COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1963

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

JOHN W. KNEUBUHLER II,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION, AND OSCAR MAYER FOODS CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

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

VERGERONT, J. John Kneubuhler appeals an order affirming the decision of the Labor and Industry Review Commission that Kneubuhler was ineligible for unemployment compensation benefits because he had been

discharged for misconduct within the meaning of § 108.04(5), STATS.[1] Kneubuhler argues that we should give no deference to the commission's conclusion of misconduct and that the commission erred in concluding that Kneubuhler's behavior constituted misconduct. As did the trial court, we hold that the commission's conclusion is entitled to great weight and that it was reasonable. We therefore affirm the trial court.

Kneubuhler was terminated from his employment at Oscar Mayer Foods Corporation after a verbal altercation with supervisory personnel on January 11, 1996. The initial determination on his application for unemployment compensation benefits was that he was not discharged for misconduct. Oscar Mayer appealed that determination and the administrative law judge (ALJ) decided that, while Kneubuhler "had demonstrated very poor judgment in his outbursts and accusations toward his supervisor," he had not engaged in misconduct.[2]

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[1] Section 108.04(5), STATS., provides in 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 until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs equal to at least 14 times the employe's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment compensation law of any state or the federal government.

[2] The ALJ made these findings:

> On January 11, 1996, the employe was questioned by one of the employer's operations supervisor about a meat batch that was improperly cooked. The employe indicated that it was not his fault. The operations supervisor reported the situation with the meat to the employe's immediate supervisor. The employe entered the office where the meeting was taking place, and complained in a loud voice that he the supervisor was lying

(continued)

Oscar Mayer appealed the ALJ's decision to the commission, which reversed. The commission made these findings concerning the incident:

> On January 11, 1996, the employe was speaking to a worker, regarding meat that his section was having a hard time slicing. The employe indicated that it was not his job to move the meat into the area. The employe was informed that it was his job and that he was responsible for lining the meat up. The employe then left. The other worker discussed the situation with the employe's supervisor. The employe overhead the conversation, and burst in, demanding to know how the supervisor knew about these things. The employe said that the supervisors were trying to conjure something up and were after him. Another supervisor walked in and said that the employe was getting loud, and it sounded like insubordination. The employe told her that this had nothing to do with her and to stay out of his business. The employe told his supervisor that this was all a bunch of junk and that the other worker was lying. The employe's supervisor told the employe to listen, and the employe said "No, you listen to me because you don't know what the fuck you're talking about." The employe spoke loudly. The employe was then told that his employment was suspended for insubordination and security escorted him from the employer's premises. He was discharged on January 16, 1996, (week 3).

The commission concluded that Kneubuhler's conduct was loud, disrespectful and belligerent, and that, "although workers might get upset with things that happen in the work place, in this case the employe's response was unreasonable and abusive

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> and that he was being harassed and retaliated against for filing complaints and grievances against the employer. The supervisor attempted to explain the purpose of the discussion but the employe stated that the supervisor "didn't know a damn thing". The employe was then told that his employment was suspended for insubordination and he was escorted from the premises by security personnel. On January 16, 1995, the employer discharged him from his employment.

The ALJ also rejected Oscar Mayer's contention that Kneubuhler had violated its break policy that same day. The break policy is not an issue on this appeal.

to the employer's supervisory personnel, and amounted to such a wilful and substantial disregard of the employer's interests as to constitute misconduct." The commission also stated:

> The commission discussed witness credibility and demeanor with the ALJ who indicated that the employe was an excitable and emotional individual, and that this was simply part of his personality. While it is true that it may be more difficult for an excitable individual not to lose his temper, in this case the employe's behavior was extreme and unjustified considering the circumstances.

Kneubuhler was directed to repay the unemployment compensation benefits he received.

Kneubuhler petitioned for judicial review of the commission's decision under § 108.09(7), STATS., and the trial court affirmed. The court concluded that under the applicable case law, the commission's decision should be given great weight and should be sustained if it is reasonable, even if an alternative is equally reasonable. The court decided that, although Kneubuhler's position that he did not engage in misconduct was a reasonable conclusion of law, the commission's conclusion of misconduct was also reasonable and therefore must be affirmed.

On appeal, Kneubuhler's first contention is that this court should not give the commission's decision any deference because the decision conflicts with the commission's prior decisions. Specifically, Kneubuhler points to two prior agency decisions in which, he contends, the commission found no misconduct under similar circumstances. The commission disagrees, asserting that the great weight deference standard of review employed by the trial court is the correct one.

We agree with the trial court and the commission that great weight deference is appropriate.

As both parties agree, we review the commission's decision, not that of the trial court. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). We must uphold the commission's factual findings 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. Kneubuhler does not challenge the commission's factual findings but instead focuses his argument on the commission's conclusion that Kneubuhler's conduct constituted misconduct within the meaning of § 108.04(5), STATS. Whether the facts as found by the commission constitute misconduct is a question of law. ***Bernhardt v. LIRC***, 207 Wis.2d 298, 305, 558 N.W.2d 874, 878 (Ct. App. 1996).

Although we are not bound by an agency's conclusions of law, we give them varying degrees of deference depending on the nature of the determination and the agency's experience and expertise. ***Bernhardt***, 207 Wis.2d at 305, 558 N.W.2d at 878. We have held that the commission's conclusion that particular facts constitute misconduct is entitled to great weight because it is intertwined with factual and value determinations. *See* ***id.***, citing ***Charette v. LIRC***, 196 Wis.2d 956, 960, 540 N.W.2d 239, 241 (Ct. App. 1995). Kneubuhler, however, disagrees. He argues that we should give no deference to the commission's decision because its past decisions are inconsistent with this one. *See* ***UFE v. LIRC***, 201 Wis.2d 274, 285, 548 N.W.2d 57, 62 (1996) (de novo review, with no deference to agency, is appropriate when issue is one of first impression or agency precedent is so inconsistent as to provide no real guidance).

To resolve this issue, we examine the statute which the agency is charged with administering. Since 1933, § 108.04(5), STATS., has provided that an emp1oyee is ineligible for unemployment compensation benefits if he or she was terminated for misconduct, but the statute does not define misconduct. *See* § 108.04(5), 1933. However, our supreme court defined the term decades ago:

> [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.
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> ….
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> On the other hand mere inefficiency, unsatisfactory conduct, failure of 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, 259-260, 296 N.W. 636, 640 (1941).

Since 1941, the commission has applied the ***Boynton Cab*** standard to resolve unemployment compensation benefits disputes when misconduct is alleged. This standard is phrased in conclusory terms, and, as the trial court aptly noted, "does not lend itself to bright line rulings" but instead requires a determination that must be made on a "case by case" basis, based on the facts of each case. Indeed, our decision to accord great weight to the commission's misconduct conclusions as we did in ***Bernhardt*** is based on this very aspect of the determination—its fact intensive nature.

The first prior agency decision Kneubuhler brings to our attention as inconsistent is ***Wisconsin Industrial Commission***, No. 37-C-40 (1938), in which the commission held that an employee's "rude remark" to a supervisor was not misconduct.[3]

In the second decision, ***Vilter Manufacturing Corp. v. Labor and Industry Review Commission and Argie Fowler Jr.***, No. 559-728 (Wis. Cir. Ct. Milwaukee County June 14, 1982), the commission held that these circumstances did not constitute misconduct: improper language to a co-worker which was justified under the circumstances; a "vulgar expression" that "may have [been] directed … to [the] supervisor"; and failure to follow a supervisor's instructions which, the commission inferred, were made for the purpose of harassing the employee.[4]

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[3] The nature of the remark and the surrounding circumstances are only briefly described in the commission's decision in ***Wisconsin Industrial Commission***, No. 37-C-40 (1938):

> The employe, seventy-four years of age, had worked for the employer as night foreman for twenty-seven years. About four weeks before his discharge the employer installed a new machine in the plant. The employe's crew worked with this machine, and he was instructed to see that it was washed at the end of the night shift.
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> The employe failed to wash the machine as instructed and this failure was called to his attention on various occasions. On the day before his discharge he was again told by the foundry superintendent to wash the machine when his shift was completed. The employe replied with a rude remark. He was discharged when he reported for work the following day.
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> The employe was not discharged for his failure to wash the machine, but was discharged solely because of his remark. While the remark was of a rude and vulgar nature, its use, under the circumstances, did not constitute misconduct.

[4] The complete description of the commission's findings, as related by the county court, are:

> The Commission … held that based on conflicting testimony, it was not established the employe directed improper

(continued)

The commission counters these two cases with four cases in which circuit courts have affirmed the commission's conclusions of misconduct in situations involving use of profanity directed at a supervisor.[5]

> language to co-workers except on one occasion which was justified. On that occasion, the co-worker was extremely negligent and could have seriously injured the employe. The language used was not uncommon in factory areas. He did not disobey the employer's rule regarding cleaning up and changing clothes early.
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> The Commission also found that in April of 1980 the employe may have directed vulgar expression to his supervisor. This allegedly occurred after he had received permission to leave work in the afternoon to take his wife home from the hospital but was subsequently given a three-day disciplinary layoff for failing to return to work for about one and one-half hours.
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> The Commission also found that in December, several days before he was discharged, the employe failed to follow instructions from his supervisor. The instructions were given at the close of an angry grievance session on a grievance the employe had filed against the supervisor. It was inferred that the instruction at this grievance meeting and in April of 1980 were made for the purpose of harassing the employe.
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> Although the employe's actions on occasion showed poor judgment, his actions did not under the circumstances evince a wilful or substantial disregard of the employer's interests or of the standards of behavior which the employer had a right to expect of him.

Vilter Mfg. Corp. v. LIRC and Argie Fowler Jr., No. 559-728 (Wis. Cir. Ct. Milwaukee County Jun. 14, 1982).

[5] ***Reilly v. Aluminum Goods Mfg. Co.***, (Wis. Cir. Ct. Dane County Feb. 8, 1954), 11 Wisconsin Unempl. Ins. Repts. (CCH) ¶8221 (APP-5) (court affirmed commission conclusion that employe's single outburst to supervisor in which she called him "god-damn bastard," was misconduct); ***Luse v. Mid-City Foundry Company & Ind. Comm.***, (Wis. Cir. Ct. Dane County Dec. 18, 1963), 11 Wisconsin Unempl. Ins. Repts. (CCH) ¶8388 (APP-8, 9) (court affirmed commission's decision that employe's single outburst to supervisor described in the court's decision as having been "Oh, _____ you" was misconduct); ***Lathrop v. DILHR & Presto Products***, (Wis. Cir. Ct. Dane County Mar. 12, 1979), 11 Wisconsin Unempl. Ins. Repts. (CCH) ¶8943 (APP-12) (court affirmed commission's decision of misconduct where employe told supervisor "stick it in your ass"); ***Stribling v. LIRC and Reinhart Foods, Inc.***, No. 95-CV-006424 (Wis. Cir. Ct. Milwaukee County Mar. 22, 1996), (APP-16) (court affirmed commission's conclusion that employe's outburst repeatedly and loud calling his supervisor a "fucking liar" was misconduct).

We disagree with Kneubuhler that these decisions show a lack of uniformity in the standard employed by the commission. ***Wisconsin Industrial Commission,*** No. 37-C-40, was decided before ***Boynton Cab Co.***, but the decisions show that the commission is applying the ***Boynton Cab*** standard. We also disagree with Kneubuhler that the commission's decision in this case is based solely on the use of profanity and that this is inconsistent with ***Wisconsin Industrial Commission***, No. 37-C-40, and ***Vilter Manufacturing***. As found by the commission, Kneubuhler's use of profanity directed at his supervisor was part of an outburst in which he charged that his supervisors were "conjur[ing] something up and were after him." He also spoke rudely to another supervisor who tried to quiet him down, and would not listen to what his supervisor was telling him but persisted in accusing others of lying, all in a loud voice.

We are not persuaded that this situation is so similar to one "rude remark" to the supervisor in ***Wisconsin Industrial Commission***, No. 37-C-40, or the "vulgar expression" that "may have [been] directed to … [the] supervisor" in ***Vilter Manufacturing*** as to constitute an inconsistent application of the misconduct standard. Rather, the two decisions cited by Kneubuhler and the four cited by the commission demonstrate the variety of factual situations in which the commission must apply the misconduct standard and the difficulty in formulating specific rules, even for certain categories of situations, such as those involving profanity directed at supervisors. This is precisely the reason why we accorded great weight to the commission's conclusions on misconduct. *See* ***Bernhardt***, 207 Wis.2d at 305, 558 N.W.2d at 878.

In addition, the requirements for great weight deference used in ***UFE Inc.***[6] are met in this case. The legislature has charged the commission with administering § 108.04(5), STATS., and the commission has long-standing experience in applying the ***Boynton Cab*** standard. Particularly given the conclusory wording of the standard and the variety of factual situations in which the standard must be applied, deferring to the commission's decision on what constitutes misconduct promotes uniformity and consistency in the application of the standard. *See* ***UFE***, 201 Wis.2d at 284, 548 N.W.2d at 61.

We hold that the commission's conclusion that Kneubuhler engaged in misconduct is entitled to great weight. We therefore must sustain its conclusion if it is reasonable, even if another conclusion on these facts would be more reasonable. *See* ***UFE***, 201 Wis.2d at 287, 548 N.W.2d at 62. Like the trial court, we acknowledge that Kneubuhler's misconduct interpretation as applied to these facts is reasonable, but we too, conclude that the commission's conclusion is reasonable and therefore must be affirmed.

Misconduct includes "deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee…." ***Boynton Cab Co.***, 237 Wis. at 259-60, 296 N.W. at 640. The commission could reasonably decide that Kneubuhler's conduct was a deliberate disregard of the standards of behavior Oscar Mayer has a right to expect from its employees. It could also reasonably decide that, even if an employee believes his supervisor is

[6] Great weight deference is appropriate when: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the interpretation of the statute 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. ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996).

being given inaccurate information about his work and finds this upsetting, an employer has a right to expect that the employee will not be belligerent, disrespectful and use profanity toward supervisory personnel.

Kneubuhler argues that the ALJ's findings and analysis were correct, not the commission's. However, we review the decision of the commission, not that of the ALJ; the commission has the ultimate responsibility for making findings of fact and conclusions of law. *See* ***Anheuser Busch, Inc. v. Indus. Comm'n***, 29 Wis.2d 685, 691, 139 N.W.2d 652, 655 (1966). The commission fulfilled its obligation to confer with the ALJ and provided an explanation for any disagreement it had with the ALJ's factual findings. *See* ***Carley Ford, Lincoln, Mercury v. Bosquette***, 72 Wis.2d 569, 575, 241 N.W.2d 596, 599 (1976).

In any event, in this case there is no significant discrepancy in the facts as found by the ALJ and those found by the commission; the latter are simply somewhat more detailed.[7] The significant difference between the two decisions is the conclusion each reaches on whether Kneubuhler's conduct constituted misconduct. However, the commission is not bound by the ALJ's conclusion of law and need accord it no deference, *see* ***Carley***, 72 Wis.2d at 576, 241 N.W.2d at 600. And the ALJ's conclusion favoring Kneubuhler does not shift our focus from the reasonableness of the commission's conclusion of law. The ALJ's conclusion may demonstrate that Kneubuhler's position is also reasonable, but, as we have already stated, that is not the inquiry before us.

[7] As is evident from the parties' briefs and our review of the transcript of the hearing before the ALJ, there is no material dispute about the basic facts of the altercation—what Kneubuhler said and did and what the others present said and did.

Kneubuhler also argues that the record shows that use of profanity at Kneubuhler's workplace was common and that the commission's failure to take this into account was error. Once his conduct is put in this proper context, Kneubuhler contends, it is at most unsatisfactory conduct or an error in judgment or discretion—conduct specifically excluded from misconduct in ***Boynton Cab Co***. *See* ***Boynton Cab Co.***, 237 Wis. at 260, 296 N.W. at 640. We have carefully reviewed the record of the hearing. There was testimony about the use of profanity at the plant. Virginia Johnson, assistant human resources manager, acknowledged that foul language was not uncommon in this workplace, but also added that she was not saying it was acceptable. Kneubuhler testified that the language he used in this incident was not unusual "on the floor" and that he had "heard worse language used by supervisors." However, the use of profanity in general among employees does not make it unreasonable to consider profanity directed at a supervisor in the circumstances of this case to be misconduct.

Similarly, Kneubuhler's general allusions to supervisors using profanity on other occasions does not make the commission's conclusion about Kneubuhler's conduct in this situation unreasonable. There was no testimony that on this occasion Kneubuhler was provoked by hostile or profane language directed at him: he became angry when he overheard the operations supervisor make what he believed were inaccurate statements about his work to his supervisor. The commission could reasonably conclude that the very general and brief testimony on the use of profanity in other situations at this workplace was irrelevant to its evaluation of Kneubuhler's conduct. We also observe that it was not simply the use of profanity directed at his supervisor that the commission found to constitute misconduct: that was one aspect of his conduct, which was disrespectful and belligerent in other ways as well.

Finally, Kneubuhler argues that the commission erred in not taking his twenty-seven years of employment at Oscar Mayer into account, and that this one incident, viewed in the context of his long work history, does not justify the label of misconduct, even though it may be a violation of a work rule and justify discharge. We agree with Kneubuhler that violation of a work rule that justifies discharge does not necessarily amount to misconduct under § 108.04(5), STATS. *See* ***Consolidated Constr. Co. v. Casey***, 71 Wis.2d 811, 238 N.W.2d 758 (1976). We also agree that the employee's history with the employer may, depending on the circumstances, be part of a reasonable analysis of what constitutes misconduct. However, we conclude that the commission could reasonably view Kneubuhler's conduct on this one occasion to meet the ***Boynton Cab*** standard, in spite of his long period of employment with Oscar Mayer. We also disagree with Kneubuhler that his conduct cannot reasonably be viewed as misconduct under § 108.04(5) because he did not touch or threaten anyone. It is reasonable to interpret "the standard of behavior which the employer has a right to expect" by its employees toward their supervisors as encompassing more than the absence of threats or physical contact.

In summary, this may be a case where another reasonable decision maker could decide that Kneubuhler had not engaged in misconduct under § 108.04(5), STATS. However, we are persuaded that the commission's decision was reasonable and, given our standard of review, we therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.