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STATE OF WISCONSIN CIRCUIT COURT BRANCH 39 MILWAUKEE COUNTY

RINATA BYRD,

Plaintiff,

vs. Case No: 2011CV13321

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant,

and

LAKESIDE BUSES OF WISCONSIN INC.,

Defendant.

DECISION AND FINAL ORDER

INTRODUCTION

Plaintiff Rinata Byrd ("Plaintiff") appeals to this court the Labor and Industry Review Commission's ("LIRC") decision ("Decision") issued on July 21, 2011, affirming, with slight modifications, Administrative Law Judge ("ALJ") Michele A. Peters', March 18, 2011, decision finding that Plaintiff quit her job with her employer, Lakeside Buses of Wisconsin, Inc., ("Lakeside") on November 27, 2009[1], and that Plaintiff's quitting was not for any reason constituting an exception to benefit suspension under the statutes. On August 18, 2011, Plaintiff timely filed an appeal of LIRC's Decision with this Court. For the reasons set forth below, this Court affirms LIRC's Decision.

[1] ALJ Peters' findings inconsistently refer to the years 2009 and 2010. As to the finding that Ms. Byrd quit her job on November 27, 2009, ALJ Peters actually stated that Plaintiff quit on November 27, 20010. (R. 00020.) It is clear from the Record, however, that the dates at issue actually occurred in 2009 and that ALJ Peters' references to November 2010 are merely typographical errors.

CASE BACKGROUND

On February 15, 2011[2], the Department of Workforce Development ("DWD") issued a Determination which found that Plaintiff was discharged from her employment with Defendant Lakeside for misconduct connected with her employment and that although the discharge was for attendance issues, disqualification under s. 108.04(5G) for failure to notify the employer of absenteeism did not apply. (R. 00042). That Determination also found that no benefits were payable from 11/29/09 through 12/18/10 and that Plaintiff had received an overpayment of $2,112.00. (R. 00042.) Although the date upon which Plaintiff appealed the Determination is not clear from the Record, DWD mailed a Hearing Notice to Plaintiff on March 7, 2011, stating that the Hearing would be held on March 14, 2011. (R. 00024-26.)

Administrative Law Judge Michele A. Peters thereafter held a hearing on March 14, 2011. Ms. Byrd appeared in person, and the employer, Lakeside, did not appear. (R. 00018.) The issues before ALJ Peters were: (1) whether the Plaintiff, pursuant to Wis. Stat. § 108.22(8)(A) and (C), was overpaid unemployment benefits which must be repaid, or whether repayment would be waived; and (2) whether the circumstances surrounding Plaintiff's separation from Lakeside disqualified Plaintiff from receiving unemployment benefits, and was she able to and available to work.[3] (R. 00024-26.) On March 18, 2011, ALJ Peters issued a decision holding that Plaintiff quit her job as of November 27, 2009, that Plaintiff was ineligible for benefits, and that Plaintiff was required to repay the overpayment sum of $2,112.00 because

[2] The Determination found at R.00042-43 contains two dates at the end of the document: February 1, 2011, and February 15, 2011. It is not clear from the Record if either of these dates actually reflects the date of the Determination and/or if either of these dates indicates the date that DWD mailed the Determination to Ms. Byrd. The Court has chosen to consider the latest date shown as the relevant date. In any event, there has been no argument that any of Ms. Byrd's appeals were untimely, and therefore the precise date of the Determination is not as relevant as it might otherwise by. DWD and LIRC are advised that such information, however, should be more easily discernible from the Record in future cases.

[3] The issues presented in the Hearing Notice cite to Wis. Stat. §§ 108.04(1)(B), (2), (5), (5G), (7) and (7M), as well as Wis. Admin. Code DWD 128, 132, and 133.

Plaintiff voluntarily terminated her employment within the meaning of Wis. Stat. § 108.04(7) and that Plaintiff's quitting was not for a reason constituting an exception to benefit suspension under the statutes. (R. 00023.)

Plaintiff thereafter filed a timely appeal of ALJ Peters' decision with LIRC on April 8, 2011, which LIRC confirmed via letter dated April 20, 2011. (R. 00015.) Upon review of ALJ Peters' decision and the Record presented to it, LIRC issued its Decision affirming the ALJ's decision, with slight modifications. LIRC's primary modification removed the following paragraph from the ALJ's Findings and Conclusions:

> The employee has received benefits totaling $2,112, to which she is not entitled, given the findings and conclusions above. Those benefits were paid because the initial determination was made without full information as to the underlying issue or was made based on a differing interpretation of the available information. The overpayment was not caused by any departmental error and repayment of the benefits cannot be waived.

(R. 00002, 00023.) LIRC replaced that paragraph with the following:

> The employee has received benefits totaling $2,112, to which she is not entitled, given the findings and conclusions above. Department records reflect that the overpayment occurred because the employee failed to report to the department that she quit her employment. The appeal tribunal therefore finds that waiver of benefit recovery is not required under Wis. Stat. § 108.22(8)(c), because the overpayment resulted from the fault of the employee as provided in Wis. Stat. § 108.04(13)(f), and the overpayment also was not the result of departmental error. See Wis. Stat. § 108.22(8)(c)2.

(R. 00002.) Additionally, although the ALJ found that "the employee is not able and available for work in the general labor market[,]" (R. 00022), LIRC deleted that sentence from its decision. (R. 00002.) The Plaintiff initiated circuit court review on August 18, 2011.

STANDARD OF REVIEW

This court reviews the LIRC's decision pursuant to Wis. Stat. § 102.23(1)(e). Accordingly, a LIRC decision may only be reversed upon the following grounds: (1) the

Commission acted without or in excess of its power; (2) the Commission's order was procured by fraud; or (3) the Commission's findings of fact do not support the order or award. Wis. Stat. § 102.23(1)(e). Wis. Stat. § 108.09(7)(b) limits the scope of judicial review to questions of law. *Wehr Steel Co. v. Dep't of Indus., Labor and Human Relations*, 106 Wis. 2d 111, 116, 315 N.W.2d 357 (1982).

The Commission's findings of fact are conclusive if they are supported by credible and substantial evidence. *Nottelson v. DILHR*, 94 Wis. 2d 106, 114, 287 N.W.2d 763, 767 (1980). Credible and substantial evidence is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion. *Princess House, Inc. v. Dep't of Indus., Labor and Human Relations*, 111 Wis. 2d 46, 54, 330 N.W.2d 169, 173 (1983). A reviewing court need only find that the evidence is sufficient to exclude speculation or conjecture. *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983).

The construction of a statute and the question of whether facts satisfy a statutory standard are questions of law. *Nottelson*, 94 Wis. 2d at 115-116, 287 N.W.2d at 768. A court is not bound by the Commission's determination on such questions, but rather accords the agency's interpretation differing degrees of deference based on a variety of factors. *State v. LIRC*, 113 Wis. 2d 107, 109, 334 N.W.2d 279, 280 (Ct. App. 1983). The court determines the appropriate level of deference by comparing the institutional qualifications and capabilities of the court and the agency by considering, for example, whether the legislature has charged the agency with administration of the statute, whether the agency has expertise, whether the agency interpretation is one of long standing, and whether the agency interpretation will provide uniformity and consistency." *Racine Harley-Davidson, Inc. v. State Div. of Hearings and Appeals*, 2006 WI 86, ¶14, 292 Wis. 2d 549, 563, 717 N.W.2d 184, 190-191.

A court must give "great weight" deference to the agency where: (1) it is charged with administration of the statute being interpreted; (2) its interpretation "is one of long standing"; (3) it employed "its expertise or specialized knowledge" in arriving at its interpretation; and (4) its interpretation "will provide uniformity and consistency in the application of the statute." *Clean Wisconsin, Inc. v. Public Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶ 39, 282 Wis.2d 250, 700 N.W.2d 768. A court must also accord great weight deference to any agency's decision if it is intertwined with value and policy decisions. *See id.* at ¶ 41. "In other words, when a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference." *Brown v. Labor & Indus. Review Comm'n*, 2003 WI 142, ¶ 16, 267 Wis. 2d 31, 671 N.W.2d 279.

Because the four factors regarding great weight deference enumerated above are present, this Court applies the great weight deference standard to LIRC's interpretation and application of the statutory exceptions to ineligibility for unemployment benefits found in Wis. Stat. §§ 108.04(7)(b) and (c).

ANALYSIS

At the hearing before the ALJ, ALJ Peters determined that "the issue for today's hearing because the initial determination found that there was a discharge, whether this separation of employment was a quit or a discharge." (Tr. 5:24-25, 6:1-2).[4] ALJ Peters also identified a secondary issue: "[i]f it's a quit, the secondary issue is whether the quitting was for one of the statutory reasons that allows immediate payment of benefits. Alternatively, if it's a discharge, is it a discharge for misconduct connected with employment." (Tr. 6:2-6.) Upon review, LIRC adopted ALJ Peters' conclusion that the separation from employment was a quit. (R. 00002, 00021.) Accordingly, the issue before the Court is whether there is evidence in the Record that

[4] "Tr." designates a citation to the Transcript of the hearing before ALJ Peters on March 14, 2011.

supports LIRC's determination that Plaintiff voluntarily quit her employment with Lakeside within the meaning of section 108.04(7) and, if so, whether Plaintiff's reason for quitting was for a reason constituting an exception to benefit suspension under the statutes. See Wis. Stat. § 108.04(7). Because the Plaintiff did not challenge the amount of the overpayment in her appeal before either LIRC or this Court, the Court will not address whether that amount is correct. *See Pickering v. Labor & Indus. Review Comm'n*, 156 Wis. 2d 361, 370, 456 N.W.2d 874 (Ct. App. 1990) (citation omitted).

I. The Record Supports LIRC's Determination that Plaintiff Voluntarily Quit Her Employment with Lakeside Within the Meaning of Wis. Stat. § 108.04(7).

"[O]ne of the ultimate objectives of the Unemployment Compensation Act is, . . ., to 'cushion the cruel blow of unemployment resulting through no fault of the employee.' However, the public policy declarations of the act may not be used to supersede, alter or modify its specific provisions." *Salerno v. John Oster Mfg. Co.*, 37 Wis. 2d 433, 441, 155 N.W.2d 66 (1967). "The right of an unemployed person to receive unemployment compensation benefits is wholly dependent on the fulfillment of the statutory prerequisite embodied in chapter 108 of the statutes." *Id.* at 437, 155 N.W.2d at 68. Plaintiff argues that LIRC incorrectly concluded that she was ineligible to receive unemployment benefits because none of the statutory exceptions of Wis. Stat. § 108.04(7) applied to Plaintiff's voluntary termination.

Wisconsin Statute Section 108.04(7), captioned "voluntary termination of work," provides, in relevant part that:

> (a) If an employee terminates work with an employing unit, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages ager the week in which the termination occurs equal to at least 4 times the employee's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be

that rate which would have been paid had the termination not occurred. This paragraph does not preclude an employee from establishing a benefit year by using the base period wages paid by the employer from which the employee voluntarily terminated, if the employee is qualified to establish a benefit year under s. 108.06(2)(a).

(b) Paragraph (a) does not apply if the department determines that the employee terminated his or her work with good cause attributable to the employing unit. In this paragraph, "good cause" includes, but is not limited to, a request, suggestions or directive by the employing unit that the employee violate federal or Wisconsin law, or sexual harassment, as defined in s. 111.32(13), by an employing unit or employing unit's agent or a co-worker, of which the employer knew or should have known but failed to take timely and appropriate corrective action.

(c) Paragraph (a) does not apply if the department determines that the employee terminated his or her work but had not reasonable alternative because the employee was unable to do his or her work, or that the employee terminated his or her work because of the verified illness or disability of a member of his or her immediate family and the verified illness or disability reasonably necessitates the care of the family member for a period of time that is longer than the employer is willing to grant leave; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while such inability or unavailability continues.

Wis. Stat. §§ 108.04(7)(a), (b), and (c). Upon reviewing the Record and Plaintiff's testimony, LIRC concluded that the Plaintiff had voluntarily terminated her employment with Lakeside. (R. 00002, 00021.)

An employee can voluntarily terminate employment by knowingly refusing to take action that would have allowed his or her employment to continue. *Shudarek v. LIRC*, 114 Wis. 2d 181, 187-88, 336 N.W.2d 705-06 (Ct. App. 1983). The statutory concept of "voluntary termination" is not limited to the words "I quit." Rather, "[t]he test to determine whether a discharge constitutes 'voluntary termination is"

> ""'When an employee shows that he [or she] intends to leave his [or her] employment indicates such intention by word **or manner of action, or by conduct**, inconsistent with the continuation of the employee-employer relationship, it must be held, . . . that the employee intended and did leave his [or her] employment voluntarily . . . .'""

Id. at 187, 336 N.W.2d at 705 (citation omitted) (brackets and omissions in original) (emphasis added).

In this case, LIRC reviewed and adopted the ALJ's findings that Plaintiff last worked for Lakeside on November 20, 2009, that she was instructed to provide a medical excuse for her absences, that she failed to provide a medical excuse excusing her from work after November 25, 2009, and that as a result of her actions, namely not returning to work as required absent a medical excuse from her physician, that Plaintiff quit her employment as of November 27, 2009. (R. 0002, 00021.) The evidence, as discussed below, supports these findings.

First, at the hearing, the ALJ asked Plaintiff "[s]o is November 20, 2009 the correct date that your [sic] last day worked, as best as you can recall?" and Plaintiff responded "[a]s best as I can recall, yes." (Tr. 9:13-15.) Second, in addition to Plaintiff's testimony as to her last day of work for Lakeside, there is also evidence in the record that supports LIRC's conclusion that Plaintiff quit her job as of November 27, 2009. The Court recognizes that Ms. Byrd believes that she was on medical leave as of November 27, 2009, and that it was not until late December 2009 that she affirmatively deiced that she would not return to Lakeside. There is, however, no evidence in the Record that supports Ms. Byrd's contention that her physician determined that she could not return to work as of November 27, 2009, and there is similarly no evidence in the Record that establishes that Ms. Byrd's employer approved her medical leave. To the contrary, the only relevant physician's note in the Record as to November 27, 2009, states that Ms. Byrd was under her physician's care from 11/23/2009 through 11/25/2009 and that "pt. is to return to work on 11/26/09." (Tr. Ex. 1-1.) Accordingly, this evidence supports LIRC's findings.

Furthermore, despite being told that she would be terminated if she did not provide her employer with a medical excuse, Ms. Byrd testified at the hearing before the ALJ that she never

obtained a medical excuse. (Tr. 27:2-20, 28:9-25, 29:1-4.) Although Plaintiff continues to argue that she could still obtain the medical excuse from her physician, it was incumbent upon Plaintiff to take the documentation necessary to support her position to the hearing before the ALJ. At that hearing, Plaintiff testified that she had read the hearing notice and that she understood the statement that the hearing would be her only opportunity to present documents and testimony as to her case and that any further review of her case would be based on the record created at the hearing before the ALJ. (Tr. 12:17-25, 13:1.) Based on the Record, it is clear to the Court that the evidence supports LIRC's findings.

Pursuant to the relevant standard of review, LIRC's factual findings "are conclusive if they are supported by credible and substantial evidence." *Nottelson v. DILHR*, 94 Wis. 2d 106, 114, 287 N.W.2d 763, 767 (1980). In this case, there is credible and substantial evidence in the Record that supports LIRC's finding that Plaintiff, based on her actions, voluntarily quit her employment with Lakeside as of November 27, 2009. Therefore, the Court must next determine whether LIRC correctly considered and determined that none of the statutory exceptions to benefit suspension applied.

II. LIRC Correctly Considered and Applied the Exceptions to Benefit Suspension Under Wis. Stat. § 108.04(7); Therefore, the Record Supports LIRC's Determination that No Exception Applied.

Under certain circumstances, an employee's voluntary termination will not suspend the employee's eligibility for unemployment benefits. See Wis. Stat. § 108.04(7). In this case, LIRC considered and applied Wis. Stat. §§ 108.04(7)(b) and (c) and concluded that because neither exception applied, Plaintiff was not eligible for benefits. (R. 00002, 00021-22.) As noted above, this Court affords LIRC's statutory construction great weight deference.

A. Wis. Stat. § 108.04(7)(b)

In its review of ALJ Peters' decision, LIRC considered the statutory language of Wis. Stat. § 108.04(7)(b) to determine with the "good cause" exception to voluntary employment applied. That statutory language provides that:

> Paragraph (a) does not apply if the department determines that the employee terminated his or her work with good cause attributable to the employing unit. In this paragraph, "good cause" includes, but is not limited to, a request, suggestion or directive by the employing unit that the employee violate federal or Wisconsin law, or sexual harassment, as defined in s. 111.32(13), by an employing unit or employing unit's agent or a co– worker, of which the employer knew or should have known but failed to take timely and appropriate corrective action.

Wis. Stat. § 108.04(7)(b). ALJ Peters, and subsequently LIRC, also considered the Plaintiff's testimony and the exhibits entered in the Record.

"Good cause" is not defined within Wis. Stat. Ch. 108, despite its frequent appearance. See Wis. Stat. §§ 108.04(2)(e); 108.04(7)(b); 108.04(8); 108.09(4)(d); 108.09(4)(e). However, the courts have "construed the phrase 'terminated his [or her] employment with good cause attributable to the employment unit' in § 108.04(7)(b), Stats.'" *Shudarek v. Labor & Indus. Review Comm'n*, 114 Wis. 2d at 187-88, 336 N.W.2d at 705. "'"Good cause attributable to the employing unit" means some act or omission by the employer justifying the employee's quitting; it involves 'some fault' on the part of the employer and must be 'real and substantial.'"'" *Id.* Additionally, the employee must establish that he or she explored alternatives short of quitting prior to actually quitting and that he or she gave the employer to address and resolve the employee's concerns. *See, e.g., Collier v. Rubbermaid & Sign Co.*, UI Dec. Hearing No. 99604071RC (LIRC October 14, 1999).

The applicability of this statutory subsection primarily concerns Plaintiff's arguments that she quit because she was harassed during the course of her employment at Lakeside. In regard to the applicability of Wis. Stat. § 108.04(7)(b), LIRC concluded that there was no act or omission

by the employer that reasonably justified Plaintiff quitting her job. (R. 00002, 00022.) Although LIRC found that the Plaintiff "was concerned about things happening to her bus (e.g. white milky substance on the windshield, a wrench left on the bus hood, the latch to the bus hood was left undone)[,]" LIRC further concluded that "[t]he employee had no evidence that the employer was responsible for these acts." (R. 00002, 00022.) In addition, LIRC found that Plaintiff did not have credible evidence that she was threatened by her employer, that Plaintiff failed to explore alternatives prior to quitting, and that she did not advise her employer about her concerns until after she had quit. (R. 00002, 00022.)

Pursuant to the applicable standard of review, this Court looks to whether there is evidence in the Record that supports LIRC's finding, and so long as evidence supports LIRC's findings, the Court must abide by that finding even if it would have found otherwise. Here, the evidence in the Record supports LIRC's conclusion.

First, the Plaintiff testified that the alleged harassment, described above, began in October 2009 after she had sent the first of two letters to Lakesides' Vice President. (Tr. 20:16-25, 21:1-11, 21, 22:1-25, 23: 1-10.) The Plaintiff, however, failed to provide a copy of that letter to the ALJ at the March 14, 2011, hearing, and accordingly, it is not a part of this Record. Based on Plaintiff's testimony in regard to the alleged harassment, Plaintiff admitted that she did not report those incidents to anyone at Lakeside. (*Id.*) The Plaintiff did, however, send a second letter to Lakeside's Vice President in a letter date December 3, 2009, and in that letter, she described the alleged harassment. However, Plaintiff did not sent that letter until *after* November 27, 2009, the date upon which LIRC found that Plaintiff quit her employment. Accordingly, Plaintiff did not provide Lakeside with an opportunity to address her concerns until after she had already quit.

Simply put, the evidence clearly supports LIRC's finding that Ms. Byrd did not quit for good cause attributable to her employer. Importantly, Ms. Byrd presented no evidence to support her assertion that she was harassed, and her own testimony establishes that Ms. Byrd failed to inform her employer about the alleged harassment until after she had already quit. There is also no evidence that Ms. Byrd considered any alternatives to quitting. Therefore, the evidence in the Record supports LIRC's finding that the statutory exception to ineligibility found at Wis. Stat. § 108.04(7)(b) did not apply to Ms. Byrd's voluntary termination.

B. Wis. Stat. § 108.04(7)(c)

In addition to considering whether the Plaintiff's voluntary termination was for good cause, LIRC also considered whether the statutory exception found at Wis. Stat. § 108.04(7)(c) applied on account of Plaintiff's alleged knee injury. That statute provides that:

> Paragraph (a) does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative because the employee was unable to do his or her work, or that the employee terminated his or her work because of the verified illness or disability of a member of his or her immediate family and the verified illness or disability reasonably necessitates the care of the family member for a period of time that is longer than the employer is willing to grant leave; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while such inability or unavailability continues.

Wis. Stat. § 108.04(7)(c). Here, LIRC concluded that Plaintiff did not explore alternatives and/or that she did not give her employer an opportunity to explore alternatives, and also that Plaintiff failed to have any discussion regarding accommodations or a leave of absence with her employer before she quit. (R. 00002, 00022.) Additionally, LIRC found that the Plaintiff's testimony was only partially credible because she failed to provide a medical excuse for the dates in question. (R. 00002, 00022.)

As with LIRC's other findings in this matter, there is credible and substantial evidence in the Record that supports those findings. In particular, the Plaintiff testified that the last day that she worked was November 20, 2009, that she never provided the required medical excuse to her employer, and that her employer never approved her for medical leave. (Tr. 9:13-15, 24:17-25). Additionally, the lack of evidence in the Record regarding any attempt that the Plaintiff made to explore alternatives as a result of her alleged injury support LIRC's findings that the Plaintiff failed to make any such inquiry. Although the Plaintiff believed that she was on medical leave and that it was not until December 2009 that she decided that she would not return to her position with Lakeside, there simply is no evidence in the Record that Plaintiff was on medical leave, which Plaintiff admitted. Accordingly, the evidence supports LIRC's conclusion that the statutory exception to ineligibility found at Wis. Stat. § 108.04(7)(c) did not apply.

CONCLUSION

Based on a review of the Record and the parties' briefs, this Court finds that LIRC's findings of fact and order affirming ALJ Peters' decision are supported by substantial and credible evidence. Accordingly, **IT IS HEREBY ORDERED** that the decision of the Labor and Industry Review Commission is affirmed and this Court denies Plaintiff's requested relief. This is a final order that disposes of the entire matter in litigation and is intended by the court to be an appealable order under Wis. Stat. § 808.03(1). *See Tyler v. The Riverbank*, 2007 WI 33, ¶ 25.

Dated this 22 day of May, 2012, in Milwaukee, Wisconsin.

BY THE COURT

Jane V. Carroll, Circuit Court Judge