. Sec. 227.57(5), Stats. The Court shall also set aside an agency's action based on any material findings of fact not supported by substantial evidence. Sec. 227.57(6), Stats. Substantial evidence is such evidence that reasonable minds might accept as adequate to support a conclusion. Gilbert v. Medical Examining Bd., 119 Wis.2d 168, 195 (1984). The question is whether substantial evidence supports the findings the Commission did make, not whether evidence supported findings it did not make. Eastex Packaging Co. v. DILHR, 89 Wis.2d 739, 745 (1979). "Even if the findings . . . are contrary to the great weight and clear preponderance of the evidence, reversal is not commanded. . . ." Id. The Court may not reweigh the evidence. Sec. 227.57(6), Stats.

Contrary to Butzlaff's suggestion, the Commission's credibility determinations are not subject to substantial evidence review. Witness testimony is evidence itself and there is no requirement that it cannot be credited unless corroborated. Credibility determinations do not rest solely on the substantiation of the testimony by other evidence but on other factors as well, such as the tribunal's impressions of the witness, impressions which are unavailable to the Court. Thus, the Court may not substitute its judgment for the Commission's evaluation of the credibility of the witnesses. West Bend Co. v. LIRC, 149 Wis.2d 110, 118 (1989); Chicago & North Western R.R. v. LIRC, 91 Wis.2d 462, 468 (Ct. App. 1979), aff'd, 98 Wis.2d 592 (1980). Credibility determinations are in the exclusive province of the Commission and it may discredit even the uncontradicted testimony of witnesses. Spacesaver Corp. v. Dept. of Revenue, 140 Wis.2d 498, 503-04 (Ct. App. 1987).

Here, Butzlaff asserts that the Department, through his former supervisor, Grulke, interfered with his rights under FMLA and retaliated against his attempts to exercise those rights. FMLA, sec. 103.10, Stats., requires employers to permit employees to take family and medical leave to deal with the birth or adoption of a child, or a serious health problem of the employee or a family member. Kelley Co., Inc. v. Marquardt, 172 Wis.2d 234, 248 (1992). Sec. 103.10(11)(a), Stats., prohibits employers from interfering with, restraining or denying rights under FMLA. Under sec. 103.10(11)(c), Stats., employers also may not discharge or

retaliate against an employee who seeks to enforce rights under the Act. See sec. 111.322(2m), Stats.

Contrary to Butzlaff's arguments, the Commission's decision here did not turn on its interpretation of the statute. It clearly recognized that an employer may not retaliate against employees exercising FMLA rights and that employers may not interfere with the exercise of those rights. Instead, the Commission found that there was no retaliation and that Grulke's actions did not constitute interference with Butzlaff's FMLA rights. These determinations were based on the findings that Grulke did not make the statements Butzlaff attributed to him and that the justification offered by the Department for the discharge was credible.

Job discrimination may be proved either directly, by showing that discriminatory reasons more likely motivated the employer's decision, or indirectly, by showing that the employer's proffered explanation is unworthy of credence thereby giving rise to a permitted inference of discrimination. Kovalic v. DEC International, Inc. (Kovalic I), 161 Wis.2d 863, 875-76 (Ct. App. 1991). In the administrative setting, whether an employee is fired for a discriminatory motive is a question of fact and the agency's finding as to it is conclusive if supported by substantial evidence. Chicago, M., St. P. & P. RR Co. v. DILHR, 62 Wis.2d 392, 396 (1974).

Here, the only credited direct evidence that Butzlaff's discharge was motivated, at least in part, to discriminate

against his exercise of FMLA rights, was the bare bones fact that he had exercised his FMLA rights in relative proximity to the date that he was fired. Standing alone, this is not sufficient to establish discrimination. See Kovalic I, 161 Wis.2d at 885 (Fact that fired employee's duties assumed by someone younger not enough of itself to establish age discrimination).

The other direct evidence that Butzlaff was fired for exercising his FMLA rights were the statements he attributed to Grulke which inferably reflected the supervisor's hostility to the exercise of FMLA rights. However, the Commission discredited the testimony that those statements were made and specifically found that they were not made.

In over seventy pages of briefs, Butzlaff fails to recognize that the Court may not reevaluate the credibility of the witnesses even though credibility determinations clearly provided the central underpinning for the Commission's decision. The only argument Butzlaff makes for overturning the Commission's credibility assessment is the entirely unsubstantiated contention, discussed later, that the Commission was biased against him.

The Commission's four page discussion of Butzlaff's credibility, Decision at 10-13, more than satisfies any requirement that it explain its credibility assessments. In addition to the Commission's discussion, the Court also notes that Butzlaff's version of the events which culminated in his termination substantially conflicted with the testimony of his co-worker, Kay Spaulding. The implicit but clear

crediting of Spaulding by the Commission substantially undermined Butzlaff's claim that he was fired for discriminatory rather than legitimate reasons.

Butzlaff testified that Grulke stated that he would ask Spaulding to train Butzlaff on the fire drills. Tr. at 65. He complained in a letter to the Commission that Spaulding abandoned him. Ex. R-18 at 4. Butzlaff testified that he did not watch Spaulding perform the entire first fire drill because she did not want him following her and asked him to perform another task. Tr. at 103, 114. He purportedly complied with Spaulding's request even though it meant disregarding Grulke's orders because he regarded Spaulding as his senior. Inconsistently, he had previously written notes to her critiquing her work. Tr. at 113-16. Butzlaff's version is also puzzling because the only reason Spaulding reluctantly consented to conducting the fire drill at all was to show him how to do it. Moreover, in a written statement to Grulke, he stated that he observed the drill and felt that he could do the others on his own. Ex C-23 at 1.

Spaulding's understanding of Grulke's orders was that she should not help Butzlaff with the drills until she had finished her work, Tr. at 1213, a direct contradiction of Butzlaff's story. Spaulding testified with respect to the incident of April 30, 1990, that she thought Butzlaff was trying to manipulate her and he implied that she was lying in their disagreement about Grulke's orders for that night. Tr. at 1231. The inconsistencies, the contradiction of another witness, and the impression of that witness that he was being

manipulative, more than adequately support a determination that Butzlaff's testimony was not credible. The Commission could certainly infer from Butzlaff's statements regarding his relations with Spaulding that his characterizations of Grulke's words and actions contained similar difficulties.

Only a few of the Commission's explicit findings with respect to Butzlaff's credibility require comment. Butzlaff stated that he did not observe fire drills on previous shifts with Officers Welch and Schweiger, a contention they both contradicted. Here again, it was the Commission's task to choose which testimony to credit.

Butzlaff contends that he was not required to reveal to the Department that he had been asked to resign from the Sheriff's Department because he had been arrested for retail theft. See Commission's Decision at 13. He makes a purely conclusory assertion that this was protected arrest information under sec. 111.335, Stats. However, that statute does not allow a job applicant to provide false information to a prospective employer. Miller Brewing Co. v. DILHR, 103 Wis.2d 496, 504 (Ct. App. 1981).

Butzlaff also contends that he was not required to put all of his evidence into his May 29, 1990 letter to the Commission, Ex. R-18, so that it was inconsequential that the letter failed to relate a number of statements made by Grulke reflecting a discriminatory attitude toward FMLA rights or threatening to fire Butzlaff for exercising those rights. However, the question is not what Butzlaff was required to say in the letter but what the letter did and did

not actually say. The Commission noted that the letter was otherwise exhaustive in its detail of the circumstances surrounding his discharge. Decision at 11-12. These threats, if credibly related, would certainly be important, perhaps clinching, evidence of retaliation or discrimination. Like Sherlock Holmes with the dog that did not bark, the Commission could certainly wonder why a complaint otherwise so detailed failed to include such remarks.

The Commission also discredited statements by Jacqueline Butzlaff, then petitioner's wife, to the effect that Grulke told her that the Butzlaff's family issues were not his concern. Decision at 18. Contrary to Steven Butzlaff's argument, nothing in the Commission's decision, at 18-19, indicates that Jacqueline was discredited because she was then Steven's wife. Rather, she was discredited because the Commission perceived her statements as inconsistent and motivated by financial interests. Certainly, the Court cannot reweigh the significance of these factors in order to upset the Commission's credibility determination. It was the Commission, through the hearing examiner, which had the benefit of evaluating Jacqueline's testimony in person and the Court is in no position to second guess its impressions.

Butzlaff protests that the Commission erroneously credited the testimony of some of the Department's witnesses which, he says, conflicted with their previous deposition testimony. However, even in the court setting, the crediting of inconsistent testimony will not be set aside except in rare circumstances which are not presented here. Pappas v.

Jack O. A. Nelson Agency, Inc., 81 Wis.2d 363, 367-68 (1978).

The remaining evidence conflicts as to whether Grulke was hostile to the exercise of family leave rights. Former Officer Groesbeck testified that Grulke was insensitive to Groesbeck's need to take care of his handicapped child. Tr. 229-31. However, the Commission distinguished the matter before it by noting that Groesbeck's need to take care of his handicapped child conflicted with his job's mandatory requirement of "forced overtime" and that Grulke's concern that Groesbeck make himself available was found to be motivated by a concern to run his department by the book rather than any animus against taking care of family members. Also, the Commission noted that Groesbeck's situation did not involve a request for family leave under FMLA, a point not disputed here. Decision at 18.

The Commission's findings as to Grulke's motivation is well supported by the record which reveals that Grulke was a hard-nosed authoritarian supervisor and not well-liked but was motivated by a need to run a tight operation in which all of his employees would be held to the same strict, perhaps excessively strict, standard. The testimony of union steward Marie Carlin, who had numerous run-ins with Grulke over his personnel management style, is a good example of the evidence supporting this view. Carlin could no more than speculate that Grulke's treatment of another employee was discriminatory, but she could identify no instances where he had harassed employees because they had taken family leave. Tr. at 359-61, 363-64. Carrie Matthews, another security

officer, who found Grulke to be a difficult supervisor, testified that he had never tried to dissuade her from using sick leave to care for her children and could actually be accommodating in that regard. Tr. at 1079.

It is in this context that the question of pretext must be examined. When an employer offers a legitimate reason for taking action against an employee, in response to evidence of discrimination produced by the employee, the employee must then prove that the legitimate reason was merely a pretext for the discriminatory action. Kovalic I, 161 Wis.2d at 875.

As emphasized in the Court of Appeals' subsequent decision, Kovalic v. DEC International (Kovalic II), 186 Wis.2d 162, 167-69 (Ct. App. 1994), the employee may establish discrimination based on a showing of pretext alone, even if there is no other evidence of discrimination. However, where the employee proffers, and the finder of fact credits, evidence that the employer's legitimate reasons were merely pretextual, the finder of fact may, but is not required to, infer that the pretext was a pretext for discrimination. 186 Wis.2d at 167-68. Accord Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990). This rule makes perfect sense because the employer's pretextual reason may be an excuse for embarrassing motives, personal grudges or the employer's own incompetence, which may not be unlawful of themselves especially where, as here, the employee was terminable at will. See Shager, 913 F.2d at 401.

Here, the Commission credited the Department's proffered legitimate reasons for discharging Butzlaff so there was no

finding of pretext from which discrimination could be inferred. The Court reviews the finding of no pretext for substantial evidence. Butzlaff's assertions of pretext are two fold. First, he argues that it was not legitimate to fire him because of his failure to perform the fire drills because he, in fact, had no time to perform them and because his training was inadequate. He also argues that the Department failed to undertake its customary procedures in discharging him. The Commission rejected these assertions.

Butzlaff was not fired for incompetence but for failing to follow orders to conduct the fire drills. He was a probationary employee and was not entitled to a second chance to demonstrate his subordination. Thus, while the Commission's determination that Butzlaff's work record was "irrelevant" might not be the best choice of terminology, the Commission was certainly justified in concluding that the fact that Butzlaff had previously been evaluated as competent did not shed very much light on whether or not he was insubordinate in this instance.

As for having inadequate time to perform the fire drills, credible and substantial evidence supports the Commission's conclusion that he would have had adequate time to do so had he not caused his colleague Kay Spaulding to leave her shift. Butzlaff himself admitted that he would have had enough time to complete the fire drills had Spaulding not gone home. Ex. C-29 at 1 (statement to Grulke). However, Butzlaff pressured Spaulding to violate her own orders from Grulke not to assist with the fire

drills. Acting shift supervisor Newlun made the reasonable judgment that the security of the facility would be better served by Spaulding and Butzlaff not working together on the same shift so he allowed Spaulding to go home. Thus, Butzlaff put himself in the position of having to perform the tasks of two security officers thereby putting the security of the facility in jeopardy.

Besides causing Spaulding to leave her shift, Butzlaff's own conduct resulted in the failure to complete the fire drills in other ways. He failed to advise Grulke that he would be unable to do them. Tr. at 1254. He failed to advise Newlun that he would need assistance when the latter sent Spaulding home. He watched the switchboard during the telephone operator's breaks when he could have been performing the fire drills.

Moreover, Butzlaff's record was not entirely spotless as he suggests. Spaulding had complained to Grulke about his condescending and patronizing conduct towards her and Grulke reprimanded him for it. The events of April 30, 1990, reasonably can be seen as an extension of Butzlaff's failure to work with and show proper respect for a co-worker.

Butzlaff complains that his fire drill training was inadequate. However, the evidence reveals that Spaulding was able to do them and she had as much or as little training on them as Butzlaff, having been hired at roughly the same time. Tr. at 1214-15. The fire drill procedures, See Decision, Finding of Fact 6, do not appear to have been particularly difficult to master and Matthews and Spaulding both testified

that they were easy to do. Tr. at 1056, 1196. While the evidence suggests that Grulke ordered Butzlaff to conduct the drills because he thought Butzlaff needed the practice, the Commission could conclude that the deficiency was in Butzlaff's performance rather than in the inadequacy of his training.

Butzlaff contends that Grulke did not fairly conduct the termination hearing. Here, it must be recalled that Butzlaff was a probationary employee and not entitled to termination for cause and with due process. Thus, it is not conclusive that the usual practice was to allow employees who had made a first mistake an opportunity to conform their conduct. The Court is not aware of any employer whose rules regarding termination are so rigid, especially with respect to probationary employees, that every employee is entitled to one free kick at the cat regardless of the egregiousness of their error. The Department did not have such a policy. Tr. at 1514-15 (Dokken).

It must be emphasized that Butzlaff did not merely fail to conduct the fire drills but that, according to the evidence credited by the Commission, he put himself in the position of having to conduct the fire drills himself by baiting Spaulding, putting his own interests ahead of the security of the facility. Moreover, again, Butzlaff was not operating on a clean slate; he had a history of not being able to work with Spaulding and this event could certainly be regarded as an episode of it.

As to the procedure used by Grulke to conduct the

hearing, the Court is not persuaded that there were anything more than procedural irregularities which in no way prejudiced Butzlaff. Butzlaff knew he was a probationary employee. Grulke had informed him prior to the start of the shift in question that failure to conduct the fire drills would result in job action. Ex. R-18 at 3. Grulke also advised Butzlaff in a notice the day before the hearing that termination was being considered. Ex. R-26.

This is not a cause of action for termination without due process; it is a review of an administrative decision concluding that FMLA rights had not been violated. Butzlaff nowhere informs the Court that he could or has commenced a cause of action for termination without due process in a court or any other forum. The Commission was not required to determine that Grulke had made an airtight case that Butzlaff's conduct required no action other than termination or that Grulke's running of the termination hearing was flawless. The only question here is whether Butzlaff's FMLA rights were violated and, as the Court of Appeals made clear in both Kovalic decisions, irregularities in the termination process in no way compel a conclusion that discrimination occurred. At best, the irregularities in Butzlaff's termination might have permitted the Commission to infer that the Department's proffered reasons for the firing were pretextual but those irregularities certainly did not compel such an inference. The Commission reasonably determined that the Department's actions were within the bounds of reason and not pretext for anything, let alone for discrimination.

Butzlaff contends that the Commission was biased against him. Adjudicators are presumed to act with honesty and integrity. Eastman v. City of Madison, 117 Wis.2d 106, 114 (Ct. App. 1983). In order to show bias, the party asserting such a charge must show that it was treated unfairly. State v. McBride, 187 Wis.2d 409, 416 (Ct. App. 1994). Butzlaff's claim that the Commission was biased here is utterly without foundation.

Butzlaff fails to identify any evidence of bias against him. His main "evidence" of the Commission's bias is its opinion that "[t]his is not a close case." Decision at 21. A tribunal's low opinion of a party's case does not establish bias. Otherwise, findings of bias would be a common occurrence. That the parties chose to draw this case out over several years and an eight day hearing may reflect overlawyering by the parties as much as anything. At any rate, the fact remains that once the Commission discredited the testimony about Grulke's motive, the outcome of the case became a foregone conclusion.

Butzlaff also asserts that the error of law which led to the Court of Appeals decision in Butzlaff v. Wis. Personnel Comm., 166 Wis.2d 1028 (Ct. App. 1992), is further evidence of bias. This argument deserves short shrift. The Commission's error was in interpreting a statute which was acknowledged by Butzlaff to be ambiguous. 166 Wis.2d at 1034.

Finally, the Commission's twenty-one page decision exhaustively established the basis for its decision. If it

does not contain a discussion of the legal issues involved, that is because the case turned on the factual issues and credibility determinations.

Accordingly,

O R D E R

IT IS HEREBY ORDERED that the decision of the Wisconsin Personnel Commission in the above-captioned matter is AFFIRMED.

Dated, at Madison, Wisconsin, this 19 day of March, 1997.

BY THE COURT

Richard J. Callaway, Judge
Circuit Court, Branch 6

cc: Attorney Thomas H. Brush
Assistant Attorney General Richard E. Moriarty
Assistant Attorney General David C. Rice