

STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

MILWAUKEE COUNTY

MICHAEL CARSON

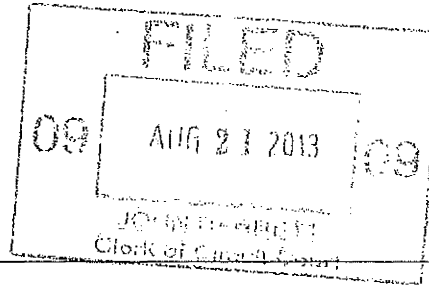
Plaintiff,

Case No. 13-CV-002082

vs.

LABOR AND INDUSTRY
REVIEW COMMISSION and
ACTUANT ELECTRICAL/MARINCO,

Defendants.



DECISION AND ORDER

Petitioner Michael Carson, proceeding *pro se*, seeks judicial review of a decision by the Labor Industry and Review Commission ("LIRC"). LIRC's decision, issued on February 14, 2013, found that Actuant Electrical/Marinco ("Actuant") had discharged Mr. Carson for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5). Accordingly, LIRC determined that Mr. Carson was ineligible for unemployment benefits until he met the requalification requirements of the statute. This Court has reviewed the record, evidence, and the parties' arguments, and for the reasons stated herein, affirms LIRC's decision.

STATEMENT OF FACTS

Mr. Carson was hired by Actuant as a material handler in May of 2011. On October 9, 2012, Actuant discharged Mr. Carson for making threatening statements regarding another employee during his shift the previous night. After being terminated, Mr. Carson made a claim for unemployment insurance benefits.

After conducting an investigation, the Department of Workforce Development issued a determination dated October 24, 2012, finding that Mr. Carson was discharged for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5) and was therefore ineligible for unemployment insurance benefits. Mr. Carson appealed that determination, and a hearing was held before an Administrative Law Judge ("ALJ") on November 26, 2012.

At the hearing, Actuant maintained that Mr. Carson's termination was based on physically threatening statements he made on October 8, 2012, following a disagreement with a co-worker. Patricia Paulson, Mr. Carson's supervisor, testified that Mr. Carson approached her during his shift to report that a co-worker, Jerry Berres, had spoken to him disrespectfully. During the course of gathering information about Mr. Carson's complaint, Ms. Paulson was told by Jose Ortega, the second-shift lead, that Mr. Carson had made comments to him and other employees that seemed threatening toward Jerry Berres. The comments allegedly made by Mr. Carson include, "I'm going to make a call and someone will take care of him."; "I'm going to make a call and he won't come back."; "It doesn't have to be here – they're going to follow him." Ms. Paulson testified that two employees other than Mr. Ortega also told her that they heard Mr. Carson make a statement about making a phone call. Ms. Paulson further testified that she directly heard Mr. Carson state that he would make a call to get his point across, and he did not respond when she inquired about what he meant by that.

Mr. Carson denied that he made any threatening comments after his conflict with Jerry Berres. He contends that Ms. Paulson and Mr. Ortega misunderstood his comments about "making a call," which were actually referring to his intention to make a call to the outbound manager, Jocelyn Walton.

The ALJ issued a decision on December 5, 2012, affirming the department's determination that Mr. Carson was terminated for misconduct within the meaning of Wis. Stat. § 108.04(5). The ALJ found that the comments Mr. Carson made were such that it would be reasonably foreseeable to the employee that they would be taken as a threat of physical violence. By making the comments, the employee evinced a willful, intentional and substantial disregard of the employer's interests and of the standards of conduct the employer had a right to expect of him.

In response to the ALJ's decision, Mr. Carson petitioned LIRC for review. On February 14, 2013, LIRC adopted the ALJ's findings of facts and conclusions of law and affirmed the ALJ's decision. Mr. Carson now appeals LIRC's final decision to this Court, alleging that LIRC's decision is not supported by its findings of fact.

STANDARD OF REVIEW

I. Findings of Fact

The LIRC's factual findings are binding on the court. *Patrick Cudahy, Inc. v. LIRC*, 2006 WI App 211, ¶ 7, 296 Wis. 2d 751, 723 N.W.2d 756; Wis. Stat. § 102.23(1)(a) ("The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive."). When a factual issue involves a question of intent and credible evidence raises competing inferences, the LIRC's finding is conclusive. *Fitzgerald v. Globe-Union, Inc.*, 35 Wis. 2d 332, 336-37, 151 N.W.2d 136 (1967). The LIRC is the sole judge of the witnesses' credibility and the weight to be accorded to their evidence. *Manitowoc Cnty. v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). As such, a court may not substitute its judgment for that of the LIRC regarding credibility even if the court may have independently arrived at a different conclusion. *Younglove v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 139-40, 579 N.W.2d 294 (Ct. App. 1998). The role of the reviewing court is to search the record to locate credible evidence which supports the LIRC's decision, rather than weighing the evidence opposed to it. *Brakebush Bros., Inc. v. LIRC*, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997).

II. Legal Conclusions

A court reviews the LIRC's decisions pursuant to Wis. Stats. §§ 102.23(1)(e) and 108.09(7). Decisions by the LIRC may be set aside by a court only if (1) the commission acted without or in excess of its power, (2) the commission decision was procured by fraud, or (3) the findings of facts do not support the commission's decision. Stat. § 102.23(1)(e).

Under this standard, a court must uphold the LIRC's reasonable legal conclusion if it is not contrary to the clear meaning of the statute, even if the court feels that an alternative conclusion is more reasonable. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (Ct. App. 1998). There are three levels of deference applicable to the LIRC's interpretation or application of a statute: great weight, due weight, or *de novo*. *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

Great weight deference is appropriate if the court has concluded that: (1) the agency was 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 the interpretation; and (4) the agency's interpretation will provide

uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659-60, 539 N.W.2d 98 (1995). Due weight deference is appropriate “when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court.” *UFE, Inc.*, 201 Wis. 2d at 286. Finally, a court will apply a *de novo* standard of review only when the issue before the LIRC is clearly one of first impression or the LIRC’s positions on a statute have been so inconsistent as to provide no real guidance. *Id.* at 285.

“Great weight” deference is appropriate where, as here, a legal question (i.e. whether certain conduct constitutes misconduct) is intertwined with factual and value determinations. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991). It is well-established that LIRC’s interpretation and application of the “misconduct” standard in the context of unemployment insurance benefits should be given great weight deference. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 303, 558 N.W.2d 874 (Ct. App. 1996); *Charette v. LIRC*, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995); *Lopez v. LIRC*, 2002 WI App 63, ¶ 16, 252 Wis. 2d 476, 487, 642 N.W.2d 561.

DISCUSSION

Petitioner challenges LIRC’s finding that he made threatening statements toward another employee, which is a finding of fact. See *Bernhardt v. LIRC*, 207 Wis. 2d 292, 303, 558 N.W.2d 874 (Ct. App. 1996) (holding that questions concerning employee conduct and intent are questions of fact for the commission to determine.). The petitioner argues that LIRC’s decision must be reversed because there is no credible evidence supporting the finding that he made threatening statements regarding a co-worker. Specifically, petitioner contends that the documents presented to the ALJ containing statements by Patricia Paulson and Jose Ortega, do not constitute credible evidence. In support of this allegation, petitioner points out that these statements were signed ten days after the date on which he was terminated. Furthermore, petitioner contends Jose Ortega’s statement should have been disregarded entirely as Mr. Ortega did not appear at the hearing to testify. Petitioner has not challenged LIRC’s interpretation or application of any law.

At the hearing, the ALJ received five exhibits into evidence, including the written statements of Ms. Paulson and Mr. Ortega. When asked if there was any objection to the ALJ’s receiving the exhibits into evidence, Mr. Carson responded, “No objection.” Tr. 75, November

26, 2012. The ALJ stated on the record that the exhibit containing Jose Ortega's statement was inadmissible hearsay because Mr. Ortega was not present to authenticate it. Tr. 75. As such, the ALJ stated that it would only be used to corroborate related admissible evidence presented at the hearing.

Petitioner challenges the credibility of Ms. Paulson's testimony and Mr. Ortega's statement. However, the determination of the credibility of evidence and witnesses is a function of LIRC, not this Court. See Wis. Stat. § 102.23(6), providing that "the court shall not substitute its judgment for that of the commissions as to the weight or credibility of the evidence on any finding of fact." It is well-established that the credibility of the witnesses lies exclusively within the province of the commission. *Neff v. Indus. Comm'n*, 24 Wis. 2d 207, 213, 128 N.W.2d 465, 468 (1964).

The fact that petitioner's testimony conflicted with the evidence and testimony provided by his employer is not a sufficient basis for reversing the findings of LIRC. *Eastex Packaging Co. v. DILHR*, 89 Wis. 2d 739, 745, 279 N.W.2d 248 (1979). This Court may only set aside LIRC's decision if the decision depends on any controverted finding of fact that is not supported by credible and substantial evidence. *Holy Name School v. ILHR Dep't*, 109 Wis. 2d 381, 386, 326 N.W.2d 121, 124 (Ct. App. 1982). A finding of fact is supported by evidence if reasonable minds could arrive at the same conclusion that LIRC arrived at. *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis. 2d 561, 644 N.W.2d 649.

While petitioner testified that his comments were not intended as a threat, it was reasonable for LIRC to find that Ms. Paulson's testimony was more credible. Even disregarding Mr. Ortega's written statement, a reasonable mind could conclude, based on Ms. Paulson's testimony, that Mr. Carson did make threatening comments in reference to his co-worker. Ms. Paulson testified that she spoke to two employees other than Mr. Ortega who acknowledged hearing Mr. Conrad's comments. Tr. 31. This, along with her observations of Mr. Conrad's agitated behavior after his confrontation with Mr. Berres, convinced Ms. Paulson that Mr. Conrad had intended his comments as a threat toward Mr. Berres. Tr. 37.

This Court is required to search the record to locate credible evidence supporting LIRC's decision, rather than weighing the evidence opposed to it. *Brakebush Bros.*, 210 Wis. 2d at 630. In doing so, this Court finds that there is credible and substantial evidence to support the finding that Mr. Conrad made threatening comments at work which were directed at his co-worker, Jerry

Berres. The Commission properly determined that this conduct was “misconduct” under Wis. Stat. § 108.04(5) because it evinced “such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee...” *Boynton Cab. Co. v. Neubeck & Industrial Comm.*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

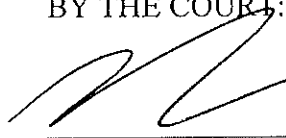
CONCLUSION AND ORDER

Based upon a thorough review of the record and the arguments of the parties as set forth in their briefs, and in light of the applicable standard of review the court is bound to follow, this Court finds that the decision of the Labor and Industry Review Commission is hereby **AFFIRMED.**

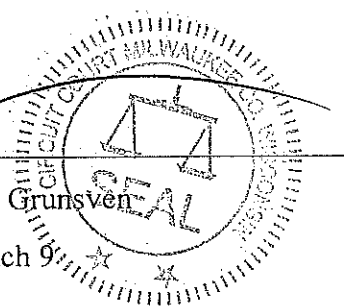
SO ORDERED.

Dated this 21st day of August, 2013, in Milwaukee, Wisconsin.

BY THE COURT:



Judge Paul R. Van Grunsven
Circuit Court Branch 9



THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL.