

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0342

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VICTOR MCKITTRICK AND LINDA MCKITTRICK,

PLAINTIFFS-APPELLANTS,

v.

JOHN A. BIEWER CO. OF WISCONSIN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Victor and Linda McKittrick appeal a judgment dismissing their wrongful termination action against Victor's former employer, John A. Biewer Co. of Wisconsin, Inc. They contend that an employee handbook created a contract that Biewer breached when it fired Victor. The trial court did

not decide whether the handbook created contractual rights because, even if it did, the firing was justified under the terms of the contract. We affirm the conclusion that the firing was authorized under the contract's terms.

¶2 An employee who worked under McKittrick filed complaints alleging employment discrimination and sexual harassment. When Biewer investigated the claims, McKittrick denied touching the employee in any inappropriate, sexual manner. Other employees informed Biewer and testified at trial that they observed McKittrick touching the subordinate's breasts and/or buttocks. The trial court found that McKittrick lied when he denied touching her and that his lie constituted grounds for his immediate dismissal under the contract.

¶3 We affirm the trial court's decision on different grounds. Its finding that McKittrick lied is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98). It necessarily follows that the trial court determined that McKittrick touched a subordinate's breasts and/or buttocks.

¶4 The handbook provided for immediate discharge for immoral or indecent acts in the workplace. Construction of its terms is a question of law that we decide without deference to the trial court. *See Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 244, 271 N.W.2d 879 (1978). We conclude that touching a subordinate's breasts or buttocks in the workplace constitutes immoral or indecent acts justifying immediate termination under the employment agreement.

¶5 McKittrick argues that another provision of the handbook created lesser penalties for "horseplay" and that the witnesses who saw him touch the subordinate in a sexually inappropriate manner described the conduct as "horseplay," suggesting that it was mutual or consensual. The other employees' characterization is not binding on this court. "Horseplay" describes a variety of

activities, most of which are not immoral or indecent in nature. Because we conclude that grabbing a subordinate's breast or buttocks is indecent behavior regardless whether it was reciprocal, consensual or playful, we conclude that McKittrick's immediate termination was justified under the terms of the handbook.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

