STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EUGENE RELERFORD,

Plaintiff,

DIRECTIONS FOR JUDGMENT

vs

GM ASSEMBLY DIVISION JANESVILLE
GENERAL MOTORS, PHILIP LERMAN,
Commissioner Department of Industry,
Labor and Human Relations,

Case No. 139-434

Defendants.

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This is an appeal to review a decision of the Department of Industry, Labor and Human Relations (hereinafter DILHR) which adopted and affirmed the findings and decision of its appeal tribunal holding that the plaintiff, Eugene Relerford, was discharged for misconduct connected with his employment and was therefore ineligible for UC benefits based on his employment with the defendant GM Assembly Division (hereinafter referred to as the employer).

Plaintiff-applicant Relerford last worked for defendant on May 10, 1972. Upon his termination he filed a claim for UC benefits, and the defendant-employer filed a form UC-23 in which it was alleged that plaintiff was ineligible for UC benefits on the ground that he was discharged for misconduct connected with his employment.

The district office of DILHR investigated the case, and an initial determination was issued by a department deputy holding that plaintiff was discharged for misconduct and benefits were denied accordingly. Thereafter, plaintiff appealed and a hearing was held on February 5, 1973 before an examiner acting as an appeal tribunal. On March 9, 1973, the examiner issued the following findings of fact and decision:

"FINDINGS OF FACT

"The employe worked thirteen months as a laborer for the employer, an automobile manufacturer. His hours of work were from 4:30 p.m. to 1 a.m. He completed his last day of work on May 10, 1972 (week 20).

"Following completion of his work shift the employe was involved in fight with a co-worker on the employer's premises. The co-worker was cut on the forehead and back by a boxcutter. After an investigation by the employer he was discharged on the evening of May 10, for causing injury to another worker while fighting.

"The employe stated that the co-worker had instigated the fight. However, the fight was precipitated by a prior dispute during which he had made several remarks designed to inflame the conflict. He did not attempt to avoid the trouble.

"The employe asserted that at the commencement of the fight he had taken the boxcutter from his pocket to frighten the co-worker. However, he conceded that he had cut the co-worker and that the co-worker had no weapon.

"Under the circumstances, the employe's use of a dangerous weapon to seriously injure a co-worker during a fight on the employer's premises was not justified. His actions evinced a substantial disregard of the standards of behavior which the employer had the right to expect of him.

"The appeal tribunal therefore finds that the employe was discharged in week 20 of 1972, for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes.

"DECISION

"The department deputy's initial determination is affirmed. Accordingly, benefits are denied based on employment with the employer, and the employe is also ineligible for benefits, based on employment by previous employers, in weeks 20 through 23 of 1972."

The above decision was appealed by the plaintiff to DILHR, whereby plaintiff asked that the appeal tribunal decision be reversed or, in the alternative, he be given a further hearing. On May 17, 1973, the commission issued its decision adopting the examiner's findings of fact and decision denying benefits. The commission also denied the employe's request for a further hearing. From the commission decision, appeal was duly taken to the Circuit Court for Dane County.

There are two simple issues involved in this review:

(1) Are the examiner's findings of fact adopted by the commission supported in the evidence?

(2) If the findings of fact are supported, do they sustain a decision that plaintiff was discharged for misconduct connected with his employment, within the meaning of sec. 108.04(5), Wis. Stats.?

At the outset, we should point out that the hearing record in this case is rather unsatisfactory, which is not at all due to the conduct of the hearing by the trial examiner. First, the victim in this case, the injured co-worker, Terry Higgenbotham, was killed in an automobile accident prior to the hearing date. Consequently, we do not have his version of how the fight in question started and who, if either party, was the actual aggressor.

Also, the only testimony elicited on behalf of the plaintiff himself was that given by the plaintiff himself. This testimony is rambling, somewhat inconsistent in places, and it obviously was not given a great deal of credence by the examiner. There were two independent eye witnesses of the actual fight, to-wit, Kendal Howard and Dean Devlin. Howard testified, at page 38 of the record, that the deceased victim of the fight had told him on the night in question that the plaintiff said to the victim "You better be ready--I am going to put some steel in your body." Obviously this is hearsay, but it is worthy of some probative value because the plaintiff himself admitted in his testimony that he had made certain veiled threats to Higgenbotham.

As to the actual fight which Howard witnessed, he testified at page 39 of the record as follows:

> "Q What happend at one o'clock on the 9th--that would be the 10th--I presume--by that time--it would be Wednesday morning--is that correct?
>
> "A Yes. At one o'clock I followed Terry out--and Eugene was ahead of Terry--and he walked--and went across the road--and Terry said something--and Gene reached back in his pocket--and went straight at him.
>
> "Q Then what happened?
>
> "A Well--when Gene pulled out--I don't know what it was--I thought it was a piece of steel--Gene approached him--and Terry took a swing--and Gene was running at him. And I saw Eugene hit him across the forehead. He hit Terry across the forehead--and there was blood coming from his forehead.
>
> "Q Then what happened?
>
> "A Well, there was a series of blows--and then it became kind of stationary--at a standstill. Gene was in back of him. And Terry was kneeling down--and Gene had his arm around him--around his throat--and he had him--holding him there. Terry kept saying that he had a knife. He said---'get him away from' him--and he 'did not want to die'. And somebody tried to--
>
> "Q (INTERRUPTING) Did you actually see the knife?
>
> "A Yes. He held it up. He said, 'I don't have a knife open. I don't have a knife open.' He said, 'I don't have it open.' He kept holding up a knife and said, 'I don't have it open.'
>
> "Q What happened after that?
>
> "A Somebody approached him--and tried to get the box opener from him. Finally, he just took off from there--toward the South entrance."

The second eye witness was a co-employe by the name of Devlin, and he testified as an eye witness to the fight at page 48 of the record as follows:

Finally, at page 55 on redirect examination, Howard testified that he actually saw plaintiff strike Higgenbotham during the fight.

In our judgment, based on our careful review of the record, we find that all of the examiner's finding of fact are supported in the record, including specifically the finding that plaintiff took the boxcutter from his pocket in order to frighten the victim, and he also conceded that he had cut Higgenbotham, who was unarmed.

The examiner made no specific finding as to who actually precipitated the fight in question. It is undisputed that it did occur on the employer's premises, and in our judgment a fair reading of the record indicates that it was more or less a mutual fight. Absent the use of the boxcutter or knife by plaintiff, it would appear that both participants in the fight should have been disciplined equally. At the time of oral argument, counsel for DILHR alleged that Higgenbotham was in fact disciplined. What that discipline was, if any, is not revealed in the record, but we view that fact as immaterial.

Basically, what we have here is a situation where one employe engages in a fight with a co-employe upon the employer's premises. The first employe, the plaintiff in this case, used a deadly weapon, prototype of which absent the blade was introduced into evidence and marked as an exhibit. Use of this weapon by the employe clearly inflicted serious wounds upon the victim which required immediate first aid at the plant, along with a later conveyance to the Mercy Hospital in Janesville.

At page 9 of the record, Sergeant Vitcenda testified that he went to the scene of the fight and found the victim, Higgenbotham, bleeding quite severly about the head and face, unable to see because of blood in his eyes, and that his face was covered with blood.

In our judgment, there was no excuse whatever for the plaintiff to use deadly force against the victim under the circumstances here present. We agree with the examiner's findings that plaintiff's actions "evinced a substantial disregard of the standards of behavior which the employer had the right to expect of him."

The record indicates that plaintiff was initially charged with a felony of aggravated battery which was reduced to simple battery. The plaintiff was found guilty of the lesser charge and fined.

We can find no Supreme Court decisions dealing with the discharge of an employe for fighting on the employer's premises; however, in Howard Onsgard v. Oscar Mayer & Company and Industrial Comm. decided by the late Judge Reis on August 7, 1952, a decision of the commission denying UC benefits to an employe who had cursed and threatened a co-worker was affirmed.

On December 20, 1972, in the case of Ealy v. Harley-Davidson Motor Co., Inc., and DILHR, case No. 136-432, Judge Jackman affirmed the decision of DILHR denying benefits to an applicant on the ground of a discharge for misconduct. In that case, applicant and a co-worker taunted each other which led to a confrontation whereby the co-worker was cut with a knife wielded by the applicant. In affirming DILHR's decision, Judge Jackman aptly stated his reasons as follows:

> "...We are of the opinion that the conduct of plaintiff can reasonably be construed to be an intentional and calculated provocation which any reasonable person would consider might well result in violence. The employer's interest requires conduct by its employes which permits peaceable and reasonably pleasant relationships between them. The absence of such peace, of necessity, interferes with the employee's work. Upset, angry and apprehensive employees are neither safe nor efficient workmen or women. We are of the opinion that the evidence supports the conclusion that plaintiff was guilty of misconduct. An employee cannot goad another to violence and then claim innocence because he or she did not strike the first blow."

The Harley-Davidson case is strongly in point with the case at bar, and we have no hesitation in affirming the commission's decision holding that the discharge in question was one for misconduct within the meaning of sec. 108.04(5).

One is only justified in using deadly force to repel an attack when one is in serious danger of suffering great bodily harm or death. That was not the case here, and the plaintiff-applicant was completely without justification in cutting up his co-worker under the circumstances presented in this record.

Counsel for DILHR may prepare a proper form of judgment confirming in all respects the findings of fact and decision here under review. A copy of the proposed judgment should be furnished counsel for the plaintiff before submission to the court for signature.

Dated March 20, 1975.

BY THE COURT:

/s/ Richard W. Bardwell
Circuit Judge