STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

ALDRICH CHEMICAL COMPANY, INC.,

Plaintiff,

-vs- Case No. 626-676

LABOR AND INDUSTRY REVIEW COMMISSION and ROBERT M. ADLER,

Defendants.

MEMORANDUM DECISION

This is an action brought by the employer-petitioner to review an order of the LIRC adopting the findings and conclusions of an appeal tribunal which held that the employe-respondent was entitled to unemployment compensation under Chapter 108.

The employer was discharged on January 5, 1983 for "misuse of company property, use of vile language and engaging in indecent conduct." Specifically he had a female switchboard operator page "Jack Mehoff." It is undisputed that he understood and intended the slang term for masturbation to be broadcast.

COMMISSION FINDINGS

The commission, by adopting the appeal tribunal's decision, found that the conduct of the employe was:

". . . intended as a prank, and that it was an exceedingly foolish thing to do. The employe, caught up in the moment and under the influence of co-workers performed an adolescent act. The employer, on the other hand, had a significant interest in protecting itself from the results of such activity. Not only did the employer run the risk of damage to its reputation should an outsider be present, the more significant matter was the serious potential imposition on the receptionist. Although many people, especially in a factory setting, would laugh off the incident as a bad joke, the risk remained that the people involved, the receptionist or any who heard the page, might be personally and significantly upset by the unwitting involvement in the act. There is no question that the employer must protect its workers from such an imposition, must protect its reputation and must maintain order and an appearance of professionalism. The mode chosen by the employer to maintain discipline was the discharge of the employe. That was well within its discretion and for valid business reasons. Yet, in terms of wilfullness, the employe intended none of the dire consequences which could have resulted from the mindless act. His actions amounted to an isolated instance of very poor judgment, but did not rise to that level of wilfull impropriety as to constitute misconduct within the meaning of the unemployment compensation law.

"In coming to its decision, the employer considered that the employe in his act was acting in concert with a co-worker who had committed an act of sexual harassment against a co-worker. The employe denied, and there is no evidence to the contrary, any involvement in that other activity. The employer was properly highly incensed over the other harassment and lumped the employe's page together with that of the other matter. The differences between the acts are significant. The one is an act of foolishness and the other an act of knowing cruelty."

The reference to the act of the co-employe was the co-worker's calling a company secretary and breathing heavily into the telephone.

ISSUE

The issue is whether such conduct constituted misconduct within the meaning of the Unemployment Compensation Act.

FACTS

An examination of the record made before the commission reveals that the employe was 22 years of age at the time and had no previous experience as an employe. A co-worker suggested the page as a prank. When he declined to do it himself because of fear that his voice would be recognized, the employe-respondent volunteered to do it.

The act was contrary to written rules of the employer which were known to the employe. These rules in regard to discipline and discharge provided for an oral warning as a first step and a written warning with suspension as a second step. Those steps could be skipped in the case of extreme misconduct. Deliberate misuse of company property, vile language and indecent conduct were enumerated as extreme misconduct. The rules warned employes that a discharge would result in ineligibility for employe benefits.

It is also clear that this was the first trans-

gression of the employe-respondent and was not done as part of his co-worker's conduct of harassment of another female employe. The employe volunteered to apologize to the receptionist, but was precluded from doing so.

MEANING OF MISCONDUCT

The statute itself does not define the term misconduct. Judicial interpretation of the term misconduct as used in §108.04 (5) Stats. was first considered in Boynton Cab Co. v. Neubeck, 237 Wis. 249 (1941). It was there said that misconduct as used in the statute is:

> ". . . limited to conduct evincing such wilfull or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employe or in callousness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or design or to show an intentional and substantial disregard of the employer's interest or the employe's duties and obligations to his employer.
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> "Mere inefficiency, unsatisfactory conduct, failure of good performance as a result of inability or incapacity, inadvertance 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."

When formulating the test for misconduct as it relates to unemployment compensation the Supreme Court in Boynton, supra, p. 261 quoted extensively from guidelines given to tribunals under the British Unemployment Compensation Act. The Court quoted as follows:

> "It is not safe to do more than deal with the subject on broad lines because misconduct is always a question of fact which depends upon an infinite variety of circumstances including the past record and general character of the alleged delinquent. As a general rule it may be said that a single instance of negligence or mistake is not sufficient evidence of misconduct.
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> But to this rule there are exceptions, and when the direct consequences of an act or omission are fairly obvious to an applicant and are such as to be likely to cause serious loss to the employer, his business or his property, a finding of misconduct is not unreasonable.
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> But though one instance of negligence or mistake may not amount to misconduct, the recurrence or repetition of the act or other acts may indicate a culpability which may clearly be described as misconduct. I think that point is reached when it can be said that the behavior of an applicant shows a wanton or deliberate disregard of his employer's interests or of applicant's duties. . . . Here, again, is a question of fact to be determined upon consideration of all the circumstances. The standard or test will not be the same in all cases. It will vary with degree of responsibility or skill which the employe is engaged to exercise. The number of warnings given may be an important factor and the evidence of them should be definite. . . . In any case, misconduct must be proved and not assumed."

Decisions subsequent to Boynton have emphasized intent and attitude of the employe in regard to determination whether the misconduct reflects an intentional and substantial disregard of the employer's interests or employe's duties. McGraw-Edison Co. v. ILHR Dept., 64 Wis. 2d 703 (1974). For an employe's misbehavior to be misconduct, it must be found to be an intentional and unreasonable interference with his employe's interests. Baez v. ILHR Dept., 40 Wis. 2d 581 (1978). At the same time the Court has recognized that a recurrent pattern of negligent acts so serious as to amount to gross negligence and thereby evincing an intentional and substantial disregard of the employer's interests amounts to misconduct. Fitzgerald v. Globe Union, Inc., 35 Wis. 2d 332 (1967).

EXTENT OF COURT'S REVIEW

A determination of whether or not certain conduct amounts to misconduct is a conclusion of law and a determination by an appeal tribunal or commission is not binding on the courts. Cheese v. Industrial Comm., 21 Wis. 2d 8 (1963); McGraw-Edison, supra. A court may substitute its judgment for that of the agency. Frito-Lay, Inc. v. WLIRC, 95 Wis. 2d 395 (Ct. Appeal-1980). Nevertheless, this principle is subject to several caveats. Due deference must be accorded an agency's application of the law to the

found facts if the agency has particular competence or expertise in the matter. Wisconsin Dept. of Revenue v. Milwaukee Refining Co., 80 Wis. 2d 44 (1977). Its construction and interpretation of the statute is entitled to great weight. If several rules of application of a rule are equally consistent with the purpose of the statute, the Court will adopt the agency's formulation and application of the standard, if a reational basis exists for the agency's interpretation and does not conflict with legislative history, prior court decisions or constitutional prohibitions. Libby, McNeil & Libby v. WERC, 48 Wis. 2d 472 (1970). However, such deference is not required when a court is as competent as the agency to decide the question involved. Wisconsin Dept. of Revenue, supra.

With these guidelines in mind, the Court has analyzed the record before the Commission. It concludes that the Commission has erred in interpreting the law and therefore acted outside its powers.

It is the Court's judgment that the Commission has given too little weight to the employer's interest in regard to providing a workplace where female employes are free from such imposition and harassment as encountered in the case at bar. This is a matter of broad public policy of which the courts are more competent than the agency because of their more generalized experience. Recent

legislation in the areas of sexual assault, domestic abuse and sex discrimination are expressive of a strong public policy discouraging conduct and attitudes which condone such activity as involved in this action. The public policy expressed in the Unemployment Compensation Act to cushion the impact of unemployment does not extend to those who forfeit their eligibility by misconduct.

Because the Court concludes that the Commission has erroneously interpreted the law as it applies to the circumstances of this case, it sets aside the decision of the Commission and reverses its determination. Counsel for the petitioner is directed to prepare an appropriate order.

Dated at Milwaukee, Wisconsin, this 3rd day of October, 1984.

BY THE COURT:

Marvin C. Holz

Marvin C. Holz-Circuit Judge