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OF WISCONSIN

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June 6, 1985

Madison,

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You are hereby notified that the Court entered the following opinion and order:

#85-0034 - Aldrich Chemical Company, Inc. v. LIRC,
Robert M. Adler (Trial court case No. 626-676)

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

Robert Adler appealed from a judgment of the circuit court which reversed a decision of the Labor & Industry Review Commission (LIRC). Pursuant to this court's order of February 13, 1985, and a presubmission conference, the parties have submitted memo briefs. Upon review of those memoranda and the record, at conference, we summarily affirm the judgment of the trial court.

Adler was employed as a material handler at Aldrich Chemical Company, Inc. (Aldrich). One day at work, Adler asked the warehouse receptionist to page "Jack Meoff." The receptionist complied without recognizing the sexual connotation of the phrase. Adler was fired for misusing company property and engaging in indecent conduct. After a hearing at which Aldrich contested Adler's eligibility for unemployment compensation benefits, the hearing examiner determined that the paging incident was an isolated instance of poor judgment which did not rise to the level of misconduct. LIRC affirmed the examiner's decision. The circuit court reversed LIRC's decision.

The issue on appeal is whether Adler's paging request constituted misconduct connected with his employment. Any determination whether certain conduct amounts to misconduct is a conclusion of law and a determination by LIRC is not binding on the courts. McGraw-Edison Co. v. DILHR, 64 Wis.2d 703, 713, 221 N.W.2d 677, 683 (1974). Therefore we shall not defer to LIRC's interpretation of the legal issue.

An employee who is discharged for misconduct is barred from receiving unemployment compensation. Sec. 108.04(5), Stats. Misconduct, as used in sec. 108.04(5), means conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941).

Sexual harassment, as defined in ch. 111, Stats., includes unwelcome verbal conduct of a sexual nature. Sec. 111.32(13), Stats. Sexual harassment is unlawful pursuant to sec. 111.36, Stats. An employer is presumed liable for an act of sexual harassment by any of its employees. Sec. 111.36(1)(b), Stats.

Adler sexually harassed the warehouse receptionist by subjecting her to unwelcome verbal conduct of a sexual nature. Adler testified that he volunteered to request the page and he understood that the phrase was indecent. An employer has a right to expect that an employee will not engage in conduct which will subject the employer to liability for sexual harassment under sec. 111.36(1)(b), Stats. By his deliberate violation of the sexual harassment laws, Adler evinced a willful and wanton disregard of his employer's interest. The paging incident was misconduct within the meaning of sec. 108.04(5), Stats.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the trial court is affirmed.

Sullivan, J. (dissenting). 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. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 260, 296 N.W. 636, 640 (1941). I agree with LIRC's determination that Adler's actions amounted to an isolated instance of very poor judgment which did not rise to the level of misconduct. The court is not bound by LIRC's determination on a question of law. Nottelson v. DILHR, 94 Wis.2d 106, 115, 287 N.W.2d 763, 767 (1980). However, if the agency's legal conclusion is reasonable, it will be sustained even though an alternative conclusion may be equally reasonable. West Allis School District v. DIHLR, 110 Wis.2d 302, 304, 329 N.W.2d 225, 227 (Ct. App. 1982), aff'd 116 Wis.2d 410, 342 N.W.2d 415 (1984). When the expertise of the agency is significant to the determination of a legal question, the agency's decision should be given weight. Nottelson, 94 Wis.2d at 117, 287 N.W.2d at 768.

LIRC is empowered to conduct the hearings, investigations and inquiries necessary for the administration of the sexual harassment statute. Sec. 111.375(1), Stats. Therefore, LIRC has significant expertise in implementing the policies of the sexual harassment statute as well as the unemployment compensation act. Accordingly, it is particularly appropriate to defer to the agency's decision in this case. Furthermore, because LIRC's legal conclusion is reasonable in that it is consistent with the body of precedent construing the term "misconduct," its conclusion should be sustained. I would reverse the judgment of the trial court.

Marilyn L. Graves
Clerk of Court of Appeals