STATE OF WISCONSIN CIRCUIT COURT BRANCH 26 MILWAUKEE COUNTY

SHERRON R. BATTLE,

Plaintiff,

v. Case No. 10-CV-1011

LABOR AND INDUSTRY REVIEW COMMISSION,

and

SSC GERMANTOWN ORP CO.,

Defendants.

DECISION AND ORDER

Sherron R. Battle, Plaintiff, seeks judicial review of a decision by the Labor and Industry Review Commission ("LIRC" or "the Commission"). The LIRC decision, issued on January 8, 2010, affirmed the decision of the administrative law judge who agreed with the Department of Workforce Development, finding that Ms. Battle was discharged for misconduct connected to the employee's work, within the meaning of Wis. Stat. § 108.04(5). Pursuant to Wis. Stat. §§ 102.23 and 108.09(7), Ms. Battle appeals the Commission's decision to the Circuit Court. This Court has reviewed the record, evidence, and arguments, and for the reasons stated herein, affirms the Commission's decision.

BACKGROUND

I. Ms. Battle's Employment

Ms. Battle was employed as a resident care specialist by SSC Germantown ORP Co. ("SSC Germantown"), operator of a nursing home facility, from October 2, 2007 to June 1, 2009. Assignments at the nursing home facility were given by the charge nurse based on the number of residents requiring care and "acuity" factors, such as the amount of care a resident required. The employer assigned a charge nurse to supervise the shifts. The charge nurse assigned duties to the care specialists and oversaw the care of the residents. Because some residents may need more care than others, employees may not be assigned exactly the same number of residents in order to balance the care specialists' overall duties. Although Ms. Battle had been disciplined for insubordination and instances of neglect previously for which she was issued written warnings, her discharge on June 1, 2009 arose from her reaction to her assignment on that particular night.

On her last day of work, Ms. Battle was assigned to fifteen residents; her co-worker was assigned to thirteen. Ms. Battle was given two extra residents because they shared a room and one required total care and the other one required no special care. The charge nurse wanted to avoid the interruptions that came from having two caregivers service one room. Ms. Battle objected, expressing that the assignment was unfair. The charge nurse asked her to do the assignment a second time, explaining the reasoning behind the assignment. Ms. Battle responded "no" to the repeated request, asserting it was unfair for her to have fifteen residents to care for while her co-worker had only thirteen. The supervisor, who overheard the discussion between the charge nurse and Ms. Battle, intervened and instructed the employee to do the assigned work and warned her

that her response amounted to insubordination. Ms. Battle continued to refuse the assignment and express her feeling that it was unfair. The charge nurse ultimately assumed responsibility for the extra residents and Ms. Battle left work early for unrelated reasons.[1]

II. Application for Unemployment Insurance and Subsequent Appeals

After Ms. Battle's discharge on June 5, 2009 for insubordination on the evening of June 1, 2009, she applied for unemployment insurance benefits. The Department of Workforce Development ("the Department") determined that Ms. Battle was discharged for misconduct connected with her work. As a result, she was ineligible for unemployment benefits. Ms. Battle appealed the Department determination.

On September 8, 2009, a hearing on the appeal was held before Administrative Law Judge Paul E. Gordon ("the ALJ"). On September 11, 2009, the ALJ affirmed the Department's determination. The ALJ found that Ms. Battle was terminated for misconduct connected with her work for the employer, within the meaning of Wis. Stat. § 108.04(5). Accordingly, Ms. Battle remained ineligible for benefits beginning in week twenty-three of 2009, and until seven weeks had elapsed since the end of the week of discharge and Ms. Battle had earned wages in covered employment performed after the week of discharge equaling at least fourteen times the employee's weekly benefits rate which would have been paid had the discharge not occurred. Ms. Battle timely appealed the decision of the ALJ.

On January 8, 2010, the LIRC affirmed the decision of the ALJ, and adopted the findings and conclusions in that decision as its own. The Commission noted that the ALJ

[1] Ms. Battle left work just after midnight during her shift due to a break-in at her home. Transcript at pg. 45.

found misconduct solely on Ms. Battle's willful refusal to care for her patients on June 1, 2009; thus, it was unnecessary to consider any of her prior discipline issues. On January 22, 2010, Ms. Battle filed this action for judicial review of the Commission's January 8, 2010 decision.

STANDARD OF REVIEW

I. Findings of Fact

This Court reviews the LIRC's decision pursuant to Wis. Stat. §§ 102.23(1)(e) and 108.09(7). Wis. Stat. § 108.09(7)(b) limits the scope of judicial review to questions of law. *Wehr Steel Co. v. Department of Industry, Labor and Human Relations*, 106 Wis.2d 111, 116, 315 N.W.2d 357 (1982). The LIRC's decision may be set aside only if: (1) the commission acted without or in excess of its powers; (2) the order was procured by fraud; or (3) LIRC's findings of fact do not support its order. Wis. Stat. § 102.23(1)(e).

The LIRC's factual findings are binding on the Court. *Patrick Cudahy Inc. v. LIRC*, 2006 WI App 211, ¶ 7, 296 Wis.2d 751, 723 N.W.2d 756 (Ct. App. 2006); Wis. Stat. § 102.23(1)(a) ("The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive."). When a factual issue involves a question of intent and credible evidence raises competing inferences, the Commission's finding is conclusive. *Fitzgerald v. Globe-Union, Inc.*, 35 Wis.2d 332, 336-37,151 N.W.2d 136 (1967). The LIRC is the sole judge of the witnesses' credibility and the weight to be accorded to their evidence. *Manitowoc County v. Department of Industry, Labor and Human Relations*, 88 Wis.2d 430, 437, 276 N.W.2d 755 (1979). Therefore, the Court may not substitute its judgment for that of the LIRC regarding credibility even

if the court may have independently arrived at a different conclusion. *See Younglove v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 139-140, 579 N.W.2d 294 (Ct. App. 1998). The role of the reviewing court is to search the record to locate credible evidence that supports the LIRC's decision, rather than weighing the evidence opposed to it. *See Brakebush Bros., Inc. v. LIRC*, 210 Wis.2d 623, 630, 563 N.W.2d 512 (1997); *Vande Zande v. DILHR,* 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975).

II. Conclusions of Law

The LIRC's determination of whether an employee engaged in misconduct is a legal conclusion that the Court reviews *de novo*. *Patrick Cudahy, Inc.*, 2006 WI App 211, ¶ 8. However, the Court must give the LIRC's determination appropriate deference. *Id*. This case involves a review of the LIRC's interpretation of a legal question: whether Ms. Battle's actions amounted to misconduct under Wis. Stat. § 108.04(5). There are three levels of deference applicable to the LIRC's interpretation or application of a statute: great weight, due weight, or *de novo*. *UFE, Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57 (1996).

Great weight deference is appropriate if the Court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659-60, 539 N.W.2d 98 (1995). Due weight deference is appropriate "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the

interpretation of the statute than a court." *UFE, Inc.*, 201 Wis.2d at 286. Finally, the Court will apply a *de novo* standard of review only when the issue before the Commission is clearly one of first impression or the Commission's positions on a statute have been so inconsistent that they provide no real guidance. *Id.* at 285.

The Court finds that the LIRC fulfills the four requirements for great weight deference. First, the LIRC is in charge of administering Wis. Stat. §108.04(5). *Patrick Cudahy Inc.*, 2006 WI App 211, ¶ 11. Second, the LIRC's interpretation of § 108.04(5) is long standing and the statute has been applied by LIRC to a variety of fact situations. *Lopez v. LIRC*, 2002 WI App 63, ¶ 13, 252 Wis.2d 476, 642 N.W.2d 561 (Ct. App. 2002). Third, the LIRC employed its expertise and specialized knowledge of the statute in forming its interpretation. *See id.* Finally, the LIRC's interpretation of the statute will provide uniformity and consistency in the application of the statute. Furthermore, the courts have specifically recognized that the LIRC's conclusions of law arising under Wis. Stat. §108.04(5) intertwined with factual determinations (e.g. employee intent as it relates to misconduct) are entitled to great weight. *Kannenberg v. LIRC*, 213 Wis. 2d 373, 386-87; *Bernhardt v. LIRC*, 207 Wis. 2d 292, 303; *Charette v. LIRC*, 196 Wis. 2d 956, 960.

Under the great weight standard, the Court must "uphold an agency's reasonable interpretation of the statute if it is not contrary to the clear meaning of the statute," even if the Court concludes that another interpretation is more reasonable. *Lopez*, 2002 WI App 63, ¶ 10. Additionally, the LIRC's decision must be affirmed if it is reasonable. *Id.*, ¶ 16. "A decision is unreasonable if it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without a rational basis." *Id.* The burden of establishing that the LIRC's interpretation is unreasonable is on the party challenging the

decision; "the agency does not have to justify its interpretation." *Bunker v. LIRC*, 2002 WI App 216, ¶ 26, 257 Wis. 2d 255, 650 N.W.2d 864 (Ct. App. 2002).

ANALYSIS

Applying the great weight standard of deference, the Court must determine whether Ms. Battle's conduct indeed constitutes "misconduct" within the meaning of Wis. Stat. §108.04(5), or whether the Commission's interpretation in Ms. Battle's case is contrary to the clear meaning of the statute. Section 108.04(5) states:

> Unless sub. (5g) results in disqualification, an employee whose work is terminated by an employing unit for misconduct connected with the employee'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 employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment insurance law of any state or the federal government.

Because the statute fails to provide an actual definition of the term "misconduct," the task fell to the courts. In *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941), the Wisconsin Supreme Court established the current test for misconduct, holding:

> [T]he intended meaning of the term "misconduct", as used in sec. 108.04 . . . 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.

Boynton, 237 Wis. 249, 259-60, 296 N.W. 636, 640. Based on a review of the evidence in the record and the facts presented at the hearing, the Court holds that the LIRC's determination that Ms. Battle's willful refusal to care for the patients assigned to her amounted to misconduct satisfies the *Boynton* test for misconduct, is not contrary to the clear meaning of the statute, and is reasonable.

In his September 11, 2009 decision, the ALJ found that the assignment made by the charge nurse was consistent with the needs of the residents, employer, and staff. Furthermore, the ALJ found no ill motive on the part of the supervisor who made the assignment. The ALJ noted in his decision that Ms. Battle's initial expression of dissatisfaction with the assignment was not unreasonable or insubordinate. However, the ALJ found her repeated response of "no" when asked to accept her resident assignment "was insubordinate in that it demonstrated an unwillingness to accede to the rightful authority of her supervisors and evinced a willful, substantial and unreasonable disregard of the employer's interests." This Court finds that the ALJ's findings are supported by credible evidence in the record and testimony at the hearing. Therefore, the factual findings are binding on the Court. *Patrick Cudahy Inc.*, 2006 WI App 211, ¶ 7; Wis. Stat. § 102.23(1)(a).

Based on the above factual findings, the ALJ concluded that Ms. Battle's discharge was for misconduct connected with her work. Her repeated refusal to accept an assignment that was within the prerogatives of her supervisors and not patently unreasonable was insubordinate. Laura Means, the charge nurse working the shift on the night of June 1, 2009 testified that her responsibilities were to "oversee basically the care of all residents, to assign the duties" and to "make sure [residents'] needs are met in a

timely manner." Transcript at pg. 19. When Ms. Battle refused to comply with Ms. Means' request, Ms. Battle willfully, substantially, and unreasonably disregarded her employer's interests for care of the residents. The LIRC, in affirming the ALJ's determination, found that there was nothing to suggest that the supervisor had a motive to intentionally give Ms. Battle additional work. When describing the process for assigning the work, Ms. Means admitted that it is "not necessarily a 50/50 split" but that "I try to balance it out" (based on the level of care each resident requires). *Id.* at pgs. 20-21. The Commission noted that Ms. Battle had a right to speak her mind and express her belief that she was being treated unfairly. However, her continued refusal to care for an assigned resident "was such a substantial and willful disregard of the employer's interests that it amounted to misconduct."

Ms. Battle argues on appeal that although she admittedly expressed that the assignment was unfair, she never refused to care for a resident. In addition, she raises the issue of employer inconsistency. Specifically, concern that the June 2, 2009 write-up, recommending termination, references an employee handbook rule number that does not mention insubordination. The discipline notice refers to #37 of the performance expectations (employee may not "physically, verbally, emotionally, or psychologically abuse a resident...neglect resident care duties related to the safety, health, or physical comfort of the residents"). Hearing Exhibit 3. However, item #38 in the handbook actually defines insubordination, which includes, but is not limited to, "refusal by words or actions to comply with a direct order from a supervisor and/or refusal of a job assignment, including modified duty." *Id.*

The Court must defer to the LIRC's interpretation of the statute and can only overturn its decision if it is clearly contrary to the meaning of the statute or unreasonable. The *Boynton* definition of misconduct as intended in Wis. Stat. § 108.04 places the focus on employee conduct:

> [T]he intended meaning of the term "misconduct", as used in sec. 108.04 . . . 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.

Boynton, 237 Wis. 249, 259-60, 296 N.W. 636, 640. In the present case, Ms. Battle's conduct on the night of June 1-2, 2009 was much more significant to the LIRC's determination than the label that may have been assigned to that conduct in her discipline report. Furthermore, the final write-up states "insubordination" in addition to "#37" (Hearing Exhibit 3) and the supervisor warned Ms. Battle at the time of the incident that her refusal was insubordinate. Transcript at pg. 30. Thus, Ms. Battle was clearly aware of the reason for her discharge.

The Court finds the LIRC's determination of Ms. Battle's conduct is reasonable and supported by substantial evidence in the record. At the hearing, Ms. Means, the charge nurse on duty the night of June 1-2, 2009, responsible for assigning residents to the staff, testified to the incident she witnessed firsthand. She testified to the balance the employer tries to reach each night of residents to staff, based on the amount of care each resident needs. *Id.* at pgs. 20-22. She also testified to Ms. Battle's repeated negative responses when she tried to give Ms. Battle her assignment. *Id.* at pgs. 25-30. When Ms.

Means asked Ms. Battle if she "could just check [the independent resident] when she was doing the other [resident in the room who required total care] instead of having people come in and out, flipping on the lights multiple times, waking them up," Ms. Battle replied "no." *Id.* Ms. Battle proceeded to refuse her assignment on two more occasions.

Conversely, Ms. Battle testified that she "never refused to do [the assignment]." *Id.* at pg. 46. Ms. Battle did, however, admit that she stated the assignment was unfair multiple times and did not disagree with the fact that the supervisor who heard the exchange felt it necessary to intervene. *Id.* at pgs. 46-47. The LIRC, not the reviewing court, is the sole judge of the witness's credibility and the weight to be accorded to the evidence. *Manitowoc County v. Department of Industry, Labor and Human Relations*, 88 Wis.2d 430, 437, 276 N.W.2d 755 (1979). Based on the testimony and exhibits in the record, the LIRC affirmed the decision of the ALJ that Ms. Battle's continued refusal to take on her assignment and care for those residents was insubordinate. An employer has a right to expect that its employees will comply with direct orders from supervisors regarding employment and accept job assignments as given. Ms. Battle's conduct fell short of meeting this expectation.

Based on a review of all of the evidence in the record, including Ms. Battle's own testimony that she repeatedly insisted the assignment was unfair, this Court upholds the Commission's determination that Ms. Battle's responses to the charge nurse and supervisor on the night of June 1-2, 2009, demonstrated conduct evincing a willful, wanton, and negligent disregard of the employer's interests and Ms. Battle's obligations. The Court, in assigning a great weight level of deference, concludes that the LIRC's determination that Ms. Battle's conduct constitutes misconduct under Wis. Stat. §

108.04(5) is reasonable, is supported by substantial evidence in the record, and is in compliance with the clear meaning of the statute.

CONCLUSION

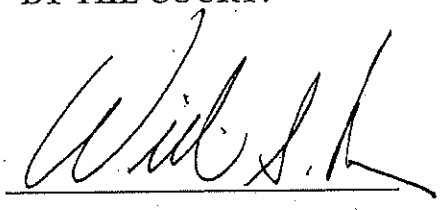
Based upon a review of the record, the evidence presented at the hearing, and for the reasons outlined above, the Court finds that there is credible and substantial evidence to uphold the Labor and Industry Review Commission's decision to affirm the administrative law judge's decision affirming the Department of Workforce Development's determination that Sherron R. Battle was terminated due to misconduct pursuant to Wis. Stat. § 108.04(5).

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

SO ORDERED.

Dated this 14th day of September, 2010, at Milwaukee, Wisconsin.

BY THE COURT:



William S. Pocan
Circuit Court Judge

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL