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ROBERT D. NELSON,

Plaintiff,

-vs-

DECISION AND ORDER

LABOR AND INDUSTRY REVIEW COMMISSION,

-and-

DHL AIRWAYS, INC.,

Case No. 91-CV-181

Defendants.

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The above case is before this Court on the initiative of Robert D. Nelson for a review of the Labor and Industry Review Commission's decision of October 16, 1991, reversing the appeal tribunal's determination that Nelson was entitled to unemployment compensation benefits from DHL Airways, Inc. ("DHL").

The basis for the Commission's denial of benefits is its finding that Nelson's conduct in acquiring a conviction for operating a motor vehicle while under the influence of alcohol violation on July 24, 1990, for conduct occurring while he was off-duty on June 24, 1990, constituted misconduct connected with Nelson's employment within the meaning of Section 108.04(5), Stats.

FACTS

The facts concerning Nelson's OMVWI violation are not in dispute. Nelson acknowledged that prior to his OMVWI violation, he had been advised by DHL that an OMVWI violation occurring even while off-duty could be grounds for termination of employment

(Transcript, 17). Nelson was employed as a driver for DHL which is a private overnight mail courier. At the tribunal hearing, the only evidence offered by DHL as to the reasonableness of its rule prohibiting off-duty OMVWI violations by its driver-employees was that such violations prohibited a driver convicted of such from having a driver's license so as to be available for employment, and also because federal regulations supposedly prohibited DHL from employing drivers with off-duty OMVWI convictions. However, the uncontroverted testimony received at the hearing demonstrated that at all pertinent times Nelson had a driver's license making him available for employment, and the Commission correctly found that the federal regulations applied only to on-duty or in-service violations. See 40 C.F.R., Sec. 391.15(c)(1)(i)(1990).

#### DECISION

The Commission's findings of fact are conclusive if they are reasonable and based on substantial credible evidence. Sec. 102.23(6), Stats. When the employer seeks to deny unemployment benefits because of alleged employee misconduct, the employer has the burden of demonstrating that the employee was discharged for misconduct. Transport Oil, Inc., -vs- Cummings, 54 Wis 2d 256, 268, 195 NW 2d 649 (1972). Since the claimed misconduct occurred during off-duty hours, DHL was required to show that the rule prohibiting the same was reasonably related to the employer's interest. Gregory -vs- Anderson, 14 Wis 2d 130 (1961). The only evidence introduced by the employer which tended to establish any

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nexus between Nelson's conduct and its interest was its mistaken opinion that Nelson could not lawfully drive for either want of some form of Wisconsin driver's license, or because of a federal prohibition. Even though the Commission and the hearing tribunal found that Nelson could lawfully drive in the course of his employment despite his OMVWI conviction, the Commission inferred that the rule was reasonable because the "public" might adversely view DHL if it would employ drivers who had such off-duty violations. However, there is absolutely no evidence in the record of the hearing which supports this inference. Even if true, this conclusion of the Commission can only be described as conjecture. It is not the job of this Court nor the Commission to supplement the record made before the hearing examiner with evidence that might have been offered.

The conclusion of the Commission is one of law, which rests on its finding that the rule prohibiting the off-duty conduct was a reasonable one. This finding involves an inference which is not supported by credible and substantial evidence. Sec. 102.23(6) Stats. The employer may well have had valid and compelling reasons for the off-duty work rule in question, which may have included the inference found by the Commission, as well as the uninsurability of hired drivers with OMVWI convictions, but no such evidence or concerns were expressed by DHL at the hearing. DHL introduced no evidence that it was adversely affected other than the claimed license and federal regulation consequences, both of which concerns were unfounded. As a side

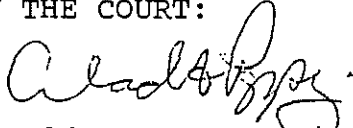
note it is not important how the public perceives DHL's employment policies in this context as long as its business interests are not adversely affected. Gregory, supra at 138. What the Commission infers from the evidence is nothing more than a conjecture which lacks support from the record, and this Court cannot assume how the employer could or should have created a record which would have supported the Commission's conclusion.

ORDER

Upon the foregoing, it is hereby ordered that the Commission's order in this matter be set aside for the reason that the findings made by it do not support its conclusions nor its order.

Dated this 13th day of August, 1992.

BY THE COURT:



Donald A. Poppy, Circuit Judge,  
Calumet County, Wisconsin