COURT OF APPEALS
DECISION
DATED AND RELEASED

December 5, 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. 96-1755

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

JESUS BARBARY,

Petitioner-Appellant,

v.

JAMES R. STURM, DILHR LABOR & INDUSTRY REVIEW COMMISSION, and BLACKHAWK TECHNICAL COLLEGE,

Respondents-Respondents.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed*.

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

ROGGENSACK, J. Jesus Barbary appeals a circuit court order confirming the determination of the Labor and Industry Review Commission (LIRC) that Barbary was ineligible for unemployment compensation benefits because he was discharged for misconduct connected with his employment,

within the meaning of § 108.04(5), STATS. Because LIRC's conclusion that Barbary was discharged for misconduct connected with his employment is reasonable and not contrary to the clear meaning of the statute, the order is affirmed.

BACKGROUND

Barbary began working as a full-time custodian for Blackhawk Technical College on August 1, 1989. The last day he worked was February 8, 1995. During his shift that day, Barbary was involved in an altercation with an off-duty co-worker, Charles Stokes. At one point during the dispute, according to Stokes, Barbary picked up a chair and threatened to "bash [Stoke's] m*****f***ing brains out." Barbary maintains that Stokes initiated the confrontation, and that he (Barbary) was merely lifting the chair to move it. After Stokes reported the incident, Barbary was suspended pending investigation, and ultimately discharged from his employment on February 21, 1995.

Barbary promptly applied for unemployment compensation benefits. On March 2, 1995, the Department of Industry, Labor and Human Relations (DILHR) made an initial determination that the evidence available did not establish misconduct and held him eligible for unemployment compensation. On April 14, 1995, after an evidentiary hearing, an administrative law judge (ALJ) reversed the initial determination, and ordered Barbary to repay $1,414.00 in benefits which he had already received. The ALJ found Stokes' testimony that Barbary had verbally and physically threatened him to be "consistent, credible, and persuasive," and because Barbary's "actions and behavior were intentional and in substantial disregard of the employer's interests, the discharge was for misconduct connected with the employment." Upon review, LIRC adopted the findings and conclusions of the ALJ, and affirmed the decision to deny benefits. The Rock County Circuit Court in turn affirmed LIRC's decision, and Barbary appeals.

DISCUSSION

Scope of Review.

This court reviews LIRC's decision rather than that of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). LIRC's factual findings must be upheld on review if there is credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983); § 102.23(6), STATS.[1] A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. ***Advance Die Casting Co. v. LIRC***, 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 102.23(6). Once the facts are established, however, the determination of whether certain conduct is "misconduct" within the meaning of § 108.04(5), STATS., is a question of law. ***McGraw-Edison Co. v. DILHR***, 64 Wis.2d 703, 713, 221 N.W.2d 677, 683 (1974).

A court is not bound by an agency's conclusion of law. ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). However, it may defer to its determination. The supreme court has recently clarified both when to defer to an agency's legal conclusion, and how much deference the courts should give. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996) (citations omitted). An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review. ***Id.*** at 284, 548 N.W.2d at 61. We will accord great weight deference only when all four of the following requirements are met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) … the interpretation of the agency is one of long-standing; (3) … the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) … the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id., *citing* ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). We will accord due weight deference when "the agency has some

[1] Section 102.23(6), STATS., is applied to judicial reviews of unemployment compensation decisions by § 108.09(7), STATS.

experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** at 286, 548 N.W.2d at 62. The deference allowed an administrative agency under due weight is accorded largely because the legislature has charged the agency with the enforcement of the statute in question. ***Id.*** This court will not overturn a reasonable agency decision that furthers the purpose of the statute unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency. ***Id.*** We will employ *de novo* review when the legal conclusion made by the agency is one of first impression, or when the agency's position on the statute has been so inconsistent as to provide no real guidance. ***Id.*** (citations omitted).

Under the great weight standard, "a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." ***UFE***, 201 Wis.2d at 287, 548 N.W.2d at 62. We conclude that great weight deference must be accorded to LIRC's application of the facts to the statutory standard set forth in § 108.04(5), STATS., because LIRC was charged with the duty of administering the statute; it has long-standing experience in doing so, through which it has developed expertise in interpreting what types of conduct rise to the level of misconduct; and it gives consistency to statutory interpretation to defer to the agency.

Misconduct.

An "employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible to receive [unemployment compensation] benefits" until certain qualifying conditions are met. Section 108.04(5), STATS. Misconduct has been defined by the supreme court to include:

> ... conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee ....

Boynton Cab Co. v. Neubeck et al., 237 Wis. 249, 259, 296 N.W. 636, 640 (1941). A single incident can amount to misconduct where it endangers the safety of others. ***McGraw-Edison***, 64 Wis.2d at 713, 221 N.W.2d at 683.

Barbary contends that his actions did not rise to the level of misconduct because (1) he did not threaten Stokes in the manner Stokes described; (2) even if he did threaten Stokes, he did not actually cause any physical harm; and (3) his discharge was based on a single, isolated incident. None of these arguments are persuasive. First, the determinations that Barbary used profane language and physically threatened a co-worker are factual findings. They are directly supported by the testimony of the co-worker, Stokes, whom the ALJ found to be credible. Therefore, we may not set them aside. Section 102.23(6), STATS. Furthermore, it is reasonable to conclude that physical threats to co-workers violate standards of behavior which the employer has the right to expect. Even where no one is actually injured, such threats are sufficient to cause a disruption in the work place. Under the totality of the circumstances presented by this case, we cannot say LIRC's conclusion that Barbary was fired for misconduct connected with his employment is unreasonable or contrary to the clear meaning of the statute. Therefore, we affirm LIRC.

CONCLUSION

LIRC's findings that Barbary verbally and physically threatened a co-worker were supported by substantial and credible evidence. LIRC's conclusion that such threats constituted misconduct which disqualified him from receiving unemployment benefits is reasonable and not contrary to the clear meaning of the statute. Therefore, we defer to LIRC and affirm.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.