STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

DON A. WALLACE,

Plaintiff,

Case No. 140-292

vs.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and EDUCATIONAL SERVICE PROGRAMS, INC.,

MEMORANDUM DECISION

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action to review a decision of the defendant department dated July 31, 1973 in an unemployment compensation proceeding which found that the appeal tribunal's findings of fact were supported by the applicable records and evidence and determined that benefits were denied to plaintiff Wallace (hereafter the employee) based on his employment with the employer, Educational Service Programs, Inc. (hereafter ESP).

The appeal tribunal's findings of fact read as follows:

> "The employe worked for about eleven months as an agency representative for the employer, a company supplying tutorial and educational programs. His last day of work was November 20, 1972 (week 48).
>
> "During the course of his employment the employe formed an association which was in competition with the employer. When the employer became aware of the competing business, he was discharged.
>
> "Although the employe contended that his association was not in conflict with the employer's interests, he had submitted a proposal, through his association, to a client with whom the employer was also concerned. He at no time advised the employer of his actions or intentions.
>
> "It is not unreasonable for an employer to expect his employes to refrain from engaging in a competitive business while still on the employer's payroll. Whether a competing employe acutally prevails upon his employer's clients to patronize him is immaterial, as the possibility that he may is always present. (Wis. U.C. Digest, 1960 MC-713; 52-A-518).

"Under the circumstances, the actions of the employe in forming an association in competition with the employer, evinced a wilful and substantial disregard of the employer's interests and of the standards of behavior the employer had a right to expect of him.

"The appeal tribunal therefore finds that the employe was discharged in 1972 week 48, for misconduct with his employment, within the meaning of section 108.04(5) of the statutes."

"Sec. 108.04(5), Stats., provides in part as follows:

"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: . . ."

ESP's principal business is that of providing tutoring and educational programs in the Milwaukee area and its president and director is Rev. Neuberger. The employee testified that about the middle of December, 1971 he went to Neuberger and suggested he had reason to believe it was possible to obtain a contract for an adult education program from Model Cities and offered his services to ESP. This resulted in a six month contract being entered into between ESP and the employee for the employment of the employee covering the period of January 1, 1972, through June 30, 1972. This contract required the employee to devote himself exclusively to the sales of ESP's programs and the servicing of its accounts. In return ESP agreed to pay the employee a salary of $900 per month plus a commission of 6% on sales in excess of $9,000 per month, and to cover him with term life, health, disability and major medical coverage insurance.

Around March 1, 1972, the employee submitted to Model Cities a proposal Neuberger had drafted for ESP to contract to provide an adult education program for Model Cities. Thereafter, Model Cities changed its procedure of having its governing body approving a proposal submitted by its Education Committee for awarding a contract for its adult education program, and decided to solicit competitive bids.

The six month employment contract proved disappointing to ESP because its gross income never exceeded $3,000 per month, and Neuberger gave the employee the required 30-day notice prior to June 30, 1972 for terminating the contract. A new verbal agreement was then entered into between Neuberger in behalf of ESP and the employee, whereby the employee's compensation was to be $100 per month plus a commission of 10 percent of gross receipts. ESP also agreed to continue the same insurance coverage of the employee, the cost of which was approximately $60 per month. The employee's earnings under this arrangement were $300 for each of the months of July and August and a total of $466 for the two months of September and October.

Model Cities set 5 o'clock p.m. of August 25, 1972, as the deadline for submitting bid proposals for supplying its adult educational program. Neuberger testified that in July he decided not to pursue the proposed contract with Model Cities because of a bid requirement of guaranteeing performance. The employee testified it was around August 1st when Neuberger by telephone informed him ESP was not going to submit a bid (Tr. 32, 33). According to the employee, the guarantee was that of guaranteeing a certain number of graduates (Tr. 31). This guarantee had been discussed between the employee and Neuberger many times (Tr. 30). When asked by the examiner sitting as the appeal tribunal whether the bid specifications with respect to the August submission of bids contained anything with respect to guarantees, the employee replied, "They [Model Cities] made a suggestion that it be, you know -- that guarantees would be in order." (Tr. 32). When then asked if this was one of the reasons for Neuberger not wanting to submit a bid, the employee replied, "I don't know what his reasons were. You know, I thought his reason for not wanting to get involved with it was a monetary one" (Tr. 32).

The employee, without disclosure to ESP or to Neuberger, together with an unnamed associate acting under the name of Educational Associates of Milwaukee (hereafter EAM), worked out a bid proposal to Model Cities which was filed on August 25, 1972, just five minutes prior to the 5 o'clock deadline for submitting bids (Tr. 20, 33). This bid did not contain any guarantees. "I just filed the fact that I wouldn't be willing to make guarantees" (Tr. 33). EAM was never incorporated but probably would have been as a non-profit corporation if it had been awarded the contract by Model Cities (Tr. 28). The bid, while in the name of EAM, did not indicate that the company was in existence or that incorporation papers were being filed. (Tr. 29)

The employee further testified that the discussions and the working out of this EAM bid proposal had taken place between 9:00 p.m. and 3:00 in the morning (Tr. 21).

Neuberger did not learn of the employee's connection with EAM and the submission of the EAM bid to Model Cities until he read articles in the Milwaukee Sentinel and Milwaukee Journal shortly prior to November 20, 1972, describing these activities (Tr. 9). Neuberger requested the employee to meet him on the morning of November 20th. At this meeting Neuberger told the employee of what he had read in these newspaper articles, that the employee had established a competitive operation, and Neuberger saw this as a violation of the employment agreement (Tr. 7). Neuberger also told the employee he thought his activities (in connection with EAM) were contrary to the interests of ESP (Tr. 7). The employee stated he saw nothing wrong in what he had done, and did not consider what he had done was of a competitive nature or represented a conflict of interest because Neuberger had expressed no interest in pursuing the Model Cities contract (Tr. 7-8). Neuberger informed the employee that the relationship between ESP and him was terminated (Tr. 7).

Neuberger further testified he thought there was a conflict with ESP's programs because EAM would be going after the same business (Tr. 7). The fact is that EAM was not awarded the Model Cities contract and never engaged in any other activities (Tr. 23).

The leading Wisconsin case with respect to what constitutes "misconduct connected with his [the employee's] employment" within the meaning of sec. 108.04(5), Stats., (formerly sec. 108.04(a), Stats.) is Boynton Cab Co. v. Neubeck (1941), 237 Wis. 247. In that case the Court defined "misconduct" as follows:

> ". . . the intended meaning of the term 'misconduct', as used in sec. 108.04(a), Stats., is limited to conduct evincing such wilful 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 errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statutes."

In the case of Gregory v. Anderson (1961), 14 Wis. 2d 130, the Wisconsin Supreme Court reaffirmed and followed the definition of misconduct laid down in the Neubeck case, supra. In the case of Milwaukee Transformer Co. v. Industrial Comm. and Lorriane E. St. John (1964), 22 Wis. 2d 502, 511-512, the court stated:

> "When determining whether a worker's conduct is 'misconduct' which will disqualify him from the benefits of the program, the employe's behavior must be considered as an intentional and unreasonable interference with the employer's interests."

In Roosevelt D. Tate v. Industrial Comm. (1964), 23 Wis. 2d 1, 5, the court said:

> "In order for such misconduct to exist, there must be an intentional and substantial disregard of the employer's interests or of the employe's duties."

In the case of C. L. Cheese v. Industrial Comm. (1963), 21 Wis. 2d 8, the Supreme Court held that while whether or not a claimant's conduct constitutes misconduct within the meaning of sec. 108.04(5) constitutes a question of law, the ultimate conclusion of the commission (now department) as to whether or not certain specified conduct amounts to "misconduct" should not be regarded lightly; and such conclusion should not be disturbed upon judicial review unless it clearly appears that the commission acted arbitrarily, capriciously, or without reasonable basis, or that the conduct as actually found on the basis of credible evidence would not permit of the conclusion reached. The Court is of the opinion that the finding of fact appearing in the fourth paragraph of the appeal tribunal's findings of facts meets the test thus enunciated in the Cheese case of being the type of conclusion which this Court should not disturb.

The appeal tribunal and the department could reasonably infer from the evidence that EAM might have been interested in obtaining the Model Cities contract if it could be obtained under a bid which contained no guarantees, and that the employee was aware of this. This being so, it could reasonably be concluded the employee acted in intentional disregard of his employer's interests in formulating and submitting the bid proposed of August 25, 1972 without informing ESP and asking whether it had any objection to the same. Furthermore, the business of both EAM and ESP was that of providing adult education programs, and it was reasonable to conclude that their activities would or might be competitive.

Under the rationale of the cases cited from Wis. U.C. Digest, 1960 at MC-713, pp. 284-285, Wis. U.C. Digest, 1966 Supp., at MC-710.04, pp. 199-202, appearing at pages 10-13 of the department's brief, it would appear that potential competition with the employer's business as a result of an employee's outside activities is sufficient to constitute misconduct, and that actual competition is not essential.

The brief in behalf of the employee cites Citizens State Bank & Trust v. Telschow & Industrial Comm., Case No. 114-229 decided by the Circuit Court for Dane County December 30, 1963, and reported in the 1966 Supp., Wis. U.C. Digest, at p. 202. In that case a head bank teller was interviewed for and accepted a job with a new competing bank subject to subsequent approval by the new bank's president. The Circuit Court affirmed a decision by the commission that the employee was not discharged for misconduct, and held an employee is under no duty to refrain from seeking new employment or, unless a contract provides otherwise, to give notice of intention to terminate. That case is readily

distinguishable from the instant case in that here the employee was organizing a company to compete with his employer, and submitted the bid proposal to Model Cities during normal working hours. Furthermore, the employee did not testify he intended to terminate his employment with ESP if and when his bid was accepted.

Let judgment be entered confirming the department's decision here under review.

Dated this 18 day of March, 1974.

By the Court:

/s/ George R. Currie
Reserve Circuit Judge