

DARRYL CAPER,

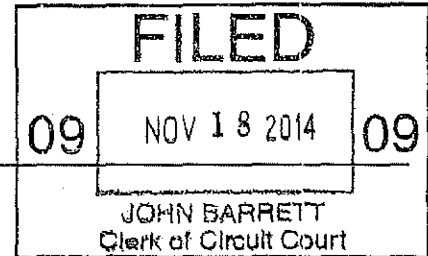
Petitioner,

Case No. 14-CV-1830

vs.

LABOR AND INDUSTRY REVIEW COMMISSION and  
WISCONSIN DEPARTMENT OF CHILDREN & FAMILIES,

Respondents.

**DECISION AND ORDER**

The petitioner, Darryl Caper, seeks judicial review of a decision by the Labor Industry and Review Commission (“LIRC” or “the Commission”) denying his claim for unemployment insurance benefits. LIRC’s decision, issued on February 12, 2014, found that Mr. Caper was not eligible for benefits due to a discharge for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5). Accordingly, LIRC determined that Mr. Caper was ineligible for unemployment benefits until he met the requalification requirements of the statute. This Court has thoroughly reviewed the record and the parties’ arguments, and for the reasons stated herein, affirms LIRC’s decision.

**STATEMENT OF FACTS**

Mr. Caper worked for the Department of Children and Families (“DCF”) for approximately two years as a “childcare subsidy specialist – senior.” He was discharged on October 11, 2013 for unsatisfactory work performance. DCF’s decision to discharge Mr. Caper came after approximately one year of consistently poor work performance, despite attempts by his supervisor to help him achieve minimum objectives. Mr. Caper’s supervisor, Ms. Rucker, outlined her initial concerns about his performance in an email sent in October, 2012 and followed up with him later that month. In November, 2012, Mr. Caper’s caseload was reduced from 15 to 10 and he was referred to the Employee Assistance Program (“EAP”). Mr. Caper only completed 6 of his 10 cases by February 2013. Beginning on March 27, 2013, he was

placed on a Concentrated Performance Planning and Development program for six months. This program required Mr. Caper to meet with his supervisor on a weekly basis, and provided him with a monthly progress report. Mr. Caper was aware that failure to meet the required standards of performance could result in his termination, but showed no substantial improvement. The facts that Mr. Caper had demonstrated the ability to perform his job functions for approximately six years prior to these events (including the time he was employed by Milwaukee County in the same capacity prior to being transferred to DCF) and that his performance was at an unacceptable level during the relevant time period are undisputed.

After his termination, Mr. Caper made a claim for unemployment insurance benefits. The Department of Workforce Development issued a determination on November 27, 2013 finding that Mr. Caper had been discharged for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5) and was therefore ineligible for unemployment insurance benefits. Mr. Caper appealed the determination, and a hearing was held before an Administrative Law Judge (“ALJ”) on January 3, 2014. The ALJ issued a decision on January 10, 2014 affirming the department’s determination that Mr. Caper was discharged for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5) and was therefore ineligible for unemployment insurance benefits. Mr. Caper subsequently filed a petition for review of the ALJ’s decision by LIRC. In its February 12, 2014 decision, LIRC affirmed and adopted the decision of the ALJ. Mr. Caper now appeals LIRC’s final decision to this Court, alleging that it is not supported by the credible evidence.

## STANDARD OF REVIEW

### I. Findings of Fact

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; 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, LIRC’s finding is conclusive. *Fitzgerald v. Globe-Union, Inc.*, 35 Wis. 2d 332, 336-37, 151 N.W.2d 136 (1967). LIRC is the sole judge of the witnesses’ credibility and the weight to be accorded to their evidence. *Manitowoc Cnty. v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). As such, a 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. *Younglove*

*v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 139-40, 579 N.W.2d 294 (Ct. App. 1998). The role of the reviewing court is to search the record to locate credible evidence which supports LIRC's decision, rather than weighing the evidence opposed to it. *Brakebush Bros., Inc. v. LIRC*, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997).

## II. Legal Conclusions

A court reviews LIRC's decisions pursuant to Wis. Stats. §§ 102.23(1)(e) and 108.09(7). Decisions by LIRC may be set aside by a court only if (1) the commission acted without or in excess of its power, (2) the commission decision was procured by fraud, or (3) the findings of facts do not support the commission's decision. Stat. § 102.23(1)(e). Under this standard, a court must uphold LIRC's reasonable legal conclusion if it is not contrary to the clear meaning of the statute, even if the court feels that an alternative conclusion is more reasonable. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (Ct. App. 1998).

There are three levels of deference applicable to 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, 660, 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, a court will apply a *de novo* standard of review only when the issue before the agency is clearly one of first impression or the agency's positions on a statute have been so inconsistent as to provide no real guidance. *Id.* at 285.

"Great weight" deference is appropriate where, as here, a legal question (*i.e.* whether certain conduct constitutes misconduct) is intertwined with factual and value determinations. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991). It is well-established that LIRC's interpretation and application of the "misconduct" standard in the context of unemployment insurance benefits should be given great weight deference. *See, e.g., Bernhardt v.*

*LIRC*, 207 Wis. 2d 292, 303, 558 N.W.2d 874 (Ct. App. 1996); *Charette v. LIRC*, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995); *Lopez v. LIRC*, 2002 WI App 63, ¶ 16, 252 Wis. 2d 476, 487, 642 N.W.2d 561.

### DISCUSSION

Mr. Caper argues that the credible evidence in this case supports his position that he did not engage in misconduct when he failed to meet the minimum production and performance requirements for his position. Mr. Caper denies that he showed an intentional and substantial disregard for his employer's interests, claiming that he tried very hard to improve and failed due to a lack of retraining and his supervisor's incompetence. Finally, Mr. Caper argues that he did not engage in carelessness or negligence that indicated an intentional and substantial disregard of his employer's interests.

This Court may only set aside LIRC's decision if the decision depends on any controverted finding of fact that is not supported by credible and substantial evidence. *Holy Name School v. ILHR Dep't.*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982). A finding of fact is supported by evidence if reasonable minds could arrive at the same conclusion that LIRC arrived at. *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis. 2d 561, 644 N.W.2d 649.

This Court is required to search the record to locate credible evidence supporting LIRC's decision, rather than weighing the evidence opposed to it. *Brakebush Bros.*, 210 Wis. 2d at 630. LIRC reasoned that Mr. Caper's failures were so pervasive and ongoing that they reached the level of negligence necessary to constitute misconduct as defined in *Boynton Cab*. Misconduct, for purposes of Wis. Stat. § 108.04(5), is defined as "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 Cab Co. v. Neubeck*, 237 Wis. 2d 249, 296 N.W. 636, 640 (1941).

Thus, this Court must determine whether there is credible evidence to support LIRC's finding that Mr. Caper was negligent to such degree or recurrence as to manifest (1) equal culpability, (2) wrongful intent or evil design, or (3) to show an intentional and substantial

disregard of the employer's interests or of the employee's duties and obligations to his employer. To support its decision, LIRC states that Mr. Caper "completed 17 referrals in six months, while his co-workers averaged 26 per person per month," "committed multiple errors in multiple cases" and lists examples of those errors, "was as many as seven months behind in some of his cases, despite the employer's having reduced his workload," and failed to represent his employer at Fair Hearings because he was unprepared and missed more than one. In sum, it appears that Mr. Caper failed to adequately perform any of his job duties for a period of six months to one year, despite attempts by his employer to reduce his workload to a manageable level for him, and provide additional training and supervision. Finally, despite Mr. Caper's claims that he was unable to perform his job duties due to personal problems, his satisfactory work performance at the beginning of his employment demonstrates his ability.

Even if this Court found Mr. Caper's explanation regarding his unsatisfactory performance to be the more persuasive argument, LIRC's determination should be affirmed as long as it is reasonable. Mr. Caper argues at length that his intent was always to do his job and that he did so to the best of his reduced ability at the time. However, LIRC's determination as to the credibility of Mr. Caper's testimony and the weight to accord this evidence is binding on this Court. *Manitowoc Cnty. v. DILHR*, 88 Wis. 2d at 437 (explaining that when it comes to relevant testimony, the agency "is the sole judge of the weight and credibility of the witnesses"). In addition, there is evidence that Mr. Caper had the ability to perform his job functions, that his employer took steps to aid him in his performance and that Mr. Caper failed to take full advantage of this help.

Consequently, this Court finds that there is credible and substantial evidence to support the finding that Mr. Caper's poor work performance was so pervasive and ongoing that it reached the level of negligence required to constitute misconduct under Wis. Stat. § 108.04(5). Specifically, Mr. Caper's actions demonstrated an intentional and substantial disregard of his duties and obligations to his employer. Accordingly, LIRC's interpretation and application of the "misconduct" standard in this case was consistent with the law and supported by substantial evidence.

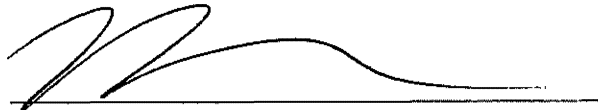
**CONCLUSION AND ORDER**

Based upon a thorough review of the record, the arguments of the parties as set forth in their briefs, and in light of the applicable standard of review this Court is bound to follow, the Court HEREBY AFFIRMS the decision of the Labor and Industry Review Commission.

SO ORDERED.

Dated this 18<sup>th</sup> day of November, 2014, in Milwaukee, Wisconsin.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'P. Van Grunsven', is written over a horizontal line.

Judge Paul R. Van Grunsven  
Circuit Court Branch 9

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