State of Wisconsin

Labor and Industry Review Commission

Candice R. Bolson Employee **Mole Lake Band** Employer Hearing No. 24200917EC	**Unemployment Insurance Decision**[1] **Dated and Mailed:** October 11, 2024 bolsoca_usd.doc:149

The commission **modifies** and, as modified, **affirms** the appeal tribunal decision. Accordingly, the employee is eligible for benefits beginning in week 12 of 2024, if otherwise qualified.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review.

Findings of Fact and Conclusions of Law

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based upon its review, the commission makes the same findings of fact and conclusions of law as stated in the appeal tribunal decision and incorporates them by reference into the commission's decision, subject to the following modifications:

1. The second and third sentences of the first paragraph of the ALJ's FINDINGS OF FACT and CONCLUSIONS OF LAW are deleted.

2. The following paragraph is added after the fourth paragraph of the ALJ's FINDINGS OF FACT and CONCLUSIONS OF LAW:

> The employer has a policy prohibiting sexual harassment. However, the employer did not produce a copy of this policy as an exhibit during the hearing, and the employee did not receive a copy of the policy. Further, although the employer claimed that the employee had attended a training on sexual harassment in August of 2023, the employee could not recall having done so, and the employer did not explain how this training would have alerted her that her conduct was unacceptable.

Memorandum Opinion

In its petition for commission review, the employer argues that the ALJ erred by focusing on whether there was sufficient evidence in the record to conclude that the coworker was offended or felt harassed by the employee's conduct, which the ALJ described as a "prank." It argues that a finding of misconduct or substantial fault does not require a finding that the subject of the prank was offended and, regardless of how the coworker felt about the employee's conduct, it still would have discharged the employee in compliance with its zero-tolerance policy regarding sexual harassment and a code of conduct which prohibits what the employer describes as "the employee's disturbing, sexually-related conduct" in the workplace. It also argues that the employee was aware of its sexual harassment policies yet chose to violate them through her actions and, therefore, her actions constitute an intentional and substantial disregard of its interests and reasonable expectations. The commission has considered the employer's arguments but does not find them persuasive.

An employee who is discharged from her employment is eligible for unemployment insurance benefits unless the discharge was for misconduct or substantial fault by the employee connected with the employee's work. Wis. Stat. §§ 108.02(11), 108.04(5),

and 108.04(5g). The employer bears the burden of establishing with competent, non-hearsay evidence that the employee was discharged for a reason that should disqualify her from benefits. *Operton v. LIRC,* 2017 WI 46, ¶ 38, 375 Wis. 2d 1, 894 N.W.2d 426.

In this case, the employer failed to meet its burden to prove that the employee's conduct amounted to either misconduct or substantial fault. At the hearing, the coworker who was the subject of the prank did not appear. Instead, the employer offered the testimony of a single witness, its HR director, who had no firsthand knowledge of the incident. The employee, who was the only competent witness, described her conduct as a joke between two friendly coworkers, who openly talked and joked about sex in the workplace. The employee explained that she and her coworker laughed about it afterward, and that, further, the employee had been the subject of a similar prank herself. Although the prank may have demonstrated poor judgment on the part of the employee, the employee's testimony does not demonstrate that her actions were offensive to her coworker or created an intimidating, hostile, or offensive work environment.

In its brief to the commission, the employer cites several prior commission decisions, as well as the Court of Appeals' decision in *Dept. of Workforce Dev. v. Labor and Indus. Review Comm'n.* (*Wozniak*), No. 2020-AP-2002 (Wis. Ct. App. May 10, 2022) (unpublished) in support of its contention that a finding of harassment does not require evidence that the subject of the prank was offended by the harassing conduct.[2] However, the factual circumstances present in the cases cited by the employer, including *Wozniak*, are distinguishable from the conduct present in this case. In *Wozniak,* the employee made homophobic, deprecating comments about a coworker while gossiping with other cashiers, one of whom ultimately reported the employee's conduct to the employer's management. The other commission decisions cited by the employer in its brief involve similarly egregious conduct, which was clearly unwelcome to the co-workers to whom it was directed. By contrast, in this case the employee played a prank in the context of a friendly workplace relationship with a coworker, with whom she had previously discussed sexual topics, and the evidence revealed that the employee had been the subject of a similar prank in the past.[3] Given

[2] Specifically, the employer cites the commission's decisions in *Bludau v. H.G. Weber & Co.*, UI Dec. Hearing No. 17400734AP (LIRC Sept. 6, 2017) (finding substantial fault where an employee sent a photograph of a sexual nature to a coworker, then transferred several files of a sexual nature from her work computer onto her personal flash drive, in violation of the employer's policies), *Green Jr. v. Ho Chunk Nation,* UI Dec. Hearing No. 16004469MD (LIRC Mar. 10, 2017) (finding misconduct where an employee made multiple highly inappropriate and offensive remarks to a female coworker, including "hello rape victim."), and *Angus v. Labor Finders*, UI Dec. Hearing No. 98603573MW (LIRC Jan. 12, 1999) (finding misconduct where an employee threw a foot-long two-headed rubber penis at a sleeping subordinate, left the object in the open after being made aware that the owner would not approve of it, and engaged in the same activity the same morning during another meeting).

[3] The commission recognizes that the *Wozniak* decision did not require a finding that the conduct was unwelcome or offensive to the individual who was the subject of the alleged harassment in order to support a finding of harassment under the statute. However, *Wozniak* is an unpublished decision, and the commission is not bound by it. *See* Wis. Stat. § 809.23(3). The commission has previously held that,

those facts, the commission finds that the employee's conduct, while inappropriate, did not amount to misconduct or substantial fault for purposes of unemployment eligibility.

The commission has considered the employer's remaining arguments but does not find them persuasive. Because the commission agrees with the ALJ that the employer failed to meet its burden to prove that the employee's conduct amounted to either misconduct or substantial fault, within the meaning of Wis. Stat. § 108.04(5)-(5)(g), the commission affirms the appeal tribunal decision.

cc: Phoua Xiong, HR Director

to constitute harassment, the employer must prove that the alleged harassing conduct was offensive to the individual to whom it was directed or otherwise created an intimidating, hostile, or offensive work environment. *See*, e.g., *Manz v. Dept. of Nat. Res.*, UI Dec. Hearing No. 13202510EC (LIRC Jan. 2, 2014). The commission continues to believe that is the correct standard to apply.

GEORGIA E. MAXWELL, Commissioner (dissenting):

I would reverse the ALJ's decision and find that the employee was discharged for misconduct under Wis. Stat. § 108.04(5)(d), which defines misconduct as including "one or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace of his or her employer." It is undisputed that the employee taped a dildo under her coworker's desk in such a manner that when she sat down, it would hit her. The employee's conduct not only constitutes an act of harassment within the meaning of the statutory language cited above, but it also violated the employer's policies regarding sexual harassment in the workplace and amounts to a deliberate disregard of the standards of behavior which the employer has a right to expect of its employees.

I disagree with the majority that harassment requires evidence that the alleged conduct was unwelcome or offensive. I would instead follow the Court of Appeals' reasoning in *Dept. of Workforce Dev. v. Labor and Indus. Review Comm'n. (Wozniak),* No. 2020-AP-2002 (Wis. Ct. App. May 10, 2022) (unpublished), which broadly defined harassment without considering whether the subject of the alleged harassment was offended or whether the conduct was unwelcome.

Even assuming, for the sake of argument, that the employee's conduct does not constitute an act of harassment within the meaning of Wis. Stat. § 108.04(5)(d), the employee's conduct clearly constitutes misconduct as originally defined by the Wisconsin Supreme Court in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941), and now codified in Wis. Stat. § 108.04(5)(intro.). All employers have a significant vested interest in prohibiting acts of sexual harassment at the workplace that not only could create an unsafe working environment for its employees but could also potentially subject it to liability for sexual harassment under state or federal law. As such, the employer justifiably emphasized to all workers that it had a zero-tolerance policy regarding sexual harassment in the workplace. The employee's conduct, even if construed, as the majority views it, as merely a prank or a joke made between friendly coworkers, amounts to a major violation of the employer's policies and could plausibly expose the employer to liability. Therefore, I respectfully dissent.

/s/
Georgia E. Maxwell, Commissioner