COURT OF APPEALS
DECISION
DATED AND RELEASED

February 29, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0234

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

WILLIAM J. MCKIBBIN,

Plaintiff-Respondent,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant,

MARTEN TRANSPORT, LTD.,

Defendant-Appellant,

R.E. HARRINGTON, INC.,

Defendant.

APPEAL from an order of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Marten Transport, Ltd., appeals from an order reversing a Labor and Industry Review Commission (LIRC) order denying unemployment compensation benefits to Marten's former employee, William J. McKibbin. The issue is whether LIRC correctly determined that Marten fired McKibbin for misconduct, rendering him ineligible for unemployment compensation under § 108.04(5), STATS. We conclude that the evidence fails to establish misconduct. We therefore affirm.

Marten employed McKibbin as an over-the-road truck driver from February 1991 until January 1993. He was discharged after he fell asleep at the wheel and rolled his truck on December 28, 1992, while driving on an Ohio interstate highway. Marten discharged him pursuant to a written company policy mandating termination for any accident caused by driver neglect. The discharge letter also cited a report that McKibbin was intoxicated at the time of the accident.

McKibbin admitted to drinking two beers six to seven hours before the accident, which occurred at 3:00 a.m. He did not believe that any alcohol remained in his system. He attributed his falling asleep to his fatigue. He was near the end of a three-day trip from California to Ohio, and had driven about fifteen hours the day before, only to start driving again, at 2:00 a.m., after four or five hours of sleep. He also testified, however, that he was charged after the accident with driving while intoxicated, and that a breathalyzer registered a .136 blood alcohol content. In a subsequent prosecution on that charge, the breathalyzer test was ruled invalid, and the charge was reduced to reckless driving.

McKibbin appealed the initial determination that he was fired for misconduct. The administrative law judge on his appeal reversed after concluding from the evidence that his actions were merely negligent and not intentional and therefore did not constitute misconduct. On Marten's appeal, LIRC, in turn, reversed the administrative law judge's determination. LIRC reasoned that "falling asleep behind the wheel constituted an act of negligence of such a degree that it will constitute misconduct despite the fact that it was a single incident." Marten takes this appeal from the trial court's order reversing LIRC's determination and once again establishing McKibbin's eligibility for unemployment compensation.

Misconduct that disqualifies an employee for unemployment compensation is:

> conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). The burden of proving misconduct is the employer's. ***Holy Name School v. DILHR,*** 109 Wis.2d 381, 387, 326 N.W.2d 121, 125 (Ct. App. 1982). Whether the established facts demonstrate misconduct is a question of law. ***Fitzgerald v. Globe-Union, Inc.***, 35 Wis.2d 332, 337, 151 N.W.2d 136, 139 (1967). We review LIRC's decision on that issue, not the trial court's. ***Keeler v. LIRC***, 154 Wis.2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990). We are not bound by LIRC's conclusion on a question of law but will give it due weight if LIRC's expertise is significant to the value judgment involved. ***Nottelson v. DILHR***, 94 Wis.2d 106, 116-17, 287 N.W.2d 763, 768 (1980).

Marten did not prove that McKibbin engaged in misconduct under the ***Boynton*** standard. McKibbin testified that this was his first accident in thirty-one years of driving. Marten's representative effectively confirmed that by testifying that Marten would never hire a driver with an accident on his record. Marten did not dispute McKibbin's testimony that his breathalyzer test was invalidated or attempt to rebut McKibbin's testimony that he was free of the effects of any alcohol by the time the accident occurred. Under these

circumstances, Marten has not shown negligence to such a degree as to manifest a substantial and intentional disregard of its interests. In a fatigued state, McKibbin simply made one bad mistake. On this question we have not deferred to LIRC's expertise because it is not in a better position than a court to determine when negligence crosses the line into misconduct under the ***Boynton*** test.

Marten contends that we should deem McKibbin's acts misconduct because McKibbin pleaded guilty to reckless driving, and violated various state and federal regulations by driving in hazardous weather, driving while fatigued, exceeding the maximum daily work hours for drivers, driving a truck after consuming alcohol, and carrying a weapon in his truck. As noted, Marten failed to meet its burden of proof on the drinking charge. Marten was not aware of the other alleged law violations when it fired McKibbin, and therefore could not have relied on them. Additionally, if McKibbin violated regulations against driving too many hours, in hazardous weather or while fatigued, there is some evidence that the company shared responsibility. McKibbin testified that he drove in the middle of the night after a short rest and following a long driving day in order to meet his scheduled delivery time. Marten did not deny responsibility for setting McKibbin's schedule.

By the Court.—Order affirmed.

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