
DAVID A. FISCHER,

Plaintiff,

vs.

DECISION

DEPARTMENT OF INDUSTRY, LABOR AND
HUMAN RELATIONS and LABOR AND INDUSTRY
REVIEW COMMISSION and UNIVERSITY OF
WISCONSIN-RIVER FALLS,

Case No. 87-CV-74

Defendants.

Before the Hon. R. D. Galstad, Circuit Judge

Plaintiff seeks review pursuant to Section 108.09(7) and Sec. 102.23, Wis. Stats., of a February 4, 1987 decision of the Labor and Industry Review Commission, which held that the plaintiff had been discharged for misconduct, and was, therefore, ineligible for unemployment benefits.

Plaintiff had been employed as a police officer for the University of Wisconsin-River Falls for approximately four years. He was discharged by the employer on September 17, 1986.

The basic issue in this case is whether the record sustains the finding that the plaintiff was discharged for misconduct connected with his employment within the meaning of Sec.108.04(5), Wis, Stats. Having thoroughly reviewed the briefs submitted by the parties, cases cited, the transcript, applicable records and evidence submitted, the Court finds that this issue must be decided in the affirmative, and the order of the Commission affirmed.

The plaintiff began working for the employer in July of 1981, as a police officer. On August 27, 1986, he worked a shift which began at 6:00 p.m., and concluded at midnight. During that work shift, another officer asked the plaintiff for a review of weapons retention technique. Plaintiff had previously been classified as Range Officer, and agreed to meet with the other officer.

Plaintiff met with the other officer after the conclusion of his shift, and they conducted a training session with unloaded weapons, which lasted approximately 15 or 20 minutes. After completing the session, the plaintiff re-loaded and holstered his weapon. The other officer then asked another question and plaintiff removed his weapon from its holster. At some point during this process, plaintiff's weapon discharged, and the bullet from plaintiff's weapon struck the other officer in the chest. The other officer was wearing a bulletproof vest, so the resulting injury was a minor contusion.

Later that day, August 28, 1986, the plaintiff was suspended with pay, pending an investigation of the incident, and was then discharged by letter dated September 17, 1986.

Plaintiff applied for unemployment benefits, and on October 9, 1986, a deputy with the Department of Industry, Labor and Human relations made an initial determination that the plaintiff was not eligible for such benefits because he had been discharged for misconduct connected with his employment, within the meaning of Sec. 108.04(5), Wis. Stats. Plaintiff appealed this determination and an appeal hearing was held before Examiner Jo Ellen Rehbein on December 8, 1986. The examiner entered her

decision on December 12, 1986, finding that the plaintiff had been discharged for misconduct, that he was not eligible for unemployment benefits, and that the deputy's determination was affirmed. The plaintiff petitioned for review of the examiner's decision by the Labor and Industry Review Commission, and the Commission affirmed the examiner's decision on February 4, 1987. Plaintiff now seeks review of the decision of the Labor and Industry Review Commission by this Court.

The determination by the Commission as to whether or not the conduct of the plaintiff amounts to misconduct for purposes of Sec. 108.04(5) Wis. Stats. is a conclusion of law, and not binding upon the Court. However, the Court should sustain the Commission's view if its determination is reasonable, even though an alternative view may be equally reasonable. Vocational, Technical and Adult Ed. Dist. 13 v. Department of Industry, Labor and Human Relations, 76 Wis. 2d 230, 251 N.W. 2d 41 (1977).

The record clearly indicates that plaintiff was well aware of the contents of the work rules and weapons policy adopted and promulgated by his employer, and plaintiff's actions in allowing his weapon to discharge, resulting in the injury to another officer, during an unauthorized training session, evinced a wilful, intentional, and substantial disregard of the employer's interests and of the standards of conduct which the employer had a right to expect of him. The findings adopted by the Commission are amply supported by the record, and are found to be reasonable after a detailed review of that record.

Plaintiff argues that this was an isolated incident, lacking in intent, and that the discharge of his weapon was

accidental. He further argues that if there was an error of judgment on the part of plaintiff, it was an error of judgment that was brief, isolated and non-recurring, and that the conduct does not, as a matter of law, constitute misconduct under the statute. Plaintiff urges the Court to place special emphasis on the employee's attitude and intent.

Intent, however, need not actually exist. Emphasis on an employee's intent in determining whether he has been guilty of "misconduct" disqualifying him from unemployment compensation benefits does not mean that the intent must actually exist; if the negligence of the employee is such that manifests equal culpability, wrongful intent or evil design, the employee is guilty of misconduct. McGraw-Edison Co. v. Department of Industry, Labor and Human Relations, 64 Wis. 2d 703, 221 N.W. 2nd 677 (1974).

The procedure used by the plaintiff in removing his weapon from his holster was negligent and reckless, and could have easily resulted in the death of his fellow officer. Plaintiff's familiarity with the work rules and weapons policy of his employer compounds this negligent and reckless conduct into gross negligence, and this gross negligence amounted to misconduct for unemployment purposes.

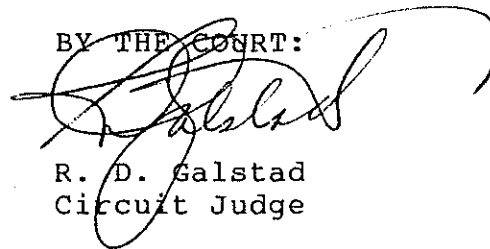
Misconduct of an employee warranting denial of unemployment benefits is defined by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck, 273 Wis. 249, 296 N.W. 636 (1941). The elements of misconduct there spelled out find support in the findings of fact here adopted by the Commission and justify the legal conclusion of misconduct. The Court, therefore, finds that the determination of the Commission was reasonable.

From the record in this case, the Court finds that the plaintiff had a full and fair hearing; that there is no legal cause or justification to return the matter for further hearing; and that the decision of the Labor and Industry Review Commission of February 4, 1987, affirming the appeal tribunal be approved and affirmed.

Concluding papers in accordance with this decision may be prepared and submitted.

Dated: February 25, 1988

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. D. Galstad", is written over the printed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

R. D. Galstad
Circuit Judge