
BILLY J. NASH,

Plaintiff,

vs.

Case No. 92CV003660

U.S. POSTAL SERVICE and
LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant.

MEMORANDUM DECISION

This case is before the Court on a judicial review of a decision issued by the Labor and Industry Review Commission. In the decision, the Commission affirmed a decision of the Appeal Tribunal. The ALJ determined that the plaintiff, Billy J. Nash, had been discharged for misconduct and therefore would not be able to collect unemployment compensation benefits under Wis. Stat. Sec. 108.04 (5).

Nash was employed by the defendant, U.S. Postal Service, from 1973 up until his termination on October 11, 1991. Beginning in August 1990, Nash began having attendance problems. On several occasions Nash was absent without leave. Nash violated various Postal rules and regulations because of the absences. Numerous disciplinary actions were subsequently taken against Nash prior to his termination, including three 14-day suspensions and a 30-day suspension.

Nash acknowledged he had a problem with alcohol and this was the cause of his irregular attendance. Thus the Postal Service referred him to its employee assistance program. The Postal Service required Nash's participation in this program for his continued employment with the Postal Service. Nash failed to continue his participation in this program.

Nash was discharged from his employment with the Postal Service on October 11, 1991 and applied for unemployment compensation following his discharge. Through an ex parte investigation, it was determined that Nash was not discharged due to misconduct. Thus under Wis. Stat. Sec. 108.04 (5), Nash would be eligible to collect unemployment benefits. The Postal Service appealed this determination. The ALJ rendered a decision that reversed the initial determination and found Nash to have been discharged because of misconduct connected with his employment. The result of the ALJ's decision was Nash was not eligible for unemployment benefits and the benefits that he already received would need to be repaid. Thus Nash was required to repay an amount of \$1,575 to the Unemployment Reserve Fund.

Nash appealed the Appeal Tribunal decision to the Labor and Industry Review Commission. The Commission affirmed the decision of the Appeal Tribunal. Nash subsequently brought this action for judicial review of the Commissions decision.

In a judicial review of a Commission decision under Wis.Stat. Sec. 102.23(1)(e), the court may set aside the order 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.
3. That the findings of fact by the commission do not support the order or award.

In addition, under Wis. Stat. Sec. 102.23(6), "if the commission's order or award depends on any fact found by the commission . . . [t]he court may, however, set aside the commission's order . . . that is not supported by credible and substantial evidence."

Thus the issue in this review is whether the Commission's order to affirm the Appeal Tribunal's finding, that Nash was terminated for misconduct connected with his work, was

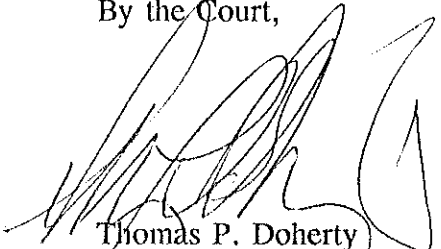
supported by credible and substantial evidence.

This court agrees with the Commission's findings of law that Nash's behavior in regards to his employment constituted misconduct. The term misconduct within Wis. Stat. Sec. 108.04(4)(a) has been defined as "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". Boynton Cab Co. v. Neubeck, 257 Wis. 249 (1941). Nash's conduct clearly falls within this definition.

In addition, the findings of fact made by the Commission are supported by "credible and substantial evidence." The evidence in this case conclusively supports the Commission decision encompassing the absences involved in this case and the appropriate reasons for such absences. Nash has failed to show that the absences without notice to the employer were for reasons beyond his control. Thus it is the determination of this Court that the decision of the Labor and Industry Review Commission be affirmed.

Dated this 21 day of March 1993, in Milwaukee, Wisconsin.

By the Court,


Thomas P. Doherty
Circuit Court