STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

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#115-012

LIEBMANN PACKING COMPANY,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN and MARTIN D. KACMARYNSKI,

Defendants.

MEMORANDUM

OPINION

* *

This is an action to review the findings of fact and decision of the Industrial Commission dated October 18, 1963, wherein it held that the employe was not discharged for misconduct connected with his employment, within the meaning of Sec. 108.04(5) Stats. and allowed benefits. In doing so it reversed the findings of fact and decision of its appeal tribunal under date of May 29, 1963, which had determined that the employe was discharged for misconduct connected with his employment within the meaning of Sec. 108.04(5) Stats. and denied benefits.

This case is a close and troublesome one for the Court in order to mete out justice. It was troublesome for the Commission, as it made a far more complete and detailed resume of its findings than the appeal tribunal in order to justify its reversal. This Court is well aware that in Wisconsin it is well established law that the findings of fact made by the Commission in unemployment compensation cases are conclusive on the Court if supported by any credible evidence. Marathon Electric Mfg. Co. vs. Industrial Comm. 263 Wis. 394-402.

Likewise it is a well established rule of law that the Commission, being the trier of facts, is the sole judge of the credibility of the witnesses. Kohler Co. vs. Industrial Comm. 272 Wis. 310-322.

Also, where different inferences may be drawn from the evidence, the Court has held that the inferences drawn by the Commission are conclusive and binding on the Court. Even where the facts are not in dispute, the drawing of one of permissible inferences by the Commission is an act of fact finding and beyond the power of the Court to review. Gant vs. Industrial Comm. 263 Wis. 64, 69-70.

From the foregoing it would appear that a reviewing Court has a very limited power and must confine itself to errors in respect to legal determinations made by the Commission. This Court is of the opinion that it is not so limited. If it were so, the legislature would have so provided. Where the Commission's findings are made contra to a clear preponderance of the credible evidence or based on illogical or unreasonable inferences from such evidence, can it

be said that a reviewing Court is powerless to act and grant relief? The answer is no.

In the instant case the plaintiff contends that the crucial findings of fact are against the clear preponderance of the evidence and that many are based on faulty and illogical inferances. The Court has carefully read all the testimony given before the appeal tribunal.

It appears from such evidence and as found by the Commission, "That the employe was employed as a production worker in the employer's meat packing plant on two occasions for a total of about seven years, his last period of employment covering about five years." The last period of employment was interrupted for a period of five months from May 14 to October 1, 1962, because of a strike and employe was a picket captain for this union during the strike (T. 122-123). The employe is a young man, 33 years of age, 5' 11" tall and weighs about 200 pounds (T. 79-110).

At the hearing the employer submitted evidence of various acts of misbehavior that occurred during claimant's last one and one-half years of employment which it alleges constituted misconduct connected with his employment, the last one occuring on December 3, 1962, which culminated in his discharge. These acts occurred both before the strike and after its termination.

The first one occurred on April 18, 1961. Robert Bristol, who was foreman of the offal department, testified that the claimant had walked out of the offal department where he was trimming offal onto the killing floor and was talking to two men on that floor (T. 54). He was reprimanded by the foreman, and this apparently being a violation of the company's rules, made a written report of it which he submitted to the superintendant of the plant (Ex. 13).

The next reported incident occurred on the morning of August 9, 1961. It took place on the kill floor, where Vilas Genke is foreman. According to Genke's testimony, the claimant was late on the job that morning; that he told him, away from the rest of the men, that he was late on the job, and he flared up and pointed his finger in his face. The foreman then told him to keep his mouth shut, to go in the shackling pen and shackle calves which he did, but that he could not keep his mouth shut. He was using cuss words, about the plant superintendant, and that every foreman was no good. It was then he told him to punch out and he remarked that he wasn't man enough for that, so he went and punched him out. He then got the plant superintendant, Garret, to come up and he called the claimant out of the shackling pen and talked to him and then he was sent home (T. 69). Claimant was given a 3-day suspension for insubordination (Exs. 12 & 15).

The next reported incident occurred shortly after claimant's return from his 3-day suspension. It was filed by the same foreman, Vilas Genke, and it was to the effect that the claimant had wasted 12 minutes of company time when he was relieved from

shackling calves to enter his employment on the killing floor without giving a good excuse (T. 70, Ex. 14).

The last two reports on acts of misbehavior were filed after the strike in the month of November, 1962, by the plant foreman, Garret Veldhuizen. The first one is dated November 13, 1962, and it deals with his observations of claimant's slow movements on all jobs that he was performing, to wit: pushing carts, shackling calves and trimming hearts. He further stated that whenever he would correct him, he would laugh and sneer at him and start singing out loud about how he was watching him, and deliberately made fun of him many times (Ex. 11). In his direct examination he covers in detail these complaints (T. 33-37).

The last report is dated November 23, 1962, and refers to an incident that occurred on that date, while claimant was working in the offal cooler. Twice on that day he found claimant had stopped working on his job and was talking to workers in the cooler, the first time at 10 minutes past 8:00 A. M. and was told to get back to his job; the second time at 12 minutes past 9:00 A. M. (Ex. 10, T. 31)

And now we come to the final episode that culminated in the discharge of the claimant. It appears that in the morning of December 3, 1962, at about 10:00 A. M., 72-year-old Herbert Liebmann, Sr., Secretary and Treasurer of the plaintiff company, happened to stop out on the loading dock and noticed claimant bring in the hind quarters down from the upper level to the lower level for loading in a car. He was doing it in an improper way and he watched him for a minute. The first round he brought around two hind quarters and the next four. He then said, "Martin you are doing that wrong", stepped in and took around six hind quarters. There is a dispute on what instructions were given, as to braking or as to any given number of hinds to be taken at a time. But Liebmann had demonstrated to Martin what he wanted done and Martin understood or should have, because according to claimant's testimony, Liebmann said to him when he handed the hook back, "I am an old man, you are a young man. If I were you I would be ashamed to show my face around here." (T. 83) The inference is clear that he was finding fault with the number of hinds that claimant was taking around (T. 18).

Liebmann further testified that after he had so demonstrated, claimant took only four hinds around and used the improper method. As he started to walk away, he turned around and saw a sneering look on claimant's face, which he didn't like and he went back and talked to him (T. 7). There is a dispute as to what was then said. Liebmann said that he asked him "whether he wanted to work there or not" (T. 7). Claimant said that when he came back and said that I was saying that to be funny or just doing that to be funny, he made mention that, "You can't teach these goldarn -- or goldamn blockheads nothing." (T. 85) One thing both agree upon is that claimant did not talk back. As to the sneering look, claimant admitted that he laughed, that it was a kind of embarrassing

laugh for what Liebmann said when he handed the hook back after the demonstration. Thereupon claimant was relieved of this job by the foreman and at about 4:00 P. M. of that day received his discharge.

This job was one of the easiest to perform in the entire plant. It required little strength, the smallest man in the plant could do it. Claimant had previously handled it. The Commission found that since the claimant was not ordered to take any certain number of quarters around, he was not violating any order and therefore not guilty of insubordination. This finding is clearly erroneous, not based on credible evidence and reasonable and logical inferences.

It may be true that Liebmann did not tell claimant what to do. But he demonstrated to him what he wanted done. Showing an employe what you want done is a more effective method than telling him. When Liebmann demonstrated by taking six hinds around and made the remark above stated, the claimant well knew or should have that he was dissatisfied with claimant's taking around only four. It was so understood by two of plaintiff's witnesses who testified at the hearing and who were attesting witnesses on Ex. 2. Both Nicholas Buhr and Myron J. Wery so testified. Buhr testified at page 137 that the "incorrect" method used by claimant referred to in Ex. 2 was in respect to the number of hinds, that four is incorrect, that there should have been more. He also testified that when he worked at this job, he "pushed from six to eight at all times" (T. 140).

Wery also testified in respect to Ex. 2, "Martin defied my orders," that this meant to him that claimant didn't take enough hinds around (T. 142), and on page 143 he testified that on bull hinds he usually pushed 5 to 8 depending on the size.

It is evident that claimant knew that he did not follow the instruction. When Liebmann returned after claimant then had only pushed four hinds around with a sneer or embarrassing smile on his face, he spoke to him in an angry manner and asked him whether he wanted to work there or not or whether he was doing that just to be funny. Claimant made no reply but only laughed at him, so he told fellow workers later. He well knew that he did wrong or he would have asked the old man. He owed that respect to the old man and his official title.

This incident was the precipitating cause for his discharge. His conduct during this incident was in line with a well established work and behavior pattern during the last year or more of his employment. The record is well established that during that period of time he had similar trouble with every foreman in the plant. These acts of misbehavior had occurred both before and continued after the strike. One of the most serious occurred before the strike on August 9th when he was given a 3-day suspension for insubordination. After the strike, there was a slow down in all lines of work assigned to him, and whenever his

foreman or plant foreman would try to correct him, he would treat them with disrespect. (See Ex. 11) It must be borne in mind that some of the jobs assigned to him were chain operations, such as trimming hearts and shackling calves. In not keeping up with his part, he slowed down the entire operation.

The only testimony presented to controvert the overwhelming testimony of misbehavior offered by the employer was that of the claimant himself. There may be some evidence in his direct testimony which could support the Commission's findings. However, any judge or a person experienced in evaluating testimony, after reading the cross examination, could thereafter place little, if any, credence in his testimony as a whole. The Court is satisfied that the Commission did not read this cross examination. In it, the claimant was very hesitant, evasive and many times showed a lapse of memory on very important acts of misbehavior. At times he was sarcastic with his answers, displaying the same attitude that he displayed to his foremen in the plant.

The trial examiner, Neil Murphy, who presided and conducted a fair trial and who appeared well founded in the law of evidence, did not rely on his testimony. The following are some of the observations he made on this cross examination. On page 14 of his notes, which are part of the record, in the middle of the page he noted:

> "At this point there is further interrogation regarding claimant's being reprimanded twice within 30 or 40 minutes for conversing on the job, and his answers are evasive. His answers throughout most of the cross examination are nonresponsive or evasive."

Again we find on page 117 of the transcript where he was being cross examined by Mr. Evrard, the following:

> "Q And did you tell the men, "I just laughed it off?" Isn't that the words you used, "I just laughed it off?"
>
> A I just forgot about it.
>
> Q Did you make that statement?
>
> A There was no reason to cause a fright.
>
> Q That isn't the point. Mr. Examiner, I think he ought to answer that question. It is a very important question.
>
> THE EXAMINER: I agree. I think your client is being very evasive, Mr. Duffy. I am sure that many of these questions you understand. You are trying to be sarcastic about it."

There are many more incidents in the cross examination, where claimant's answers are evasive, show lack of memory or are sarcastic, but the Court will not prolong this opinion by their citation.

Notwithstanding all the evidence above stated by the Court in this opinion, the Commission concluded with the following:

> "Although the employe may not always have met the work standards which his superiors expected of him, it does not appear that the manner in which he performed his work or his work pace manifested a wilful disregard of his obligations and duties as an employe, but rather that any failure on his part to perform at the standards expected was ascribable to mere inefficiency, inability or incapacity."

This finding of an ultimate fact has very little evidence in the record to support it. It is only supported by the self-serving statements of the claimant, most of which were discredited in his cross examination and not worthy of belief. While on the other hand, the clear preponderance of the evidence submitted by the employer, much of which was in memoranda form, showed that in the last year and one-half of his employment, the claimant showed a wilful disregard of his obligations and duties to his employment and a disrespect to his superiors. It is contra to all reasonable and logical inferences that can be drawn from undisputed facts.

The employer never made any complaint against inefficiency, inability or incapacity to perform. In fact, claimant had worked for the company more than five years before the first complaint of misbehavior was lodged against him. In fact, he was rehired after he had voluntarily left his employment after two years of service. This would not have been done if he was inefficient and unable to perform his work. There is no evidence thereafter that he had become disabled or incapacitated during his employment. He was a well built young man, 33 years old and familiar with all the jobs in the plant. At one of the most skilled jobs in the plant, that of trimming hearts, before his alleged slowing down began, he was the best trimmer. So testified his foreman, Robert Bristol (T. 54).

For the foregoing reasons, the Court cannot approve of the above findings nor the conclusion of law based thereon that the claimant's conduct did not evince a wilful, wanton or substantial disregard of his obligations and duties as an employe and his discharge was not for misconduct connected with his employment. To do so in the opinion of the Court after a careful review of all the evidence would be a miscarriage of justice.

The evidence is clear and satisfactory that during the last year and one-half of his employment and particularly during the month of November, 1962, and culminating with the incident of

December 3, 1962, the claimant's behavior must be considered as an intentional and unreasonable interference with his employer's interest so as to be guilty of misconduct connected with his employment within the meaning of Sec. 108.04(5) Stats. and so interpreted by the Court in the cases of Milwaukee Transformer Co. vs. Industrial Commission et al, 22 Wis. (2d) 502 and Roosvelt D. Tate vs. Briggs & Stratton Corp. et al, 23 Wis. (2d) 1.

Therefore, the findings of the Commission so made and its decision based thereon, holding the employe eligible for benefits are reversed and set aside.

Counsel for the plaintiff may prepare a proper judgment in accordance with the foregoing instructions, submitting the same to approving counsel before presenting it to the Court for signature.

Dated this 31st day of July, 1964.

BY THE COURT:

Herman W. Sachtjen

HERMAN W. SACHTJEN,
Reserve Circuit Judge