STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES T. ANDALORO,

Plaintiff,

vs.

DECISION
Case No. 95 CV 5

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and DALUMS UTILITY EQUIPMENT CO.,

Defendants.

The plaintiff, James T. Andaloro, seeks judicial review of a decision of defendant, Labor & Industry Review Commission (LIRC), which affirmed an administrative law judge's finding that the plaintiff was discharged by his employer for misconduct within the meaning of sec. 108.04(5), Stats., and therefore ineligible for unemployment compensation benefits. This court concludes that the LIRC's findings of fact are supported by credible and substantial evidence, and their determination that the plaintiff's actions qualified as "misconduct" within the meaning of the statute was reasonable. For the reasons set forth below, the court affirms the LIRC's findings.

Section 108.04(5), Stats., provides that:

> An emloye whose work is terminated by an employing unit for misconduct connected with the employe's work is ineleigible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs to at least 14 times the employe's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment compensation law of any state or the federal government.

The plaintiff was discharged on February 14, 1994 by his employer of eight years, co-defendant Dalums Utility Equipment Co., for violating its "no smoking" policy. The plaintiff applied for unemployment compensation benefits on February 16, 1994. A deputy for unemployment compensation of the Department of Indutry, Labor, & Human Relations determined, on March 2, 1994, that the plaintiff was discharged for misconduct connected with his employment. The plaintiff appealed that determination on March 8, 1994.

In response to the plaintiff's appeal, a hearing was held before an administrative law judge on April 4, 1994. In a decision dated April 6, 1994, Administrative Law Judge John D. Winderl made the following pertinent findings:

> During 1993 the employer instituted a smoke-free workplace policy. Smoking was prohibited on all company premises. The employes were informed of that policy. However, on January 4, 1994 the employe was found smoking outside his paint booth. He received a two-day suspension for violating the employer's smoke-free workplace policy.
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> On February 9, 1994 a supervisor saw smoke curling up in front of the employe. The employe was sitting next to his tool box. The smoke was coming from a disposable rag. The supervisor asked the employe what was burning and he replied that he did not know. The supervisor could smell the odor of a cigarette butt burning. He asked the employe to open the rag but he would not. The supervisor then demanded that he open the rag and a smoldering cigarette butt fell out. The employe stated that he had no idea where it came from. Following a review of the incident he was discharged.
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> At the hearing the employe denied having any knowledge of where the cigarette butt came from and denied that he had been smoking. However, the appeal tribunal did not find those denials to be credible. Having a smoldering cigarette butt in his

possession is strong circumstantial evidence that he had been smoking.

In affirming the department's initial determination, the administrative law judge concluded:

> Under the circumstances, the employe's actions in again violating the employer's smoke-free workplace policy, after receiving a disciplinary suspension for a prior violation, envinced a wilful and substantial disregard for the employer's interests and for the standards of conduct that the employer had a right to expect of him.
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> The appeal tribunal therefore finds that in week 8 of 1994, the employe was discharged for misconduct connected with his work, within the meaning of sec. 108.04(5) of the statutes.

The plaintiff petitioned for review of the decision of the administrative law judge by LIRC on April 15, 1994. In a decision dated December 2, 1994, LIRC affirmed the decision of the administrative law judge and concluded that the plaintiff was not eligble for unemployment compensation benefits pursuant to sec. 108.4(5), Stats. Plaintiff initiated this action for judicial review on January 3, 1995.

Judicial Review of LIRC decisions is governed by sec. 102.23, Stats., which states:

> (1)(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may thereforeto have been rendered thereon; but the same shall be set aside only upon the following grounds:
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> 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.

Judicial interpretation of this statute has long held that

LIRC factual findings are binding on reviewing courts as long as they are supported by substantial and credible evidence in the record. "Substantial evidence" is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Cromwell Personell Associates v. LIRC, 175 Wis.2d 537, 499 N.W. 705 (Ct. App. 1993). For evidence to be "credible" in support of findings in a compemsation case, it must be evidentiary in nature and not a conclusion of law, and it must not be so discredited by other evidence that a court could find it incredible as a matter of law. Goranson v. ILHR Department, 94 Wis.2d 537, 289 N.W. 270 (1980). This is not the same as having a reviewing court weigh conflicting credible evidence in order to determine what shall be believed. R.T. Madden, Inc. v. ILHR Dept., 43 Wis.2d 528, 169 N.W.2d 73 (1969). That discretion rests solely with the agency and the court will not upset an agency's findings as to the credibility of witnesses. Boldt v. LIRC, 173 WIS.2d 469, 496 N.W.2d 676 (Ct. App. 1992).

The plaintiff's first contention is that the LIRC's findings were not based upon credible and substantial evidence. He asserts that under Zschook v. Industrial Comm'n, 11 Wis.2d 231, 105 N.W.2d 374 (1960), the commission acted "in excess of its powers," and, pursuant to sec. 102.23(1)(e), their decision should be set aside by this court. The plaintiff claims that, by failing to provide more witnesses and to disprove the possibility that another of his co-workers who were in the

vicinity at the time of the incident on February 9, 1994 could have placed the cigarette butt in the shop rag, the burden of proof was not met and LIRC's decision could not have been based on substantial and credible evidence.

In matters before the LIRC, the burden of proof needed to constitute substantial evidence is not the preponderence of the evidence, rather, the test is whether reasonable minds could arrive at the same conclusion the commission reached. Holy Name School v. ILHR Dept., 109 Wis.2d 381, 326 N.W.2d 121 (Ct. App. 1982). By the plaintiff's own allegation, there are at least two possible inferences that can be drawn as to the source of the cigarette butt. However, as the LIRC correctly asserts, where the evidence allows more than a single reasonable inference, a fact question is presented and commission findings, if supported by any credible evidence, are conclusive on the court. Universal Foundry Co. v. ILHR dept., 86 Wis.2d 582, 273 N.W.2d 324 (1978). On review, the function of the court is not to determine if evidence exists to support a finding that was not made, but whether there was evidence to support the finding that the commission did make. Brickson v. ILHR Dept., 40 Wis.2d 694, 162 N.W.2d 600 (1968).

These are the undisputed facts which are on the record of the plaintiff's April 4, 1994 hearing before the administrative law judge:

1.) The plaintiff smoked cigarettes.

2.) The plaintiff knew of his employer's "no smoking" policy.

3.) The plaintiff had previously violated this policy.

4.) The plaintiff was observed with a smoldering rag in his possession.

5.) When confronted by a supervisor, the plaintiff was reluctant to open the rag.

6.) When the plaintiff finally opened the rag, a cigarette butt fell out.

7.) The nearest employes in the vicinity were eight to ten feet away from the plaintiff.

8.) The plaintiff had no explanation for how the cigarette butt got into the rag.

The court finds that these undisputed facts support the inference drawn by the administrative law judge, and affirmed by LIRC, that the plaintiff had been smoking on the day of February 9, 1994. The plaintiff has failed to discredit the strong circumstantial evidence against him. Therefore, the court finds that LIRC's decision was based on a reasonable inference that was supported by substantial and credible evidence. As such, the LIRC did not act "in excess of its powers," and the court will not set aside its findings.

The plaintiff's second contention is that an employe's violation of the employer's smoke-free workplace does not constitute "misconduct" within the meaning of the law.

While the statutes do not provide a definition for "misconduct" as used in sec. 108.04(5), Stats., the Wisconsin Supreme Court established one in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941):

> ...conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior in which

> the employer has the right to expect of his employee, or in carelessness or negligence of such degreee 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.

The determination that an employe's acts constitute "misconduct" as specified in sec. 108.04(5), Stats., is a question of law, and a reviewing court is not bound by the commission's finding. Although a LIRC determination of misconduct is subject to review on appeal, such review is limited in that the reviewing court will sustain the commission's view if it finds the determination to be reasonable. Vocational, Technical, and Adult Ed., Dist. 13 v. ILHR Dept., 76 Wis.2d 230, 251 N.W.2d 41 (1977). Also, if several applications of a rule are equally consistent with the purpose of unemployment compensation law, then the reviewing court will accept the commission's application of the "misconduct" standard. Fitzgerald v. Globe-Union, Inc., 35 Wis.2d 332, N.W.2d 136, (1967).

LIRC determined that the plaintiff's second violation of his employer's "no smoking" rule was a wilful disregard of his employer's interests, specifically, the health interests cited in the employee handbook as the reason for adopting an enitirely smoke-free work environment. LIRC also found that the plaintiff had ample notice that a second violation of the rule would "result in further disciplinary action including discharge."

The purpose of the Wisconsin unemployment compensation program is to help cushion the blow of being out of work

resulting through no fault of the employe. Sec. 108.01(1), Stats., Salerno v. John Oster Mfg. Co., 37 Wis.2d 433, 155 N.W.2d 66 (1967). Denying benefits to those who are unemployed as a result of their own misconduct serves to protect the limited pool of funds for those who truly deserve them.

LIRC cites two prior administrative decisions where smoking in violation of an employer's rule constituted misconduct. While these two instances may not be "several," the court nonetheless finds their applications to be consistent with the purpose of unemployment compensation legislation, and, considering LIRC's experience, technical competence, and specialized knowledge, the court gives "great weight" to its conclusions. Kelley Co., Inc. v. Marquardt, 172 Wis.2d 234, 493 N.W.2d 68 (1993). Therefore, the court finds the LIRC's determination that the plaintiff's conduct constituted "misconduct" under sec. 108.04(5), Stats. to be reasonable and must be sustained.

For the reasons set forth above, the court affirms LIRC's finding that the plaintiff was discharged for misconduct pursuant to sec. 108.04(5), Stats.

Date this 7th day of August, 1995.

By the Court:

Robert G. Mawdsley
Circuit Judge