COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1274 **Cir. Ct. No. 2013CV57**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LLOYD A. SPENCER,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

COCA-COLA REFRESHMENTS, INC.,

RESPONDENT.

APPEAL from a judgment of the circuit court for Forest County: FRED W. KAWALSKI, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Lloyd Spencer appeals a judgment affirming a decision of the Labor and Industry Review Commission. The Commission

determined Spencer was not entitled to unemployment compensation because he was fired for misconduct. Applying great weight deference, we conclude the Commission reasonably determined Spencer was fired for misconduct. We therefore affirm.

BACKGROUND

¶2 The underlying facts are essentially undisputed and are taken from the evidence presented to the administrative law judge (ALJ). Spencer was hired by Coca-Cola Refreshments, Inc., on July 2, 2001. He initially worked as a merchandiser but later became a delivery driver.

¶3 On January 13, 2011, Spencer called his supervisor, Shelli Stenz, to ask her about his route for the following day. When Stenz told him what his route would be, Spencer

> made comments about he was f—ing sick of us putting all the f—ing work on him. … Made comments that [the] company worked him like an f—ing mule. I'm f—ing sick of you putting this—all this shit on me. He, ah, made comments that he [was] always the driver to clean up all the f—ing messes.[1]

Stenz asked Spencer to meet with her when he returned to the building. Spencer responded, "[O]h, you better f—ing be there[,]" and hung up. Spencer later returned to the building, but he left without seeing Stenz. Stenz then called Spencer to ask him to come back for a meeting, but he stated, "I'm not going to waste my breath[] anymore, this is f—ing bullshit[,]" and again hung up.

[1] The transcript of the hearing before the ALJ uses the term "f—ing." However, it is undisputed that, wherever the term "f—ing" appears, Spencer used the actual word.

¶4 Spencer received a written warning on January 26, 2011, as a result of this incident. The warning notified Spencer that Coca-Cola expected him to "conduct [himself] in a professional manner at all times and not engage in conversation using profanity towards [his] supervisor, [Coca-Cola] employees or customers." The warning also indicated that future violations of company policy could result in dismissal.

¶5 A second incident involving Spencer occurred on July 31, 2012. Stenz was in a conference room with her manager and Coca-Cola's regional safety coordinator. Spencer was walking past the conference room to punch out at the end of the day, and Stenz's manager asked him how his day had been. Spencer did not respond, and when the manager asked him again, Spencer stated he was "ready to quit this f—ing shithole" and then "stormed out."[2] Stenz chased after Spencer, but he "made a quick exit[.]" Stenz was given the choice whether to discharge Spencer at that point or "give him a second chance[.]" She chose to give him a second chance, but she also gave him a "stern coaching" and advised him Coca-Cola would not accept another similar outburst.

¶6 The incident that directly led to Spencer's discharge occurred on November 1, 2012. On that date, a store owner called an account manager at Coca-Cola and complained that Spencer had not properly shelved the products he delivered. Stenz then called Spencer and asked him to return to the store to address the owner's concern. Spencer went back to the store, but when he arrived, he informed the owner it was "ridiculous" to ask him to come back to restock a

[2] At the hearing before the ALJ, Spencer testified he told Stenz's manager he was "f—ing great now that I'm out of this shithole[.]" The parties do not contend that this minor discrepancy regarding the precise words Spencer used is relevant for purposes of this appeal.

few bottles and move a stack of twelve-packs. Spencer later called the account manager and argued with him about being sent back to the store. During that conversation, Spencer told the account manager, "[I]f you want to start playing hardball you start pitching and I'll start swinging, I will call your manager on everything that you don't do." Coca-Cola terminated Spencer's employment as a result of this incident on December 14, 2012.

¶7 Spencer subsequently applied for unemployment compensation. On January 23, 2013, the Department of Workforce Development issued an initial determination finding that Spencer was discharged for misconduct connected with his employment and was therefore ineligible for benefits, pursuant to WIS. STAT. § 108.04(5).[3] Spencer appealed, and the matter was scheduled for a hearing before an ALJ.

¶8 Spencer and Stenz testified at the hearing. The written warning Spencer received on January 26, 2011, was introduced into evidence, as was Coca-Cola's policy regarding conduct in the workplace. In that policy, Coca-Cola describes itself as "one of the most respected companies in the world[,]" due to its

[3] WISCONSIN STAT. § 108.04(5) provides, in relevant part:

> [A]n 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.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. Section 108.04(5) was amended in July 2013. *See* 2013 Wis. Act 20, §§ 1717d-1717f. It is undisputed that the amendments do not apply to Spencer's case. *See* ***id.***, § 9351(1q).

exceptional products and customer service. The policy reminds employees that they are Coca-Cola to the company's customers, and it asks employees to "act in a way that would make [Coca-Cola] proud." The policy lists several examples of inappropriate workplace behavior but also states it is "not possible to list all of the forms of behavior that are considered unacceptable[.]" Finally, the policy warns employees that corrective action will be taken if they fail to "live up to [Coca-Cola's] high standards[.]"

¶9 On February 18, 2013, the ALJ issued a decision reversing the Department of Workforce Development's initial determination. The ALJ reasoned Spencer "used poor judgment" when speaking to the store owner and account manager on November 1, 2012, but he did not use "vulgar language," and his comments "were not so inappropriate as to result in termination of his employment." The ALJ concluded Spencer's behavior did not rise to the level of misconduct under WIS. STAT. § 108.04(5), and he was therefore eligible for unemployment compensation, assuming all other requirements were met.

¶10 Coca-Cola filed a petition for review. On June 12, 2013, the Commission reversed the ALJ's decision, concluding Spencer was ineligible for benefits because he was fired for misconduct. The Commission reasoned:

> [Spencer] had been warned regarding his insubordinate and disruptive behavior at work. In the final incident he responded rudely and inappropriately to the customer's concerns, and then proceeded to threaten the employer's account manager. His behavior was deliberate, and demonstrated a substantial disregard for the employer's interest in having him demonstrate a basic respect for his supervisors. His rude behavior towards the customer was also deliberate, and in substantial disregard of the employer's interest in good customer relations. His actions evinced a willful, intentional, and substantial disregard of the employer's interests and constituted misconduct connected with his employment.

The Commission also found that Spencer had received $5082 in unemployment benefits for which he was not eligible. Spencer was ordered to repay that amount to the Unemployment Reserve Fund.

¶11 Spencer appealed the Commission's decision to the circuit court, which affirmed in a decision filed April 18, 2014. Spencer now appeals.

DISCUSSION

¶12 On appeal, we review the Commission's decision, rather than that of the circuit court. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). Whether an employee is entitled to unemployment insurance benefits under WIS. STAT. ch. 108 raises both factual and legal questions. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980). Here, however, the parties do not dispute the underlying facts, and the only issue is whether those facts fulfill the legal standard for misconduct. "[The Commission's] determination of whether an employee engaged in misconduct under WIS. STAT. § 108.04(5) is a legal conclusion [that] we review *de novo* but give appropriate deference." ***Patrick Cudahy Inc. v. LIRC***, 2006 WI App 211, ¶8, 296 Wis. 2d 751, 723 N.W.2d 756.

¶13 Specifically, we may give the Commission's legal determination regarding misconduct great weight deference, due weight deference, or no deference. ***Id.***, ¶9. The parties agree that the Commission's application of the misconduct standard in this case is entitled to great weight deference. In addition, case law confirms that great weight deference is appropriate. *See, e.g.*, ***Goetsch v. DWD***, 2002 WI App 128, ¶9, 254 Wis. 2d 807, 646 N.W.2d 389; ***Lopez v. LIRC***, 2002 WI App 63, ¶16, 252 Wis. 2d 476, 642 N.W.2d 561; ***Charette v. LIRC***, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995).

¶14 Applying great weight deference, we will uphold the Commission's decision as long as it is reasonable. ***Lopez***, 252 Wis. 2d 476, ¶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.*** Spencer bears the burden to establish that the Commission's decision is unreasonable. ***Bunker v. LIRC***, 2002 WI App 216, ¶26, 257 Wis. 2d 255, 650 N.W.2d 864.

¶15 WISCONSIN STAT. ch. 108 does not define the term "misconduct." However, our supreme court has held that, for purposes of Chapter 108, misconduct is

> conduct evincing such wil[l]ful 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.

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

¶16 Based on the evidence before it, the Commission could reasonably conclude Spencer's conduct met this standard. The undisputed facts showed that Spencer committed multiple acts of rude or insubordinate behavior toward his supervisors and a customer between January 2011 and November 2012. After the first incident, Spencer received a written warning reminding him he was expected to behave in a professional manner at all times and notifying him that future violations could result in dismissal. Following the second incident, Spencer received an oral warning that similar outbursts would not be tolerated. Despite these warnings, in November 2012, Spencer responded to a customer complaint by telling the customer her request that he return to fix a problem was "ridiculous."

Shortly thereafter, Spencer called an account manager and argued with him about being sent back to the store. During that discussion, Spencer threatened to report errors made by the account manager to his supervisor, apparently in retaliation for the account manager telling Stenz about the customer's complaint.

¶17 On these facts, the Commission could reasonably conclude that Spencer exhibited a willful or wanton disregard of Coca-Cola's interests and of the standards of behavior the company may reasonably expect of its employees. *See* ***id.*** at 259. It is "reasonable to interpret 'the standard of behavior which the employer has a right to expect' from its employees as encompassing the expectation that an employee will not be antagonistic and disrespectful toward a customer." ***Bunker***, 257 Wis. 2d 255, ¶31.[4] It is also reasonable to conclude that an employee who repeatedly makes rude and insubordinate comments toward his or her supervisors acts in willful disregard of the employer's interest in maintaining an orderly workplace.

¶18 Nevertheless, Spencer argues the Commission's conclusion that he committed misconduct was unreasonable for several reasons. We address his arguments in turn.

Use of the word "ridiculous"

¶19 First, Spencer takes issue with the Commission's conclusion that he "responded rudely and inappropriately" by telling a customer her request that he

[4] Admittedly, the conduct found to constitute misconduct in ***Bunker v. LIRC***, 2002 WI App 216, ¶31, 257 Wis. 2d 255, 650 N.W.2d 864, involved both a violation of a work rule and profane language directed at a customer. However, nothing in ***Bunker*** suggests that disrespectful comments toward a customer, absent profanity, are insufficient to constitute misconduct. Nor does ***Bunker*** suggest that violation of a work rule is required to support a finding of misconduct.

come back to fix a problem was ridiculous. Spencer concedes that disrespectful or antagonistic behavior toward a customer may constitute misconduct. However, he asserts the word "ridiculous" "is not, as a matter of law, disrespectful and antagonistic." Be that as it may, the Commission did not conclude the word "ridiculous" was disrespectful as a matter of law. Instead, the Commission concluded Spencer's use of that word was rude and inappropriate under the circumstances—specifically, in the context of responding to a customer complaint. The Commission's determination in that regard was reasonable.

¶20 Spencer also argues his use of the word "ridiculous" must not have been disrespectful because there was no evidence the customer complained about it to Coca-Cola. We do not deem this fact particularly relevant. As Spencer himself points out, the standard for determining misconduct under WIS. STAT. § 108.04(5) is objective. *See* ***Wehr Steel Co. v. DILHR***, 106 Wis. 2d 111, 119, 315 N.W.2d 357 (1982). "'We are called upon to determine whether a reasonable person under the factual situation presented would have considered (the employee's) conduct to be a willful interference with the company's interests ….'" ***Id.*** (quoting ***Universal Foundry Co. v. DILHR***, 86 Wis. 2d 582, 591, 273 N.W.2d 324 (1979)). Thus, that the customer, for whatever reason, decided not to complain to Coca-Cola about Spencer's behavior is not dispositive of whether his behavior was rude or disrespectful.

¶21 Spencer next asserts the customer's failure to testify at the hearing before the ALJ prevented the Commission from concluding Spencer committed misconduct. We disagree. Spencer was a party to the conversation with the customer and testified as to what was said. Again, the Commission did not need to know whether the customer was subjectively offended by Spencer's behavior in order to conclude his behavior was objectively rude or disrespectful.

¶22 Finally, Spencer notes the customer's complaint that he did not stock the product correctly on November 1, 2012, was the first and only customer complaint against him during his eleven years working for Coca-Cola. However, Spencer does not provide any record citation for this assertion, and, accordingly, we need not consider it. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (assertions of fact in an appellate brief that are not properly demonstrated to be part of the record on appeal will not be considered). More importantly, even if no other customers previously complained about Spencer, his admitted conduct on November 1 demonstrated a substantial disregard of Coca-Cola's interest in good customer relations and of the standards of behavior it may reasonably expect of its employees. In addition, Spencer was not discharged solely because of the incident with the customer on November 1. His discharge was also based on his continued failure to show his supervisors proper respect. Accordingly, the lack of previous customer complaints does not render the Commission's conclusion that Spencer was discharged for misconduct unreasonable.

Provocation

¶23 Spencer next argues the Commission erred by failing to consider whether his conduct was the result of provocation. At the hearing before the ALJ, when asked to explain the conduct that led to the January 26, 2011 written warning, Spencer stated:

> Well, [Stenz] kept [jockeying] my route around and that's what happened there because I was—I had my own normal route and then … she g[a]ve me probably the hardest route on a Friday and that's been my route ever since. I mean she just keeps bouncing everything around and it seemed like I'd always got the worst days on the routes usually.

Spencer later testified Stenz routinely gave him more work than the other drivers. He explained, "If you're a good worker they take advantage of you." Spencer also testified the account manager involved in the incident on November 1, 2012, had a history of criticizing Spencer for minor mistakes.

¶24 In addition, in a document in the administrative record, Spencer asserted Stenz routinely rode along with other delivery drivers but rode along with him only five times in two years.[5] In the same document, Spencer asserted Stenz "treated [him] unfairly in comparison to [his] peers" to such an extent that she "set [him] up" to violate Coca-Cola's workplace conduct policy. Elsewhere, Spencer claimed the situation with Stenz pushed him "to the brink of blowing up." He also claimed he never had any problems at work until Stenz became his supervisor.

¶25 Spencer is correct that whether an employee's conduct was provoked is a proper factor to consider in determining whether the employee was discharged for misconduct. *See, e.g.*, ***Bunker***, 257 Wis. 2d 255, ¶¶30-31; ***Lopez***, 252 Wis. 2d 476, ¶¶14-19. However, in this case, we reject Spencer's provocation argument for two reasons. First, Spencer did not raise any argument related to provocation before the ALJ, the Commission, or the circuit court. "It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." ***State v. Outagamie Cnty. Bd. of Adjustment***, 2001 WI 78, ¶55, 244

[5] The Commission argues we may not rely on this and other documents cited by Spencer because, although in the administrative record, they were not presented as evidence at the hearing before the ALJ. In response, Spencer cites an administrative code provision stating that the Commission's review "shall be based on the record of the case *including the evidence previously submitted at hearing before the department*." *See* WIS. ADMIN. CODE § LIRC 1.04 (Sept. 2009) (emphasis added). We need not resolve this dispute because, even considering the documents Spencer cites, we conclude the Commission reasonably determined he was discharged for misconduct.

Wis. 2d 613, 628 N.W.2d 376. "As a general rule, this court will not address issues for the first time on appeal." ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶26 Second, Spencer's provocation argument also fails on the merits. When an employee raises provocation as a defense, the operative question is whether the alleged provocation justified the employee's reaction, thereby removing the employee's behavior from the realm of misconduct. *See* ***Lopez***, 252 Wis. 2d 476, ¶¶18-19 (concluding the Commission could reasonably determine instances of provocation did not justify the employee's reaction, and the reaction could therefore reasonably be considered misconduct). Here, the Commission could reasonably conclude that, even if Spencer's complaints about Stenz and the account manager were true, their conduct did not justify Spencer's insubordinate, rude, and disrespectful comments, particularly to a Coca-Cola customer.

¶27 Spencer faults the Commission for failing to address provocation in its decision. However, as noted above, Spencer failed to raise any argument regarding provocation before either the ALJ or the Commission. Moreover, the Commission's findings "need be only as to the ultimate facts[.]" ***Van Pool v. Industrial Comm'n***, 267 Wis. 292, 294, 64 N.W.2d 813 (1954). If the Commission concluded any evidence of provocation proffered by Spencer did not alter its ultimate determination that he was fired for misconduct, the Commission did not need to address the provocation evidence in its decision. *See* ***Lopez***, 252 Wis. 2d 476, ¶18 (The Commission's failure to discuss certain evidence of provocation in its decision did not necessarily mean the Commission failed to consider the evidence; the evidence simply may not have altered the Commission's ultimate conclusion.).

Coca-Cola's workplace conduct policy

¶28 Spencer next argues his use of the term "playing hardball" during his argument with the account manager did not violate Coca-Cola's workplace conduct policy and, therefore, cannot be considered misconduct. As noted above, Coca-Cola's workplace conduct policy lists several examples of inappropriate workplace conduct. Specifically, the policy prohibits "[t]hreatening, intimidating or harassing another employee[.]" Spencer argues his comment about playing hardball was not a "true threat" and, accordingly, did not violate the policy.

¶29 This argument misses the mark. The Commission did not find that Spencer's behavior was misconduct because it violated Coca-Cola's workplace conduct policy. The Commission found that Spencer committed misconduct by continuing to make rude and inappropriate comments toward his supervisors and a customer following two warnings. The Commission did not rely on or cite the workplace conduct policy in its decision. Spencer does not cite any authority for the proposition that the Commission must find a violation of an employer's policy in order to conclude an employee committed misconduct. Whether Spencer's comment about playing hardball was a "true threat," in violation of the workplace conduct policy, is therefore irrelevant.

¶30 Spencer also argues his comment about playing hardball cannot be considered misconduct because it is consistent with the whistleblower provision of the workplace conduct policy. However, Spencer never argued before the ALJ or the Commission that he was acting pursuant to the whistleblower provision when he made that comment. *See* ***Outagamie Cnty.***, 244 Wis. 2d 613, ¶55 (arguments must be raised before the administrative agency to be preserved for judicial review). Moreover, the whistleblower provision states, "If you know of an

employee who is violating a [Coca-Cola] policy or procedure, you must report it to your supervisor. If you are not comfortable discussing it with your supervisor, you may call the HeRe! Team or the Employee Hotline[.]" Spencer did not report any violations of company policy to his supervisor, human resources, or the employee hotline. Instead, he threatened to report future infractions in response to the account manager telling his supervisor about a customer complaint. The plain language of the whistleblower provision does not encompass this type of conduct.

¶31 In a related argument, Spencer argues his remark about playing hardball was merely an example of "tattling," which he asserts is not misconduct. Spencer cites the Commission's previous decision in ***Perlewitz v. Lapham Hickey Steel Corp.***, UI Hearing No. 08401142AP (LIRC June 30, 2008), in support of this argument. In ***Perlewitz***, an employee's coworker reported to their supervisor that the employee had been taking breaks without punching out. ***Id.*** The employee subsequently called the coworker a number of derogatory names and "told him that he would get back at him for this one." ***Id.*** The coworker reported these comments to his supervisor, and the employee was discharged. ***Id.***

¶32 The Commission concluded the employee in ***Perlewitz*** was not discharged for misconduct. ***Id.*** It conceded the employee's statement about getting back at his coworker showed "extremely poor judgment[.]" ***Id.*** However, the Commission stated, "[U]nder these circumstances, and without a warning, the employee's comments did not amount to such a willful and substantial disregard of the employer's interest as to amount to misconduct connected with his work." ***Id.***

¶33 ***Perlewitz*** is distinguishable. As the Commission notes, the employee in that case had not received any prior warnings for behavior similar to

that which led to his discharge. In contrast, before the November 1, 2012 incident, Spencer had received two warnings about using inappropriate and disrespectful language in the workplace. Thus, although the Commission concluded the employee's threat to get back at a coworker was not misconduct in ***Perlewitz***, the Commission could reasonably reach a contrary conclusion under the circumstances of this case.

Prior incidents from January 2011 and July 2012

¶34 Spencer concedes the Commission could consider the prior incidents from January 2011 and July 2012 in determining whether he was discharged for misconduct. *See* ***Charette***, 196 Wis. 2d at 962. However, Spencer argues those prior incidents do not support a finding of misconduct because: (1) the first and second incidents involved profanity and were therefore factually dissimilar from the third incident; and (2) eighteen months elapsed between the first and second incidents. Again, Spencer failed to raise this argument before the ALJ, the Commission, or the circuit court. He has therefore forfeited his right to raise it on appeal. *See* ***Van Camp***, 213 Wis. 2d at 144; ***Outagamie Cnty.***, 244 Wis. 2d 613, ¶55.

¶35 In addition, Spencer's argument regarding the prior incidents fails on the merits. Spencer argues the incident on November 1, 2012, was completely unrelated to the previous incidents because it did not involve profanity. However, all of the incidents involved Spencer making unprofessional and inappropriate comments in the workplace. It is immaterial that the first two incidents involved profanity and the third did not. Based on the evidence before it, the Commission could reasonably conclude that the third incident represented part of a pattern of disrespectful and inappropriate conduct, and that Spencer had been warned about

similar conduct in the past. That eighteen months elapsed between the first and second incidents does not, as Spencer asserts, automatically mean the incidents were isolated events.

¶36 Spencer cites ***Fitzgerald v. Globe-Union, Inc.***, 35 Wis. 2d 332, 151 N.W.2d 136 (1967), in support of his claim that the three incidents did not amount to misconduct. However, ***Fitzgerald*** actually cuts against Spencer's position. The employee in ***Fitzgerald*** was discharged because she was negligent in her work on four separate occasions. ***Id.*** at 338-39. Our supreme court concluded the Commission reasonably determined the employee was discharged for misconduct because her acts were so serious in the aggregate as to amount to gross negligence. ***Id.*** at 340-41. The court distinguished its previous decision in ***Cheese v. Industrial Commission***, 21 Wis. 2d 8, 123 N.W.2d 553 (1963), which held that a single incident of inadvertently pouring water into the fuel tank of a crane was not misconduct. ***Fitzgerald***, 35 Wis. 2d at 340. The court observed that, unlike ***Cheese***, ***Fitzgerald*** did not involve "one or two isolated instances of misconduct[.]" ***Fitzgerald***, 35 Wis. 2d at 340. Similarly, this case does not involve one or two isolated instances of misconduct. Spencer made disrespectful and inappropriate comments in the workplace on three occasions, and he was warned twice before his discharge. Based on Spencer's entire work record, the Commission could reasonably conclude he was discharged for misconduct.

Credibility conference

¶37 Finally, Spencer appears to assert it was necessary for the Commission to confer with the ALJ regarding witness credibility before it reversed her decision. We disagree. The underlying facts regarding Spencer's discharge are not in dispute. Based on these undisputed facts, the ALJ reached a

legal conclusion that Spencer's behavior did not amount to misconduct. Based on the same undisputed facts, the Commission reached a contrary conclusion. The Commission's decision was not based on any assessment of the witnesses' credibility. That the Commission reached a different legal conclusion from that reached by the ALJ did not trigger the requirement of a credibility conference. *See* ***Carley Ford, Lincoln, Mercury, Inc. v. Bosquette***, 72 Wis. 2d 569, 576, 241 N.W.2d 596 (1976). Accordingly, the Commission's failure to confer with the ALJ regarding credibility does not warrant reversal of the Commission's decision.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.