STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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#122-354
GUSTAVO A. BAEZ,

Plaintiff,

vs. DECISION

INDUSTRIAL COMMISSION OF WISCONSIN
and ALBERT TROSTEL & SONS COMPANY,

Defendants.

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Whether an employe's conduct is "misconduct" under Section 108.04(5) Stats. is a question of law. The reviewing Court will sustain the commission's finding, if such find is reasonable even though an alternative finding might be equally reasonable. Generally in misconduct cases there is little dispute as to the facts. In this case, the facts are far from clear.

I have read and re-read the record and I must confess I could not describe the employe's regular job. The record is full of inconsistencies. For example, at page 6 of the record, the foreman testified that he told the employe that "... during this period that there would be a reassignment of work area with prime concern to the plating area, for which he was responsible as a jeeper, and that during the period he was not servicing this department that I wanted him to move loads with his jeep from the third and fourth floors." Later it appears to be conceded that the foreman was creating a job because there was no work at the employe's regular job.

This is quite different from the letter of Mr. Behling, the assistant personnel manager outlining the reason for the employe's discharge.

> "On September 19, 1966, Mr. Baez directly refused, for no apparent reason, to perform work which was normally considered part of his responsibility and was discharged by his foreman for insubordination."

The operation of elevators, according to the foreman, was part of a jeeper's job. (Tr. 23) Yet this employe appeared to have some restrictions on his use of the elevator (other than strictly as a passenger elevator).

(Tr. 20) "Q No, you just tell us what you know about this.

A That he has used the elevator prior to this time, operating the elevator with the jeep on prior time to this date.

Q Right. Isn't it a fact that he was told never to do this?

A This is true."

Certainly there was enough confusion about this employe's use of the elevator that would provide some justification to his attitude as to the job assignment.

There is also the question of the company policy in regard to an employe going home rather than accepting a transfer to temporary work. Mohr testified that such a policy existed, and was to the effect that if there was not enough work in the employe's department, the foreman would inquire if the employe wanted to work at another job or go home. On cross-examination he conceded that his experiences did not involve a situation where there would be an interim of a few hours when work would not be available, but work would be available before the shift ended. Herring testified that sometimes when his regular work was not available, he took other jobs and sometimes he went home. As a matter of fact, he was discharged for refusing to go on a different job to get out some rush orders as requested by his foreman. This seems to be a much stronger case of "misconduct" than the case at bar, since there is nothing in the record to indicate any urgency. As a matter of fact, there is nothing in the record to indicate why the employe regularly responsible for moving loads between the third and fourth floors were not taking care of that job. Yet Herring was rehired within three hours, after he called his stop union foreman.

The foreman, himself, was not sure of what the policy was, and sought the counsel of Mr. Pangborn. If what according to the record the foreman told Mr. Pangborn was all he told him, it is difficult to understand how Mr. Pangborn could advise him. Nothing was said about company policy relative to going home or accepting other work, or whether such a policy existed. If there was some such policy, certainly the statement that ". . . one of my employes, namely Gus Baez, had refused a work assignment during a slack period in the area he was assigned to cover" was not sufficiently precise upon which to base any advice. If Mr. Pangborn understood the situation as Mr. Behling said it was (see letter to Department quoted above) then he, like Mr. Behling, was misinformed as to the facts.

The record does not disclose what the dialogue was between the foreman and the employe, which makes it almost impossible to make a finding whether the employe was discharged for misconduct.

(Tr. 6) "Q What did Mr. Baez do?

A He brought to my attention certain facts that were not relevant to the case.

(Tr. 7) "Q Tell us what you said? Is this what you said to him?

A He related the subject had no bearing on the particular point at issue.

(Tr. 8) "Q Now did he say anything to you at this time other than what you have related to us up to this point?

A Other than facts that were not pertinent to the assignment.

Mr. Catania: Well, Your Honor, I move that the witness be directed to answer the question. It's not for him to determine what's pertinent or irrelevent or immaterial.

The Examiner: Read the question, please.

(Question read back by reporter)

The Examiner: All right, will you answer that, sir?

A No.

The Examiner: Your answer is no?

A That is correct."

If the witness was answering the examiner's question (which the grammatical construction indicates), then his response was that he would not answer the question. If he was responding to the previous question, he gave an answer totally different from his previous answer. In either case, it is quite apparent that there was a good deal more to the conversation between the foreman and the employe than the foreman cared to state. It seems a fair assumption that the withheld portions of the dialogue would not be helpful to the employer's position. Certainly a full record of what the conversation was would have been helpful in determining whether the refusal of the employe to follow the foreman's order was wilful or whether there was some justification for it.

The findings of fact of the appeal tribunal in regard to the company policy is that "... while the testimony in this respect was somewhat conflicting, it appears that such option may have been allowed only when there was to be no regular work available for any individual employe for the balance of any given day...."

To sustain the finding of misconduct a definite finding of what the company policy was is a pre-requisite. If the examiner could not find from the record what the policy was, the employe cannot be found to have been discharged for misconduct for invoking such policy as a reason for

refusing the work assignment. In view of this and in view of the indefiniteness of the conversation between the foreman and the employe, this record does not support a finding of misconduct. The employe may have been confused, but his position was not indefensible. He may have been wrong, but the record does not support a finding of wilfulness.

The determination of the Commission that the employe was discharged for misconduct connected with his employment and therefore disqualified for unemployment compensation benefits is reversed.

The employe's counsel may submit an order in conformity with this decision.

Dated: January 15, 1968.

BY THE COURT:

/s/ Daniel C. O'Connor
Acting Circuit Judge