COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1629

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

JEROME A. BEATTY,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND
A TITAN WHEEL COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

SNYDER, P.J. This case involves the unemployment compensation benefit eligibility of an employee discharged for sexual harassment reasons. Jerome A. Beatty appeals from a circuit court judgment affirming a Labor and Industry Review Commission (LIRC) decision holding that he was

ineligible for unemployment compensation benefits because his workplace sexual harassment behavior was disqualifying misconduct within the meaning of § 108.04(5), STATS.[1] Beatty contends that the behavior was not misconduct under § 108.04(5) because he did not act with intentional disregard of the interests of his former employer. He further argues that LIRC's conclusion that his behavior constituted disqualifying misconduct is not entitled to great weight deference. Because we conclude that LIRC's decision is entitled to great weight and that its conclusion that Beatty's sexual harassment behavior constituted employee misconduct is reasonable, we affirm.

Beatty was terminated from his employment at Titan Wheel International, Inc. (Titan Wheel) on December 16, 1995, after three female employees reported that they had been sexually harassed by Beatty. After his termination, Beatty applied for unemployment compensation benefits and was denied benefits at an initial hearing because he had been discharged for employment misconduct within the meaning of § 108.04(5), STATS. An administrative law judge (ALJ) later held that Beatty's discharge was not for misconduct within the meaning of § 108.04(5) and reversed the initial determination denying compensation. Titan Wheel appealed the ALJ's decision to LIRC. After consulting with the ALJ, LIRC determined that Beatty was not eligible for benefits.[2] Beatty petitioned for a § 108.09(7), STATS., judicial review

[1] Section 108.04(5), STATS., provides in pertinent part:

> **(5)** DISCHARGE FOR MISCONDUCT. An employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible to receive benefits ....

[2] In its decision, LIRC ordered Beatty to repay $13,950 he had already received in unemployment compensation.

of the LIRC decision. The circuit court accorded the LIRC decision great weight deference and affirmed the decision as reasonable.

We must determine if Beatty's workplace sexual harassment behavior constituted "misconduct" supporting a denial of unemployment compensation benefits under § 108.04(5), STATS. We review the LIRC decision and not that of the circuit court. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). The LIRC decision included the following findings:

> [Titan Wheel's written] policy provides that all employes have the right to work in a discrimination-free environment. The policy states that each worker has the right to be free from sexual harassment, including any situation where the conduct interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. [Beatty] had received a copy of this policy. [3]

[3] Titan Wheel's written employment policy provides in relevant part:

> SEXUAL HARASSMENT POLICY AND PROCEDURE
>
> Titan Wheel International, Inc. believes that all employees have a right to work in a discrimination-free environment. This encompasses freedom from sexual harassment. Sexual harassment is a form of employee misconduct which interferes with work and wrongfully deprives employees of the opportunity to work in an enjoyable and productive environment. Moreover, it is prohibited and is a violation of the law and will not be condoned in any form by the Company.
>
> Sexual harassment is defined as any unwelcome sexual advances, request for sexual favors or any verbal or physical conduct of a sexual or sex-based nature where: ... (3) such conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment....
>
> Examples of sexual harassment are listed as follows, but are not all inclusive:

(continued)

On July 5, 1995 [Beatty] told the employer's human resources manager that she looked nice. She told [Beatty] not to make similar comments in the workplace, and [Beatty] acquiesced.

On November 30, 1995 a female co-worker, Wald, informed the human resources manager that [Beatty] had made sexual comments to her since her employment began with the company in October 1995. [Beatty] told Wald that she had a nice butt; commented about a picture of rubber gloves, stating that they could be used as condoms, and made comments about placing his hands on various parts of her body. [Wald] never informed [Beatty] that these comments made her feel uncomfortable. After Wald made these comments to the human resources manager, two other female co-workers provided statements alleging that [Beatty] had also sexually harassed them.

- Sexual molestation; intentional physical conduct of a sexual nature, such as touching, pinching, grabbing, brushing against another employee's body;
- Unwanted sexual advances such as sexually-oriented gestures, jokes, noises, remarks, etc;

...

- Subjecting an employee to unwelcome sexual conduct which makes such employee's job more difficult to perform;

....

... Employees engaging in such "harassment" will be appropriately disciplined, up to and including discharge. Specific disciplinary actions shall depend upon the nature and/or severity of the misconduct or warnings.

Any employee who has a complaint of sexual harassment, a concern or question, is encouraged to—either orally or in writing—discuss the matter thoroughly with his/her immediate supervisor, or if preferred, with the Personnel Representative or Operations Manager. Be assured that all such charges will be treated confidentially, promptly investigated, and that no retaliatory measures will be taken against the complaining employee or witnesses.

Our management is committed to vigorously enforcing its Sexual Harassment Policies at all levels of [t]he Company.

> Co-worker Schulist and [Beatty] worked in the same department, but did not get along well at the workplace. She accused [Beatty] of saying, in 1993 and 1994, that her ass looked better in jeans than in a uniform. Schulist did not report this to management at the time of the alleged occurrences. In November, 1995 Schulist alleged that [Beatty] ran his hands down her back. She reported this incident to management in December, 1995. Schulist never told [Beatty] that she believed his conduct to be inappropriate.
>
> In the summer of 1995, [Beatty] commented to co-worker Naughtin that she had a nice body, and that she should wear tighter clothes so that he would have something to look at. Naughtin did not report this comment to management until December, 1995, after she learned that Wald had spoken to management with her concerns. Naughtin did not inform [Beatty] that his comments were unwelcome.
>
> [Beatty] was suspended on December 8, 1995 (week 49) and discharged on December 16, 1995 (week 50) for violating the employer's sexual harassment policy.

Beatty initially contends that LIRC's determination is entitled to only "due weight" deference rather than "great weight" deference because LIRC lacks expertise in sexual harassment cases.[4] Whether an employee engaged in misconduct under § 108.04(5), STATS., is a legal conclusion which we review de novo. *See* ***Charette v. LIRC***, 196 Wis.2d 956, 959, 540 N.W.2d 239, 241 (Ct. App. 1995). Even though this is a question of law, Wisconsin courts may assign "great weight" to the agency determination if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the law. *See* ***Sauk County v. WERC***, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991). "Great weight" deference is also applied

[4] An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or be subject to de novo review. *See* ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996).

where a "legal question is intertwined with factual determinations or with value or policy determinations." ***Id***. (quoted source omitted).

"Great weight" deference may be accorded to a LIRC determination if four factors are met: (1) the agency is charged by the legislature with the duty of administering § 108.04(5), STATS.; (2) the agency's interpretation of § 108.04(5) is one of long-standing; (3) the agency employed its expertise or specialized knowledge in interpreting § 108.04(5); and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *See* ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). Beatty contends that LIRC has not sufficiently established ***Harnischfeger*** factors (2) and (3) to warrant great weight deference. However, we have previously held that Wisconsin courts may assign "great weight" to an agency's interpretation of § 108.04(5) "depending on the subject matter." *See* ***Charette***, 196 Wis.2d at 959, 540 N.W.2d at 241.

Beatty contends that "great weight" deference is not applicable here because sexual harassment is a "subject matter" that does not directly implicate the employer's interests like the misconduct in ***Charette***. In ***Charette***, the "subject matter" was excessive tardiness that "was recurrent and disrupted other employees' work schedules." ***Id***. Here, the "subject matter" is the violation of Titan Wheel's policy stating that each worker has the right to be free from sexual harassment, including any situation where the "conduct interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment," a copy of which LIRC found was provided to Beatty. In ***Charette***, however, we also said that because "the question of whether tardiness constitutes misconduct is intertwined with factual and value determinations," the

LIRC decision was entitled to great weight deference. *See* ***id.*** at 960, 540 N.W.2d at 241.

Beatty's sexually harassing behavior, like Charette's excessive tardiness, involves factual and value determinations as to Beatty's workplace behavior toward his coemployees and as to the purpose and intent of Titan Wheel's written sexual harassment policy. Because a violation of a work rule may justify discharge of an employee but not amount to misconduct for unemployment compensation purposes, *see* ***Consolidated Construction Co., Inc. v. Casey***, 71 Wis.2d 811, 819-20, 238 N.W.2d 758, 763 (1976), factual and value determinations were necessary by LIRC here, as in ***Charette***, to determine if Beatty's behavior was § 108.04(5), STATS., misconduct. Because LIRC's interpretation of employee misconduct under § 108.04(5) has been recognized as one of long-standing and because LIRC's determination of whether Beatty's sexually harassing behavior was misconduct is intertwined with factual and value determinations, we conclude that LIRC's decision is entitled to great weight deference.

An examination of the statute that LIRC is charged with administering supports our conclusion.[5] Section 108.04(5), STATS., provides that an employee is ineligible to receive unemployment compensation benefits if he or she was terminated for misconduct, but the statute does not define the term "misconduct." That lack of definition created an ambiguity as to the statutory meaning of "misconduct," *see* ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 256-57, 296 N.W. 636, 638-39 (1941), that was resolved by judicial establishment

[5] LIRC is charged with the duty of administering § 108.04(5), STATS., pursuant to § 108.09(6), STATS.

of the following standard concerning its meaning in unemployment compensation disputes:

> [Misconduct] is limited to 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 [the] employer. On the other hand mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies of 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.

Id. at 259-60, 296 N.W. at 640.

We read the ***Boynton Cab*** standard as being phrased in conclusory terms and as not lending itself to bright-line misconduct rulings. Accordingly, LIRC's statutory charge is not to determine if Beatty's workplace conduct amounted to sexually harassing behavior, which Beatty did not contest, but whether such behavior amounted to employee misconduct as measured against the ***Boynton Cab*** standard. The standard lends itself to a requirement that LIRC make factual, value and policy determinations on a case-by-case basis in finding disqualifying conduct under § 108.04(5), STATS.

In addition, while Beatty points out that no published Wisconsin case expressly addresses sexually harassing behavior as § 108.04(5), STATS., misconduct, the lack of specific past cases with wholly or partially analogous facts applicable to an agency's interpretation of a statute need not deprive the agency of great weight deference. *See* ***Barron Elec. Coop. v. PSC***, 212 Wis.2d 752, 764, 569 N.W.2d 726, 732 (Ct. App. 1997). In ***Barron***, we held:

> The [deference] test is not … whether the commission has ruled on the precise---or even substantially similar---facts in prior cases. If it were, given the myriad factual situations to which the [statutory] provisions … may apply, deference would indeed be a rarity. Rather, the cases tell us that the key in determining what, if any, deference courts are to pay to an administrative agency's interpretation of a statute is the agency's experience in administering the particular statutory scheme---and that experience must necessarily derive from consideration of a variety of factual situations and circumstances. Indeed, we have recognized in a series of cases that an agency's experience and expertise need not have been exercised on the precise---or even substantially similar---facts in order for its decisions to be entitled to judicial deference.

Id. (footnote omitted).

Finally, we note that since 1941, Wisconsin labor and industry agencies have gained substantial experience and knowledge in interpreting and applying the statutory scheme embraced in § 108.04(5), STATS. *See* ***Boynton Cab***, 237 Wis. at 249, 296 N.W. at 636 (accidents, failure to report accidents and fare discrepancies); ***Cheese v. Industrial Comm'n***, 21 Wis.2d 8, 123 N.W.2d 553 (1963) (employee sabotage of employer equipment); ***Miller Brewing Co. v. DILHR***, 103 Wis.2d 496, 308 N.W.2d 922 (Ct. App. 1981) (falsifying employment application); ***Charette***, 196 Wis.2d at 959, 540 N.W.2d at 241 (excessive tardiness misconduct); ***Bernhardt v. LIRC***, 207 Wis.2d 292, 558 N.W.2d 874 (Ct. App. 1996) (workplace "slowdown" misconduct). We are satisfied that LIRC's § 108.04(5) misconduct determination of Beatty's workplace behavior is entitled to great weight deference.

We now turn to Beatty's contention that he did not engage in misconduct with intent to disregard the interests of his employer, Titan Wheel. Conceding that his sexual harassment behavior was "crude and boorish behavior," Beatty maintains that he was discharged without warning that his workplace

behavior implicated Titan Wheel's interests and that by its very nature the behavior did not implicate Titan Wheel's interests.

Where an agency interpretation is entitled to great weight deference this court will affirm the agency determination even if an alternative reading of the statute is more reasonable. *See* ***Barron***, 212 Wis.2d at 761, 569 N.W.2d at 731. Employment "misconduct" is the intentional and substantial disregard of an employer's interests. *See* ***Boynton Cab***, 237 Wis. at 259-60, 296 N.W. at 640. The crucial question is the employee's intent or attitude which attended the act or omission alleged to be misconduct. *See* ***Cheese***, 21 Wis.2d at 14, 123 N.W.2d at 556. Questions concerning the employee's conduct and intent are questions of fact for LIRC to determine. *See* ***Holy Name Sch. v. DILHR***, 109 Wis.2d 381, 386, 326 N.W.2d 121, 124 (Ct. App. 1982). We may not substitute our judgment for that of the agency as to the weight and credibility of the evidence on any finding of fact, and the agency's findings of fact must be upheld if supported by credible and substantial evidence. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173-74 (1983).

In its misconduct determination, LIRC reviewed Titan Wheel's sexual harassment policy, made factual findings as to Beatty's workplace behavior and acknowledged that it must determine if Titan Wheel's interests had been intentionally disregarded by Beatty. LIRC then concluded:

> After reviewing the record and reaching essentially the same set of facts as the administrative law judge, the commission concludes that [Beatty's] conduct was sufficiently egregious and intentional so as to support a finding of misconduct within the meaning of the law. [Beatty's] conduct was prohibited under the employer's general work rule policy which the employe was aware of even though his female co-workers failed to inform him that his actions and comments were unwelcome. [Beatty's] continued banter and gestures loaded with sexual overtures

> were a substantial and intentional disregard of the employer's interests and standard of conduct the employer had a right to expect of [Beatty].

In both its findings and conclusion, the LIRC decision directly addressed Beatty's contention that he did not act with the knowledge or intent to substantially disregard the interests of his employer. Because we are satisfied that the LIRC determination is reasonable and that credible and substantial evidence supports its determination that Beatty's misconduct was intentional and contrary to Titan Wheel's interests, we affirm the judgment denying Beatty's eligibility for unemployment compensation benefits.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.