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June 9, 2020

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

2019AP1643 Jerry L. Peete v. LIRC (L.C. # 2018CV10225)

Before Brash, P.J., Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jerry L. Peete, *pro se*, appeals a circuit court order affirming a decision of the Labor and Industry Review Commission denying him eligibility for unemployment insurance benefits. The Commission determined that Menard, Inc., terminated Peete's employment for substantial fault connected with his work within the meaning of WIS. STAT. § 108.04(5g) (2017-18),[1] and that

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Peete was therefore ineligible for unemployment benefits until he requalified. Based upon 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. We affirm.

Peete worked as a delivery coordinator for Menard, Inc., for approximately twenty months. His manager, Kevin Kulibert, met with Peete on May 14, 2018, to give him a warning for eating pizza and being unproductive during work hours. Peete became loud and argumentative during the meeting, refused to sign the warning, and challenged Kulibert to fire Peete. Kulibert then showed Peete a video of the incident, but Peete remained loud and contentious. At that point, Kulibert terminated Peete's employment with Menard, Inc.

Peete applied for unemployment benefits. The Department of Workforce Development made an initial determination that Menard, Inc., discharged Peete for misconduct. The Department therefore denied him benefits. Peete appealed that determination to the Department's appeals tribunal.

The matter proceeded to a hearing before an administrative law judge (ALJ). Kulibert testified about the disciplinary meeting with Peete and described him as "yelling and argumentative" both when Kulibert presented Peete with a written warning and when Kulibert showed Peete the video of the incident underlying the disciplinary action. Kulibert explained that he terminated Peete's employment after they watched the video together because Peete continued to yell and argue about what it showed.

Kulibert further testified that Peete had received an employee handbook at the outset of his employment, and the ALJ admitted a portion of the handbook as an exhibit. The handbook

reflected that "insubordination regarding work rules and directives" was a violation of Menard, Inc.'s regulations for employees.

Peete also testified at the hearing. He admitted telling Kulibert that the basis for the disciplinary warning was "a lie," and that "[Peete was] not going to listen to this crap" but instead would leave for the day. Peete described his tone of voice at that time as "loud," although "not boisterous." Peete said that he and Kulibert next watched the video together, and Peete acknowledged accusing Kulibert of lying about its contents. Peete also acknowledged that his voice at that time was "more hyper" than it was in the hearing room. Peete said that he demanded an apology in a "louder" voice, and thereafter he was fired.

At the conclusion of the hearing, the ALJ made the following findings of fact:

> [t]he employee received a warning on his last day of work. He disagreed with the merits of the warning and was exceedingly loud in expressing his disagreement. At one point he indicated that he was leaving. The employer had him look at a video recording of the incident in question. In indicating that he felt the video exonerated him, he remained exceedingly loud and indicated that the employer was a liar. Because of this situation, he was discharged.

The ALJ went on to discuss the applicable law. The ALJ first determined that Peete's behavior was "less egregious than that which is required to support a finding of misconduct." Instead, the ALJ concluded that Menard, Inc., discharged Peete for "substantial fault" as that term is defined in WIS. STAT. § 108.04(5g), and that he was therefore ineligible to receive unemployment benefits until he earned additional wages in accordance with the formula described in that statute. Peete appealed to the Commission, which adopted the ALJ's findings of fact and conclusions of law and affirmed the ALJ's decision. The circuit court affirmed in turn, and this appeal followed.

Whether Peete is entitled to unemployment benefits is a mixed question of fact and law. *See* ***Klatt v. LIRC***, 2003 WI App 197, ¶10, 266 Wis. 2d 1038, 669 N.W.2d 752. We review the Commission's decision, not the circuit court's decision, *see* ***Operton v. LIRC***, 2017 WI 46, ¶18, 375 Wis. 2d 1, 894 N.W.2d 426, and our scope of review is identical to that of the circuit court, *see* ***Hill v. LIRC***, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994).

We will uphold the Commission's findings of fact if they are supported by credible and substantial evidence. *See* ***Operton***, 375 Wis. 2d 1, ¶18. "Credible and substantial evidence is that which is 'sufficient to exclude speculation or conjecture.'" ***Xcel Energy Servs. Inc. v. LIRC***, 2013 WI 64, ¶48, 349 Wis. 2d 234, 833 N.W.2d 665 (citation omitted). We search the record for evidence that supports the Commission's decision, *see* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975), and we may "not substitute [our] judgment for that of the [C]ommission as to the weight or credibility of the evidence on any finding of fact," *see* WIS. STAT. § 108.09(7)(f).

Our supreme court has ended the practice of deferring to an administrative agency's conclusions of law. *See* ***Tetra Tech EC, Inc. v. Wisconsin DOR***, 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21. Accordingly, we review the Commission's legal conclusions *de novo*. *See* ***id.***, ¶84. Nevertheless, we "give 'due weight' to the experience, competence, and specialized knowledge of an administrative agency as we consider its arguments." *See* ***id.***, ¶108.

On appeal, Peete first challenges the Commission's findings of fact. He asserts that he merely "argue[d] his case" during the disciplinary hearing and that "[t]here is no clear evidence in this matter of [Peete] yelling at [Kulibert] but for [Kulibert's] word." The Commission, however, is the sole judge of the weight and credibility of the evidence, *see* ***Bernhardt v. LIRC***,

207 Wis. 2d 292, 298, 558 N.W.2d 874 (Ct. App. 1996), and the Commission was entitled to believe Kulibert. His testimony supported the finding that Peete was "exceedingly loud" in disputing the disciplinary warning. Additionally, Peete himself acknowledged at the hearing that he accused Kulibert of lying, and Peete does not suggest any reason that we should discredit his testimony in that regard. In short, Peete fails to demonstrate any colorable basis on which to reject the Commission's factual findings about his conduct immediately preceding his discharge.

Whether an employee's actions constitute substantial fault within the meaning of WIS. STAT. § 108.04(5g) is a question of law. *See* ***Easterling v. LIRC***, 2017 WI App 18, ¶10, 374 Wis. 2d 312, 893 N.W.2d 265. Substantial fault sufficient to disqualify an employee from unemployment benefits "includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer." *See* § 108.04(5g)(a). The statute also specifies that substantial fault does not include: "(1) [o]ne or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. (2) One or more inadvertent errors made by the employee. (3) Any failure of the employee to perform work because of insufficient skill, ability, or equipment." *See* ***id.*** If an employee's actions fall within the ambit of any of the infractions, errors, or failures described in the three statutory exclusions, the actions do not constitute "substantial fault" within the meaning of § 108.04(5g)(a). *See* ***Operton***, 375 Wis. 2d 1, ¶37.

Peete contends that he did no more than "use a tone [of voice] not of [his] employer's liking." He argues that doing so constituted a "minor infraction" at worst. The Commission concluded, however, that Peete's insubordination during a disciplinary hearing violated Menard, Inc.'s reasonable "expectation that workers be respectful and refrain from yelling and

argumentative behavior." The Commission further determined that Peete's actions were within his control and that his violation of Menard, Inc.'s workplace regulations was not a minor infraction. *See* WIS. STAT. § 108.04(5g)(a). We agree.

Wisconsin has long recognized that an employee's substantial insubordinate behavior "is to be distinguished from a case where there has been a mere breach of duty." *See* ***Green v. Somers***, 163 Wis. 96, 99, 157 N.W. 529 (1916). Moreover, our supreme court has explained that "'[u]nprovoked insolence or disrespect on the part of the employee toward the employer or the latter's representative may afford ground for the discharge or dismissal of the employee.'" ***Millar v. Joint Sch. Dist. No. 2***, 2 Wis. 2d 303, 314-15, 86 N.W.2d 455 (1957) (citation omitted).

Applying the law to the facts here, the Commission correctly concluded that Peete was discharged for "substantial fault" within the meaning of WIS. STAT. § 108.04(5g)(a). He was excessively and inappropriately loud throughout a disciplinary meeting during which he accused his manager of lying and challenged the manager to fire him. His insubordinate and insolent behavior was well within his control, deliberate, and indisputably unrelated to any failure to perform his work due to insufficient skill, ability, or equipment. *See* ***id.*** His conduct was more than a minor infraction. Rather, his conduct violated the employer's reasonable requirement that employees behave respectfully and with appropriate decorum in the workplace. Accordingly, we affirm.

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals