STATE OF WISCONSIN | CIRCUIT COURT BRANCH 14 | DANE COUNTY

WILLIAM J. MCKIBBIN,

Plaintiff,

vs.

DECISION and ORDER
Case No. 94-CV-0213

STATE OF WISCONSIN
LABOR & INDUSTRY REVIEW
COMMISSION,
MARTEN TRANSPORT, LTD., and
R. E. HARRINGTON, INC.,

Defendants.

DECISION and ORDER

This matter comes before the court on a petition to review a final order of the Labor and Industry Review Commission (hereinafter, "LIRC"). LIRC found that the plaintiff was discharged for misconduct connected with his work, within the meaning of § 108.04(5), Wis. Stats., and thus determined the plaintiff was ineligible for unemployment compensation.

William J. McKibbin's (hereinafter, "Mr. McKibbin") application for unemployment compensation was initially denied based on a determination by a deputy of the Department of Industry, Labor and Human Relations (hereinafter, "DILHR") that Mr. McKibbin had been discharged for misconduct within the meaning of § 108.04(5), Wis. Stats. Mr. McKibbin appealed, and following a hearing, the administrative law judge for DILHR reversed. Marten Transport appealed this decision to LIRC which reviewed the record and concluded that Mr. McKibbin had been discharged for misconduct. The plaintiff filed a timely appeal to this court.

Based on review of the record and relevant law, I conclude that the LIRC's decision must be reversed.

FACTS

Mr. McKibbin was a full time over-the-road tractor-trailer driver for defendant Marten Transport, Ltd. from February 28, 1991 through January 5, 1993 when Mr. McKibbin was discharged. On December 28, 1992, Mr. McKibbin was in an accident. He fell asleep driving his truck for Marten Transport and as a result, the truck rolled over. The amount of damage was over $19,000.

Mr. McKibbin initially received a citation for failure to maintain control of his vehicle and driving under the influence. However, the citation was amended to a charge of reckless driving. The employee was discharged as a result of the accident. The record also indicates that the accident of December 28, 1992 was Mr. McKibbin's first accident in 31 years of driving.

STANDARD OF REVIEW

The scope of judicial review under §§ 102.23 and 108.09(7), Wis. Stats., is quite narrow. The reviewing court may set aside a decision of LIRC only if 1) the commission acted without or in excess of its powers, 2) the order or award was procured by fraud, or 3) the findings of fact by the commission do not support the order or award. Sec. 102.23(1)(e), Wis. Stats.

The standard of review for an administrative decision depends on whether the issue presented involves questions of fact or law. The question of whether an unemployment compensation claimant's behavior was misconduct such as to disqualify him from benefits is

a question of law. Wehr Steel Co. v. Dept. Industry, Labor and Human Relations, 106 Wis. 2d 111, 118, 315 N.W.2d 357 (1982); Consolidated Construction Co., Inc. v. Casey, 71 Wis. 2d 811, 816, 238 N.W.2d 758 (1976).

The Labor and Industry Review Commission's findings of fact are conclusive upon review if they are supported by credible and substantial evidence. § 102.23(6), Wis. Stats.; Wehr Steel Co., 106 Wis. 2d 111 at 117. In determining whether an agency's factual findings are supported by substantial evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. Dept. of Industry, Labor and Human Relations, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980).

A court is free to review a question of law ab initio when matters of law are at issue and when material facts are undisputed. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). Nonetheless, a court gives weight to agency decisions when the agency expertise is significant to the determination of a legal issue. Nottelson v. Dept. of Industry, Labor and Human Relations, 94 Wis. 2d 106, 117, 287 N.W.2d 763 (1980). A court will also sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. United Way v. Dept. of Industry, Labor and Human Relations, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981).

DECISION

In this case, the factual findings are not at issue. Mr. McKibbin does not dispute any of the findings of fact as set forth in the April 9, 1993 appeal tribunal decision by Administrative Law Judge LeAnn R. Prock (hereinafter, "ALJ") or the December 27, 1993 LIRC decision. Moreover, the court has reviewed the record and concludes that LIRC's findings of fact are supported by substantial and credible evidence. § 102.23(6), Wis. Stats. Consequently, LIRC's factual findings are binding on this court because there is no fraud nor lack of support by substantial and credible evidence. § 102.23, Wis. Stats.; Wis. Dept. of Industry, Labor and Human Relations, Unemployment Compensation Div. v. Labor, Industry and Review Comm'n, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990).

The issue in this case is whether Mr. McKibbin's conduct resulting in the accident of December 28, 1992 was "misconduct" within the meaning of § 108.04(5), Wis. Stats. The Wisconsin Supreme Court interpreted the meaning of "misconduct" as used in the unemployment compensation statutes in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941). The Boynton Cab court held

> that the intended meaning of the term "misconduct," as used in sec. 108.04(4)(a) [currently sec. 108.04(5)], Stats., is limited to 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 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 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 or ordinary negligence in isolated instances, or good-faith errors in judgement or discretion are not deemed "misconduct" within the meaning of the statute. Boynton Cab, 237 Wis. at 259-60.

The Boynton Cab court reasoned that the provision of the workers compensation statute which bars an employee's eligibility for benefits when the employee is discharged for "misconduct" operates as a forfeiture or penalty. Id. at 258. The court further found that statutes providing for forfeitures are to be strictly construed and "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." Id. at 259.

The cases since Boynton Cab have consistently cited the definition above and emphasized the employee's intent and attitude in determining whether misconduct has occurred. Miller Brewing Co, v. DILHR, 103 Wis. 2d 496, 499, 308 N.W.2d 922 (Ct. App. 1981). Specifically, "(b)enefits may not be denied unless the employee's conduct amounts to an 'intentional and substantial disregard of' or an 'intentional and unreasonable interference with' the employer's interests." Id. (citations omitted); see also Eastex Packaging Co. v. DILHR, 89 Wis. 2d 739, 752, 729 N.W.2d 248 (1979).

The standard for determining whether an employee's conduct was "misconduct" is an objective standard defined as

> whether a reasonable person under the factual situation presented would have considered the employee's conduct to be willful interference with the company's interests. Wehr Steel Co., 106 Wis. 2d at 119.

In the case at bar, the ALJ found that Mr. McKibbin's falling asleep while driving was not intentional nor part of any pattern of negligence which would constitute misconduct as defined in Boynton Cab. (ALJ Decision, April 9, 1993, p. 2). LIRC reversed the ALJ and found that remaining awake and in control of a vehicle while driving is a minimum requirement of the position of a truck driver. (LIRC Decision, December 27, 1993, p. 2). LIRC concluded that Mr. McKibbin's falling asleep behind the wheel constituted an act of negligence of such a degree that it constitutes misconduct despite the fact that it was a single incident. (Id. at p. 3). Specifically, LIRC noted that approximately an hour before Mr. McKibbin had resumed driving, he had had a substantial sleep break (Id.).

The court partially agrees with LIRC's analysis of the definition of "misconduct" in Boynton Cab cited above. Under this definition, "misconduct" arises from (1) deliberate violations or disregard of the employer's standards or (2) from carelessness or negligence of a certain degree or recurrence. LIRC's analysis fails in that the analysis ignores the definition of the degree of negligence required in order to find "misconduct." The level of negligence defined as "misconduct" is that which manifests "wrongful intent or evil design," or shows "an intentional and substantial disregard of the employer's interests." Boynton Cab, 237 Wis. at 259-60. The supreme court further described this form of "misconduct" as consisting of a "recurrent pattern of negligent acts, so serious as to amount to gross negligence and thereby

evince an intentional and substantial disregard of the employer's interests." McGraw-Edison Co. v. ILHR Dept., 64 Wis. 2d 703, 712, 221 N.W.2d 677 (1974).

In the instant case, LIRC does not argue, nor is there any evidence on the record, that demonstrates that Mr. McKibbin's falling asleep was an intentional violation or disregard of his employer's standards of behavior. LIRC argues that Mr. McKibbin was negligent to such a degree that his act of falling asleep was "misconduct." However, the court concludes that no evidence exists which supports that Mr. McKibbin's act reaches the level of carelessness or negligence to be "misconduct" under Boynton Cab and subsequent cases.

Both the ALJ and LIRC note that Mr. McKibbin's conduct was a one time occurrence. Thus, recurrence of negligent acts is not at issue. Additionally, the evidence does not show that Mr. McKibbin's conduct was of such degree as to manifest "wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to the employer." Boynton Cab, 237 Wis. at 259-60. (emphasis added).

The standard for determining whether an employee's conduct is "misconduct" is that of a reasonable person. Wehr Steel Co., 106 Wis. 2d at 119. As LIRC stated, an hour before Mr. McKibbin had the accident, he had had a substantial sleep break. Additionally, the record indicates that the accident at issue was Mr. McKibbin's first accident in 31 years. Given this factual background, a reasonable person would not consider Mr. McKibbin's falling asleep

at the wheel to be a willful or wanton disregard of the employer's interests under Boynton Cab.[1] Instead, the factual findings show "inadvertencies or ordinary negligence in isolated instances," or "good-faith errors in judgement." Boynton Cab, 237 Wis. at 259-60. Such actions are not deemed "misconduct" within the meaning of the statute.

After considering LIRC's factual findings and the relevant case law, the court concludes that this single act of negligence may be grounds for dismissal but is not grounds for denial of unemployment compensation.

ORDER

For the reasons stated above, the court REVERSES LIRC's decision and REMANDS for further proceedings consistent with this opinion.

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[1] Moreover, falling asleep at the wheel is not automatically gross negligence. The supreme court has determined that where a finding of gross negligence was warranted, additional evidence of intermittent drowsiness or sleep existed. Parchia v. Parchia, 24 Wis. 2d 659, 668, 130 N.W.2d 205 (1964). In other words, there was something more than mere falling asleep. It is possible that sleep may sometimes overtake its victim unaware and it would be going too far to say that falling asleep without more is evidence of gross negligence. Id. In the instant case, no evidence exists showing Mr. McKibbin is liable for more than ordinary negligence. Additionally, Mr. McKibbin's conviction for reckless driving under Ohio law does not prove that Mr. McKibbin's act was "misconduct." The definition of "wanton act" cited from State v. Earlenbaugh, 18 Ohio St. 3d 19, 479 N.E.2d 846 (1985) describes a level of negligence that the factual record before LIRC and this court do not indicate existed in the instant case.

IT IS SO ORDERED.

Dated this 23rd day of December, 1994.

BY THE COURT:

George A.W. Northrup, Judge
Circuit Court Branch 14

cc: Atty. Steven Helland
Atty. David Nance
Atty. Jon P. Axelrod