

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
BRANCH 31

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Robert T. Pinkos

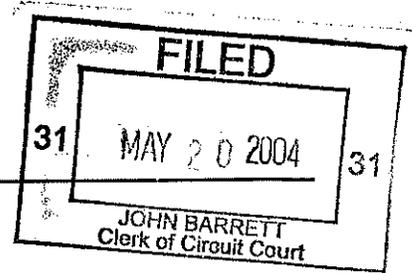
Plaintiff,

v.

Case No.: 03-CV-010792

LABOR AND INDUSTRY REVIEW COMMISSION, et al.

Defendants.



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**DECISION**

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**BACKGROUND**

On May 16, 2003, a deputy of the Department of Workforce Development issued an initial determination that found that in the week ending May 3, 2003 (week 18), Plaintiff, Robert T. Pinkos, quit his employment with Defendant Burgess Boys Auto and Truck Service Center within the meaning of Wis. Stat. § 108.04(7)(a). This resulted in the suspension of Plaintiff's eligibility for certain unemployment insurance benefits pursuant to the statute. Plaintiff appealed to the Department and a hearing was held before Administrative Law Judge Daniel O. Wolter on June 5, 2003. On June 11, 2003, ALJ Wolter issued an appeal tribunal decision reversing the initial determination and finding that Plaintiff had terminated his employment with good cause attributable to the employer within the meaning of Wis. Stat. § 108.04(7)(b). This resulted in payment of the unemployment benefits Plaintiff had claimed. Burgess Boys appealed to Defendant Labor and Industry Review Commission, and on November 26, 2003, the Commission

reversed the appeal tribunal decision on the basis that Plaintiff had not given his employer a chance to correct the problems before quitting. The Commission further found that Plaintiff was required to repay some unemployment benefits he had received as a result of the appeal tribunal decision. Pursuant to appeal rights provided in Wis. Stat. §§ 108.09(7) and 102.23, Plaintiff initiated this action for judicial review of the Commission's decision.

### **FACTS**

The Commission made a number of findings of fact in its November 26, 2003, decision. It found that Plaintiff worked almost eight months as a mechanic for Burgess Boys, and that his last day of work was May 1, 2003 (week 18), when he voluntarily terminated his employment. The Commission found that Chris Niemiec was the service writer at the location at which Plaintiff worked and functioned as Plaintiff's supervisor at that location. On April 18, 2003, Niemiec called Plaintiff a "brain-dead dumb ass" when Plaintiff failed to hear Niemiec's call for assistance. Later that day, Plaintiff went to Niemiec's office and told Niemiec he was sick and needed to go home. Niemiec called Plaintiff a "fucking crybaby."

The Commission further found that on April 30, 2003, Plaintiff failed to tie up an exhaust which was dragging on the ground prior to pulling a truck into the shop, and Niemiec called Plaintiff a "brain-dead dumb ass" again as a result. In response, Plaintiff called Niemiec a "disrespectful asshole," and asked Niemiec to stop calling him names. Niemiec then sent Plaintiff home for the rest of the day. On May 1, 2003, due to Niemiec's treatment of him on April 18 and 30, Plaintiff told Niemiec he was putting in his two weeks' notice. Niemiec told Plaintiff to grab his stuff and leave then.

Plaintiff had not brought his concerns about Niemiec's treatment of him to manager David Burgess because he and Burgess had argued in December 2002 when Plaintiff had failed to punch out when he left work to go to his son's school program. On that occasion in December, Burgess had yelled at Plaintiff and told him that he was stealing from him.

### STANDARD OF REVIEW

Judicial review of a decision by the Labor and Industry Review Commission is limited to a determination that the Commission acted without or in excess of its powers; that the order or award was procured by fraud; or that the findings of fact by the Commission do not support the order or award. Wis. Stat. § 102.23(1)(e). The findings reviewed by the court on appeal are those of the Commission, not those of the administrative law judge. *Hakes v. LIRC*, 187 Wis. 2d 582, 589, 523 N.W.2d 155 (Ct. App. 1994); *Burton v. ILHR Dept.*, 43 Wis. 2d 218, 222, 170 N.W.2d 695 (1969).

“Any judicial review under [Chapter 108] shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders . . . shall . . . apply to any decision of the commission reviewed under this section.” Wis. Stat. § 108.09(7)(b). “The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive.” Wis. Stat. § 102.23(1)(a). § 102.23 goes on to state:

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.

Wis. Stat. § 102.23(6). The reviewing court's role is to search the record to locate credible evidence which supports the Commission's decision, rather than weighing the evidence opposed to it. *Vande Zande v. ILHR Dept.*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

A reviewing court is not bound by the Commission's decisions on questions of law. *DILHR v. LIRC*, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (1990). The court, however, must determine what level of deference to apply to the Commission's interpretation of a statute: great weight deference, due weight deference, or *de novo* review. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659-60, 539 N.W.2d 98 (1995).

Great weight deference is appropriate once a court has concluded that: (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.

*Id.* at 660. The Commission's interpretation of § 108.04(7) meets these requirements, as has been recognized by numerous cases over the years. *See, e.g., Shudarek v. LIRC*, 114 Wis. 2d 181, 186, 336 N.W.2d 702 (1983); and *Farmers Mill of Athens, Inc. v. ILHR Dept.*, 97 Wis. 2d 576, 582, 294 N.W.2d 39 (1980).

Under the great weight standard, a court will sustain the commission's conclusion of law if it is reasonable, even if the court feels that an alternative interpretation is just as reasonable or even more reasonable. *Kelly Brown v. LIRC*, 2003 WI 142, ¶ 19, 267 Wis. 2d 31, 671 N.W.2d 279. "An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the words of the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without rational basis." *Ibid.*

## ANALYSIS

The first question to be answered is whether there is credible and substantial evidence to support the Commission's finding that Plaintiff quit his employment. The second question is whether the Commission's conclusion that Plaintiff did not quit for good cause attributable to the employer within the meaning of Wis. Stat. § 108.04(7)(b) was a reasonable conclusion. Questions of employee and employer conduct and intent are questions of fact, and whether the facts fulfill the legal standard set by statute is a question of law. *Holy Name School v. ILHR Dept.*, 109 Wis. 2d 381, 386-87, 386 N.W.2d 121 (Ct. App. 1981).

The Commission's decision found that Plaintiff quit his employment. The record contains testimony from both Plaintiff and Dave Burgess of Burgess Boys supporting this finding of fact. Therefore, it is conclusive. The Commission went on to find that Plaintiff did not quit for good cause within the meaning of § 108.04(7)(b) because Plaintiff failed to alert Dave Burgess or anyone else of his problems with Niemiec. "Good cause attributable to the employing unit' means some act or omission by the employer justifying the employee's quitting; it involves 'some fault' on the part of the employer and must be 'real and substantial.'" *Nottleson v. IHLR Dept.*, 94 Wis. 2d 106, 120, 287 N.W.2d 763 (1980). The employee must give the employer an opportunity to address and resolve matters that the employee finds so serious that he is considering terminating his employment because of them. *Collier v. Rubbermaid & Co.*, UI Hearing No. 99604071RC (LIRC Oct. 14, 1999); *Roth v. LIRC & Wisconsin Youth Co. Inc.*, Case No. 02-CV-000409 (Milw. Co. Cir. Ct. Aug. 5, 2002).

In this case, the Commission found that Plaintiff failed to give his employer notice of his concerns. While Niemiec directed insulting profanity towards the Plaintiff on several occasions, Plaintiff did nothing to bring this matter to Burgess's attention. Plaintiff explained that this failure was because Burgess had "yelled" at Plaintiff while criticizing him for failing to punch out in December 2002. The Commission, found that this was not "sufficient justification for failing to alert the employer of a situation which he felt was so serious that he had no choice but to quit." § 108.04(7)(b) is an exception to the general rule of § 108.04(7)(a), providing that one who voluntarily terminates employment is not eligible for unemployment compensation. As such, Plaintiff has the burden of showing good cause attributable to the employer, in accordance with the rule "that one who relies on an exception to a general rule or statute has the burden of proving that the case falls within the exception." *State v. Big John*, 146 Wis. 2d 741, 756, 432 N.W.2d 576 (1988). The Commission's conclusion that Plaintiff did not meet this burden is reasonable, and as such, this court will not overturn it.

The final question this court must answer is whether the Commission erred in its determination that the overpayment by Plaintiff was not due to departmental error within the meaning of Wis. Stat. § 108.02(10e), and that Plaintiff must therefore repay \$7,201. Plaintiff claims that since the overpayment was clearly not his fault, it must be due to departmental error. Wis. Stat. § 108.22(8)(c)2 provides:

If a determination or decision issued under s. 108.09 is amended, modified or reversed by an appeal tribunal, the commission or any court, that action shall not be treated as establishing a departmental error for purposes of subd. 1.a.

Therefore, the simple fact that the Commission reversed the administrative law judge does not establish a departmental error. *Unemployment Compensation Directive 94-33*,

promulgated by the Department on June 6, 1994, gives guidance as to what constitutes departmental error. It differentiates between situations where there is a clear misapplication of the law to the facts (e.g. payment of unemployment benefits to striking workers) and situations where different conclusions can be reached by reasonable minds. "There would be no misapplication or misinterpretation of law if an appeal body found that four absences without notice constituted misconduct after the department had determined such conduct to be merely an error in judgment." *Id.* In this case, the administrative law judge and the Commission focused on different facts and reached different conclusions of law; there was no misinterpretation within the meaning of § 108.02(10e).

#### CONCLUSION AND ORDER

NOW, THEREFORE, IT IS ORDERED, that the Commission's decision is affirmed.

Dated this 20 day of May, 2004, at Milwaukee, Wisconsin.

BY THE COURT:



Hon. Daniel A. Noonan  
Circuit Judge Br. 31