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DISTRICT II

February 12, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP774

Impressions Day Spa, Inc. v. LIRC (L.C. # 2012CV354)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

The Labor and Industry Review Commission (LIRC) appeals a circuit court order which reversed LIRC's decision that Jamie L. Reinheimer was entitled to unemployment insurance benefits. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We reverse the circuit court order and remand with directions to reinstate LIRC's decision.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Reinheimer worked as a cosmetologist for Impressions Day Spa, Inc. On November 26, 2011, she was scheduled to work and was booked with numerous appointments. According to the owner of Impressions, Reinheimer did not report to work that day but instead called in sick. The owner later discovered that Reinheimer had gotten a tattoo that day. The next day, Reinheimer was discharged from Impressions.

Reinheimer subsequently applied for unemployment insurance benefits. Her claim was initially allowed, as the Department of Workforce Development (DWD) determined that her discharge had not been for misconduct connected with her employment within the meaning of WIS. STAT. § 108.04(5). Impressions appealed that determination to an ALJ.

Following a hearing on the matter, an ALJ reversed, finding Reinheimer ineligible for unemployment insurance benefits based on its conclusion that she had been discharged for misconduct. Specifically, it found that Reinheimer “had skipped work, got a tattoo, and misled the employer about her reason for missing work.”² Reinheimer appealed the ALJ’s decision to LIRC, which conducted a de novo review based on the record made at the hearing before the ALJ.

LIRC reversed, concluding that Reinheimer had not been discharged for misconduct and was therefore eligible for unemployment insurance benefits. LIRC explained that its decision was based on the lack of competent, nonhearsay evidence presented by Impressions regarding the alleged misconduct.

² While there was evidence introduced of Reinheimer’s other rule violations at Impressions, it is not disputed that the motivating reason for her discharge was the alleged misrepresentation of the reason for her absence when calling in on November 26, 2011.

Impressions then commenced an action for judicial review of LIRC's decision in the circuit court. Following briefing and argument, the court issued an order which reversed LIRC's determination and reinstated the decision of the ALJ. This appeal follows.

On appeal, we review LIRC's decision and not the decision of the circuit court. *Pick 'n Save Roundy's v. LIRC*, 2010 WI App 130, ¶8, 329 Wis. 2d 674, 791 N.W.2d 216. Our task is merely to determine whether LIRC's decision was correct, and we therefore owe no special deference to the decision of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). The burden to prove misconduct in unemployment compensation determinations lies squarely on the employer. *Boynton Cab Co. v. Giese*, 237 Wis. 237, 243, 296 N.W.2d 630 (1941).

Here, LIRC contends that it reasonably concluded that Reinheimer was not discharged for misconduct. We agree. Although the owner of Impressions accused Reinheimer of misrepresenting the reason for her absence when calling in on November 26, 2011, the only evidence presented in support of that allegation was hearsay.³ DWD's rules make clear that "no issue may be decided solely on hearsay evidence unless the hearsay evidence is admissible under ch. 908, Stats." WIS. ADMIN. CODE § DWD 140.16(1) (July 2008). Because we are not

³ The owner of Impressions was the only person who appeared at the ALJ hearing and testified for the employer. She said that Reinheimer called in sick on November 26, 2011, which Reinheimer denied. However, the owner was simply recounting what the receptionist had told her about Reinheimer's call. The owner's testimony about that conversation is hearsay.

Impressions also cites two documents as evidence that Reinheimer called in sick: (1) a "Discharge Questionnaire" prepared by the owner of Impressions over a month after the discharge, which recorded Reinheimer's absence; and (2) a report prepared by a DWD investigator, which contains the investigator's notes about a conversation she had with Reinheimer. Again, both of these documents are hearsay.

persuaded that the evidence Impressions relied upon is admissible under WIS. STAT. ch. 908, we conclude that it did not meet its burden of proving misconduct. There simply was no evidence of misconduct other than the hearsay. Accordingly, we reverse the circuit court order and remand with directions to reinstate LIRC's decision.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and remanded with directions, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals