COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1515

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

JUDITH ELLENZ,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

REGIS BEAUTY SALON,

DEFENDANT.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission (LIRC) appeals a circuit court order which reversed its determination that Judith Ellenz was ineligible for unemployment benefits and needed to repay those benefits which she had already received. The trial court's decision was based on its conclusion that LIRC had unreasonably determined that Ellenz had been discharged for disqualifying misconduct. We affirm on the alternate basis that LIRC improperly made a factual finding regarding the employee's intent without first discussing the employee's credibility with the administrative law judge (ALJ) who had decided in the employee's favor.

BACKGROUND

¶2 Ellenz applied for unemployment benefits after being fired by the Regis Beauty Salon where she had worked as a stylist for twelve years. The Unemployment Insurance Division of the Department of Workforce Development approved her claim after determining that the discharge had not been for misconduct. The salon appealed the division's determination to the department's appeals tribunal. The ALJ who heard the matter made the following factual findings:

> The employe reduced her hours to part time in August of 1998 after giving birth to a child. In late November, the employer assigned her to work additional hours on December 23 as part of its scheduling of workers for additional holiday season hours. The employe objected to the additional hours due to her length of service and childcare responsibilities. The manager informed her that it would be necessary for her to work the hours, find a substitute or look for another job. On December 21, the manager, who had begun a maternity leave, received word from the acting manager that the employe had not found a substitute, and had stated that she would not work the additional hours. On December 22, the manager instructed the acting manager to terminate the employe. Also on that day, the employe arranged with another worker to work for

> her from 9:00 to 10:00 p.m. on December 23, and noted the arrangement on the scheduled sheet. However, the employe did not have coverage for the additional scheduled hours of 7:00 to 9:00 p.m. that day because her substitute was already scheduled to work during those hours. Near the end of the employe's shift on December 22, the acting manager discharged her.
>
> The employer contended that the employe refused to work the additional hours as scheduled and that this was misconduct connected with her employment. This contention cannot be sustained. While the employe was not very vigorous in her attempt to meet the employer's expectation that she work the additional hours or find a substitute, she did make some attempt to find a substitute and partially succeeded. The employer terminated her before she in fact had refused to work the scheduled hours.

The ALJ proceeded to discuss the relevant law on misconduct, and concluded as follows:

> While the employee showed very poor and puzzling judgment in not exerting greater effort to either work the three extra hours or find a substitute worker, her actions in this single incident did not reflect such an intentional and substantial disregard of the employer's interests as to amount to misconduct connected with her work.

¶3 The Salon appealed the ALJ's decision to LIRC. LIRC did not discuss witness credibility or demeanor with the ALJ. After reviewing the written record, LIRC made a number of findings similar to those made by the ALJ. It also made some additional factual findings throughout its decision, including that "[t]he employe believed that she should be relieved of working on December 23rd because of her long-term employment and personal circumstances,"[1] and that she

[1] This finding does not automatically follow from the ALJ's finding that Ellenz "objected to the additional hours due to her length of service and childcare responsibilities." Such an objection could be phrased in the form of a request for consideration without a corresponding expectation of entitlement.

"waited until three or four days before December 23rd to make any attempts to find a substitute."[2] LIRC concluded:

> The employe received plenty of notice that she was scheduled to work. The employe received plenty of notice that if she did not work she had to find a replacement or she risked losing her job. The employe had ample time to ask everyone possible whether to work the shift for her. She waited until the last minute and found someone to only work the last hour for her. Given the amount of notice the employe had and the lack of effort she made to find a substitute, the commission finds that she was discharged for actions which constituted an intentional and substantial disregard for the employer's interests.

LIRC reversed the ALJ's determination that Ellenz was eligible for unemployment benefits and order Ellenz to repay $1,257 to the Unemployment Reserve Fund. Ellenz sought certiorari review in the circuit court, and the circuit court reversed LIRC's decision on the grounds that the employee's inability to work two hours, after twelve years of service to the employer, was not significant and did not constitute misconduct as a matter of law. LIRC appeals the circuit court's decision.

STANDARD OF REVIEW

¶4 We review the decision of LIRC rather than that of the circuit court. ***Secor v. LIRC***, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175. The determination whether specific action constitutes disqualifying "misconduct" sufficient to render an employee ineligible for unemployment benefits is a question of law. ***Bernhardt v. LIRC***, 207 Wis. 2d 292, 305, 558 N.W.2d 874 (Ct.

[2] This finding was based upon uncontradicted testimony in the record. However, neither the ALJ nor LIRC made any finding as to when Ellenz learned that neither of the two friends who she had asked to babysit would be unable to do so.

App. 1996). Because LIRC has been administering WIS. STAT. § 108.04(5) (1999-2000)[3] pursuant to § 108.09(6) for many years, and because the legal question of misconduct is intertwined with factual and policy determinations, we give great weight to the commission's legal interpretation. ***Charette v. LIRC***, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995).

¶5 One of the "intertwined" factual determinations which underlies a finding of misconduct is the employee's intent. *See generally* ***Holy Name Sch. v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982) (intent is a question of fact). We may not substitute our judgment for that of the agency as to the weight and credibility of the evidence on any finding of fact. ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). We can, however, set aside LIRC's decision on due process grounds if the commission failed to consult with the ALJ about witness credibility before making materially different findings of fact. ***Pieper Elec., Inc. v. LIRC***, 118 Wis. 2d 92, 97-98, 346 N.W.2d 464 (Ct. App. 1984).

ANALYSIS

¶6 In order to evaluate the significance of LIRC's factual findings, we begin with a brief overview of the applicable law. WISCONSIN STAT. § 108.04(5) limits the unemployment benefit eligibility of employees whose work is terminated "for misconduct connected with the employee's work." Although the statute does not define misconduct, it is well established in case law that:

> [Misconduct] is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> deliberate violations or disregard of standards of behavior which the employer has the right to expect of [the] 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 [the] employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies of ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W.2d 636 (1941).

¶7 A violation of a work rule may justify the discharge of an employee but not amount to misconduct for unemployment compensation purposes. ***Consolidated Constr. Co., Inc. v. Casey***, 71 Wis. 2d 811, 819-20, 238 N.W.2d 758 (1976). Rather, the misconduct provision "will be given the construction which is least favorable to working a forfeiture, so as to minimize the penal character of the provision by excluding rather than including conduct or cases not clearly intended to be within the provision." ***Boynton Cab Co.***, 237 Wis. at 259. The crucial question is the employee's intent or attitude which attended the act or omission alleged to be disqualifying misconduct. ***C.L. Cheese v. Afram Bros. Co.***, 21 Wis. 2d 8, 14, 123 N.W.2d 553 (1963).

¶8 Thus, excessive tardiness and absenteeism was found to be misconduct in ***Charette***, but a salaried employee's refusal to work overtime without pay at a specified time was not deemed misconduct in ***Cooper's, Inc. v. Industrial Comm'n***, 15 Wis. 2d 589, 113 N.W.2d 425 (1962). Similarly, the court remanded the issue of whether several employees who left a plant without permission due to heat were guilty of misconduct within the meaning of the

unemployment act in ***Wehr Steel Co. v. DILHR***, 106 Wis. 2d 111, 315 N.W.2d 357 (1982).

¶9 Here, the ALJ found that Ellenz had not "refused" to work the additional hours, because she was terminated before the scheduled shift had actually occurred and because she had made a partially successful attempt to find a substitute. The ALJ, who was able to observe Ellenz's testimony in person, attributed Ellenz's failure to exert a greater effort to cover the shift to poor judgment, rather than an intentional and substantial disregard of her employer's interests. These findings, coupled with the ALJ's legal conclusion that Ellenz's failure to cover her assigned shift should not be deemed misconduct, imply that the ALJ found Ellenz to have committed a good-faith error in judgment, rather than to have willfully or intentionally disregarded her employer's interests.

¶10 In contrast, LIRC attributed Ellenz's failure to make a greater effort to find a substitute to a belief on Ellenz's part that she should be relieved of working the extra hours. Its legal conclusion that Ellenz's failure to cover the shift constituted misconduct implies a finding that Ellenz acted intentionally, that is, with a wrongful intent.

¶11 WISCONSIN STAT. § 227.46(2) requires LIRC to provide a written explanation of each variance from the decision of the hearing examiner. In addition, where the credibility of a witness is at issue:

> [I]t is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing. Thus, whenever LIRC overrules an ALJ's credibility determination, LIRC must hold a credibility conference in order to obtain the ALJ's impressions concerning the witnesses' demeanor and credibility.

Hermax Carpet Marts v. LIRC, 220 Wis. 2d 611, 617, 583 N.W.2d 662 (Ct. App. 1998) (internal citations omitted).

¶12 LIRC indicated that it did not disagree with any credibility determination made by the ALJ. We are persuaded, however, that the determination of the employee's intent in this case necessarily involved an assessment of Ellenz's credibility and demeanor. This is particularly so given the employee's testimony that she did not have a problem with the posted holiday schedule until she learned that her normal babysitter was not going to be available later in the evening. Also, LIRC specifically rejected Ellenz's testimony that she believed her employer only needed her to find someone to cover only the last hour before closing because there were a number of other stylists scheduled until 9 p.m. The ALJ, however, made no determination as to the sincerity of Ellenz's belief in this regard.

¶13 Because the determination of misconduct in this case is in large measure dependent upon the employee's intent, and because LIRC made factual findings relevant to the intent with which Ellenz acted that were contrary to findings of the ALJ, we conclude LIRC erred procedurally by failing to confer with the ALJ regarding Ellenz's credibility. We therefore do not reach the question of whether LIRC's determination that Ellenz had engaged in misconduct was reasonable. We affirm the order of the circuit court setting aside LIRC's decision, and remand with directions that LIRC confer with the ALJ regarding Ellenz's demeanor and credibility before determining whether her actions were undertaken with an intentional disregard for the employer's interests, or whether she committed a good-faith error in judgment.

By the Court.—Order affirmed and cause remanded with directions.

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