

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-3536
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000814

**IN COURT OF APPEALS
DISTRICT IV**

DAN PAAR,

PLAINTIFF-APPELLANT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

MIDAS MUFFLER & BRAKE SHOPS,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Dan Paar appeals an order affirming a decision of the Labor and Industry Review Commission (LIRC). The administrative

proceeding concerned Paar's claim for unemployment compensation. On appeal, Paar challenges LIRC's ruling that Paar's employer fired him for misconduct. Paar also challenges LIRC's decision that Paar must repay compensation he received before LIRC ruled that he is not entitled to unemployment compensation because he was fired for misconduct. We affirm on both issues.

¶2 Midas Muffler & Brake Shops employed Paar as a shop manager, until May 20, 2002. After his employment ceased, Paar applied for unemployment compensation, and the Department of Workforce Development found him eligible. Midas appealed and, after a hearing, an administrative law judge determined that Paar was discharged from his employment for reasons other than misconduct.

¶3 Midas appealed that decision to LIRC. Meanwhile, Paar was receiving unemployment compensation benefits. LIRC subsequently held that Paar was ineligible for unemployment compensation, and ordered him to repay the unemployment compensation benefits he had received (\$11,016) to the Unemployment Reserve Fund. The trial court affirmed LIRC's decision, resulting in this appeal.

¶4 The following are the undisputed facts LIRC used to make its decision:

Several weeks prior to his last day of work, [Paar] told the president that he was going to put duals on a 1976 truck. The employee asked the employer what he should charge the customer, but the employee did not tell the president that he was going to cut off the catalytic converter. The president entered the shop are [sic] on May 20, 2002, and saw a catalytic converter had been cut off a vehicle. The president indicated that this was a violation of Federal and State law as well as a violation of the employer's policy. The employee and a subordinate were cutting the catalytic converter off to put a dual exhaust system on an older

truck. The president approached the employee and asked what he was doing. The employee said they were putting duals on a truck that belonged to a friend's son. The employee and the president then went to the office. The president told the employee he did not understand his behavior. The employee walked out of the office, saying he guessed he would give his two-week notice. The employer said that would not be necessary and the employee should leave his keys and leave immediately. The employee left after picking up his personal belongings. The president indicated that the employer could be subject to a \$10,000 fine.

Based on those facts, LIRC set aside the administrative law judge's decision, and concluded:

The employer asserts that the employee's actions in removing a customer's catalytic converter, without informing the employer of this fact, amounted to misconduct connected with his employment. The commission agrees. The employee deliberately removed the catalytic converter, knowing that this violated the employer's policy. Further, he told the employer, prior to his last day of work, that he was going to work on the truck. However, he failed to inform the employer that he was going to cut off the catalytic converter. The employee testified that according to EPA policies and the employer's policies he could not remove a catalytic converter. The president testified that the employer could be subject to a fine for the removal of the converter. Under the circumstances, the commission concludes that the employee's actions in deliberately removing a catalytic converter from a friend's vehicle demonstrated such a wilful and substantial disregard of the employer's interests as to constitute misconduct connected with his work.

Paar contends as a matter of law that his conduct in the case, the only such incident in thirteen years of employment, was not misconduct.

¶5 An employee discharged for misconduct is ineligible for unemployment compensation. WIS. STAT. § 108.04(5) (2001-02).¹ The definition of misconduct under § 108.04(5) is conduct that shows willful or wanton disregard of an employer's interests as demonstrated by deliberate violations of rules or disregard of standards of behavior which the employer has the right to expect. *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259, 296 N.W. 636 (1941). Mere inefficiency, unsatisfactory conduct, ordinary negligence in isolated instances, or good faith errors are not misconduct. *Id.* at 260. We give great weight deference to LIRC's decision as to whether an employee's conduct amounts to disqualifying misconduct. *Lopez v. LIRC*, 2002 WI App 63, ¶16, 252 Wis. 2d 476, 642 N.W.2d 561. Under great weight review, we will uphold LIRC's interpretation and application of the misconduct standard if it is reasonable, even if this court could determine that an alternative interpretation is more reasonable. *See Ide v. LIRC*, 224 Wis. 2d 159, 167, 589 N.W.2d 363 (1999).

¶6 We conclude that LIRC reasonably determined that Paar's actions were misconduct. LIRC found that Paar violated federal law, and exposed Midas to a substantial financial penalty, by removing an air pollution reduction device, a catalytic converter, from a vehicle. Paar contends that the violation was not clear, because the truck was a mix of a 1975 body and a 1976 engine, and 1975 vehicles were not subject to the catalytic converter law. However, Paar never attempted to clarify whether the law applied, and he did not inform his supervisor of the issue before performing the work. Notwithstanding Paar's otherwise clean work history, LIRC could reasonably infer a deliberate illegal act, or a willful disregard

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

of its potential illegality, and could reasonably conclude that Paar's act constituted misconduct.

¶7 We also conclude that LIRC properly ordered Paar to reimburse the Unemployment Reserve Fund for the \$11,016 in benefits. LIRC is authorized to order reimbursement to the department unless payments were made as a result of "departmental error." WIS. STAT. § 108.22(8)(c)1. The statutes further provide that, if a determination of eligibility is subsequently amended, modified, or reversed on administrative or judicial review, "that action shall not be treated as establishing a departmental error." WIS. STAT. § 108.22(8)(c)2. Paar does not allege that "departmental error" within the meaning of the statute occurred. He does not present a reasonable contrary interpretation of the statutes. Instead, Paar essentially argues that the plain statutory scheme is inequitable because a recipient will often use the payments received to pay for living expenses and not have the money available for repayment if it is later determined that he or she was not entitled to the payments in the first place. However, this is a public policy argument, which must be directed to the legislature. *See VanCleve v. City of Marinette*, 2003 WI 2, ¶6, 258 Wis. 2d 80, 655 N.W.2d 113 ("[P]ublic policy considerations cannot trump unambiguous statutes.").

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

