STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DAVID L. SHUTVET,

Plaintiff,

vs.

MEMORANDUM DECISION

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and SUB ZERO FREEZER CO., INC.,

Case No. 156-282

Defendants.

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

This is an action by the plaintiff Shutvet (hereafter the employee) to review the decision of the defendant department dated February 23, 1977, entered in an unemployment compensation proceeding, which adopted the findings of fact of the appeal tribunal and affirmed its decision. The appeal tribunal denied unemployment compensation benefits to the employee based on his employment with the defendant employer Sub Zero Freezer Co., Inc.

The appeal tribunal's findings of fact read:

> "The employe worked during about one year and eight months as an assembly operator for the employer, a manufacturer of refrigerator appliances. His last day of work was March 4, 1976 (week 10).
>
> On several occasions during the month of February 1976 the employe requested permission from his foreman to be absent from work during the second week of March 1976. He was told by his foreman that his vacation plans would probably be approved. He was also informed that approval for all vacations must come from the employer's vice president.
>
> On March 4, 1976 (week 10), the foreman told the employe that he would not be allowed to be absent from work the following week. After leaving work that day, the employe did not return again to the employer's place of business until March 15, 1976 (week 12), at which time he was discharged.
>
> Although the employe's foreman had indicated to the employe that permission for his vacation would probably be forthcoming, the employe had not been granted vacation leave as of March 4, 1976. He understood that the foreman was not in a position to authorize any leaves of absence or vacation, and he was aware that he had not received actual permission to be absent from work.

> Although the employe may have felt justified in taking the action that he did, under the circumstances, the employe's absence from work for one week without permission 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 12 of 1976, the employe was discharged for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

ISSUES RAISED BY EMPLOYEE

The fore part of the employee's brief contends that certain findings of fact are not supported by credible evidence. Further on in this brief this contention is clarified by this statement:

> "It is urged that the examiner in forming his findings of facts failed to consider facts brought out by a close examination of the record. As such, his findings of fact, though somewhat supported by credible evidence do not present a complete picture."

The second contention made by the employee's brief is that as a matter of law the employee was not discharged for misconduct within the meaning of sec. 108.04(5), Stats.

APPLICABLE STATUTE

Section 108.04(5), Stats., provides in part as follows:

> "An employee'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 . . . ."

THE COURT'S DECISION

The court, after carefully reviewing the employee's brief believes the only findings of fact other than the concluding two paragraphs of the findings of fact with which the employee takes issue are the findings, "the employe had not been granted vacation leave as of March 4, 1976," and "he was aware that he had not received actual permission to be absent from work."

Brunt, vice president of the employer, testified that it was the employer's practice that all leaves of absence, "be granted by myself in conjunction with the supervisor" (Tr. 11).

The employee testified he remembered a conversation with Buroker, his supervisor, wherein Buroker had told him that in order to get vacations approved they had to be checked out through Brunt. He was then asked this question and gave this answer (Tr. 30):

> "Q Were you ever told that Mr. Brunt had okayed the second vacation?
> A He--I don't think he said it was okayed. I think he said that--he said it could be worked out that we could--that I could take this second vacation. I believe he did go in and mention it to Jack, prior to the first one, that I was taking the second one. And it was more or less to be worked out from the plant."

The "he" in the above answer refers to Buroker, and "second vacation" refers to the period of March 8 through March 12, 1976.

There is no testimony that Brunt ever approved any vacation leave for the period of March 8 through March 12, 1976. The Court, therefore, determines that the finding that the employee had not been granted vacation leave as of March 4, 1976, qualified as it was by the preceding words, "Although the employe's foreman [Buroker] had indicated to the employe that permission for his vacation would probably be forthcoming," is supported by credible evidence.

The employee had been granted a two day leave of absence for February 24 and 25, 1976, which period he used for vacation purposes but overstayed this leave by one day. He testified this was caused by plane difficulties. Buroker testified that to the best of his knowledge after the employee returned from this trip in which he had "misused his first leave" Buroker explained to him "that his second leave was probably in jeopardy" (Tr. 24). The examiner's synopsis of the testimony was, "Prior to March 4 I told him [the employee] the second leave was in jeopardy because he misused his first leave." The Court considers this to have been a reasonable interpretation of this testimony given by Buroker, and determines that it, together with the employee's knowledge that the leave of absence was not effective until approved by Brunt, constitutes credible

evidence which supports the finding made "he [the employee] was aware he had not received actual permission to be absent from work."

The evidence which the employee's brief contends was not considered in the making of the findings of fact is: The employee had a good work record during the year and nine months he had been employed by the employer. The employee testified that another employee had been trained to do the employee's work, and, therefore was in a position to do his work when he would be gone the week. The week's leave was for a trip to Colorado with four male conpanions to go skiing, and they planned to leave by plane on Saturday, March 6th. Before the employee was told on March 4th that the leave was being denied he had already paid $535 for the charter fee of the plane and had made a $40 deposit on his housing reservation in Colorado. In the afternoon of March 4th all employees of the plant were sent home because of an ice storm and the employee tried to reach Brunt by phone from Mt. Horeb but was unsuccessful.

The Court is of the opinion that these additional stated facts not directly covered by the findings of fact did not excuse his conduct in informing the employer on March 4th "Well, I'm going anyway" (Tr. 24) when told he would not be granted the week's leave of absence, and then absenting himself for such week, from being determined to have been misconduct connected with his employment. As far as the record discloses the employee did not even contact his four trip companions to see whether they could take over the entire $535 plane charter fee.

The Wisconsin Supreme Court has adhered to its definition of "misconduct" for purposes of sec. 108.04(5), Stats., and its predecesor statute, laid down in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941), as follows:

> ". . . (t)he intended meaning of the term 'misconduct', as used in sec. 108(4)(a), Stats., is limited to conduct evincing such wilful or wanton

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 culpacility, 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 statute."

In Milwaukee Transformer Co. v. Industrial Comm. and St. John, 22 Wis. 2d 502, 126 N.W. 2d 6 (1964), the Supreme Court stated:

"When determining whether a worker's conduct is 'misconduct' which will disqualify him from the benefits of the program, the employe's behavior must be considered as an intentional and unreasonable interference with the employer's interests."

The Court determines that the department could reasonably determine that the employee's actions in asserting he was going to go anyway when told his requested leave of absence was being denied, and the absenting himself from work for the week in question, "evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct the employer had the right to expect of him," and thus that he had been discharged for misconduct connected with his employment within the meaning of sec. 108.04(5), Stats.

Let judgment be entered confirming the department's decision which is the subject of this review.

Dated this 27th day of March, 1978.

By the Court:

Reserve Circuit Judge