COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP263-FT **Cir. Ct. No. 2008CV956**

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

BERNICE D. REINL,

PETITIONER-APPELLANT,

V.

AFFINITY HEALTH SYSTEM AND LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bernice Reinl appeals[1] an order affirming a Labor and Industry Review Commission decision regarding her claim for unemployment compensation. Reinl argues LIRC erred by concluding she was discharged for misconduct connected with her employment. We disagree and affirm the order.

¶2 Reinl was employed by Affinity Health System as a customer call center representative. In June 2006, the call center began taking incoming emergency/trauma calls, which could involve medical emergencies, child abductions, fires, or bomb threats, among other things. These "code phone calls" were handled by two staff members: one would take the call and then use Affinity's intercom system to notify the appropriate physician or emergency response team; the other would notify those personnel by their pagers in the event they were not in a facility or part of the hospital where they could hear the "overhead page." Because the call center sometimes had only two workers on duty, all call center employees had to be competent in taking code phone calls.

¶3 Before the code phone system became operational, call center staff received training on the system and received ongoing training after the system became operational. Reinl refused to answer the calls as frequently as her co-workers and also refused additional training. By February 2007, Affinity became concerned by what it characterized as an unacceptable level of misdirected calls by Reinl. In December, after Reinl mishandled a call, her supervisor asked her to temporarily move her work station closer to the code phone.[2] Reinl refused. She

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Reinl's work station was at the furthest point in the call center from the code phone.

also refused the supervisor's request to go to a conference room with the supervisor. Reinl then refused the supervisor's second request that they go to a conference room and said the supervisor could do whatever the supervisor wanted, including firing her, but she was not moving her work station.

¶4 Reinl was suspended for three shifts for insubordination. She returned to work on December 24. On that day, Reinl again stated she would not move her work station. The supervisor discussed the matter with the human resources manager, and they met with Reinl on December 26. The manager explained why they were meeting and asked Reinl if she would move her work station. The manager again explained the reasons for the temporary move and indicated they wanted to assist in her training and comfort level answering the code phone. Reinl again refused to move her station. The manager told Reinl her insubordination left no choice but termination and Reinl responded, "do what you gotta do." Reinl refused at least five times during the hour-long meeting to move her work station. Reinl was discharged for continued insubordination.

¶5 Following her application for unemployment compensation, the department of workforce development issued an initial determination, which concluded Reinl had been discharged for misconduct connected with her employment within the meaning of WIS. STAT. § 108.04(5). Reinl filed a request for hearing, and the determination of misconduct was affirmed by the appeal tribunal. LIRC then issued a decision affirming and adopting as its own the appeal tribunal decision. Reinl then appealed to the circuit court which issued an order upholding LIRC's decision. Reinl now appeals.

¶6 In this case, we review LIRC's decision, not that of the circuit court or the administrative law judge. ***Lopez v. LIRC***, 2002 WI App 63, ¶9, 252 Wis. 2d

476, 642 N.W.2d 561. We may not substitute our judgment for that of LIRC as to the weight and 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). Findings of fact made by LIRC acting within its powers shall, in the absence of fraud, be conclusive. *See* WIS. STAT. § 102.23(1)(a). The reviewing court's role is to search the record for evidence that supports LIRC's decision. ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶7 The longstanding definition of misconduct in the unemployment compensation context is conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of the employee. *See* ***Milwaukee Transformer Co. v. Industrial Comm'n***, 22 Wis. 2d 502, 508, 511-12, 126 N.W.2d 6 (1964). Whether Reinl's actions constitute misconduct under WIS. STAT. § 108.04(5) is a conclusion of law. *See* ***Charette v. LIRC***, 196 Wis. 2d 956, 959, 540 N.W.2d 239 (Ct. App. 1995). One of the "intertwined" factual determinations that underlies a finding of misconduct is the employee's intent. ***Holy Name School v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982).

¶8 We give great weight deference to LIRC's decision as to whether an employee's conduct amounts to misconduct.[3] ***Lopez***, 252 Wis. 2d 476, ¶16. We will uphold LIRC's interpretation and application of the misconduct standard if it is reasonable, even if we could determine that an alternative interpretation is more reasonable. *See* ***Ide v. LIRC***, 224 Wis. 2d 159, 167, 589 N.W.2d 363 (1999). The burden of proof to show the agency's interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 661-63, 539 N.W.2d 98 (1995). An interpretation is unreasonable if it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without rational basis. ***Id.***

¶9 We conclude LIRC reasonably concluded Reinl's deliberate violations and disregard of standards of behavior which Affinity had a right to expect of its employees constituted misconduct. Reinl was not taking her share of the code phone calls and was making errors she should not have made. These matters could have been resolved by moving her work station closer to the code

[3] Reinl argues the standard of review is de novo, but she misunderstands the proper standard of review analysis. Reinl claims she feared making a code phone error and causing harm to someone. She contends this is a case of first impression because LIRC has no experience deciding cases involving employee actions taken out of fear. LIRC responds that whether a question is one of first impression depends not on whether the agency has previously dealt with the specific type of situation involved but, rather, upon whether the agency has developed expertise through similar general determinations about the statute. ***School Dist. of Drummond v. WERC***, 120 Wis. 2d 1, 7, 352 N.W.2d 662 (Ct. App. 1984). LIRC also responds that an agency's expertise in construing a statute entitles it to great deference even though it has not previously addressed the specific fact situation at issue. *See* ***Lifedata Med. Servs. v. LIRC***, 192 Wis. 2d 663, 671-72, 531 N.W.2d 451 (Ct. App. 1995); ***Susie Q Fish Co. v. DOR***, 148 Wis. 2d 862, 868-69, 436 N.W.2d 914 (Ct. App. 1989). In her reply brief, Reinl fails to refute LIRC's responses in this regard and we conclude she has therefore conceded the arguments. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We agree with LIRC's analysis in any event.

phones in order to provide her more opportunities to take code phone calls. There is no dispute Reinl refused multiple times to move her work station closer to the code phone. Her actions were reasonably characterized as insubordinate. *See*, *e.g.*, ***Millar v. Joint Sch. Dist.***, 2 Wis. 2d 303, 313-15, 86 N.W.2d 455 (1957); ***Green v. Somers***, 163 Wis. 96, 99, 157 N.W. 529 (1916).

¶10 Reinl insists she was forced into becoming a 911 operator, a responsibility that was completely outside her usual duties. This argument is contrary to LIRC's findings that answering the phone was part of her duties and that she needed to become more efficient in answering the code phone system. These findings of fact are supported by the record and we defer to LIRC's assessment as to the weight and credibility of the evidence. *See* WIS. STAT. § 102.23(1)(a). Every employee in the call center was required to be proficient in the code phone system and received extensive training before it became operational and ongoing training once it was operational. Reinl's supervisor specifically told Reinl she understood Reinl's discomfort in answering the code phone, but indicated "we would all be there to help her and assist her." Several offers of assistance were made to Reinl, all of which were refused. Indeed, Reinl conceded at the hearing that moving her work station probably would have helped her and given her more experience in answering the code phone.

¶11 Reinl improperly relies upon a Minnesota case, ***Enz v. Holiday Inn North***, 388 N.W.2d 756 (Minn. Ct. App. 1986), where an assistant kitchen manager was asked to lead a portion of an employee training session. The court found the request to be "completely outside the scope of his usual duties." ***Id.*** at 758. This is distinguishable from the present case where, as mentioned, LIRC

specifically found Reinl's job was to answer phones and route the incoming matters appropriately.[4]

¶12 Affinity had a valid reason for requesting Reinl to move her work station and it reasonably believed if she were closer to the phone she would be able to answer the phone more often, providing her the opportunity to become more comfortable with the system. By contrast, Reinl did not sufficiently justify her continued refusals to move her work station. Her arguments to the contrary ignore the appropriate standards of review and take unwarranted umbrage with LIRC's findings and conclusions. LIRC did not err by concluding Reinl was discharged for misconduct connected with her employment.

By the Court.—Order affirmed.

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

[4] We note the Minnesota court of appeals distinguished ***Enz*** in ***McGowan v. Executive Express Transportation Enterprises, Inc.***, 411 N.W.2d 593 (Minn. Ct. App. 1987), *aff'd en banc*, 420 N.W.2d 592 (Minn. 1988). In that case, the employer's delivery driver refused to pick up a personal package for the president of the company and was discharged. The court upheld the agency's conclusion of misconduct, reasoning that McGowan was a delivery driver whose job was to pick up packages all over the area.