

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP2179

Cir. Ct. No. 2013CV575

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LOGAN J. GRIFFITH,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

BMO HARRIS BANK NA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOSEPH G. SCIASCIA, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. This appeal concerns whether Logan Griffith must repay unemployment insurance benefits. Through no fault of his own or his employer, BMO Harris Bank, the Department of Workforce Development paid Griffith \$1,575 in benefits to which he was not entitled. The issue on appeal is whether the Labor and Industry Review Commission (LIRC) properly ordered Griffith to repay the benefits. The circuit court concluded that the overpayment was the result of “Departmental error” and, thus, concluded that Griffith is not required to repay the benefits. We agree and, therefore, affirm.

¶2 Generally, the department has a right to reimbursement of overpayments from recipients. However, as LIRC explains, the department must waive its right to recovery if:

a. The overpayment was the *result of a departmental error* and was not the fault of any employer under s. 108.04(13)(f); and

b. The overpayment did not result from the fault of an employee as provided in s. 108.04(13)(f), or because of a claimant’s false statement or misrepresentation.

WIS. STAT. § 108.22(8)(c)1. (emphasis supplied).¹ It is undisputed here that the overpayment was not the result of fault on the part of either Griffith or his employer. The only issue is whether the overpayment to Griffith was the result of “departmental error.”

¶3 The fact that the department’s decision to pay Griffith benefits was reversed by LIRC does not affect our analysis one way or the other. The statutes

¹ LIRC tells us that a recent amendment to the statutes does not apply because the pertinent events here predate time cut-offs specified by the legislature. We understand LIRC to be asserting that the 2011-12 version of the statutes applies here. Accordingly, all references to the Wisconsin Statutes will be to the 2011-12 version unless otherwise noted.

direct that a reversal by LIRC “shall not be treated as establishing a departmental error.” WIS. STAT. § 108.22(8)(c)2.

¶4 As LIRC points out, “departmental error” is statutorily defined:

“Departmental error” means an error made by the department in computing or paying benefits which results from:

(a) A mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, whether by commission or omission; or

(b) Misinformation provided to a claimant by the department, on which the claimant relied.

WIS. STAT. § 108.02(10e). Looking to this definition, and again putting to the side non-issues, the more specific question is whether the overpayment to Griffith was “departmental error” because that overpayment was the result of a “misapplication or misinterpretation of the law or mistake of evidentiary fact.” Thus, Griffith can be compelled to repay the department if the overpayment did *not* result from the department:

1. misinterpreting the law,
2. misapplying the law to the facts, or
3. acting under a mistaken view of the facts.²

¶5 We first summarize the facts. We then address LIRC’s arguments as to why the overpayment to Griffith was not a result of the department

² We realize the actual statutory language is “mistake of *evidentiary* fact.” Whatever is meant by “evidentiary,” it cannot here be a reference to the evidence presented at the hearing conducted by the ALJ on the repayment issue. Here, the department made its determination as to computation and payment of Griffith’s benefits before that hearing was held.

misinterpreting the law, misapplying the law to the facts, or acting under a mistaken view of the facts.

¶6 Griffith worked for BMO Harris Bank for about 15 months. Griffith was absent from work 8 times. He was significantly tardy once. He was also sent home one time because he showed up for work intoxicated. Griffith's attendance failures were caused by a drinking problem. Griffith did not pursue treatment while employed by BMO Harris Bank and never asserted that he was incapable of controlling his drinking or complying with the employer's attendance policy.

¶7 The department paid Griffith unemployment insurance benefits, having determined that he was not terminated for misconduct. The employer appealed to the ALJ, who held a hearing and determined that Griffith was terminated for misconduct. Griffith appealed to LIRC, which affirmed the ALJ's decision. The ALJ and LIRC decisions persuasively explain why the facts summarized above show that Griffith did not have a valid reason for his failure to abide by his employer's attendance policy and why, therefore, Griffith was terminated for "misconduct" which rendered him ineligible for unemployment benefits. *See* WIS. STAT. § 108.04(5) ("Discharge For Misconduct").

¶8 According to the record, it appears that the department initially determined that Griffith was not terminated for misconduct and, therefore, paid benefits based on the following rationale:

The attendance record provided by the employer shows 8 sick days and 2 tardies. The attendance record does not reach the level of misconduct as all of the sick days are considered valid. The two tardies are invalid but they do not establish a substantial disregard of the employer's interests.

However, as we further explain below, we find nothing in the ALJ’s decision, LIRC’s decision, or LIRC’s argument on appeal explaining why the department could have reasonably made this initial determination. The only pertinent statement in the ALJ’s or LIRC’s decisions we find is the following conclusory statement in the ALJ’s written decision: “Those benefits were paid because the initial determination was made without full information as to the underlying issue or was made based on a differing interpretation of the available information.” LIRC’s decision adopting the findings and conclusions of the ALJ does not further address why the department might have erred.

¶9 With this background in mind, we return to the specific question at hand—whether the overpayment was the result of the department:

1. misinterpreting the law,
2. misapplying the law to the facts, or
3. acting under a mistaken view of the facts.

Most of LIRC’s arguments on this topic can be summarized as follows. LIRC speculates that the department “gave different weight to the facts and analyzed the legal issues presented differently” than the ALJ and LIRC. LIRC asserts that “the record is different and more complete at the appeal tribunal level because witnesses are called to testify under oath and are subject to cross examination and parties may provide additional evidence in support of their positions.” LIRC tells us that reversals by LIRC “are normally a matter of choosing different factual or legal findings in cases in which more than one finding could reasonably have been made or more than one conclusion could have reasonably been drawn.” If these assertions amount to something more than loose thinking, we fail to grasp what that something more is.

¶10 When LIRC speculates that the department possibly “gave different weight to the facts,” what does that mean? LIRC tells us the facts are undisputed and that we must defer to LIRC’s fact finding. But LIRC does not explain why it was reasonable for the department to give any “facts” “different weight” so that those facts do not constitute misconduct.

¶11 LIRC speculates that the department may have chosen “different factual ... findings.” What different factual findings? What in the record supports the proposition that the department could *reasonably* choose different findings? And, if so, why would such different findings not show that the department acted under a mistaken view of the facts? It appears that at least part of what happened here is that the ALJ had before her *additional* facts that were not before the department when it made its initial decision. The ALJ said it herself in stating that one of two possible reasons for the department’s decision appeared to be that “the initial determination was made without full information.” And, LIRC points out that the record is “different and more complete at the appeal tribunal level.” But in what way and to what end? Why does this scenario support LIRC’s view that there was no “departmental error” within the meaning of WIS. STAT. § 108.02(10e)? As we have seen, a mistake of fact is “departmental error.” Thus, the obvious question is this: Why is making an initial determination based on insufficient information different than making a decision based on a mistaken view of the facts?

¶12 LIRC says that the department, perhaps, “analyzed the legal issues ... differently.” Similarly, LIRC seems to say that the department may have chosen “different ... legal findings.” There are two problems with this argument. First, LIRC again fails to provide record support. LIRC points to nothing indicating that the department applied a different view of the law to the true facts. Second, even

if the department did “analyze[] the legal issues ... differently” than LIRC, LIRC fails to explain why such analysis would not constitute the department mis-analyzing a legal issue and, therefore, misinterpreting the law.

¶13 LIRC supplies no answers to any of the questions we ask.

¶14 LIRC argues that its application of the overpayment waiver statutes to the facts here is entitled to great weight deference. We are unable to discern, however, what exactly LIRC is asking us to defer to. Specific to the waiver issue, what are the facts we should defer to? What is the interpretation of the applicable waiver statutes we should defer to? Neither the ALJ’s decision nor LIRC’s decision contains an analysis of the waiver statutes, an interpretation of those statutes, or a discussion of how those statutes apply to the facts here.

¶15 Before concluding, we address another of LIRC’s arguments. LIRC cites our decision in *Bernhardt v. LIRC*, 207 Wis. 2d 292, 558 N.W.2d 874 (Ct. App. 1996), for the proposition that a determination of misconduct involves a value judgment. LIRC then states: “[T]he overpayment in this case results from differing value judgments as to whether Mr. Griffith’s conduct rose to the level of misconduct connected with his employment.” There are at least two problems with this argument.

¶16 First, LIRC’s reliance on “value judgment” language in *Bernhardt* lifts the language from its context. In the portion of *Bernhardt* LIRC points to, we are explaining why we give great weight deference to LIRC’s determinations of “whether certain conduct constitutes misconduct.” *Id.* at 303. There is no dispute here that LIRC correctly determined that Griffith was terminated for misconduct. Our *Bernhardt* decision does not speak to whether a different “value judgment” by the department—as to whether particular facts constitute “misconduct”—might

or might not be a misapplication of law to facts and, thus, might or might not be departmental error.

¶17 Second, even if we assume that *Bernhardt* provides some indirect support for LIRC’s legal proposition, LIRC points to nothing in the record that supports the factual proposition that the department actually made a different value judgment, as opposed to simply misapplying the law to the facts or possibly assuming incorrect or incomplete facts.

¶18 In sum, nothing we can locate in either LIRC’s arguments or the record suggests any reason why Griffith’s behavior was not misconduct or why the department could have reasonably concluded at the time it paid the benefits that Griffith’s conduct was not misconduct. More to the point, nothing suggests any reason why the department’s error was not based on a mistaken understanding of the facts, a misunderstanding of unemployment compensation law, or a misapplication of that law to the facts.

¶19 We agree with the circuit court’s conclusion that the “record in this case contains no evidence that the decision to issue benefits was based on anything other than the Department’s misinterpretation of the law or mistake of evidentiary fact.”

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

