COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2915 **Cir. Ct. No. 2010CV214**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MICHAEL W. KINNEY,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND SPEE DEE DELIVERY SERVICE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Michael W. Kinney appeals from an order of the circuit court affirming the Labor and Industry Review Commission's determination that Kinney voluntarily terminated his employment with Spee Dee

Delivery Service, Inc., and was therefore not entitled to unemployment insurance benefits. We affirm.

BACKGROUND

¶2 Kinney was employed as a route driver for Spee Dee Delivery for more than nine years. On July 2, 2009, Kinney was indefinitely suspended following his refusal to sign a written disciplinary form which pertained to an allegation that he had driven over a customer's lawn, causing damage. At that time, Kinney asked if his indefinite suspension meant that he was discharged. It is undisputed that Kinney was informed by his employer's human resource representative that he was not discharged, but that he nevertheless assumed that his indefinite suspension was the equivalent of being discharged from his job.

¶3 On July 3, 2009, Kinney applied for unemployment insurance benefits on the basis that he had been discharged from his employment. He then went on vacation from that date until July 6. When Kinney returned home from vacation, he listened to two voicemail messages from his employer that had been received on July 3, 2009. One message told him to report to work at 1:30 p.m. that day to discuss the situation. The other message told him to report to work on July 6, 2009, at his usual start time.

¶4 Kinney ignored both messages and, when his employer called later that morning to see why he had not come in, he informed his employer that he believed that he had been discharged. Kinney's employer responded that Kinney knew from his conversation on July 2, 2009, with the human resources representative that he had not been discharged and that if Kinney did not report to work, his employment would be terminated. Kinney did not report to work and Kinney's employer assumed that Kinney had thereby quit his job.

¶5 Upon its review of Kinney's application for unemployment benefits, the Department of Workforce Development determined that Kinney's employment had been suspended for one week and that Kinney was eligible for benefits for that week. The Department further determined that Kinney's employment was terminated for reasons unrelated to misconduct following his week-long suspension and that Kinney was also eligible for unemployment benefits following his termination.

¶6 An administrative law judge (ALJ) affirmed the Department's determination regarding Kinney's eligibility for benefits during his suspension, but reversed the Department's determination regarding Kinney's eligibility for benefits following his termination. The ALJ determined that Kinney had voluntarily terminated his employment within the meaning of WIS. STAT. § 108.4(7)(a) (2009-10)[1] and was therefore ineligible for benefits. The ALJ found that Kinney had been paid benefits in the amount of $5,808 to which he was not entitled and ordered Kinney to repay that amount.

¶7 Kinney petitioned LIRC for review. LIRC largely adopted the ALJ's factual findings and legal conclusions, with some modifications, and affirmed the ALJ's determination that Kinney was ineligible for benefits following his week-long suspension.

¶8 Kinney sought judicial review of LIRC's decision, and the circuit court affirmed. Kinney appeals.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

STANDARD OF REVIEW

¶9 In reviewing a LIRC decision, we review the agency's decision, not the decision of the circuit court. *See* ***Wisconsin Dept. of Revenue v. Menasha Corp.***, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. We uphold LIRC's findings of fact on appeal as long as they are supported by credible and substantial evidence. ***Applied Plastics, Inc. v. LIRC***, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). We will not substitute our judgment for LIRC's in considering the weight or credibility of the evidence on any finding of fact. WIS. STAT. § 102.23(6); ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989).

DISCUSSION

¶10 Kinney contends the circuit court erred in affirming LIRC's decision because: (1) certain factual findings by LIRC were not supported by credible and substantial evidence; (2) LIRC's conclusion that he voluntarily quit his employment was not reasonable; and (3) both the ALJ and LIRC violated Kinney's due process right by taking administrative notice of a departmental record under WIS. ADMIN. CODE § DWD 140.16(2) (July 2008). We address each argument in turn below.

A. Factual Findings

¶11 Kinney challenges two specific factual findings made by LIRC in its decision, which he claims were not supported by credible and substantial evidence.

¶12 LIRC found that Kinney "ignored both messages [left by his employer on June 3, 2009], and at 9:30 a.m. [on June 6] the employer telephoned

[Kinney] to ask why [Kinney] was not at work." Kinney asserts that the credible and substantial evidence does not support the finding that he ignored the messages left by Spee Dee Delivery. According to Kinney, the evidence supports a finding that he had not ignored the messages, but instead had gone on vacation based upon his understanding that he would not hear back from Spee Dee Delivery until a week after his suspension, when the human resources representative was scheduled to return from his own vacation. We disagree.

¶13 Kinney bases his argument entirely on a finding by LIRC that the Spee Dee Delivery human resource representative had informed Kinney that he would be out of town for the week following the date of Kinney's suspension. Kinney asserts that he reasonably relied upon his suspension being at least a week and therefore went on vacation with his wife. However, this does not explain why Kinney did not immediately call into Spee Dee Delivery to explain that situation to his manager when Kinney finally received the messages. Kinney asserts that he was confused by the calls and was thinking about what to do when his manager called "no more than 30 minutes after he received the messages," to see why he had not reported for work. However, LIRC was free to draw whatever weight and credibility determinations they chose from the testimony. *See* ***Ellis v. DOA***, 2011 WI App 67, ¶31 n.7, 333 Wis. 2d 228, 800 N.W.2d 6. LIRC found that "[t]he employee is found not to be credible." We accept LIRC's credibility determination. WIS. STAT. § 102.23(6).

¶14 Furthermore, LIRC found that when Kinney was asked why he had not reported to work on July 6, 2009, Kinney "replied that he thought he had been discharged," but that Spee Dee Delivery "responded that [Kinney] knew, from conversations on July 2, that [he] had not been discharged." This finding is supported by the finding that on July 2, Kinney "asked the employer if [his

suspension] meant he was discharged. He was told he was not discharged." These findings demonstrate that LIRC's conclusion that Kinney's claim that he did not return the calls promptly upon receiving them due to his confusion about his status was not credible was based upon substantial evidence.

¶15 Accordingly, without even delving into the voluminous testimony of both Kinney and his manager, we conclude that there was substantial evidence in support of LIRC's finding that Kinney ignored the two messages left by Spee Dee Delivery on July 3, 2009.

¶16 Kinney also challenged the finding by LIRC that Kinney "intentionally misconstrued the employer's statements [regarding his indefinite suspension] to constitute a discharge of employment." Kinney's challenge to this finding is really just a variation of his challenge to the finding discussed above. The same evidence supports both findings. Spee Dee Delivery asserted that Kinney repeatedly claimed that an indefinite suspension was the equivalent of dismissal, even claiming at one point to have been told that by a lawyer. Kinney denied having said that; however, LIRC found that "[t]his version of events is belied by [Kinney's] statement when filing his claim on July 3 that he had been discharged." LIRC weighed the evidence of the statement in his claim for benefits against his denial and found Kinney not to be credible. That is appropriate fact-finding and we will not upset it. WIS. STAT. § 102.23(6).

¶17 Kinney challenges no other findings, nor does he make a general challenge that the findings taken as a whole are not supported by credible and substantial evidence. Therefore, his challenge to the findings of fact must fail and we affirm LIRC on this issue.

B. The Conclusion that Kinney Voluntarily Quit was Reasonable

¶18 Kinney challenges LIRC's conclusion that Kinney voluntarily quit his employment with Spee Dee Delivery. LIRC based its conclusion in part on the finding that Kinney deliberately misconstrued his indefinite suspension as tantamount to discharge, after he had been directly told it was not, and then ignored two phone messages requesting him to return to work. LIRC concluded: "[t]his is conduct inconsistent with the continuation of the employment and, as such, a voluntary quit pursuant to WIS. STAT. § 108.04(7)(a)."

¶19 "When reviewing an agency's conclusions of law, we 'apply a sliding scale of deference that is contingent upon the level of [LIRC's] experience, technical competence, and specialized knowledge.'" ***M.M. Schranz Roofing, Inc. v. First Choice Temporary***, 2012 WI App 9, ¶7, 338 Wis. 2d 420, 809 N.W.2d 880 (citation omitted). There is no need to review the three levels of deference and the criteria governing how they are to be applied. Kinney asserts that we should apply the mid-level "due deference" standard. While LIRC asserts that "great weight deference" applies, we will assume without deciding that due deference applies, as the difference between due deference and great weight deference will have no effect on the resolution of this issue. "In affording 'due weight' deference to the agency's interpretation, we will not overturn a reasonable agency decision that comports with the purpose of the statute unless we determine that there is a more reasonable interpretation available." ***Id.***

¶20 Both parties agree that "[w]hen an employee shows that he intends to leave his employment and indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employee-employer relationship, it must be held ... that the employee intended and did leave his

employment voluntarily." ***Dentici v. Industrial Comm'n***, 264 Wis. 181, 186, 58 N.W.2d 717 (1953). LIRC's finding that Kinney voluntarily quit his job was a direct application of the standard enunciated in ***Dentici***.

¶21 LIRC's conclusion was driven by its findings, which we have already concluded, are supported by credible and substantial evidence. No more reasonable conclusion from those findings has been proposed, nor does one present itself to us independently. We therefore affirm LIRC's conclusion.

C. Administrative Notice of Department's Employment Record

¶22 Kinney argues that LIRC violated his right to procedural due process by taking administrative notice of his departmental record, specifically the date on which he first applied for unemployment compensation and the reason he gave for the termination of his employment. Kinney correctly points out that this information forms part of the evidentiary basis of LIRC's finding that he "intentionally misconstrued" his indefinite suspension as a termination of his employment.

¶23 However, the printout of the departmental record was not the only source of that information. Without looking at the printout, Kinney testified that he had indicated in his first claim for benefits that he had been discharged. The printout itself was thus, at most, cumulative. We conclude, therefore, that even assuming without deciding that the use of the departmental record was error, it was harmless error. ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467 (an error is harmless if there is no reasonable possibility that the error contributed to the outcome of the action.)

CONCLUSION

¶24 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.