

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 15

DANE COUNTY

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE
DEVELOPMENT

FILED

JAN 25 2018

Petitioner,

DANE COUNTY CIRCUIT COURT

v.

Case No. 17-CV-1587

STATE OF WISCONSIN
EMPLOYMENT RELATIONS
COMMISSION,

RE: [WERC Dec. No. 36912-B]

Respondent.

**DECISION ON PETITION
FOR JUDICIAL REVIEW**

The State of Wisconsin Department of Workforce Development (“DWD”) seeks judicial review of two administrative decisions issued by the State of Wisconsin Employment Relations Commission (the “Commission”) related to the discharge of employee Susan Rakowski. The DWD asks the court to reverse the Commission’s determinations that (1) DWD had not made a valid, unconditional offer of reinstatement to Rakowski, and that (2) DWD had forfeited its authority to choose whether to restore Rakowski to her former position or transfer her to a comparable position. For the reasons stated below, the decisions of the Commission are AFFIRMED.

BACKGROUND

Susan Rakowski started working in the Unemployment Insurance Division of the DWD (“DWD-UI”) in 1995. She successfully completed her one-year probation and attained

permanent status in class. From 1995 to 2015 Rakowski worked for DWD-UI as a Claims Specialist, Claims Mentor, and as a Claims Lead. Rakowski was a Claims Lead at the Milwaukee Benefit Center, a position formally titled Employment Security Assistant (ESA) 4, until she accepted a permissive transfer to a different position within DWD-UI in October of 2015. (R. at 12.)

On October 4, 2015, Rakowski began working as an Unemployment Benefit Specialist in DWD-UI. (R. at 57). She was required to serve a twelve-month probationary period. (R. at 12.) DWD terminated Rakowski from her probationary period at the eleventh month. (R. at 13.) In addition, DWD discharged Rakowski from state employment entirely. (R. at 13.)

Rakowski grieved her termination through administrative procedures and ultimately appealed to the Commission on December 13, 2016. (R. at 1.) The DWD moved to dismiss the complaint on the ground that the Commission lacked jurisdiction to review Rakowski's termination. (R. at 8-13.) On March 6, 2017, the Commission denied DWD's motion. (R. at 16-17.) The Commission determined it needed more information about Rakowski's position at the time of her termination and whether she should have been on probation before it could make a ruling on jurisdiction. (R. at 17.) The Commission noted that even if the DWD was authorized to institute a probationary period, DWD was required to restore Rakowski to her previous position or to transfer her to a position for which she was qualified because she had obtained permanent class status prior to her promotion. (R. at 17.)

On April 11, 2017, the Commission issued a decision and order regarding Rakowski's termination. It determined it was within the discretion of the DWD to impose a twelve-month probationary period following Rakowski's transfer to the Unemployment Benefit Specialist position, and that it therefore did not have jurisdiction to review her termination from that

position¹. (R. at 92.) Because Rakowski had permanent status in class prior to her October 4, 2015 transfer, however, the WERC determined it had jurisdiction pursuant to Wis. Stat. § 230.44(1)(c) to review her termination from state employment. (R. at 92.) The Commission found that DWD did not have just cause to discharge Rakowski, and therefore was required to reinstate her and make her whole for all lost wages, benefits, and seniority.² (R. at 92.)

In a memorandum accompanying its decision, the Commission addressed the two remaining issues: (1) whether DWD had previously made a reinstatement offer to Rakowski that tolled its back pay obligation; and (2) what position should Rakowski hold upon reinstatement. (R. at 94.) As to the first issue, the Commission determined DWD had not made an unconditional reinstatement offer as required by *Anderson v. LIRC*, 111 Wis. 2d 245, 254-257, 330 N.W.2d 594 (1983). (R. at 94.) Thus, Rakowski's back pay did not need to be tolled. (R. at 94.)

As for the second issue, the Commission reasoned that under normal circumstances Rakowski should have either been restored to her former ESA 4 position or transferred to a

¹ Section 230.28(1)(d) of the Wisconsin Statutes provides:

A promotion or change in job status within in an agency shall not affect the permanent status in class and rights, previously acquired by an employee within such agency. . . .

Section 230.44(1)(c) provides:

Demotion, layoff, suspension or discharge. If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause.

Jurisdiction turns on whether an employee was terminated during a validly imposed probationary period. The Commission lacks jurisdiction if the termination occurred during a valid probationary period and the employee had not previously obtained permanent status in another class.

² Regarding Rakowski's discharge from state employment, the DWD acknowledged that WERC had jurisdiction and that it lacked just cause to discharge Rakowski. DWD further conceded that it had an obligation to reinstate Rakowski and make her whole.

position for which she was qualified in the same pay range as the ESA 4 position without a break in employment. (R. at 94.) DWD would normally have the discretion to either restore or transfer an employee with permanent class status upon early termination from a probationary period. (R. at 94.) In this case, however, the Commission determined that restoring Rakowski to her former position would maximize her opportunity to successfully re-enter state employment. (R. at 94.) The Commission noted that because DWD had wrongfully discharged Rakowski, it lost the “comparable position” option it would usually have. (R. at 94.) Consequently, the Commission rejected the DWD’s discharge of Rakowski and ordered DWD to immediately reinstate her to her former ESA 4 position, with permanent status in class, and to make her whole for all lost wages, benefits, and seniority. (R. at 92.)

Following the Commission’s decision, DWD petitioned for a rehearing. (R. at 96-104.) DWD argued the Commission exceeded its authority when it determined DWD had forfeited the authority to determine which position Rakowski would hold upon reinstatement, and that it erred when it determined DWD’s offer of reinstatement was not a valid, unconditional offer. (R. at 96.)

On May 30, 2017, the Commission denied DWD’s request for a rehearing. In a written decision, the Commission restated its reasoning for ordering DWD to reinstate Rakowski to her previous position. (R. at 112-13.) It noted that it had the inherent power to remedy a discharge without cause by awarding various equitable remedies, including back pay and reinstatement. (R. at 113.) The Commission also dismissed DWD’s renewed argument that Rakowski’s back pay should be limited to the period of time prior to the date she rejected an offer of reinstatement, citing lack of evidence that Rakowski turned down an unconditional, unilateral offer of reinstatement. (R. at 113).

DWD now seeks judicial review.

STANDARD OF REVIEW

Section 230.44(4)(bm) of the statutes provides that decisions of the Wisconsin Employment Relations Commission are subject to review under Chapter 227 of the Wisconsin Statutes “only on the ground that the decision was procured by corruption, fraud, or undue means or that the arbitrator or the commission exceeded the arbitrator’s or the commission’s power.”

Wis. Stat. § 230.44(4)(bm). Paragraph (4)(c) then provides:

After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.

Wis. Stat. § 230.44(4)(c).

Judicial review under ch. 227 is limited to determining whether the agency committed a procedural error, erroneously interpreted a provision of law, or lacked substantial evidence in the record for its decision. Wis. Stat. § 227.57(3)-(6). The burden of proof is on the party seeking to overturn the underlying decision, and not on the agency to justify its decision. *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). Unless the court finds grounds for setting aside, modifying, remanding or ordering agency action, it must affirm the agency’s action. Wis. Stat. § 227.57(2).

ANALYSIS

DWD contends the commission erroneously interpreted applicable law and acted outside its statutory authority in determining that DWD had not made a valid, unconditional offer of reinstatement to Rakowski. The Commission determined no unconditional offer of reinstatement

had been made by the time of its decision, and therefore Rakowski's back pay entitlement had not been tolled.

A valid offer of reinstatement ends the accrual of back pay as of the date the offer is rejected or accepted by a former employee. *Anderson v. LIRC*, 111 Wis. 2d 245, 254, 330 N.W.2d 594 (1983). The Wisconsin Supreme Court in *Anderson* made clear that an offer of reinstatement must be specific and unconditional. *Id.* at 255. "A discharged employee should be encouraged to accept reinstatement; an equivocal, unclear offer by the employer would not accomplish this end." *Id.* The court set forth guidelines to help employers in this area: (1) the offer of reinstatement must be for the same position or a substantially equivalent position; (2) the offer of reinstatement must be unconditional; (3) the employee must be afforded a reasonable time to respond to the offer of reinstatement; and (4) the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual. *Id.* at 256-57.

Here, I find that the Commission correctly applied *Anderson* and acted with proper authority when it determined DWD had not made a valid, unconditional offer. In its decision, the Commission states: "Here, the only offer we are aware of was made as part of a settlement discussion and had conditions attached." (R. at 94.) The "offer" the Commission references occurred on March 17, 2017, during negotiations between Rakowski and DWD, mediated by Commission attorney Raleigh Jones. Following the negotiations, Mr. Jones sent an email to Rakowski and DWD memorializing a settlement offer Rakowski was to consider over the weekend. (R. at 98.) The email reads, in relevant part:

...

1. You will be reinstated and placed in an Employment and Training Specialist position on a date to be determined (probably late March, 2017);

5. You will also be paid \$5000 to reimburse you for various incidental costs you incurred; and

6. All of your pending appeals with the Commission will be dismissed.

This is simply the bare bones, so to speak, of what the settlement agreement would look like. The actual settlement agreement still has to be drafted by Ms. Larson; I just wanted you to have something in writing that memorialized the major points of the Employer's proposal.

One point that we did not talk about late in the day was whether you would serve a probationary period in your new position. I assume that the Employer wants you to serve a standard 1 year probationary period.

Raleigh Jones

(R. at 98-99.) The above quoted email is the only evidence of an offer in the record before court.

As to the first *Anderson* factor, Rakowski argued that DWD had previously found her unqualified for the position being offered.³ (R. at 83). In fact, Rakowski claimed she had been offered the position in February of 2017, but the DWD hiring authority then withdrew the offer of employment after conducting a reference check and determining she was not qualified for the position. (R. at 83, 90.) DWD did not respond to Rakowski's objections regarding her qualifications for the position.

The second factor, that DWD make an unconditional offer of reinstatement, is not supported by the record. The above quoted email is simply a written summary of the key terms of the negotiation between Rakowski and DWD and does not appear to be a complete,

³ Not only must the offer be for the same or a substantially equivalent position, a discharged or demoted employee "is not required in mitigation of damages, to accept alternative employment of an 'inferior kind', or of a more 'menial nature', or employment outside of his usual type or for which he is not sufficiently qualified by experience, or employment the inferiority of which might injuriously affect the employee's future career or reputation in his profession." *Anderson*, 111 Wis. 2d at 256 (internal citations omitted).

unequivocal offer. Attorney Jones notes: "The actual settlement agreement still has to be drafted by Ms. Larson." Further, no starting date is specified and the issue of a new probation period had yet to be decided. As such, I find it reasonable for the Commission to have determined, in the absence of any other written offer submitted by DWD, that an unequivocal, clear, and unconditional offer had not yet been made to Rakowski.⁴ Consequently, the Commission correctly determined that Rakowski's accrual of back pay had not ended.

DWD further contends that the Commission erroneously interpreted applicable law and acted outside its statutory authority in determining DWD forfeited its opportunity to choose which position Rakowski would hold upon reinstatement. The Commission argues that ordering Rakowski's reinstatement to her previous ESA 4 position falls within its equitable powers to remedy an unjust discharge.

Both DWD and the Commission rely on § 15.055 of the Administrative Code, which reads:

If a probationary period resulting from a transfer . . . is required, the appointing authority, at any time during this period, may remove the employee from the position to which the employee transferred, without the right of appeal. An employee so removed shall be restored to the employee's previous position or transferred to a position for which the employee is qualified in the same pay range or pay rate or counterpart pay range or pay rate without a break in employment. Any other removal, suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s. 230.34, Stats.

Wis. Admin. Code ER-MRS § 15.055. While accepting that it has an obligation to reinstate Rakowski to state employment following her termination without cause, DWD argues it has the discretion to either restore Rakowski to her previous position or transfer her to a comparable

⁴ The third and fourth *Anderson* factors have little bearing on this case. Given the absence of any final offer in the record, apart from Attorney Jones' summary email, the court does not address whether DWD afforded Rakowski a reasonable time to respond to an offer or whether an offer was made directly from DWD or an agent of DWD authorized to hire and fire.

position under this provision. DWD contends that the Commission's order went too far when it ordered Rakowski be reinstated to a specific position and infringed on DWD's statutorily granted discretion. DWD argues this is a case of a transfer related to Rakowski's termination from her probationary position, and the Commission does not have jurisdiction over transfers within the department's discretion.

The Commission correctly points out, however, that this is a case challenging an unjust discharge. Had DWD followed the mandate of § 15.055, it would have had the opportunity to restore Rakowski or transfer her without a break in employment. The DWD did neither when it terminated Rakowski's probationary period. Instead, Rakowski was discharged from DWD entirely, which she appealed on the ground that her discharge was not based on just cause. As § 15.055 states, "[a]ny other removal, suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s. 230.34, Stats." Section 230.34(1)(a) of the statutes provides: "Any employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause."⁵ Whether Rakowski had permanent status in class is undisputed. Rakowski was correct to appeal her discharge, and the Commission properly exercised jurisdiction when it reviewed her discharge for lack of just cause.

The Commission did not err in asserting its equitable power by ordering Rakowski be restored to her old ESA 4 position. Section 230.43(4) of the Wisconsin Statutes provides:

RIGHTS OF EMPLOYEE. If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment *by order of the commission* or any court upon review, the employee shall be entitled to compensation therefore from the date of

⁵ See also Wis. Stat. § 230.44(1)(c): *Demotion, layoff, suspension or discharge*. If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause.

such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled but for such unlawful removal, demotion or reclassification. . . .

Wis. Stat. § 230.43(4) (emphasis added). By DWD's own admission, it terminated Rakowski without just cause, in violation of the rights of employees with permanent in class status. Section 230.43(4) explicitly recognizes the power of the Commission to restore an employee to the position from which they were wrongfully removed. "Reinstatement is intended to put the employee in the position he or she would have been before the adverse employment action." *Sands v. Menards, Inc.*, 2010 WI 96, ¶ 68, 328 Wis. 2d 647, 680, 787 N.W.2d 384. Under Wis. Stat. § 230.44(4)(c), the Commission was required to affirm, modify, or reject DWD's termination of Rakowski. "If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." Wis. Stat. § 230.44(4)(c). DWD fails to demonstrate that the Commission exceeded its authority under §§ 230.43(4) and 230.44(4)(c) when DWD admittedly terminated her without just cause.

IT IS THEREFORE ORDERED THAT:

1. The Wisconsin Employment Relations Commission's determinations are affirmed.

Dated: January 25, 2018

By the Court:



Stephen E. Ehlke
Circuit Court Judge – Branch 15

cc: AAG Anne M. Bensky
Atty. Peter G. Davis