

STATE OF WISCONSIN:

CIRCUIT COURT:

RACINE COUNTY:

SUZANNE E. ENNIS,

Plaintiff,

-vs-

LABOR AND INDUSTRY REVIEW  
COMMISSION, STATE OF WISCONSIN,  
and RED LOBSTER DIVISION, GENERAL  
MILLS RESTAURANTS, INC.,

DECISION AND ORDER  
REGARDING WHETHER EMPLOYEE  
COMMITTED MISCONDUCT  
PURSUANT TO  
SECTION 108.04(5) STATS.

File No. 92-CV-1548

Defendants.

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This is an action brought for judicial review pursuant to Sec. 102.23(1) Stats. as authorized by Sec. 108.09(7) Stats. of the Wisconsin Unemployment Compensation Act. The plaintiff seeks to set aside the decision of the Wisconsin Labor and Industry Review commission dated April 1, 1992. That decision reversed the January 3, 1992, decision of Administrative Law Judge Steven P. Glick, who affirmed the initial determination of the unemployment compensation division of the Wisconsin Department of Industry, Labor and Human Relations. Based upon the record of this case and the applicable law, this Court reverses the decision of the commission which concluded that the plaintiff was discharged for misconduct connected with her employment within the meaning of Sec. 108.04(5) Stats. and which required her to repay \$771 to the unemployment reserve fund.<sup>1</sup>

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<sup>1</sup>Sec. 108.04(5) reads in part: "DISCHARGE FOR MISCONDUCT. An employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits until seven weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least fourteen times the employee's weekly benefit rate under Sec. 108.05(1). . .

The plaintiff is represented in this matter by Robert K. Weber and Alice A. Nejedlo of the law firm of Hansen, Gasiorkiewicz & Weber, S.C. The defendants Labor and Industry Review Commission and State of Wisconsin are represented by Assistant Attorney General Robert C. Reed. The defendant Red Lobster Division, General Mills Restaurants, Inc. did not appear in this matter.

#### FACTS

The hearing before Administrative Law Judge Glick occurred January 2, 1992. Only two witnesses testified; Michael Muleski, the then general manager for Racine Red Lobster Restaurant, and Suzanne Ennis, the employee and plaintiff. Ms. Ennis had worked for the Red Lobster Restaurant in Racine for approximately six years during three separate periods.

On October 20, 1991, she was working as a waitress when she was asked by a co-worker to sing happy birthday to a customer, which was a common event for servers when a customer is celebrating a birthday. Ms. Ennis responded that she had already been asked but first had hot food to get to the dining room. She indicated that once the food was delivered she would sing. The other employee, Karen Steinmetz, responded "you're such a bitch, Susan".

Ms. Ennis delivered the food into the dining room, and when she went back into the kitchen, Ms. Steinmetz stated, "You're right, Suzanne, you're always right". Ms. Ennis explained that the hot food had to go out first. Ms. Steinmetz responded, "You're right, you're always right, you know everything," to which Ms. Ennis stated, "That's right," and Ms. Steinmetz then said, "You're such a bitch".

Ms. Ennis left the kitchen and came back with a tray of dishes. Ms. Steinmetz was talking to another server and was making comments to the effect that "you've got to watch out for that one there, she's just a bitch, she thinks she knows everything". Ms. Ennis testified that she then was so frustrated that she "slammed" down the tray in her hand.

The record showed that when the tray left her hands, it was at waist level. The tray was not raised but rather dropped from the point where she had had it. Her testimony indicated that there were approximately four or five plates on the tray along with silverware and napkins. When the tray hit the ground, some of the plates broke and sauce went on one of the waitresses. Ms. Ennis then left the area. The next day she was terminated for destroying Red Lobster property.

Based upon that testimony, Administrative Law Judge Glick concluded that Ms. Ennis' actions were "an impulsive reaction to provocation by a coworker, who was directing verbal abuse at her and was denigrating her to a coworker". Judge Glick stated:

"Under the circumstances, while the employee engaged in unsatisfactory conduct, her actions did not evince such a willful, intentional and substantial disregard of the employer's interest as to constitute misconduct connected with her employment".

He felt that she was eligible for unemployment compensation benefits.

The Labor and Industry Review Commission indicated that it conferred with Judge Glick about the case; however, it indicated the reason it reversed his decision was not because of a different

assessment of the witness's credibility. This is a procedure set forth in Transamerica Ins. Co. v. ILHR Department, 54 Wis. 2d 272, 284; 195 N.W. 2d 656 (1972). Instead, the commission noted that it reversed Judge Glick because of different inferences it drew from the facts which he found.

It was the commission's finding that Ms. Ennis refused to assist her coworker and then participated in an argument with that same coworker. They found she deliberately broke her employer's property because she was angry with the coworker. They then concluded that such behavior evinces such a willful and substantial disregard of the employer's interests as to amount to misconduct connected with her employment. Accordingly, the commission found that Ms. Ennis was ineligible for benefits and was required to repay the sum of \$771 to the Unemployment Reserve Fund.

#### DISCUSSION

Chapter 108 does not contain a definition of the term "misconduct". However, the Wisconsin Supreme Court defined the term in the case of Boynton Cab Company v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941). The Court said:

"[M]isconduct. . . 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 careless 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 of

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."

The State in its very well written brief discusses the concept of intentional and deliberate acts and cites other court cases in which misconduct was found. One such case is a 1985 trial court decision authored by the Honorable Laurence C. Gram, Jr. of Milwaukee. However, that case involved an employee of Pabst Brewing Company sawing and cutting a fire extinguisher hose.

Other examples cited in the commission's brief relate to a theft of candy in Weibel v. Clark, 87 Wis. 2d 696, 275 N.W. 2d 686 (1979) and the propelling of a ten pound dryer part toward another employee's work area as a reaction to a belief the other employee did an act which caused a finger injury in McGraw-Edison Co. v. Department of Industry, Labor & Human Relations, 64 Wis. 2d 703, 221 N.W. 2d 677 (1974).

This Court is of the opinion that the plaintiff's conduct in the instant case does not rise to the level of deliberate acts such as those cited in the State's brief. While the plaintiff's instantaneous act may have been an over-reaction to a provocation by another employee, it does not rise to an "intentional and substantial disregard of the employer's interests or the employee's duty". Baez v. ILHR Department, 40 Wis. 2d 581, 588, 162 N.W. 2d 576 (1968).

The tray was not raised and then thrown to the floor. The described act fits the description of a drop. On the other hand, the case law examples cited by the commission show purposeful acts

which took forethought to accomplish. They were not instantaneous. The commission examples have elements of premeditation or sabotage. Such is not the fact in the instant case.

In the instant case both Ms. Ennis' act of dropping four dishes and her reason for it do not rise to the level of willful and wanton behavior with substantial disregard of the employer's interests. While this obviously was more than a mere accident, the breaking of five or less plates in a restaurant is not uncommon and happens quite frequently.

Ms. Ennis' response to verbal abuse, while perhaps inappropriate, cannot be concluded to be misconduct under the facts as found by the commission. While this Court does not believe that Red Lobster was unreasonable in terminating Miss Ennis for her conduct, this Court is not satisfied that it can be concluded that her action constitutes misconduct under Sec. 108.04(5).

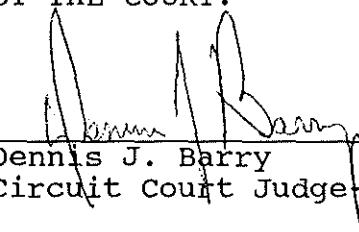
The commission's conclusion is not such as to entitle deference to it. Sauk County v. WERC, 165 Wis. 2d 406, 413, 417 N.W. 2nd 267 (1991). There is no technical competence or specialized knowledge necessary to interpret Ms. Ennis' acts and to distinguish their nature from the acts of the cases which the commission has cited. The fact that the commission was unable to cite a precedent or a case with similar facts demonstrates that it has no special expertise or experience with such conduct.

This Court is satisfied that the conclusion reached by Administrative Law Judge Glick is the correct one. Therefore, this Court orders that the April 1, 1992, decision of the Wisconsin Labor and Industry Review Commission reversing Judge Glick's

decision be and hereby is set aside.

Dated at Racine, Wisconsin, this 25<sup>th</sup> day of November, 1992.

BY THE COURT:

  
Dennis J. Barry  
Circuit Court Judge Branch 5

CIVIL COURT  
FILED

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CLERK OF CIRCUIT COURT  
RACINE COUNTY