

STATE OF WISCONSIN:           CIRCUIT COURT:   WAUKESHA COUNTY  
                                  BRANCH VI

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DORAN L. BLUM

PLAINTIFF

-vs-

DECISION

STATE OF WISCONSIN, LABOR AND INDUSTRY  
REVIEW COMMISSION, AND CONLEY AND  
ASSOCIATES INC.

CASE NUMBER 83-CV-2321

DEFENDANTS  
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This matter comes before this court pursuant to a petition for review brought by the plaintiff, Doran L. Blum, of an unemployment compensation decision rendered by the Labor and Industry Review Commission of the State of Wisconsin (hereinafter Commission). The commission determined that the plaintiff's employment was terminated for reasons of misconduct and is therefore ineligible for unemployment compensation.

In December of 1977 the plaintiff was hired by Conley Associates (hereinafter employed), a management consulting firm. In 1979 the plaintiff was promoted to the position of vice-president. On October 8, 1982, plaintiff was discharged from the company and applied for unemployment compensation benefits. On November 3, 1982 plaintiff was granted unemployment compensation benefits pursuant to an initial determination made by a deputy of the Department of Industry, Labor and Human Relations. The plaintiff received benefits from October 8, 1982 through January 31, 1983. The employer filed a request for a hearing in the initial determination. An examiner of the Department of Industry, Labor and Human Relations, Job Service Division conducted hearings regarding plaintiff's eligibility on December 6, 1982, January 5, 1983, and January 25, 1983. On February 8, 1983 the hearing examiner issued his decision reversing the initial determination and denied unemployment compensation benefits by finding that the plaintiff's action constituted misconduct. The plaintiff filed for review of the examiner's decision to the commission. On September 15, 1983, the commission issued its decision and adopted the examiners findings of fact and conclusions of law as its own, except as to the noted deletions and amendments stated in the commission's decision.

The commission's decision, with the appropriate deletions and amendments, is accurately reproduced in the plaintiff's brief dated July 12, 1984, at pages two and three. The decision states that the employer alleged four reasons for the plaintiff's discharge:

"that he failed to adhere to the employer's dress code; he continued to receive personal telephone calls at work after having been warned against doing so, that he frequently left the employer's establishment while his superior was attempting to discuss matters with him and that he failed to engage in business development."

The commission addressed three of the above reasons in its decision. The reasons addressed were the plaintiff's business development, dress code, and leaving the building while discussing matters with his superior. The commission concluded that all of these reasons constitute misconduct by finding that plaintiff's actions evidenced a willful, intentional and substantial disregard of the employer's interests.

The issue in this case is whether there is credible and substantial evidence to support the commission's findings of fact and whether those findings of fact support the conclusion of law that the plaintiff's actions constituted misconduct.

The commission does not act as an appellate body but, rather under its own powers, as if in an original proceeding, when reviewing the findings and conclusions of the examiner. The commission makes its own determinations and the ultimate responsibility for findings made is upon the commission itself. Consequently, on judicial review it is the findings of the commission which are scrutinized for their adequacy. Indianhead Truck Lines v Industrial Comm. 17 Wis 2d 362 (1962) and State v Industrial Comm. 233, Wis 461 (1940).

Section 108.09 (7) (b) Wis. Stats. states that judicial review under the unemployment compensation act shall be confined to questions of law and that the provisions of Chapter 102 shall govern such review. Chapter 102 is the worker's compensation act. Section 102.23 (1) (b) Wis Stats sets forth the grounds upon which a commission order or judgment may be set aside as follows:

if the commission acted without or in excess of its powers, or that the order was procured by fraud, or that the findings of fact do not support the order. In 1978 subsection (6) was added to the statute to clarify the standard to be utilized in reviewing the findings of fact of the commission by the courts. Section 102.23(6) states in relevant part;

"The court may, however, set aside the order of award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence."

The first cases to apply the new sec 102.23(6) Wis Stats was Farmers Mill of Athens Inc v ILHR Dept, 97 Wis 2d 576, 579 (ct App. 1980). In the recent case of Princess House Inc v DILHR 111 Wis. 2d 46 (1983), the court took the opportunity to explain this new standard of review. The court proclaimed that the "credible and substantial" language did not pose a different standard of review from that which already existed with respect to unemployment compensation cases or worker's compensation cases. The court in Princess House, at p 54, reaffirmed the case of R. T. Madden Inc v ILHR Dept., 43 Wis 2d 528 (1969), by stating that;

"Evidence that is relevant, probative and credible, and which is in a quantum that will permit a reasonable fact finder to base a conclusion upon it is 'substantial' evidence."

The Madden case dealt with the "credible" evidence test used for judicial review. The relevant language from the Madden case, at p 547-548 states;

"If there is credible, relevant, and probative evidence and that evidence construed most favorable would justify men if ordinary reason and fairness to make that finding, the evidence is sufficient."

The commission's findings should rest upon such evidence that is more than a mere scintilla of evidence but does not necessarily have to be a preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion that the commission reached.

Section 108.04 (5) Wis. Statute states an employee's eligibility shall be barred for any week of unemployment completed if he is discharged by the employer for misconduct connected with his employment. This statute does not define misconduct, however,

the court has defined this term through case law. The leading case is Boynton Cab Co v Neubeck , 237 Wis. 249, 259-260 (1941) where the court defined misconduct as;

"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. 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 error in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute ."

This definition has consistently been cited with approval in recent cases. Holy Name School v ILHR Department, 109 Wis. 2d 381, 389. (Ct App 1982); Wehr Steel Co. v ILHR Dept. 106 Wis 2d 111, 116 (1982); Mc Graw-Edison Co v ILHR Department, 64 Wis 2d 703, 711-712 (1974). Benefits may not be denied unless the employee's conduct amounts to an 'intentional and substantial disregard of 'or an' intentional and unreasonable interference with 'the employer's interests. Miller Brewing Co v ILHR Department, 103, Wis 2d 496, 499 (Ct App 1981).

Misconduct within the meaning of sec 108.04 (5) Wis. Stats is a question of law. Consolidated Const Co v Casey, 71 Wis 2d 811, 816 (1976). Any legal conclusion drawn by the commission from its findings of fact is subject to judicial review. The court is not bound by the agency's determination of a question of law. Wehr Steel at p 117.

The unemployment compensation act is remedial in nature and should be liberally construed to provide compensation to workers. The law presumes that an employee is not disqualified from unemployment compensation. The law places on the employer the burden of introducing credible evidence sufficient to demonstrate that there is some disqualifying reason that bars the employee's claim. Holy Name School, at p 387, citing Consolidated Const Co v Casey, 71 Wis 2 d 811, 820 (1976). Furthermore, the commission should state all factors which it relies upon for its decision. Wehr Steel at p 122.

This court will now turn to the employers reasons for

✓ discharging the plaintiff and the facts relied upon the commission in determining that plaintiff's action constituted misconduct within the meaning of the statute.

Conduct of Personal Business at Place of Employment

One of the employers reasons for discharge was that the plaintiff continued to receive personal telephone calls at work. The commission does not address this reason in its decision. Clearly, the commission did not rely upon this reason of discharge in determining misconduct of the plaintiff. This is best demonstrated by the conflicting testimony taken on this issue at the examiner's hearing. The commission declined to rule which testimony was more credible and thereby refused to make such findings of fact a part of its decision.

There was testimony that the plaintiff received frequent personal telephone calls at the office. The supervisor, Gordon Housfeld, stated the calls were from a former woman employee of the firm. The plaintiff testified that his wife and daughter also called him at the office. However, the supervisor stated that there was no problem with personal telephone calls being received at the office and that the phone lines were not tied up so as to preclude incoming or outgoing calls for the business. There was no evidence presented <sup>that</sup> personal telephone calls hindered the normal routine of the business. Furthermore, there is no evidence of an office rule prohibiting or limiting such personal calls for any of the employees.

Another reason that falls within this category, asserted by the employer and stated in the commissions brief, was that during the week ending September 25, 1982, a co-worker, vice-president Jack Boetcher, claimed he saw the plaintiff in the hallway embracing and kissing a woman. This co-worker assumed that the woman was not the plaintiff's wife and he conveyed his impression to the plaintiff's superior. However, the plaintiff's wife testified that she had visited her husband at the office during this week and that she embraced her husband at the door in the hallway before leaving the building. Once again there is conflicting testimony presented which the commission declined to determine the credibility of and further make part of its decision.

Furthermore, the commission tries to characterize the plaintiff as a "bad man" by referring to an incident in its brief that allegedly took place in December of 1981. The supervisor stated that the plaintiff appeared at his office and wanted to exchange cars with the supervisor because the husband of a lady friend was after him and he wanted to get out of town in a hurry. The supervisor stated he was told to be careful when driving the plaintiff's car because there was a gun under the seat. The plaintiff testified that he may have borrowed the supervisor's car but that it was not to leave town in a hurry or that there was gun under the seat.

Such evidence goes toward the character of the plaintiff as being a "bad man." There is no relevancy of this evidence upon the question of plaintiff's misconduct at the business place and is purely inserted by the commission for emotional appeal. The plaintiff's personal life is not relevant so long as it does not interfere with his business activities. There is no evidence submitted that that incident interfered with the employer's business interests.

Although the commission refers to all of the above arguments and reasons in its brief filed with this court, the commission's decision is void of any such discussion. Therefore this court holds that there is no credible and substantial evidence in the commission's findings of fact to support a conclusion that one of the factors for plaintiff's misconduct consisted of his personal business affairs

Business Development and Employer's Instructions

The employer claims that one of the reasons for the plaintiff's discharge was that he failed to engage in business development. The commission addressed this issue in its decision by stating;

"When the employe was hired, he was advised that the development of new business contacts would be an integral part of his job duties. In spite of this fact, he denied that business development was initially a part of his job duties."

In a letter sent by the employer to the plaintiff upon hiring, dated October 7, 1977, the employer states.

"Your initial responsibilities will include the conduct of research assignments from the Milwaukee office. In addition, we will look for your help in new business development using contacts from your prior business experience."

In other words, business development meant that the plaintiff was to try to establish new accounts for the employer.

The question is whether there is credible and substantial evidence to support a fact that the plaintiff did not engage in new business development altogether as alleged by the employer. This court has searched the record and has found no evidence stating that the plaintiff did not engage in searching for new business accounts for the employer.

A close reading of the commission's decision reveals that the commission did not hold that the plaintiff failed to search for new business accounts. The commission merely stated that the plaintiff initially denied that searching for new account was a part of his job. As to this finding, there is evidence to support the fact that the plaintiff did initially deny this duty as part of his job.

The plaintiff was not instructed on a quota or on how much new business he was expected to bring into the firm. The testimony reveals that when the supervisor and the plaintiff discussed the matter that they only spoke in generalities. There was evidence introduced that the plaintiff had engaged in new business development. The supervisor and the plaintiff both testified that the plaintiff did try to secure new accounts. Trying to secure and actually obtaining a new account are two different things. It should be noted that the volume of new business actually secured by the plaintiff is not the issue in this case.

This court is not directing its inquiry into whether findings that were not made should have been made or could be sustained by the evidence. Rather, the inquiry is directed toward whether there is evidence to sustain findings made. Eastex Packaging Co v DILHR, 89 Wis 2d 739, 745 (1979). This court has previously stated that there is credible and substantial evidence supporting that plaintiff initially denied securing new accounts has a part of his job. However, this court holds that there is no credible and substantial evidence to support the employer's allegation that the plaintiff failed to engage in business development altogether during his term of employment.

The commission states in its brief that the plaintiff did not follow the employer's instructions in billing an engineering client and in procedurally handling an account for J. I. Case Company in August of 1982. However, failure to follow the supervisor's directions was not stated in the commission's decision as a reason for the plaintiff's discharge by the employer. Thus such evidence is irrelevant but the manner in which the plaintiff addressed his supervisor during these discussions is relevant to the issues of

this case.

Dress Code and Leaving Business Meetings.

The employer claims that the plaintiff did not adhere to the employer's dress code and that the plaintiff frequently left business meetings with his supervisor before the meeting was completed. The commission found that the supervisor had requested that the plaintiff wear a suit and tie and that the plaintiff did not always appear at work with a suit and tie. The commission also found that the plaintiff terminated meetings with his supervisor by abruptly leaving in a state of frustration.

Although there was not a written dress code, the supervisor stated that he had discussed the plaintiff's attire with the plaintiff during various meetings held in 1981. The supervisor claimed these meetings occurred on January 14, 1981, April 20, 1981, May 8, 1981, October 6, 1981, and October 28, 1981. The supervisor claims that at some of these meetings the plaintiff left before the discussion was completed. The Plaintiff argues that he clearly was not present at some of these meetings and offered such evidence to discredit the supervisor's testimony. It is not the function of this court to weigh the credibility of testimony on the evidence presented pertaining to findings of fact since that function remains solely within the province of the commission. Section 102.23(6) Wis. States., in relevant part, states;

"If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact."

On August 1, 1982, the co-worker vice-president, Jack Boetcher was hired by the employer. At the plaintiff's invitation, the co-worker and the plaintiff had an informal conversation during the week of September 25, 1982. Among other things, the co-worker conveyed his views to the plaintiff concerning plaintiff's appearance, leaving business discussions with the supervisor early and business development. The co-worker suggested the supervisor was dissatisfied but did not state that the supervisor was seriously considering terminating the plaintiff. Furthermore, the co-worker was not plaintiff's superior.



Thus, there is credible and substantial evidence to support the commission's finding of fact that the plaintiff dressed without a suit and tie and that the supervisor requested the plaintiff to dress in a suit and tie. There is evidence to support that the plaintiff terminated meetings with his supervisor by abruptly leaving in a state of frustration over the supervisor's suggestions.

✓ However, approximately eleven months had passed after the October 28, 1981 meeting before the subject of plaintiff's attire was again discussed and that discussion was with a co-worker. The supervisor did not discuss with the plaintiff his manner of dress or early termination of meetings until the time at which the plaintiff was discharged. The supervisor stated that he usually met with the plaintiff every two or three weeks to discuss job performance. It is to be noted that the incidents of personal appearance and leaving early reoccurred after October 28, 1981 and before September 25, 1982. Eventhough the supervisor and the plaintiff periodically met, the supervisor did not discuss with the plaintiff his attire or leaving business conferences early during this eleven month period.

These two situations have occurred over a long period of time starting in January 1981 and continuing through August of 1982. The supervisor made requests of the plaintiff at the beginning of this period but failed to warn the plaintiff during the last eleven months of this period. It is unfair to allow these acts to compile over a period of years and then discharge a person for the accumulation, especially since his supervisor has not recently warned the person of the consequences for such an accumulation. The recent actions by the plaintiff are not different in degree or in kind from his past actions. The employer has condoned such behavior during this entire period by not taking swift and immediate action at the on-set of said problems with the plaintiff.

In Vocation, Tech & Adult Ed Dist. 13 v ILHR Dept., 76 Wis 2d 230 (1977), the court affirmed the distinction drawn between a request and an order from a supervisor. In that case, a supervisor demanded that a teacher-employee reinstate a student. The teacher refused to do so believing that the supervisor's demand was a request and not a direct order. The court ruled in favor of the teacher and allowed unemployment compensation by holding that the supervisor had requested and had not ordered the teacher. Similarly, this court holds that the supervisor in this case had made

requests of the plaintiff that were not explicit and therefore did not directly order the plaintiff.

Therefore, these two continuing situations demonstrate unsatisfactory conduct toward the employer and can not alone justify a conclusion that the plaintiff was discharged for misconduct.

The commission did not rely on these two situations in determining misconduct. The commission relied on all the actions of the plaintiff set forth in its decision. Thus, this court will now focus on the events prior to the discharge, that prompted the discharge by the employer, in order to determine if there was misconduct.

#### Conclusion

The events that occurred from August of 1982 through September of 1982 consist of plaintiff's personal telephone calls, the embracing and kissing incident during the week ending September 25, 1982, the plaintiff's inability to actually secure new business accounts, the J. I. Case account instructions in August, and the continuous situation of plaintiff's appearance and leaving meetings early. All of these events combined, prompted the discharge of the plaintiff. It can not be said that any single event was the reason for the discharge. These events may be valid reasons for terminating employment although they may not be valid for finding misconduct.

This court has determined that the commission did not rely on the personal calls and the embracing incident in its decision. Thus, there is no credible and substantial evidence that the plaintiff's personal affairs at the place of business was one of the factors relied upon in determining misconduct. This court has determined that there is no credible and substantial evidence to support the allegation that plaintiff did not engage in business development altogether. This court has determined that the instructions concerning the J.I. Case account were not alleged as a reason of discharge. Lastly, this court has determined that the plaintiff's manner of dress and termination of business meetings can not alone justify misconduct.

The commission specifically relied upon the arguments of business development and the plaintiff's appearance and early termination of meetings in its decision to determine misconduct. This court can not sustain the commission's conclusion of misconduct based on the above determinations. The commission's limited findings of fact regarding business development do not support the conclusion of misconduct. Moreover, the commission's findings

regarding the continuous situations over the plaintiff's attire and termination of meetings do not alone support the legal conclusion that the plaintiff's actions constitute misconduct.

The reviewing court is not bound by the commission's determination of questions of law, but it has deferred to some extent to the legal construction and application of the statute by the commission. Miller Brewing, at p 501. In light of the facts and the previous discussion, this court holds that the plaintiff's actions constitute unsatisfactory conduct and falls within that part of the Boynton definition that excludes certain actions as misconduct.

The plaintiff's action do not constitute an intentional and unreasonable interference with the employer's interests. Thus, the commission's decision denying unemployment to the plaintiff, Doran Blum, is reversed.

Dated this 18 day of October, 1984.

BY THE COURT:

  
Circuit Judge Branch VI

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH VI

WAUKESHA COUNTY

DORAN L. BLUM,  
Plaintiff,

-vs-

ORDER FOR JUDGMENT  
Case No. 83-CV-2321

FILED

STATE OF WISCONSIN, LABOR AND INDUSTRY IN CIRCUIT COURT  
REVIEW COMMISSION, AND CONLEY AND  
ASSOCIATES, INC.

NOV 13 1984

Defendants.

WAUKESHA CO. WIS.  
VIRGINIA E. HUNKING, CLERK

WHEREAS, the above captioned matter having come on before the court pursuant to the Petition for Review brought by the plaintiff, Doran L. Blum, and upon the files, records, and briefs filed by the parties hereto and;

WHEREAS, the court having rendering a decision in favor of the plaintiff, Doran L. Blum, said decision having been filed on the 18th day of October, 1984.

IT IS HEREBY ORDERED THAT the decision of the Labor and Industry Review Commission of the State of Wisconsin is hereby reversed and;

IT IS FURTHER ORDERED that the plaintiff, Doran L. Blum, is hereby entitled to unemployment benefits in the full amount allowable by law, said amount to be paid to the plaintiff by the Department of Industry, Labor and Human Relations-Job Service Division forthwith.

Dated at Waukesha, Wisconsin on this 13 day of November, 1984.

BY THE COURT

*Robert T. McGraw*  
Judge Robert T. McGraw  
Circuit Court Judge

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RECORDED