STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RESEARCH PRODUCTS CORPORATION,

Plaintiff,

vs.

DECISION
Case Nos. 155-432
155-430

DILHR & JEFFREY D. VANINGEN, AND ROBERT J. MC FARLANE, II,

Defendants.

This is an action to review a decision of the Department of Industry, Labor & Human Relations (Department) which held that the employees had been discharged, but not for misconduct connected with their employment within the meaning of Section 108.04(5) Stats. The employees, along with three other employees, had harassed three strike breaking employees several miles from the plant. The strike breaker's car was disabled with a flat tire. All of which was reported to the picket line. Two cars containing five strikers took off to find the disabled vehicle.

When overtaken three strike breakers got out of the disabled car, Mr. Yonkie and two women. One striker, Mr. Olson, took a knife from his dashboard, attached it to his belt, got out of the car along with all five strikers and upon observing the flat tire stated: "We ought to flatten the other three." Olson kicked one of the strike breaker's radio into the gutter and asked Mr. Yonkie if he'd "like to get stuck like a pork."

The mother of one of the strike breakers had been called to come to the rescue. So in order to avoid involvement of the mother with the strikers, the three strike breakers started walking toward Poynette with at

least two of the strikers, including Mr. Vaningen, following them in goose step, throwing beer from a can and spitting and verbally abusing the three strike breakers with obscene language. Mr. Yonkie walked in the rear to provide some protection for the women.

The strike breakers stopped in a store for a short time during which the five strikers reorganized for the purpose of following them when they left the store. Testimony was offered by only one strike breaker, Mr. Yonkie. Testimony was also given by Gary East, who was one of the five strikers, but he had not been discharged because his conduct was not discovered until after the Union contract had been signed following the strike, and he, therefore, received disciplinary action under the contract.

Gary East testified that the five rotated with two or three of them walking on the heels of Yonkie, who again was walking last, kicking Yonkie's lunch basket and kicking his legs while continuing to spill beer on him and spit on him.

Yonkie had picked up a stone for his protection but threw it away in the march of misery.

When the strike breakers reached Highway 51, the strikers abandoned their pursuit. But before doing so, made remarks such as: "We hope we don't see you back in town"; "We hope we don't see you back at our jobs"; "Maybe this will learn you a lesson not to take our jobs". (transcript 157-158)

The next morning Yonkie and the two women reported for work and from the office with the use of binoculars identified Vaningen and McFarlane on the picket line as two of the participants.

The Department made Findings of Facts to sustain its Conclusion of Law. The findings were that the striking employees "harassed several replacement workers on December 2, 1974, by spitting upon them, by throwing beer upon them, by using threatening, abusive and profane language toward them, by kicking the lunch

bucket of one of them, and by throwing snowballs at them."

"This reprehensible conduct by the group of co-strikers, of which the employee was a member, occurred away from the employer's plant location and after such replacement workers had completed their shift. The employer failed to establish by competent evidence that the employee had personally engaged in any conduct other than name calling, spitting upon, and throwing snowballs at the replacement employees. It did not appear that the replacement employees filed any charges against the employee or that any police action was taken against him because of his behavior on December 2, 1974. The replacement employees were not injured and there was no property damage sustained by the employer as a result of that incident.

"Although the name calling and other activities in which the employee participated with co-strikers against the replacement employees on December 2, 1974, might well tend to increase the tension in the employer's establishment between union and non-union employees, the employer failed to establish any rule of off-the-premises conduct which would be applicable to the employee and violated by him. The employer also failed to establish that any of the non-striking workers were intimidated into missing any work or discontinuing their employment with the employer or that any property damage resulted to the employer because of the employees conduct on December 2, 1974, which resulted in his discharge."

None of the findings made by the Department were proper nor did they have any validity in resolving the issues before the Department.

The issues before this Court are:

1. Did the Department err as a matter of law in determining that the conduct involved did not constitute misconduct within the meaning of Section 108.04(5) Stats?

2. Can a discharged individual be held responsible for the actions of a group of strikers with whom he acts in concert?

The Court is of the opinion that the answer to both these questions must be in the affirmative.

In McGraw-Edison Co. v. DILHR, 64 Wis. 2d 703, 711-712, 221 N.W. 2d 677 (1974) the court summarized the existing law on the meaning of misconduct as that term is used in Sec. 108.04(5) Stats. That summarization started with a citation to Boynton Cab Co. v. Newbeck, 237 Wis. 249, 296 N.W. 636 (1941) wherein the definition of misconduct was first set forth:

> " '. . .(T)he 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 is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, 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 employee'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 statutes.'"

The crucial test in a case of discharge for misconduct is whether or not the employee "show(ed) an intentional and substantial disregard of the employer's interest or of the employees duties and obligations to his employer."

In Cheese v. Industrial Comm., (1963), 21 Wis. 2d 8, 14, 123 N.W. 2d 553, it was said that ". . . the crucial question is the employee's intent or attitude which attended his act or omission which is alleged to be disqualifying misconduct." In Milwaukee Transformer Co. v. Industrial Comm., (1964), 22 Wis. 2d 502, 511, 126 N.W. 2d 6, the court found the general standard for determining misconduct to be whether the conduct reflects an intentional and substantial disregard of the employer's interests or the employee's duties. Finally, in Baez v. ILHR Department (1968), 40 Wis. 2d 581, 588, 162 N.W. 2d 576, it was said that ". . . for an employee's behavior to be misconduct it must be found to be an intentional and unreasonable interference with his employer's interest."

At the same time, however, the court has recognized that it is a reasonable interpretation of "misconduct" to conclude that a recurrent pattern of negligent acts, so serious as to amount to gross negligence and thereby evince an intentional and substantial disregard of the employer's interests, amounts to misconduct. Fitzgerald v. Glove Union, Inc. (1967), 35 Wis. 2d 332, 151 N.W. 2d 136.

Under the facts of this case the court is convinced that the claimant employees' behavior was indeed an intentional substantial interference with the employer's legitimate interests to hire replacement employees.

What occurred in Poynette on December 2, 1974, was certainly no accident. These were not good faith errors in judgment or the result of inefficiency. These were not failures in performance based on inability, incapacity or negligence. These were deliberate acts of harassment, intimidation, humiliation, threats of violence with a knife, and physical acts of kicking a person and his accoutrements. Given the existence of the strike and the object of the striker's rath, these acts cannot be seen as anything other than intentional attempts to scare the replacement workers out of their jobs. This court cannot view these acts as the playful activities of young strikers. The employer has a

legitimate right to hire replacement employees during a strike. Attempts by striking employees to intimidate the replacement employees into leaving their jobs is in its very essence an intentional interference with the employer's interests.

A group of strikers acting in concert to harass, threaten with knives and assault non-strikers are each guilty of the culpable conduct of the entire group.

As pointed out in the context of the National Labor Relations Act:

"We agree with the Board that reinstatement is not to be denied striking employees because of ordinary incidents of the maintenance of a picket line or for the use of rude language arising out of the feelings thereby aroused. We do not think, however, that anything in the act requires or contemplates the reinstatement of employees who have banded together in hurling profane, obscene and insulting epithets at employees who are attempting to work, in an effort to degrade and humiliate them publicly and prevent their working. To get into a quarrel in the course of an argument on the picket line and use unseemly language is not ordinarily a matter which would justify discharge or the denial of reinstatement; but to combine with others to use profane and indecent language in an attempt to humiliate those who are attempting to work and thus to prevent their working is a very different thing ...." N.L.RB Longview Furniture, 206 F. 2d 274 (4th Cir. 1953).

While recognizing that "(T)he unemployment compensation statute is not a "little" labor relations law", Milwaukee Transformer, at 512, this court cannot help but recognize the relevance of the above quoted language. A certain amount of misconduct is to be tolerated in any strike situation. The line, however, must be drawn somewhere. The strike setting is not a carte blanche for strikers to band together to harass, intimidate, humiliate and assault non-striking working employees. The court is firmly convinced that the behavior here in question has crossed the line and

must be held, as a matter of law, to constitute misconduct connected with his employment within the meaning of Sec. 108.04(5) Stats.

This court is of the further opinion that regardless of what individual acts claimants Vaningen and McFarlane were found guilty of, they must also be held responsible for the acts of the group as a whole. This court is well aware that a finding of misconduct results in what is, in effect, a forfeiture of the claimants rights to unemployment benefits. The court is also aware that it is the employer's burden to establish misconduct on the part of claimants if it wishes to deny benefits. However, these factors should not be used by claimants to avoid the responsibility for acts and actions which they shared in and were an integral part of.

Even in a criminal setting, where the forfeitures are the greatest and the burden of proof the stiffest in our legal system, responsibility for group action can be attached to the individual for his part in that action.

Wisconsin Jury Instruction - Criminal 570 defines the crime of conspiracy in this state. It states:

> "Conspiracy, as defined in Section 939.31 of the Criminal Code of Wisconsin, is committed by one who, with intent that a crime be committed, agrees or combines with another for the purpose of committing such crime, if one or more of the parties to the conspiracy does an act to effect its object."
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> "A mere understanding, expressed or unexpressed, between two or more persons that they will commit a crime, is all that is essential to constitute a conspiracy. Thus, it is not necessary that the conspirators had any express or formal agreement, or that there was a meeting of them, or even that they all knew each other. Neither is it necessary that there was distinctly stated the precise thing to be accomplished or the

plans for its accomplishment, either in a general way or in detail, by any member of the conspiracy to any other member. It is sufficient to constitute a conspiracy if there is a meeting of the minds, that is, a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose." (emphasis added)

There is no doubt in the court's mind that these strikers banded together, and acted together in concert to harass, intimidate, and humiliate the replacement employees. They had in mind a common purpose, clearly inferrable from their intentional acts.

In Oneita Knitting Mills v. NLRB, 375 F. 2d 385, 64 LRRM 2724 (4th Cir. 1967), the court of appeals was faced with this same issue, albeit within the context of the National Labor Relations Act.

The court held at page 391 "those who cooperate in egg throwing (at non-striker workers) with the offending strikers are equally culpable and likewise forfeit their right to reinstatement." See also NLRB v. Longview Furniture Co. 206 Fed. 2d, 274 4th Circuit, 1953.

The fact that the misconduct occurred away from the employer's premises serves to aggravate rather than mitigate the seriousness of the intentional misbehavior. This deliberate hounding of the replacement employees as they attempted to walk to safety emphasizes even more the deliberate and intentional nature of this behavior. This was no picket line incident. The strikers searched out and followed their victims through the streets of Poynette harassing them, threatening them, spitting on them, throwing beer, kicking Yonkie's lunch basket and kicking his legs as he walked away, seeking to humiliate and intimidate them in every way possible. The strikers were motivated by job related concerns and their behavior was directly connected with their employment.

The Department findings to support the conclusion of law relied heavily on factors which appear to the court to have no place in a case such as this.

All of the factors cited by the Department such as: the lack of police action, the lack of property damage, the absence of physical injury, the fact that the replacement employees returned to work are totally immaterial, irrelevant, and should not have been considered by the Department. The real issue in any misconduct case is the employees intent, not his success or failure in reaching a particular result. As pointed out in Gregory v. Anderson, 14 Wis. (2d) 130, 140, 109 N.W. 2d, 675 (1961), the fact that certain conduct might harm the employer's interest is the real test. Whether or not it actually does is immaterial.

Here there is no question but that the strikers purpose was to harass and threaten the working employees to the point of scaring them out of coming back to work. Their failure to succeed is of no import. It is their behavior that is being questioned and not the results of that behavior.

For the reasons set forth above the decision of the Department of Industry, Labor and Human Relations dated January 12, 1977, is reversed. Accordingly, claimants Vaningen and McFarlane were ineligible for unemployment compensation benefits under Chapter 108 Stats.

In light of this decision, the court further finds that any benefits paid to claimants were erroneous within the meaning of Sec. 108.09(9)(c) Stats. The court, therefore, orders that pursuant to Secs. 108.16(2m) and 108.22 Stats. the Department determine the amount of such erroneous payments and reimburse the employer's account accordingly.

Dated 10/26/77

Norris Maloney
Reserve Circuit Judge