STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 17

DENNIS J. SHESKEY,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION, and
WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

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PERSONNEL COMMISSION

Case No. 98 CV 2196

MEMORANDUM DECISION AND ORDER

The petitioner, Dennis J. Sheskey, has filed a petition for judicial review of a ruling issued by the Wisconsin Personnel Commission (WPC) on June 3, 1998. The WPC granted the Wisconsin Department of Employment Relation's motion to dismiss after the WPC found that Sheskey had failed to file his complaint under the statutory limitations of Wis. Stat. §103.10(12)(b). On June 22, 1998, the WPC denied Sheskey's petition of rehearing. For the reasons set forth below, WPC's decision is affirmed.

STANDARD OF REVIEW

When an agency has interpreted a provision of law, the court must review this interpretation according to Wis. Stat. §227.57(5), which states:

> 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.

Wis. Stat. §227.57(5) (1997-98). If the court does not find any grounds for setting aside, modifying, or remanding the agency action, it must affirm the agency's decision. Wis. Stat. §227.57(2) (1997-98).

When reviewing questions of law, the court is not bound by an administrative agency's conclusions. Kelley Co., Inc. v. Marquardt, 172 Wis.2d 234, 244, 493 N.W.2d 68 (1992). However, the court has applied three levels of deference to the conclusions of law and statutory interpretation in agency decisions. Id. 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." Id. Second, if the agency decision is "very nearly" one of first impression, it is entitled to a mid-level standard of review, that is, "due weight" or "great bearing." Id. Third, if the case is clearly one of first impression for the agency and the agency lacks expertise or experience in determining the question presented, *de novo* review is applied. Id. at 245.

The court must also review an agency's order or award in light of Wis. Stat. §227.57(6), which states:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Thus, the court must determine whether there is sufficient evidence in the record to support the agency's decision. Leist v. LIRC, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (Wis. 1994). If the court finds substantial evidence in the record, it must not upset the agency's decision. Id.

The court must affirm the agency's findings if there is *any* credible evidence, even if the

agency's findings are contrary to the great weight and clear preponderance of the evidence. CBS, Inc. v. LIRC, 213 Wis.2d 285, 294, 570 N.W.2d 446, 450 (Wis. Ct. App. 1997). Credible evidence is evidence that excludes speculation and conjecture. Bretl v. LIRC, 204 Wis.2d 93, 100, 553 N.W.2d 550, 552 (Wis. Ct. App. 1996). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Id.

In some instances, one or more inferences may be drawn from the evidence. In those cases, the drawing of one such permissible inference by the agency is an act of fact finding, and the inference so derived is conclusive on the reviewing court. Bernhardt v. LIRC, 207 Wis.2d 292, 299, 558 N.W.2d 874, 876 (Wis. Ct. App. 1996). However, if the facts are undisputed and only one reasonable inference can be drawn from the facts and that inference is contrary to the conclusion drawn by the agency, the court must overrule the agency. Leist, 183 Wis.2d at 458, 515 N.W.2d at 271.

DECISION

A. Statutory Interpretation by DER

WPC dismissed Sheskey's claim after it determined that Sheskey failed to file his complaint within the statutory time limitations of Wis. Stat. §103.10(12)(b). This section states:

> An employee who believes his or her employer has violated sub. (11) (a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation.

In its ruling, the WPC discussed each of the violations alleged by Sheskey in his complaint and determined that Sheskey did not file his complaint within 30 days after any of the violations or within 30 days after he should reasonably have known of the violations.

In aiding their determination of when the violation occurred or of when Sheskey should reasonably have known the violation occurred, the WPC relied on its own decisions in which it had interpreted time limitation statutes similar to Wis. Stat. §103.10(12)(b). Specifically, the WPC relied on its decision in Sprenger v. UW-Green Bay, 85-0089-PC-ER, 1/24/86, in which the WPC interpreted two statutory sections regarding the time limit for filing a complaint of discrimination under the Wisconsin Fair Employment Act. The statutory sections included Wis. Stat. §230.44(3), which states:

> Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later, except that if the appeal alleges discrimination under such. II of ch. 111, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred.

and Wis. Stat. §111.39(1), which states:

> The department may receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination, unfair honesty testing or unfair genetic testing occurred....

The WPC in Sprenger noted the similarity between the language in the above sections that an appeal must be filed "...300 days after the alleged discrimination occurred" and the language in Title VII that a charge of discrimination "...be filed within 180 days after the alleged unlawful employment practice occurred..." 42 U.S.C.A. §2000e-5(e)(1)(West 1999). Because of this similarity, the WPC reviewed federal cases that had applied §2000e-5(e)(1) to determine the beginning point for filing a complaint under Wis. Stat. §230.44(3) and Wis. Stat. §111.39(1).

In particular, the WPC in Sprenger referred to Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975). In that case, the United States Supreme Court held that the

statute of limitations did not begin to run until "the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." Reeb, 516 F.2d at 931. The WPC in Sprenger then adopted this "reasonably prudent" standard and used it to determine when discrimination complaints must be filed under Wis. Stat. §230.44(3) and Wis. Stat. §111.39(1).

In our case, the WPC similarly adopted and applied this "reasonably prudent" standard, and this standard was the correct standard to apply for a number of reasons. First, Wis. Stat. §103.10(12)(b) states that an employee may file a complaint "within 30 days after the violation occurs." This language is very similar to the language cited above in Wis. Stat. §230.44(3), Wis. Stat. §111.39(1) and Title VII. As a result, if the "reasonably prudent" standard is used to help define the latter statutory sections, it should also be reasonable to use this standard to help in applying Wis. Stat. §103.10(12)(b).

Second, Wis. Stat. §103.10(12)(b) contains language that Wis. Stat. §230.44(3), Wis. Stat. §111.39(1) and Title VII do not contain, that is, that an employee may also file a complaint within 30 days after he or she "should reasonably have known that the violation occurred." This language is very similar to the "reasonably prudent" standard itself. As a result, the WPC acted appropriately in applying the "reasonably prudent" standard in this case.

Third, the "reasonably prudent" standard that was first enumerated in Reeb has been followed in a number of cases as the correct standard to use in determining the beginning point for the statutory time period. *See e.g.*, Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3rd Cir. 1994); Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984). As

a result, the WPC correctly relied on this standard in making its decision.

The Wisconsin Supreme Court interpreted Wis. Stat. §103.10(12)(b) in Jicha v. DILHR, 169 Wis.2d 284, 485 N.W.2d 256 (Wis. 1992). In Jicha, the court also answered the question of when the 30-day limitation begins to accrue under this statute. The Court concluded that:

> Our case law indicates that "a cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." In other words, a cause of action has accrued when all of the elements necessary to bring a cause of action have accrued.
>
> The statute at issue in this case provides that an employee must bring a claim "within 30 days after the violation occurs..." This language is another way of saying that a claim must be brought within 30 days after a violation accrues or a cause of action has accrued.

Jicha, 169 Wis.2d at 294, 485 N.W.2d at 260 (citations omitted). Thus, the court concluded that a claim must be brought within 30 days after the violation accrues or a cause of action has accrued.

Later in the opinion, however, the additional language in Wis. Stat. §103.10(12)(b) required the court to make an additional examination under the statute. The court had to examine whether the employee brought his complaint within 30 days after he "reasonably should have known that the violation occurred." The court decided that the ultimate determination depended on when the employee "reasonably knew of a violation."

The standard applied in Jicha is identical to the "reasonably prudent" standard applied in our case. The "reasonably prudent" standard requires that a complainant file a claim when "the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." This language is simply another way of stating that the complainant must file a claim

when he or she knows or should have reasonably known of the violation. As a result, the WPC correctly applied a standard that is identical to the standard applied by the Wisconsin Supreme Court in Jicha.

Having decided that the WPC applied the correct standard, I now must determine whether the WPC interpreted this provision of law correctly. Again, depending on the agency's expertise in interpreting a provision of law, I will apply a level of deference to the agency's statutory interpretation. An agency's statutory interpretation is entitled to "great weight deference" if: "(1) the legislature has charged the agency with the duty of administering the statute; (2) the agency's interpretation is one of long-standing; (3) the agency used its expertise or specialized knowledge in forming the interpretation; and (4) the interpretation of the agency will provide uniformity and consistency in the application of the statute." Balele v. Wisconsin Personnel Commission, 589 N.W.2d 418, 421 (*citing* Harnischfegher Corp. v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (Wis. 1995)).

In most instances, the WPC has been given authority under Wis. Stat. §103.10(12) to administer complaints concerning FMLA violations. Wis. Stat. §103.10 has been in effect since 1988, and surely the WPC has had significant opportunity to interpret and apply issues of timeliness of complaints under Wis. Stat. §103.10(12)(b). Thus, the WPC has obtained an expertise in applying this statute, and the agency's interpretation of this statute in this case will provide necessary uniformity and consistency in the application of the statute. As a result, the WPC's determination is entitled to "great weight deference."

In his complaint, Sheskey identified several incidents in which employees at DER allegedly retaliated and discriminated against him for taking family leave. For the most part,

these incidents all occurred between November 5, 1994 and August 18, 1995 and included (1) an alleged inappropriate identification on his evaluation of his use of family leave, (2) alleged misinformation by DER regarding use of vacation and sick days during his family leave, (3) an alleged change in work assignments and (4) an alleged inappropriate lay off procedure. Sheskey also argued that DER retaliated and discriminated against him for taking family leave by not recalling him from lay off after August 18, 1995. I will address each of these complaints and the WPC's application of Wis. Stat. §103.10(12)(b) to them.

1. Identification of Family Leave on Sheskey's Evaluation Form

The WPC determined that the facts that would give rise to an FMLA violation concerning the identification of family leave on Sheskey's evaluation form should have been apparent to Sheskey at the time of his evaluation on February 1, 1995. The WPC noted that, at that time, Sheskey questioned his supervisor about the notation of his family leave on his evaluation form. Even though his supervisor reassured Sheskey that the notation on his evaluation was legal, the WPC determined that a "reasonably prudent" person in a similar situation as Sheskey position would have inquired further about possible discrimination at that time. The WPC reached this conclusion after applying the "reasonably prudent" standard in conjunction with Oestreich v. DHSS & DMRS, 89-0011-PC, 9/8/89, which stated:

> The general rule is that when a "reasonably prudent" person is affected by an adverse employment action such as a disciplinary action, denial of reclassification, failure to promote, etc., he or she could be expected to make whatever inquiry is necessary to determine whether there is a basis for believing discrimination occurred.

Applying this language, the WPC concluded Sheskey should have inquired about his rights under FMLA after this alleged violation. I agree. Sheskey should have inquired about his rights after

his evaluation, and as a result, the statute of limitations for this alleged violation began to run after this evaluation.

Sheskey argues, however, that, before the statute of limitations begins to run, the state must prove certain allegations about Sheskey claims. In particular, Sheskey argues that the state must prove both that the notation on the evaluation was an actual FMLA violation and that Sheskey suffered an adverse employment action as a result of this violation. Clearly, Sheskey has the burden of proving the elements of his own claims, including whether an FMLA violation occurred and whether he suffered any adverse employment action. The real issue remains, however, that Sheskey's claim regarding an FMLA violation on his evaluation should have been brought within 30 days after his inquiry regarding his FMLA rights during the February 1, 1995 evaluation. Sheskey did not make an inquiry, and the WPC was correct in dismissing this claim.

2. Alleged Misinformation Regarding Use of Vacation / Sick Days

The WPC dismissed Sheskey's claims that DER retaliated and discriminated against him for taking family leave by giving him misinformation about using vacation days during his leave. The WPC dismissed these claims because Sheskey provided no reason for tolling the statute of limitations. I agree. These violations should have been apparent to Sheskey at the time they occurred, or Sheskey should have made a reasonable inquiry regarding his rights under FMLA at that time. Because Sheskey did not file his claim within 30 days from when these violations should have become apparent, his claims are barred under Wis. Stat. §103.10(12)(b).

Sheskey argues that the WPC cannot dismiss these claims because the state must first prove that he suffered an adverse employment action and that these actions were discriminatory or retaliatory. Again, the real issue is whether these claims were timely filed, not whether these

claims can be proven. Any violations of FMLA should have been apparent to Sheskey at the time these actions by DER occurred, and these claims were properly dismissed.

3. Alleged Change in Work Assignments

The WPC dismissed Sheskey's claim that DER retaliated or discriminated against him by changing his work assignments. The WPC determined that Sheskey's claim was untimely and that he provided no explanation for tolling the filing deadline. I agree. Sheskey should reasonably have known about any violations at the time they occurred, which was between November 1994 and August 1995.

Sheskey once again argues that the statute of limitations regarding this claim should not begin to run because the state has not proven discrimination or adverse employment action. Regardless of proof concerning this claim, the claim was not timely filed and was properly dismissed.

4. Alleged Improper Layoff Procedure

The WPC determined that Sheskey's complaint alleging that his layoff on August 18, 1995 was the result of retaliation or discrimination was untimely. Sheskey's complaint discussed the alleged hostile environment at DER and his surprise at the abruptness of his layoff. The WPC concluded that "a person with a reasonably prudent regard for his or her rights, similarly situated to complainant, either would have known the facts necessary to have filed a claim, or would have made additional inquiry to attempt to ascertain those facts." (WPC Ruling on Motion, June 3, 1998, Page 7.) I agree.

Sheskey repeats his argument that the state did not prove that the layoff was the result of discrimination or retaliation and that this layoff was an adverse employment action. What

Sheskey fails to understand is that timeliness is the issue, and he failed to file his complaint on time.

It is interesting that Sheskey has changed the facts from his original complaint and now argues that nothing out of the ordinary occurred during his employment at DER. In his briefs to this court, Sheskey effectively denies that any discrimination or retaliation occurred between November 1994 and August 1995 during his employment with DER. He also argues that the state must prove these incidents occurred, not him. Of course, I am troubled by the changes in Sheskey's claims and believe that these claims border on frivolity.

5. Alleged Denial of Recall Rights

The WPC dismissed Sheskey's claim that the DER discriminated or retaliated against him for taking family leave by not recalling him from layoff after August 18, 1995. The WPC concluded that, after his layoff on August 18, 1995, "a person with a reasonably prudent regard for his or her rights under similar circumstances would not have waited until February 19, 1998, to make an inquiry relative to his recall rights." (WPC Ruling on Motion, June 3, 1998, Page 8.) The WPC believed that, because Sheskey already allegedly had suspicions of discrimination and retaliation in August 1995, it was unreasonable for him to wait until February 1998 to investigate these violations of FMLA concerning his recall rights.

Sheskey argues that he did not know of any failures to recall until he began examining DER records in February 1998. At that time, he argues, his own investigation of DER records revealed to him that he had been denied various restoration opportunities, specifically in October 1995 and July 1997. Sheskey believes that his self-notification on February 22, 1998 should begin the 30-day statute of limitations. Further, he states there is no precedent for "expecting

an employee to actively search for hidden evidence of illegal or discriminatory adverse employment actions." (Petitioner's Reply Brief, January 4, 1999, Page 5.)

Again, the WPC has correctly applied Wis. Stat. §103.10(12)(b). In light of the other alleged discriminatory events surrounding his employment with DER, Sheskey should have made a reasonably inquiry well before February 1998 as to why DER had not informed him of any reinstatement vacancies.

The WPC states that Sheskey's situation was similar to Kimble's situation in Kimble v. DILHR, 87-0061-PC-ER, 2/19/88. In that case, the WPC dismissed Kimble's claim that DILHR had retaliated against him by denying him increases in salary. The WPC dismissed this claim because it believed that Kimble should have investigated salary data well before his filing date, especially considering that Kimble had already alleged discrimination by the DILHR in a complaint two years before this time. The WPC's application of this precedent was correct. As a person with a reasonably prudent regard for his rights, Sheskey, like Kimble, should have investigated into his recall rights well before February 1998. Two and one-half years is certainly a long time to wait to investigate into why he had not been notified by the DER of any restoration opportunities, especially when considering Sheskey had suspected retaliation and discrimination prior to this time.

6. Notification Violations

Lastly, Sheskey argues that the DER did not notify him of possible job opportunities and that this was a violation of his recall rights. Sheskey did not raise this issue before the WPC. "The general rule, is that, in the absence of fraud, evidence will not be taken in the circuit court when reviewing the department's orders." Weibel v. Clark, 87 Wis.2d 696, 708, 275 N.W.2d

686 (Wis. 1979) (citing International Harvester Co. v. Industrial Comm., 157 Wis. 167, 172, 147 N.W. 53 (Wis. 1914)). "A party is precluded from offering evidence he failed to offer before the commission." Id.

There is no evidence that the WPC acted with fraud. In turn, Sheskey is precluded in offering additional evidence to this court regarding the DER's failure to notify him of recall opportunities that was not offered to the WPC.

B. Evidence Supporting DER's Decision

Sheskey claims that WPC's decision was not supported by the substantial evidence in the record. In particular, Sheskey argues the substantial evidence in the record does not support DER's finding that the events prior to September 1995 should have prompted him to file a complaint. Instead, Sheskey argues, the substantial evidence shows that he did not know that he was being discriminated against until February 1998 when he reviewed documents through an open records request and found that he was allegedly denied his restoration rights.

The substantial evidence supports WPC's decision. Again, the court reviews whether there is substantial evidence in the record to support the finding by the WPC, not whether there is substantial evidence to support an alternate finding. The WPC relied on Sheskey's complaint in concluding that he should reasonably have known about any alleged retaliation or discrimination occurring during his employment with DER. The complaint is substantial evidence in the record, and the WPC made reasonable inferences from this substantial evidence.

Sheskey also argues that the substantial evidence in the record does not support WPC's conclusion that Sheskey was aware or should have been aware of any retaliation or

discrimination from his denied mandatory restoration rights prior to February 1998. However, there is substantial evidence in the record to support the WPC's finding that Sheskey should reasonably have known about any alleged retaliation or discrimination.

Specifically, the substantial evidence in the record shows that Sheskey suspected retaliation and discrimination were occurring prior to his alleged denial of recall rights. Thus, Sheskey should have investigated the cause of any denial of recall rights after a reasonably amount of time had passed where he was not recalled. Sheskey did not. Further, the substantial evidence shows that Sheskey did not investigate his denial of recall rights until February 1998, two and one-half years after his layoff. Certainly, this substantial evidence supports the WPC's inference that Sheskey should have reasonably inquired about his recall rights sooner.

C. Allegations that WPC's Decision was Arbitrary and Capricious

Sheskey also argues that the WPC's conclusions of law and findings of fact were arbitrary and capricious. In particular, he first asserts that the WPC selectively and arbitrarily interpreted submitted evidence, statutes and cases to justify the dismissal of petitioner's complaint. I disagree. The WPC's inferences were from substantial evidence in the record, and its interpretation of statutes and precedent were correct.

Second, Sheskey asserts that the WPC's decision was arbitrary and capricious because the WPC never specified precise dates on which the statute of limitations began to run for his various claims. Again, I disagree. Although the WPC did not provide specific dates on which the statute of limitations would begin to run on some of Sheskey's claims, the WPC specified that Sheskey should reasonably have known about any violations after a reasonable amount of time. The WPC can certainly conclude that Sheskey should have acted after a reasonable

amount of time and that Sheskey forfeits his right to file a claim if he did not file within this reasonable amount of time.

CONCLUSION

For the reasons stated above, the findings of fact and conclusions of law made by the WPC are affirmed. Dennis Sheskey's petition is denied, and the case is dismissed with prejudice with no costs or attorney fees.

Dated this 27 date of April, 1999.

BY THE COURT:

Paul B Higginbotham

Judge Paul B. Higginbotham
Dane County Circuit Court - Branch 17

cc: Dennis J. Sheskey
John D. Niemisto, AAG
Jennifer Sloan Lattis