

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 41

MILWAUKEE COUNTY

ISREAL WEBB,

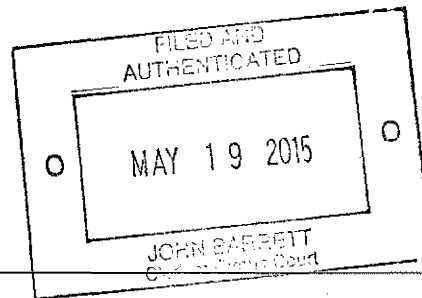
Plaintiff,

Case No. 14-CV-7452

v.

LABOR AND INDUSTRY REVIEW
COMMISSION and TOTAL CLEANING
SYSTEMS, INC.,

Defendants.



DECISION AND ORDER

Introduction

Isreal Webb seeks judicial review of a decision of the State of Wisconsin Labor and Industry Review Commission (“LIRC”). In its decision dated August 12, 2014, LIRC concluded that Mr. Webb was discharged for misconduct connected with his employment, within the meaning of Wis. Stat. § 108.04(5)(e), and that he was therefore ineligible for unemployment insurance benefits. After reviewing the administrative record and the parties’ arguments, the Court is unable to determine how LIRC interpreted the applicable statute. LIRC’s decision must therefore be reversed and remanded for proceedings consistent with this decision.

The relevant facts are undisputed. Mr. Webb worked as a general cleaner for Total Cleaning Systems, Inc. (“the employer”). His last day of work was February 25, 2014. He was scheduled to work on February 26, 27, and 28, 2014, but he did not show up for work on those dates because after he left work on February 25, he was arrested and incarcerated based on charges of felony child abuse. Prior to the start of his scheduled shift on February 26, Mr.

Webb's spouse notified the employer that Mr. Webb would be absent "for three to five days" because he was "in jail."

Mr. Webb was released on March 1. On March 2, he contacted the employer to inquire whether he could return to work. The employer informed him that his employment was terminated.

Mr. Webb subsequently applied for unemployment insurance benefits. After an investigation by a deputy of the Wisconsin Department of Workforce Development ("the Department"), his application for unemployment compensation was denied.

On May 8, 2014, Administrative Law Judge Michael Stark issued an appeal tribunal decision, which affirmed the Department's initial determination. ALJ Stark found that Mr. Webb quit his employment, within the meaning of Wis. Stat. § 108.04(7), and that his quitting was not for any reason that would constitute an exception to that statute. As a result, unemployment insurance benefits were denied until Mr. Webb earned sufficient wages in employment following the week of the quit.

On August 12, 2014, the Wisconsin Labor and Industry Review Commission ("LIRC") modified the ALJ's decision to find that Mr. Webb did not quit his employment, but, rather, was discharged by the employer. LIRC also found that Mr. Webb was discharged for "misconduct" connected with his employment, within the meaning of Wis. Stat. § 108.04(5)(e). As a result, unemployment insurance benefits were denied until after seven weeks had elapsed, and after Mr. Webb earned sufficient wages in employment.¹

¹ Wis. Stat. § 108.04(5) provides as follows:

An employee whose work is terminated by an employing unit for misconduct by the employee connected with the employee'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

Pursuant to Wis. Stat. §§ 108.09(7) and 102.23, Mr. Webb initiated this action for judicial review, seeking a reversal of LIRC's finding of misconduct and a reinstatement of benefits. At issue is whether LIRC reasonably concluded, based on the facts found, that Mr. Webb was discharged for misconduct connected with his employment, within the meaning of Wis. Stat. § 108.04(5)(e).

Standard of Review

A circuit court's scope of review differs depending on whether it is reviewing LIRC's findings of fact, or its conclusions of law, or its discretionary decisions. A court will affirm LIRC's findings of fact if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). The weight and credibility of the evidence are for LIRC to evaluate, not the court, and a court will accept the reasonable inferences that LIRC draws from the evidence. *Milwaukee Transformer Co., Inc. v. Industrial Comm'n*, 22 Wis.2d 502, 510 (1964). Whether an employee's conduct, as found by LIRC, constitutes misconduct within the meaning of the statute is a question of law, and a circuit court gives great weight deference to LIRC's determination on this issue. *Id.*, ¶ 26. This deferential standard is appropriate because LIRC is charged with the interpretation and application of § 108.04(5)(e). Great weight deference means that a court will sustain LIRC's decision that particular conduct constitutes misconduct if the decision is reasonable, meaning that it does not directly contravene the words of the statute, it is not clearly contrary to legislative intent, and it has a rational basis. *See Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 661-62 (1995).

employee earns wages after the week in which the discharge occurs equal to at least 14 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

Because Court the must apply the great weight standard of review, the Court must determine whether LIRC's interpretation of Wis. Stat. § 108.04(5)(e) as applied to Mr. Webb was contrary to the clear meaning of the statute.² Unfortunately, it is impossible to determine from LIRC's decision how LIRC interpreted and applied this statute.

Discussion

According to Wis. Stat. § 108.04(5)(e). the statutory definition of "misconduct" includes:

Absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature, or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee, if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism or tardiness.

In this case, it is undisputed that Mr. Webb was absent on more than two occasions. It is also undisputed that Mr. Webb provided timely notice of his absenteeism. The only issue is whether Mr. Webb provided a "valid reason" within the meaning of the statute. In its decision, LIRC stated, in a conclusory manner, as follows:

In this case, the employee was absent for three scheduled shifts immediately preceding his discharge. While his absences were with notice to the employer, they were not for valid reasons. Under the circumstances, the employee's absenteeism amounts to misconduct [within the meaning of Wis. Stat. § 108.04(5)(e)].

Absent from LIRC's decision is any meaningful analysis as to why Mr. Webb's absences were for invalid reasons.

² Mr. Webb makes several arguments that are outside the scope of review. For example, he argues that the employer violated the Wisconsin Fair Employment Act because he was terminated "solely because he was arrested and incarcerated for an alleged offense that had no connection with his employment whatsoever." The only issue is whether LIRC erred in concluding that Webb engaged in misconduct, and the Court will not entertain Mr. Webb's claim of unlawful discrimination.

LIRC's decision appears to be at odds with several recent administrative decisions.³ For example, in *Albrecht v. Farm & Fleet of Monroe, Inc.*, UI Hearing Decision No. 05003647JV (LIRC November 28, 2007), the employee came home from his work shift and got into a fight with his father. He apparently struck his father but did not admit to doing so. After he left the house and took off in his vehicle, the police chased him. At the end of the chase the employee's vehicle collided with a police car, but it was unclear who caused the collision. The employee was incarcerated for three days, all of those were work days. On the morning of the first day the employee's father telephoned the employer and informed them that the employee was in jail. The employee got out of jail the morning of the fourth day and immediately telephoned the employer, but the employer had already discharged him for missing three consecutive work days.

At the appeal tribunal hearing, the employee conceded that he had fought with his father and had subsequently been in an accident with a police car, but did not admit to striking his father or causing the accident. The employer's only witness at the hearing was the store manager, who indicated that when the employer discharged the employee it had no knowledge of why he had been incarcerated. The appeal tribunal found that the employer had failed to demonstrate misconduct because it failed to show that the employee had done anything to justify his incarceration. LIRC agreed. In its decision, LIRC noted the absence of any evidence before the ALJ to indicate that Albrecht had "engaged in intentional criminal behavior." The only evidence offered at the hearing by Farm & Fleet, LIRC stated, was that Albrecht was absent because he was incarcerated, and Albrecht had not admitted to any intentional criminal conduct. LIRC specifically noted that, if Albrecht was ultimately convicted of the criminal behavior that had caused his incarceration and therefore his absence from work, Farm & Fleet should bring

³ While agency decisions are not binding authority, the Court may consider prior agency decisions on review. *See, e.g., Gilbert v. LIRC*, 2008 WI App 173, ¶ 10, 315 Wis.2d 726, 735

this to the attention of LIRC and LIRC will then “determine whether to reconsider its decision....”

Albrecht is consistent with a more recent decision, which was issued after the enactment of 2013 Wisconsin Act 20. In *Raven Laws v. Alpha Baking Co., Inc.*, UI Dec. Hearing No. 14401746AP (LIRC Sept. 10, 2014), the employee was incarcerated on a probation hold on January 18, 2014, based on an allegation that he had violated his probation by consuming alcohol. Prior to the employee’s next shift, the employee’s girlfriend informed the employer that the employee was incarcerated and would be unable to report to work, and did not know when he would be released. On January 28, the employee was released from jail. He telephoned the employer and asked if he could return to work. At that time the employer terminated his employment for excessive absenteeism. LIRC found that the employee was discharged for purposes of unemployment insurance, but that the employee’s absences were not “misconduct” under either the general standard of *Boynton Cab Co. v. Neubeck*, 237 Wis. 249 (1941), or the more specific standard set forth in Wis. Stat. § 108.04(5)(e). After noting that the employer bears the burden of proof to show misconduct, LIRC stated as follows:

As to whether the employee had a valid reason for his absences, the commission has long held that absence due to incarceration is not for a valid reason if it is due to the employee's fault, but it is for a valid reason if there was insufficient evidence of the employee's fault. The standard for evaluating fault is whether the employee willfully and intentionally started the chain of events that led to his or her being unavailable for work. *Hylar v. Regal-Beloit Corp.*, UI Dec. Hearing No. 97002837JV (LIRC Aug. 27, 1997). Here, the lack of evidence showing that the employee's incarceration was due to culpable behavior on his part prevents the conclusion that his absence was for an invalid reason. See *Robinson v. Rocore Industries, Inc.*, UI Dec. Hearing No. 12601441MW (LIRC June 29, 2012); *Acker v. Staff Management, Inc.*, UI Dec. Hearing No. 07002110MD (LIRC Dec. 19, 2007).

In this case, a review of the administrative record reveals a lack of evidence showing the employer’s knowledge that Mr. Webb was at fault for his incarceration. The record reveals that

the employer did not know the specific reason for Mr. Webb's incarceration; the employer merely understood that "he was incarcerated for something that involved one of his children."

At the hearing, Mr. Webb testified that he was arrested for felony child abuse, that he waived his preliminary hearing, that probable cause had been found, and that it had been set for trial. He did not admit any intentional criminal conduct. However, LIRC recently held that "criminal pleas, and even criminal judgments, are of no value to employers in proving misconduct under Wis. Stat. § 108.04(5)." *Albrecht v. Farm and Fleet of Monroe, Inc.*, UI Dec. Hearing No. 05C03647JV (LIRC Nov. 28, 2007). Consequently, even if the employer were to present evidence of a criminal conviction, it would have no bearing on the outcome of this case. *See id*; *see also Sommers v. USF Holland, Inc.*, UI Dec. Hearing No. 08400933AP (LIRC Jul. 23, 2008). Moreover, in Wisconsin, felony child abuse is not limited to intentional behavior. *See* Wis. Stat. § 948.03(3) ("Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony."). LIRC did not address whether and/or how its decision would be impacted based on a finding that Mr. Webb recklessly caused great bodily harm to a child.

The purpose of the unemployment act is to afford relief to those who have been unemployed through no fault of their own. It would be against public policy to grant Mr. Webb unemployment benefits if his employment was terminated as a result of imprisonment that resulted from his own actions. However, in this case, it is unclear from the record whether Mr. Webb willfully committed an act that caused his incarceration. It is uncertain whether his actions evinced a wanton disregard for his employer's interests, whether his behavior was culpable, and whether the consequence was foreseeable. In cases where LIRC has found misconduct based on incarceration, it was able to affirmatively find that the employee's actions

or failures to act caused a chain of events which created circumstances which made him unavailable for work and he was therefore the defaulting actor. *Brian W. Schweikert v. Ganton Technologies, Inc.*, UI Dec. Hearing no. 91606281 (LIRC Mar. 24, 1992); *Love v. Emmpak Foods, Inc.*, UI Dec. Hearing No. 99604845MW (LIRC Jan. 27, 2000). In this case, LIRC did not make this factual finding. Instead, it merely stated, in a conclusory manner, that Mr. Webb did not provide a valid reason for his absence.

The record reveals that Mr. Webb did provide a reason for his absence – incarceration. Whether his incarceration is a valid reason or not requires a further inquiry into his culpability. In particular, the validity of his reason for incarceration depends on whether his actions or inactions started the chain of events that led to his unavailability for work. While it is unclear from the record whether LIRC made this inquiry, it is certain that LIRC did not provide any reasoning with respect to this issue. On remand, LIRC should explain its rationale for concluding that Mr. Webb failed to provide a valid reason for his absence. To the extent LIRC deviates from the reasoning contained in its previous administrative decisions, LIRC should provide an explanation. To the extent it deviates from the ALJ's credibility determinations, LIRC must consult with the ALJ as to his credibility impressions.⁴

⁴ The employer argued to the ALJ that Mr. Webb quit his employment. Webb argued that he was discharged. The ALJ agreed with the employer. LIRC reversed on this issue, stating that Mr. Webb “persuasively testified that the area manager discharged him.”

CONCLUSION

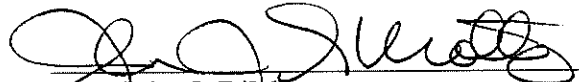
THEREFORE, based upon a thorough review of the record;

IT IS HEREBY ORDERED that LIRC's eligibility determination is hereby REVERSED and REMANDED for proceedings consistent with this decision.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL

Dated at Milwaukee, Wisconsin, this 19th day of May, 2015.

BY THE COURT:



Hon. John J. DiMotto
Milwaukee County Circuit Court, Branch 41

