

KEVIN ACKERMANN,

Petitioner,

vs.

CAPITOL COURT CORPORATION,

Respondent.

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MEMORANDUM DECISION
Case No. 94-CV-10783

Kevin Ackermann, the petitioner, filed this certiorari review of the decision by the Labor and Industry Review Commission (LIRC) which denied him unemployment compensation benefits. LIRC found that the discharge was due to a work-related misconduct.

Since 1987 until 1993, the petitioner was employed by the respondent Capitol Court Corporation as a maintenance worker. He was discharged on October 12, 1993. LIRC found the following.

1. In October 1987, respondent gave the petitioner a written reprimand for driving a sweeper recklessly on a public street.
2. In October 1991, respondent gave the petitioner a second warning and a five day suspension without pay for using respondent's vehicle for personal purposes without permission.
2. In March 1992, respondent gave the petitioner a second warning for being out of uniform during working hours.
3. In January 1993, respondent gave the petitioner a third warning for walking off the job and going home an hour early.
4. In June 1993, the petitioner backed a company vehicle into a police car but was not disciplined or reprimanded for that incident.
5. On September 27, 1993, respondent gave the petitioner a fourth warning and placed him on a two day suspension until September 29, 1993 for poor work performance. The petitioner did not

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paint the wall in a vacant store as he was requested because he determined that the wall was not properly prepared.

6. On September 30, 1993, the petitioner struck a pedestrian while driving an end-loader in the parking lot. The petitioner maintained that he was driving one mile per hour. The supervisor who re-enacted the accident determined that the petitioner drove 3-9 miles per hour. Also, the petitioner was observed raising and lowering the bucket of the end-loader as the loader was moving. The approved position of the bucket while operating the loader is in a lowered position.

Department's Initial Determination was that the discharge was not for misconduct connected with work. The Appeals Tribunal affirmed the Initial Determination. LIRC reversed the Appeals Tribunal and concluded,

"The administrative law judge did not consider all the reprimands given to the employee because she determined that the reprimands received in January 1993 and prior thereto were too remote in time. The commission agrees that usually any reprimand occurring over one year prior to discharge is of insufficient consequence to be considered in a determination of misconduct. However, in this case the successive reprimands, especially in the driving incidents, establish a pattern of conduct which indicates carelessness or negligence on the part of the employee. [...] Under the circumstances, the commission concludes that the employee's actions went beyond mere inefficiency, unsatisfactory conduct or an isolated incident of failing to perform the job properly. [...] The sequence of reprimands culminating in the final incident exhibited a pattern of conduct by employee showing carelessness and negligence on his part of such degree and recurrence as to evince an intentional and substantial disregard of the employer's interests and of the employee's duties and obligation to the employer."

LIRC ruled that the discharge was due to a work related misconduct.

The standard of review of LIRC's decision is defined in sec. 108.09(7). It provides that judicial review of unemployment compensation decisions may be sought in accordance with sec. 102.23, Stats. A court may set aside LIRC's order if it "depends on

any material and controverted finding of fact that is not supported by credible and substantial evidence", sec. 102.23(6), or if LIRC's findings of fact do not support its order, sec. 102.23(1)(e)3. The substantial evidence test under sec. 102.23(6), Stats., does not constitute a preponderance of evidence; rather, "[t]he test is whether reasonable minds could arrive at the same conclusion the commission reached." Holy Name School v. ILHR Department, 109 Wis.2d 381, 386, 326 N.W.2d 121 (Ct.App. 1982). It is LIRC's function to weigh the evidence and determine the credibility of witnesses. Farmers Mill of Athens, Inc. v. ILHR Dept., 94 Wis.2d 576, 579-80, 294 N.W.2d 39 (Ct.App. 1980) (footnote omitted). When more than one inference may be drawn, the inference drawn by LIRC is a finding of fact and is conclusive. Id. (footnote omitted).

"Misconduct" under sec. 108.04(5), Stats., has been defined as conduct evincing such wilful or wanton disregard of an employer's interests as found either in deliberate violations or disregard of standards of behavior or in carelessness or negligence of such degree or recurrence as to manifest equal culpability. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). This court is not bound by LIRC's conclusions on questions of law. If LIRC's conclusions are reasonable, however, the court will sustain them although another view may be equally reasonable. Farmers Mill of Athens, Inc., at 580 (footnote omitted).

The court now turns to the petitioner's arguments.

First, the petitioner contends that the October 1987 warning should not have been considered by LIRC because it was not made a

part of the hearing record and the respondent did not consider it to be a deciding factor for the discharge. The information regarding the October 1987 warning was a part of the oral evidence adduced at the hearing from Richard Pangratz, the operations manager for the respondent. Richard Pangratz's testimony is uncontroverted. It established the fact of the October 1987 warning. His testimony also established that although the 1987 incident was not "a large factor" in petitioner's discharge, it was noted in the statement to the union. Therefore, the court concludes that LIRC properly considered evidence of the October 1987 warning.

Second, the petitioner claims that the October 1991 incident is too remote in time and the March 1992 incident too minor to be considered. The petitioner also argues that the January and September 1993 incidents might have been violations of a work rules, but not a "misconduct."

LIRC found that the employer had a progressive disciplinary policy which provided for four warnings and a discharge. LIRC further found that the employee received all preliminary warnings. The first warning was given in October 1991 when the employee used employer's vehicle and a trailer for personal purposes without employer's permission. LIRC agreed with the Administrative Law Judge's conclusion that the 1991 incident considered alone would have been too remote in time to warrant a finding of misconduct. However, LIRC concluded that this incident considered in a pattern of ongoing conduct, was indicative of a recurring negligence.

LIRC's conclusion is reasonable and in harmony with Boynton Cab which allows consideration of recurring carelessness or negligence. Cf. id. at 259-60.

For the same reasons LIRC's consideration of the March 1992, January 1993 and September 1993 warnings is proper. As links in a chain of successive reprimands, LIRC considered evidence of warnings given to petitioner for being out-of-uniform, leaving work early without notifying supervisors, and disregarding work assignment. If considered in isolation, each of these incidents might have been insufficient to warrant a finding of "misconduct." Taken together in the context of other warnings and incidents indicative of petitioner's inadvertence, LIRC could have reasonably concluded these warnings were relevant links in a pattern of recurring carelessness and disregard for employer's interests amounting to a misconduct.

Next the petitioner argues that no evidence supports a conclusion that he is a negligent driver. LIRC found that in October 1987, the petitioner was reprimanded for driving a sweeper recklessly on a public street. Also, LIRC found that in June 1993, the petitioner backed into a police car but that he did not receive a citation and was not reprimanded for that incident. Finally, LIRC found that on September 30, 1993, the petitioner struck a pedestrian with an end-loader truck. The petitioner was observed raising and lowering the bucket of the loader while operating the truck. LIRC found that the approved position of the bucket is in a lowered position and that a raised bucket could have obstructed

petitioner's vision. LIRC further found that this accident occurred in an unobstructed portion of the parking lot. Evidence indicating that the petitioner was driving faster than he testified was also received. In light of that history, LIRC's findings of negligence are supported by substantial evidence.

Finally, the petitioner points out that the employer itself admitted that the termination was not due to a misconduct. This occurred on the form letter notifying the employee of his rights to continue with medical insurance under Consolidate Omnibus Budget Reconciliation Act (COBRA) amendments to ERISA. Under COBRA, ERISA plan sponsors are required to provide terminated employees and their dependents with option of purchasing continuation of their health coverage without regard to insurability. An ERISA-plan sponsor is obliged to determine employees' rights to continuation coverage. Under 29 U.S.C. §1163(2), an employee terminated for "gross misconduct" does not qualify for continued health coverage. "Gross misconduct" under 29 U.S.C. §1163(2) is defined by a whole body of federal law. See e.g. Burke v. American Stores Employee Ben. Plan, 818 F.Supp. 1131 (N.D.Ill. 1993); Paris v. F.Korbel & Bros., Inc. 751 F.Supp. 834 (N.D.Cal. 1990); Connery v. Bath Associates, 803 F.Supp. 1388 (N.D.Ind. 1992). These determinations are not relevant for purposes of state unemployment compensation law. They are made to serve and conform to different social policy and thus are governed by a different body of law. Therefore, this court declines to find that employer's determination made for COBRA

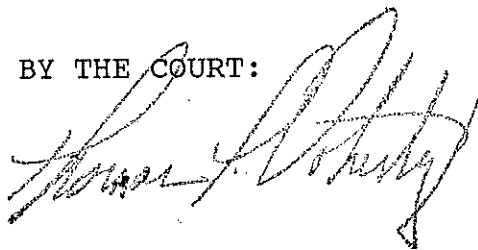
purposes that the petitioner was not discharged for reasons of "gross misconduct" is binding on LIRC making a determination of "misconduct" for purposes of the Wisconsin unemployment law.

For those reasons, the court concludes that LIRC's decision that the petitioner was discharged for misconduct is reasonable. As such, the decision is affirmed. The counsel for the respondent will prepare an order consistent with this Decision under the five days rule.

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September ____, 1995, Milwaukee, Wisconsin

BY THE COURT:



Thomas P. Doherty
Circuit Court Judge