COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP690 **Cir. Ct. No. 2010CV2020**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LEONARD J. PIONTEK,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

COOPER SPRANSY REALTY, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Leonard Piontek was receiving unemployment benefits when he quit a part-time real estate agent job. The Labor and Industry Review Commission (LIRC) determined that a voluntary termination provision, WIS. STAT. § 108.04(7)(a),[1] was applicable and, therefore, Piontek's voluntary decision to quit rendered him ineligible for continued unemployment benefits. We agree with LIRC's interpretation of the statute and its application to the facts here. Accordingly, we affirm the circuit court's order affirming LIRC's decision.

Background

¶2 Leonard Piontek held a full-time job with Midwest Wholesale, where Piontek worked as a salaried sales representative. While working for Midwest Wholesale, Piontek also held a part-time job as a real estate agent with Cooper Spransy Realty, where Piontek was paid on a commission basis for "list[ing] and sell[ing] real estate." In July 2008, Piontek was laid off from his full-time job with Midwest Wholesale, and he filed for and began receiving unemployment benefits based on having lost that job. While receiving the unemployment benefits, Piontek continued working on a part-time basis for Cooper Spransy.

¶3 In April 2009, Piontek quit his job with Cooper Spransy in order to take a similar real estate agent position with Century 21, apparently because Piontek believed the Century 21 position would be more lucrative. Piontek continued to receive unemployment benefits flowing from losing the Midwest Wholesale job.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 In July 2009, the Department of Workforce Development determined that, because Piontek quit the Cooper Spransy job in April 2009, he was rendered ineligible for unemployment benefits. An administrative law judge affirmed that determination, and Piontek petitioned LIRC for review.

¶5 LIRC affirmed the ALJ's determination that Piontek became ineligible for unemployment benefits when he quit his job with Cooper Spransy. LIRC based its determination on WIS. STAT. § 108.04(7)(a), a statutory provision that governs eligibility in the event of a voluntary termination. Piontek sought judicial review of LIRC's decision, and the circuit court affirmed.

Discussion

¶6 Piontek appeals the circuit court's order affirming LIRC's ineligibility determination. On appeal, we review LIRC's decision, not the circuit court's decision. ***Oshkosh Corp. v. LIRC***, 2011 WI App 42, ¶6, 332 Wis. 2d 261, 796 N.W.2d 217. Piontek's challenge to LIRC's decision is solely a question of law regarding the proper interpretation of WIS. STAT. § 108.04(7)(a).

¶7 When reviewing an agency's conclusions of law, we sometimes accord the agency deference. *See* ***Andersen v. DNR***, 2011 WI 19, ¶26, 332 Wis. 2d 41, 796 N.W.2d 1 (explaining that three levels of deference may apply). Here, the parties dispute the appropriate level of deference. We need not resolve that dispute because, regardless of the level of deference, we would affirm.

¶8 Our interpretation of WIS. STAT. § 108.04(7)(a) is guided by the following principles:

> [S]tatutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common,

> ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). Further, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶9 We first explain that the plain language of WIS. STAT. § 108.04(7)(a) made Piontek ineligible for unemployment benefits because he quit his part-time real estate agent job. We then address and reject Piontek's arguments that this interpretation should be rejected because it leads to absurd results.

A. The Plain Language Of The Voluntary Termination Provision

¶10 Under WIS. STAT. § 108.04(7)(a), an employee who is otherwise eligible to receive unemployment benefits is rendered ineligible if the employee "terminates work." After Piontek was laid off from his full-time job at Midwest Wholesale, he received unemployment benefits, even though he continued to work part-time as a real estate agent. When Piontek quit that part-time job, LIRC determined that, under § 108.04(7)(a), he became ineligible for unemployment benefits. We agree with LIRC that the plain language of § 108.04(7)(a) dictates this result.

¶11 WISCONSIN STAT. § 108.04(7)(a) states, in pertinent part: "If an *employee* terminates work with an employing unit, the employee is ineligible to

receive benefits ...." ***Id.*** (emphasis added).[2] Piontek's argument is that he is not an "employee" within the meaning of this language and, therefore, LIRC was not entitled to rely on § 108.04(7)(a) to declare Piontek ineligible.

¶12 We first briefly discuss two undisputed aspects of why the language of WIS. STAT. § 108.04(7)(a) applies to Piontek. We then focus our attention on whether he was an "employee" of Cooper Spransy for purposes of the statute.

¶13 There is no dispute that Cooper Spransy, the real estate company Piontek worked for, is an "employing unit." That term is broadly defined to include "any person who employs one or more individuals." WIS. STAT. § 108.02(14m). LIRC contends, and Piontek does not dispute, that Cooper Spransy "employs" someone. More specifically, LIRC asserts that Cooper Spransy plainly "employ[ed]" Piontek and that, in any event, Cooper Spransy "employs" various office personnel.

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[2] WISCONSIN STAT. § 108.04(7)(a) reads, in full:

> **(7)** VOLUNTARY TERMINATION OF WORK. (a) If an employee terminates work with an employing unit, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 4 times the employee's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be that rate which would have been paid had the termination not occurred. This paragraph does not preclude an employee from establishing a benefit year by using the base period wages paid by the employer from which the employee voluntarily terminated, if the employee is qualified to establish a benefit year under s. 108.06(2)(a).

Our focus is on the first part of this subsection quoted in the text above. It is undisputed that the remainder of § 108.04(7)(a), concerning "requalification" for benefits, does not apply to Piontek.

¶14 LIRC also contends, and Piontek does not dispute, that Piontek met the "terminates work" requirement in WIS. STAT. § 108.04(7)(a). There is no doubt that Piontek "terminate[d]" when he voluntarily quit. The question then is whether Piontek terminated "work." "Work" is not defined in WIS. STAT. ch. 108. LIRC takes the position that the common usage of the term "work" is very broad and that there is no reason to think the term has a narrower meaning here. We agree and conclude, therefore, that Piontek "terminate[d] work" within the meaning of § 108.04(7)(a).

¶15 What remains is the parties' dispute over whether Piontek was an "employee" within the meaning of WIS. STAT. § 108.04(7)(a). If Piontek was an "employee" of Cooper Spransy, then, at least so far as § 108.04(7)(a) is concerned, LIRC properly deemed him ineligible because he was "an employee [that] terminate[d] work with an employing unit." *See* ***id.***[3]

¶16 The definitions statute at the beginning of WIS. STAT. ch. 108 defines "employee" as follows: "'Employee' means any individual who is or has been performing services for pay for an employing unit ...." WIS. STAT. § 108.02(12)(a). We have just explained that there is no dispute that Cooper Spransy is an employing unit. Thus, the only reason Piontek would not qualify as an "employee" is if he was not performing "services" for pay for Cooper Spransy.

¶17 "Services" is also not defined in WIS. STAT. ch. 108. Generally, when a statutory term is undefined, we give the term its "common, ordinary, and accepted meaning." *See* ***Kalal***, 271 Wis. 2d 633, ¶45. LIRC contends that there

[3] There are exceptions to ineligibility under WIS. STAT. § 108.04(7), one of which is the subject of Piontek's absurd results argument that we address in the next section of this opinion.

can be no serious dispute that Piontek, who was paid by Cooper Spransy on a commission basis for "list[ing] and sell[ing] real estate," provided "services" for pay as that term is commonly understood. We agree that Piontek's activity at Cooper Spransy fits the common meaning of "services."

¶18 Piontek, for his part, does not dispute that the *common* meaning of "services" for pay includes his work with Cooper Spransy. Rather, he seemingly argues that WIS. STAT. ch. 108 implicitly instructs that the term "services" has a narrower meaning because it is interchangeable with the statutorily defined term "employment." Piontek's work as a commission-paid real estate agent is specifically excluded from the term "employment." *See* WIS. STAT. §§ 108.02(15)(a) (generally defining "employment") and 108.02(15)(k)7. ("'Employment' ... does not include service ... as a real estate agent ... if all of the service ... is performed for remuneration solely by way of commission."). Thus, if Piontek is correct that the term "services" has the same meaning as "employment," then it is also true that Piontek's work at Cooper Spransy was not "services," and Piontek was not an "employee" for purposes of WIS. STAT. § 108.04(7)(a).

¶19 Piontek, however, fails to provide a persuasive reason for why we should construe the term "services" in WIS. STAT. § 108.02(12)(a) as having the same meaning as the defined term "employment." Piontek seems to think that his view is supported by the fact that "employment" is defined with reference to "any service." *See* § 108.02(15) ("'Employment', subject to the other provisions of this subsection means any service ... performed by an individual for pay."). For that matter, as we indicate above, the real estate agent exclusion further defines "employment" with reference to excluded "service[s]." *See* § 108.02(15)(k)7. However, these references to "service" in the subsections defining "employment" undercut, rather than support, Piontek's view.

¶20 First, there is the mere fact that the subsections sometimes use the two words in the same sentence. If the legislature thought the two words had the same meaning, it would not have used the two different words. *See* ***Hubert v. LIRC***, 186 Wis. 2d 590, 599, 522 N.W.2d 512 (Ct. App. 1994) ("Where the legislature uses similar but different terms in a statute, particularly within the same section, we presume it intended those terms to have different, distinct meanings.").

¶21 Second, the context of these particular subsections shows that "service" is intended to have a more general meaning. WISCONSIN STAT. § 108.02(15) defines "employment" as a subset of "any service." That is, "employment" means "any service" minus the listed exceptions.

¶22 Accordingly, we reject Piontek's assertion that the words "services" and "employment" have the same meaning.[4]

¶23 In a related point, Piontek contends that it matters that a prior version of WIS. STAT. § 108.02(12)(a) defined "employee" as someone engaged in services "in an employment." The former version of § 108.02(12)(a) stated: "'Employee' means any individual who is or has been performing services for an employing unit, *in an employment*, whether or not the individual is paid directly by such employing unit ...." WIS. STAT. § 108.02(12)(a) (2003-04) (emphasis added). The current version of § 108.02(12)(a) does not contain the "in an employment" limitation; it now reads: "any individual who is or has been

[4] In his reply brief, Piontek first asserts that the use of the term "services" in a different provision, WIS. STAT. § 108.02(12)(bm), supports his argument about the meaning of the term "services" in the "employee" definition. This argument comes too late. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286 ("[A]rguments advanced for the first time in a reply brief are waived."). Moreover, even if we were to address Piontek's argument, it is not clearly set forth and, as argued, we discern no merit to it.

performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit." WIS. STAT. § 108.02(12)(a).

¶24 We observe that, on its face, *the removal of* the "in an employment" language seemingly cuts against Piontek's view that the current definition is limited to "employment." Piontek nonetheless argues otherwise.

¶25 Piontek seemingly contends that, if we can discern why the legislature removed the "in an employment" limitation from the definition of "employee," that legislative intent will shed light on the legislature's intended meaning of the word "employee" in the current version of the statute. To this end, Piontek asserts that the legislature sought to do something very limited when it deleted "in an employment," namely, to close a loophole in a wage-reporting subsection.[5] We need not explain Piontek's theory in more detail because Piontek's argument contains a basic logical flaw. He assumes that the legislature could have had only one purpose in mind when it deleted "in an employment" from the definition of "employee." Plainly, however, the legislature could have had multiple purposes in mind, especially given that it chose to amend the general definition of "employee" applicable throughout WIS. STAT. ch. 108. Thus, even if Piontek first demonstrated ambiguity, thus opening the door to a legislative intent argument, we would not further entertain this particular legislative intent argument.[6]

[5] Piontek's view relates to wage-reporting requirements that apply to an "employee" in WIS. STAT. § 108.05(3).

[6] For the sake of completeness, we note that we have considered Piontek's argument that a statement of "initial applicability" in 2005 Wis. Act 86 supports his view. Section 73(1) of that Act states: "The treatment of section[] 108.02(12)(a) … first applies *with respect to employment* after December 31, 2005." 2005 Wis. Act 86, § 73(1) (emphasis added). Piontek seemingly (continued)

¶26 Therefore, we agree with LIRC that the plain language of WIS. STAT. § 108.04(7)(a) rendered Piontek ineligible to receive unemployment benefits because Piontek quit his job with Cooper Spransy.

B. Piontek's Absurdity Arguments

¶27 Piontek argues that LIRC's interpretation of "employee" leads to absurd results. If that were true, it would be a basis for rejecting the plain meaning interpretation adopted by LIRC. *See* ***State v. Carey***, 2004 WI App 83, ¶8, 272 Wis. 2d 697, 679 N.W.2d 910 ("[W]e will reject a literal reading of a statute that would lead to an absurd or unreasonable result that does not reflect the legislature's intent."). Piontek, however, does not persuade us that LIRC's interpretation produces absurd results.

1. Absurdity Related To WIS. STAT. § 108.04(7)(p)

¶28 Piontek argues that LIRC's interpretation of "employee" is absurd because it makes Piontek subject to WIS. STAT. § 108.04(7) and that provision denies Piontek eligibility but permits other similarly situated persons to retain eligibility. To understand Piontek's argument, it is necessary to understand § 108.04(7)(p).

¶29 WISCONSIN STAT. § 108.04(7)(p) permits an employee to quit his or her job to take another job and still remain eligible for unemployment benefits if

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means to assert that the italicized phrase is relevant evidence of legislative intent to limit an "employee" to "employment." However, Piontek does not explain why, in terms of the rules of statutory interpretation, we should consider this phrase. In any event, at best, the phrase might affect the applicability date in various situations, but it does not affect the statutory definition of "employee" that we discuss above.

the new job has a greater average weekly wage. Subsection (7)(p), however, contains another limitation. The new job has to either fit the WIS. STAT. ch. 108 definition of "employment" or otherwise be "work covered by the unemployment insurance law of any state or the federal government." WIS. STAT. § 108.04(7)(p).[7] In other words, the new job has to be covered by unemployment insurance laws (i.e., a "covered job"). With this understanding of § 108.04(7)(p) in mind, we turn to Piontek's absurdity argument related to that section.

¶30 It is undisputed that Piontek's new real estate job at Century 21 does not qualify under WIS. STAT. § 108.04(7)(p) as a covered job. Thus, according to Piontek, if people like him are subject to § 108.04(7), the result is the following unreasonably different treatment:

- If a person quits a covered job and takes a better-paying job of the same type (thus also a covered job), that person does not lose eligibility.

- If a person quits a non-covered job (such as Piontek's real estate job), and takes a better-paying job of the same type (thus also a non-covered job, like Piontek's real estate job), that person loses eligibility.

[7] WISCONSIN STAT. § 108.04(7)(p) states, in full:

> Paragraph (a) does not apply if the department determines that an employee, while claiming benefits for partial unemployment, terminated work to accept employment or other work covered by the unemployment insurance law of any state or the federal government, if that work offered an average weekly wage greater than the average weekly wage earned in the work terminated.

According to Piontek, it is absurd to discourage a person in the latter situation from taking a better-paying job in his field and particularly absurd to treat these situations differently. Piontek's argument does not persuade us.[8]

¶31 First, for his absurdity contention to succeed, Piontek would need to make an argument comprehensively addressing the complex unemployment insurance scheme. Only then would it be possible to discern whether the particular mechanism Piontek complains of is in fact absurd in light of that scheme's specific mechanisms. Piontek does not provide that kind of comprehensive analysis.

¶32 Second, we are not persuaded that LIRC's interpretation leads to unreasonably different treatment. Piontek asserts that it is unreasonable to deprive him of the option of quitting his non-covered job to take the *same type of* better-paying job, something that a person who quits a covered job may do and still remain eligible. However, as LIRC explains, an alternative way of looking at the quit-to-take-a-covered-job mechanism is that it treats all workers uniformly because it treats them the same as to their post-quit options. That is, absent some other applicable exception, *no one* may quit to take a non-covered job and still remain eligible for unemployment benefits. For example, if someone quits any job to take a better-paying job as a real estate agent, or any other non-covered job, that person loses his or her unemployment benefits. On the other hand, if someone

[8] Piontek also points to WIS. STAT. § 108.04(7)(L), a subsection providing different criteria allowing a person to avoid ineligibility when quitting. But Piontek does not suggest any reason to think that separate consideration of this subsection is warranted. Indeed, Piontek's argument directed at § 108.04(7)(p) is more developed. If there is a difference between these subsections that matters for purposes of assessing Piontek's absurdity argument, he does not explain it.

quits any job, including a job as a real estate agent as Piontek did, and that person takes a better-paying covered job, that person would not lose eligibility.

¶33 We concede that Piontek has identified a difference. That is, persons who begin in covered jobs may quit to take the *same type* of job and still remain eligible, but persons who begin in non-covered jobs may not do the same. Standing alone, however, we fail to understand why this difference in treatment rises to the level of absurdity. LIRC suggests that this scheme makes sense because it discourages workers from quitting, except to take better-paying covered jobs, thereby increasing the number of employees in covered jobs, which, in turn, increases the overall financial viability of the unemployment benefits system by increasing the amount employers pay into the system. Although, based on the record before us, we cannot evaluate whether this argument holds up, we find the argument helpful in that it highlights the difficulty in assessing Piontek's absurdity argument. Piontek's argument is simply not sufficiently developed, given the complexity of the statutory scheme, to persuade us that LIRC's interpretation of "employee" leads to absurd results.

2. Absurdity Relating To The General Policy Of WIS. STAT. Ch. 108

¶34 Piontek asserts that LIRC's application of the voluntary termination provision to him is at odds with the general policy statement in WIS. STAT. § 108.01. Piontek writes:

> Rather than trying to reduce the burden of unemployment on individuals and encourage them to find work that has regular and higher earnings, *cf.* WIS. STAT. § 108.01(1), [LIRC's application of § 108.04(7) to someone like Piontek] traps individuals in positions where earnings are reduced ....

We disagree that LIRC's interpretation is in conflict with the legislature's policy statement.

¶35 The policy statement begins by generally acknowledging the "urgent public problem" of unemployment and that "[t]he burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his or her family." WIS. STAT. § 108.01(1). After these general remarks about the ills of unemployment, the policy statement continues on to say that employing units should help pay for some of this "social cost," stating, for example: "Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." ***Id.***[9]

¶36 Piontek's argument is flawed because he ignores the language in WIS. STAT. § 108.01 that introduces the above-quoted text: "Without intending that this section shall supersede, alter or modify the specific provisions hereinafter contained in this chapter, the public policy of this state is declared as follows ...." Thus, the policy clause effectively instructs that, in the event of tension between a specific provision in WIS. STAT. ch. 108 and the general policy statement, we should follow the specific provision. Thus, assuming for argument's sake that

[9] Along similar lines, WIS. STAT. § 108.01(2) further states the policy goal of seeking to reduce the "economic burdens" of unemployment via a "system of unemployment reserves." Piontek does not explain that subsection (2) adds anything to subsection (1) that might matter here.

there is some tension, Piontek asks us to do what this introductory language says we should not do.[10]

¶37 Piontek's reliance on broad policy statements in case law is also misplaced. For example, Piontek cites the following language in ***Moorman Manufacturing Co. v. Industrial Commission***, 241 Wis. 200, 205, 5 N.W.2d 743 (1942): "[T]he [unemployment compensation] act contemplates compensation for loss of earnings by workers. This must be given great—even controlling—effect, in determining who are employees under the act ...." Sweeping policy statements like this do not provide a basis for ignoring plain statutory language.

¶38 Finally, we observe that Piontek makes additional assertions of possible far-reaching negative consequences that flow from LIRC's interpretation of the term "employee." Piontek appears to believe that these consequences are unreasonable in light of the general purpose of WIS. STAT. ch. 108. We choose not to address these additional assertions individually. As to all of them, they are either insufficiently developed or they fail to persuade us because they do not plainly demonstrate a consequence that is absurd when measured against the legislature's general policy statement.

3. Absurdity Relating To WIS. STAT. § 108.02(12)(e)

¶39 Piontek asserts that if "employee" includes individuals not engaged in "employment," then a conflict arises with a portion of WIS. STAT. ch. 108 that is not directly at issue here, namely, WIS. STAT. § 108.02(12)(e). Section

[10] Piontek also asserts that the policy declaration states a purpose of encouraging workers "to find work that has … higher earnings." We find no such statement and, even if we did, it would not matter for the reasons discussed above.

108.02(12)(e) states that § 108.02(12) (containing the "employee" definition) is used to determine two things:

- "an employing unit's liability under the contribution provisions of this chapter" and
- "the status of claimants under the benefit provisions of this chapter."[11]

¶40 Earlier in this opinion, we explained that, on its face, the term "employee" is not limited to persons in "employment." We understand Piontek to be asserting that this reading of "employee" creates problems because WIS. STAT. ch. 108 is generally structured to provide for contributions and benefits based on "employment," not based on general "employee" services that do not qualify as "employment." Piontek's reasoning, so far as we can discern it, never gets more specific than what we have just summarized. LIRC provides the following facially reasonable counterarguments.

¶41 As to contributions, LIRC explains that WIS. STAT. ch. 108 specifically provides that employer contributions are based on "payroll." *See* WIS. STAT. § 108.18. "Payroll" is defined as "all wages paid directly or indirectly by an employer within a certain period to individuals *with respect to their employment* by that employer." WIS. STAT. § 108.02(21)(a) (emphasis added). The italicized language plainly limits contributions to "employment." Therefore, a broader

[11] WISCONSIN STAT. § 108.02(12)(e) states, in full: "This subsection shall be used in determining an employing unit's liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter."

definition of "employee" does not matter because, regardless how "employee" is defined, contributions are based on "payroll," which in turn is based on "employment."

¶42 As to benefits, LIRC points to the definition for "base period," which is defined as "the period that is used to compute an employee's benefit rights." WIS. STAT. § 108.02(4). Chapter 108 defines "base period wages" as "[a]ll earnings for wage-earning service which are paid to an employee during his or her base period *as a result of employment* for an employer." WIS. STAT. § 108.02(4m)(a) (emphasis added). Thus, because the determination of claimants' benefits is also tied to "employment," a broad definition of "employee" does not matter.

¶43 We are unable to identify a meaningful reply from Piontek to LIRC's analyses. That is to say, Piontek has not identified an absurdity relating to WIS. STAT. § 108.02(12)(e) flowing from LIRC's interpretation of the term "employee."

Conclusion

¶44 For the reasons discussed, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.