

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP430

Cir. Ct. No. 2009CV139

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ALBERT GALINDO,

PETITIONER-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-APPELLANT,

ASHLEY FURNITURE INDUSTRIES, INC.,

RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission appeals from a judgment reversing the Commission’s finding that Albert Galindo’s positive drug test for marijuana constituted misconduct for unemployment compensation purposes within the meaning of WIS. STAT. § 108.04(5).¹ We reverse.

¶2 Galindo was discharged after failing a random drug test at Ashley Furniture, where he was employed for three years in its upholstery assembly area. Ashley Furniture’s work rules stated that an employee “who tests positive as a result of a random/universal drug test will be discharged from further employment.” Galindo acknowledged in writing that he had received Ashley Furniture’s work rules and substance abuse policy.

¶3 Galindo’s defense to the positive test was that he had a documented drug addiction to marijuana, cocaine and alcohol. Therefore, his ingestion of the marijuana was not intentional. As evidence of his purported marijuana addiction, Galindo pointed to a voluntary outpatient program he completed in 1989, and a drug court program he participated in from December 2005 to October 2007.

¶4 The Commission determined that Galindo was ineligible for unemployment benefits because he was discharged for misconduct.² The Commission found that Galindo was aware that he would be subject to discharge if he received a positive drug test at work. The Commission also noted that

¹ References to the Wisconsin Statutes are to the 2007-08 version unless noted.

² Galindo was paid benefits of \$1,878 for which he was not eligible. The Commission found that a waiver of benefit recovery was required because “the overpayment was the result of a departmental error.”

Galindo claimed to be addicted, but he neither informed his employer that he had a drug problem nor availed himself of its drug treatment program. In addition, the Commission concluded Galindo presented no medical evidence or expert opinion to support his assertion that he was addicted to marijuana and unable to abstain from its use. Galindo sought judicial review, and the circuit court reversed the Commission in its entirety. The Commission now appeals.

¶5 Our review is of the Commission's decision. See *DILHR v. LIRC*, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990). Whether Galindo's unauthorized use of marijuana meets the standard of misconduct under WIS. STAT. § 108.04(5) is a conclusion of law. See *id.* However, WIS. STAT. § 108.09(6) charges the Commission with the duty of administering § 108.04(5). The Commission and its predecessor have interpreted the misconduct provision of § 108.04(5) for more than sixty years. See, e.g., *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W.2d 636 (1941).

¶6 In the last twenty years, the Commission has regularly held that a positive drug test violating the employer's work rules constitutes misconduct under WIS. STAT. § 108.04(5).³ The Commission has developed the expertise, specialized knowledge and technical competence in the handling of this issue to warrant great weight deference from this court. See *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 663, 539 N.W.2d 98 (1995). Under this standard, we will

³ See, e.g., *Dowling v. Walgreen Co.*, Wis. LIRC UC Decision Hearing No. 05005192 MD, <http://dwd.wisconsin.gov/lirc/ucdecsns/2503.htm> (March 3, 2006); *Hall v. Sysco Corp.*, Wis. LIRC UC Decision Hearing No. 97601931 WB, <http://dwd.wisconsin.gov/lirc/ucdecsns/3.htm> (August 15, 1997); *Olson v. Distribution Transformer Div.*, Wis. LIRC UC Decision Hearing No. 88-603167WK, <http://dwd.wisconsin.gov/lirc/ucdecsns/587.htm> (February 3, 1989).

uphold the Commission's reasonable interpretation that is not contrary to the clear meaning of the statute, even if this court feels an alternative interpretation is more reasonable. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996).

¶7 A person discharged for misconduct is generally ineligible for unemployment compensation. WIS. STAT. § 108.04(5). Misconduct for unemployment compensation purposes includes actions which are “deliberate violations or disregard of standards of behavior which the employer has the right to expect of [its] employee.” See *Boynton*, 237 Wis. at 259. Galindo does not dispute the reasonableness of Ashley Furniture's drug testing rules. Rather, he insists he is addicted to marijuana and therefore failing the drug test was not volitional.

¶8 Our supreme court has held that whether an employee was an alcoholic “is a matter of expert medical opinion that should be proved by a physician and not by a layman.” *State v. Freiberg*, 35 Wis. 2d 480, 484, 151 N.W.2d 1 (1967). Freiberg was required to submit “proper medical proof ... showing that because of the excessive and prolonged use of intoxicating liquor [he] was an alcoholic and that condition deprived him of the capacity to work” *Id.* at 484-85. This reasoning was reaffirmed in *Connecticut General Life Insurance Co. v. DILHR*, 86 Wis. 2d 393, 406, 273 N.W.2d 206 (1979). In that case, the complainant's evidence of a drinking problem was time spent at a rehabilitation hospital for alcoholics and drug addicts, a history of drinking, and “the shakes” some mornings. *Id.* The court stated the assumption that the drinking problem was alcoholism “would be particularly inappropriate if made without benefit of expert opinion on the complex medical and social questions involved” *Id.* at 408.

¶9 Galindo’s evidence suffers from the same deficiencies. His completion of a voluntary outpatient program in 1989 is too remote to be relevant. His participation in drug court from 2005 to 2007 does not establish addiction to marijuana. Galindo’s evidence is no more probative of an addiction than the program at the rehabilitation hospital in *Connecticut General*. As the Commission correctly emphasized, Galindo “had no expert opinion to support his conclusion that [his] use of marijuana was not a willful or knowing violation of the employer’s policy, or that [he] lacked a normal capacity to refrain from drug use.”

¶10 Moreover, the evidence shows Galindo can refrain from using marijuana. He did in fact maintain sobriety for nearly two years when participating in drug court. Galindo further asserted his most recent use of marijuana was a one-time occurrence about a week prior to his termination, and he had been sober for the prior three and one-half years.

¶11 The Commission reasonably concluded that Galindo’s ingestion of unauthorized controlled substances was in deliberate disregard of standards of behavior which Ashley Furniture reasonably expected of its employees. Galindo’s actions constituted misconduct for purposes of unemployment insurance.

By the Court.—Judgment reversed.

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

