STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY
CIVIL DIVISION

CORPORATE COURIER EXPRESS, INC.,
Petitioner,

-vs-

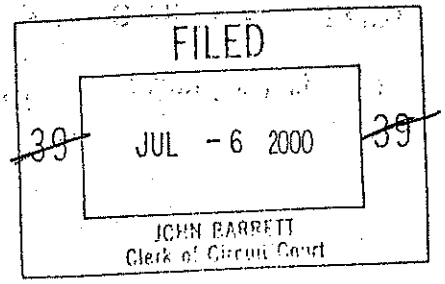
Case No. 99-CV-009373

LABOR AND INDUSTRY REVIEW COMMISSION and CHRISTINE M. DEEL,
Respondents.

DECISION AND ORDER

STATEMENT OF THE CASE

The Petitioner, Corporate Courier Express, Inc. ("Corporate Courier"), appeals the October 28, 1999 decision of the Labor and Industry Review Commission ("LIRC") reversing the June 22, 1999 decision of Administrative Law Judge ("ALJ") John C. Gelhard. LIRC, after reviewing the record and consulting with the ALJ regarding the demeanor of the witnesses, determined Corporate Courier discharged Christine M. Deel, respondent, in week 16 of 1999, but that the discharge was not for misconduct connected with her employment. After determining Corporate Courier's testimony about the customer complaints was hearsay, LIRC determined Corporate Courier did not meet its burden of proof in establishing Ms. Deel was discharged for misconduct connected with her work.



BACKGROUND

Ms. Deel worked for two years as a driver for Corporate Courier, a courier service. Ms. Deel's last day of work was April 12, 1999. The Corporate Courier discharged Ms. Deel for excessive customer complaints and poor work performance.

On October 19, 1998, Ms. Deel received a warning because she failed to fill out an accident report after she had been rear-ended. The accident occurred in September of 1998 and involved only property damage. Ms. Deel was directed by Corporate Courier to go to the police station and fill out an accident report. Ms. Deel did not file the police report because she was required to do so on her own time.

On January 5, 1999, Corporate Courier issued an Employee Warning Notice because Ms. Deel was two hours late making her pick-ups and deliveries. Ms. Deel did not dispute the delay, but attributed it to having a new route. On January 15, 1999, Corporate Courier issued an additional Employee Warning Notice to Ms. Deel for excessive tardiness on her deliveries and for allegedly yelling at dockworkers at Northwestern Mutual Life Insurance Company. Ms. Deel testified that she asked the dockworkers to move a truck that was blocking her way and she did not raise her voice. During this same time, Aurora Health Care, a customer of Corporate Courier barred Ms. Deel from future visits because it believed that she would not listen to instructions. Additionally, Lincoln State Bank, another Corporate Courier customer, complained Ms. Deel's deliveries were made thirty minutes later than the previous driver's deliveries. In response, Ms. Deel indicated that poor management was to blame for the customer complaints.

On March 6, 1999, Corporate Courier issued another Employee Warning Notice for late pick-ups and deliveries. Johnson Controls, a Corporate Courier client, complained about Ms. Deel's performance. Additionally, another client, the Archdiocese of Milwaukee, complained that its workers were required to stay twenty minutes past their shift waiting for Ms. Deel to pick up the mail. On March 10, 1999, Corporate Courier issued another Employee Warning Notice for discussing non-relevant information over the radio.

On April 8, 1999, a security guard at Johnson Controls complained that Ms. Deel was talking to him on his shift and taking up fifteen to twenty minutes of his time. Ms. Deel was discharged following that complaint. Corporate Courier did not speak to Ms. Deel about the final complaint. Ms. Deel testified at the hearing that she had not spoken to the guard.

STANDARD OF REVIEW

The court reviews the Commission's decision and not that of the ALJ. Braun v. Industrial Comm., 36 Wis. 2d 48, 56 (1967). Under Wis. Stat. § 102.23 (1) (e), LIRC's decision may be overturned only if: (1) the Commission acted without or in excess of its powers; (2) the order or award was procured by fraud; or (3) the findings of fact made by the Commission do not support the order or award. The scope of review differs depending upon whether the issue being reviewed is a question of fact or a question of law. United Way of Greater Milwaukee v. DILHR, 105 Wis. 2d 447, 453 (Ct. App. 1981). This case involves a question of law.

Although the legal conclusions and statutory interpretations of the Commission do not bind this court, it must give deference to them. Sauk County v. WERC, 165 Wis. 2d

406, 413 (1991). The Supreme Court has applied three levels of deference to questions of law. Generally, the court must give "great weight" to an agency's decision. This level of review applies if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation of and application of a statute. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 244 (1992). The Commission has extensive experience, technical competence, and specialized knowledge on which to base its conclusions of law and interpretations of Wis. Stat. § 108.04(5). Furthermore, "'great weight'" is also applied where a 'legal question is intertwined with factual determinations or with value or policy determinations." Bernhardt v. LIRC, 207 Wis. 2d 292, 303 (Ct. App. 1996). Because of this, the Commission's decision must be given great weight. See Kannenberg v. LIRC, 213 Wis. 2d 373, 386-87 (1997); Bernhardt v. LIRC, 207 Wis. 2d 292, 303. Therefore, this court will uphold the Commission's decision if it is not contrary to the clear meaning of Wis. Stat. §108.04(5) or to legislative intent, even if this court feels that an alternative interpretation is more reasonable. UFE Inc. v. LIRC, 196 Wis. 2d 650, 661 (Ct. App. 1995).

ANALYSIS

Section 108.04(5) provides:

> 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 . . ..

The term misconduct

> 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 employe, 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 employe'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.

Boyton Cab Co. v. Neubeck & Ind. Comm., 237 Wis. 2d 249 (1941). The Commission found Corporate Courier failed to meet its burden of proof in establishing that Ms. Deel was discharged for misconduct connected with her work; i.e. that she acted with a wilful, intentional, and substantial disregard of Corporate Courier's interests.

Specifically, the Commission determined Corporate Courier's testimony about the customer complaints was hearsay. Ms. Deel testified at the hearing and blamed a change in routes or the weather for late deliveries. As to the final incident, Ms. Deel denied talking to the guard. "In hearings before administrative agencies hearsay testimony should not be received over objection where direct testimony of the same fact is obtainable." Erickson v. ILHR Dept., 49 Wis. 2d 114, 122 (1970) citing Outagamie County v. Brooklyn, 18 Wis. 2d 303 (1962).

Petitioner argues that at least three hearsay exceptions, § 908.03(6), § 908.03(24) and § 908.01(4)(b), Stats., apply to its testimony about the customer complaints. Contrary to petitioner's argument, § 908.03(6), Stats., providing that business records of regularly conducted activity are admissible, is inapplicable to the Employee Warning Notices given to Ms. Deel. Johnson v. American Family Mut. Ins. Co., 93 Wis. 2d 633, 649 (1980). Each of the warnings contains allegations of behavior transmitted by a third party—the individuals who wrote the warnings lacked personal knowledge of Ms. Deel's actions underlying the warnings. Section 908.03(6), Stats. requires "personal knowledge transmitted in the course of a 'business day.'" Kulman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, n.2 (1978).

Similarly, § 908.03(24), Stats., the residual hearsay exception, is inapplicable to the Employee Warning notices given to Ms. Deel. "To apply the residual exception requires establishment of 'circumstantial guarantees of trustworthiness' comparable to those existing for enumerated exceptions." State v. Sorenson, 143 Wis. 2d 226, 243-44 (1988). Petitioner has not established 'circumstantial guarantees of trustworthiness' with respect to the hearsay evidence concerning Ms. Deel.

Finally, petitioner contends the hearsay exception found in § 908.01(4)(b), Stats.—admissions by a party opponent—allows for the admissibility of the evidence it presented. Petitioner argues Ms. Deel admitted that her signature appears on three of the five warnings, did not deny seeing any of the five and did not allege there was any alteration the warnings. However, just because Ms. Deel signed the warnings does not mean that she admitted the underlying facts. The Commission specifically stated that "[w]hile [Ms. Deel] signed some warnings[,] she did not admit culpable behavior." Except for her failure to file the accident report, Ms. Deel denied the allegations made in the written warnings. The Commission found her testimony credible. The credibility and weight of the evidence is to be determined by the agency and not the reviewing court. Sterlingworth Condominium Association v. DNR, 205 Wis. 2d 710, 727 (Ct. App. 1996). A reviewing court may not "second-guess the weight the agency places upon the evidence, but may only pass on the reasonableness of the agency's findings." Copland v. Dept. of Taxation, 16 Wis. 2d 543, 555 (1962).

Because none of the hearsay exceptions apply, the Commission properly excluded petitioner's evidence. Therefore, Corporate Courier failed to meet its burden of proof in establishing that Ms. Deel was discharged for misconduct connected with her work.

CONCLUSION

THEREFORE, based on a thorough review of the record and the arguments of the parties as set forth in their briefs, IT IS HEREBY ORDERED that the decision of the LABOR AND INDUSTRY REVIEW COMMISSION is hereby **affirmed** and the appeal is dismissed.

Dated at Milwaukee, Wisconsin this 6 day of July 2000.

BY THE COURT:

Honorable Michael Malmstadt
Circuit Court Judge
Branch 39