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JEFFERY A. BLOCK,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW COMMISSION,  
and GANTON TECHNOLOGIES,

Defendant.

Case No. 93-CV-2194

CIVIL COURT  
FILED

JAN 27 1995

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DECISION

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CLERK OF CIRCUIT COURT  
RACINE COUNTY

This is a petition for review pursuant to Sec. 108.09(7), Stats., of a decision of the Labor and Industry Review Commission (hereafter "LIRC" or "the commission"), denying unemployment compensation benefits to the Plaintiff, Jeffery A. Block. The Plaintiff was terminated from his job as a dye cast operator at Ganton Technologies (hereafter "Ganton" or "the employer") in November of 1992 for being absent from work without a valid reason. The issues is whether the employee was discharged for misconduct connected with his work, within the meaning of Sec. 108.04(5), Stats.

Most of the facts are not disputed. Plaintiff was employed by Ganton as a dye cast operator for approximately two and a half years from 1989 through 1992. During his period of employment, the Plaintiff checked himself into a hospital for substance abuse three times, in September 1991, March 1992, and October 1992. Plaintiff testified that his treatment was for the use of cocaine. (Tr. 15, 16, 26). Following the March hospitalization, at a meeting

attended by the employer, union representatives, and the Plaintiff, a "letter of understanding" was executed. (Ex. 2). The letter provided that the Plaintiff would participate in a drug treatment program established by DePaul Hospital, which included regular counseling sessions, total abstinence from alcohol and all other controlled substances, except as prescribed by a physician, and active participation in regular AA or NA meetings. The letter further provided that should the Plaintiff fail to comply with these stated provisions his employment would be terminated.

On each day from October 20 through October 26, Plaintiff's mother called the employer to report that he was ill. Plaintiff, who testified that he was using cocaine as much as he could during the month of October, telephoned the employer's personnel manager on October 27 and told her that he was "having problems with substance abuse" again and wanted her help in getting back into the treatment program at DePaul. (Tr. 9-10, 21). After ascertaining that the employee's mother had been making the calls to DePaul, she suggested that Plaintiff call the hospital himself, and later on that day, Plaintiff called to state that he did indeed have an assessment scheduled at DePaul for October 29 at 10:45 a.m.

At about 10:30 a.m. on October 29, 1992, Plaintiff came to Ganton to pick up his paycheck and disability forms and was told by the personnel manager that he was going to be late for his assessment. Plaintiff testified that he did not make it to the assessment that day because he was "running late", but that he did have a subsequent appointment which he met at DePaul on Saturday, October 31, 1992. He went through detoxification for two or three days and then entered DePaul for inpatient drug treatment until December 10, 1992 (Tr. 23). Because the personnel manager had not heard from Plaintiff, she sent him a letter on October

30 indicating that he was on suspension pending investigation of whether he had violated the terms of the letter of understanding. Plaintiff telephoned the personnel manager on Monday, November 2, 1992, stating that he disagreed with her letter because he believed that he had graduated from the DePaul program and had thus complied with the letter of understanding. (Tr. 11-12, Ex. 5).

When the personnel director, Ms. Atchison, contacted DePaul, she was told that Plaintiff had tested positive for cocaine and would be placed in a thirty-day treatment program. She recontacted DePaul and was told that Plaintiff's release date would be November 25, 1992. She sent a letter to Plaintiff's home instructing him to report to the personnel office on November 30. When Plaintiff did not appear, the employer sent a letter of termination to the Plaintiff. (Tr. 12-13; Ex. 1). Ms. Atchison later learned that the Plaintiff's release date had been moved forward into December, but testified that this did not change the decision to discharge Plaintiff because the stated reason for discharge was his continued use of an illegal drug, causing unexcused absences most recently from October 20 through November 30, 1992.

The issue is whether the Commission erred in determining that Plaintiff was discharged for misconduct and thus ineligible for benefits under Sec. 108.04(5), Stats. The Commission found that the employee's drug use, which resulted in his being absent from work in October and November of 1992, evinced a willful, intentional and substantial disregard of the employer's interests and of the standards of conduct the employer had a right to expect of a worker so as to constitute misconduct connected with his employment. "Misconduct" for unemployment compensation purposes is conduct evincing such willful 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 its employee, or in carelessness or negligence of such degree or recurrence as to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

The question of whether the Plaintiff's actions constitute "misconduct" is a question of law that is reviewed de novo. McGraw Edison Co. v. ILHR Department, 64 Wis. 2d 703, 221 N.W. 2d 677 (1974). However, while the application of an interpretation of a statute to a given set of facts by an administrative agency is a conclusion of law, the agency's interpretation is given deference if there is a rational basis for the agency's actions. Kocher v. DHSS, 152 Wis. 2d 170 (Ct. App. 1989).

"Because LIRC has longstanding experience, technical competence and specialized knowledge in administering the unemployment compensation statutes, its interpretation and application of those statutes is entitled to great weight. Under this statute, we uphold LIRC's interpretation and application of the statute as long as it is reasonable and consistent with the statute's language, regardless of whether other interpretations are reasonable." Hubert v. LIRC, 186 Wis. 2d 590, 597 (Ct. App. 1994).

This standard is, however, complicated by the Commission's statement that it "has never held that dependency on an illegal drug such as cocaine is a valid defense to misconduct." In its brief, the Commission's attorney acknowledged that the Commission had overstated its case by that statement, and that the Commission did not mean to imply that in a case where a credible expert medical opinion established that an individual had acted involuntarily due to cocaine addiction, it would nevertheless find intent. The Commission

contends that "this overstatement at most constituted harmless error by which Plaintiff was not damaged." (Brief of Defendant at pg. 17.) The Commission in its brief does point out that the Commission's experience with Sec. 108.04(5), Stats., as applied to numerous cases involving attendance violations and drug/alcohol abuse is certainly of longstanding duration. The Court in this instance will apply the "great weight" standard to the Commission's determination.

While most of the facts are not in dispute, what is in dispute is whether the Plaintiff engaged in intentional conduct when he resumed his use of cocaine in October 1992, resulting in a third period of missed worked days and ultimately his discharge. The Commission found that Plaintiff had "pledged to abstain from alcohol or other controlled substances or he would be subject to immediate termination." It further found that the Plaintiff violated that agreement by his renewed drug use in October of 1992. The Plaintiff testified that it was his understanding that the provisions of the March 1992 letter of understanding meant only that he was required to have total abstinence from alcohol and controlled substances while he was actively involved in the DePaul treatment program. However, he conceded that he did not read the letter of understanding to mean that once he was out of DePaul he could use illegal drugs. (Ex. 7; Tr. 18). The crux of his argument is that he lacked the ability to abstain from cocaine use in October and therefore was not guilty of intentional misconduct.

Plaintiff provided no medical evidence to substantiate his assertion that his absences during October and November of 1992 were the result of uncontrollable cocaine dependence. It is undisputed, however, that he did participate in the DePaul outpatient program between

January 9, 1992, and August 20, 1992, and went through detox when he entered a treatment program on October 31, 1992. The record does not contain any medical opinion, either by testimony or record, however, describing his degree of addiction, if any, or whether in October 1992 he was medically incapable of refraining from cocaine use. While this Court is certainly aware of the extraordinary addictiveness of cocaine, it is reluctant to substitute its judgment for that of the Commission in finding that the cocaine use in October of 1992 was voluntary. Given the absence of medical information in the record, this Court will not overturn that finding by the Commission.

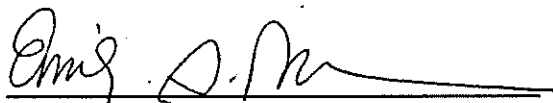
Where one or more inferences may be drawn from the evidence, the drawing of one such permissible inference by the Commission is an act of fact finding, and the inference so derived is conclusive on the Court. *Universal Foundry Co. v. DILHR and Clark*, 86 Wis. 2d 582, 589, 273 N.W. 2d 324 (1978). It is apparent that one of the Commission's considerations in rendering its decision was that, unlike alcohol, the possession of cocaine is a crime in this state. That fact was apparently a value determination in the Commission's approach to this case. Even had dependency been established on the record, it is not clear whether the Commission would have treated the addiction to an illegal substance the same as it treats the disease of alcoholism. On this record, however, there is only the testimony of the Plaintiff to indicate that his use of cocaine in October 1992 was not voluntary. It is the function of the Commission, and not the reviewing Court to determine the credibility of evidence or witnesses and to weigh the evidence. *Link Industries, Inc. v. LIRC*, 141 Wis. 2d 557, 558, 415 N.W. 2d 574 (Ct. App. 1987). The determination that the resumption of cocaine use was voluntary is a permissible inference by the Commission, based upon the

record and upon an assessment of the credibility of the witnesses.

The decision of the Commission is, therefore, affirmed and judgment may be entered dismissing the petition for review.

Dated at Racine, Wisconsin, this 27 day of January, 1995.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Emily S. Mueller", written over a horizontal line.

EMILY S. MUELLER  
Circuit Judge, Branch 3