



DISTRICT I
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COURT OF APPEALS
OF WISCONSIN

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April 2, 1987

Madison, _____

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Hon. Robert W. Landry
Milwaukee, WI 53233

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

#86-2275 - Jerry Avant v. Labor & Industry Review
Commission, Mt. Sinai Medical Center, Inc.
(L.C. No. 702-890)

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

Jerry Avant appeals from the circuit court's judgment affirming a decision of the Labor and Industry Review Commission (LIRC). Pursuant to this court's order of January 15, 1987, and a presubmission conference, the parties have submitted memo briefs. Upon review of those memoranda and the record, we affirm the circuit court's judgment.

Avant worked as a part-time food service worker on the cafeteria line at Mt. Sinai Medical Center, Inc. He was discharged for using "profane, abusive, and obscene language towards a fellow employee." A deputy for the Department of Industry, Labor and Human Relations determined that Avant was ineligible for unemployment compensation benefits

because he was discharged for misconduct in connection with his employment. Avant requested a hearing on the issue.

The appeal tribunal examiner found that Avant asked a co-worker to bring him some french fries from the freezer. The co-worker, who made a disparaging reference to Avant's race, told Avant to get the french fries himself. Avant responded by repeatedly referring to the co-worker by a vulgar and obscene epithet. When a supervisor intervened, Avant continued to repeat the vulgar and obscene language.

The examiner also found that Avant knew the employer's work rules prohibit the use of vulgar language and that Avant used the language near an area open to the public. The examiner held that Avant engaged in misconduct under sec. 108.04(6)(a), Stats. LIRC adopted the examiner's decision.

On appeal, Avant contends that his actions did not constitute misconduct. Whether particular conduct amounts to misconduct is a question of law. McGraw-Edison Co. v. DILHR, 64 Wis. 2d 703, 713, 221 N.W.2d 677, 683 (1974). 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 Dist. v. DILHR, 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).

Misconduct as used in sec. 108.04(5), Stats., means conduct evincing such willful or wanton disregard of an employer's interest 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). Avant's repeated use of obscene language in a public area of his employer's premises evinced a willful disregard for his employer's interest. We defer to LIRC's conclusion that Avant engaged in misconduct.

Avant also argues that he voluntarily obtained the part-time job when he was laid off from his former full-time employment. Because he was eligible to receive unemployment compensation benefits as a result of the layoff from his full-time job, Avant argues that misconduct occurring on his voluntarily obtained part-time job does not affect his continuing eligibility for unemployment compensation benefits.

Section 108.04(5), Stats., provides in part that:

An employe's eligibility for [unemployment] benefits...shall be barred for any week of unemployment completed after he or she has been discharged by the employing unit for

misconduct connected with his or her employment, and the employe is ineligible for any benefits based upon employment with an employer other than the employer from whom the employe is discharged... . (Emphasis added.)

Pursuant to the clear language of sec. 108.04(5), Avant's misconduct on his part-time job bars him from obtaining benefits based on his previous full-time employment.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's judgment is affirmed.

Marilyn L. Graves
Clerk of Court of Appeals