STATE OF WISCONSIN CIRCUIT COURT BRANCH 26 MILWAUKEE COUNTY

GENIA B. WILLIAMS,

Plaintiff,

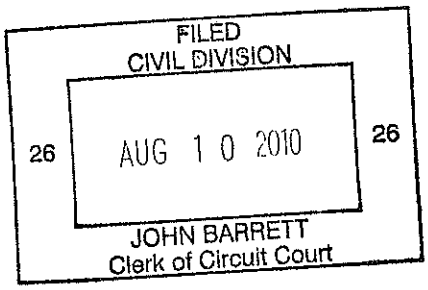
v. Case No. 10-CV-876

AURORA HEALTH CARE, INC.,

and

LABOR AND INDUSTRY REVIEW COMMISSION.,

Defendants.



DECISION AND ORDER

Genia B. Williams seeks judicial review of a decision of the Labor and Industry Review Commission ("the LIRC" or "the Commission") affirming an administrative law judge's decision to affirm the Department of Workforce Development's determination that Ms. Williams was discharged by her employer for misconduct and therefore ineligible for certain unemployment benefits under Wis. Stat. § 108.04(5). The LIRC's decision found that Ms. Williams was terminated for misconduct and therefore ineligible for unemployment benefits. Pursuant to Wis. Stat. §§ 108.09(7) and 102.23, Ms. Williams appeals the LIRC's decision to the Circuit Court. This Court has reviewed the record, evidence, and arguments, and for the reasons stated herein, affirms the LIRC's decision.

BACKGROUND

I. Ms. Williams' Employment at Aurora

Ms. Williams was employed as a phlebotomist at the Aurora Sinai Medical Center of Aurora Health Care, Inc. ("the hospital") from June 19, 2000 to April 9, 2009. Ms. Williams worked as part of a team of phlebotomists in a laboratory. The team was apparently divided into shifts with each shift working at different times throughout the day. Margaret Trudell, the Laboratory Supervisor, was Ms. Williams' immediate supervisor. Ms. Williams' discharge on April 9, 2009, stems from an incident in which Ms. Williams became upset at Ms. Trudell, used profane language, and threatened to use violence against Ms. Trudell.

In 2008 and early 2009, Ms. Williams missed a substantial amount of work due to her father's illness and death. A coworker covered many of the shifts that Ms. Williams missed. On March 30, 2009, Ms. Trudell posted a service award nomination for the coworker. The nomination, posted in a public area in the hospital, stated that the coworker "came to the rescue of a third shift employee who's father was very ill and subsequently passed away. The employee had a problem returning to work following the experience and consequently was calling in late on second shift for the third shift." The nomination then described how the employee "rescued" the department by covering the missed shifts, praised the coworker's contribution to the team, and commended the coworker's leadership, dedication, and "positive ethics and values."[1]

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[1] The nomination states in full that:

> During several weekends late in January and early February, Kendra Phipps came to the rescue of a third shift employee who's father was very ill and subsequently passed away. The employee had a problem returning to work following the experience and consequently was calling in late on second shift for the third shift. Kendra rescued the department several times by finding care for her own children, canceling her own personal plans and working double shifts. Kendra is dedicated to Aurora Sinai's goals. She delivers exceptional service, contributes to the team to fulfill the departments needs. She is a true leader to anyone who is looking for a person with positive ethics and values. Kendra's dedication is a tribute to her constant delivery of exceptional service. Aurora Sinai is a better hospital because of people like Kendra Phipps.

See Hearing Exhibit 2.

When Ms. Williams saw the nomination on March 30, 2009, and after allegedly hearing other coworkers question whether she was the individual mentioned in the nomination, she became incensed. Ms. Williams, who was standing in a public area of the hospital, began crying and yelling obscenities about the workplace and Ms. Trudell. Ms. Williams yelled that she wanted to "hit" Ms. Trudell, who wrote the nomination. Another employee then took Ms. Williams into an office and attempted to calm her down but was unable to do so. Next, Ms. Williams walked out into a hallway with the other employee to view the posting again. Apparently looking at the door to Ms. Trudell's office, Ms. Williams again threatened to hurt the supervisor. Finally, since no one could calm her down, she was told to go home.

On April 15, 2009, Jennifer Vogel, a human resources supervisor, sent Ms. Williams a letter terminating her employment, effective April 9, 2009. The letter described the incident on March 30, 2009, and stated that several attempts to call and set up an in-person meeting with Ms. Williams had been unsuccessful. The letter explained that Ms. Williams had therefore been terminated for the misconduct that occurred on March 30, 2009.

II. **Application for Unemployment Benefits and Subsequent Appeals**

After she was terminated by the hospital, Ms. Williams applied for unemployment benefits. On May 30, 2009, the Department of Workforce Development ("the Department") determined that Ms. Williams had been discharged for misconduct and therefore was ineligible for unemployment benefits. Ms. Williams appealed the determination.

On July 14, 2009, a hearing on the appeal was held before Administrative Law Judge Cheryl M. Korinek ("the ALJ"). On July 17, 2009, the ALJ affirmed the Department's decision. The ALJ found that Ms. Williams was terminated for misconduct within the meaning of Wis. Stat. § 108.04(5). Therefore, the ALJ concluded that Ms. Williams is ineligible for benefits beginning in week fifteen of 2009 and until seven

weeks had elapsed since the end of the week of discharge and Ms. Williams has earned wages in covered employment performed after the week of discharge equaling at least fourteen times her weekly benefit rate which would have been paid if her discharge had not occurred. On August 7, 2009, Ms. Williams appealed the ALJ's decision.

On December 23, 2009, the LIRC affirmed the ALJ's decision and adopted the ALJ's findings and conclusions as the Commission's own. The Commission also specifically affirmed the ALJ's conclusion that Petitioner was terminated for misconduct and therefore, ineligible for benefits until she met the requisite conditions and earned sufficient covered income. On January 20, 2010, apparently pursuant to Wis. Stat. §§ 108.09(7) and 102.23, Ms. Williams filed this action for judicial review of the Commission's December 23, 2009 decision.[2]

STANDARD OF REVIEW

I. Findings of Fact

This Court reviews the LIRC's decision pursuant to Wis. Stat. §§ 102.23(1)(e) and 108.09(7). Wis. Stat. § 108.09(7)(b) limits the scope of judicial review to questions of law. *Wehr Steel Co. v. Department of Industry, Labor and Human Relations*, 106 Wis.2d 111, 116, 315 N.W.2d 357 (1982). The LIRC's decision may be set aside only if: (1) the commission acted without or in excess of its powers; (2) the order was procured by fraud; or (3) LIRC's findings of fact do not support its order. Wis. Stat. § 102.23(1)(e).

The LIRC's factual findings are binding on the Court. *Patrick Cudahy Inc. v. LIRC*, 2006 WI App 211, ¶ 7, 296 Wis.2d 751, 723 N.W.2d 756 (Ct. App. 2006); Wis. Stat. § 102.23(1)(a) ("The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive."). When a factual issue involves a

[2] In a related but separate proceeding, an ALJ determined, and the LIRC subsequently affirmed, that Ms. Williams was ineligible for unemployment benefits in weeks 14 through 18 of 2009 because she had not properly filed for benefits during those time periods. *See* LIRC hearing number 09605344MW. Ms. Williams has not petitioned for review of this determination.

question of intent and credible evidence raises competing inferences, the Commission's finding is conclusive. *Fitzgerald v. Globe-Union, Inc.*, 35 Wis.2d 332, 336-37,151 N.W.2d 136 (1967). The LIRC is the sole judge of the witness's credibility and the weight to be accorded to their evidence. *Manitowoc County v. Department of Industry, Labor and Human Relations*, 88 Wis.2d 430, 437, 276 N.W.2d 755 (1979). Therefore, the Court may not substitute its judgment for that of the LIRC regarding credibility even if the court may have independently arrived at a different conclusion. *See Younglove v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 139-140, 579 N.W.2d 294 (Ct. App. 1998). The role of the reviewing court is to search the record to locate credible evidence which supports the LIRC's decision, rather than weighing the evidence opposed to it. *See Brakebush Bros., Inc. v. LIRC*, 210 Wis.2d 623, 630, 563 N.W.2d 512 (1997); *Vande Zande v. DILHR,* 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975).

II. **Legal Conclusions**

The LIRC's determination of whether an employee engaged in misconduct is a legal conclusion which the Court reviews *de novo*. *Patrick Cudahy, Inc.*, 2006 WI App 211, ¶ 8. However, the Court must give the LIRC's determination appropriate deference. *Id.* This case involves a review of the LIRC's interpretation of whether Ms. Williams' actions constituted statutory misconduct under Wis. Stat. § 108.04(5). There are three levels of deference applicable to the LIRC's interpretation or application of a statute: great weight, due weight, or *de novo*. *UFE, Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57 (1996).

Great weight deference is appropriate if the Court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659-60, 539 N.W.2d 98 (1995). Due weight deference is

appropriate "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *UFE, Inc.*, 201 Wis.2d at 286. Finally, the Court will apply a *de novo* standard of review only when the issue before the Commission is clearly one of first impression or the Commission's positions on a statute have been so inconsistent as to provide no real guidance. *Id.* at 285.

The Court finds that the LIRC fulfills the four requirements for great weight deference. First, the LIRC is in charge of administering Wis. Stat. §108.04(5). *Patrick Cudahy Inc.*, 2006 WI App 211, ¶ 11. Second, the LIRC's interpretation of § 108.04(5) is long-standing. *Lopez v. LIRC*, 2002 WI App 63, ¶ 13, 252 Wis.2d 476, 642 N.W.2d 561 (Ct. App. 2002). Third, the LIRC employed its expertise and specialized knowledge of the statute in forming its interpretation. *See id.* Finally, the LIRC's interpretation of the statute will provide uniformity and consistency in the application of the statute.

Ms. Williams appears to argue that the LIRC's findings are not entitled to great weight deference since the LIRC's decisions regarding misconduct and provocation are allegedly "sometimes inconsistent". *See* Ms. Williams' April 28, 2010, Briefing Statement. The Court disagrees. The LIRC's determination of whether an employee's conduct constitutes misconduct within the meaning of Wis. Stat. § 108.04(5) is ordinarily entitled to great weight deference. *See Bunker v. Labor and Industry Review Com'n*, 2002 WI App 216, ¶ 26, 257 Wis.2d 255, 650 N.W.2d 864 (Ct. App. 2002); *Lopez*, 2002 WI App 63, ¶ 13 (great weight deference is appropriate even when the Commission has not previously applied the statute to a particular factual scenario).

Moreover, the Court does not find that the LIRC has been inconsistent or arbitrary in its past decisions on profanity and threats of violence directed at supervisors. While Ms. Williams cites *Champion v. LIRC & Millis Transfer, Inc.*, No. 91-CV-1223 (Brown Co. Cir. Ct., May 14, 1991) (unpublished), and *Cook v. LIRC & United Parcel Service, Inc.*, No. 94-CV-1258 (Waukesha Co. Cir. Ct., Jan. 27, 1995) (unpublished), those

decisions appear to focus on provocation.[3] However, this case is more accurately characterized as one focusing on profanity and threats of violence against a supervisor. Although neither party has provided the Court with any cases addressing similar facts, a review of the LIRC's decisions in these areas shows that the Commission has consistently found misconduct when profanity is used and threats of violence are made in the workplace and particularly, when directed at a supervisor. *E.g. Miller v. LIRC & Milwaukee Teacher Education Center*, Hearing No. 02608597MW (LIRC May 19, 2003) (finding that an employee's profane language to her supervisor, coupled with a threat to physically harm her supervisor, constituted misconduct), *Piskula v. LIRC & Midwest Products & Engineering, Inc.*, Hearing No. 02600171MW (LIRC Aug. 28, 2002) (finding that disrespectful language directed at a supervisor and vulgar language directed at coworkers constituted misconduct); *Kneubuhler v. LIRC & Oscar Mayer Foods Corp*, Hearing No. 96001045MD (July 12, 1996) (LIRC finding that a single instance of loud vulgarity directed towards a supervisor constituted misconduct); *Sucevich v. LIRC & Bradley Exterminating Co.* (East), Inc., Hearing No. 90-606142 MW (LIRC June 21, 1991) (finding that "there is an important distinction which should be drawn between a profanity which is directed at a supervisor" and profanity directed at no one in particular and indicating that the former may be misconduct while the later is not) (emphasis added by the LIRC). Further, while the LIRC's decisions may appear somewhat inconsistent because they reach different results, "[t]he different results in LIRC decisions are explained by differences in factual situations." *Lopez*, 2002 WI App 63, ¶ 15.

Therefore, the Court finds that the LIRC's decisions on misconduct that address profanity and threats of violence directed at a supervisor consistently find that such behavior constitutes misconduct and that deference to the Commission's interpretation of the statute will continue to provide consistency in the statute's application. Thus, since all four elements have been satisfied, the Court concludes that it must apply the great weight standard of deference.

[3] Ms. Williams has not provided the Court with a copy of these decisions.

Under the great weight standard, the Court must "uphold an agency's reasonable interpretation of the statute if it is not contrary to the clear meaning of the statute," even if the Court concludes that another interpretation is more reasonable. *Id.*, ¶ 10. Additionally, the LIRC's decision must be affirmed if it is reasonable. *Id.*, ¶ 16. "A decision is unreasonable if it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without a rational basis." *Id.* The burden of establishing that the LIRC's interpretation is unreasonable is on the party challenging the decision; "the agency does not have to justify its interpretation." *Bunker*, 2002 WI App 216, ¶ 26.

ANALYSIS

Applying the great weight standard of deference, the Court must determine whether Ms. Williams' conduct constitutes "misconduct" within the meaning of Wis. Stat. § 108.04(5). Wis. Stat. § 108.04(5) provides that:

> Unless sub. (5g) results in disqualification, an employee whose work is terminated by an employing unit for misconduct connected with the employee'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 employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's 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.

Wis. Stat. § 108.04(5). Since the term "misconduct" is undefined in the statute, the Wisconsin Supreme Court in *Boynton Cav. Co. v. Neubeck* established what has become known as the *Boynton* test for misconduct, holding that:

> [T]he intended meaning of the term "misconduct", as used in sec. 108.04 . . . 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 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 Cav. Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). Although an employee's intent or attitude is an important consideration in determining misconduct, *see Cheese v. Industrial Comm'n,* 21 Wis.2d 8, 14, 123 N.W.2d 553, 556 (1963), questions regarding an employee's intent are questions of fact for the LIRC to determine. *Holy Name School v. ILHR Dept.,* 109 Wis.2d 381, 386-87, 326 N.W.2d 121 (Ct. App. 1982). Thus, the Court's evaluation of whether Ms. Williams' actions arise to misconduct is a mixed question of law and fact.

Based on a review of the evidence in the record and facts presented at the hearing, the Court holds that the LIRC's conclusion that Ms. Williams' conduct satisfies the *Boynton* test for misconduct is not contrary to the clear meaning of the statute and is reasonable.

The ALJ, in her July 17, 2009, decision, found that Ms. Williams missed a substantial amount of work due to her father's illness and death and that a coworker covered many of her shifts. The ALJ described the award nomination posted on March 30, 2009, and found that when Ms. Williams saw the nomination, she became "irate", "began swearing about her job and the facility", and stated "that she wanted to 'hit that b***', referring to her manager who had written the nomination paper."[4] The ALJ also found that Ms. Williams was told to go home because a supervisor could not get her to calm down and that she was later discharged for "inappropriate behavior, using profanity, and failing to address coworkers with dignity and respect." This Court finds that the ALJ's factual findings are supported by credible evidence in the record and testimony at

[4] The profanity used in this quotation has been edited with *'s to indicate the letters that comprise the profanity. All other profanity referenced in this decision will be similarly redacted. Ms. Williams' profanity has been included in this decision because it is critical to why the LIRC determined that her actions constituted misconduct.

the hearing. As such, the ALJ's factual findings are binding on the Court. *Patrick Cudahy Inc.*, 2006 WI App 211, ¶ 7; Wis. Stat. § 102.23(1)(a).

Based on those factual findings, the ALJ concluded that Ms. Williams was discharged for misconduct. Specifically, the ALJ found that the hospital "has a right to expect that its workers will not have violent outbursts at work and will not state a desire to hit a supervisor." The ALJ noted that the nomination paper was "poorly worded". However, the ALJ found that it was not proven that the nomination was prepared specifically to upset Ms. Williams and that regardless, Ms. Williams had a duty to discuss the nomination calmly with a member of management. The ALJ therefore found that "[u]nder the circumstances, the employee's inappropriate conduct in the work place and her stated desire to hit her manager evidenced a willful and substantial disregard of the employer's interests and of the standard of conduct that the employer had a right to expect". The LIRC, in affirming the ALJ's determination, found that Ms. Williams "engaged in a loud and prolonged outburst at work during which she uttered coarse language and vocalized her desire to hit her supervisor". Therefore, the LIRC, like the ALJ, concluded that Ms. Williams' "actions demonstrated an intentional and substantial disregard of the standard of behavior the employer had a right to expect of the employee".

Ms. Williams argues that the LIRC's decision is unreasonable due to the circumstances surrounding her outburst. However, the Court must defer to the LIRC's interpretation of the statute and can only overturn its decision if it is clearly contrary to the meaning of the statute or unreasonable. Here, the Court finds that the LIRC's decision is reasonable and supported by substantial evidence in the record. At the hearing, two key witnesses, Felicia Williams and Ms. Genia Williams, testified regarding what occurred on March 30, 2009. Felicia Williams, who oversaw the day to day operations of the phlebotomy staff, witnessed the incident first hand. She testified that while she was in her office, she heard "a loud commotion" and "[y]elling" from Ms. Genia Williams. When Felicia Williams came out of her office, she saw that Ms. Genia Williams was visibly upset and crying. Transcript at pg. 24-25.

Felicia Williams testified that Ms. Genia Williams said "I'm pissed off. I can't believe she would post that.[']" *Id.* at pg. 25. Ms. Genia Williams continued, saying "Oh I got to get out of here. I can't – I got to get out of here. Oh, I want to go – I want to go hit that b***. I'm so pissed off.[']" *Id.* Felicia Williams convinced Ms. Genia Williams to come into her office, at which point she tried to calm Ms. Genia Williams down. Ms. Genia Williams then left the office, presumably to show Felicia Williams where the nomination was posted. Felicia Williams followed Ms. Genia Williams to what was apparently a public waiting area that was by Ms. Trudell's office. In the waiting area by Ms. Trudell's office, Felicia Williams heard Ms. Genia Williams yell profanity at the supervisor's door. Specifically, Ms. Genia Williams yelled "Oh f*** this job. Oh, I just want to – oh, I want to f*** her up. Oh, I'm so pissed off." *Id.* at pg. 26. Felicia Williams testified that after this outburst, she eventually convinced Ms. Genia Williams to go home. *Id.* at pg. 26-29.

In addition, an employee disciplinary notice with a summary of the incident stated that as Ms. Williams "left the department, [she] continued to state, 'f*** this job' and 'this is b***s***' loudly as she walked down the hallway outside of the laboratory within earshot of patients, visitors and other employees." *See* Hearing Exhibit 5.

Ms. Williams also testified extensively at the hearing. Ms. Williams testified that when she first reported to work on March 30, 2009, she watched a video that reminded her of what she was going through with her husband. The video made her "emotionally upset" and "disturbed". Transcript at pg. 47. Upon seeing the award nomination, Ms. Williams testified that she "just began crying, just was upset. Started cussing, hollering out that this is B.S." *Id.* at pg. 48. Ms. Williams testified that her voice was "loud", that she used the word "b***s***", and that she said "this is b***s***" between five to ten times. *Id.* at pgs. 48-50. Ms. Williams further testified that while she was "out in the public" she said "'F*** this. F*** this'". Referring to Ms. Trudell, Ms. Williams also said "'I'm going to f*** her up.'" Ms. Williams then said "'I have to leave. This is b***s**t." *Id.* at pg. 48.

The ALJ also specifically questioned Ms. Williams regarding the threat, "I'm going to f*** her up", which was directed at Ms. Trudell. Ms. Williams, in response to the ALJ's questioning, confirmed that she said "I'm going to f*** her up" and that she was referring to Ms. Trudell. *Id.* at pg. 50. The ALJ then questioned Ms. Williams regarding what she meant by that phrase. Ms. Williams testified that the phrase "could mean a lot of different things" but "[a]t that time I wanted to knock her out". *Id.* Ms. Williams further clarified that she wanted to "[p]unch her." *Id.* Finally, Ms. Williams testified that she did not believe her actions were appropriate but that "in the heat of the moment, . . . my emotions just took over." *Id.*

Based on this record, the Court finds that Ms. Williams' conduct, which included profanity and threats of violence directed at her supervisor, demonstrated a willful, wanton, and substantial disregard of the hospital's interests and the standard of behavior which the hospital has a right to expect. Therefore, the LIRC's interpretation of the statute is not only reasonable and supported by substantial evidence in the record, but is supported by all of the evidence in the record. It is undisputed that after viewing the award nomination, Ms. Williams yelled profanity while in a public area of the hospital and threatened to use physical violence against her supervisor. Further, Ms. Williams clarified at the hearing that the threat of violence was not merely an expression of her emotional distress, but that she actually wanted to "[p]unch" her supervisor. The hospital has a right to expect its employees to refrain from using profanity in the workplace and in front of the public, and to refrain from threatening supervisors with physical violence. Under these circumstances, the LIRC's conclusion that Ms. Williams' actions constituted misconduct is entirely reasonable.

Ms. Williams argues that her actions were not misconduct since her language should not have been taken as a threat and she did not cause any actual physical harm to her supervisor. Ms. Williams, while at the hospital and at one point standing close to her supervisor's office, stated that she wanted to "hit that b***" and "f*** her up", both times referring to her supervisor. These statements, alone, are threats. However, at the hearing, Ms. Williams testified that she actually wanted to cause physical harm to her

supervisor by punching her. Therefore, Ms. Williams' statements certainly constituted threats. Further, the fact that Ms. Williams did not carry out her threats does not change the gravity of a threat to physically harm a supervisor, an employer's obligation to respond to such a threat, or that threatening to harm a supervisor is well outside the bounds of behavior that an employer has a right to expect.

Additionally, although Ms. Williams points out that this was an isolated incident, this was not an isolated incident involving only profanity or a minor error in judgment. Instead, the incident involved substantially more—profanity and threats of physical violence towards a supervisor. While even an isolated instance of inappropriate profanity can be sufficient to find misconduct under some circumstances, see *Bunker v. Labor and Industry Review Com'n*, 2002 WI App 216, ¶¶ 3, 31-32, 257 Wis.2d 255, 650 N.W.2d 864 (Ct. App. 2002), Ms. Williams' use of profanity and threats of physical violence towards her supervisor was a significant disregard of any reasonable standard of behavior the hospital had a right to expect and of the hospital's interests in protecting its employees. Moreover, Ms. Williams' actions were not "mere mistakes, errors in judgment", minor or unintentional acts of negligence, or the type of "similar minor peccadilloes" which fall outside the definition of misconduct. *Boynton*, 237 Wis. at 640. Rather, the consequences of threatening violence against one's supervisor, and an employer's need to respond to such a threat, are "fairly obvious" and serious enough such that they fall within the definition of misconduct. *Id.* at 641.

Further, even though Ms. Williams asserts that profane language was typically used in the workplace, as the LIRC points out, there is no evidence of that assertion in the record. Regardless, Ms. Williams was terminated for profane language and threats of physical violence. Ms. Williams also requests that the Court "question whether an employee discharged for directing profane language to others (including supervisors) in the workplace had been warned or otherwise put on notice that such conduct could lead to discharge." Ms. Williams' April 28, 2010, Briefing Statement. Again, Ms. Williams was discharged for not only for using profane language but also for threatening physical violence against her supervisor. Any employee could expect to be discharged for

threatening to hit their supervisor. In addition, the hospital's employee handbook, which Ms. Williams received, had rules that put Ms. Williams on notice that she could be discharged for using profane language, harassing others, or intimidating others while in the workplace. *See* Hearing Exhibit 3; Transcript at pgs. 18-19, 53.

Finally, Ms. Williams claims that her actions did not constitute misconduct because similar behavior has been tolerated from other "white" employees, who are presumably of a different race than Ms. Williams. As the LIRC points out, there is no evidence in the record regarding the hospital's treatment of other employees. Moreover, the issue in this case is not race or how other employees were treated, but whether Ms. Williams' actions on March 30, 2009, constituted conduct within the meaning of Wis. Stat. § 108.04(5).

Based on a review of all of the evidence in the record, including Ms. Williams' own testimony that she wanted to hit her supervisor, this Court concludes that Ms. Williams' use of profanity and threats of physical violence towards her supervisor on March 30, 2009, demonstrated conduct evincing a willful, wanton, and negligent disregard of the hospital's interests and Ms. Williams' obligations. The Court, therefore, in assigning a due weight level of deference, concludes that the LIRC's determination that Ms. Williams' conduct constitutes misconduct under Wis. Stat. § 108.04(5) is reasonable and in compliance with the purpose of the statute.

CONCLUSION

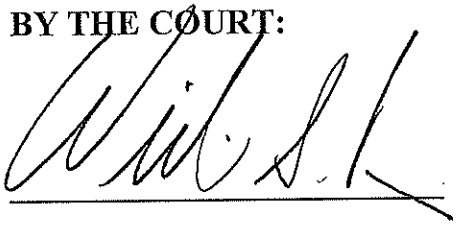
Based upon a review of the record, the evidence presented at the hearing, and for the reasons outlined above, the Court finds that there is substantial evidence to uphold the Labor and Industry Review Commission's decision to affirm the administrative law judge's decision to affirm the Department of Workforce Development's determination that Genia B. Williams was terminated due to misconduct pursuant to Wis. Stat. § 108.04(5).

Accordingly, it is ordered that the decision of the Labor and Industry Review Commission is hereby **AFFIRMED**.

SO ORDERED.

Dated this 10th day of August, 2010, at Milwaukee, Wisconsin.

BY THE COURT:



William S. Pocan
Circuit Court Judge

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL