

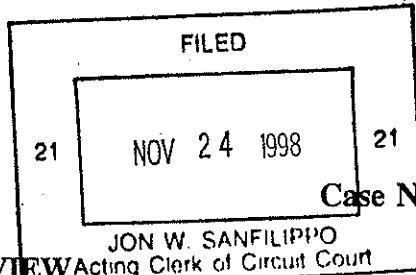
JAMILLA J. CONNER,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW
COMMISSION and NORTHWEST
GENERAL HOSPITAL,

Defendants.



Case No. 98-CV-002754

MEMORANDUM DECISION AND ORDER

Jamilla Conner ("Conner") seeks judicial review of a decision by the Labor and Industry Review Commission ("Commission") which reversed a decision by an Administrative Law Judge ("ALJ") determining that Conner was not discharged for misconduct connected with her employment. Conner submitted a brief on July 6, 1998, and the LIRC filed it's response on August 3, 1998. For the reasons stated in this opinion, the Commission's decision is affirmed.

FACTS

Conner began her employment at Northwest General Hospital ("Hospital") on April 15, 1996. Conner served as the Director of the Hospital's Alcohol & Drug Treatment Center, and her responsibilities included day to day staff supervision, management of all alcohol and drug treatment services, inpatient, outpatient, day treatment, and patient mental health services.

On July 2, 1997, Conner met with the Hospital's president and director of human

resources. At this meeting, Conner was informed that another employee had falsified her timecard. Conner was this employee's supervisor and requested an opportunity to investigate the matter and come back with a recommendation. The Hospital agreed, and on July 3, 1997, Conner wrote a letter to the Hospital's president stating that the employee had made a mistake in filling out her timecard and that Conner had decided to dock the employee's next paycheck.

On July 8, 1997, Conner again met with the Hospital's president and director of human resources, who told her that the employee should be discharged. Conner reported that the incorrect time card was a result of an error and recommended that the employee's pay be docked. The Hospital's president disagreed and repeated that the employee be discharged. Conner indicated that she would not discharge the employee. The Hospital's president again directed that Conner discharge the employee, and Conner again refused. The Hospital's president then discharged Conner.

Conner filed for unemployment compensation benefits on July 9, 1997. On July 25, 1997, a deputy of the Department of Workforce Development determined that Conner's discharge was not for misconduct connected with her employment. The Hospital appealed this determination, and a hearing was held before ALJ Daniel J. Waite on September 17, 1997. The ALJ issued his decision on September 22, 1997, affirming the initial determination. The Hospital appealed to the Commission, and on March 19, 1998, the Commission issued a decision reversing the decision of the ALJ. The Commission concluded that Conner was not eligible for unemployment benefits pursuant to Wisconsin Statutes Section 108.04(5), because she had been discharged for conduct connected with her work.

Conner now appeals from the Commission's findings and order.

DECISION

Wis. Stat. Sec. 108.09(7) (1995-96) provides for judicial review of unemployment compensation cases. Wis. Stat. Sec. 108.09(7)(b) states as follows:

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

This statutory section adopts the standard of review provided for in Wis. Stat. Chap. 102, which deals with worker's compensation. Therefore, Wis. Stat. Sec. 102.23 (1995-96) sets forth the appropriate standard of review in this case. Wis. Stat. Sec. 102.23(1)(a) states in pertinent part:

(a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive.

Pursuant to Wis. Stat. Sec. 102.23(1)(e):

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

In addition, Wis. Stat. Sec. 102.23(6) states as follows:

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

The Wisconsin Supreme Court has defined "substantial" evidence as that which is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it." Princess House, Inc. v. DIHLR, 111 Wis.2d 46 (1983). See also R.T. Madden, Inc. v. IHLR Dept., 43 Wis.2d 528 (1969). The evidence in support of the Commission's finding need not meet the increased burden of proof to that of a preponderance or the great weight of the evidence but need only be sufficient to exclude speculation or conjecture. Bumpas v. ILHR Dept., 95 Wis.2d 334 (1980), citing Kress Packing Co. v. Kottwitz, 61 Wis.2d 175 (1973). It is within the province of the Commission, not this court, to determine the credibility of witnesses, to weigh conflicting testimony and to decide who should be believed. Link Industries, Inc. v. LIRC, 141 Wis.2d 551 (Ct. App. 1987). This court is bound to accept the findings of the Commission unless the evidence was insufficient or incredible as a matter of law. Id. at 558, citing E.F. Brewer Co. v. DILHR, 82 Wis.2d 634, 636-37 (1978).

This court is not bound by the Commission's determinations on questions of law. Wehr Steel v. DILHR, 106 Wis.2d 111 (1982). The Wisconsin Supreme Court has applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. Kelley Co. v. Marquardt, 172 Wis.2d 234, 244 (1992). These three levels are the great weight, due weight and de novo standards. Jicha v. DILHR, 169 Wis.2d 284, 290-91 (1992).

In UFE Incorporated and Pacific Indemnity Company v. Labor and Industry Review Commission and Jerry Huebner, 201 Wis.2d 274, 284 (1996), the Wisconsin Supreme Court stated that four conditions must be met for an agency interpretation of a statute to be accorded great weight deference:

1. the agency was charged by the legislature with the duty of administering the statute;
2. that the interpretation of the agency is one of long-standing;
3. that the agency employed its expertise or specialized knowledge in forming the interpretation; and
4. that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Wisconsin courts have held that LIRC's decisions on whether misconduct has occurred are entitled to great weight because they are intertwined with fact and value determinations. Kannenberg v. LIRC, 213 Wis.2d 373, 386-87 (Ct. App. 1997). Under the great weight standard, a court will uphold the commission's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is reasonable. UFE Inc., 201 Wis.2d at 287. The burden to show that an agency's interpretation is unreasonable is on the party seeking to overturn the agency's decision. Harnischfeger Corp. v. LIRC, 196 Wis.2d 650, 661 (1995).

Pursuant to Wis. Stats. Sec. 108.04(5) DISCHARGE FOR MISCONDUCT:

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. For purposes of requalification, the employe's weekly benefit rate shall be that rate which would have been paid had the discharge not occurred. The wages paid to an employe by an employer which terminates employment of the employe for misconduct connected with the employe's employment shall be excluded from the employe's base period wages under s. 108.06(1) for purposes of benefit entitlement...

The Wisconsin Supreme Court defined "misconduct" in Boynton Cab Co. v. Neubeck & Ind. Comm., 237 Wis. 249, 259 (1941), as:

"...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."

The Commission in its March 19, 1998, decision noted that one of Conner's duties as a supervisor was to discharge workers. Therefore, as Conner's employer, it was the Hospital's prerogative to order that Conner discharge the worker. Additionally, although Conner disagreed with the Hospital's decision, as an employee she had no right to be insubordinate and refuse to carry out a direct order. The Commission stated that while reasonable minds may differ as to whether the worker intentionally submitted an incorrect timecard, it remained the Hospital's prerogative to determine that it wished to discharge the worker for such actions.

The Commission found that Conner's actions amounted to an intentional and substantial disregard of the employer's interests and of the standards of behavior the employer had a right to expect of the employee.

The evidence in the record supports the Commission's findings. At the hearing before the ALJ, Conner admitted that on at least two occasions she refused a direct order from the Hospital's president and CEO to discharge the worker for submitting an incorrect timecard. Even though Conner had a different opinion as to how the worker should be punished, Conner still had a duty to follow her employer's orders in this regard. Conner was the worker's supervisor, and responsible for reviewing and approving the worker's time cards. It was entirely reasonable for the Hospital to order that Conner discharge the worker. It was also reasonable

for the Hospital to discharge Conner after she refused this order on more than one occasion.

Whether or not the worker intentionally submitted an incorrect timecard is not relevant to the issue of whether or not Conner was discharged for misconduct. Conner has not met her burden for showing that the Commission's interpretation was unreasonable. It is also not this court's function to search for other reasonable ways that the Hospital could have acted. In this case the Commission's interpretation of the law was reasonable and with a rational basis. In addition, there is credible evidence in the record to support this conclusion.


ORDER

Upon the records, files and proceedings had herein, and for the reasons stated, IT IS ORDERED that the decision of the Labor and Industry Review Commission is AFFIRMED.

Dated this 24th day of November, 1998, at Milwaukee, Wisconsin.

BY THE COURT:





Judge Stanley A. Miller
Circuit Court, Branch 21
Case No. 98-CV-002293