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Northwest Passage, Ltd.,

MEMORANDUM OPINION

Plaintiff,

vs.

State of Wisconsin, Dept. of Industry, Case No. 87-CV-37  
Labor and Human Relations, Labor and Industry  
Review Commission, Dept. of Industry, Labor  
and Human Relations and Francene K. Hart,

Defendants.  
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FACTS

This is an unemployment compensation claim by Francis K. Hart against her former employer, Northwest Passage, Ltd. Mrs. Hart was employed eight years prior to her discharge on September 15, 1986. She gave art instruction and also counseling for about 15 emotionally disturbed boys who had been sent to Northwest Passage for emotional reasons. Northwest Passage counselors went on a camping trip to North Dakota on or about September 1, 1986. About 15 boys were along and four counselors including Francene Hart. They went in two vehicles and later split into two groups. During the trip home Francene Hart and a Mr. Dittmar drove one vehicle and Mr. Rose and Mr. Doriott drove the other. One of the stops on the way home was at Hardee's restaurant in St. Cloud, Minnesota. When they returned home on a Friday night the counselors either retired or went home and the boys went to Northwest Passage. On Saturday, September 13, the next morning, Mrs. Hart returned to Northwest Passage to unpack the vehicles after the camping trip and did so. On Sunday evening September 14 Mrs. Hart received a phone call from her boss,

Steven Ammend who informed her that she was not to report for work the next day because she had been accused of a number of serious allegations with respect to the camping trip. He would not explain to her what these allegations were. He further notified her that she was being suspended pending an investigation. The following Monday, September 15, Mrs. Hart contacted Mr. Ammend to inquire whether her suspension was with or without pay. She was informed that she was suspended without pay. Mr. Ammend also refused to elaborate on the accusations made against Mrs. Hart, but he did say that he was very disappointed with her and that the statements were damaging. Mrs. Hart has never been charged with the commission of any crime as a result of this. Later that week she received two letters from her employer both dated September 17, 1986, the first came from Dennis Tucker, a director from Northwest Passage, who informed her that she was fired due to a determination by her employer that she had inappropriate physical contact with a resident under her care. She was also informed that she had a right to an appeal by grievance committee and also that she would have the right to question the staff members alleging the misconduct and the right to review transcripts of the resident's testimony. She received a letter from Ammend and Dennis Tucker dated September 17, in which she was informed that she was suspended based upon verbal testimony by the boys. Mrs. Hart then retained legal counsel, asked for a grievance committee hearing and applied for unemployment compensation. After the grievance hearing she was informed that the decision by Northwest Passage would stand regarding her discharge. She was denied access to the interview tapes of the residents' testimony and the written transcript. Mrs. Hart's first application for unemployment

compensation was denied. She then appealed to the Appeal Tribunal Committee where the initial determination was reversed. Th employer appealed the Appeal Tribunal Committee's decision up through the administrative process and finally into the circuit court of Burnett County.

#### ISSUES

The issues are whether or not the commission's adopted findings of fact are supported by credible and substantial evidence in the record and secondly, whether the commission reasonably concluded that Francene Hart's discharge was not for misconduct, within the meaning of Section 108.04(5) of the Statutes.

#### DECISION

The court will find that the commission's decision dated February 2, 1987, should be in all respects affirmed. Their adopted findings of fact are supported by the testimony of the employee which was deemed credible. On the facts as properly found there was absolutely no basis for a conclusion that the employee was discharged for misconduct.

Section 102.23 of the Statutes provides for the review standard used by the court. In the case of Farmers Mill of Athens, Inc. v. ILHR Dept. 97 Wis. 2d 576 (1986) said:

"We must determine whether there is substantial credible evidence in the record to support the commission's findings. Substantial evidence is not a preponderance of the evidence. The test is rather whether reasonable minds could arrive at the same conclusions reached by the commission. This is not the same as a reviewing court's weighing conflicting credible evidence to determine what shall be believed. The fact that the evidence is in conflict is not a sufficient basis for reversal of the commission.

Further, it is the function of the commission, and not the reviewing court, to determine the credibility of evidence or witnesses and to weight the evidence. When one or more inferences may be drawn from the

evidence; the drawing of one of such permissible inferences by the commission is an act of fact-finding, and the inference is conclusive on the court."

Therefore, the case prohibits a reviewing court from determining the weight or credibility of the evidence so long as the commission has not acted without or in excess of its powers.

In the instant case, Francene Hart and the employer's witness, Dittmar, were the only first hand witnesses presenting testimony. There was nothing incredible about the testimony of either. The law judge who had the opportunity to observe the demeanor of both believed Hart rather than Dittmar and the commission agreed with and upheld that assessment. Therefore, it is the role of a reviewing court to search the record to locate credible and substantial evidence which supports the commission's determination rather than weighing the evidence opposed thereto. Vande Zande v. ILHR Dept. 70 Wis. 2d 1086 (1975).

Applying these standards to the instance case, Hart's testimony denying she engaged in inappropriate physical conduct with the minor resident is not inherently incredible. Dittmar's testimony that she engaged in such conduct over a period in excess of six hours in full view of others may be considered incredible. In any event, her denial constituted credible and substantial evidence supporting the administrative law judge's finding which were affirmed by the commission that Hart did not engage in such conduct.

Misconduct within the meaning of Section 108.04(5) of the Statutes is:

Intentional and substantial disregard of or intentional and unreasonable interference with" the employer's interest according to Holy Name School v. ILHR Dept. 109 Wis. 2d 381 (1982)

Section 108.02(11) of the Statutes provides a presumption that an employee is eligible for benefits and the employer's has been described by the Supreme Court as follows:

The law presumes that an employee is not disqualified from such compensation and it places on the employer the burden of producing credible evidence sufficient to convince DILHR that some disqualifying provision should bar the employee's claim. Consolidated Construction Co. vs. Casey 71 Wis.2d 811 (1976).

In the case where an employee is accused of misconduct which would constitute a crime, the necessary quantum of proof is: "clear, satisfactory and convincing" evidence. The general applicability of this middle burden in which a party is accused of criminal conduct was recognized in the case of Hafemann v. Seymer 191 Wis. 174 (1926). This standard has been used to review unemployment compensation misconduct cases as early as 1960. It appears that the presumption in favor of Hart's eligibility and the employer's failure to meet its burden requires a finding that Hart is eligible for benefits. The case of Pieper Electric, Inc. v. LIRC 118 Wis. 2d 92 (1984) relied on by plaintiff is not controlling to support the proposition that unsigned, undated, unsworn and anonymous purported statements of a number of minor residents in plaintiff's institution should have been considered or in the alternative that a further hearing should have been granted to permit plaintiff to produce those juveniles. In this case, Dittmar's testimony was rejected as incredible by the trier of fact and the juvenile statements can therefore not suffice as support for a finding that Hart was guilty of misconduct unless such statements were admissible under §908 Wisconsin Statutes.

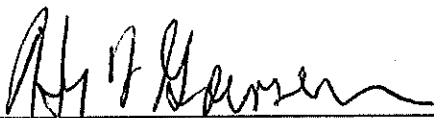
and no point was made by petitioner to establish same either at the hearing or in their briefs. The case of Austin v. Ford Motor Co. 86 Wis. 2d 628 (1979) said:

"We know of no rule of law that permits a party to have a second opportunity to prove a crucial element of its case when that opportunity was afforded on the first trial and the element on which it failed to discharge its burden was clearly and unequivocally and issue at trial."

For the above reasons, the court will find the commission's decision of February 2, 1987, affirmed in all respects.

Dated this 1st day of December, 1987.

BY THE COURT:

  
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HARRY F. GUNDERSEN, Circuit Judge