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March 17, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP2431

Fred Perry v. Labor & Industry Review Commission
(L.C. # 2018CV761)

Before Brash, P.J., Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Fred Perry appeals from an order of the circuit court that affirmed the Labor and Industry Review Commission's decision modifying and affirming an appeal tribunal's decision that Perry was ineligible for unemployment benefits. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ The order is summarily affirmed.

Perry began working as a carpet cleaning technician for Packerland Rent-a-Mat, Inc., in late 2015. Perry worked for Packerland for about twenty months and, prior to the end of that employment, received multiple verbal warnings, largely based on allegations from customers and coworkers that he failed to properly secure job sites, left job sites prior to work being completed, rushed through his cleaning duties, failed to finish jobs, and had become argumentative with supervisors and coworkers. In particular, a bank that is one of Packerland's biggest clients had alleged that on November 30, 2016, Perry left one door unlocked and another open after completing his cleaning. Perry denied doing so, but received a warning from Packerland.

On May 11, 2017, Perry was again assigned to clean carpets at the bank. His supervisor, evidently mindful of the November incident, specifically reminded the cleaning crew of the importance of securing the bank doors while cleaning. Despite the reminder, Perry left three doors open all night as he passed cleaning hoses through them without following the proper procedure for cabling the doors shut. A bank employee who had to stop back after closing witnessed the open doors, and the bank complained to Packerland the next morning. When Perry was questioned about it, he said, "I ain't gonna lie, I didn't lock the doors all night." Multiple co-workers also provided written statements confirming that Perry failed to secure the doors. Consequently, Perry's employment was terminated by Packerland.

¹ All references to the Wisconsin Statutes and Administrative Code are to the 2017-18 version unless otherwise noted.

Following his termination, Perry applied for unemployment benefits. A claim adjudicator from the Department of Workforce Development, tasked with making an initial determination about benefits, determined that Perry had been discharged for “substantial fault” in connection with his work, making him ineligible to collect benefits until he requalified. Perry appealed, and a hearing on the matter was held before an appeal tribunal overseen by an administrative law judge. *See* WIS. STAT. § 108.09(3)(a). While the tribunal modified the Department’s determination, concluding that Perry’s actions “were sufficiently egregious as to be misconduct” rather than substantial fault, it still affirmed the ultimate result that Perry was ineligible for benefits.

Perry appealed to the Commission. *See* WIS. STAT. § 108.09(6)(a). The Commission modified and affirmed the tribunal’s decision, “mak[ing] the same findings of fact and conclusions of law” except for a single substituted sentence, and otherwise incorporating the tribunal decision by reference. The Commission agreed with the tribunal that Packerland’s allegations were credible and concluded that Perry’s actions constituted misconduct under WIS. STAT. § 108.04(5).

Perry then appealed to the circuit court. *See* WIS. STAT. § 108.09(7)(a). The circuit court determined that the Commission’s findings of fact were supported by substantial and credible evidence and that those facts established Perry’s actions in leaving the bank doors unsecured constituted misconduct. Thus, the circuit court affirmed the Commission. Perry appeals.

On appeal, we review the Commission’s decision, not the circuit court’s. *See DWD v. LIRC*, 2017 WI App 68, ¶8, 378 Wis. 2d 226, 903 N.W.2d 303. We may only set aside that decision on the grounds that “the [C]ommission acted without or in excess of its powers”, “the

order was procured by fraud”, or “the findings of fact by the [C]ommission do not support the order.” *See* WIS. STAT. § 108.09(7)(c)6.a.-c.

The Commission’s factual findings are conclusive. *See* WIS. STAT. § 108.09(7)(c). We may not substitute our judgment for the Commission’s as to the weight or credibility of the evidence, and we may only set aside a finding of fact if it is not supported by credible and substantial evidence. *See* § 108.09(7)(f). We are not, however, bound by the Commission’s determinations on questions of law. *See Wehr Steel Co. v. DILHR*, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982). The burden of proof is generally on the party seeking to overturn the Commission’s action. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995), *abrogated on other grounds by Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

An employee who is terminated for misconduct is ineligible for unemployment benefits until he or she requalifies. *See* WIS. STAT. § 108.04(5).

For purposes of this subsection, “misconduct” means one or more actions or conduct evincing such *willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer’s interests, or of an employee’s duties and obligations to his or her employer.*

Id. (emphasis added). Misconduct also includes seven additional, specific situations that are not applicable here. *See* § 108.04(5)(a)-(g).

On appeal, Perry first complains that he asked his supervisor to review surveillance video that would have exonerated him, but the supervisor refused to do so. Perry provides no record

citation for this assertion. We will not search the record for evidence to support a party's contentions. See *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. The Commission notes that Perry did not mention the video at all during his testimony to the appeal tribunal. We do not consider arguments raised for the first time on appeal. See *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). In any event, the Commission found the testimony of Perry's supervisor—that Perry admitted leaving the doors unsecured—to be credible, so we are bound by that determination.

Perry next states that his supervisor told the “hearing officer” that when he (the supervisor) was hired, he was told “to watch [Perry] because he was trouble.” There is no record citation to support this contention. Perry further complains that Packerland did not submit any relevant evidence of him “creating any trouble” prior to his supervisor's hiring and claims that “the hearing officer was not impartial in its decision regarding ‘misconduct.’” However, Perry fails to cite any legal authority for his argument that his trouble free period of employment should have been considered, and he develops no argument beyond his conclusory assertion to demonstrate that the hearing officer was in any way impartial. We do not consider undeveloped arguments. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Perry next notes that “no issue may be decided solely on hearsay evidence,” see WIS. ADMIN. CODE § DWD 140.16(1), and contends that the Commission's decision was based “entirely on hearsay[.]” However, Perry provides no record citations to the hearsay evidence he believes was relied upon. Moreover, while it is true that no issue can be decided *solely* based on hearsay, “[s]tatutory and common law rules of evidence and rules of procedure applicable to courts of record are not controlling with respect to hearings” and “[h]earsay evidence is

admissible if it has reasonable probative value[.]” *See id.* Here, the Commission’s decision was not based solely on hearsay evidence. Perry’s supervisor testified that the bank expected its doors to be locked at all times and that he had spoken directly with the cleaning crew to convey that expectation. The supervisor also testified that when he confronted Perry about the doors, Perry admitted leaving them unlocked before he smiled and walked away. The supervisor’s testimony about Perry’s statement is not hearsay, *see* WIS. STAT. § 908.01(4)(b)1., nor are the supervisor’s first-hand experiences and observations.

Finally, Perry cites to WIS. STAT. § 108.04(5)(e) and complains that “there was not a handbook sign[ed] by appellant that would have apprised appellant of any disciplinary actions that could or may have been taken against [employees] who violate work rules or policies.” However, § 108.04(5)(e) is not applicable here; that paragraph prescribes the circumstances under which employee absenteeism will constitute misconduct, and notes that statutory parameters can be altered if “otherwise specified by [the] employer in an employment manual of which the employee has acknowledged receipt with his or her signature[.]” *See id.* Perry was not terminated for absenteeism, and he cites no other legal authority under which a handbook was required before his termination for misconduct.

The Commission, in its response brief, details its factual findings and the evidence upon which it relied, as well as the basis for its ultimate legal conclusion that Perry’s actions constituted misconduct. The Commission’s findings are straightforward and adequately supported by the record. Perry has opted against filing a reply brief; accordingly, we deem him to have admitted the Commission’s arguments. *See Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals