COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0073 **Cir. Ct. No. 03-CV-274**

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

LAURIE M. MARCUKAITIS,

PLAINTIFF-RESPONDENT,

V.

STATE OF WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION

DEFENDANT-APPELLANT,

AND WAL-MART ASSOCIATES, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State of Wisconsin Labor and Industry Review Commission appeals a circuit court order reversing its determination that Laurie Marcukaitis was terminated from Wal-Mart for misconduct. The Commission

argues credible and substantial evidence supports its determination. The Commission further argues that if we reverse the circuit court's holding, Marcukaitis should be required to repay the unemployment benefits she received. We agree with the Commission on both issues and reverse the order.

BACKGROUND

¶2 Marcukaitis began working at Wal-Mart on June 28, 1999, starting in the jewelry department and as a cashier. On June 4, 2002, she received a verbal warning from the assistant store manager, Patrick Platta, for rudeness to customers. On June 10, she began working in Wal-Mart's in-store restaurant, Radio Grille. On June 26, she received a written warning for rudeness to customers and co-workers. The warning stated that if the behavior continued, the next level of corrective action would be termination.

¶3 On July 5, Marcukaitis was working with Cathy Peterson in the Grille. Peterson reported to Platta that Marcukaitis had a bad attitude and had stated she was going to shut the Grille down and go home. Platta called the store manager, Carrie Faulk, to tell her what Peterson reported. Falk told Platta that if Marcukaitis closed the Grille she should be terminated. Normally, the Grille closes at 8 p.m. and employees working there are to stay until the area is cleaned. However, at 6:30 p.m., Platta observed Marcukaitis put the chain across the Grille entrance to close it down. Platta stated he asked Marcukaitis why the Grille was closed and she responded, "Because it's closed. I am going home." Platta called Falk again to tell her what happened and Falk told him to terminate Marcukaitis. The termination was for "misconduct with coachings."

¶4 On July 31, a deputy from the Department of Workforce Development issued an initial determination that "the employee's discharge was

not for misconduct connected with her employment." The Department concluded that Marcukaitis was entitled to unemployment benefits. Wal-Mart appealed and a hearing was held before an administrative law judge on September 25. The ALJ reversed the initial determination and found Marcukaitis was discharged for misconduct within the meaning of WIS. STAT. § 108.04(5). The ALJ also found that Marcukaitis was required to repay $2,343 in unemployment benefits she had received because she was not entitled to them and the overpayment was not caused by "departmental error" within the meaning of WIS. STAT. §§ 108.02(10e) and 108.22(8).

¶5 Marcukaitis petitioned the Commission for review. The Commission affirmed and adopted the ALJ's decision. Marcukaitis then petitioned the circuit court for review of the Commission's decision. The court reversed the finding of misconduct and concluded Marcukaitis was entitled to unemployment benefits. The Commission appeals.

STANDARD OF REVIEW

¶6 We review the decisions of an administrative agency, not those of the trial court. ***WPSC v. PSC***, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). We may set aside a commission decision only upon the following grounds: (1) when the commission acted without or in excess of its powers; (2) the commission's order or award was procured by fraud; or (3) its findings of fact do not support the order or award. *See* WIS. STAT. § 102.23(1)(e). The standards of review of a commission's decision differ depending upon whether the issue under review is a question of fact or one of law. ***United Way of Greater Milw., Inc. v. DILHR***, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981).

¶7 An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). We may not substitute our judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983), *overruled on other grounds by* WIS. STAT. § 108.02(15)(k)16. This court's role is to search the record to locate credible evidence, which supports the commission's determination, rather than weighing the evidence opposed to it. *See* ***Kannenberg v. LIRC***, 213 Wis. 2d 373, 384, 571 N.W.2d 165 (Ct. App. 1997). Where more than one reasonable inference may be drawn from the evidence, the drawing of one such inference by the commission is an act of fact-finding and the inference so derived is conclusive on the court. ***Bernhardt v. LIRC***, 207 Wis. 2d 292, 301-02, 558 N.W.2d 874 (Ct. App. 1996).

¶8 When we review a commission's conclusions of law, we are not bound by its decision, ***DILHR v. LIRC***, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990), but we examine it in terms of the degrees of deference—great weight, due weight or no deference at all. ***Jicha v. DILHR***, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992). Great weight deference is appropriate if the court determines that: (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. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995).

¶9 Whether the facts of this case fulfill the legal standard of misconduct under WIS. STAT. § 108.04(5) presents a question of law. ***Milwaukee***

Transformer Co. v. Industrial Comm'n, 22 Wis. 2d 502, 510, 126 N.W.2d 6 (1964). The commission is charged with administering § 108.04(5). The commission's interpretation and application of the misconduct statute is of a longstanding duration. *See* ***Charette v. LIRC***, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995). As a result of this experience, the commission has developed an expertise in applying the statute to a variety of fact situations, ***Lopez v. LIRC***, 2002 WI App 63, ¶13, 252 Wis. 2d 476, 642 N.W.2d 561, which promotes uniformity and consistency in its application. Because LIRC's actions comport with the highest degree of deference, we apply the great weight standard of review.

¶10 When applying the great weight standard, this court will uphold the commission's reasonable interpretation that is not contrary to the clear meaning of the statute, 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).

DISCUSSION

¶11 We first address whether credible and substantial evidence supports the Commission's findings of fact. The credibility of the witnesses, Platta and Marcukaitis, was the decisive factor in the Commission's fact-finding. Platta testified that the Grille normally closes at 8 p.m., and that he saw Marcukaitis close the Grille at 6:30 p.m.. He stated that Peterson told him that Marcukaitis said she was going to close early. Further, Platta stated that when he asked Marcukaitis why the Grille was closed, she responded, "Because it's closed. I am going home." Marcukaitis also testified that she knew the Grille was to remain

open until 8 p.m. However, she stated that she never told Platta she closed the Grille but instead that Peterson closed it.

¶12 Marcukaitis argues the Commission's findings of fact are not supported by credible and substantial evidence. For example, she maintains that Platta did not actually see her put the chain across the Grille, contrary to Platta's testimony. Therefore, she argues that the Commission could not reasonably have found Platta's testimony credible.

¶13 However, it is the Commission that evaluates the weight and credibility of evidence. ***Currie v. DILHR***, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). The Commission accepted Platta's description of the events and rejected Marcukaitis'. From Platta's testimony the Commission determined that Marcukaitis was the one who closed the Grille early. We may not substitute our judgment for that of the Commission. ***Princess House, Inc.***, 111 Wis. 2d at 54.

¶14 We next must determine whether the facts support the Commission's conclusion that Marcukaitis' conduct was misconduct. Under WIS. STAT. § 108.04(5), an employee who is terminated "for misconduct connected with the employee's work" may not receive unemployment benefits. Although the statute does not define misconduct, our supreme court has defined it as

> 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 of 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. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary

> negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct."

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-260, 296 N.W. 636 (1941).

¶15 The Commission adopted the ALJ's opinion, which stated:

> [Marcukaitis'] actions in closing the restaurant early and without permission demonstrated the willful and substantial disregard of the employer's interests and of the standards of conduct the employer had a right to expect of her necessary to rise to the level of misconduct under the Boynton Cab standard.

There was evidence that Marcukaitis had received warnings about her attitude and rudeness. Further, as we have noted, the Commission found that Marcukaitis closed the Grille without authorization. Marcukaitis testified that she was aware that the Grille was to stay open until 8 p.m. Yet, she closed it at 6:30 p.m. The Commission concluded that closing early showed disregard for Wal-Mart's interests because it potentially would have affected profits as well as inconvenienced customers and co-workers who would have chosen to purchase food at the Grille between 6:30 and 8 p.m.

¶16 Marcukaitis argues that the Commission ignored the fact that Wal-Mart had the burden of proving that she was terminated for misconduct. In the absence of more evidence of misconduct, other than merely Platta's testimony, Marcukaitis argues the Commission should have given deference to her position. Because it did not, Marcukaitis argues the Commission failed to apply the correct burden of proof and thus acted without or in excess of its powers. However, Marcukaitis's argument really goes to the issue of credibility, not burden of proof. The Commission concluded that Platta's testimony was credible. Therefore, the testimony fulfilled Wal-Mart's burden of proving misconduct. We will not substitute our judgment for that of the Commission regarding this credibility

determination. *See* ***Princess House, Inc.***, 111 Wis. 2d at 54. We therefore conclude the Commission did not disregard the applicable burden of proof.

¶17 Further, we conclude that the Commission's interpretation was reasonable. A retail employer expects its employees to keep the store open until its regular closing time. For Marcukaitis unilaterally to decide to close early is an intentional and substantial disregard of Wal-Mart's interests, as noted by the Commission. Her actions showed a deliberate violation of Wal-Mart's standards of behavior.

¶18 Our conclusion reversing the circuit court's decision regarding misconduct means Marcukaitis was ineligible to receive unemployment benefits. We therefore must determine whether she is required to pay back the $2,343 she received in unemployment benefits.

¶19 Generally, a claimant who erroneously received unemployment benefits must repay them. WIS. STAT. § 108.22(8)(a). However, when an overpayment of benefits results from "departmental error," repayment may be waived. WIS. STAT. § 108.02(10e). "Departmental error" is defined as either: "(a) A mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, whether by commission or omission; or (b) Misinformation provided to a claimant by the department, on which the claimant relied." ***Id.*** However, "If a determination or decision issued under s. 108.09 is amended, modified or reversed by an appeal tribunal, the commission or any court, that action shall not be treated as establishing a departmental error for purposes of subd. 1.a." WIS. STAT. § 108.22(8)(c)2.

¶20 The Commission argues that there was no departmental error because the circuit court merely reversed its determination, which under WIS.

STAT. § 108.22(8)(c)2 does not constitute "departmental error." Thus, it maintains there can be no waiver of overpayment of benefits under WIS. STAT. § 108.02(10e). We agree.

¶21 Marcukaitis argues that repayment should be waived "in the greater interests of the burdened employee as a matter of law." However, waiver only applies when there has been "departmental error." WISCONSIN STAT. § 108.02(10e) unambiguously states that reversal of a commission's decision by the circuit court does not constitute "departmental error." Repayment of benefits cannot be waived in this case because there was no "departmental error" but only a reversal of the commission's decision. Further, Marcukaitis' arguments against repayment are primarily based on public policy concerns. However, "it is the province of the legislature, not the courts, to determine public policy." ***Flynn v. DOA***, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998). Therefore, we reject her arguments.

By the Court.—Order reversed.

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