COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2899 **Cir. Ct. No. 2011CV5186**

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

DAVID A. WALTER,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

DEAN FOODS OF WISCONSIN AND DEAN FOODS OF WISCONSIN, LLC,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. The Labor and Industry Review Commission ("LIRC") appeals from a circuit court order reversing LIRC's decision to deny

David A. Walter's claim for unemployment insurance benefits. LIRC concluded that Walter was not entitled to benefits because his employer, Dean Foods of Wisconsin and Dean Foods of Wisconsin, LLC (collectively "Dean Foods"), terminated his employment for misconduct within the meaning of WIS. STAT. § 108.04(5) (2009-10).[1] The circuit court, applying only due weight deference to LIRC's decision, disagreed. We conclude that LIRC's decision is entitled to great weight deference, and, applying that standard ourselves, uphold LIRC's decision. As such, we reverse the circuit court.

BACKGROUND

¶2 The facts of this case are not in dispute. For nine years, Walter worked second shift as a filling-machine operator at Dean Foods, a milk bottler and ice cream mix manufacturer. One of Walter's job duties included checking the date code[2] on the production line in regular intervals of no more than thirty minutes. The date code informs customers of the product's "use by" date.

¶3 In December 2009, Dean Foods issued Walter a three-day suspension and placed him on probation for 270 days for running a production line for over five hours with the incorrect date code.

¶4 In August 2010, Walter reported for his shift at 6:00 p.m. Walter was assigned to two filling machines that were in the midst of a production run that had been started at 5:00 p.m. by another employee. Walter was uncertain

[1] All references to the Wisconsin Statute are to the 2009-10 version.

[2] The terms "date code" and "code date" are used interchangeably throughout the briefs and record. We use only the term "date code" for the sake of consistency.

whether he conducted quality checks on both machines at the start of his shift, testifying that he "thought" he checked the date codes, but that "[a]pparently the one -- apparently one was wrong. I looked at it and there was a date on it. Maybe I didn't read it, you know, 100 percent. It was kind of like a glance thing." At about 9:30 p.m., Walter discovered the date code was incorrect. The error mismarked thirty-five full pallets and forty additional cases of product.

¶5 Four days later, Dean Foods terminated Walter's employment for inattentiveness related to the production run and "other just cause" under the provisions of a union contract.

¶6 Walter filed a claim for unemployment insurance benefits. The Department of Workforce Development ("DWD") denied his claim, finding that Walter's discharge was for misconduct connected with his employment within the meaning of WIS. STAT. § 108.04(5). Walter appealed the DWD's determination and a hearing was held before an administrative law judge ("ALJ"). The ALJ affirmed the DWD's determination, also finding that Walter was discharged for misconduct. Walter appealed the ALJ's decision to LIRC, which affirmed the ALJ's decision and adopted the ALJ's findings of fact and conclusions of law as its own.

¶7 Walter then began an action for judicial review of LIRC's decision in the circuit court. Affording LIRC's decision only due weight deference, the circuit court reversed, concluding that Walter's conduct was not intentional but merely ordinary negligence insufficient to support a finding of misconduct within the meaning of WIS. STAT. § 108.04(5). LIRC appeals.

DISCUSSION

¶8 LIRC argues that its decision finding that Walter's actions constituted misconduct is entitled to great weight deference, rather than only the due weight deference applied by the circuit court. LIRC further contends that its decision is reasonable, and that therefore we must reverse the circuit court's order. We agree.

I. We apply great weight deference to LIRC's decisions regarding whether an employee's negligent actions constitute misconduct within the meaning of WIS. STAT. § 108.04(5).

¶9 The issue raised on appeal is what level of deference to give LIRC's decision that Walter's negligent actions constituted misconduct within the meaning of WIS. STAT. § 108.04(5). Section 108.04(5) states, in relevant part:

> DISCHARGE FOR MISCONDUCT. … [A]n employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate….

Case law defines misconduct as:

> conduct evincing such wil[l]ful 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 the 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.2d 636 (1941).

¶10 We review LIRC's decision, rather than the circuit court's decision. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). Whether an employee is entitled to unemployment insurance benefits under WIS. STAT. ch. 108 raises questions of both fact and law. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980). Here, the parties do not challenge the findings of fact. "LIRC's determination of whether an employee engaged in misconduct under WIS. STAT. § 108.04(5) is a legal conclusion which we review *de novo* but give appropriate deference." ***Patrick Cudahy Inc. v. LIRC***, 2006 WI App 211, ¶8, 296 Wis. 2d 751, 723 N.W.2d 756. There are three levels of deference to which we may give LIRC's decision: great weight, due weight, and *de novo*. ***Id.***, ¶99.

¶11 We must give the agency's legal conclusion great weight deference where: (1) the agency is charged with administration of the statute being interpreted; (2) the agency's interpretation "is one of long-standing"; (3) "the agency employed its expertise or specialized knowledge" in arriving at its interpretation; and (4) "the agency's interpretation will provide uniformity and consistency in the application of the statute." ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995). A court must also accord great weight deference to any agency's decision if it is intertwined with value and policy decisions. ***Barron Elec. Coop. v. Public Serv. Comm'n***, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). If an agency's decision is reviewed under great weight deference, that decision will be upheld if it is reasonable. ***Id.***

¶12 A court must give due weight deference when an agency has some experience in an area, but has not developed the expertise necessary to place it in a better statutory judgment-making position than that of a court. ***Id.*** at 762. The deference accorded the agency in this situation is based not so much on knowledge or skill as it is on whether the legislature has charged the agency with enforcing the statute in question. ***Id.*** If the agency's decision is reviewed under due weight deference, a decision based upon a reasonable interpretation of the statute will be upheld so long as another interpretation is not more reasonable than the one employed by the agency. ***Id.*** at 762-63.

¶13 Finally, a court will apply the *de novo* standard when it is clear from the agency's precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented, or when the agency's position on the issue has been so inconsistent as to provide no real guidance. ***Id.*** at 763. Under this standard of review, the agency's interpretation is given no deference.

¶14 The parties and the circuit court all agree that the first two factors for great weight deference have been met in this case: LIRC is charged by the legislature to administer unemployment insurance benefits, *see* WIS. STAT. § 108.09(6), and LIRC's interpretation of unemployment insurance law is longstanding. However, the circuit court concluded that while LIRC may have applied its expertise and specialized knowledge to numerous misconduct cases, its review of misconduct cases related to negligent actions in the workplace has led to non-uniform or inconsistent application of the law of misconduct under WIS. STAT. § 108.04(5). LIRC disagrees and asks us to address the issue on appeal. As such, we focus our analysis on whether LIRC, in applying its expertise and

specialized knowledge, has uniformly and consistently applied the term "misconduct" to an employee's negligent acts.

¶15 Walter set forth three LIRC decisions that he argues demonstrate that LIRC has not been consistent when applying the term "misconduct" under WIS. STAT. § 108.04(5) to an employee's negligent acts. He contends that in other cases like his, that is, in other cases in which "an employee made mistakes that resulted in damage to the property of the employer's customers … [and] when the employee had been previously warned about his conduct," "LIRC has found no misconduct." While that may be true, each decision cited by Walter includes other factors distinguishing it from his. We review each here.

¶16 In ***Malecki v. Best Buy Stores Ltd. Partnership***, Hearing No. 98201180EC (LIRC Jan. 14, 1999), the employee, a car stereo installer, was discharged after facing the following allegations over a four-month period: (1) a customer alleged that the employee scratched the dashboard of the customer's vehicle, although the employee's manager agreed that the employee likely did not cause the damage; (2) the employee damaged a customer's vehicle during installation because another employee had installed the chassis using the wrong screw; (3) the employee installed an alarm too high on a customer's vehicle, causing the windshield wipers not to work and snapping the vehicle's hood cable; and (4) the employee drilled through a vehicle's heater hose. ***Id.***

¶17 LIRC concluded that the employee's actions did not amount to misconduct because: (1) there was insufficient evidence to establish that the employee was involved in the first matter; (2) the employee's level of responsibility for the second matter was slight; (3) there was little room for the alarm in the third matter, the employee used his best judgment, and the employee

admitted to snapping the cable; and (4) the employee merely used the wrong nut and bolt as a reference point when drilling the hole in the fourth matter. ***Id.*** Hence, LIRC concluded that the employee's actions were not intentional nor did they show substantial disregard for the employer's standards.

¶18 Unlike the employee in ***Malecki***, Walter failed to perform a task delegated to him by his employer (rather than incorrectly performing a task) and Walter made the same error (rather than several different errors) more than once after being warned. Furthermore, Walter's error was not momentary, that is, Walter's error did occur in a matter of minutes or seconds, as is the case when a dashboard is scratched or a hole is drilled. Rather, Walter continued to let the machines run with the wrong date code for hours, despite being directed by his employer to check the date code every thirty minutes. As such, his case is distinguishable from ***Malecki***.

¶19 The employee in ***Ward v. Motor Castings Co.***, Hearing No. 06602760MW (LIRC Sept. 15, 2006), an operator for a foundry, was discharged when over a period of several months he: (1) improperly loaded a machine after following the advice of a senior worker rather than the machine's written directions; (2) improperly notified the employer of an absence; and (3) improperly removed eighteen castings immediately after being instructed on how to remove the castings by a supervisor. ***Id.*** LIRC concluded that the employee's actions did not constitute misconduct because: the employee had never performed those particular tasks before; and, while the employee was required to follow all written directions, the employer failed to maintain job process cards at all work locations. ***Id.***

¶20 The employee in ***Ward***, unlike Walter, made three different errors. Furthermore, the two errors that the employee made which resulted in damage to property were the result of tasks that the employee had not previously performed, while Walter's error was made during a task that was part of his regular duties. Moreover, one of the errors made by the employee in ***Ward*** could be attributed, at least in part, to the employer. That is not the case here.[3] As such, Walter's case is distinguishable from ***Ward***.

¶21 Finally, in ***Fojut v. Bank One Wisconsin***, Hearing No. 01003788JF (LIRC Dec. 14, 2001), the employee, a customer service representative for a bank, was discharged after the employee used the wrong account number to make substantial deposits for customers when opening new accounts on two different occasions. ***Id.*** LIRC concluded that the employee's actions were not misconduct because the errors were simple, isolated instances and because, beyond generally requiring accuracy, the bank did not impose any special duty on the employee to double check account numbers before making deposits. ***Id.***

¶22 Here, unlike the employer in ***Fojut***, Dean Foods did impose a duty upon Walter to check the accuracy of the date code and Walter admitted that he was uncertain as to whether he fulfilled that duty. And unlike the employee in ***Fojut*** who made a simple error that occurred in an instant—using the wrong account number—Walter allowed the filling machines to run for several hours before performing his required duties. As such, ***Fojut*** is also distinguishable from this case.

[3] Walter complains in his brief that he did not notice the date code was wrong because he was "overwhelmed" during his shift, citing to several difficulties he faced during that time. He does not, however, fault Dean Foods for any of the problems he faced.

¶23 In sum, each case that Walter relies on for the proposition that LIRC has inconsistently defined misconduct when dealing with negligent acts is distinguishable on its facts. Our further review of LIRC's decisions on this matter leaves us to conclude that LIRC has not been inconsistent or arbitrary in its past decisions but rather "[t]he different results in LIRC decisions are explained by differences in factual situations." *See* ***Lopez v. LIRC***, 2002 WI App 63, ¶15, 252 Wis. 2d 476, 642 N.W.2d 561. Consequently, we conclude that there is no reason to deviate from well-established case law, which states that "whether an employee's conduct constitutes misconduct within the meaning of WIS. STAT. § 108.04(5) is entitled to great weight deference." *See* ***Bunker v. LIRC***, 2002 WI App 216, ¶26, 257 Wis. 2d 255, 650 N.W.2d 864. It follows that we will apply that standard here.

II. LIRC's conclusion that Walter's actions constituted misconduct under WIS. STAT. § 108.04(5) is reasonable.

¶24 Having concluded that LIRC's decision is entitled to great weight deference, we are required to uphold that decision so long as it is reasonable, even if we believe another conclusion based on these facts would be more reasonable. *See* ***Barron***, 212 Wis. 2d at 762-63. Here, there is sufficient evidence to demonstrate that Walter evinced "substantial disregard of the employer's interests or of the employee's duties and obligations to his employer" when he permitted the filling machines to run for hours while using the wrong date code. *See* ***Boynton Cab Co.***, 237 Wis. at 260.

¶25 LIRC concluded as follows:

> The employer has quality check procedures which required the employee to check the date code at regular intervals of no more than 30 minutes throughout the production run. The employer further requires workers to log each check throughout the shift. The employee did not

> discover the date code error until 3.5 hours into his shift. While the employee testified that he was working to the best of his ability, his testimony is self-serving and not credible. If the employee had followed the employer's procedures he would have discovered the error earlier than 3.5 hours into the shift.
>
> Additionally, the employee was issued prior discipline, including an extended probationary period for a similar incident. The employee knew or reasonably should have known that his job was in jeopardy. While the final incident may be interpreted as a "lesser infraction" due to the shorter time the production ran with the error, the employee's conduct evinced a willful and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect, and therefore constituted misconduct connected with the employment.

¶26 While it may be that another reasonable decision-maker could conclude otherwise, LIRC's decision that Walter's actions constituted misconduct under WIS. STAT. § 108.04(5) is reasonable and based upon the facts and the law. Given our standard of review, we must uphold LIRC's decision and reverse the circuit court's decision to the contrary.

By the Court.—Order reversed.

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