STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

JANICE L. ANDING,

Plaintiff,

vs.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, and RHINELANDER PAPER COMPANY, INC.,

Defendants.

MEMORANDUM DECISION

Case No. 88 CV 349

Nature of Action

This is an appeal from a decision of the Labor and Industry Review Commission which affirmed the decision of the Administrative Law Judge holding that the discharge of the employee, Janice Anding, was for misconduct connected with her employment within the meaning of s.108.04(5), Stats. The impact of the decision is to deny the employee unemployment compensation benefits.

Facts

The following facts from the administrative agency proceedings are undisputed.

The employee worked as an engineer and maintenance supervisor for about two years. She was a salaried employee making approximately $36,000.00 annually.

Because of vacations of other employees and various special projects she was responsible for, the employee was averaging in excess of 55 to 60 hours of work per week in 1988. There were some weeks in which she worked in excess of 60 or 70 hours and, during one week, she worked 90 hours.

The employee was described by a senior project engineer as "an energetic employee" who worked extra hours. Prior to May 9, 1988, no previous instances of misconduct were noted.

The employee was required to carry a pocket-pager and one or more persons set it off as a form of harassment, sometimes 28 times a day. The employee complained about this but the problem continued. The employee was also experiencing crank phone calls and lights shining at night into the windows of her home which she complained to the police about.

On May 9, 1988, the employee brought a small firearm onto the premises of the employer. The employer had a direct rule prohibiting firearms which the employee knew about. The firearm was observed by a co-employee who was in the process of breaking off a personal relationship with the employee. The co-employee summoned the police. The police disarmed the employee. The employee was subsequently discharged.

It is undisputed that the employee was depressed over her long hours of employment and the break-up of the relationship with the co-employee. The co-employee described her as "quiet and withdrawn." The police officer who disarmed her took her to a local psychiatric ward, noting that she was "completely depressed and crying." In her statement, the employee herself said, "basically, I was stressed out and had a nervous breakdown." This was confirmed by a psychiatric social worker with whom the employee was treating. He testified that he believed the employee had suffered from acute stress, that her behavior on May 9, 1988 constituted a "suicidal gesture" and a "cry for help."

I. The Finding as to Intent

There is tension in the cases regarding the nature of the intent required in employee misconduct cases. The earlier cases emphasize the employees "attitude which attended his act or omission . . ." Cheese vs. Industrial Commission, 21 Wis. 2d 8 (1963). More recently, the cases emphasize "an objective test of what a reasonable person would have intended and what conclusion a reasonable person would have drawn." Wehr Steel Company vs. ILHR Department, 106 Wis. 2d 111, 315 NW 2d 357 (1982). Additionally, that "the employees intent does not mean that the intent must actually exist." Fitzgerald vs. Globe Union, Inc., 35 Wis. 2d 332, 151 NW 2d 136 (1967).

It is unclear what the Administrative Law Judge found with respect to intent in the case at bar. Partly, this is because the ultimate finding is stated as a negative:

> "However, from the entirety of the evidence presented, the appeal tribunal is not persuaded that the employee was so disoriented by these events that she could not recognize the impropriety of taking a firearm and ammunition into the employer's plant." (Emphasis added.)

More importantly, the word "intent" or "intentional" is never used. The decision is cast in terms of the employee "recognizing the impropriety." Where does this language come from? Clearly, not Boynton or any other cited authority. If an employee "recognizes the impropriety" does that equal intent? Conversely, if the employee does not "recognize the impropriety" does that mean there is no intent?

There is an even more troublesome problem with the intent

finding, however. If there is intent in this case, it is "legal" intent - "she did it, therefore she intended it." As with intentional crimes, the intent is imputed from the act. This is almost a strict liability form of intent. This is what counsel for the employer urged in his October 7, 1988 brief before the Commission.

> "2. The proper standard to determine employee misconduct is to look at the objective facts and not the subjective intent of the employee." Torgerson brief, page 6.

The Administrative Law Judge did not apply this standard. Instead, she apparently found that the employee subjectively recognized the impropriety of taking the gun into the plant. For this there is no evidence in the record.

II. The Conclusion That There Was Misconduct

Whether or not the record supports the factual finding of intent, the question of whether there was misconduct is a legal one. See Cheese, supra, at p.15.

The word "misconduct," while used in s.108.04(5), Stats., is not defined therein. The classic, oft-repeated definition of the term comes to us from the case of Boynton Cab Company vs. Neubeck, 237 Wis. 249 (1941). Boynton emphasized that the term "misconduct" was inherently ambiguous and doubtful in its meaning. In order to construe the meaning of the word, the Court insisted upon discussing the entire context of the workers compensation law. In doing so, the Court emphasized that the statute worked a forfeiture and, thus, in order to minimize the penal character of the provision conduct which was not clearly included within the meaning of it should be

excluded. The Supreme Court's definition follows:

> ". . . The intended meaning of the term misconduct as used in sec.108.04(4)(a), Stats., is limited to conduct evincing such willful 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."

This court cannot agree that, under the circumstances of this case, "misconduct" within the meaning of the above definition was committed. Justice Callow, in amplifying the decision of the Court in Wehr Steel Company vs. ILHR Department, supra, observed the following in his concurring opinion:

> "I believe that the proper standard for testing the alleged misconduct is as follows: Was the employee's conduct reasonable in light of the facts and circumstances . . .? In other words, did the employee act as a reasonable person would have acted under the same or similar conditions?"

If placed in the same position as the employee in this case, any reasonable person would have been pushed beyond the limit. For the reasons stated, I reverse the Commission's decision and find the employee qualified for unemployment compensation benefits.

Dated this 1st day of June, 1989.

BY THE COURT:

Honorable Robert E. Kinney
Oneida County Circuit Judge, Branch I

Footnote

[1] I do not mean to be overly critical of the author's writing style. Her decision is generally very well-written. Rather, I point to the use of double negatives as evidence of the hesitating, non-committal and evasive nature of the finding. See the Elements of Style, Strunk and White, 3rd Edition, page 19 and Clear Understandings - A Guide to Legal Writing, Goldfarb and Raymond, page 11.