

**JEAN M. AEDER GORT,**

Plaintiff,

Vs.

Case No. 06 CV 114

**LABOR AND INDUSTRY REVIEW COMMISSION, et al.,**  
Defendants.

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**DECISION AND ORDER**

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This case involves a judicial review under Wis. Stats. §108.09(7) of a decision of the Wisconsin Labor and Industry Review Commission denying unemployment compensation benefits to the plaintiff, Jean M. Aeder Gort ("the employee"). The Commission determined in a 2-1 decision dated February 7, 2006 that Ms. Aeder Gort was not eligible for unemployment compensation benefits because she had been discharged for "misconduct" as that term is described in §108.04(5). The Commission's decision reversed the finding of the administrative law judge who heard the case.

**STANDARD OF REVIEW**

The scope of this court's review of the commission's decision is rather limited. Wis. Stats. §108.09(7)(b). With respect to factual matters, "The findings of fact made by the commission acting within its powers shall, in the absence of

fraud, be conclusive." Wis. Stats. §102.23(1)(a). The trial court is permitted to set aside the commission's decision only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award." Wis. Stats. §102.23(1)(e).

Wis. Stats. §102.23(6) goes on to provide as follows:

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

The court is not to substitute its judgment for that of the commission as to the weight of the evidence. Rather, the trial court is to determine whether the findings of fact made by the commission are supported by substantial evidence, and if they are, those findings may not be set aside. Kannenberg v. LIRC, 213 Wis. 2d 373, 384 (Ct. App. 1997).

The trial court is not bound by the conclusions of law drawn by the Commission from its findings of fact. However, the commission's conclusions of law are entitled to some deference:

" . . . courts should defer to an administrative agency's interpretation of a statute in certain situations. This court has applied three distinct levels of deference to agency interpretations: great weight, due weight and de novo review. See, *Jicha v. DILHR*, 169 Wis.2d 284, 290, 485 N.W.2d 256, 258-59 (1992). Great weight deference is appropriate once a court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute. See, *Lisney v. LIRC*, 171 Wis.2d 499, 505, 493 N.W.2d 14, 16 (1992)." *Harnischfeger v. LIRC*, 196 Wis. 2d 650, 659-660 (S. Ct. 1995).

In this case the primary legal question is whether the facts which constitute the reason for the employee's discharge amount to misconduct under §108.04(5). As a general rule, Wisconsin courts have held that the commission's determination whether an employee's conduct constitutes misconduct within the meaning of §108.04(5) is entitled to great weight deference. *Bunker v. LIRC*, 257 Wis. 2d 255, 271 (Ct. App. 2002). In some specific contexts, however, courts have found that the commission's consideration of specific types of misconduct have not been consistently applied and are entitled to only due weight deference. See, e.g., *Patrick Cudahy, Inc. v. LIRC*, 296 Wis. 2d 751, 763-764 (Ct. App. 2006), in the case of misconduct relating to alcohol consumption.

The plaintiff cites the court to no authority which would suggest that the court, under the facts of this case, should apply anything other than the normal great weight standard to the commission's conclusions of law regarding misconduct. Under the great weight standard, the court will uphold the commission's conclusion of law if it is reasonable, even if the court believes an alternative interpretation is just as reasonable or even more reasonable. Brown v. LIRC, 267 Wis. 2d 31, 46-47 (S. Ct. 2003).

#### DECISION

The facts in this case are largely undisputed. The employee worked as a reference librarian in the Information and Adult Services Department of the Manitowoc Public Library. On September 28, 2004 Alan Engelbert, the Manitowoc Public Library Director, notified supervisors of his concern that some employees were "pushing it" by wearing Capri pants to work that were barely below the knee in length and were more like shorts, which were prohibited under the clothing policy, than Capri pants. Supervisors were told to notify their employees that to be considered allowable Capri pants, the pants would have to reach mid-calf. Kathy Schmidt, the employee's supervisor, passed on Director Engelbert's interpretation of the policy via e-mail to the employees she supervised, including Jean Aeder

Gort. Aeder Gort responded to all the recipients of the e-mail by questioning in writing what the director's authority was for his definition of "shorts." She quoted from a number of definitions of "shorts" which the employee felt were inconsistent with the director's interpretation. As noted by the Commission in its brief, the employee gave a variety of explanations for her e-mail response to the Capri pants directive. She told investigator Jason Bowers when her claim was investigated that she "was curious and I didn't think the rule was fair." (Interestingly, she also told the investigator that she did not own a pair of Capri pants.) (R. 145). At the hearing before the administrative law judge, Aeder Gort testified that she thought her e-mail response would "lighten the atmosphere for one thing," but she also indicated that she wrote it because she felt the director's "logic was faulty." (T. 128). She also felt that the directive constituted "an unreasonable rule." (T. 129).

After learning of Aeder Gort's e-mail, Director Engelbert questioned whether she was trying to undermine his authority or simply using poor judgment. Following a meeting with Aeder Gort, Director Engelbert sent her a memorandum dated October 4, 2004, which was introduced as Exhibit 7, notifying her that any question concerning action taken by her superiors should be

discussed with her immediate supervisor. The memo concluded as follows:

"If you believe the action taken by your superiors is in violation of the labor agreement, you have recourse to the grievance procedure, which also requires that you discuss the matter with your immediate supervisor. You are not free to send out e-mails or other forms of communication to all or part of the staff if you question decisions made by your superiors. Doing so in the future will result in discipline up to and including termination." (emphasis added).

As detailed by the Commission in its findings, Aeder Gort did not take kindly to the director's memorandum and responded with a number of communications to a number of persons. On the following day, October 5, 2004, she sent an e-mail to her supervisor, Kathy Schmidt, expressing her displeasure. She contacted a former college professor soliciting his opinion on the dispute.

On October 8, 2004 she telephoned another library employee, Rachel Muchin-Young. She notified Ms. Muchin-Young that she planned on filing a grievance, but did not specify the basis for the grievance. She notified Ms. Young that she wanted the director and another supervisor, Hallie Yundt-Silver, "to be walking on eggshells."

The Commission further found that on October 8, 2004 the employee sent an e-mail to Linda Bendix, a former Manitowoc Public Library supervisor who was serving at the time as

Director of the Lake Geneva Public Library. She informed Ms. Bendix that she planned on filing a grievance against the director and wanted "to talk to anyone who can add to the list of complaints against him." She informed Ms. Bendix that "if nothing else, I will embarrass him out of town."

On October 9, 2004 she telephoned her supervisor, Kathy Schmidt, at home and notified Ms. Schmidt that "she was going to get Alan to either resign or have to be very careful from now on around management team members." She informed Ms. Schmidt that she had compiled a list of recommendations on who should be the next library director and notified Ms. Schmidt that she was third on her list.

On October 9, 2004 Aeder Gort sent an e-mail to a number of library supervisors and department heads notifying them that she was planning "on taking serious action on a matter of extreme importance." She asked the recipients to "plead my case to Rachel that what I have done is righteous wrath--not vindictiveness." Exhibit 9.

After the director became aware of the communications to Ms. Schmidt and Ms. Muchin-Young, he met with Ms. Schmidt, Deb Geiger from the city personnel office, and David Ellison, the union steward. Ellison informed him that Aeder Gort's objective was to get the director removed from his position. Ellison

further indicated he wanted to distance himself from Aeder Gort and described her to the director as a "zombie."

Other developments took place as more fully described in the Commission's findings of fact contained in its decision. On October 11, 2004 the director met with Aeder Gort and suspended her for insubordination and undermining his authority and effectiveness. He believed that her contacts inside and outside the library constituted a violation of the directive she was given in his October 4, 2004 memo. At the meeting Aeder Gort handed the director a document and insisted that he deliver it to Tom Klein, the President of the Library Board. After the director told her she could deliver the document herself, she nevertheless pushed the document back toward the director and insisted that he deliver it. The memo, which was introduced as Exhibit 15, notified the president of the library board that Ms. Aeder Gort planned on bringing up some important matters and requested a meeting with Mr. Klein. The memo listed copies going to various library supervisors and the union bulletin board.

After the employee was suspended, the director learned of another e-mail the employee had apparently sent just before the suspension meeting addressed to approximately 15 other staff members notifying them that Aeder Gort was soliciting anything that needed discussion with the president of the library board.

The library director subsequently discussed Aeder Gort's actions with city personnel officials and the Library Board president and made the decision to discharge Aeder Gort. She was discharged in a letter from Director Engelbert dated October 14, 2004. The reasons given for termination were:

"1. Insubordination.

2. Your actions undermining the authority and effectiveness of the library director.

3. Causing the reputation and esteem in which the Manitowoc Public Library is held in the community to diminish.

4. Making verbal and written threats to publicly damage the reputation and livelihood of the library director."

The above is a summary of the findings made by the Commission in its decision. The Commission made additional factual findings as well contained in its decision.

The brief in support of appeal and reply brief submitted by Aeder Gort include additional alleged facts, not all of which were reflected in the Commission's findings. The employee's briefs also place different characterizations on the factual findings included in the Commission's findings. The court does not find that any of the facts which formed the basis of the Commission's decision are seriously disputed. That is not to say there are no facts in dispute. For example, the Commission's factual findings start by reciting that the

employee "worked one and one-half years as a Reference Librarian." In fact, it appears undisputed that Aeder Gort worked as a Reference Librarian from March of 2001 through her termination on October 14, 2004. (T. 7). Aeder Gort raises other contested factual issues in her brief, such as disputing whether her October 9, 2004 e-mail was sent from her home, or the library, which apparently would have been closed at the time the e-mail was sent. Neither these, nor other disputed facts, go to the heart of the Commission's decision. The court concludes that the Commission's findings of fact, at least to the extent to which they are material to its decision, are all supported by credible and substantial evidence.

The court next must determine whether the Commission's conclusions of law, the primary one being that the actions of Aeder Gort constitute misconduct within the meaning of §108.04(5), are supported by the evidence. As noted above, the Commission's conclusions of law are entitled to great weight and will be upheld by the court as long as those conclusions are reasonable, even if the court feels an alternative interpretation is just as reasonable or even more reasonable.

An employee who is discharged for misconduct connected with the employee's work is ineligible to receive benefits until the waiting period prescribed in the statutes has elapsed. §108.04(5). The long-accepted definition of misconduct comes

from the case of Boynton Cab Co. v. Neubeck & Ind. Comm., 237

Wis. 249, 259-60 (1941):

"... the intended meaning of the term 'misconduct' ... is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

The Commission concluded that the employee's actions constituted misconduct within the meaning of §108.04(5) because those actions "demonstrated an intentional and substantial disregard of the employer's interest and of standards of behavior the employer had a right to expect of the employee." Decision, p. 10. This court concludes that the Commission's interpretation of the evidence is reasonable. After reading and re-reading the employee's brief in support of her appeal and reply brief, this court cannot identify with any certainty exactly what the employee's substantive dispute with the library director was. The record shows that she was determined to bring a number of her concerns with the director's supervision of the library to the attention of the library board and solicited

complaints from other employees and at least one former employee. However, the court is at a loss to specify exactly what those concerns were, with the exception of the Capri pants issue that put all of the events in this case in motion. Given the fact the employee informed the investigator she did not even own a pair of Capri pants, the court is only left with the conclusion that either the employee's personal animosity toward Mr. Engelbert or her enjoyment in playing the role of provocateur motivated her actions to "bring down" the library director. Her communications with fellow employees and others seeking the director's removal, coupled with the lack of any substantive accusations to support her efforts, support the Commission's conclusion that her actions were taken in intentional and substantial disregard of the employer's interests. Likewise, it is the absence of any meaningful substantive accusations which belies any claim that the First Amendment somehow should play a role in this case.

The dissenting commissioner does not appear to dispute the conclusion that the employee's actions demonstrated an intentional and substantial disregard of her employer's interests. Rather, the dissent argues that the employee's actions do not constitute misconduct under the statute because she was not sufficiently alerted ahead of time that her conduct was jeopardizing her continued employment. This position is not

supported by the evidence. After Aeder Gort's sarcastic response to the Capri pants clarification directive, she was notified in writing by the director that "you are not free to send out e-mails or other forms of communication to all or part of the staff if you question decisions made by your superiors. Doing so in the future will result in discipline up to and including termination." The employee's communication with her former professor, former Library employee Linda Bendix, Union Steward David Ellison and her own supervisor, Kathy Schmidt did not technically violate her written warning. However, only four days after receiving the director's memorandum, Aeder Gort contacted another library employee, Rachel Muchin-Young, at home to notify her that she was filing a grievance. She also asked Muchin-Young if she took the job at the library because she needed benefits. Her call left Ms. Muchin-Young "stunned." Exhibit 11. She was so disturbed she called Aeder Gort back to seek clarification for her strange and disturbing phone call. Aeder Gort notified Muchin-Young that she wanted the director "to sign a long memo that she was writing." She also notified Muchin-Young that she wanted "Alan and Hallie to be walking on eggshells."

The dissent concludes that "(i)n her communication with Ms. Muchin-Young, she did not technically question a decision made by her superiors, but did indicate she was going to file a

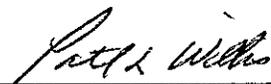
grievance against the director and wanted him to quit or be walking on eggshells." The very essence of a grievance is to question a decision made by an employee's superior. A telephone call is certainly a communication. One purpose of the director's October 4, 2004 memo was obviously to avoid having other employees disturbed by Aeder Gort's complaints and there is little doubt Muchin-Young was disturbed by the employee's comments. While the communications with Ms. Muchin-Young were not the only reasons for the termination, it is clear that Aeder Gort directly violated the admonition at the end of the suspension memo when she contacted Muchin-Young.

**ORDER**

For the foregoing reasons, the decision of the Commission is affirmed.

Dated this 7<sup>th</sup> day of December, 2007.

BY THE COURT,

  
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Patrick L. Willis,  
Circuit Judge