

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2003

Cornelia G. Clark
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. 03-1214
STATE OF WISCONSIN**

Cir. Ct. No. 02CV008936

**IN COURT OF APPEALS
DISTRICT I**

JESSIE DAVIS,

PLAINTIFF-APPELLANT,

v.

**KELCH CORPORATION AND LABOR &
INDUSTRY REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jessie Davis appeals *pro se* from an order dismissing her petition for review of a decision by the Labor & Industry Review Commission (LIRC), which concluded that she had been discharged for employment misconduct.

¶2 Although it is not altogether clear, Davis appears to challenge the factual basis for LIRC's decision, thereby leaving its ultimate conclusion bereft of any logical support. Because there is credible and substantial evidence to sustain LIRC's findings of fact which, in turn, support its legal conclusion of employee misconduct, we affirm.

BACKGROUND

¶3 Davis worked as a press operator on a production line for the Kelch Corporation of Menomonee Falls. On April 17, 2002, she was discharged from her job for alleged misconduct. She applied to the Department of Workforce Development (DWD) for unemployment benefits. Because it was determined that she had been discharged due to misconduct, initial benefits were denied. Davis filed a timely request for a hearing. Kelch claimed that Davis was guilty of misconduct for failure to follow work instructions and insubordination.

¶4 On June 19, 2002, a hearing was held before an Administrative Law Judge (ALJ). Davis testified on her own behalf and Debra Quast, first-shift supervisor, testified on behalf of Kelch. In affirming the DWD's determination, the ALJ made the following findings of fact. Davis had received several warnings for excessive scrap or poor workmanship during her employment. The warnings were documented in an April 27, 2002 letter to the DWD from a human resources assistant at Kelch. On April 15, 2002, Davis's supervisor observed her tossing good parts into a scrap bin, to make it look like she was keeping up with the production line. Quast had a counseling session with Davis, warning her that they would be monitoring her performance and that she was subject to further discipline, even discharge, if she did not improve her performance. Davis ignored Quast's questions while on the production line that day. On April 16, 2002,

Davis's supervisor again observed her throwing away good parts. Information submitted from Davis's doctor indicated that she was suffering from tendonitis in her wrist at the time. Davis did not indicate that discomfort in her wrist was the cause of the problem until after the April 15th counseling session was complete. She ignored her supervisor's questions when she was on the line that day. On April 17, 2002, the employer discharged her for insubordination (not following instructions), and for intentional destruction of company property (throwing out good parts).

¶5 Davis then filed a petition with LIRC to review the ALJ's decision. On August 21, 2002, LIRC issued a decision and memorandum opinion adopting the findings of fact of the ALJ and affirming the decision that Davis had been discharged for misconduct. Dissatisfied with the LIRC decision, Davis filed a petition for review under WIS. STAT. § 102.23 (2001-02).¹ The circuit court concluded that LIRC's findings of fact were supported by substantial credible evidence and affirmed the LIRC order. Davis now appeals.

DISCUSSION

Standard of Review

¶6 We review the decisions of an administrative agency, not those of the trial court. *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n*, 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

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

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 Milwaukee, 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). Credible evidence is that evidence which excludes speculation or conjecture. *See Bumpas v. DILHR*, 95 Wis. 2d 334, 343-44, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). 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). Because we conclude that the agency's findings of fact in this case are supported by credible and substantial evidence in the record, we are bound by them.

¶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 interpretation of the agency 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 the application of 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 the duty of administering WIS. STAT. §§ 108.04(5) and 108.09(6). 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 feels that an alternative interpretation is more reasonable. *See Ide v. LIRC*, 224 Wis. 2d 159, 167, 589 N.W.2d 363 (1999).

Analysis

¶11 For reasons to be stated, we conclude that the credible and substantial evidence contained in the record clearly demonstrates that LIRC's finding of misconduct in the circumstances of this case was reasonable and comports with the recognized meaning of WIS. STAT. § 108.04(5).

¶12 The general standard for determining whether an employee's course of conduct is misconduct, is whether such behavior reflects an "intentional and substantial disregard of the employer's interests or the employee's duties." *Milwaukee Transformer Co.*, 22 Wis. 2d at 511 (citation omitted).

¶13 The credibility of the witnesses was the decisive factor in this case. LIRC adopted the ALJ's findings and logically, by reasonable inference, the ALJ's credibility determinations. In arriving at the above-stated factual findings, the ALJ made the following observations:

The employee contended that her wrist had prohibited her from performing her production duties in an efficient manner on the days in question, and that her discharge was not for misconduct. However, the employee presented no medical evidence that indicated a medical restriction existed at the time that interfered with her production. Moreover, she did not state wrist pain as a reason for the problem until after the counseling session was concluded on April 15, and after she had been given ample opportunity to give such an excuse. The employee did not protest, also, on the following day when assigned the same job with her wrist in presumably the same condition. Finally, the numerous warnings issued to the employee for poor workmanship and other rule violations rendered her denial of wrongdoing with regard to the final incidents less than credible.

¶14 In addition, from our review of the testimonial record, we note the following. After Quast observed Davis throwing good parts into a bin, she counseled Davis and gave her a written warning. She refused to sign the counseling warning because, in her own words, "... I didn't feel like it was right." Later in the same hearing, she denied that Quast had even showed her the warning document. Finally, Davis admitted throwing away good parts that had become cold due to slow production.

¶15 LIRC, in adopting the ALJ's findings, determined that "[t]he employee admitted that she was throwing good parts into the scrap bin, because she could not keep up with the production line." It concluded:

This constitutes intentional destruction of company property ... which is a basis for suspension or discharge under the employer's work rules. The employee argues that she was doing so because of an injured wrist. It may be true that the employee's wrist was injured; that does not justify the destruction of the parts For this reason, the commission agrees with the administrative law judge's conclusion of misconduct.

¶16 From this review, we conclude there is more than enough evidence in the record to support the findings of fact of the ALJ as adopted by LIRC. These findings amply supply an adequate and reasonable basis to warrant the conclusion that employee misconduct occurred.

By the Court.—Order affirmed.

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

