STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOSEPH E. SMITH,

Plaintiff,

Case No. 152-031

vs.

MEMORANDUM DECISION

AMBROSIA CHOCOLATE CO.,
W. R. GRACE & CO., and
DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,
MADISON, WISCONSIN,

Defendants.

BEFORE: HON GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the plaintiff employee Smith to review a decision of the defendant department dated April 20, 1976, entered in an unemployment compensation proceeding which adopted the findings of fact of the appeal tribunal and affirmed the appeal tribunal's decision that the employee was ineligible for benefits and ordered repayment by the employee of the benefits previously paid to him.

The appeal tribunal's findings of fact read:

"The employe worked about four years and eleven months as a maintenance mechanic for the employer, a manufacturer of chocolate. He last worked on September 16, 1975 (week 38).

"On January 24, 1975 (week 4) the employe reported to work under the influence of intoxicating liquor and was sent home. He acknowledged that he had been drinking bourbon before coming to work.

"On May 5, 1975 (week 19) the employe refused to work on the third shift that he had been transferred to. He was discharged and later the discharge was converted to a one week disciplinary suspension. He refused to work on the third shift because he believed that with his seniority under the union contract he was not obliged to do so. However, rather than refusing to work on the third shift he could have attempted to resolve his problem through the union-grievance procedure.

"On June 24, 1975 (week 26) the employe cut a padlock on a locker to get necessary material to complete a job assignment. He had been warned in writing prior to June 24, 1975 (week 26)

that this was not to be done without written authorization from a foreman or person in charge. His foreman was at home and he knew that he could have received authorization by telephoning to him. He did not seek written authorization.

"On September 16, 1975 (week 38) the employe arrived at work and while filling out a time sheet fell asleep. He was awakened by his foreman and told to go to a department to make needed repairs on equipment. He did not go, but fell asleep again. He acknowledged that he fell asleep but alleged that it was sue to lack of sleep because of car trouble and having to attend a company-union meeting for his grievance involving change of his shift and seniority. However, as the result of not making the repairs to the equipment a line had to be shut down for approximately one-half hour and seven co-workers on the line were unable to perform their duties during that half hour. On September 17, 1975 (week 38) he was discharged.

"Under all the circumstances, the employe's actions evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of behavior the employer had a right to expect of him.

"The appeal tribunal therefore finds that in week 38 of 1975, the employe was discharged for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

STATUTE INVOLVED

Sec. 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 ISSUES

The brief in behalf of the employee raises no issue with respect to any of the evidentiary findings of fact set forth in the first five paragraphs of the findings of fact not being supported by credible evidence. Counsel for the employee has advanced these two contentions:

(1) The findings with respect to the incidents of alleged misconduct which occurred prior to the falling asleep incident of September 16, 1975, were acquiesced in and ratified by the employer.

(2) The conduct of the employee in falling asleep on September 16, 1975, did not constitute misconduct within the meaning of sec. 108.04(5), Stats.

THE COURT'S DECISION

Counsel for the plaintiff employee are in error in contending that the employer could not ground its discharge on the prior incidents of misconduct, viz., reporting to work while intoxicated, refusal to accept a transfer to the third shift, and cutting a padlock without first obtaining permission to do so, as well as on the incident of falling asleep on the job on September 16, 1975. Merely because some discipline was imposed with respect to coming to work intoxicated and refusing to accept the transfer to the third shift, and the employee was continued in employment after cutting the padlock, did not mean that the employer had condoned such misconduct.

In Checker Cab Co. v. Industrial Comm. (1943), 242 Wis. 429, 8 N.W. 2d 286, the employee King had had six traffic accidents while driving the employer's cabs. The first five were apparently his fault and he was warned for his lack of diligence. While the sixth was apparently not King's fault, he was nevertheless discharged for his entire record. The Supreme Court declared (p. 433):

> "We concur in the view of the trial court that if the defendant was guilty of misconduct within the meaning of the statute warranting his discharge, the last accident was the occasion of and not the reason for his discharge. The trial court said:
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> > "'The fact that the employer kept the employee until six accidents happened, and fired him after the sixth [accident], does not mean that there was no cause for the discharge except the sixth [accident]. No metaphysical gymnastics can change the truth that the employer fired the man because he had had six accidents not because he had had one.'
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> "The appeal tribunal apparently had the view, in which the commission concurred, that in some way the admitted misconduct was condoned because the employer continued King in his employment. This is a clear mistake of law. Condonation does not apply to such a situation. It may be that if the employee

had continued in his employment for many months a waiver of his prior misconduct might be inferred but certainly no such inference can be made under the facts of this case."

In Misco P. C. Incorporated v. Industrial Comm. and Yancey, Dane County Circuit Court, Case No. 107-412, October 11, 1961, the Honorable Richard W. Bardwell, Circuit Judge, reversed a Commission decision which had held that Yancey's discharge was not for misconduct. The court stated:

"However, whether or not a claimant's final spurt of absenteeism was or was not blameworthy is beside the point. Claimant had already built up a horrible record of absenteeism which had not been condoned and therefore under the doctrine of the Checker Cab case whatever act on the part of the claimant, blameless or not, triggering his discharge is of no moment. The employer had a perfect right to discharge the claimant for misconduct and the fact that he waited unnecessarily to discharge him at a time when the claimant was free from culpability does not take this case out of the rule of Checker Cab Company decision. In fact, it falls squarely within it and, further, we think it is quite consistent with our ruling in Dietrich vs. Cornell Paper Products Co. and Industrial Comm., decided February 5, 1957, and cited at page 21 of the Commission's brief. We stated there that an employer does not have to discharge an employee when the misconduct occurs but may prolong the decision for a reasonable period. In effect, that is exactly what was done here."

The falling asleep by the employee on September 16th after he had been directed by the foreman to go and repair an air line on a machine was merely the "straw that broke the camel's back."

On oral argument plaintiff's counsel contended there was no misconduct on the part of the employee in refusing to work on the third shift when directed to do so by the employer because the employee's seniority protected him from such a transfer. However, a collective bargaining agreement containing a grievance procedure existed between a local of the Teamsters Union and the employer. It is an elementary principle in labor law that an employee must accept a work assignment and then file a grievance to correct the situation if he believes the assignment violated the contract. It is significant that the employee did file a grievance with respect to the transfer but did not grieve the one week suspension without pay for refusing to work on the third shift when directed to do so (Tr. 39).

The Court turns now to the matter of the employee's conduct on September 16, 1975. There is a slight discrepancy in the facts stated in the finding of fact covering that incident. in stating that the employee fell asleep twice. This is what occurred according to the testimony of foreman Helgemoe and not disputed by the employee: At 11:30 Wally Morocco called Helgemoe and reported there was a broken air line on "number 2 nugget machine". At that time the employee was making out his time sheets at the desk of foreman Fisher. Helgemoe directed the employee to repair the leak as soon as he took a minute or two to finish making out his time sheets. The employee then asked Helgemoe if he knew what length and size the hose was. Helgemoe replied he didn't know and that the employee would have to go and check, "secure the line and make whatever repairs were necessary." At about 11:45 p.m. Morocco called Helgemoe and reported he was shutting down the candy bar line due to the loss of air pressure. Helgemoe then went and found the employee sound asleep behind Fisher's desk. (Tr. 10-11).

The employee's testimony with respect to what had occurred on September 16th prior to his reporting for work on the third shift was: He got through work at the employer's plant at 9:00 a.m. but did not sleep between then and 2:00 p.m. because he had a lot of straightening up around his house to do because he had just bought a home and moved into it. At 2:30 p.m. he attended a grievance meeting with respect to his transfer to the third shift. He left the employer's plant at 4:00 or 4:30 and then had problems with his car and did not arrive home until about 7:30, and "from 7:30 till 11:00 there was no sleep I could get." (Tr. 36-37).

There were thus at the minimum four hours available for sleep prior to going to the grievance meeting and another two hours in the evening, but he chose to use this time for other purposes. The Supreme Court held in Theisen v. Milwaukee Automobile Mut. Ins. Co. (1962), 18 Wis. 2d 91, 98-99, 118 N.W. 2d 140, 119 N.W. 2d 393, that falling asleep at the

wheel of a car "is negligence as a matter of law because no facts can exist which will justify, excuse, or exculpat such negligence." While falling asleep on the part of a factory maintenance repair man may not in all instances constitute negligence, it certainly was so here on the employee's part because he made no attempt to use the time which was available to him on September 16th to attempt to get some sleep. Therefore the appeal tribunal was justified in finding such conduct to have been wilful. It embodied an intentional disregard of the employer's interests. For the test of misconduct within the meaning of sec. 108.04 (5), Stats., see McGraw Edison Co. v. ILHR Department (1974), 64 Wis. 2d 703, 221 N.W. 2d 677.

While standing alone this falling asleep incident might not have warranted the severe discipline of discharge, this combined with the other found instances of misconduct certainly did. The employer followed what is known as the progressive system of discipline. This was set forth in its Employee Handbook, of which a copy had been provided the employee at the time of his employment, wherein at page 33 (Exhibit 3) it is stated:

> "Disciplinary penalties may take the form of oral warning, written warnings, suspensions, or finally discharge from employment. We want to assure all employees that the following guidelines will be followed: (1) Every type of disciplinary action taken against an employee shall be based upon just cause fully attributable to the employee; (2) Penalties will be proportionate to the severity and gravity of the offense; (3) Greater penalties will be meted out for repeated violations; (4) The employee's work record, including length of service and all disciplinary records of the employee, shall be considered in determining the penalties to be imposed; (5) Disciplinary actions will be consistent and in line with penalties imposed on other employees; and (6) Where unusual circumstances exist, judgment and discretion will be exercised accordingly."

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

Dated this 1st day of February, 1977.

By the Court:

George R. Currie

Reserve Circuit Judge