STATE OF WISCONSIN | CIRCUIT COURT BRANCH 08 | MILWAUKEE COUNTY

BRIAN STRIBLING,

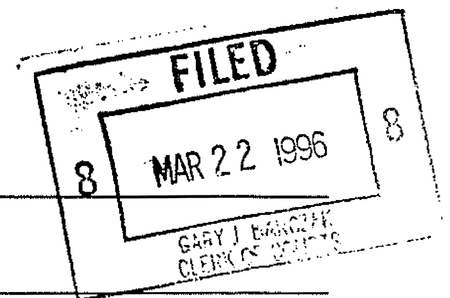
Plaintiff,

vs.

Case No. 95-CV-006424

LABOR AND INDUSTRY
REVIEW COMMISSION and
REINHART FOODS, INC.,

Defendants.



MEMORANDUM DECISION

This matter is before the court upon Brian Stribling's *pro se* action for the judicial review of a Labor and Industry Review Commission (LIRC) decision, pursuant to Wis. Stat. ss. 108.09(7) and 102.23. The LIRC affirmed the Administrative Law Judge's (ALJ) denial of Stribling's Unemployment Compensation (UC) claim, adopted the ALJ's findings as its own, and issued a short Memorandum Opinion which addressed the assertions Stribling made in his appeal. The LIRC found that Stribling's behavior on October 25, 1994, which led to his termination, was misconduct connected with his employment, precluding his claim for UC benefits.

The findings of fact and conclusions of law by the ALJ are as follows: Stribling worked as a driver for the employer for about five years. He was on light duty because of a back injury, and did not work on October 10, 1994. A disagreement arose as to whether Stribling had told his supervisor, John Hummel, that he could not work that day because of his back. Hummel told Ed Johnson,

Hummel's supervisor, that Stribling did not give a reason for refusing to work.

When Stribling arrived at work on October 25th, 1994, his next scheduled work day, he:

> confronted Hummel and entered into a profane outburst against Hummel in front of co-workers. The employe repeatedly and in a loud voice accused Hummel of being a fucking liar. Hummel ordered the employe to go home. the employe refused. Hummel then telephoned Johnson, who ordered the employe to leave work. The employe complied but as he exited the building, he continued his profane outburst.

(ALJ Determination, Record at 76.) The ALJ found that the employer has work rules that prohibit abuse or harassment of supervisors, and that Stribling was discharged for violation of these rules.

The ALJ considered Stribling's testimony that he admitted confronting Hummel but denied engaging in a profane outburst. He found that the more credible evidence established that Stribling "repeatedly called his supervisor a fucking liar in front of co-workers" and that his actions "clearly violated the employer's rules." (Id.) He further found that Stribling was insubordinate when he refused to leave immediately when Hummel told him to, and found that Stribling's outburst was not justified because he believed that Hummel had lied about the incident of October 10th or because Hummel had allegedly used a racial slur against him four years earlier.

The ALJ determined that Stribling's actions "evinced a wilful and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect, and therefore constituted misconduct connected with the employment."

(Id.)

The LIRC acknowledged Stribling's argument that the employer's witnesses were not truthful, but agreed with the ALJ determination that the employer's witnesses were more credible. It found that Stribling's behavior on October 25th, 1994 was insubordinate, and that his outburst was long, abusive and unjustified. That incident alone amounted to misconduct connected with his employment.

The LIRC also considered Stribling's further assertion that one of his co-workers was awarded UC benefits after being discharged for rude behavior, but, as it did not have that employe's record before it, could not determine the basis for the award, if in fact there was one. The LIRC agreed with the determination made by the ALJ based on Stribling's record.

Stribling's main argument on judicial review is that the company officials lied, and he alleges that he was terminated in retaliation for his Workers' Compensation claim. He claims that evidence presented by the employer of a suspension in June of 1994 was false. The LIRC, however, based its decision only on the events which occurred on October 25, 1994. Stribling claims that on that date he was not profane, and apparently argues that even if he was, the profanity rule was not consistently applied and was not grounds for discharge.

When a court reviews a case under Wis. Stat. ss. 108.09 and 102.23, it may only set the LIRC order aside if the LIRC acted without or in excess of its powers, if the order was procured by fraud, or if the findings of fact do not support the order. Wis.

Stat. s. 102.23(1)(e). The court may not substitute its judgment for the commission's as to the weight or credibility of the evidence on any finding of fact. If the commission's findings of fact are supported by credible and substantial evidence they are conclusive upon the court's review. McGraw-Edison Co. v. ILHR Dep't., 64 Wis. 2d 703, 709 (1974); General Casualty Co. v. LIRC, 165 Wis. 2d 174, 178 (Ct. App. 1991). "Indeed, as long as there is credible evidence to support the findings, [the court] will uphold them even if they are against the great weight and clear preponderance of the evidence." General Casualty Co., 165 Wis. 2d at 178 (citations omitted).

There is credible and substantial evidence in the record to support the LIRC decision. Hummel testified that Stribling asked him "What the fuck did you say to Ed" when Stribling arrived at work at about 4:45 a.m. on October 25, 1994. (Tr. pp. 54-61.) Even though Hummel tried to avoid the confrontation, Stribling began yelling and said "fuck you," and called Hummel a "fucking liar" several times. (Id.) When Hummel ordered Stribling to go home Stribling said "Fuck you, I'm not going home" and refused to leave until Hummel phoned Johnson, and Johnson told Stribling to leave. (Id.) Johnson testified that, when Hummel called him at about 5:00 a.m., he could hear Stribling screaming in the background, calling Hummel a "fucking liar," in a threatening tone. (Tr. pp. 83-84.) Jeff Roeming,[1] another driver, testified that he

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[1]Stribling claims that Roeming was not in the room when the incident occurred. The credibility of the witnesses, however, is for the LIRC to determine.

was in the room and heard the argument, and heard Stribling call Hummel a "fucking liar" three to four times. (Tr. pp. 186-188.)

Stribling appears to claim that Ed Johnson was his direct supervisor and only Johnson could send Stribling home. However, there is sufficient testimony in the record to establish that Hummel was the supervisor in charge when this event occurred.

Because there is credible and substantial evidence in the record to establish that Stribling did engage in profane and insubordinate behavior toward his superior, the court must determine whether the LIRC correctly found that Stribling's actions were misconduct connected with employment, justifying the denial of UC benefits pursuant to Wis. Stat. s. 108.04(5).

The LIRC urges the court to accord its decision "great weight," as it has expertise in applying the misconduct standard in these cases. It also cites Charette v. LIRC, 196 Wis. 2d 956 (Ct. App. 1995), where the court concluded that the question of whether tardiness constituted misconduct was "intertwined with factual and value determinations" that justified assigning "great weight" to the LIRC's decision. Id. at 960.

There is no published caselaw in Wisconsin that deals with the precise issue of profanity toward a superior, but the LIRC submitted circuit court decisions to show its application of the misconduct standard in similar situations. Insubordination has been dealt with in the caselaw. The refusal to follow an order of a superior has been found to be misconduct which was an intentional and unreasonable interference with the employer's interest. Baez

v. ILHR Dep't., 40 Wis. 2d 581 (1968).

When the misconduct standard is applied to a single incident, it "is limited to conduct evincing such wilful 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, 237 Wis. 249 (1941).

The circuit court decisions establish that the LIRC has consistently considered profanity toward a superior and insubordination to be wilful acts that are not merely inefficient or inadvertent, even when only one incident forms the basis for the termination. While these cases are not precedential, they are evidence of the LIRC's expertise in applying the misconduct standard to the situation found here, which is intertwined with factual and value determinations, and justify the court's accordance of "great weight" to the agency decision.

Further, there is evidence in the record that establishes that Stribling's acts on October 25th did in fact interfere with the employer's interests. Johnson testified that the Stribling's behavior was not only a disruption of the supervisor's job duties, but was also a "total disruption" of the work force because other employees were present. (Tr. p. 85.) The employer did expect its employees not to engage in that type of behavior, as evidenced by its employee handbook, which Stribling acknowledged receiving.

This court finds that the tirade and insubordination that Stribling engaged in toward Hummel, his supervisor, was, as a

matter of law, an intentional and unreasonable interference with the employer's interest, and a disregard of the standards of conduct the employer had a right to expect; that behavior was thus wilful misconduct connected to his employment. The LIRC's application of the law to the facts of this case was correct.

Stribling's claim that the company policy that prohibits profanity and racially derogatory statements is not applied consistently was not fully developed in the proceedings below. He now recounts other arguments that occurred at the company, alleging that no disciplinary action was taken in response to them. The LIRC was presented with evidence of one of those incidents, one incident is argued but undocumented, and as evidence of a third incident Stribling has submitted a letter to the court from Craig Stribling, dated November 20, 1995.

When the court reviews an LIRC decision, that review is made on the record that was before the appeal tribunal. Wis. Stat. s. 102.23(1)(d). The letter from Craig Stribling was not offered to LIRC and is not part of the record, and the plaintiff is therefore precluded from offering it to the court. Weibel v. Clark, 87 Wis. 2d 696, 708, *cert. denied*, 444 U.S. 834 (1979).

Despite any other incidents that may have occurred at the company, only Stribling's behavior is before this court for review. How the company chooses to enforce discipline is not within the scope of that review. If Stribling has an equal protection claim, he must pursue it as such. The court may not entertain it here. However, the court feels compelled to point out that several

witnesses testified that they had never seen behavior that rose to the level that Stribling's did on that day.

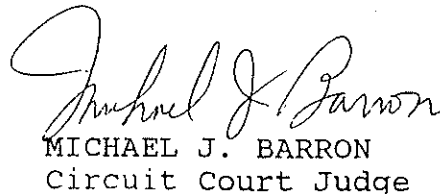
Stribling also makes a new allegation in this action, claiming for the first time that his witnesses' jobs were threatened if they were to become involved in his case. He claims that one of his witnesses carried a tape recorder while management officials had a threatening conversation with him. While the court could receive evidence of fraud, Stribling does not present any evidence; he only makes the accusation. Further, the witness whom he claims made the tape recording, Milton John, testified at Stribling's hearing and no evidence of fraud or coercion was presented to the ALJ. The court will not consider this argument, pursuant to Weibel, because it should have been presented to the ALJ or to the LIRC, and was not.

The court finds that the decision of the LIRC was within its powers, that it was not procured by fraud, and that it is supported by adequate facts in the record. Therefore, the plaintiff's request that the decision be set aside is denied.

Counsel for the Labor and Industry Review Commission shall prepare an order consistent with this decision and submit it under the five day rule.

Dated this 22 day of March, 1996, at Milwaukee, Wisconsin.

BY THE COURT:



MICHAEL J. BARRON
Circuit Court Judge