STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY
BRANCH 9

WIERSMA TRUCKING, INC.,

Plaintiff,

vs. Decision 00-CV-486

LABOR AND INDUSTRY REVIEW COMMISSION
And MARTIN B. CVIKEL, SR.,
Defendants.

Statement of the Case

This is an action by Wiersma Trucking, Inc. to set aside a recent decision of the State of Wisconsin Labor and Industry Review Commission. The Commission's decision found that Wiersma's former employee Martin B. Cvikel Sr. was eligible for unemployment insurance benefits following his discharge because he was not discharged for misconduct within the meaning of Wis. Stat. § 108.04(5). This court upholds the Commission's order.

Statement of Facts

Wiersma discharged Cvikel on September 20, 1999 because Wiersma's insurance refused to cover Cvikel. During Cvikel's one year and three month period of employment he was involved in numerous accidents while operating his employer's vehicle. Wiersma repeatedly told Cvikel to be more careful. However, Cvikel denies ever being told his job was in jeopardy and Wiersma's testimony indicates that he never specifically told Cvikel that his job was in jeopardy.

Analysis

Adequacy of Warning

Wiersma first argues that this court should overturn the Commission's factual finding that Cvikel was not adequately warned about the danger of losing his job. Second, Wiersma argues that this court should hold as a matter of law that Cvikel's repeated accidents evinced a substantial disregard of the standard of behavior expected of him. In short, Wiersma believes that Cvikel's conduct meets the statutory definition of misconduct and that he should be disqualified from receiving unemployment compensation benefits.[1]

Wisconsin Statute Section 102.23(1) provides that "the findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." Section 102.23(e) states that an award 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."

The Administrative Law Judge specifically found that "the record in this matter fails to establish that the employe was [sic]adequately[2] warned that he was in danger of being fired." This court agrees with the ADMINISTRATIVE LAW JUDGE that the employee was not adequately warned because Cvikel denied ever being told his job was in jeopardy and Wiersma's testimony indicated that he never specifically told Cvikel that his job was in

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[1] Wis. Stat § 108.04(5) states:
(5) DISCHARGE FOR MISCONDUCT. An employe whose work is terminated by an employing unit for misconduct connected with the employes 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 employes weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employes 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 employes employment shall be excluded from the employes base period wages under s. 108.06 (1) for purposes of benefit entitlement. This subsection does not preclude an employe who has employment with an employer other than the employer which terminated the employe for misconduct from establishing a benefit year using the base period wages excluded under this subsection if the employe qualifies to establish a benefit year under s. 108.06 (2) (a) The department shall charge to the funds balancing account any benefits otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 from which base period wages are excluded under this subsection.

jeopardy. The record shows that Cvikel never received any written warnings of impending termination, nor did Wiersma ever do anything except tell Cvikel to be more careful. In fact, Wiersma continued to employ Cvikel until Wiersma could no longer get insurance to cover Cvikel.

Misconduct

The Administrative Law Judge's determination of misconduct is a question of law. Therefore, the Administrative Law Judge's decision is not binding on this court. To determine whether Mr. Cvikel's conduct constituted misconduct, this court applies an objective test. The test is whether a reasonable person would have considered the employee's conduct to be a willful interference with the company's interests. Universal Foundry Co. v. DILHR, 86 Wis.2d 582, 591-92, 273 N.W.2d 324, 328 (1979). The Supreme Court fashioned the following definition of misconduct:

> "[Misconduct is] . . . conduct evincing such willful 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."

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

Wiersma argues that Cvikel's negligence was "of such a degree or reoccurrence as to manifest equal culpability. . . or to show an intentional disregard of the employer's

[2] The word adequately has been substituted for inadequately, as this was a typographical error.

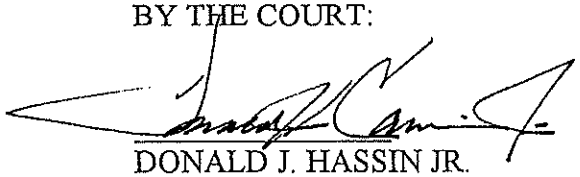
interests." This court agrees with the Commission that the employer's complaints paint a picture of a less than model employee. However, this court finds no evidence of willful or wantonness in Mr. Cvikel's actions. Further, no evidence of carelessness or negligence showing wrongful intent or evil design exists in this case.

The Administrative Law Judge held that the employer has an obligation to warn an employee that the employee will be discharged in all but the most serious of offenses and give that employee an opportunity to improve before a finding of misconduct will be made. See Marcoline v. Alma Public Schools, Hearing No. 78-20774EX (LIRC, May 1979). This court certainly believes that Wiersma told Mr. Cvikel repeatedly to be more careful and that Mr. Cvikel had the opportunity to improve his performance. Unfortunately, Wiersma never specifically told Mr. Cvikel he would lose his job if Mr. Cvikel continued to have accidents.

Lastly, Wiersma argues that the Commission "failed to address the crucial question of Cvikel's attitude." However, "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." Wis.Stat. § 102.23. The Administrative Law Judge in this case was present and able to question the parties and assess the "crucial question of Cvikel's attitude." This court will not substitute its own credibility judgment for that of the Administrative Law Judge's.

Because Cvikel was not adequately warned, and his conduct does not meet the definition of misconduct, this court hereby affirms the determination of the Labor and Industry Review Commission.

BY THE COURT:



10/13/00

DONALD J. HASSIN JR.
Circuit Court Judge
Branch 9
Civil Division