

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2016

Diane M. Fremgen
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. 2015AP716

Cir. Ct. No. 2014CV6402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WI DEPT. OF WORKFORCE DEVELOPMENT,

PLAINTIFF-APPELLANT,

v.

WI LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

NIKKI L. WALLENKAMP AND ARBY'S RESTAURANTS,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. The Department of Workforce Development (DWD) appeals an order of the circuit court affirming a decision of the Labor and Industry Review Commission (LIRC). The DWD contends that LIRC erred in finding that Nikki Wallenkamp did not conceal facts about her wages and employment status while seeking unemployment insurance benefits. We affirm.

BACKGROUND

¶2 In 2011, Nikki Wallenkamp began filing for unemployment insurance benefits. During week forty-four of 2012 through week three of 2013 (November 2012 through January 2013), Wallenkamp worked at the fast-food chain Arby's. During two of those weeks in November 2012, Wallenkamp also worked for TRH Restaurants, Inc., the corporation operating as Rocky Rococo's. Wallenkamp quit her job with TRH on December 1, 2012. Wallenkamp stopped working for Arby's on January 16, 2013 (week three). Arby's paid Wallenkamp for unused vacation time for the week of January 20-26, 2013 (week four).

¶3 Wallenkamp filed weekly claim certifications for unemployment benefits for the time period between week forty-four of 2012 and week four of 2013 using the DWD's automated telephone claim filing system. The fourth question of the automated system (Question 4) asked: "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" Wallenkamp answered "no." It is undisputed that Wallenkamp did work during the time period at issue, except during week four of 2013. Wallenkamp had worked for two employers (Arby's and TRH) during weeks forty-seven and forty-eight of 2012 and had received vacation pay for week four of 2013.

¶4 On March 28, 2012, following a DWD investigation, the DWD issued multiple determinations finding: (1) Wallenkamp had worked and earned

wages from Arby's and TRH in week forty-four of 2012 through week four of 2013; (2) Wallenkamp indicated that she did not work during that time period; (3) Wallenkamp did not indicate that she quit working for TRH; and (4) Wallenkamp received or would receive vacation pay from Arby's, despite indicating otherwise. The DWD determined that Wallenkamp was ineligible for benefits during the time period at issue, resulting in an overpayment of \$1880. The DWD determined that Wallenkamp was required to repay the overpayment, along with a concealment penalty of \$282. The DWD also found that Wallenkamp's concealment of wages and material facts subjected her to a redaction of future benefits in the amount of \$5264.

¶5 Wallenkamp appealed the DWD's determinations. Wallenkamp testified in front of an Administrative Law Judge (ALJ), stating that she believed she correctly reported her employment and wages on her claim certifications. However, when shown an exhibit confirming that Wallenkamp answered "no" to Question 4, Wallenkamp told the ALJ that her answer "does not make any sense at all." Wallenkamp also told the ALJ that she was learning disabled and was confused by the discrepancy. The ALJ affirmed the DWD's determinations.

¶6 Wallenkamp appealed to LIRC. LIRC found that Wallenkamp incorrectly answered Question 4 because she worked during the time period in question, did not report that she quit her employment with TRH in week forty-eight of 2012, and did not report that she received vacation pay from Arby's in week four of 2013. LIRC also noted, however, that prior to week forty-three of 2012, Question 4 of the weekly claim certification simply asked, "Did you work?" Beginning in week forty-three of 2012, Question 4 was modified to ask: "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" LIRC determined that the modified question was "more

susceptible to misinterpretation”; thus, Wallenkamp’s incorrect answers were not sufficient evidence of an intent to conceal wages. LIRC also found that Wallenkamp’s testimony rebutted any presumption that she intended to defraud the DWD. LIRC found that Wallenkamp: (1) credibly testified that she was confused by Question 4; (2) was surprised when the ALJ informed her that she answered incorrectly; and (3) genuinely did not understand how to properly file her claims. LIRC upheld the DWD’s requirement that Wallenkamp repay the \$1880 overpayment, but reversed the portion of the DWD’s order requiring Wallenkamp to pay a concealment fee and redacting her future benefits.

¶7 The DWD appealed to the circuit court. The circuit court affirmed LIRC. This appeal follows.

DISCUSSION

¶8 The DWD raises many arguments on appeal; however, this appeal centers on two issues: (1) whether evidence in the record supports LIRC’s finding that Wallenkamp did not conceal facts pertaining to her employment and wages during the time period at issue, in violation of WIS. STAT. § 108.04(11)(g) (2013-14);¹ and (2) whether LIRC misinterpreted and misapplied § 108.04(11)(g).²

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² WISCONSIN STAT. § 108.04(11)(g) defines the term “conceal” for the purpose of determining a claimant’s eligibility for benefits. The statute provides: “For purposes of this subsection, ‘conceal’ means to *intentionally* mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.” (Emphasis added.)

Standard of Review and Level of Deference.

¶9 On appeal, we review LIRC’s decision, not the decision of the circuit court. See *General Cas. Co. v. LIRC*, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322 (Ct. App. 1991). LIRC’s decision may be reversed only upon the following grounds: (1) LIRC acted without or in excess of its power; (2) LIRC’s order or award was procured by fraud; or (3) LIRC’s findings of fact do not support the order or award. WIS. STAT. § 102.23(1)(e); see also *Patrick Cudahy Inc. v. LIRC*, 2006 WI App 211, ¶5, 296 Wis. 2d 751, 723 N.W.2d 756.

¶10 The DWD contends that we should give no deference to LIRC’s decision because LIRC’s interpretation of WIS. STAT. § 108.04(11)(g) was flawed. Although courts are never bound by an agency’s interpretation of a statute, courts “will under certain circumstances give deference to an agency’s statutory interpretation.” *MercyCare Ins. Co. v. Wisconsin Comm’r of Ins.*, 2010 WI 87, ¶27, 328 Wis. 2d 110, 786 N.W.2d 785. More specifically:

A reviewing court accords an agency’s statutory interpretation no deference when the issue is one of first impression, when the agency has no experience or expertise in deciding the legal issue presented, or when the agency’s position on the issue has been so inconsistent as to provide no real guidance. When no deference to the agency decision is warranted, the court interprets the statute independently and adopts the interpretation that it deems most reasonable.

A reviewing court accords due weight deference when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute. When applying due weight deference, the court sustains an agency’s interpretation if it is not contrary to the clear meaning of the statute—unless the court determines that a more reasonable interpretation exists.

Finally, a reviewing court accords great weight deference when each of four requirements are met: (1) the agency is 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 its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. When applying great weight deference, the court will sustain an agency's reasonable statutory interpretation even if the court concludes that another interpretation is equally or more reasonable. The court will reverse the agency's interpretation if it is unreasonable—if it directly contravenes the statute or the state or federal constitutions, if it is contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis.

Id., ¶¶29-31 (citations omitted).

¶11 We conclude that LIRC's decision is entitled to great weight deference. LIRC is charged with administering WIS. STAT. § 108.04(11) by virtue of its broad authority to review unemployment benefits decisions. *See* WIS. STAT. § 108.09(6). Further, LIRC's interpretation of § 108.04(11) is one of longstanding—LIRC has been interpreting the statutory term “conceal” for decades.³ In deciding the present case, LIRC necessarily employed the expertise, specialized knowledge, and technical competence it has developed over the years. In addition, deferring to LIRC's interpretation of § 108.04(11) provides uniformity in the application of the statute.

³ The DWD contends that LIRC's interpretation of the term “conceal” is not longstanding because the “Legislature enacted the statutory definition of ‘conceal’ in 2008.” While the current statutory definition of “conceal” may have been enacted in 2008, LIRC has not been addressing issues of concealment only for the past eight years. Affording LIRC's interpretation great weight deference will allow for uniformity and consistency in LIRC's application of WIS. STAT. § 108.04(11)(g).

LIRC's Decision is Supported by Substantial and Credible Evidence.

¶12 In the absence of fraud, findings of fact made by LIRC acting within its powers are “conclusive.” WIS. STAT. § 102.23(1)(a). We will uphold LIRC’s factual findings as long as there is “credible and substantial evidence in the record on which reasonable persons could rely to make the same findings.” See *Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, ¶25, 349 Wis. 2d 234, 833 N.W.2d 665 (citation omitted). Substantial evidence “does not constitute the preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion [LIRC] reached.” *Holy Name Sch. of the Congregation of the Holy Name of Jesus of Kimberly v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982) (citation omitted). LIRC is the sole judge of the weight and credibility of the witnesses. *Manitowoc Cty. v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). We may not substitute our own judgment for LIRC’s in evaluating the weight or credibility of the evidence. WIS. STAT. § 102.23(6).

¶13 Applying great weight deference, we will uphold LIRC’s conclusion that Wallenkamp did not conceal her employment and wages as long as there is “relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion.” See *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983), *overruled on other grounds by* WIS. STAT. § 108.02(15)(k). We conclude that LIRC’s findings of fact are supported by substantial and credible evidence in the record.

¶14 The record establishes that LIRC took multiple factors into consideration in determining whether Wallenkamp’s misrepresentations were intentional, as it was required to do in accordance with the DWD’s *Disputed*

Claims Manual. The manual “instructs adjudicators to establish *why* the claimant failed to report wages.” (Emphasis added.) The manual states:

When an investigation establishes a claimant has given us false answers we must determine the claimant’s intent. We must decide if this was an innocent mistake or done on purpose or with such careless disregard of the claiming process as to amount to an intentional act.

LIRC considered the wording of the specific question (Question 4), Wallenkamp’s testimony, and her ability to comprehend the benefit filing system.

¶15 LIRC found that just before the time period at issue, Question 4 of the DWD’s weekly claim certification asked a simple question: “Did you work?” During week forty-four of 2012 through week four of 2013, however, the automated system asked a more complex, compound question: “During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?” LIRC acknowledged that Wallenkamp incorrectly answered the question, but also recognized that “the [DWD’s] question about work is no longer simple.” Thus, LIRC found that Wallenkamp’s incorrect answers were not indicative of an intent to conceal wages. LIRC then considered Wallenkamp’s testimony.

¶16 LIRC found that Wallenkamp’s testimony credibly demonstrated that she “was confused by the compound nature of Question No. 4 on the weekly claim certifications.” Wallenkamp admitted that she was “confused” by the second part of Question 4, which asked, “did you receive or will you receive sick pay, bonus pay or commission?” She testified that she did not claim vacation pay “because I’d never accepted it ... until I got terminated from Arby’s, that’s when I told my manager to put my vacation hours on. I did not know ... as I earned them, that I was supposed to claim them.” Wallenkamp further stated, “I thought like ---

when I used [the vacation pay], then, I would claim them.... Because that would be counting as money, so, I guess, I was confused on that.” (Some formatting altered.)

¶17 When asked by the ALJ why Wallenkamp reported that she did not work during the time period at issue, Wallenkamp expressed confusion, responding, “How did I claim no, when I received a check, ma’am?” LIRC noted that when Wallenkamp was presented with proof that she answered incorrectly, Wallenkamp was surprised. Wallenkamp told the ALJ “this is not making any sense to me, at all,” explaining, “I thought they were talking about ... the vacation pay, or sick pay. I don’t understand, why I would have said that, it doesn’t make sense.... The only thing I can say is that I may not have listened to the question correctly.” (Some formatting altered.)

¶18 Wallenkamp also testified that she did not report quitting her job with TRH because she knew her position with TRH would be short-term; thus, she did not think she had to report TRH as an employer. LIRC concluded that Wallenkamp genuinely misunderstood the unemployment insurance program, noting that she was learning disabled and worked low-skill jobs.

¶19 Because LIRC is the sole arbiter of credibility, *see Manitowoc County*, 88 Wis. 2d at 437, its reliance on Wallenkamp’s testimony provides credible and substantial evidence supporting its findings, *see Xcel Energy Services, Inc.*, 349 Wis. 2d 234, ¶25. Accordingly, LIRC’s determination that Wallenkamp did not conceal work and wages was not erroneous.

LIRC did not Misinterpret the Statutory Definition of Conceal.

¶20 The DWD also contends that LIRC improperly interpreted the statutory definition of “conceal,” as defined by WIS. STAT. § 108.04(11)(g), by adding a requirement that the DWD prove a claimant’s intent to receive benefits that the claimant knows he or she is not entitled to. We disagree.

¶21 WISCONSIN STAT. § 108.04(11)(g) states: “For purposes of this subsection, ‘conceal’ means to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.”

¶22 Although the application of a statute to found facts is a question of law reviewable *de novo*, when LIRC has a history of expertise and familiarity with a particular field of law, we typically defer to a certain extent to its application of the statute. *See Klusendorf Chevrolet-Buick, Inc. v. LIRC*, 110 Wis. 2d 328, 331, 328 N.W.2d 890 (Ct. App. 1982). Thus, a reasonable legal conclusion will be sustained even if an alternative view may be equally reasonable. *See Eaton Corp. v. LIRC*, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985).

¶23 We conclude that LIRC’s interpretation of WIS. STAT. § 108.04(11)(g) is reasonable. The statute unequivocally states that concealment requires an intent to mislead or defraud the DWD by withholding, hiding, or falsifying information. LIRC determined that Wallenkamp did not intend to mislead or defraud the DWD, but rather, that her mistaken filings were based upon confusion. LIRC’s findings necessarily assume that Wallenkamp did not intend to receive benefits she knew she was not entitled to. A determination that a claimant did not intend to mislead or defraud the DWD necessarily incorporates a determination that the claimant did not intend to seek unentitled benefits. LIRC’s

interpretation and application of the statute does not alter the statute's meaning and thus is reasonable.

¶24 For the foregoing reasons we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

