

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2152

Cir. Ct. No. 2006CV7

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FARM & FLEET OF MONROE, INC.,

PLAINTIFF-RESPONDENT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

JAY D. ALBRECHT,

DEFENDANT.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 VERGERONT, J. The Labor and Industry Review Commission (LIRC) determined that Jay Albrecht was eligible for unemployment

compensation benefits after Farm & Fleet of Monroe, Inc. terminated him for absence from work while he was incarcerated. LIRC also denied Farm & Fleet's motion for reconsideration. The circuit court reversed LIRC's decision and LIRC appeals. We conclude that LIRC's decision that Farm & Fleet did not establish that Albrecht's absence constituted misconduct was supported by substantial and credible evidence and was based on correct conclusions of law. We also conclude that the issue of reconsideration of that decision should be remanded to LIRC. We therefore reverse the circuit court's order and remand to the circuit court with instructions for it to enter an order consistent with this opinion.

BACKGROUND

¶2 Albrecht worked for three years as a tire mechanic for Farm & Fleet.¹ Farm & Fleet had an attendance policy providing that "if an employee is absent for a period of three (3) consecutive working days ... it will be considered that they [sic] have voluntarily terminated their employment." Albrecht missed three days of work because he was arrested and incarcerated. When he was first arrested, he contacted his father who relayed the message to Farm & Fleet that he would be absent from work until he was released from custody. Albrecht was released at midday on the fourth day; he contacted Farm & Fleet as soon as he was released and was told that his employment was terminated.

¶3 Albrecht applied for unemployment compensation benefits under WIS. STAT. ch. 108.² Generally, an employee is ineligible for these benefits if the

¹ The facts in this paragraph are taken from the decision of the administrative law judge (ALJ) and were adopted by LIRC; they are not disputed.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

employee “is terminated ... for misconduct connected with the employee’s work.” WIS. STAT. § 108.04(5).³ The Department of Workforce Development (DWD) awarded unemployment compensation benefits to Albrecht upon determining that his termination was not voluntary and that Farm & Fleet “did not provide detailed information to establish that he was discharged for misconduct related to his employment.”

¶4 Farm & Fleet appealed that determination and a hearing was held before an administrative law judge (ALJ). Farm & Fleet’s position was that it had terminated Albrecht because he had breached the absence policy by being absent for three days and it presented a witness to testify to these facts. According to Albrecht’s testimony, he was arrested and incarcerated when he “was returning home to discuss an altercation that had happened between me and my father” and his vehicle collided with a police car. He described the collision as “the policeman struck me just as much as I struck him.” He acknowledged that he argued with the officer and was very upset because the officer rammed the left side of his vehicle; because he was upset, he testified, “they tasered” him. Albrecht testified that, “as far as [he’d] been told,” he was facing three misdemeanors and three felonies; he later testified that “the district attorney said

³ WISCONSIN STAT. § 108.04(5) provides in part:

(5) Discharge for misconduct. Unless sub. (5g) applies, an employee whose work is terminated by an employing unit for misconduct 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 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....

that he's going to drop the felonies and go after those," but "I'm told nothing." Other than questioning Albrecht, Farm & Fleet presented no evidence regarding the nature of the conduct that had resulted in Albrecht's incarceration.

¶5 The ALJ affirmed DWD's initial decision. The ALJ's decision applied case law defining "misconduct" and stated that, in deciding whether absenteeism constitutes "misconduct," "an employee's intent and attitude are the most important factor." The ALJ concluded that a violation of Farm & Fleet's absence policy, in itself, does not constitute misconduct because the policy does not include any consideration for valid reasons or notice to the employer, and "misconduct" within the meaning of unemployment law requires fault on the employee's part. The ALJ noted that Albrecht had his father contact Farm & Fleet to explain why he would not be at work and then called Farm & Fleet as soon as he was released. The ALJ concluded that the employer had not demonstrated that Albrecht was at fault for his absence.

¶6 Farm & Fleet appealed this decision to LIRC, arguing that Albrecht's "absence from work constitute[s] misconduct ... [because h]e wilfully committed acts causing his incarceration and his actions evinced a wanton disregard of his employer's interest." With its letter brief, Farm & Fleet attached a police report and a criminal complaint charging Albrecht with misdemeanor battery, disorderly conduct, and criminal damage to property, all allegedly arising from an altercation with his father; and second-degree reckless endangerment, battery of a peace officer, and felony criminal damage to property, all allegedly arising from Albrecht "ram[ming] head on into" a squad car.

¶7 LIRC agreed with the findings and conclusions of the ALJ, based on the evidence before the ALJ, and adopted those. 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 this to the attention of LIRC and LIRC will then “determine whether to reconsider its decision....”

¶8 Shortly thereafter Farm & Fleet requested reconsideration of LIRC’s decision on the ground that judgments of conviction on four misdemeanors had been entered against Albrecht and this showed the conduct causing his incarceration was culpable and in wanton disregard of Farm & Fleet’s interests. LIRC declined to reconsider. LIRC explained in a letter to Farm & Fleet that, while it had in the past set aside and reissued decisions when an employee had either pleaded guilty or been convicted after a trial of intentional behavior that resulted in an absence from work, the misdemeanor convictions against Albrecht were based on no-contest pleas. LIRC stated that its position was based on *Estate of Safran v. Unborn Children of Safran*, 102 Wis. 2d 79, 306 N.W.2d 27 (1981), which LIRC described as holding that “a criminal conviction based on a plea of no contest is generally not admissible in a subsequent civil action as evidence of the facts on which the conviction is based.”

¶9 Farm & Fleet appealed to the circuit court LIRC’s decision granting Albrecht unemployment benefits and LIRC’s decision denying reconsideration. The circuit court reversed. The court concluded “the record was clear that Albrecht was incarcerated as a result of his intentional criminal conduct” and LIRC’s findings of fact “are not supported by credible and substantial evidence.”

Because of this conclusion, the circuit court did not reach the issue of LIRC's denial of Farm & Fleet's motion for reconsideration.

DISCUSSION

¶10 On an appeal from a circuit court order affirming or reversing the decision of an administrative agency, we review the decision of the agency, not that of the circuit court. *Bunker v. LIRC*, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864. Therefore, we focus on Farm & Fleet's claims that LIRC erred, not on LIRC's claims that the circuit court erred. Farm & Fleet contends that LIRC's determination that Farm & Fleet did not establish misconduct is not supported by substantial and credible evidence and that LIRC erroneously exercised its discretion in declining to reconsider its decision.

¶11 Our scope of review differs depending on whether we are reviewing LIRC's findings of fact, or its conclusions of law, or its discretionary decisions. We affirm LIRC's findings of fact if they are supported by credible and substantial evidence in the record. *Id.*, ¶30. The weight and credibility of the evidence are for LIRC to evaluate, not the court, *id.*, and we accept the reasonable inferences that LIRC draws from the evidence. *Milwaukee Transformer Co., Inc. v. Industrial Comm'n*, 22 Wis. 2d 502, 510, 126 N.W.2d 6 (1964). We review issues of law de novo, but we may give varying degrees of deference to an agency's interpretation of a statute. *Bunker*, ¶25. Whether an employee's conduct, as found by LIRC, constitutes misconduct within the meaning of the statute is a question of law, and we give great weight deference to LIRC's determination on this issue. *Id.*, ¶26. Great weight deference means that we 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, 539 N.W.2d 98 (1995). Finally, when a discretionary decision of LIRC is appealed, “[a court] shall not substitute its judgment for that of the agency,” WIS. STAT. § 227.57(8),⁴ but must affirm if the agency applied the correct law to the relevant facts and reached a reasonable result. *Verhaagh v. LIRC*, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996).

I. LIRC’s Decision on Misconduct

¶12 We first address LIRC’s decision that Farm & Fleet did not establish at the hearing that it terminated Albrecht for misconduct connected with his employment. Misconduct within the meaning of WIS. STAT. § 108.04(5)

is limited to conduct evincing such wilful and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of [its] 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 or her] employer.

⁴ WISCONSIN STAT. § 227.57(8) provides:

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636 (1941). “The law presumes that an employee is not disqualified from unemployment compensation, and places on the employer the burden of introducing credible evidence sufficient to convince [the agency] that some disqualifying provision—here ‘misconduct’—should bar the employee’s claim.” *Consolidated Const. Co., Inc. v. Casey*, 71 Wis. 2d 811, 820, 238 N.W.2d 758 (1976). A violation of a work rule may justify discharge but may not amount to “misconduct” within the meaning of the statute, *id.* at 819-20, and this is true of absence policies. *Milwaukee Transformer Co.*, 22 Wis. 2d at 509-13 (affirming a LIRC decision that an employee did not engage in misconduct when she did not report during an absence as required by the employer’s rule).

¶13 In this case, both LIRC and Farm & Fleet agree that LIRC has in past decisions concluded that absences due to incarceration are or may be misconduct in connection with employment “if the employe[e] willfully and intentionally started the chain of events which led to his [or her] being unavailable for work.” *Hobson v. Milwaukee Public Schools*, UI Dec. Hearing NO. 03610025MW (LIRC May 28, 2004); citing *Schweikert v. Ganton Technologies, Inc.*, UI Dec. Hearing NO. 91-606281RC (LIRC March 24, 1992) (available on LIRC’s website at www.dwd.state.wi.us/lirc). This is true even if the employee has notified the employer. *See id.* The rationale for this standard is that:

An employee who wilfully and intentionally starts the chain of events which created circumstances making him unavailable is certainly the defaulting actor. In determining the question of availability, the end result must be directly related to the beginning of the course of conduct. In this and in similar cases he is acting inconsistently with the continuation of the employer-employee relationship. It would be contrary to the policy and purpose of the legislation providing for unemployment compensation to cast that burden of a self-created disadvantage of and by the employee onto the shoulders of the employer, by leaving

him with work to be done and no available employee to do it.

Schweikert, UI Hearing NO. 91-606281 (LIRC Mar. 24, 1992) (citation omitted).

¶14 Farm & Fleet implicitly accepts the legal standard LIRC has employed in past decisions as a correct construction of the phrase “misconduct in connection with employment.” Farm & Fleet contends the only substantial and credible evidence in the record establishes that Albrecht was incarcerated because of intentional criminal conduct and therefore it has met that legal standard. In analyzing this issue, we confine ourselves to the evidence before the ALJ; Farm & Fleet’s subsequent submissions are relevant to its motion to reconsider, but not to whether the evidence presented at the hearing established misconduct.

¶15 Farm & Fleet contends that Albrecht’s testimony that he had an altercation with his father, collided with a police car, got so upset that he had to be tasered, and was told he faced six charges conclusively establishes that he was incarcerated because of his intentional criminal conduct. However, as LIRC points out, Albrecht’s description of the collision with the police car does not indicate that he intentionally collided with the police car; being upset with police officers is not necessarily criminal conduct; and Albrecht provided no details on his altercation with his father. Because there was no other evidence on what occurred, LIRC could reasonably decide to credit Albrecht’s view of events and could reasonably decide that his account did not establish intentional criminal conduct. With respect to the status of the charges, Albrecht’s testimony was not clear and LIRC apparently drew the inference that all he knew was that he might be charged. This is a reasonable inference that LIRC was entitled to draw. There may be other reasonable inferences from Albrecht’s testimony, but we accept those drawn by LIRC as the fact-finder.

¶16 It appears that Farm & Fleet is also arguing that the arrest establishes that Albrecht was engaged in criminal conduct. Although Farm & Fleet’s argument on this point is phrased in terms of what the evidence shows, the challenge is more accurately described as a challenge to the legal standard LIRC employed. LIRC decided, in essence, that (in the context of an absence due to incarceration), when the evidence of the employee’s conduct itself does not establish intentional criminal conduct, evidence that the employee was arrested does not meet the employer’s burden of proving “misconduct” under the statute. Whether a party has satisfied its burden of proof presents a question of law, *Currie v. DIHLR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). As we have noted above, we give great weight deference to LIRC’s conclusions of law involving the construction and application of the statutory term “misconduct.” See *Bunker*, 257 Wis. 2d 255, ¶26.

¶17 A lawful arrest requires probable cause, which means that the arresting officer has sufficient knowledge to lead a reasonable officer to believe the person probably committed or was committing a crime; probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Young*, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729. Even if we were to apply a de novo standard of review, we would conclude that evidence of an arrest is not sufficient to establish that the person actually committed a crime.⁵

⁵ Farm & Fleet makes the same argument with respect to the charges. As we have stated above, LIRC could reasonably infer from Albrecht’s testimony that no charges had yet been filed. However, even if one were to infer from his testimony that a charge or charges had been filed, a charge would be insufficient as a matter of law to establish that he committed the crime charged. A proper charge in a criminal complaint must be based on a statement of facts or reasonable inferences from the facts that would lead a reasonable person to conclude that a crime was

(continued)

¶18 We conclude LIRC’s findings of fact were based on credible and substantial evidence and, based on LIRC’s findings, it correctly concluded the employer did not prove that Albrecht’s absence constituted misconduct within the meaning of the statute.

II. LIRC’s Decision on Reconsideration

¶19 Two statutory sections give LIRC the authority to set aside its decisions. Under WIS. STAT. § 108.09(6)(b), within twenty-eight days of its decision, LIRC “may, on its own motion, set aside its decision for further consideration....” Under para. (6)(c), within two years of its decision, LIRC “on its own motion, for reasons it deems sufficient, ... may set aside ... [its] decision ... upon grounds of mistake or newly discovered evidence....” Because in this case LIRC denied Farm & Fleet’s motion to reconsider within twenty-eight days of its decision, LIRC was not limited to the grounds specified in para. (6)(c). The use of the word “may” in para. (6)(b) means that whether to set aside its decision under this section is committed to LIRC’s discretion. See *Verhaagh*, 204 Wis. 2d at 160.

¶20 In this case, LIRC declined to reconsider based on Farm & Fleet’s submission of the judgment of conviction because of LIRC’s position that *Estate of Safran*, 102 Wis. 2d 79, held that “a criminal conviction based on a plea of no contest is generally not admissible in a subsequent civil action as evidence of the facts on which the conviction is based.” LIRC did not specifically address the

probably committed and the defendant was probably the culpable party; it does not establish that the party actually committed the crime. See *State v. Olson*, 75 Wis. 2d 575, 581, 250 N.W.2d 12 (1977).

criminal complaint and police report that Farm & Fleet submitted with its appeal to LIRC.

¶21 On appeal, it appears that LIRC no longer takes the position that the type of plea is relevant to whether the judgment of conviction establishes criminal conduct. LIRC states:

Partly as a result of research done in response to the employer's appeal of this case, in future cases with procedural circumstances similar to the employee's, the commission will no longer place particular emphasis on what type of plea was made by an employee charged with criminal conduct. This is because a criminal conviction, whether based on a plea of no contest, a guilty plea, or a guilty verdict, is not admissible in a civil case as evidence of the facts upon which such plea or verdict was based. *In Matter of Estate of Safran*, 102 Wis. 2d 79, 94-95, 306 N.W.2d 27 (1981).⁶

(Footnote added.) Instead, for the first time on appeal, LIRC contends “there were a number of good reasons not to reopen the decision” besides the no-contest plea. LIRC now provides the following reasons: Albrecht was absent only for three days, gave notice, and Farm & Fleet discharged him without any indication it had considered the reason for his absence; Farm & Fleet's own policy takes into

⁶ Farm & Fleet agrees with LIRC that the reason LIRC gave for denying reconsideration is based on incorrect law. Farm & Fleet cites WIS. STAT. § 108.101(4), which provides:

(4) No finding of fact or law, determination, decision or judgment in any action or administrative or judicial proceeding in law or equity not arising under this chapter made with respect to the rights or liabilities of a party to an action or proceeding under this chapter is binding in an action or proceeding under this chapter.

Because it is unnecessary on this appeal, we do not decide the relevance or effect of a judgment of conviction, whatever the basis, on the issue of misconduct under WIS. STAT. § 108.04(5).

account whether notice was given;⁷ according to the police reports Farm & Fleet submitted, Albrecht's family members believed Albrecht's behavior was the result of a psychological problem; and Farm & Fleet should have presented any evidence on Albrecht's conduct at the administrative hearing, asking for a postponement if necessary.

¶22 When we review a discretionary decision, we look at the decision the agency made to determine if the agency applied the correct law to the relevant facts and reached a reasonable result. *See Verhaagh*, 204 Wis. 2d at 160. Here, LIRC is asking us to affirm a discretionary decision for reasons that, according to the record, were not considered by LIRC when making that decision. We decline to do this. LIRC's counsel's argument in a brief is not the equivalent of the agency exercising its discretion. In light of the fact that LIRC is not relying on the reason it initially gave for its exercise of discretion, we conclude the appropriate disposition is to remand to LIRC to permit it to exercise its discretion on whether to set aside its decision that Farm & Fleet did not establish misconduct.

⁷ Farm & Fleet's policy provides:

If an employee is absent for a period of three (3) consecutive working days *or* leaves work before the specified time without notifying their immediate supervisor, it will be considered that they have voluntarily terminated their employment.

LIRC's position in its appellate brief is that the phrase "without notifying ..." modifies *both* absence for three consecutive days *and* leaving work before the specified time, while Farm & Fleet argues that it modifies *only* the "leaving work" phrase. We do not resolve this dispute because it was not an issue either raised or decided by LIRC in the administrative decisions we are reviewing.

CONCLUSION

¶23 We conclude that LIRC's decision that Farm & Fleet did not establish that Albrecht's absence constituted misconduct was supported by substantial and credible evidence and was based on correct conclusions of law. We also conclude that the issue of reconsideration of that decision should be remanded to LIRC. We therefore reverse the circuit court's order and remand to the circuit court. The circuit court is directed to issue an order affirming LIRC's decision that Farm & Fleet did not establish misconduct and remand to LIRC the issue of its reconsideration of that decision.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

