

1 STATE OF WISCONSIN     ||   CIRCUIT COURT     :   MILWAUKEE COUNTY

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3 ALDRICH CHEMICAL COMPANY, INC.,

4                             Plaintiff,

5             -vs-

Case No. 626-676

6 LABOR AND INDUSTRY REVIEW COMMISSION  
7 and ROBERT M. ADLER,

8                             Defendants.  
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10                             MEMORANDUM DECISION

11             This is an action brought by the employer-petitioner  
12 to review an order of the LIRC adopting the findings and  
13 conclusions of an appeal tribunal which held that the  
14 employe-respondent was entitled to unemployment compensation  
15 under Chapter 108.

16             The employer was discharged on January 5, 1983  
17 for "misuse of company property, use of vile language and  
18 engaging in indecent conduct." Specifically he had a female  
19 switchboard operator page "Jack Mehoff." It is undisputed  
20 that he understood and intended the slang term for masturba-  
21 tion to be broadcast.

22                             COMMISSION FINDINGS

23             The commission, by adopting the appeal tribunal's  
24 decision, found that the conduct of the employe was:

1 ". . . intended as a prank, and that it was  
2 an exceedingly foolish thing to do. The  
3 employe, caught up in the moment and under  
4 the influence of co-workers performed an  
5 adolescent act. The employer, on the other  
6 hand, had a significant interest in protecting  
7 itself from the results of such activity.  
8 Not only did the employer run the risk of  
9 damage to its reputation should an outsider  
10 be present, the more significant matter was  
11 the serious potential imposition on the  
12 receptionist. Although many people, espec-  
13 ially in a factory setting, would laugh off  
14 the incident as a bad joke, the risk  
15 remained that the people involved, the  
16 receptionist or any who heard the page,  
17 might be personally and significantly upset  
18 by the unwitting involvement in the act.  
19 There is no question that the employer must  
20 protect its workers from such an imposition,  
21 must protect its reputation and must maintain  
22 order and an appearance of professionalism.  
23 The mode chosen by the employer to maintain  
24 discipline was the discharge of the employe.  
25 That was well within its discretion and for  
valid business reasons. Yet, in terms of  
wilfullness, the employe intended none of  
the dire consequences which could have resulted  
from the mindless act. His actions amounted  
to an isolated instance of very poor judgment,  
but did not rise to that level of wilfull  
impropriety as to constitute misconduct  
within the meaning of the unemployment compen-  
sation law.

"In coming to its decision, the employer  
considered that the employe in his act was  
acting in concert with a co-worker who had  
committed an act of sexual harassment against  
a co-worker. The employe denied, and there  
is no evidence to the contrary, any involve-  
ment in that other activity. The employer  
was properly highly incensed over the other  
harassment and lumped the employe's page  
together with that of the other matter.  
The differences between the acts are signi-  
ficant. The one is an act of foolishness  
and the other an act of knowing cruelty."

1           The reference to the act of the co-employee was the  
2 co-worker's calling a company secretary and breathing  
3 heavily into the telephone.

4                           ISSUE

5           The issue is whether such conduct constituted  
6 misconduct within the meaning of the Unemployment Compensa-  
7 tion Act.

8                           FACTS

9           An examination of the record made before the  
10 commission reveals that the employe was 22 years of age at  
11 the time and had no previous experience as an employe.  
12 A co-worker suggested the page as a prank. When he declined  
13 to do it himself because of fear that his voice would be  
14 recognized, the employe-respondent volunteered to do it.

15           The act was contrary to written rules of the  
16 employer which were known to the employe. These rules in  
17 regard to discipline and discharge provided for an oral  
18 warning as a first step and a written warning with suspension  
19 as a second step. Those steps could be skipped in the case  
20 of extreme misconduct. Deliberate misuse of company  
21 property, vile language and indecent conduct were enumerated  
22 as extreme misconduct. The rules warned employes that a  
23 discharge would result in ineligibility for employe  
24 benefits.

25           It is also clear that this was the first trans-

1  
2 gression of the employe-respondent and was not done as  
3 part of his co-worker's conduct of harassment of another  
4 female employe. The employe volunteered to apologize  
5 to the receptionist, but was precluded from doing so.

6  
7 MEANING OF MISCONDUCT

8 The statute itself does not define the term  
9 misconduct. Judicial interpretation of the term mis-  
10 conduct as used in §108.04 (5) Stats. was first con-  
11 sidered in Boynton Cab Co. v. Neubeck, 237 Wis. 249  
12 (1941). It was there said that misconduct as used in  
13 the statute is:

14 ". . . limited to conduct evincing such  
15 wilfull or wanton disregard of an employer's  
16 interest as is found in deliberate viola-  
17 tions or disregard of standards of behavior  
18 which the employer has the right to expect  
19 of his employe or in callousness or negli-  
20 gence of such degree or recurrence as to  
manifest equal culpability, wrongful intent  
or design or to show an intentional and  
substantial disregard of the employer's  
interest or the employe's duties and  
obligations to his employer.

21 "Mere inefficiency, unsatisfactory  
22 conduct, failure of good performance  
23 as a result of inability or incapacity,  
24 inadvertance or ordinary negligence in  
25 isolated instances or good faith errors  
in judgment or discretion are not to be  
deemed misconduct within the meaning of  
the statute."

1           When formulating the test for misconduct as it  
2 relates to unemployment compensation the Supreme Court in  
3 Boynton, supra, p. 261 quoted extensively from guidelines  
4 given to tribunals under the British Unemployment Compensa-  
5 tion Act. The Court quoted as follows:

6           "It is not safe to do more than deal with  
7 the subject on broad lines because miscon-  
8 duct is always a question of fact which  
9 depends upon an infinite variety of cir-  
10 cumstances including the past record and  
11 general character of the alleged delinquent.  
12 As a general rule it may be said that a  
13 single instance of negligence or mistake  
14 is not sufficient evidence of misconduct.

15           But to this rule there are exceptions, and  
16 when the direct consequences of an act or  
17 omission are fairly obvious to an applicant  
18 and are such as to be likely to cause serious  
19 loss to the employer, his business or his  
20 property, a finding of misconduct is not  
21 unreasonable.

22           But though one instance of negligence or  
23 mistake may not amount to misconduct, the  
24 recurrence or repetition of the act or other  
25 acts may indicate a culpability which may  
clearly be described as misconduct. I think  
that point is reached when it can be said  
that the behavior of an applicant shows a  
wanton or deliberate disregard of his employer's  
interests or of applicant's duties. . . .  
Here, again, is a question of fact to be  
determined upon consideration of all the  
circumstances. The standard or test will  
not be the same in all cases. It will vary  
with degree of responsibility or skill which  
the employe is engaged to exercise. The  
number of warnings given may be an important  
factor and the evidence of them should be  
definite. . . . In any case, misconduct must  
be proved and not assumed."



1 found facts if the agency has particular competence or  
2 expertise in the matter. Wisconsin Dept. of Revenue v.  
3 Milwaukee Refining Co., 80 Wis. 2d 44 (1977). Its con-  
4 struction and interpretation of the statute is entitled to  
5 great weight. If several rules of application of a rule are  
6 equally consistent with the purpose of the statute, the  
7 Court will adopt the agency's formulation and application of  
8 the standard, if a rational basis exists for the agency's  
9 interpretation and does not conflict with legislative  
10 history, prior court decisions or constitutional prohibitions.  
11 Libby, McNeil & Libby v. WERC, 48 Wis. 2d 472 (1970).  
12 However, such deference is not required when a court is as  
13 competent as the agency to decide the question involved.  
14 Wisconsin Dept. of Revenue, supra.

15 With these guidelines in mind, the Court has  
16 analyzed the record before the Commission. It concludes  
17 that the Commission has erred in interpreting the law and  
18 therefore acted outside its powers.

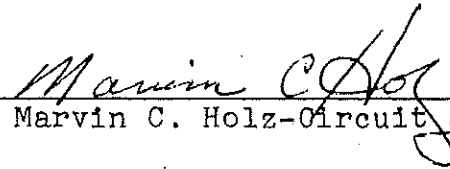
19 It is the Court's judgment that the Commission  
20 has given too little weight to the employer's interest in  
21 regard to providing a workplace where female employes are  
22 free from such imposition and harassment as encountered in  
23 the case at bar. This is a matter of broad public policy  
24 of which the courts are more competent than the agency  
25 because of their more generalized experience. Recent

1 legislation in the areas of sexual assault, domestic abuse  
2 and sex discrimination are expressive of a strong public  
3 policy discouraging conduct and attitudes which condone  
4 such activity as involved in this action. The public policy  
5 expressed in the Unemployment Compensation Act to cushion  
6 the impact of unemployment does not extend to those who  
7 forfeit their eligibility by misconduct.

8 Because the Court concludes that the Commission  
9 has erroneously interpreted the law as it applies to the  
10 circumstances of this case, it sets aside the decision of  
11 the Commission and reverses its determination. Counsel for  
12 the petitioner is directed to prepare an appropriate order.

13 Dated at Milwaukee, Wisconsin, this 3rd day  
14 of October, 1984.

15 BY THE COURT:

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19 Marvin C. Holz-Circuit Judge  
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