COURT OF APPEALS DECISION DATED AND FILED

January 19, 2012

A. John Voelker
Acting 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. 2011AP837

Cir. Ct. No. 2010CV4826

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

MICHAEL MACNEIL,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND WASTE MANAGEMENT-MADISON,

DEFENDANTS-RESPONDENTS.

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

Before Vergeront, Lundsten and Sherman, JJ.

¶1 VERGERONT, J. Michael MacNeil's employment with Waste Management-Madison was terminated after MacNeil tested positive for marijuana metabolites in violation of Waste Management's employment policy. MacNeil appeals an order of the circuit court affirming the Labor and Industry Review Commission's (LIRC) decision that he is ineligible for unemployment insurance

benefits under WIS. STAT. § 108.04(5)[1] because he was discharged for misconduct connected with his work. We assume without deciding that due weight deference is appropriate and hold that LIRC's conclusion is reasonable and a contrary conclusion is not more reasonable. Accordingly, we affirm the circuit court order affirming LIRC's decision.

BACKGROUND

¶2 MacNeil worked as a laborer for Waste Management, a waste disposal and recycling corporation, for four and a half years. Waste Management has a "Drug and Alcohol Free Workplace" policy, which provides in part: "All employees will be subject to … random … drug and alcohol testing…. A positive drug/alcohol test result … will result in termination of employment…." MacNeil was required to submit to a random drug test and tested positive for marijuana. MacNeil admitted he consumed marijuana off-duty. Waste Management discharged MacNeil for testing positive for marijuana metabolites in violation of Waste Management's policy.

¶3 MacNeil filed a claim for unemployment benefits. His claim was denied on the ground that he had been terminated for misconduct connected with his work. MacNeil requested a hearing before the administrative law judge (ALJ). At the hearing MacNeil acknowledged that he was aware of the policy and had signed a statement saying he understood it.

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

¶4 The ALJ concluded that MacNeil had not committed misconduct, as defined by WIS. STAT. § 108.04(5), and reversed the initial denial of MacNeil's unemployment benefits. Specifically, the ALJ determined that MacNeil did not have notice that the policy prohibited off-duty drug use because the policy did not explicitly state that it did and because MacNeil did not know how long after marijuana use the marijuana metabolites could still be detected by a drug test. In addition, the ALJ concluded that Waste Management's employment policy did not identify how the prohibition of illegal drug use was related to MacNeil's employment duties.

¶5 Waste Management appealed to LIRC. LIRC reversed the ALJ's decision, stating:

> The employee tested positive for illegal substances and conceded off-duty drug use. While the employer's policy does not specify that off-duty drug use is prohibited, the commission has repeatedly held that where an employer policy provides for discharge based upon a positive drug test result, that policy is considered to effectively prohibit off-duty drug use. *See*, ***Dowling v. Walgreen Co. Illinois***, UI Hearing No. 05005192MD (LIRC March 3, 2006); ***Lyons v. Menominee Casino-Bingo-Hotel***, UI Hearing No. 05400675AP (LIRC August 10, 2005); ***Armstrong v. Emmpak Foods, Inc.***, UI Hearing No. 01605775MW (LIRC November 29, 2001). The employee understood the policy and was aware that a positive test would result in the termination of his employment. The employee's actions in violating the employer's known and reasonable drug policy evinced a willful and substantial disregard of the standards of behavior that the employer had a right to expect.

¶6 The circuit court affirmed LIRC, and MacNeil appeals.

DISCUSSION

¶7 MacNeil contends on appeal that LIRC failed to make any findings that Waste Management's off-duty drug policy is reasonably related to its business

interests and therefore LIRC erred in concluding that he was terminated for misconduct within the meaning of WIS. STAT. § 108.04(5). LIRC responds that the record is sufficient to support LIRC's conclusion of misconduct and LIRC did not need to make more specific findings than it did.

¶8 We review LIRC's decision and not the decision of the circuit court. ***Madison Gas & Elec. v. LIRC***, 2011 WI App 110, ¶7, 336 Wis. 2d 197, 802 N.W.2d 502 (citation omitted). We may set aside LIRC's order or award only upon the following grounds: (1) that LIRC acted without or in excess of its powers; (2) that the award was procured by fraud; or (3) that the findings of fact by LIRC do not support the order or award. WIS. STAT. § 102.23(1)(e).

¶9 In reviewing LIRC's decision, we defer to its findings of fact if they are supported by credible and substantial evidence. ***Princess House, Inc. v. LIRC***, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983). We have a duty to search the record to find credible evidence that supports the agency's findings. ***Mireles v. LIRC***, 2000 WI 96, ¶36, 237 Wis. 2d 69, 613 N.W.2d 875 (citation omitted).

¶10 Whether MacNeil's conduct constitutes "misconduct" under WIS. STAT. § 108.04(5) is a question of law. ***Bunker v. LIRC***, 2002 WI App 216, ¶25, 257 Wis. 2d 255, 650 N.W.2d 864. Generally, we review questions of law de novo. ***Id.*** However, when we review an agency's interpretation or application of a statute that the agency is charged with enforcing, we may decide that deference to the agency's legal conclusion is appropriate. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). When we accord great weight deference, we uphold an agency's interpretation or application of a statute if it is reasonable and not contrary to the clear meaning of the statute, even if we conclude there is a more reasonable alternative. *See* ***id.*** at 287. When we accord

due weight deference, we uphold the agency's interpretation or application if it is reasonable and if we conclude an alternative is not more reasonable.[2] *See* ***id.***

¶11 The parties dispute whether great weight or due weight deference should be accorded to LIRC's conclusion of misconduct in this case. MacNeil contends that prior LIRC decisions are inconsistent on the requirements for proving misconduct based on a violation of an employment policy prohibiting the off-duty use of illegal drugs. Specifically, MacNeil asserts that prior decisions are inconsistent on whether the employer needs to prove and LIRC needs to find specific facts showing that the employer's policy prohibiting off-duty use of illegal drugs is reasonably related to a business interest. Because of this inconsistency, MacNeil asserts, we should accord only due weight deference to LIRC's conclusion. LIRC responds that its past decisions have consistently upheld as reasonable employment policies prohibiting off-duty drug use, and the level of detail on the employer's interest in having such policies does not make them inconsistent.

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[2] Great weight deference is appropriate when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in applying the statute. ***Patrick Cudahy Inc. v. LIRC***, 2006 WI App 211, ¶9, 296 Wis. 2d 751, 723 N.W.2d 756 (citation omitted).

Due weight deference is appropriate "when the agency is charged by the legislature with enforcement of the statute and has experience in the area, but has not developed expertise that necessarily places the agency in a better position than the court to interpret the statute. ***Milwaukee Symphony Orchestra, Inc. v. DOR***, 2010 WI 33, ¶36, 324 Wis. 2d 68, 781 N.W.2d 674.

We give no deference to an agency's legal conclusions when any of the following conditions are met: (1) the issue presents a matter of first impression; (2) the agency has no experience or expertise relevant to the legal issue presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance. ***Id.***, ¶37.

¶12 We will assume without deciding that LIRC's conclusion that MacNeil engaged in misconduct is entitled to due weight, not great weight deference. Applying this standard, we affirm LIRC's decision because we conclude that a contrary conclusion is not more reasonable.

¶13 WISCONSIN STAT. § 108.04(5) provides that "an employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits" until a specified period of time has passed since the discharge and the employee earns a statutorily specified amount of wages. "Misconduct" is not defined by the statute. However, in ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 259-60, 296 N.W. 636 (1941), the supreme court adopted the following definition:

> [T]he intended meaning of the term "misconduct," as used in 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 employer's interests or of the employee's duties and obligations to his employer.

¶14 In ***Gregory v. Anderson***, 14 Wis. 2d 130, 137, 109 N.W.2d 675 (1961), the supreme court held that, in order for violation of an employer's policy to constitute misconduct under WIS. STAT. § 108.04(5), the policy must be reasonable. In order for a policy that relates to an employee's off-duty conduct to be reasonable, "it must bear a reasonable relationship to the employer's interests." ***Id.*** The parties here agree that Waste Management's policy effectively prohibits off-duty use of illegal drugs. Accordingly, under ***Gregory***, in order for Waste Management's policy to be reasonable, it must bear a reasonable relationship to Waste Management's business interests. *See* ***id.***

¶15 In its decision LIRC found that Waste Management's policy was a "reasonable drug policy" but did not explain why. In light of ***Gregory***, we infer that, by finding that Waste Management's drug policy is reasonable, LIRC was implicitly finding that the policy is reasonably related to Waste Management's business interest. We conclude that Waste Management's policy itself supports this finding.

¶16 Waste Management's "Drug and Alcohol Free Workplace" policy is contained in the section of its employee handbook entitled "Safe Work Environment." The introductory portion of this section states that "WM is committed to providing a safe, healthy and professional work environment." The complete first paragraph of the "Drug and Alcohol Free Workplace" policy provides as follows:

> WM is committed to maintaining a workplace that is free from the influence of drug and alcohol abuse. No person may use, sell, make, handle, purchase, transfer, possess, consume, inhale, transport, or otherwise be involved with drugs and alcohol while on WM property, while performing services for WM or in a WM vehicle. "Drugs and alcohol" include: controlled substances, illegal drugs, legal drugs illegally used (not taken as directed by the employee's physician), intoxicants, drug paraphernalia, and alcohol. In addition, the presence of any illegal drugs or drugs illegally used in any employee's system is prohibited.

¶17 Given the terms of Waste Management's policy, we understand the implicit rationale underlying LIRC's finding that Waste Management's policy is reasonable (that is, reasonably related to Waste Management's business interests) to be that Waste Management has a business interest in having all its employees free from illegal drugs in their systems when they are at work. This is a reasonable determination. It is reasonable to decide that a workplace where employees do not have illegal drugs in their systems will be a safer and healthier

workplace and that an employer has an interest in a safe and healthy workplace. It is also reasonable to decide—as implicitly LIRC did—that random testing is a reasonable means of attempting to achieve these legitimate goals.[3]

¶18 When, as found by LIRC and supported by the evidence here, the employee knows of the employer policy on illegal drugs, knows there will be random tests, and understands that a positive test will result in termination of his or her employment, it is reasonable to conclude, as LIRC did here, that MacNeil's conduct shows a willful and substantial disregard of the standards of behavior his employer has a right to expect. *See* ***Boynton Cab***, 237 Wis. at 259-60.

¶19 There may be other reasonable ways to interpret and apply "misconduct" as defined in ***Boynton Cab*** and ***Gregory***. It may be reasonable, as MacNeil may be suggesting, to require a showing by the employer that the particular employee has a job that makes safety a concern—such as driving vehicles or working around machinery. It may be reasonable to require a showing that the employee who tests positive has sufficient illegal drugs in his or her system to impair job performance. However, we are convinced that such alternative approaches are not more reasonable than that taken by LIRC in this

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[3] The circuit court concluded that a different paragraph of the "Drug and Alcohol Free Workplace" policy provides a reasonable basis for inferring that job performance and safety are two employer interests that underlie the adoption of the policy. MacNeil contends that the other paragraph relied upon by the circuit court relates only to legal use of prescription drugs, not illegal drug use. According to MacNeil, if that other paragraph is interpreted to apply to illegal drugs, then Waste Management's policy on the use of illegal drugs is unclear and he did not have adequate notice of the consequences of the off-duty use of illegal drugs. As already noted, we review the decision of LIRC, not that of the circuit court. ***Madison Gas & Elec. v. LIRC***, 2011 WI App 110, ¶7, 336 Wis. 2d 197, 802 N.W.2d 502. We do not rely on the paragraph the circuit court referred to as a basis for inferring Waste Management's interests and therefore we do not address this argument. MacNeil does not otherwise dispute LIRC's finding that he "understood the policy [on off-duty use of illegal drugs] and was aware that a positive test would result in the termination of his employment."

case. LIRC's approach has the advantage of not requiring employers to make specific factual showings for each employee of the degree of impairment resulting from the illegal drug use and the effect of that degree of impairment on the particular job duties of the employee. As LIRC has previously concluded in a decision cited by MacNeil in his brief, "[w]hile [it] may be true [that the existence of marijuana metabolites in an employee's system does not necessarily mean the employee is impaired], the employer has no reliable way to demonstrate impairment …. [Thus, the employer] has little choice but to use a test that can only determine whether a worker has used drugs in the recent past." ***Dillon v. WE Energies***, UI Hearing No. 08604257MW (LIRC Dec. 12, 2008).

¶20 MacNeil contends that LIRC must make specific findings of the employer's reasonable business interests in each case and did not do so here. MacNeil appears to agree that LIRC may base such findings on statements in the employer's policy. However, MacNeil asserts, because LIRC did not make any express findings on Waste Management's interests based on its policy, we should not search the policy in support of LIRC's determination that the policy is reasonable—that is, reasonably related to Waste Management's business interests.

¶21 While we acknowledge that LIRC's findings in this case are spare and more specific findings would be helpful, we do not agree that the absence of more specific findings entitles MacNeil to a reversal of LIRC's decision. As LIRC points out:

> A general finding by the Department implies all facts necessary to support it. A finding not explicitly made may be inferred from other properly made findings and from findings which the Department failed to make, if there is evidence (or inferences which can be drawn from the evidence) which would support such findings.

Valadzic v. Briggs & Stratton Corp., 92 Wis. 2d 583, 591, 286 N.W.2d 540 (1979) (citations omitted). Waste Management's employment policy on illegal drug use is part of the record and it supports LIRC's determination that the policy is reasonable—that is, has a reasonable relationship to Waste Management's business interests—even though LIRC did not make this particular finding. The specific policy on "Drug and Alcohol Free Workplace" and the section on "Safe Work Environment" in which it appears provide the evidentiary foundation for a reasonable inference that Waste Management has an interest in providing a safe and healthy workplace that is free from the influence of illegal drugs.

¶22 In summary we conclude that LIRC's decision that MacNeil was discharged for misconduct connected with his employment was a reasonable conclusion of law based on express or implied findings supported by the record, and there is not a more reasonable alternative to LIRC's legal conclusion.

CONCLUSION

¶23 We affirm the circuit court's order affirming LIRC's decision that MacNeil was discharged for misconduct.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.