STATE OF WISCONSIN CIRCUIT COURT FOR DANE COUNTY

PILGRIM CENTER, INC.,
a/k/a PILGRIM LIQUOR STORE,

Plaintiff, Case No. 150-256

vs.

WILLIAM A. SCHMECHEL, and
DEPARTMENT OF INDUSTRY,
LABOR, AND HUMAN RELATIONS,

Defendants.

MEMORANDUM DECISION

PILGRIM CENTER, INC.,
a/k/a PILGRIM LIQUOR STORE,

Plaintiff, Case No. 150-257

vs.

MARIAN A. SCHUBERT, and
DEPARTMENT OF INDUSTRY,
LABOR, AND HUMAN RELATIONS,

Defendants.

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

These two above entitled actions seek review of two decisions of the defendant department dated January 15, 1976, entered in an unemployment compensation proceedings which adopted the findings of fact of the appeal tribunal and affirmed the appeal tribunal's decision with respect to both defendant employees. No appearances have been entered by either defendant employee in this Court. Pursuant to stipulation of counsel for plaintiff employer and the defendant department an order was entered by this Court dated March 2, 1976, signed by Judge Torphy, which consolidated these two cases for this review and for any subsequent appeals.

STATEMENT OF FACTS

The business of the plaintiff employer is the operation of a liquor store in the Village of Menomonee Falls. At the time material to this

controversy Harold Snyder was the store manager.

The employer, because of a theft by an employee cashier in March, 1975, decided it was advisable to bond each of its employees by a group policy to be obtained from the Security Insurance Company of Hartford, Connecticut. Snyder's testimony is not clear as to how many employees were to be bonded by the new fidelity policy. He testified at one point that the store had ten emiloyees, and at another point he stated that he and another employee were already bonded and that there were approximately six other employees to be bonded by the new policy.

About April 1, 1975, Snyder passed out printed application forms to each employee to be bonded and requested each to fill out and sign the application form given the employee and then return it to him. The defendants Marian Schubert and William Schmeckel voiced objections to the application forms and Snyder had repeated conversations with them about their failure to complete and return the forms, but to no avail.

The employees were covered by a collective bargaining contract entered into with Local 444, Retail Clerk's Union. On April 11, 1975, Burtak, president of the union, wrote Sobel, the employer's counsel, a letter (Exhibit 4) stating that it had informed union members not to sign the fidelity bond applications, and suggesting a meeting with Sobel to discuss the matter. Such a meeting was held about April 20, 1975, at Burtak's office in the union headquarters attended by Sobel, Burtak, and Moczynski, who was the business representative and recording secretary of the union. Sobel was told that on the advice of legal counsel the union had objected to the language contained in the bond application form. After some discussion in which Sobel explained the employer's position it was agreed that the union officers would again confer with their attorney and then would call Sobel. About May 16, 1975, Moczynski phoned Sobel and told him the union had no objection to its members signing the application form. There is no testimony that this was communicated to Mrs. Schubert and Schmechel on May 16th. Moczynski testified the collective

bargaining contract with the employer contained no provision with respect to the bonding of employees, and that the union never took the position that the employer was violating the contract by requesting the employees to sign the application forms.

Mrs. Schubert testified to having had a conversation with Sobel at the store in which he told her that if she failed to sign the application form she would "be let go", meaning she would be discharged. Schmechel testified that no one told him he would be discharged if he did not sign the application form.

About May 12, 1975, Snyder posted this sign (Exhibit 1) by the time clock which read:

> "All Bonding Papers must be
> turned in by 5 PM Fri.
> 5-16-75"

Schubert and Schmechel failed to turn in to Snyder their signed application forms and were discharged by letter from Sobel dated May 17, 1975, to each (Exhibit 3) which read:

> . . "This is to inform you that your employment at the Pilgrim Liquor Store is terminated, effective immediately, because of your refusal to comply with the request to fill out and sign the Fidelity Bond Application as is required of all our employes."

All the other employees who had been requested to complete and return bond application forms had done so by May 16, 1975, except Schmechel's son. Schubert and Schmechel filed claims for unemployment compensation but Schmechel's son did not. The department's deputy made initial determinations that Schubert and Schmechel had been discharged but not for misconduct connected with their employment, and allowed benefits.

The employer appealed from these two initial determinations and a joint hearing of the two appeals was held before an appeal tribunal on September 2, 1975. The appeal tribunal issued separate decisions in each appeal on September 16, 1975. While the findings of fact in the two decisions differ as to the nature of the employment of Schubert and,

Schmechel and the reasons advanced by each for not signing an application form, the last six paragraphs are identical and read:

> "The bond application form required that the employe agree '. . . to protect and indemnify the said Company against any loss, to damage or expense, including court costs and counsel fees, or any liability therefor, by reason of having executed such bond on my behalf. . . Any payments made in good faith by said Company on account of any such liability, whether or not it is actually liable therefor, shall be prima facie evidence of my liability hereunder.'
>
> "The employe's refusal to sign the bond application was justified due to the new financial responsibility it imposed upon her which had not been required previously. Her failure to sign the fidelity bond application was not a wilful and substantial disregard of the employer's interests and of her duties and obligations to the employer.
>
> "The employer contended, in the alternative, that the employe voluntarily terminated her employment due to her failure to apply for the bond.
>
> "The employe was told on her last day of work that her employment was terminated by the employer. The employer's letter of May 17th stated that her employment was terminated because of her refusal to comply with the request to fill out and sign the fidelity bond application. In a Circuit Court decision, it was held that a violation of an employing unit's work rules should not be deemed a voluntarily quitting where there was no intent to quit. Martha D. Gross v. DILHR and Globe-Union, Inc., Circuit Court of Dane County, Case No. 137-319, November 14, 1973. Therefore, the employer's alternative contention that the employe quit cannot be sustained.
>
> "The appeal tribunal therefore finds that in week 20 of 1975, the employe did not terminate her employment within the meaning of section 108.04(7)(a) of the statutes.
>
> "The appeal tribunal further finds that in week 20 of 1975, the employe was discharged but not for misconduct connected with her employment within the meaning of section 108.04(5) of the statutes.

The decisions allowed benefits to each claimant if otherwise eligible.

THE ISSUES

The two issues to be resolved are these:

(1) Did the claimant employees terminate their employment with the employer within the meaning of sec. 108.04(7)(a), Stats.?

(2) Were the employees discharged for misconduct connected with their employment within the meaning of sec. 108.04(5), Stats.?

APPLICABLE STATUTES

Sec. 108.04(7)

"VOLUNTARY TERMINATION OF EMPLOYMENT. (a) If an employe terminates his employment with an employing unit, he shall be ineligible for any benefits for the week of termination and thereafter until he has again been employed within at least 4 weeks in each of which he worked at least 20 hours, except as hereinafter provided.

"(b) Paragraph (a) shall not apply if the department determines that the employe terminated his employment with good cause attributable to the employing unit."

Sec. 108.04(5)

"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 COURT'S DECISION

A. Whether Employees Terminated Their Employment

In Dentici v. Industrial Comm. (1953), 264 Wis. 181, 58 N.W. 2d 717, the Supreme Court stated (p. 186):

"When an employee shows that he intends to leave his employment and indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employee-employer relationship, it must be held, as the Industrial Commission determined here, that the employee intended and did leave his employment voluntarily. . ."

Therefore, in light of the Supreme Court's analysis, a necessary element of a termination of employment by an employee is the employee's actual positive intent to sever the employment relationship.

The employer's brief relies on certain testimony and on the theory of constructive termination to substantiate the employer's contention that the two employees terminated their own employment rather than having had their employment terminated by the employer as found by the appeal tribunal.

The testimony relied upon by the employer was given by Snyder and is as follows: On one occasion he asked Schubert, "What are you going

to do if you don't sign it?" and she replied, "Well, then I just have to quit." (Tr. 16). Thereafter, shortly after 5:00 p.m. on May 15, 1975, he had a conversation with Schubert in which she requested a statement from him that she was fired, and he said "No", that he didn't have authority to do something like that (Tr. 24-25).

However, Snyder also testified that when he refused to give Schubert the requested statement she asked, "Well, what do we do now?" and he replied, "Well that was it, she was just terminated." (Tr. 25).

In Schubert's testimony she was asked these questions and gave these answers (Tr. 38):

"Q Was there anyone from the company that told you you were discharged?

A I was let go on Friday, and on Monday I got a letter from Mr. Sobel.

Q Did that letter say the words to the effect that you were discharged, your employment was terminated because--

A Terminated.

Q Did they say it was by them or by you?

A By -- By them."

All of the foregoing testimony when considered as a whole is credible evidence to support the finding of fact that Schubert in week 20 of 1975 did not terminate her employment within the meaning of sec. 108.04(7)(a), Stats. The appeal tribunal and the department could draw the reasonable inference from such testimony that there was no intent on Schubert's part to sever the employment relationship.

No testimony was pointed to in plaintiff's brief which it is claimed showed any intent on Schmechel's part to sever the employment relationship other than refusal to sign the application form. It is this refusal on both employees' part upon which the employer grounds its contention of a constructive termination by the employees.

The single case cited by employer on the issue of constructive quitting by the employees is Dentici v. Industrial Comm., supra. In

that case the Commission had found that the employee had left his employment voluntarily without good cause attributable to the employer within the meaning of sec. 108.04(4)(b), Stats., (now sec. 108.04(7)(b), where the employee had refused to accept a transfer to another department because of the employer's lack of business with respect to the production in the department in which he was working. The employer refused to permit the employee to work in his original department and the employee refused to work in the department to which transferred. The circuit court on review reversed on the ground there had been a discharge by the employer without just cause. The Supreme Court reversed the circuit court and directed reinstatement of the Commission's decision. Nowhere in its decision did the Supreme Court use the terminology of a constructive quitting, but stated (p. 188):

> "But the facts disclosed show that it was not necessary for claimant to be without employment, that he had the alternative of accepting the job provided for by the transfer and continuing in the employ of the employer, or acting to terminate the relation on his own responsibility."

Furthermore, in Dentici, the employer had no choice but to transfer the employee. The transfer was the only alternative to unemployment for Dentici. In the case at bar, the employer elected freely and voluntarily to have its employees bonded. One who refuses to work, in essence, refuses to continue employment. It is, in fact, a quitting. This is distinguishable from the situation of a worker who declines to abide by a rule or requirement of an employer and, as a result, loses his or her employment. The rule or requirement is not an essential quality of employment; it is ancillary. One who declines to abide by an employer's rule or requirement does not refuse to work and does not refuse to continue in employment. The resulting loss in employment is the choice and decision of the employer, not the employee.

In the case of Martha D. Gross v. DILHR and Globe-Union, Inc., Dane County Circuit Court, Case No. 137-319, November 14, 1973, the Honorable Richard W. Bardwell presiding, the department held that the

plaintiff quit her employment by absenting herself from work for more than one week without proper notice in violation of a union contract provision. The court reversed the department's decision, holding that plaintiff did not quit but, in fact, was discharged by the employer. The decision stated:

> "It would appear that the department is taking the position that voluntary refusal to follow a company rule, regardless of the reason, is tantamount to a voluntary termination or quitting on the part of the employe. We find no reported case so holding.
>
> "If the department is correct, the Neubeck rule would be abrogated. An employer could adopt detailed rules re hours, dress, etc. Any violation could be deemed a voluntary quitting, and the issue of discharge for cause would never arise. That this would be a step backward in administering the Unemployment Compensation Law is quite an understatement."

The "Neubeck rule" referred to by Judge Bardwell is the rule laid down in Boynton Cab Co. v. Neubeck (1941), 237 Wis. 249, 259 N.W. 636, that limits "discharge for misconduct" within the meaning of sec. 108.04(5), Stats., to conduct evincing such wilful or wanton disregard of the employer's interests as is found in standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such a degree or recurrence as to manifest equal culpability.

The Court determines that this is not the proper case, if ever there be one, in which to adopt a determination of constructive quitting on the part of the two employees. Therefore sec. 108.04(5) is the proper statute to be applied in reaching the merits of this controversy and not sec. 108.04(7)(b). The difference in approach between the two statutes is that under sec. 108.04(5) it is the conduct of the employee which is evaluated for possible fault while under sec. 108.04(7) it is the conduct of the employer that is so evaluated.

B. Whether Employees Were Discharged for Misconduct Within Meaning of Sec. 108.04(5), Stats.

The definition of misconduct for purposes of sec. 108.04(5) which has been applied by the Supreme Court in case after case is that set forth

in Boynton Cab Co. v. Neubeck, supra. See Gregory v. Anderson (1961) 14 Wis. 2d 130, 109 N.W. 2d 675, and Cheese v. Industrial Comm. (1963), 21 Wis. 2d 8, 123 N.W. 2d 553.

Counsel for the parties have advised the Court that they have been unable in their research to find any case involving the discharge of an employee for refusing to sign an application for a fidelity bond in connection with the employer bonding the employee. The situation, however, is closely analagous to that of an employee violating a work rule.

In the case of Milwaukee Transformer Co. v. Industrial Comm. (1964), 22 Wis. 2d 502, 126 N.W. 2d 6, the Court stated (pp. 511-512):

> "When determining whether a worker's conduct is 'misconduct' which will disqualify him from the benefits of the program, the employee's behavior must be considered as an intentional and unreasonable interference with the employer's interest. In considering whether a breach of company work rules or collective-agreement provisions is misconduct, the 'reasonableness' of the company rule must be assessed in light of the purpose of unemployment compensation rather than solely in terms of efficient industrial relations. We are less concerned with the 'reasonableness' of the rule from the point of view of labor-management relations, than with the 'unreasonableness' of the conduct of the employee in breach of the rule. The unemployment compensation statute is not a 'little' labor relations law. The critical question is whether Mrs. St. John's conduct was an intentional and unreasonable interference with her employer's interest, regardless of what construction was put on the rules or the reasonableness of those rules." (Emphasis added.)

In the case of Consolidated Construction Co., Inc. v. ILHR Department (1976), 71 Wis. 2d 811, 238 N.W. 2d 758, the Court addressed the issue of whether or not the employee Casey's refusal to comply with his employer's grooming code constituted statutory misconduct, and declared:

> "We would emphasize that the ultimate legal question here is not whether Consolidated's grooming code was legally valid, or whether Consolidated could discharge Mr. Casey for his refusal to comply. The question is only whether there was statutory 'misconduct'. The principle that violation of a valid work rule may justify discharge but at the same time may not amount to statutory 'misconduct' for unemployment compensation purposes has been repeatedly recognized by this court."

The crucial question is whether the instant employees' refusal to sign the application forms was an unreasonable interference with the

employer's interests. By adopting the appeal tribunal's finding of fact made with respect to both employees, that their refusal to sign the bond application "was justified due to the new financial responsibility it imposed" upon them, the department has determined that such refusal was not an unreasonable interference with the employer's interests.

The language in the bond application form to which this finding of fact referred was that which required the employe ". . . to protect and indemnify the said Company against any loss, to damage or expense, including court costs and counsel fees, or any liability therefor, by reason of having executed such bond on my behalf . . . Any payments made in good faith by said Company on account of any such liability, whether or not it is actually liable therefor, shall be prima facie evidence of my liability hereunder." The word "Company" refers to the insurance company which was to issue the policy in the nature of a fidelity bond.

The employer contends that the above quoted provisions from the bond application form was merely a statement of the subrogation rights which the company would have against the employee upon paying the employer for a loss sustained because of the employee's theft or embezzlement. The Court disagrees that this common law right of subrogation would include any right to recover attorney fees the company might have incurred as an expense in defending itself against the employer's claim of loss. Furthermore, it is conceivable that the prima facie evidence of liability provision could put the employee in such an unfavorable position in court as to potentially increase the employee's liability. The employer has pointed to the fact that the union withdrew its objection to the employees signing. The Court considers this to be immaterial on the question of whether the bond application provisions quoted supra imposed potential additional liability upon the employees.

On oral argument counsel for the employer contended that Snyder had told Schmechel in the presence of Schubert that certain language in

the application could be eliminated. The testimony does not support this contention that either employee could have eliminated any of the printed language in the application form.

Snyder's testimony on this point was as follows (Tr. 31):

"Q Did you suggest to either one or was it both they should fill in whatever they could or wanted and then that would see about the rest of it?

A I suggested that to everyone.

Q Including Marian?

A Yes.

Q Including William Schmechel?

A In particular."

Mrs. Schubert's testimony with respect to what Snyder stated in this respect was:

"Q Now, according to the employer, they said if you objected to parts of this, then just leave that part blank and maybe the insurance company--

A That was not told to me. He just wanted me to sign it. He told Bill that, but not me." (Tr.37-38).

* * *

"Q Now, you say that Mr. Snyder did remark to you--to Bill and you--by 'Bill', you mean Mr. Schmechel, I assume, right--

A Right.

Q -- that he, Bill, could fill out whatever part of the form he chose to and not answer whatever part he chose to and then they would see what would take place; did you hear that conversation--

A Yes.

Q -- between Mr. Snyder and Mr. Schmechel?

A Yes." (Tr. 45-46).

Schmechel gave no testimony with respect to this conversation with Snyder. It is apparent from the above quoted testimony that what Snyder told Schmechel was that he did not have to fill in the blanks in the application form, and not that the printed language of the form quoted in the findings of fact could be eliminated. The blanks in the application form

were for the purpose of inserting answers to questions asked the applicant.

While Schubert voiced objection to the provision of the bond application containing the language therein quoted in the findings of fact, Schmechel did not. His objection was that the employer's request he complete and sign the form was an infringement of his rights as an American citizen.

The Supreme Court in Consolidated Construction Co. Inc. v. ILHR Department, supra, declared in a rule violation case that the ultimate question was not the validity of the rule but whether there was misconduct on the part of the discharged employee. While that is true, one of the elements of such misconduct is whether an interest of the employer was disregarded. However, Boynton Cab Co. v. Neubeck, supra, lays down the qualification that in order for conduct to constitute misconduct it must be that which the employer "has the right to expect of the employee". While the instant employer had an interest in securing the employees' cooperation in securing their bonding, it had no legitimate interest in having them assuming an additional liability to the bonding company that they would not have had but for the signing of the particular bond application forms in question. Therefore, it was not unreasonable for Schmechel to refuse to sign the application form whatever the reason was that he advanced for such refusal.

The Court has concluded that the department's decisions, which include its adoption of the appeal tribunal's findings of fact, must be confirmed.

Let judgment be entered confirming the two decisions of the department here under review.

Dated this 12th day of November, 1976.

By the Court:

Reserve Circuit Judge