STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | MARATHON COUNTY

DENISE L. CHEREK,

Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT LABOR AND INDUSTRY REVIEW COMMISSION AND SPRINGS WINDOW FASHION DIVISION, INC.,

Defendant.

MEMORANDUM OPINION
Case No. 97-CV-152

FACTS

The plaintiff, Denise L. Cherek (hereinafter Cherek), was employed by Springs Window Fashions Division, Inc. (hereinafter Springs), a manufacturer of venetian blinds. Cherek worked as a technical lead with responsibilities for technical equipment, training and record keeping. Cherek began working for the previous owner on January 2, 1990. Ownership transferred to Springs in 1995.

The first episode occurred on June 13, 1996, when Cherek swore and used vulgar language, while she was training two new employees. Cherek was called into her supervisor's office and was given an oral warning about to her "outbursts." The supervisor stressed that Cherek could not swear at new employees and that the company would not tolerate that type of behavior.

The second episode occurred on August 8, 1996. A new employee that Cherek had been training returned from being sick. When

Cherek realized that he had returned, she approached her manufacturing facilitator and stated, "I see that fucking Hmong is back." Approximately ten minutes later, again in front of the manufacturing facilitator, Cherek approached another employee and asked, "Did you see the fucking Hmong is back?"

As a result of Cherek's comments, she was called into the manufacturing facilitator's office. Also present were the department manager, Cherek's immediate supervisor and the third shift lead. Cherek was informed that she could not harass people and use foul language on the floor. Cherek was suspended for three days. Cherek was told to report back to work on August 13, 1996. When Cherek returned, she was informed that she was discharged.

On August 13, 1996, Cherek applied for unemployment compensation benefits. On August 23, 1996, a deputy of the Department of Workforce Development issued an initial determination that the plaintiff was discharged for misconduct connected with her employment.

A hearing was held before Administrative Law Judge Ronald Weisbrod on October 2, 1996. On October 4, 1996, ALJ Weisbrod issued a decision that Cherek was discharged for work misconduct within the meaning of § 108.04(5), Stats., and, therefore, was not eligible for unemployment benefits.

On October 18, 1996, Cherek appealed the ALJ's decision to the Labor and Industry Review Commission (LIRC). The Commission affirmed the decision of ALJ Weisbrod. Cherek initiated this

action for judicial review of the Commission's decision.

STANDARD OF REVIEW

Review of the Commission's decision under the unemployment compensation statute, chapter 108, is limited to questions of law. Vocational, Technical & Adult Education, District 13 v. DILHR, 76 Wis.2d 230, 236, 251 N.W.2d 41 (1977). Chapter 108 provides,

> Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102, 1971 Stats., with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section.

§ 108.09(7)(b), Stats.

Under § 102.23(1), Wis. Stats., the findings of fact by the Commission, acting within its power, shall be conclusive on appeal. Bunker v. LIRC, 197 Wis.2d 606, 611, 541 N.W.2d 168 (Ct. App. 1995). The scope of review of the Commissions's factual findings is whether there is any substantial and credible evidence in the record to support the findings made by the department. Holy Name School v. DILHR, 109 Wis.2d 381, 386, 326 N.W.2d 121 (1982). The reviewing court must determine whether reasonable minds could reach the same conclusion as the commission. Id.

> In reviewing administrative agencies' factual findings under similar provisions containing the "substantial evidence" standard, our supreme court has stated that "there may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept.

Id.

However, LIRC's legal conclusions are subject to judicial review, and LIRC's statutory construction and application of a

statute to a particular set of facts is a question of law. Bunker, 197 Wis.2d at 611.

> When the question on appeal is whether a statutory concept embraces a particular set of factual circumstances, the court is presented with mixed questions of fact and law. The conduct of the parties presents a question of fact and the meaning of the statute to the facts is also a question of law. However, the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight.

Applied Plastics, Inc. v. LIRC, 121 Wis.2d 271, 276-77, 359 N.W.2d 168 (Ct. App. 1984) (citation omitted).

Where an agency's interpretation is of long standing, this court will accord great weight deference. Charette v. LIRC, 196 Wis.2d 956, 960, 540 N.W.2d 239, 241 (Ct. App. 1995)(commission's conclusion that particular facts constitute misconduct is entitled to great weight because it is intertwined with factual and value determinations). Under the great weight deference standard, an agency's reasonable interpretation will be upheld if it is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable. UFE v. LIRC, 201 Wis.2d 274, 287, 548 N.W.2d 57 (1996).

Determination of whether the employee engaged in "misconduct" under § 108.04(5) is a legal conclusion. Holy Name School, 109 Wis.2d at 387. Questions involving employee and employer conduct and intent are questions of fact. Id. at 386.

DISCUSSION

The plaintiff first argues that Cherek's actions did not arise

to the level of employment misconduct connected with her employment. Cherek argues that the ALJ erred as a matter of law by finding misconduct where the "employe's vulgar comments were inappropriate and intended to promote bigotry."

An employee is ineligible for unemployment benefits if the employee has been discharged for misconduct. § 108.05(5), Stats. Section 108.05(4) provides,

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

§ 108.05(4), Stats.

There is no definition of misconduct in ch. 108, however, the supreme court has defined the term in Boyton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> [T]he intended meaning of the term "misconduct" as used in sec. 108.04(4)(a), Stats. [now sec. 108.04(5)], 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 the employer.

Holy Name School, 109 Wis.2d at 389.

The Wisconsin courts have continuously cited this definition with approval. Miller Brewing Co. V. DILHR, 103 Wis.2d 496, 499, 308 N.W.2d 922 (Ct. App. 1981). The emphasis has been placed on

the employee's intent and attitude in determining whether misconduct has occurred. Id. "Benefits may not be denied unless the employee's conduct amounts to an 'intentional and substantial disregard of' or an 'intention and unreasonable' interference with the employer's interests." Id.

Thus, the critical question is whether Cherek's conduct was an intentional and unreasonable interference with her employer's interest. The ALJ found that Cherek's "vulgar comments were inappropriate and intended to promote bigotry." The ALJ emphasized that Cherek "knew or should have know that such comments would not be acceptable to her employee, whether or not there was a specific rule prohibiting such comments." The ALJ held that "[u]nder the circumstances, the employe's actions evinced such a wilful, intentional, and so substantial a disregard for the employer's interests as to constitute misconduct connected with the employment with the employer."

This court finds that the ALJ's conclusion that Cherek's "outburst" amounted to misconduct is reasonable. Under the great weight deference standard, this court will uphold the agency's determination that Cherek's behavior amounted to misconduct as long as the agency's determination is a reasonable interpretation and not contrary to the clear meaning of the statute, even if this court feels that an alternative interpretation is more reasonable. UFE v. LIRC, 201 Wis.2d 274, 287, 548 N.W.2d 57 (1996).

Previously, Cherek had been orally warned about her attitude and behavior. In June, Cherek had been warned that she could not

use vulgar language and swear at new employees. The employer informed her that this conduct was unacceptable and would not be tolerated. In August, Cherek disregarded her employer's warnings and again used vulgar language in reference to a new employee by twice referring to him as a "fucking Hmong."

The employee handbook emphasizes that "workers will conduct themselves in a civil and professional manner and comply with normal standards of decency. The employer will not tolerate a worker threatening, harassing, abusing or physically assaulting another." Swearing and using vulgar language in reference to or in the presence of new employees is clearly against the interest of the employer. It is degrading and unacceptable conduct that should not be tolerated in any employment setting.

Moreover, at Springs, Cherek's job duties included the training of new employees. Cherek's attitude and behavior towards these new employees was unacceptable and unproductive to their training. Cherek's "outbursts" and usage of profanity directed at or in reference to new employees created an intimidating and "hostile" atmosphere. Cherek should have known that it would be unacceptable to engage in this type of behavior.

Next, Cherek argues that the record shows that the use of profanity at Springs was common and, therefore, the use of the term "fucking Hmong" could not arise to the level of misconduct. However, the use of profanity among general employees does not make it unreasonable to consider profanity directed at or in reference to new employees to be misconduct.

Furthermore, Cherek argues that the ALJ's finding that the "employee's comments were inappropriate and intended to promote bigotry" is not supported by substantial and credible evidence on the record. Cherek argues that it was commonplace at Springs to refer to employees by their race. Whether Cherek intended to promote bigotry is a question of fact. Holy Name School, 109 Wis.2d at 386. This court must determine whether reasonable minds could reach the same conclusion as the commission. Id.

Although it may have been common at Springs to refer to employees by their race, it was reasonable for the ALJ to determine that Cherek "intended to promote bigotry" where she intertwined the word "Hmong" with "fuck." Referring to the new employee not only as a "Hmong", but as a "fucking Hmong" was extremely disrespectful to the Hmong race. Even if Cherek did not direct the term at the employee, continuous usage of the term could create a hostile environment and open the employer up to harassment charges.

Accordingly, this court finds that Cherek was discharged from her job due to misconduct. The ALJ reasonably concluded that Cherek's outbursts were intentional and created an unreasonable interference with her employer's interests. Cherek's use of profanity directed at or in regards to new employees created an intimidating atmosphere for those employees, which Cherek should have known would not be tolerated in any work environment.

CONCLUSION

It is the opinion of this court that the findings of fact and

conclusions of law made by the Commission are proper and substantially supported by the record. Accordingly the order of the Labor and Industry Review Commission is affirmed.

Dated at Wausau, Wisconsin this 22nd day of April, 1998, but signed this 1 day of ~~April~~ May, 1998.

BY THE COURT:

RAYMOND F. THUMS
Circuit Court Judge, Branch 2

RFT/jf/mp

c: Attorney Roy Traynor

Attorney William Cassel
LIRC / State of Wisconsin

Springs Window
Keith Schreiber, Manager