

CAROL MAGLIO,

Petitioner,

vs.

CITY OF MILWAUKEE and
LABOR AND INDUSTRY
REVIEW COMMISSION,

Respondents.

DECISION AND FINAL ORDER

Case No. 94-CV-008499

FILED

MAY 23 1995

CITY CLERK
MILWAUKEE COUNTY

This case involves the judicial review of a decision issued by the Labor and Industry Review Commission (LIRC), wherein LIRC denied Petitioner Carol Maglio unemployment compensation benefits after she was terminated by the City of Milwaukee. The issue before this court is whether LIRC abused its discretion in denying Maglio's benefits. This court concludes that LIRC did not abuse its discretion and affirms the denial of benefits to Maglio.

HISTORY OF THE CASE

Petitioner Carol Maglio was employed by the City of Milwaukee as a fire inspector with the Department of Building Inspection. Before August 30, 1993, Maglio was disciplined four times, two of which were for submitting falsified daily route sheets which claimed to show that she was working at certain times, when in fact, she was not working. In May 1989 and April 1991, Maglio was suspended for one and ten days respectively.

On August 30, 1993, Maglio left her office at approximately 10:15 a.m., to begin her inspection route. Later that morning, Jeff Crouse, a supervisor, asked Maglio's supervisor, James Morawetz, to go out and find Maglio on her route because Crouse had discovered discrepancies on some of Maglio's daily reports.

Morawetz tried to find Maglio by going to all of the places listed on her daily itinerary. Morawetz drove to all of the locations listed in the order Maglio listed them and in reverse order in an effort to find her. However, Morawetz never found Maglio that day.

Maglio had filed a Daily Activity Report which allegedly listed where and when she made inspections on August 30, 1993. According to Maglio's Daily Activity Report, she spent 0.8 hours conducting a partial inspection at 3015 West Mitchell after leaving the office at 10:15 a.m. While at 3015 West Mitchell, Maglio claims that she had a field contact with a clerk and that she left at 11:00 a.m. Maglio's report then indicates that she next spent 0.7 hours conducting a partial inspection at 2101 West Mitchell, again having a field contact with a tenant. Maglio allegedly left 2101 West Mitchell at 11:45 a.m.

After the August 30, 1993, report was submitted, Maglio's supervisors became suspicious that her report was not accurate because between approximately 10:30 a.m., and 11:00 a.m., on August 30, Morawetz had been at the 3015 West Mitchell location and did not find Maglio. Morawetz was also at 2101 West Mitchell many times, including between about 11:05 or 11:10 a.m., until 11:20 or 11:25 a.m. He was also there shortly before 11:45 a.m. At no time did Morawetz see Maglio or her car at either of the locations on Mitchell.

Additionally, based upon his own 18 years of inspection experience, Morawetz believed that Maglio's inspection durations were unusually long for only partial inspections. Morawetz believes that a full inspection of the 3015 West Mitchell property would not have taken more than 0.4 hours.

Morawetz completed a follow-up field check of Maglio's listed itinerary and contacts on August 31, 1993 and September 1, 1993. Morawetz learned that the clerk from 3015 West

Mitchell had not been at the location on August 30th. Morawetz also learned that the property at 2101 West Mitchell had been closed and locked with no one present on August 30th.

On September 2, 1993, Maglio met with Morawetz, Crouse, and Skip Seeger, an administrator, to discuss the apparent discrepancies in Maglio's Daily Activity Report and Morawetz's findings. Maglio was provided with a copy of her Daily Activity Report and she was given the opportunity to get her Day Book from her office to find any entries for August 30th which would eliminate the discrepancies. After Maglio got her Day Book, she stated that she had nothing in it and that she could not remember anything about those inspections.

On September 13, 1993, Maglio was terminated for falsifying her Daily Activity Report on August 30, 1993. Thereafter, Maglio applied for unemployment compensation benefits. A deputy for the Department of Industry, Labor and Human Relations (DILHR) issued an Initial Determination which concluded that Maglio had been terminated for misconduct connected to her employment within the meaning of § 108.04(5), Wis. Stats., and that therefore, she was ineligible for benefits. Maglio appealed and an Administrative Law Judge affirmed the Initial Determination of ineligibility.

Maglio next filed a petition for review of the ALJ's decision with LIRC, which reviewed the record and then adopted the ALJ's Findings of Fact and affirmed the decision that Maglio was discharged for misconduct and thus, ineligible for benefits. Then, Maglio commenced this action for judicial review, and for wrongful discharge and discrimination against the City of Milwaukee and various of its agencies and agents. The entire matter was removed to federal court. Later, the judicial review issue was remanded to this court.

SUMMARY OF MAGLIO'S ARGUMENT

Maglio's argument basically states that she has been adversely affected by the drug Prozac, as discussed by her physician's testimony. Her physician testified that some times memory loss is seen in patients taking Prozac. Maglio contends that despite the evidence, the Commission¹ disregarded the evidence of her physician, Dr. Boblin, which constitutes an abuse of discretion on the part of the Commission. Maglio appears to argue that because she did not wilfully and intentionally falsify her Daily Report Sheet, the Commission erred in its determination.

Maglio then asserts that she has a property interest in her employment, relying on Dane County v. McCartney, 166 Wis. 2d 956 (Ct. App. 1992). Maglio cites to § 63.43(1), Stats., which provides in part that "No person or employee holding an office or position classified and graded under ss. 63.18 to 63.53, shall be removed, discharged or reduced, except for just cause which shall not be political or religious." Maglio argues that her discharge notice of September 13, 1993 evidences that she was terminated *ex parte*. In fact, Maglio claims that she had a doctor's excuse not to return to work until September 17, 1993, days before the termination proceeding.

Maglio charges the Commission with not enforcing minimum due process requirements. This clear violation is an abuse of the Commission's discretion according to Maglio. Therefore, Maglio claims that she is entitled to the reinstatement of her position with the City of

¹ This court is unclear as to whether the "commission" to which Maglio refers is the City Service Commission, as she seems to indicate in her brief on page 3, or the Labor and Industry Review Commission. This court has given Maglio the benefit of the doubt, and assumes Maglio meant the Labor and Industry Review Commission, since the only issue before this court is LIRC's determination in denying Maglio unemployment compensation benefits.

Milwaukee.

SUMMARY OF LIRC'S ARGUMENT

LIRC first states that the arguments contained in Maglio's brief are irrelevant, and the "exhibits" submitted therewith are not part of the record. LIRC claims that the only issue before the court at this time is the review of LIRC's decision on Maglio's unemployment compensation claim. LIRC maintains that there has been some confusion on the part of Maglio as to the two commissions in this case: the City of Milwaukee City Service Commission and the State of Wisconsin Labor and Industry Review Commission, as indicated by the following portion of Maglio's brief:

Plaintiff [Maglio] initiated a timely appeal to the **City Service Commission, hereinafter Commission**, and a hearing was held, beginning on October 26, 1993 and continuing on November 26, 1993 for final determination. Plaintiff initiated civil litigation in the Milwaukee County Circuit Court, involving numerous defendants, including the Commission, which was removed to United States District Court. Upon remand of the Commission issue only, Plaintiff appears before this court.

Maglio's Brief, p. 2 (emphasis added).

LIRC argues that Maglio's brief:

contains no legal arguments concerning entitlement to unemployment compensation; indeed, it does not even *mention* the Labor and Industry Review Commission or unemployment compensation. Instead, it is entirely concerned with claims of alleged abuses of discretion and denials of due process by the City of Milwaukee City Service Commission. However, those claims are not before this court.

LIRC's Brief, p. 11.

LIRC also asserts that judicial review under §§ 108.09(7) and 102.23, Stats., are based on the record made in the hearing before the ALJ, and that reviewing courts are limited to, and

bound by, that record, so that any arguments based upon a factual predicate outside the record cannot be considered by the court. Jenkins v. Sabourin, 104 Wis. 2d 309, 313-14 (1981); Weibel v. Clark, 87 Wis. 2d 696, 707-708 (1979). Evidence not offered to the ALJ cannot be offered to the court. Weibel, 87 Wis. 2d at 708. Thus, LIRC asserts that neither Maglio's appeal to the City Service Commission nor the transcript of the hearing before the City Service Commission were received as exhibits in the administrative hearings regarding her unemployment compensation claim. Because the appeal and the transcript are not part of LIRC's records, those materials should not be considered by the court.

Next, LIRC argues that it did not err in deciding that Maglio was terminated for misconduct. The standard of review this court is to use is found in §§ 102.23 and 108.09(7), Stats. Under § 102.23(1)(a), Stats., the findings of fact made by LIRC acting within its powers are, absent fraud, conclusive. Thus, the facts are conclusive if there is any credible, relevant and probative evidence which, if construed most favorably, would justify persons of ordinary reason and fairness to make such findings. R.T. Madden, Inc. v. DILHR, 43 Wis. 2d 528, 548 (1969). The question of whether conduct by an employee constitutes "misconduct" presents a question of law. McGraw-Edison Co. v. DILHR, 64 Wis. 2d 703, 713 (1974).

LIRC maintains that Maglio was discharged for misconduct. Section 108.04(5), Wis. Stats., provides in pertinent part:

Discharge for misconduct. An employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible 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 equal to at least 14 times the employe's weekly benefit rate

.....

The findings of fact made by the ALJ and adopted by LIRC, especially the finding that Maglio completed a report indicated that she had inspected two properties, when in fact she had not, is supported by substantial and credible evidence in the record.

The term "misconduct" has been defined in the case of Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-260 (1941), which provides the following definition:

. . . the intended meaning of the term "misconduct," as used in sec. 108.04(4)(a), Stats., is limited to 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 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.

LIRC contends that Maglio's duties and obligations to her employer were to conduct fire inspections and to make and file written reports regarding those inspections. The City's performance or non-performance of those inspections raises serious issues of public safety and municipal liability. LIRC argues that

[f]or Maglio to intentionally fail to make the necessary inspections, and to then intentionally file written reports which falsely stated that she had made the inspections, was clearly "an intentional and substantial disregard of the employers' interests or of the employee's duties and obligations to h[er] employer," as stated in Boynton Cab.

LIRC's Brief, p. 15. In fact, falsification of documents has been held to be misconduct. See Miller Brewing Co. v. DILHR, 103 Wis. 2d 496, 504-505 (Ct. App. 1981).

Finally, LIRC contends that Maglio's excuse that the medications she was taking made her unable to remember the day in question, is irrelevant, since it does not affect the fact that the misconduct occurred. Because Maglio has not offered anything to support that on August 30, 1993, her failure to make the inspections and her completion of filing a false report were not intentional, LIRC argues that there is credible and substantial evidence to support its finding that the filing of the false report was clearly an intentional and substantial disregard of her employers interests. It was also an intentional and substantial disregard of Maglio's duties and obligations to her employer. Accordingly, LIRC asserts that Maglio was discharged for misconduct within the meaning of the Unemployment Compensation Act, and that the decision below should thus be affirmed.

SUMMARY OF MAGLIO'S REPLY ARGUMENT

As in her initial brief, Maglio bases a part of her argument on her doctor's testimony.

Specifically, Maglio contends:

The primary thrust of this appeal is founded upon the absolute refusal by administrative law judges during the initial hearing and subsequent review, to give any consideration or weight to the direct testimony of an expert medical witness. In the decisions, neither tribunal confronted or dealt with the Prozac issue. Both decisions are void of any evidence rebutting Dr. Boblin's testimony, after he was qualified by Plaintiff's counsel during the hearing.

Maglio's Reply Brief, p. 3. Again, Maglio reminds this court that her doctor testified that Maglio suffered adverse side effects from Prozac. Maglio insists that this evidence was unrebutted, and as such, this court should reverse the lower decisions and award Maglio her benefits.

SCOPE OF REVIEW

Judicial review of a decision by LIRC is limited and narrowly defined by statute. Sec. 102.23(1)(e), Wis. Stats., provides that the court may set aside a decision of the Commission 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; or
- 3) That the findings of fact by the Commission do not support the order or award.

The statute also provides that the findings of fact made by the Commission acting within its powers shall, in the absence of fraud, be conclusive. Certain well-established rules have evolved through court decisions interpreting this statute. They are set forth in L & H Wrecking Co. v. LIRC, 114 Wis. 2d 504, 508-509 (Ct. App. 1983):

Judicial review of findings of fact by the Department is governed by statute and is limited in scope. R.T. Madden, Inc. v. Department of Industry, Labor & Human Relations, 43 Wis. 2d 528, 536, 169 N.W. 2d 73, 76 (1969). Section 102.23(1), Stats., sets out the limitations on the scope of this review. The purpose of these limitations is to ensure speedy justice under the Workman's Compensation Act by limiting appeals and extensive litigation. Id. . . . This court is to affirm the findings of the Commission if there is any credible evidence in the record to support those findings. Madden, 43 Wis. 2d at 547, 169 N.W. 2d at 82. In reviewing the sufficiency of credible evidence, we need to find only that the evidence is sufficient to exclude speculation or conjecture. Bumpas v. Department of Industry, Labor & Human Relations, 95 Wis. 2d 334, 343, 290 N.W.2d 504, 508 (1980). The Commission's findings must be upheld even if against the great weight and clear preponderance of the evidence. Coranson v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 537, 554, 289 N.W.2d 270, 278 (1980). The credibility of a witness or the persuasiveness of the testimony rendered are for the Department to determine. Sec. 102.23(6),

Stats.; Goranson, 94 Wis. 2d at 556, 289 N.W.2d at 179. In applying the credible evidence test to findings of the Department, a reviewing court does not weigh conflicting evidence to determine which should be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to a conclusion, a court must affirm. Valadzie v. Briggs & Stratton Corp., 92 Wis. 2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979).

CONCLUSION

As previously stated, LIRC's findings of fact must be upheld if they are supported by credible and substantial evidence. Section 102.23 (1)(e); DILHR v. LIRC, 155 Wis. 2d 256, 262 (Ct. App. 1990). Determination of whether the facts, as decided by LIRC, fulfill the legal standard of misconduct under § 108.04(5), Stats., is a question of law. Milwaukee Transformer Co. v. Industrial Comm., 22 Wis. 2d 502, 510 (1964).

This court finds that there is credible and substantial evidence to support the decision of the Labor and Industry Review Commission which found that Maglio engaged in misconduct connected with her employment, pursuant to § 108.04, Stats. The credible testimony of Maglio's supervisor as to his observations when he attempted to find her indicated that she was no where near the properties which she claims to have inspected. At no time did Maglio assert that she had actually inspected the properties. Therefore, one could reasonably infer that Maglio intentionally falsified her Daily Activity Report.

Maglio's argument is that due to adverse reactions from the drug Prozac, she is unable to remember even if she inspected the particular properties on August 30, 1993. However, as stated in both the ALJ's decision and in LIRC's Memorandum Opinion, just because Maglio experienced a memory loss does not explain why her Daily Activity Report falsely states that she inspected two properties on August 30, 1993. Maglio recorded the incorrect information

soon after the scheduled inspections were to take place.

This court concludes that such an intentional falsification of records constitutes misconduct connected with employment pursuant to the statutes. Under Boynton Cab, *supra*, such a falsification establishes an intentional and substantial disregard of both the City's interest in safety and liability, and of Maglio's duties and obligations to the City to conduct fire inspections.

Accordingly, the decision of the Labor and Industry Review Commission is hereby **AFFIRMED.**

IT IS SO ORDERED.

Entered this 23 day of May, 1995.





Hon. Michael P. Sullivan
Milwaukee County Circuit Court, Branch 26