

KAREN L. STEGER,  
Plaintiff,

vs.

Case No. 06-CV-240

APPLEWOOD HOMES, INC. and  
LABOR & INDUSTRY REVIEW COMMISSION,  
Defendants.

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DECISION ON JUDICIAL REVIEW

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The plaintiff, Karen Steger, was formerly employed by the co-defendant, Applewood Homes, as house care coordinator, meaning she was in charge of managing a house for one of the community-based residential facilities that Applewood owned. Applewood fired the plaintiff after an internal audit revealed several deficiencies which were not corrected prior to an audit by the state of Wisconsin, leading to a citation from the state.

The plaintiff sought unemployment benefits and was initially found to be eligible. However, that determination was reversed by the Labor and Industry Review Commission (LIRC). The plaintiff brought this action to challenge LIRC's decision, which reversed an administrative law judge's determination that she was entitled to unemployment compensation and ordered her to repay the unemployment benefits that had been paid. She argued that LIRC violated due process when it made different fact determinations than the administrative law judge (ALJ) had made without consulting with him to obtain his impressions. She also argued that LIRC erred in ordering repayment.

Due process requires that, before overruling an ALJ's credibility determination, LIRC must confer with the ALJ. "Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the

findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing.” *Shawley v. Industrial Comm’n*, 16 Wis. 2d 535, 541-42, 114 N.W.2d 872 (1962). “Thus, whenever LIRC overrules an ALJ’s credibility determination, LIRC must hold a credibility conference in order to obtain the ALJ’s impressions concerning the witnesses’ demeanor and credibility.” *Hermes Carpet Marts v. LIRC*, 220 Wis. 2d 611, 617, 583 N.W.2d 662 (Ct. App. 1998).

Here, LIRC contends that this issue is “a red herring,” arguing that it did not overturn the ALJ’s credibility determination and therefore did not need to confer with him. LIRC also attempts to minimize this issue by arguing that the plaintiff’s own testimony is sufficient to support its finding that the plaintiff was fired for misconduct, thus making her ineligible for unemployment benefits. However, LIRC cannot avoid the conclusion that a due process violation occurred.

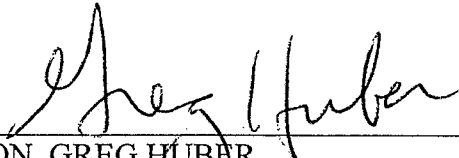
Comparing the decisions issued by the ALJ and by LIRC makes clear that LIRC did, indeed, reject the ALJ’s credibility determination. The ALJ clearly gave more credit to the plaintiff’s testimony than LIRC did. The ALJ found, “The employee made a concentrated effort to resolve all of these matters as directed.” (ALJ Decision, R. 50.) He also found, “She attempted to complete these job tasks to the best of her ability and training. The appeal tribunal finds that she was overwhelmed by the responsibilities and did not ignore or refuse to perform the duties as directed.” (*Id.*, R. 51.) In contrast, LIRC stated, “The commission ***does not credit the employee’s claim*** that she was working up to 15 hours per day. If such were true, it would be ***even more incredible*** that she employee could not set aside 2 hours to complete the final ISP [individual service plan].” (LIRC Decision, R. 4) (emphasis added). Also, LIRC accepted testimony from Applewood employees that the plaintiff watched “The Young and the Restless,”

Oprah, and Dr. Phil on television during the day – claims which the plaintiff flatly denied in her testimony. (*Id.*, R. 3; Transcript., p. 70.) Similarly, LIRC stated, “The employee never indicated to Ms. LaMothe that she was having difficulty completing required tasks,” (LIRC Decision, R. 1), while the plaintiff testified that she repeatedly told Ms. LaMothe about such difficulty and was told things like “hang in there” and “you’ll find a way” (Transcript, pp. 72-73, 76, Ex. 9). Clearly, the ALJ determined that the plaintiff was credible and gave weight to her testimony, while LIRC found the plaintiff incredible and gave weight to the testimony presented by Applewood. And there is no doubt that LIRC did not consult with the ALJ, since it announced as much quite clearly in its decision.<sup>1</sup> Thus, LIRC plainly violated due process, and its decision must be reversed.<sup>2</sup>

THEREFORE, IT IS HEREBY ORDERED that the decision of the Labor and Industry Review Commission dated February 8, 2006, is REVERSED.

Dated this 24<sup>th</sup> day of October, 2006.

BY THE COURT:

  
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HON. GREG HUBER  
Circuit Court Judge

cc: Attorney James Connell  
Attorney Frank Gumina  
Attorney William Sample

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<sup>1</sup> At the end of its decision, LIRC included the following in an endnote: “The commission did not consult with the ALJ who presided at the hearing regarding his impressions of witness demeanor and credibility. The ALJ who presided at the hearing is no longer employed by the department.” (LIRC Decision, R. 5.)

<sup>2</sup> Since reversal is appropriate on due process grounds, it is unnecessary to address the repayment issue.