Village of Greendale, Hearing No. 96606932MW (LIRC 11/25/1997), aff'd, Duerr v. LIRC and Village of Greendale, Case 97-CV-3406 (Dane Co. Cir. Ct., 8/171998)(fire department rule prohibiting public intoxication bringing the department in disrepute).

(3) Off-duty use of illegal drugs.

LIRC's handling of cases involving illegal drugs has evolved substantially in recent years. The starting point remains that off duty conduct, so long as it does not affect on-the-job performance, is not "connected with employment." This starting point is modified by LIRC's acceptance that, with proper notice to the employees, employers may enforce "drug free work environment" policies, including random drug testing. The rationale for finding employer policies regulating off-duty conduct are "connected with employment" is the employer's interest in safety and efficiency coupled with the difficulty of proving that on-the-job errors were actually caused by off-duty use of illegal drugs. Violation of that policy is, therefore, deemed an intentional disregard of the employer's interest.

Hovever, because these rules regulate off-duty conduct, LIRC requires that employer rules on when testing will be required and the consequences of positive drug tests be given in writing and well in advance so employees may conform their off-duty conduct to the employer's rule. The key to LIRC's drug testing cases appears to be written notice to the employee of both the fact that a drug test will be required and the **consequences** of a positive drug test. LIRC says it will find an employer rule "reasonable," violation of which will be "misconduct connected with employment" if:

> (1) the rule prohibits both on-duty and off-duty use of illegal drugs, is known to the employee, is provided in writing, and spells out the consequences of a positive test,
>
> OR
>
> (2) the rule implements a drug testing policy mandated by either state or federal law and the employee is provided written copies of both the legal mandates and the consequences of a positive test.

Hawthorne v. Elder Care Lines, Inc., Hearing No. 98604815MW (LIRC 10/15/98).

Thus, where the employer communicates its policy and the consequences of violating the policy, violating the policy (such as refusing to take a drug test required by the policy or failing a drug test) will be misconduct, even if there is no provable on-the-job effect. White v. LIRC, Case 90-CV-5006 (Dane Co. Cir. Ct. 1991)(two positive tests for marijuana; no evidence that employe under the influence at work); Adams v. Penda Corp., Hearing No. 95002425BO (LIRC 8/18/95); Phillips v. Stoughton Trailers, Inc., Hearing No. 95005516MD (LIRC 7/24/96)(employee failed two random drug tests in five months; last test performed on the day employee returned from a 1

week vacation).

LIRC's drug testing decisions appear to turn on the precise wording of the employer rule in question and the notice provided the employe. In a variety of contexts, LIRC is finding that a positive drug test is not by itself sufficient evidence of misconduct.

First, LIRC does not treat a positive drug test as necessarily evidence of on-the-job use or on-the-job impairment. Since a positive drug test may evidence no more than off-duty use sufficiently long ago to have no current effect, if the employer's policy does not expressly prohibit off-duty use, failing the test is not misconduct. Flagg v. Olsten Health Services (Staffing), Inc. Hearing No. 99602942MW (LIRC 8/31/99). [Note: this holding seems to assume that there is no other evidence of on-the-job use or on-the-job impairment.]

Second, because the employer's policy must be in writing and given to the employee, LIRC appears to require that the rule itself be admitted into evidence at the hearing. King v. City of Rice Lake, Hearing No. 96200696RL (LIRC 11/1/96)(employer failed to introduce rule into evidence, LIRC held that the employer did not carry its burden to prove the reasonableness of the rule); Bates v. The Peltz Group Inc., Hearing No. 02001259MD (LIRC 10/1/2002)(benefits allowed where employer did not submit the policy at the hearing, but only with its Petition for Review at LIRC)

Third, the employe must receive the policy regulating off-duty illegal drug use sufficiently before the drug test to conform off-duty conduct to the rule. Failing a test when the policy was first given to the employee the day of the test is not misconduct. Pitts v. Maynard Mfg., Hearing No. 99001366MD (LIRC 6/30/99)

Fourth, the "trigger" for requiring the drug test must be stated in the written policy. Where the employer's policy provided that a test could be given on "reasonable cause," but the employer contended that it had "probable cause" and the employer told the employe that it was a random test, LIRC held that the refusal to take the test was not misconduct. White v. Health Care & Retirement Corp. of America, Hearing No. 99601552MW (LIRC 6/22/99) Moreover, the incident leading to the drug test must be one of the "triggers" in the employer's written policy. Pouchert v. P.J.K. Finishing, Co., Inc., Hearing No. 98606573WK (LIRC 3/31/99)(written policy required drug test on hire, on-the-job accident causing injury or property damage, or "reasonable cause" that a controlled substance was interfering with job performance. The employe complained of back pain resulting from an off the job accident. The employer sent the employee for a medical examination where, pursuant to an **un**written rule requiring drug tests on all evaluations, the employee was given a drug test. HELD: not misconduct.)

Fifth, written notice of the consequences of a positive test is essential. See, Brown v. Hondo, Inc., Hearing No. 99602014RC (LIRC 7/14/99)(no evidence employe received notice of consequences of positive test). Where the policy does not provide for discharge upon a positive test, but only for a suspension and an assessment and referral, the discharge is not for

misconduct. Hawthorne v. Elder Care Lines, Inc., Hearing No. 98604815MW (LIRC 10/15/98). Where the employer did not have a policy, but claimed that a federal mandate required testing for truck drivers, there was no misconduct where the employe did not receive written notice that discharge was the consequence of failing the test, even though the employe knew from experience with a prior employer that a 30 day suspension could result and that each employer does things differently. Wallis v. Roscoe Redi Mix, Inc., Hearing No. 99000149JV (LIRC 5/6/99).

Sixth, LIRC appears to be applying the rules of evidence very strictly when the allegation is off duty conduct involving illegal drugs. In Bates v. The Peltz Group Inc., Hearing No. 02001259MD (LIRC 10/1/2002), LIRC reasoned that the employer's failure to submit a copy of its written policy at the hearing could not be cured by submitting it with the employer's Petition for Review. LIRC also held that the employer's testimony that the employee tested positive was insufficient evidence to establish that fact; a certified test report was required. In Koss v. Menominee Indian Tribe, Hearing No. 97400031GB (LIRC 4/10/98), the employer did not actually introduce the employer's written policy, and the employe testified that he did not understand the policy to prohibit off-duty use of illegal drugs. Thus, one basis for the decision in Koss is that the employer's proof was insufficient to establish (a) that it had a policy prohibiting off duty use and (b) that the employe was aware of the consequences of violating the policy. The Koss decision also discusses, however, the employer's "responsibility to show that off-duty conduct is sufficiently connected to a worker's employment to find misconduct." This portion of the Koss decision cites Nelson v. LIRC and DHL Airways, Inc., Case No. 91-CV-181 (Calumet Co. Cir. Ct. 1991) in which the circuit court reversed a LIRC decision which had found misconduct in an employe violating a written rule providing for discharge for off-duty driving while intoxicated on the ground that the employer did not establish that the rule was connected with employment. Similarly, in Lacount v. General Motors Corp., Hearing No. 00005948, (LIRC 2/13/2001), the employer had a rule prohibiting sale of illegal drugs on the company premises, but the only evidence that a sale had occurred on company premises was a hearsay report of an undercover agent. Since hearsay alone is insufficient to establish an essential fact, see Section VII C 5, infra, LIRC held that misconduct had not been proved.

(4) Refusing to conform personal lifestyle to employer's standards is not misconduct connected with employment.

See, UC Digest MC 618 at 54, Case 74-A-1544L (female bartender fired for refusing to stop living with boyfriend after being ordered to do so by employer. HELD: not misconduct). See also, Holy Name School of Congregation of the Holy Name of Jesus of Kimberly v. DILHR, 109 Wis. 2d 381 (Ct. App. 1982) (teacher at Catholic school who did not have employment contract renewed because she married divorced man before all steps had been taken to have first marriage annulled was not discharged for misconduct).

There may, however, be some jobs in which off-duty, personal behavior is "connected with employment." In Roberts v. Department of Corrections, Hearing No. 00400501AP (LIRC

10/5/2000), the claimant was a recreational worker at a medium security prison and the employer had a "no-fraternization" rule which the employe violated during off-duty hours by making and receiving telephone calls from an inmate. LIRC held that was "misconduct connected with employment." The rationale appears to be that the specific nature of the job makes the regulation of the off-duty conduct "connected with employment" because it involves a person very much connected with employment. Similarly, LIRC seems willing to find that a "no fraternization" rule for supervisors may be "connected with employment." Again, the theory would appear to be that because the supervisor's off-duty relations with a subordinate may be the basis for either a "quid pro quo" sexual harassment claim by the subordinate or a claim of sex-based favoritism, the rule regulating the supervisor's fraternization with subordinates is "connected with employment." LIRC does, however, recognize that some off-duty interaction between supervisors and subordinates is inevitable and, so long has it seems to be casual and not likely to lead to the risk of sexual harassment or favoritism allegations, literal violation of a "no fraternization" rule is not misconduct. See, Niehaus v. Fleet and Farm of Menomonee, Inc., Hearing No. 94200675HU (LIRC 2/28/95)(supervisor ran into subordinates on several occasions in taverns, restaurants or at an employee softball game; no evidence of any romantic involvement between supervisor and any subordinate or of favoritism by the supervisor; the social contacts were infrequent and for short periods of time. HELD:not misconduct)

(5) Off-duty use of the employer's property

Failure to exercise prudent control over property of employer on loan to employe for personal use may be misconduct connected with employment. Case 76-A-60542MK, UC Digest MC 618 at 54 (employe involved in auto accident after work hours while under influence of alcohol. Employe unable to recall whether he had been driver or permitted other person to drive vehicle).

(6) Debt and garnishment.

Discharge because earnings have been subjected to garnishment is prohibited by statute.and providing penalties for violation. See, §812.235, Wis. Stats.,

3. Condonation/Progressive Discipline

Even when the conduct is clearly "connected with employment" the ultimate issue in a "misconduct" case is the employe's intent. Accordingly, where the employer has failed to warn the employe in the past or condoned similar conduct, the failure of employer to issue warnings may result in a finding by LIRC that conduct was condoned, even when the conduct would, in most cases, be "misconduct connected with employment". See, Bonner v. Ziegler Builders, Hearing No. 99004684MD (LIRC 6/27/2000)(prior drinking alcohol on the job had been condoned); Mikkelson v. Pizza Pasta VI, Inc., Hearing No. 97002596LX (LIRC 10/8/97)(employee's "banking" of subordinate's hours, although prohibited by an employer rule, had been condoned in the past).