STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WILLIAM E. LATHROP,

Plaintiff,

MEMORANDUM DECISION

vs.

DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS, and PRESTO PRODUCTS, INC.,

Defendants.

Case No. 163-489

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the plaintiff employee to review a decision of the Labor and Industry Review Commission of the Department of Industry, Labor and Human Relations Department dated June 1, 1978, entered in an unemployment compensation proceeding. This decision adopted the findings of fact and conclusions of law of the appeal tribunal and affirmed the appeal tribunal's decision which denied benefits to the employee based on his employment by the defendant Presto Products, Inc. (hereafter Presto).

STATEMENT OF FACTS

The employee began his employment with Presto on September 23, 1975, at Presto's Appleton plant. At times material to this review, the employee worked in the plant's warehouse. The 47 employees in the warehouse were under the overall supervision of John Herriot, the warehouse manager. The employee's foreman was Ken Olson, and his shift supervisor was Clyde Schmidt.

On either September 28 or 29, Olson reported to Herriot certain acts of the employee that had been told to him by Schmidt which Schmidt considered unsatisfactory conduct. Schmidt had stated on September 28th he had assigned the employee the job of taking crates out of the stacks in the warehouse and weighing them, and the employee had made an obscene remark and gesture about this job which Schmidt thought might have been said in a "kidding"manner, but he also felt "there was a degree

of insubordination." The employee also worked slowly at this task and when Schmidt spoke to him about it the employee said, "Yes and I can work on it even slower tomorrow."

In addition to these matters which Olson reported, Herriot had received two other complaints about the employee. One had to do with him doing very little work when he had been permitted since September first to report to work at 6 o'clock in the morning instead of the usual 7 o'clock so as to rearrange his work schedule to have time to attend some classes. The other was that the employee on some days had elected to take his 12 minute afternoon break at 2 o'clock and then not returning to work, but punching out at 2:30.

As a result of Olson's report and these other reports Herriot scheduled a meeting on September 29, 1977, attended by the employee, Olson, Schmidt and Herriot. At this meeting Herriot questioned the employee about these reports. The employee gave his responses to each of these three lines of inquiry and what then transpired was stated by Herriot as follows (Tr. 15):

> "To the best of my recollection, I said Bill, I feel you're not completely leveling with me about what we've been talking about. You look to me to be very agitated, you're red in the face, you look to me like your hands are shaking, you're playing rather nervously with this magic marker or pen that you have in your hand, and at that point, he cut in and he said yes, and you can stick it in your ass. I said what. And he said yeh and you can stick it in your ass."

Olson testified in answer to the question put to him as to what was the employee's explanation for the things mentioned at this meeting that he was alleged to have done (Tr. 19-20):

> "Well, he didn't have a true answer for any of the questions or statements that were brought up. He sort of fumbled around with a lot of answers and I guess, to me, in my opinion that he just got really mad and this is when he told John [Herriot] to stick it in his ass." (Emphasis added.)

Herriot, in describing the employee's condition when he made his obscene remarks, stated that "mad" was probably a better term than "very nervous" (Tr. 14).

Herriot told the employee to punch out and report at 8

o'clock the next morning. However, the employee did not do so, and his reason for this was that he wished to discuss the matter with Larry Wirth, Presto's vice president in charge of production, who then was absent from the city.

The employee saw Wirth on Monday, October 3, 1977, and discussed the matter. Herriot recommended that the employee be discharged. Thereafter Wirth informed the employee he was discharged for insubordination.

Herriot testified that before the employee had made his obscene remarks at the September 29th meeting Herriot had no intention of recommending the employee be fired, and that these remarks were the reason for discharging him.

The material findings of fact and conclusions of law of the appeal tribunal read:

> "On September 29, 1977 (week 40), the employer met with the employe for the purpose of discussing allegations made by his foreman regarding improper conduct and poor work performance. Whereupon, when he directed abusive language to the employer's warehouse manager in that discussion, he was discharged.
>
> The employe contended thathe was hassled by the employer during the meeting, and accordingly, his conduct should be excused. That contention cannot be sustained. No evidence was adduced to establish that any conduct on the part of the employer would justify his admittedly abusive remarks to his warehouse manager.
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> No employer should be required to tolerate such abuse of or insolence to its supervisory personnel for no organization can successfully function unless there can be complete cooperation with and respect for those in authority. Reilly v. Aluminum Goods Mfg. Co & Ind. Comm., Dane County Circuit Court, February 8, 1954.
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> Under the circumstances, the employe's actions in using abusive language evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct the employer had a right to expect of him.
>
> The appeal tribunal, therefore, finds that in week 40 of 1977, the employe was discharged for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

THE ISSUE

The sole issue raised by the employee's brief is whether

the insubordinate and obscene remarks made by the employee to Herriot at the September 29, 1977 meeting constituted misconduct connected with his employment within the meaning of sec. 108.04(5), Stats. It is contended that as a matter of law they did not.

STATUTE INVOLVED

Section 108.04(5), Stats. provides:

> "DISCHARGE FOR MISCONDUCT. An employe's eligibility, for benefits based on those credit weeks then accrued with respect to an employing unit shall be barred for any week of unemployment completed after he has been discharged by the employing unit for misconduct connected with his employment; provided, moreover, that such employe shall be deemed ineligible for benefits (from other previous employer accounts) for the week in which such discharge occurred and for the 3 next following weeks."

THE COURT'S DECISION

The long accepted definition of the term "misconduct connected with his employment" now found in sec. 108.04(5), Stats., is that set forth in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 296 N.W. 2d 636 (1941) as follows:

> "The intended meaning of the term 'misconduct' as used in sec. 108.04(4)(a), Stats., is limited to conduct evincing such wilful or wanton disregard of an employer's interests as isfound in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employe, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employe's interests or of the employe's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies 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."

In the more recent case of Baez v. ILHR Department, 40 Wis. 2d 581, 588, 162 N.W. 2d 576 (1968) the Supreme Court stated:

> "For an employe's behavior to be misconduct, it must be found to be an intentional and unreasonable interference with his employer's interest."

The employee's brief stresses that the obscene remarks to Herriot at the September 29th meeting was one isolated incident with no employees other than supervisory employees present, and

there was no evidence adduced "that this one comment" caused a lessening of the employee's skills, respnsibilities or duties." Further it is alleged that the employee's remarks were a personal lashing out at Herriot as a person and not as a supervisor.

The appeal tribunal in its decision cited the case of Reilly v. Aluminum Goods Mfg. Co., Dane County Circuit Court (February 8, 1954). In that case Judge Herman W. Sachtjen stated in his "Directions for Judgment""

> "Calling a person a 'goddam bastard', or kindred expressions, have been known as 'fighting words'; they tend to create or provoke a breach of the peace. Many brawls and fisticuffs have taken place when such language is employed . . .
>
> Clearly, no employer should be required to tolerate such abuse of and insolence to its supervisory personnel more than once, for no organization or management thereof can successfully function unless there be complete cooperation with and respect for those in authority. To prevent insubordination it must be nipped in the bud.
>
> The court is of the opinion that the Commission's conclusion that the langugage used by the employe . . . to him . . . constitued insubordination and misconduct . . . . It is also consistent with the previous interpretations and decisions of the Commission.

The Honorable William C. O'Connell, Reserve Circuit Judge, in Luse v. Mid-City Foundry Company and Industrial Comm. of Wisconsin, Case No. 113-074, Circuit Court, Dane County, December 18, 1963, confirmed a decision of the Commission holding that a worker who said, "Oh ____ you", to a superior on only one occasion was discharged for misconduct connected with his employment. The Court even refrained from repeating such language in its decision.

A manager of a liquor store ordered the sole owner and president of the corporation out of the store and called him a "son-of-a-bitch" in Donlin v. DILHR and Hudson Liquors, Inc., Dane County Circuit Court, Case No. 143-094 (June 23, 1975). This court in its memorandum decision stated that this "constituted aggravated insubordination" and that "such transgressions . . . also could reasonably be determined by the department to be wilful and not merely manifestations of inefficiency or inadvertence."

The following cases appear in Wis. U.C. Digest, 1960 and 1970 Editions, under MC-740, entitled INSUBORDINATION and show that appeal tribunals and the Commission have consistently followed the well-established policy that use of vulgar, obscene or abusive language toward a superior constitutes misconduct connected with the employment.

> 38-A0510 An employe who complained to his foreman regarding irregular employment was offered a job in the employer's foundry. When he protested that he was physically unfit for foundry work the foreman told him that this was the easiest job in the foundry. The employe then became abusive and said, "The hell with you and your easy jobs." HELD: Discharged for misconduct.
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> 59-A-757 A tile contractor noticed that an employe had laid a section of tile higher than the level specified, and angrily remarked that it would have to be taken up and laid again according to specifications. The employe was angered and stated, "What the (obscenity) is the matter with you this morning?" This remark was made in the hearing of other employes. The employe was discharged.
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> HELD: Discharged for misconduct, when he had been cautioned previously against the use of obscene or other improper language on the job, and there was nothing unreasonable in the manner in which the employer reprimanded him for his defective work. With respect to language, some latitude arising out of general custom may reasonably be allowed employes working in construction crews; but in this case it was not only the obscene word that the employe used but the grossly insulting and insubordinate tone of his remark that was objectionable.
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> 69-A-2970 (C) An employe, whose employment was suspended because the employer intended to investigate complaints regarding his work performance, failed to obey the order of the industrial relations manager that he leave the employer's premises. When the order was repeated, he directed a vulgur and obscene remark at the industrial relations manager, as a result of which he was discharged.
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> HELD: Discharged for misconduct. Although it appeared that rough and coarse talk was commonly used by workers and the industrial relations manager, such language was used in an impersonal manner and not directed toward any individual. The employe's directing this vulgar and obscene remark at the industrial relations manager was highly improper and insubordinate, and constituted a violation of the standards of behavior which the employer had a right to expect of him, amounting to misconduct connected with his employment.

The court is of the opinion that merely one act of insubordination to a supervisor in the nature of that committed by the employee in this instance may properly be found to constitute misconduct connected with the employee's employment within the

meaning of sec. 108.04(5), Stats.

The employee's brief objects to this statement made in the appeal tribunal's decision:

> "The employe contended that he was hassled by the employer during the meeting, and accordingly, his conduct should be excused. That contention cannot be sustained. No evidence was adduced to establish that any conduct on the part of the employer would justify his admittedly abusive remarks to his warehouse manager."

It is contended that the last sentence of the above quoted statement improperly placed upon the employee the burden to establish conduct on the part of the employer to justify the employee's remarks. The court does not interpret this sentence as meaning that the appeal tribunal and the Commission had erroneously concluded that the burden of proof was on the employee to show that his obscene remarks to Herriot were not misconduct connected with his employment. Of course the burden to establish such misconduct continued throughout the hearing to be on the employer Presto. The court interprets this third sentence in the above quoted statement to merely mean that, upon the findings made in the first and second sentences, the burden of going forward with the evidence on the issue of justification shifted to the employee and he had failed to present any further evidence on that issue. The court finds no error to have been committed.

Let judgment be entered confirming the Commission's decision.

Dated this 12th day of March, 1979.

BY THE COURT:

George P. Currie

Reserve Circuit Judge