STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

PETER O. ANDERSON,

Plaintiff,

vs. MEMORANDUM DECISION AND ORDER
Case No. 92 CV 2865

LABOR AND INDUSTRY REVIEW COMMISSION , and ACTION FLOOR SYSTEMS, INC.,

Defendant.

Plaintiff, Peter O. Anderson (Anderson), seeks judicial review under sec. 102.23 and 108.09(7), Stats., of a June 17, 1992 determination by the Labor and Industry Review Commission (LIRC) that Anderson is not eligible for unemployment compensation benefits because he was discharged from his employment with Action Floor Systems, Inc. (Action Floor) for misconduct within the meaning of sec. 108.04(5), Stats.[1] Anderson takes the position that "LIRC erred by finding that the discharge was justified on a basis that the employer did not even contend was the reason for termination" (Plaintiff's Brief, p. 1). For the reasons set out below, I reverse and remand the decision of LIRC.

BACKGROUND

The facts underlying this dispute are largely undisputed and

[1]Section 108.04(5), Stats., provides in relevant part: "An employe whose work is terminated by an employing unit for misconduct with the employe's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs equal to at least 14 times the employe's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment compensation law of any state or the federal government.

can be briefly summarized. Anderson was employed by Action Floor, a strip flooring manufacturer, for approximately 17 and 1/2 half months. He was discharged on October 18, 1991. On a daily basis in the weeks preceding his discharge, Anderson made faces at a co-worker, Karen Gosch, and made growling and squawking noises at her. She asked him several times to stop this behavior. About a week prior to the discharge, Anderson instructed Gosch to perform some type of work. Gosch replied that she could not do as Anderson instructed, as she had to work on a special project. Anderson then argued about what work Gosch should perform and ultimately shoved a metal cart toward her. The cart did not hit Gosch. Gosch complained to a supervisor, but no action was taken at that time.

Part of Anderson's duties at Action Floor included delivering skids to a location near Gosch's work station. Although another route was available to Anderson, the shortest route to perform this duty was through Gosch's work area. In order to go through her work area, Anderson would push Gosch's metal cart of materials to the side approximately two feet. He did this on a frequent basis. Gosch complained that this action disrupted her flow of production because she had to walk back and forth a few steps each time she stacked wood on the cart. Gosch repeatedly told Anderson not to go through her work area.

On October 18, 1991, Anderson proceeded to go through Gosch's work area again and push the cart aside. Gosch replaced the cart back to its original position. After Anderson delivered

the skids, he again proceeded through his co-worker's work area. She told him not to move the cart. LIRC found that, at this point, Anderson pushed the cart at Gosch and pinned her with the cart. She was not injured. Anderson then went through the work area and returned to his department. Later that day, Anderson was discharged for violating a provision of company policy which states that workers who "threaten or otherwise harass co-workers" are subject to immediate discharge. Anderson received a copy of the policy when he was hired.

Anderson filed for unemployment benefits on October 21, 1991. A deputy for the unemployment compensation division of the Department of Industry, Labor and Human Relations determined, on November 6, 1991, that Anderson was not eligible for unemployment compensation benefits because he was discharged for misconduct within the meaning of sec. 108.04(5), Stats. The deputy stated, "The employee was discharged for misconduct connected with his employment. He was discharged for harassment of co-workers. His actions showed a substantial disregard of the employer's interest."

Anderson appealed this determination on November 12, 1991 and a hearing was held before Administrative Law Judge Le Ann R. Prock (ALJ) on January 27, 1992. The sole issue before the ALJ was whether Anderson was discharged for misconduct within the meaning of sec. 108.04(5), Stats. In a decision issued on January 31, 1992, the ALJ concluded that Anderson was not discharged for misconduct and was therefore eligible for

unemployment compensation benefits. The ALJ stated that although Anderson's behavior was obnoxious and annoying to the co-worker, "he received no warnings from the employer regarding it. It has not been shown that his actions evinced a willful and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect. Therefore, his discharge was not for misconduct."

Action Floor then sought review of the ALJ's decision by the Labor and Industry Review Commission. On June 17, 1992, LIRC issued its decision reversing the decision of the ALJ. LIRC first addressed the issue of warnings, stating:

> "The Administrative Law Judge found no misconduct on the theory that the employe received no warnings regarding his harassment of the co-worker. The Administrative Law Judge reasoned that in interpreting the meaning of the term 'misconduct,' the Labor and Industry Review Commission has consistently held that, except for the most serious of offenses, the employer has an obligation to warn a worker that his performance is unsatisfactory and give him an opportunity to improve before a finding of misconduct will be made. See Marcolini v. Alama Public Schools, LIRC May, 1979." Decision, p.3.

LIRC then noted that while warnings are an important element of any employment relationship, "they are not essential to a finding of misconduct when the action is a serious single incident rising to the level of misconduct." Id (emphasis added). Citing our Supreme Court's decision in McGraw-Edison Company v. ILHR Dept., 64 Wis. 2d 703 (1974), LIRC stated:

> "By analogy, the Commission concludes that the employe's shoving of the co-worker's cart was a deliberate action, constituting potentially serious conduct rising to the level of misconduct. Although

> the co-worker was not injured, she could have been pinned between the two carts and severely injured. The employe's decision to travel through the co-worker's work area and push her cart aside not only slowed the co-worker's performance down but potentially placed her and her work area at risk. The employe consciously and intentionally shoved the co-worker's cart aside and later shoved the cart at her. As a matter of law his action constitutes misconduct." Id, p. 4.

This action followed.

STANDARD OF REVIEW

The sole issue for judicial review is whether Anderson was discharged for "misconduct" within the meaning of sec. 108.04(5), Stats. This presents a question of law. Although the blackletter rule is that a court is not bound by an agency's decision on a question of law, a court will give varying degrees of deference to the agency when the decision involves the application of a law which the legislature charges the agency with administering; where the agency's application is consistent with long-standing practice; where the application requires the use of the agency's expertise, technical competence and specialized knowledge; and when the agency's application furthers the provision of uniformity and consistency in the field. Lisney v. LIRC, 171 Wis. 2d 499, 505 (1992). When such circumstances are all present, great weight should be given to the agency's decision and it should be reversed only where it directly contravenes the statute or is otherwise unreasonable or without rational basis. Id at 506. If such circumstances are not present, the agency's decision is entitled only to due weight or to no weight. Sauk County v. WERC, 165 Wis. 2d 406, 413-14

(1991).

In the present case, LIRC's conclusion that Anderson was discharged for misconduct is entitled to great weight. LIRC is the agency which is statutorily entrusted with administration of the unemployment compensation law. The misconduct disqualifier has been part of Wisconsin's unemployment compensation law since its inception in 1933. See, sec. 108.04(5), 1933 Wis. Stats. LIRC has been resolving disputes over whether certain employee conduct constitutes misconduct using the same definition of "misconduct" established by our Supreme Court in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259 (1941). LIRC is thus unquestionably more qualified and experienced than this court in determining what behavior and conduct constitutes "misconduct" under sec. 108.04(5), Stats. However, the defense owed here is to LIRC's legal conclusion of misconduct drawn from its application of the statute to the facts. LIRC's factual findings must be supported by substantial evidence in the record. Sec. 102.23(b), Stats.

MISCONDUCT

The term "misconduct" is not defined in ch. 108, Stats. However, our Supreme Court articulated a definition of that term as it is used in the unemployment compensation setting in Boynton Cab Co., supra, 237 Wis. at 259. There the Court stated:

> The intended meaning of the term "misconduct" ... is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of

> his 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 interest or of the employee's duties and obligations to his employer.

In the present case, LIRC applied the Boynton Cab Co. definition of misconduct and determined that the single incident of Anderson's shoving of the cart and pinning his co-worker was sufficiently serious to constitute misconduct. As support for this conclusion, LIRC cited McGraw-Edison Company, supra.

In McGraw-Edison Co., the unemployment compensation claimant was employed as a punch press operator for a manufacturer of metal laundry drying machine tops. The tops weighed approximately 10 pounds and measured 28 x 30 inches with two inch flange edges on all four sides. While working at his station, the claimant's finger was pinched between the tops of a laundry dryer in a punch press during a dispute between himself and a co-worker. The claimant reacted by throwing or pushing a dryer top toward the co-worker's press which caused the top or another top to strike the co-worker, severely cutting his arm. The claimant was then suspended.

When the claimant applied for unemployment compensation benefits, the employer contended that the claimant was ineligible on the grounds that he was discharged for misconduct within the meaning of sec. 108.04(5), Stats. The Supreme Court agreed with the employer and concluded that although the conduct was a single, isolated incident, it still amounted to misconduct.

Although it was not established that the claimant had any intention of injuring his co-worker, or that he could have foreseen that his action might result in injury to someone, nevertheless the claimant "pushed around the 10 pound, 14 ounce dryer top with sharp edges with sufficient force to cause a serious injury to [his co-worker]." McGraw-Edison Co., supra at 713. This conduct, the Court concluded, fit "within the Boynton Cab Co. case's definition that '. . . carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design...' is misconduct under sec. 108.04(5), Stats." Id.

It appears that in attempting to apply the reasoning of McGraw-Edison Co. to the present case, LIRC made several findings concerning the danger that Anderson's conduct posed to the safety of his co-worker which are not supported by substantial evidence in the record. First, LIRC found that the act of shoving his co-worker's cart constituted "potentially serious conduct." Second LIRC found that "although the co-worker was not injured, she could have been pinned between the two carts and severely injured." Third, LIRC found that Anderson's conduct "potentially placed her and her work area at risk." Finally, LIRC found that Anderson "intentionally disregarded the safety ... of the co-worker."

There is not substantial evidence in the record to support these findings even when all reasonable inferences are drawn from the evidence that is in the record. Unlike in McGraw-Edison,

where there was evidence that the dryer top weighed over ten pounds and had sharp edges, in the present case there is no evidence regarding how much the metal cart weighed or what its dimensions were. Unlike in McGraw-Edison, where there was undisputed evidence that the co-worker was seriously injured, here it is undisputed that Gosch was not injured. Thus the serious potential for injury of Anderson's act of shoving the cart cannot be inferred from the serious nature of the result. There is also no evidence in the record of any feature of the cart which would present a danger to another worker or how hard Anderson shoved it so that the risk of injury from his act could be assessed.

In addition, there is not substantial evidence in the record that the co-worker was "pinned" by the cart as that term is customarily defined. The verb "to pin" is defined in The American Heritage Dictionary, 2d Edition, as "To hold fast; immobilize; He was pinned under the wreckage." (emphasis in original). Gosch did not testify that she was pinned by the cart in the sense that she was physically immobilized by the cart or held by the cart. Rather, she testified as follows:

> A The final straw was he took the cart, he was going to move it and I got in between Mary Ellen's cart and her wood. The wood sticks out on the ends of the carts so I was in between the wood sticking out, cause the wood from each cart that was overlapping and I was in between those.
>
> Q Were you hurt at all?
>
> A No. Because I put my hands out to stop the cart. (T-27.)

The only reference in the record to the term "pinned" is in the investigative report prepared by Action Floor's plant manager, Karl Anderson.[2] On the first page of his investigative report, Karl Anderson stated:

> Karen also claims that on the day that she reported this to me Pete actually pushed a cart toward her, hitting her and pinning her between the cart and the nesting table. He did this when Karen refused to move so he could pass through her work area.

A good argument could be made that nothing in Karl Anderson's investigative report should have become the basis for a finding of fact in both the ALJ's and LIRC's decisions.[3] At the hearing before the ALJ, Anderson objected to the admission of the investigative report prepared by the plant manager on the grounds that it was hearsay. (R-9) While administrative proceedings are not bound by the same strict rules of evidence as governs trials, hearsay evidence should not be received at an administrative hearing over objection where direct testimony as to the same facts is available. State v. McFarren, 62 Wis. 2d 992 (1973). Aside from the reference in the investigative report to Anderson's co-worker being "pinned" by the cart, there is not substantial evidence to support this finding because Gosch, the one who was supposedly pinned, herself did not describe that

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[2]The record discloses that Action Floor's plant manager, Karl Anderson, is no relation to the claimant, Peter Anderson.

[3]In her decision, the ALJ found that, "Despite this, he pushed her cart at her and pinned her with the cart." (ALJ Decision at 1). In its decision, LIRC found that, "Despite this, the employe pushed the co-worker's cart at her and pinned her between her cart and someone else's cart." (LIRC Decision at 2-3).

Anderson's act had caused anything which could properly be viewed as being pinned by the cart Anderson shoved.

In sum, LIRC's conclusion that Anderson was discharged for misconduct within the meaning of sec. 108.04(5), Stats., depends on facts and inferences not supported by substantial evidence in the record. Accordingly, the decision of LIRC cannot stand.

In so concluding, I do not mean to imply that the act of Anderson in pushing the cart in question at Gosch could not form the basis for the conclusion that it was a single isolated incident of such a degree of seriousness as to constitute misconduct[4] That no injury resulted is not determinative if there is substantial risk of physical injury and the conduct was not simply unintentional carelessness. Here there is more than ample evidence to show that Anderson acted intentionally and at a time when he was angry at Gosch. What is missing is the evidence to show that the means he chose to act out his anger was one of sufficient danger to Gosch.

At the hearing before the ALJ, Action Floor was not represented by counsel, but instead appeared by its plant manager. Almost all of the development of the record was done by the ALJ's examination of the witnesses. Apart from confirming

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[4]Anderson contends that he was not discharged for threats but only for harassment, relying on the plant manager's testimony at pages 12-13 of the Transcript. The plant manager also testified, at p. 10, the incidents in the report (Ex #4) were the only reasons for the discharge. This report includes mention of the cart shoving incident. Such an incident can surely fall within the meaning of "harassment". Accordingly there was no violation of due process in LIRC's reliance upon this incident nor would there be if, upon remand, LIRC found the incident to present a sufficiently serious risk of harm to a co-worker.

that Gosch had not been injured by Anderson's actions, the ALJ did little to pursue the gravity of this incident. This may be explained by the ALJ's lockstep adherence to the need for a warning in misconduct cases and her corresponding lack of serious consideration of the single incident type of misconduct recognized in McGraw-Edison. Because the record here is inadequate to determine whether the cart shoving incident was of a sufficiently serious nature to constitute misconduct and because Action Floor was unrepresented at the hearing and because the ALJ directed the scope of the hearing away form the details of this incident, this is an appropriate case to remand the matter for further hearing under sec. 102.24(1), Stats. See Icke Construction Co. v. Industrial Comm., 30 Wis. 2d 63, 69 (1966).

The matter should also be remanded to permit LIRC to decide whether the undisputed fact that Anderson was given a copy of the company policy which advised him that harassment of or threats to co-workers could subject an employee to immediate discharge was a sufficient warning under the circumstances here. While LIRC made reference to this fact, it was not compelled to assess its significance given its disposition under the McGraw-Edison rationale. Since the matter is being remanded in any event, LIRC should be given the opportunity to consider this issue.

For all of the foregoing reasons,

IT IS ORDERED that the June 17, 1992 Decision of LIRC is

reversed and this matter is remanded to LIRC for further proceedings not inconsistent with this decision.

Dated this 20th day of May, 1993.

Dated: May 21, 1993

By the Court:

Michael N. Nowakowski
Circuit Judge

cc: Atty. Mark E. Larson
Atty. John M. Cirilli
Atty. Earl G. Buehler