STATE OF WISCONSIN * CIRCUIT COURT * MILWAUKEE COUNTY

RALPH R. AIKEN,

Plaintiff,

vs.

VILLAGE OF ELM GROVE and
STATE OF WISCONSIN LABOR AND
INDUSTRY REVIEW COMMISSION,

Case No. 758-525

Defendants.

MEMORANDUM DECISION

This is an action for judicial review of a decision dated October 9, 1987, in which the Labor and Industry Review Commission (hereinafter "Commission") affirmed the decision of the lower tribunal denying the plaintiff, Ralph R. Aiken, unemployment compensation benefits. It was found that the plaintiff's conduct constituted misconduct within the meaning of section 108.04(5), Wis. Stats. Unemployment compensation was denied on that basis.

This Court affirms the decision of the Commission for the following reasons.

Plaintiff worked for approximately seven and a half years as a laborer for the Village of Elm Grove. He was required to operate a front end loader, a large piece of machinery, as one of his responsibilities with the Village. He was observed sleeping on the job on September 25, 1986, February 19, 1987, and March 9, 1987. He received a verbal reprimand the first time, was suspended for two days the second time and urged to see a doctor, and was terminated as a result of the third occasion. Plaintiff then went to see a doctor.

The plaintiff's termination on March 10, 1987 was a result of driving the front end loader he was operating into a wooded area and going to sleep on the job while the front end loader was running. Initially, he denied sleeping on the job, as he did with the two prior occasions, but then admitted to each of them.

After he was terminated, plaintiff went to see two doctors, who both determined that he suffered from narcolepsy. The appeal tribunal found that he had this problem while working for the Village of Elm Grove and that it affected the quality of his work.

The Appeal Tribunal elicited testimony at the formal hearing from Village Manager Edmund Henschel, Assistant Public Works Supervisor Charles Armao, and Public Works Supervisor Ken Blaedow, as well as from the plaintiff. It concluded that the explanations of the plaintiff were not credible. The examiner found that the employee had fallen asleep on the job on or about September 25, 1986 and again on or about February 13, 1987. Further, the examiner found that the employee was well aware he was falling asleep on March 9, 1987. Rather than go to his supervisor and explain his condition and ask for time off for medical treatment, he drove his equipment into a wooded area, a place where he might be concealed, permitted the machinery to continue running, and went to sleep as opposed to falling asleep." It was found that this was a conscious decision on his part.

The Court's scope of review as to the findings of fact made by the Commission is very narrow. "The findings of fact made by the Commission acting within its powers shall, in the absence of fraud, be conclusive." Sec. 102.23(1), Wis. Stats. The proper test is whether there is credible evidence in the record to sustain the commission's findings. Princess House, Inc. v. DILHR, 111 Wis.2d 46, 330 N.W.2d 169 (1983).

As to issues of credibility, it has been consistently held that the triers of fact are the sole Judges of the credibility of witnesses. Insofar as the commission is the fact-finder in unemployment cases on Judicial review, the credibility and the weight of the evidence are the province of the commission. Kohler Co. v. Industrial Commission, 272 Wis. 310, 75 N.W.2d 293 (1956). This 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. Sec. 102.23(b), Wis. Stats.

This Court finds that there is substantial evidence in the record to support the findings of the Commission that the plaintiff went to sleep after substantial warnings that his behavior would lead to termination of his position.

The second issue subject to review is the Commission's conclusion of law that the plaintiff's actions consttituted misconduct connected with his employment within the meaning of section 108.04(5), Wis. Stats. The scope of review on this issue is broad. While this Court is not bound by the Commission's determination of a question of law, the construction and application of a statute adopted by an administrative agency charged with the duty of applying the law is entitled to great

weight. Cook v. Industrial Commission, 31 Wis.2d 232, 142 N.W.2d 827 (1966).

The term "misconduct" is not defined in section 108.04(5). In Boynton Cab Company v. Neubeck, 237 Wis.249, 296 N.W. 636 (1941), the Wisconsin Supreme Court defined "misconduct" as follows:

> Conduct evincing such wilful 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 of 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. (At 259)

Based upon a thorough review of the record of the agency's action and consideration of the arguments set forth by the parties, it is the conclusion of this Court that plaintiff's conduct constituted a wilful, intentional and substantial disregard of his employer's interests. Mr. Aiken had been warned twice that falling asleep on the job would not be tolerated. It had also been suggested to him to see a doctor with regard to his habit of falling asleep on the job. Mr. Aiken made no attempt to see a doctor until after the final incident of sleeping on the j

Job. Moreover, when he became drowsy on March 9, he drove into a wooded area and went to sleep. The Court concludes this was an intentional act evincing a disregard for the standard of behavior his employer had the right to expect of him. He certainly had other alternatives open to him, such as reporting his problem and seeking treatment.

The Court therefore concludes that the conduct of the plaintiff in performing his job constituted misconduct as defined in the Boynton case, supra. The decision of the Commission dated October 9, 1987 is accordingly AFFIRMED.

Dated this 10th day of March, 1988, at Milwaukee, Wisconsin.

BY THE COURT:

Lee Wells

Lee E. Wells
Circuit Court Judge