
City of Madison,

Plaintiff,

Case No. 08CV2097

Labor and Industry Review Commission and
Kendall Hallett,

Defendants.

DECISION AND ORDER

The City of Madison appeals from a decision by the Labor and Industry Review Commission (LIRC), decision finding that the City's discharge of Kendall A. Hallett, a parking enforcement officer, was not for misconduct connected with his employment within the meaning of Wis. Stat. §108.04(5). The decision is reversed and the case remanded for further proceedings, because LIRC applied only a purely subjective test to the employee's conduct, contrary to appellate decisions requiring use of an objective test.

STANDARD OF REVIEW

A reviewing court is bound by LIRC's factual findings if they are supported by "credible and substantial evidence" and must accept LIRC's judgment as to the weight and credibility of the evidence. Wis. Stat. §102.23(6).

An employee's actions are misconduct for purposes of unemployment compensation if they evince "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 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." *Boynton Cab Co. v. Neubeck* 237 Wis. 249, 259, 296 N.W. 636, 640 (Wis. 1941).

Whether a discharge was for misconduct within the meaning of the applicable statutes is a question of law. *McGraw-Edison Co. v. ILHR*, 64 Wis. 2d 703, 713, 221 N.W.2d 677 (1974). A court is not bound by LIRC's conclusions of law, but must give them either "great weight," "due weight" or no weight (the last only in questions of first impression). *Knight v. LIRC*, 220 Wis. 2d 137, 148-149, 582 N.W.2d 448 (Wis.App.,1998). The "great weight" standard applies if "(1) the agency is responsible for administering the statute, (2) the agency conclusion or interpretation is long standing, (3) the agency employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the agency interpretation provides consistency and uniformity in the application of the statute [citation omitted]." *Id.* at 148. When applying the "great weight" standard, "a reviewing court must uphold the agency interpretation if it is reasonable and if it is not contrary to the clear meaning of the statute." *Id.*

LIRC's legal conclusions about whether an employee's conduct was misconduct within the meaning of the statute are given great weight. *See, e.g., Charette v. State, Labor and Industry Review Com'n* 196 Wis. 2d 956, 959-960, 540 N.W.2d 239, 241 (Wis.App.,1995), *Bunker v. Labor and Industry Review Com'n*, 2002 WI App 216, ¶26, 257 Wis. 2d 255, 650 N.W.2d 864, *Lopez v. Labor and Industry Review Com'n*, 2002 WI App. ¶¶9,16, 252 Wis. 2d 476, 642 N.W.2d 561.

A LIRC conclusion that is given great weight must be affirmed unless it is unreasonable,

i.e. “it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without a rational basis,” *Lopez*, 252 Wis. 2d at ¶16, citing *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (Wis.,1995), or conflicts with prior appellate decisions, *Klusendorf Chevrolet-Buick, Inc. v. Labor and Industry Review Com'n*, 110 Wis. 2d 328, 330-31, 328 N.W.2d 890 (Wis.App.,1982). However, under the great weight standard, an interpretation of law must be affirmed if it is reasonable, even if another interpretation is more reasonable. *Board of Regents v. State Personnel Com'n*, 2002 WI 79, ¶43, 254 Wis. 2d 148, 646 N.W.2d 759.

The party seeking reversal of the LIRC decision has the burden of showing that the decision is unreasonable. *Harnischfeger Corp.* 196 Wis.2d at 661. An agency decision has a rational basis when it applies the proper standard of law to the relevant facts and reaches a conclusion a reasonable person could reach. *Verhaagh v. Labor & Industry Review Com'n*, 204 Wis.2d 154, 160, 554 N.W.2d 678 (Wis.App.,1996).

DISCUSSION AND DECISION

There is no dispute among the parties as to LIRC’s findings regarding what the employer’s policies and actions were and what the employee’s actions were, and those findings will not be recited in detail here. The dispute is whether LIRC correctly concluded that the employee’s actions were not misconduct because they were not “an intentional violation or disregard of the employer’s policies.” LIRC Decision, April 18, 2008. The employee posted the employer’s information identifying other officers by name and summarizing their performance on a publicly accessible website. LIRC Decision at 2. LIRC found that the employee’s actions were “a serious violation of the employer’s rules” and “it was not his right to release those

records without proper authorization.” LIRC Decision at 3. LIRC called the employee’s actions a valid basis for discharge, misguided and showing bad judgment. LIRC Decision at 2 and 3. Nonetheless, LIRC found that the employee was sincere in his belief that the records he posted were not subject to restrictions. Therefore, LIRC concluded that the employee’s actions were not an intentional violation or disregard of the employer’s policies. LIRC Decision at 4. LIRC also considered that this was the first incident of its kind in the employee’s disciplinary history. LIRC Decision at 4.

By relying exclusively on its factual finding that the employee was sincere in believing his actions did not violate rules LIRC applied a purely subjective test to the determination of the employee’s intent. The city argues that the proper test is an objective one. The city relies on *Wehr Steel Co. v. Department of Industry, Labor and Human Relations*, 106 Wis. 2d 111, 315 N.W.2d 357, 361 - 362 (Wis., 1982). In that case employees had been discharged for leaving a workplace they felt was too hot for their health and safety. *Id.* at 114-115. LIRC ruled that the walkouts were not misconduct. *Id.* at 113. LIRC relied on the employee’s good faith belief that the conditions were dangerous. *Id.* at 120-21. The Supreme Court rejected LIRC’s application of the “good faith” test, calling it “purely a subjective test” and stating “The correct test is what a reasonable person would reasonably believe as to whether a given set of working conditions presented a hazard to health or safety.” *Id.* at 121. The Supreme Court also rejected the Court of Appeals’ test of whether or not a hazard actually existed, saying that the correct test is not whether there was an actual hazard but whether a reasonable person would have believed a hazard existed which justified walking off the job, though a perceived hazard is one factor to be considered. *Id.* at 121.

The application of an objective “reasonable employee” standard is also implicit in *Milwaukee Transformer Co. v. Industrial Commission*, 22 Wis. 2d 502, 126 N.W. 2d 6 (Wis. 1964). In that case, the Supreme Court held the court’s main concern must be with “the ‘unreasonableness’ of the conduct of the employee.” *Id.* at 512. The court concluded that the employee’s actions were not misconduct because “her failure to continue giving notice throughout the duration of her absence was a *reasonable* response [emphasis added]” to the employer’s actions. *Id.* at 513.

Language in other cases suggests that the test is purely subjective: “The crucial question is the employee’s intent or attitude which attended the conduct alleged to be misconduct.” *Bernhardt v. Labor and Industry Review Com’n*, 207 Wis. 2d 292, 303, 558 N.W. 2d 874 (Wis. App., 1996). “The emphasis is on the employee’s intent.” *Holy Name School v. Department of Industry, Labor and Human Relations*, 109 Wis. 2d 381, 389-391, 326 N.W. 2d 121 (Wis. App., 1982).

However, *Wehr* has not been overruled, explicitly or implicitly. While LIRC’s decision must be given great weight, this court cannot ignore *Wehr*. In applying only a purely subjective test—the sincerity of the employee’s beliefs—LIRC’s decision conflicts with *Wehr*’s rejection of a purely subjective test and requirement of an objective test and *Milwaukee Transformer*’s use of a “reasonableness” test. The emphasis in *Bernhardt* and *Holy Name* on the particular employee’s intent or attitude must be read in conjunction with *Wehr*. Thus, there are both subjective and objective components to evaluating alleged misconduct.¹

LIRC must consider the particular circumstances of the alleged misconduct, including the

¹ The instruction on self defense, JI-Criminal 801, is an example of a test with subjective and objective components. A person is entitled to the privilege of self-defense only if he actually believed his actions were necessary to counter a threat that he actually believed existed and those beliefs, even if mistaken, were objectively reasonable.

employee's words and actions, and the inferences that can be drawn from them. But LIRC must then also apply the *Wehr* objective test: what would a reasonable employee reasonably have believed or done in those same circumstances? An employee may act upon beliefs he sincerely and steadfastly holds but which are objectively so unreasonable that his actions constitute misconduct. Put in terms of the present case, the question is whether the employee's sincere belief that the employer's policies did not prohibit his conduct was a reasonable belief that a reasonable employee could have held.

LIRC did not apply an objective test, and unreasonably restricted its analysis to only the employee's subjective intent. Therefore, LIRC's decision is reversed, and the case is remanded to LIRC to determine whether the employee's beliefs and actions based upon them were objectively reasonable under the *Wehr* standard. This is a final order for purposes of appeal.

Dated January 6, 2009.

BY THE COURT:


Juan B. Colás
Circuit Judge

Copy: Counsel of Record