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Labor Law - Unemployment Compensation - Voluntary Termination Not Found Where There Is Meritorious Excuse for Refusal to Pay Union Dues Based on Religious Grounds. Nottelson v. ILHR Department, 94 Wis. 2d 106, 287 N.W.2d 763 (1980)

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NOTES

LABOR LAW — Unemployment Compensation — Voluntary Termination Not Found Where There is Meritorious Excuse for Refusal to Pay Union Dues Based on Religious Grounds. *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 287 N.W.2d 763 (1980).

In *Nottelson v. ILHR Department*,[1] the Wisconsin Supreme Court addressed the issue of whether an employee who was discharged for refusing, on religious grounds, to pay union dues had voluntarily terminated his employment without good cause attributable to the employing unit. The Department of Industry, Labor and Human Relations (DILHR) had concluded that within the meaning of section 108.04(7)[2] of the statutes, claimant had voluntarily terminated his employment and that the termination was without good cause attributable to the employing unit. It therefore denied him unemployment compensation benefits. The circuit court of Dane County affirmed.[3] The Wisconsin Supreme Court, in a four-to-three decision, reversed. It held that claimant's discharge was not a voluntary termination because of the meritoriousness of his excuse for failing to pay union dues, *i.e.*, that this refusal was based on religious beliefs and was protected by the provisions of Title VII of the Civil Rights Act of 1964, as amended in 1972.[4]

In reaching its decision, the court first examined the standard of judicial review to be applied to administrative agency decisions. The court determined that in this particular case,

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1. Nottelson v. ILHR Department, 94 Wis. 2d 106, 287 N.W.2d 763 (1980).
2. At the time claimant was discharged, WIS. STAT. § 108.04(7) (1975) provided:

   (7) Voluntary Termination of Employment. (a) If an employe terminates his or her employment with an employing unit, the employe shall be ineligible for any benefits for the week of termination and thereafter until he or she has again been employed within at least 4 weeks and has earned wages of at least $200, except as otherwise provided in this subsection.

   . . . .

   (b) Paragraph (a) shall not apply if the department determines that the employe terminated his employment with good cause attributable to the employing unit.
3. Nottelson v. DILHR and A.O. Smith Corp., [1979] UNEMPL. INS. REP. (CCH) ¶ 1975.767 (1977).
4. 42 U.S.C. §§ 2000e-2000e-17 (1970 & Supp. 1975).

the issue was a question of law and therefore it was appropriate for the court to substitute its judgment for that of the agency.[5] Then, in making its redetermination of claimant's eligibility for unemployment compensation benefits, the court reviewed the case law definition of "voluntary termination" which focuses on whether an employee's conduct has been inconsistent with the continuation of the employee-employer relationship.[6] Finally, the court applied this statutory concept to the factual situation. Although the claimant was bringing a separate federal court action under Title VII for damages and injunctive relief, the court believed that DILHR should have considered the effect of the Civil Rights Act when reviewing his conduct for purposes of unemployment compensation. The court, therefore, undertook a review of the language and legislative history of Title VII, its judicial interpretation, the conduct of the employer and union, and an Equal Employment Opportunity Commission (EEOC) decision favorable to claimant. It found that all these factors established a meritorious justification for claimant's refusal to pay dues. That is, the court found that there was a reasonable basis to believe that Title VII exempted claimant from the obligation to pay dues, and that absent this obligation, his conduct was not inconsistent with the continuation of the employee-employer relationship. Therefore, he had not voluntarily terminated his employment and was entitled to unemployment compensation.[7]

Because of the complexity of this case, this note will, in addition to setting forth the facts, consider the following areas: the scope of judicial review, the definitions of statutory terms, the application of the statutory concept to the factual situation (including the language of Title VII and judicial interpretations of Title VII) and the dissent.

I. Factual Setting

"[T]his case raises for the first time the application of the state unemployment compensation act to a fact situation which involves the interplay of an employee's and employer's rights and obligations under a union security agreement and

5. 94 Wis. 2d at 113-18, 287 N.W.2d at 767-69.
6. *Id.* at 118-19, 287 N.W.2d at 769-70.
7. *Id.* at 120-25, 287 N.W.2d at 770-72.

the federal civil rights act."[8] Because of the uniqueness of the factual situation, it will be set out in some detail.

Nottelson was hired by A.O. Smith in October of 1947. From that time until January of 1975, he paid union dues in conformity with the labor agreement between Smith and the union. That contract included a union security agreement which made union membership and payment of dues a condition of employment.[9] In 1966, claimant had become a member of the Seventh Day Adventist Church. It was a church tenet that its members not join or financially support a labor union. By December of 1974, Nottelson had decided that, because of his religious beliefs, he could no longer continue paying dues. Neither the sincerity of his beliefs nor his value as an employee was questioned.[10] He met with representatives of the union several times between December, 1974 and his discharge in July, 1975, to see if an accommodation could be reached which would allow him to retain his employment without paying union dues. He suggested donating the equivalent of his dues to a nonreligious, nonunion charity. The union rejected this proposal. Nottelson also met with Smith personnel during this time to see if there was anything they could do to help resolve the conflict. There was no record of any attempt by Smith to do so.[11]

In March, 1975, the claimant filed a grievance with the EEOC charging both Smith and the union with religious discrimination. On April 15, 1975, the union notified Smith that claimant had been expelled from the union for failure to pay dues. Later in April, claimant obtained a temporary restraining order from the federal district court preventing his discharge by Smith pending final disposition of his EEOC complaint. On July 3, the EEOC found "reasonable cause" to

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8. *Id.* at 117, 287 N.W.2d at 769.

9. Article I(B)(2) of the Collective Bargaining Agreement between A.O. Smith and Smith Steel Workers in effect at the time claimant was discharged provided:

> Each employee hired or rehired on or after April 1, 1947, if retained in the employment of the company, shall no later than thirty (30) days after date of hire or date of execution of this Agreement, whichever is the later, become and remain a member in good standing in said labor organization as a condition of continued employment.

94 Wis. 2d at 110 n.1, 287 N.W.2d at 765 n.1.

10. *Id.* at 110, 287 N.W.2d at 765.

11. *Id.* at 110-11, 287 N.W.2d at 765-66.

believe that the union and Smith had discriminated against claimant in violation of Title VII of the Civil Rights Act.[12] However, on July 10, 1975, the federal court denied claimant's request for a preliminary injunction to prevent his discharge[13] and on July 11, he was fired.[14]

Claimant then applied for and received unemployment compensation. However, at Smith's request, an appeal tribunal reviewed the initial determination. It found claimant to be ineligible for benefits, holding that his failure to pay union dues constituted a voluntary termination of his employment within the meaning of section 108.04(7) of the statutes, and that such termination was not with good cause attributable to the employing unit. He was ordered to repay the $1,582 received up to that time. During the department's review, claimant testified that Smith had told him that refusal to pay union dues would result in dismissal; that he had made inquiry about his legal rights; and that he believed that federal law would prevent his discharge. The supreme court concluded, based on this testimony and his actions between December, 1974 and July, 1975, that: "The record is clear that

12. 42 U.S.C. § 2000e-5(b) (Supp. V 1975) provides in part: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." EEOC informed claimant on July 21, 1975, that its conciliation efforts had failed and that he had a right to sue in federal court. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975); Annot., 5 A.L.R. Fed. 334 (1970).

13. Nottelson v. A.O. Smith Corp., 397 F. Supp. 928 (E.D. Wis. 1975). The court held that it lacked jurisdiction under Title VII to grant the preliminary injunctive relief because Nottelson had not yet exhausted his administrative remedies (i.e., EEOC had not yet issued a right to sue notice). The court further noted that 42 U.S.C. § 2000e-5(f)(2) provides that the Commission may bring an action for appropriate preliminary relief pending final disposition of a charge, but that it did not do so in this case. The court dismissed the complaint without prejudice to reinstatement.

After receiving the right to sue notice, claimant was allowed to amend his original complaint. In Nottelson v. A.O. Smith Corp., 423 F. Supp. 1345 (E.D. Wis. 1976) the court refused to dismiss the action based on Title VII and the United States Constitution. This federal suit was pending at the time of the oral argument before the Wisconsin court on the unemployment compensation question. On Dec. 10, 1979, in Nottelson v. A.O. Smith Corp., 481 F. Supp. 756 (E.D. Wis. 1979) the Federal District Court for the Eastern District of Wisconsin rendered judgment for the plaintiff on his claim under Title VII.

14. 94 Wis. 2d at 111-12, 287 N.W.2d at 766.

the claimant did not want to quit his employment and that he resisted being discharged."[15]

II. Scope of Judicial Review

Before taking up the central question of the case — whether claimant's conduct constituted a voluntary termination of his employment without good cause attributable to the employing unit, which could make him ineligible for unemployment compensation — the court spends some time outlining its authority to review this question. The statutes give general guidance. Within the chapter on unemployment compensation, section 108.09(7) provides for judicial review of commission decisions.[16] It states that judicial review shall be confined to questions of law and that the provisions of chapter 102,[17] with respect to judicial review of orders and awards, shall also apply to review under section 108.09(7). Section 102.23 provides in part that the commission's findings of fact are conclusive as long as they are supported by credible and substantial evidence.[18] Thus, on appeal, a court would be

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15. *Id.* at 112, 287 N.W.2d at 766.

16. Wis. Stat. § 108.09(7) (1977) provides:

(7) **Judicial Review.** (a) Either party may commence judicial action for the review of a decision of the commission under this chapter after exhausting the remedies provided under this section if the party has commenced such judicial action in accordance with s. 102.23 within 30 days after a decision of the commission is mailed to a party's last known address.

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section. In any such judicial action the commission may appear by any qualified attorney who is a regular salaried employe of the department and has been designated by it for this purpose, or at the commission's request by the department of justice.

(c) If, as a result of judicial review of a commission decision denying an employe's eligibility for benefits, it is finally determined that benefits are payable, they shall be calculated as of the date of the commission's decision.

17. Chapter 102 is Wisconsin's worker's compensation statute.

18. Wis. Stat. § 102.23 (1977) provides in part:

Judicial review. (1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. . . .

. . . .

(d) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.

bound by the commission's findings of fact (when supported by credible evidence) but not by its conclusions of law. However, when the issue involves a mixed question of law and fact, the court must first decide whether it will be treated as a question of law or a question of fact. A mixed question arises when an administrative agency applies a statutory concept to a particular factual situation. For example, "Was the salesman acting within the scope of his employment?"; "Was the electric rate fair and equitable?"; and, in the present case, "Did claimant voluntarily terminate his employment without good cause attributable to the employing unit?"[19] Courts have taken two approaches to reviewing administrative decisions which apply legal concepts to the facts of a case. Professor Davis characterizes these as the analytical approach and the practical approach.[20]

In the analytical approach, the court separates the agency's decision into questions of fact and questions of law and applies the reasonableness test[21] to the facts and substitutes its judgment on the law.[22] After deciding to substitute its judgment, the court may nevertheless affirm the agency's decision.[23] As to the basis for the separation, Davis states that questions of fact are those concerned with "what happened, or the conditions or circumstances or motives" and that questions of law are those concerned with "the meaning to be assigned to a legal concept, or a refinement of that meaning in

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3. That the findings of fact by the commission do not support the order or award.

. . . .

(6) 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. The court may, however, set aside the commission's order or 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.

19. 94 Wis. 2d at 115, 287 N.W.2d at 768.

20. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01-.14 (1958 & Supp. 1970 & 1980) [hereinafter cited as DAVIS].

21. Under WIS. STAT. § 102.23(6) a factual finding would be set aside only if it was "not supported by credible and substantial evidence."

22. DAVIS, *supra* note 20, § 30.01.

23. Comment, *The Scope of Judicial Review of Administrative Agency Decisions in Wisconsin*, 1973 WIS. L. REV. 554.

the light of the particular facts."[24] Wisconsin case law provides similar definitions, holding that "a person's acts, or his intent in doing such acts, are questions of fact" while "whether the facts fulfill a particular legal standard" are questions of law.[25] Thus, if a court follows the analytical approach and the dispute focuses on the question of law, the court may substitute its judgment for that of the agency.

However, courts sometimes follow the practical rather than the analytical approach.[26] This occurs when the court declines to substitute its judgment on what is analytically a question of law. A court can accomplish this in one of two ways. First, it can label an agency's conclusion of law as a question of fact and apply only the credible evidence test on review.[27] Second, without attempting to separate law from fact, the court can simply affirm the agency's decision because it has a "rational basis."[28]

But how does a court decide whether to apply the analytical or the practical approach; when will it substitute its judgment and when will it refrain from doing so? A number of factors have been advanced as bases for courts' decisions in this area, including the one which seems central in *Nottelson*, *i.e.*, judicial versus administrative expertise.[29]

The court in *Nottelson* follows the analytical approach. Recognizing the question facing it as a mixed one of fact and law, the court cites numerous Wisconsin cases which have held that "the determination of whether the facts fulfill a particular legal standard is a question of law."[30] However, the court itself acknowledges in a note that its decisions have not

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24. DAVIS, *supra* note 20, § 30.01, at 190.

25. Cheese v. Industrial Comm'n, 21 Wis. 2d 8, 15, 123 N.W.2d 553, 557 (1963).

26. DAVIS, *supra* note 20, § 30.01.

27. *Id.* §§ 30.02-.04. *See, e.g.*, Transport Oil, Inc. v. Cummings, 54 Wis. 2d 256, 195 N.W.2d 649 (1972). Instead of treating the question of whether particular conduct amounted to misconduct within the meaning of the unemployment compensation statutes, the court treated the question as one of fact, applying the credible evidence test.

28. DAVIS, *supra* note 20, § 30.05.

29. 94 Wis. 2d at 117, 287 N.W.2d at 769. In addition to comparative qualifications of courts and agencies, Davis discusses the amount of authority delegated to the administrative agency and the tendency of courts to substitute their judgment on important generalizations but not on narrow applications. DAVIS, *supra* note 20, §§ 30.08-.11.

30. 94 Wis. 2d at 116, 287 N.W.2d at 768.

always been consistent on this issue.[31]

Clearly, the choice of review standards is highly discretionary. And while courts often fail to articulate the reasons for their choice of a particular standard in a given case,[32] the *Nottelson* court was explicit on why it has chosen to substitute its judgment. The court acknowledged that agency expertise, though not controlling on a question of law, should be given weight.[33] However, the court went on to state why, in this particular instance, it felt that its own expertise is the greater of the two:

> It appears that the commission has not developed expertise or a body of precedent on this question [*i.e.*, application of unemployment compensation law to a situation involving a union security agreement and the federal civil rights act]. Indeed the commission failed to consider the implications of the federal civil rights act in making its determination.[34]

Accepting the commission's findings of fact, the court concluded that it must nevertheless reject its conclusion of law, *i.e.*, that Nottelson voluntarily terminated his employment.[35]

III. Statutory Terms Defined

Before applying the statutory concepts to the facts of the case, the court reviewed the meaning of the terms as defined by case law. While section 108.04(7)[36] provides that an employee who voluntarily terminates his employment is ineligi-

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31. *Id.* at 115, 287 N.W.2d at 768. Dentici v. Industrial Comm'n, 264 Wis. 181, 58 N.W.2d 717 (1953) illustrates this inconsistency quite graphically. Addressing the same issue of whether particular conduct constituted a voluntary termination within the meaning of chapter 108, the Dentici court followed the practical approach and labelled the question one of fact.

32. Davis, *supra* note 20, § 30.14.

33. 94 Wis. 2d at 117, 287 N.W.2d at 768.

34. *Id.* at 117, 287 N.W.2d at 769. Professor Davis comments in this regard:

> Although courts often emphasize — and sometimes overemphasize — agency expertise, they do not usually emphasize that judges, not agencies, are the experts or comparatively the experts in many areas, including constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, fair procedure, and problems transcending the particular field of the agency.

K. Davis, Administrative Law Text § 30.06, at 552 (3d ed. 1972).

35. 94 Wis. 2d at 117-18, 287 N.W.2d at 769.

36. *See* note 2 *supra*.

ble for benefits, the statute does not define voluntary termination. As the instant case illustrates, the commission has found "voluntary termination" even in cases where the employee did not say "I quit" but rather was fired. The court cited *Dentici v. Industrial Commission*[37] as setting forth the test to determine whether a discharge constitutes a voluntary termination. "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, . . . that the employee intended and did leave his employment voluntarily . . . ."[38] This test was reaffirmed in *Fish v. White Equipment Sales & Service, Inc.*[39] and *Hanmer v. ILHR Department.*[40]

Section 108.04(7) also sets out several exceptions to the voluntary termination rule, *i.e.*, situations in which an employee who has voluntarily terminated may still be eligible for benefits. One of these allows the employee to collect benefits if he voluntarily terminated "with good cause attributable to the employing unit."[41] *Kessler v. Industrial Commission*[42] defines this as " ' some act or omission by the employer' constituting a cause which justifies the quitting. Good cause for quitting attributable to the employer as distinguished from discharge must involve some fault on his part and must be real and substantial."[43] The appeal tribunal of DILHR found that *Nottelson* did not fall within the "good cause attributable to the employing unit" exception. But the supreme court never reached the question because it found no voluntary termination in the first instance.

Before leaving the area of statutory definition, it is significant to note that chapter 108 does not contain an exception to the voluntary termination rule on the basis of a "compelling personal reason." When Wisconsin's Unemployment Compensation Act was passed in 1932, the only exemption to the voluntary termination disqualification was for "good cause at-

37. 264 Wis. 181, 58 N.W.2d 717 (1953).
38. *Id.* at 186, 58 N.W.2d at 720.
39. 64 Wis. 2d 737, 221 N.W.2d 864 (1974).
40. 92 Wis. 2d 90, 284 N.W.2d 587 (1979).
41. *See* subparagraph b, note 2, *supra.*
42. 27 Wis. 2d 398, 134 N.W.2d 412 (1965).
43. *Id.* at 401, 134 N.W.2d at 414.

tributable to the employing unit."[44] However, in 1945, the Act was amended to include an exemption for an employee who voluntarily terminated his employment for a "compelling personal reason."[45] The court elaborated on the meaning of "compelling personal reason" in *Western Printing and Lithographing Co. v. Industrial Commission.*[46] The case involved an unemancipated, nineteen-year-old woman who quit her job when her parents insisted that she move with them to California. The court quoted the commission's interpretation of the statutory term with approval:

> The Commission construes *'compelling personal reason'* to be such a reason as would impel the same or similar action by an ordinary reasonable individual under the same or similar circumstances.
>
> *'Compelling personal reason'* requires considerations or motives which leave a claimant no reasonable alternative but to terminate his employment. It exists only when, because of his personal circumstances, it would be unreasonable to expect an employee to continue in his job.[47]

The "compelling personal reason" exemption was removed in 1965 and a more limited exception for workers who quit because of their own or a family member's health was substituted.[48] The legislature has said, in effect, that personal reasons (*i.e.,* not attributable to the employer) for leaving one's employment, no matter how significant, will not be considered when determining eligibility for unemployment benefits. Thus the court could not (and did not) grant Nottelson benefits on the grounds that his religious beliefs provided a compelling personal reason for his voluntary termination. Rather, the court held that Nottelson's termination was not "voluntary;" under the *Dentici* test, his conduct was not inconsistent with the continuation of the employee-employer relationship.

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44. 1931 Wis. Laws, Special Session ch. 20.

45. 1945 Wis. Laws ch. 354. WIS. STAT. § 108.04(7)(c) (1945) provided:

> Paragraph (a) shall not apply if the commission determines that the employee terminated his employment for compelling personal reason; provided that, if the commission determines that he is physically unable to work or substantially unavailable for work, he shall be eligible while such inability or unavailability continues.

46. 260 Wis. 124, 50 N.W.2d 410 (1951).

47. *Id.* at 131, 50 N.W.2d at 413.

48. 1965 Wis. Laws ch. 10.

IV. Application of the Statutory Concept to the Factual Setting

DILHR had found that the claimant's conduct — failing to pay dues while knowing that union membership was a condition of employment — was inconsistent with the continuation of the employee-employer relationship and so was a voluntary termination. The court said the flaw in the commission's approach was that it assumed that the labor agreement required, without exception, that all employees pay dues.[49] It failed to take into account that the federal Civil Rights Act might relieve an employee whose religious beliefs forbade union membership from the obligation to pay dues.[50] Such an employee would not be acting inconsistently with the employee-employer relationship when he refused to pay union dues. The court then proceeded to review "the meritoriousness of his excuse; that is, whether his religious beliefs as protected by the federal Civil Rights Act relieved him of his obligation to pay dues."[51] It must be borne in mind that when the court speaks of the "meritoriousness of his excuse," it is not speaking of the validity of any personal reasons Nottelson may have had for his refusal. Rather, the court is objectively assessing whether, under the factual situation involved, there is a reasonable basis to believe that the federal Civil Rights Act relieved Nottelson of the obligation to pay dues.

A. The Language of Title VII

The court first looked to the language of Title VII of the Civil Rights Act of 1964.[52] The Act makes it unlawful for an

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49. 94 Wis. 2d at 121, 287 N.W.2d at 770.

50. *Id.*

51. *Id.*

52. 42 U.S.C. § 2000e-2 (1970) provides in part:

Unlawful employment practices

(a) **Employer practices.** It shall be an unlawful employment practice for an employer—

(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

. . . .

(c) **Labor organization practices.** It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discrimi-

employer to discharge or to discriminate against an employee because of his religion. It also prohibits unions from discriminating against members on the basis of religion or causing the employer to do so. As originally enacted, Title VII did not define precisely what practices were being protected. In 1967, the Equal Employment Opportunity Commission promulgated guidelines which required employers to make reasonable accommodation, short of undue hardship, to the religious needs of employees.[53] After one court construed these guidelines very narrowly and expressed doubts about the EEOC's power to adopt them,[54] Congress amended Title VII in 1972 to incorporate the guidelines into a definition of religion. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[55] This clarified the employer's affirmative duty to accommodate, although what constituted "reasonable accommodation" in a given fact situation was still unresolved.

B. Judicial Interpretation of Title VII

The Wisconsin court then turned to judicial interpretation of the Civil Rights Act. The *Nottelson* court cited five appeals court cases[56] in three circuits decided after the 1972 amendment[57] which addressed the conflict between an employee's

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nate against, any individual because of his . . . religion . . . .

. . . .

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

53. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1967).

54. Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) (equally divided court).

55. 42 U.S.C. § 2000e(j) (Supp. V 1975).

56. *See generally*, Comment, *Union Security Clauses and Religious Discrimination in Employment*, 6 N. KY. L. REV. 155-69 (1979); Note, 47 TENN. L. REV. 212-32 (1979); 4 A. LARSON, EMPLOYMENT DISCRIMINATION § 92.22 (1979 and Supplement).

57. Prior to the 1972 Title VII amendment the federal courts of appeals had consistently rejected constitutional challenges to union security agreements as impeding the free exercise of religion. *See* Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

rights under Title VII and union security clauses as sanctioned in section 8(a)(3) of the Taft-Hartley Act.[58] However, only one, *Yott v. North American Rockwell Corp.*,[59] was decided prior to Nottelson's discharge in 1975.

The fact situation in *Yott* was very similar to the instant case — a Seventh Day Adventist was discharged for his refusal to pay union dues after his employer entered into a labor agreement which included a union security clause. The court held that both the employer and the union had a duty to accommodate.[60] However, before remanding the case to the district court for a determination of whether a reasonable accommodation could be reached, the court of appeals said:

> We note, however, that this is not a "refusal to work" case in which a reasonable accommodation is easily provided. We are not certain that any accommodation is available. If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or on the employer's business then Yott's discrimination claim should fail.[61]

Faced with this skepticism, it would be difficult to conclude on the basis of *Yott* alone that Title VII mandates so great an accommodation as an exemption from the obligation to pay dues. Had Smith and the union made any effort at accommodation, the Wisconsin Supreme Court might have had a more difficult time holding that, under the law as it stood in 1975, Nottelson had a "meritorious excuse" for his conduct. However, because Smith and the union were required by *Yott* to make *some* effort at accommodation and because they failed

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Claimant in the instant case also made a first amendment argument which was not taken up by the Wisconsin court. *See* Brief for Appellant at 29-50.

58. 29 U.S.C. § 158(a)(3) (1976).

59. 501 F.2d 398 (9th Cir. 1974), *cert. denied*, 445 U.S. 928 (1980).

60. *Id.* at 403.

61. *Id.* (footnote omitted). On remand, the district court declared 42 U.S.C. § 2000e(j) to be unconstitutional and ruled that accommodations proposed by Yott were insufficient. Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977). On appeal, the Ninth Circuit affirmed, holding that the district court's decision that Yott's religious beliefs could not reasonably be accommodated was not clearly erroneous. The court of appeals did not reach the constitutional question. Yott v. North Am. Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). Although the Ninth Circuit's decision might suggest a different result than that reached by the Wisconsin court, it must be borne in mind that this decision was rendered after Nottelson v. ILHR Dept.

to do so, there was reasonable basis to believe that Smith had violated Title VII by discharging him. The court could legitimately find that Nottelson had reason to believe that he could not lawfully be discharged and therefore that his conduct was not inconsistent with the employment relationship.

While *Yott* was the only union security clause/Title VII case decided prior to Nottelson's discharge, it seems likely that the Wisconsin court was influenced by subsequent appeals court decisions in the area. A review of four union security clause/Title VII cases and the one "refusal to work" case in which the Supreme Court sought to clarify the meaning of "reasonable accommodation" and "undue hardship" will indicate the state of the law at the time *Nottelson* was decided.

In *Cooper v. General Dynamics Convair Aerospace Division*,[62] faced with the same general fact situation as in *Yott*, the Fifth Circuit held that section 8(a)(3) of the Taft-Hartley Act authorizing union security agreements was not superior to the provisions of Title VII,[63] and that Title VII placed a duty to accommodate on both the union and employer.[64] However, there was a split on what form this accommodation could reasonably take. Two of the judges felt that accommodation could extend to nonpayment of union dues[65] while the third thought that this could never be a reasonable accommodation.[66] The final determination on the form of accommodation was left to the district court on remand. Thus, *Cooper* lends greater support to the Wisconsin court's view that Nottelson had a meritorious excuse for refusing to pay dues, since he might well have been exempted from the obligation under a reasonable accommodation. The decision in *Cooper* was not unanimous, however, and a Supreme Court decision the following year seemed to herald a far narrower definition of "reasonable accommodation" and "undue hardship."[67]

In *Trans World Airlines v. Hardison*,[68] which involved a

62. 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

63. *Id.* at 169.

64. *Id.* at 170.

65. *Id.*

66. *Id.* at 175.

67. Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 1979 DET. C.L. REV. 205-39.

68. 432 U.S. 63 (1977).

religious discrimination suit brought under the same Title VII provisions as were involved in the union security clause cases, the Supreme Court upheld the discharge of an employee based on his refusal to work on Saturdays, his Sabbath.[69] The Court did so because it found that any of the suggested accommodations (paying overtime to a substitute, using supervisory personnel to replace Hardison, etc.) would have involved greater than *de minimus* cost to TWA. Thus, the Court held that any accommodation involving greater than *de minimus* cost constituted undue hardship.[70] The Court further noted that accommodating the religious needs of one employee cannot result in discrimination against other employees.[71] This holding cast doubt on whether refusal to pay union dues could be a reasonable accommodation. It is arguable that such a refusal involves greater than *de minimus* cost to the union and that it places a disproportionate burden on other union members.

The first union security clause case decided subsequent to *Hardison* was *McDaniel v. Essex International, Inc.*[72] Again, an employee refused to join or to financially support a labor organization due to her religious beliefs. She offered to pay an equivalent amount to a nonreligious charity. She also offered to pay the union an amount equivalent to the percentage of the union budget used for purposes which did not violate her religious beliefs. Neither offer was accepted and she was discharged. The district court rejected the employee's Title VII claim. The court of appeals reversed, making only limited use of the *Hardison* decision. It made no reference to the *de minimus* cost definition of undue hardship nor to the emphasis on equal treatment of all employees. It cited the high court only

69. Hardison worked in a department that operated 24 hours a day and under the labor agreement shift assignments were determined by seniority. After he voluntarily transferred to a new department he lost his seniority rights which had previously allowed him to avoid Saturday work. The union refused to allow Hardison his shift preference because this would have violated the seniority provisions of the contract. TWA refused his suggestion that he be allowed to work a four day week because this would have reduced the efficiency of his department. It also refused to use supervisory personnel to replace him or to pay union personnel overtime to do so. *Id.* at 66-69.

70. *Id.* at 84.

71. *Id.* at 81.

72. 571 F.2d 338 (6th Cir. 1978).

for the proposition that Title VII requires "some effort to accommodate an employee's religious needs."[73] The court of appeals then went on to hold that the burden of making initial efforts at accommodation or of demonstrating why accommodation would cause undue hardship is on the employer and the union.[74] The court further rejected the "hypothetical hardship" approach taken by the district court when it concluded, without any factual support in the record, that nonpayment of dues would cause undue hardship to the union.[75] This case, then, lends support to the finding that someone like Nottelson could have a meritorious excuse for refusing to pay union dues. The Sixth Circuit declined to adopt the narrow definition of reasonable accommodation set forth in *Hardison* and, indeed, placed a greater burden on the employer and union. Not only must they make an effort at accommodation, but they must take the initiative (after being informed that an employee's refusal to pay is motivated by religious belief) in suggesting accommodations and they must bear the burden, if no accommodation can be reached, of demonstrating undue hardship.

The Ninth Circuit went even further in rejecting the confines of *Hardison*. *Anderson v. General Dynamics Convair Aerospace Division*[76] again involved the discharge of a Seventh Day Adventist for refusal to pay union dues. Here, the employee suggested that, in lieu of union dues, he would make an equivalent payment to a charity of his choice. Neither the employer nor the union made any attempt at accommodation. The circuit court reversed the district court's finding that the employee's actions caused an undue hardship on the union. After noting that what constitutes undue hardship turns on the reasonableness of the conduct of the parties under the circumstances of each case,[77] the court held that the union had failed to carry its burden of proving that it could not reasonably accommodate plaintiff's religious beliefs without undue hardship.[78] The fact that Anderson's suggested accommoda-

73. *Id.* at 342.
74. *Id.* at 343.
75. *Id.*
76. 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).
77. *Id.* at 400.
78. *Id.* at 402.

tion may have been defective was immaterial because the burden was on the employer and the union to take initial steps toward accommodation.[79] The court also rejected employer's and union's argument that the creation of "free-riders" was an undue hardship because no proof was offered other than general sentiments against free-riders.[80] The court concluded:

> Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.[81]

On the same day, the Ninth Circuit decided *Burns v. Southern Pacific Transportation Co.*,[82] another union security clause case. Here, the court cited *Hardison* for the proposition that undue hardship is demonstrated "where the impacts upon co-workers or costs are greater than *de minimus.*"[83] The court then applied this to the specific facts of the case. As in *Anderson,* it rejected an argument that resentment among coworkers generated by a free-rider would constitute an undue hardship. "An employer or union would have to show, as in *Hardison,* actual imposition on co-workers or disruption of the work routine."[84] The court also rejected the argument that the loss of Burns' dues or the administrative cost of alternative payments would create an undue hardship on the union. The court found that the loss of Burns' $19 per month was *de minimus.*[85]

Thus the Ninth Circuit did not apply the *Hardison* decision to narrow employer responsibility to make reasonable accommodation. In contrast to *Hardison,* where the Supreme

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79. *Id.* at 401.

80. *Id.* at 402.

81. *Id.* On remand, the district court held that the reasonable accommodation obligation of Title VII violates the establishment clause and entered judgment in favor of the employer and the union. 489 F. Supp. 782 (S.D. Cal. 1980).

82. 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979).

83. *Id.* at 406.

84. *Id.* at 407.

85. *Id.* On remand, the district court found that the payment of a sum of money equivalent to the amount of union dues to charity was a reasonable accommodation to Burns and was not an undue hardship on the employer or the union. The court further held that 42 U.S.C. § 2000e(j) is not an unconstitutional establishment of religion. [1979] 20 EMPL. PRAC. DEC. (CCH) ¶ 30, 183.

Court had found that occasional overtime payments by TWA involved greater than *de minimus* cost,[86] this court of appeals found that $19 per month is *de minimus*. In addition, *Burns* held that the inequitable treatment of employees which concerned the high court could not be demonstrated merely by the fact that each employee in a union local might have to pay an additional few cents per month because of an accommodation to one employee's religion.[87]

The union security clause cases decided after *Yott* and cited by the Wisconsin court, therefore, continued to hold that employers and unions bear a responsibility to make reasonable accommodation to employees' religious beliefs. Indeed, these subsequent cases largely erased the doubts expressed in *Yott* about the extent of accommodation required by holding that refusal to pay dues might, in a particular situation, be a reasonable accommodation. Viewing the facts of the *Nottelson* case in light of 1975 case law (*i.e., Yott*), the Wisconsin court, because of the failure by Smith and the union to make *any* attempt at accommodation, found reason to believe that Nottelson could not lawfully be discharged; therefore, his conduct was not inconsistent with the employment relationship. The court's belief was undoubtedly further influenced by the cases decided after Nottelson's discharge — *Cooper, McDaniel, Anderson* and *Burns* — which indicated that refusal to pay dues might constitute a reasonable accommodation in certain situations.

C. Conduct of the Employer and the EEOC Decision

Following its consideration of judicial interpretation of Title VII, the Wisconsin court reviewed the conduct of the employer in the case (*i.e.*, Smith's failure to make any attempt at accommodation)[88] and the EEOC decision favorable to Nottelson.[89] And, after a disclaimer to the effect that its decision on the meritoriousness of Nottelson's excuse for unemployment compensation purposes had no bearing on the outcome of any federal court action,[90] the court concluded:

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86. 432 U.S. at 84.
87. 589 F.2d at 407.
88. 94 Wis. 2d at 123-24, 287 N.W.2d at 771-72.
89. *Id.* at 124, 287 N.W.2d at 772.
90. *Id.* at 125, 287 N.W.2d at 772.

> Considering the language and legislative history of the federal Civil Rights Act, the judicial interpretations of the Act, the EEOC determination in claimant's favor, and the conduct of the union and A.O. Smith, the claimant had meritorious justification for his assertion that he need not pay union dues and that he could retain his status as an employee.
>
> . . . . For purposes of determining whether claimant's discharge can be characterized as a "voluntary termination," we conclude that, because claimant had meritorious justification for his failure to pay dues, his conduct was not inconsistent with his continuation of the employee-employer relation.[91]

V. THE DISSENT

The dissent raised a variety of objections to the majority approach. First, it expressed concern over whether the majority would allow compensation to a person who objected to paying union dues "for other reasons."[92] The language does not make it entirely clear whether this refers to a person who objects for purely secular reasons or to one who objects for religious reasons, but is not a member of a religion which prohibits union membership. If the justices are referring to a secular reason, the answer is clearly "No," unless the secular reason is somehow protected by Title VII or some other federal legislation. The majority did not hold that Nottelson was entitled to benefits because his objection was sincerely held, but rather because, viewed objectively, his refusal was afforded protection under the provisions of the Civil Rights Act. If the dissenters are asking whether the majority would award compensation to someone discharged for refusing to pay union dues on religious grounds, although not a member of a religion professing that tenet, the answer might well be "Yes." The Title VII definition of religion is an expansive one.[93] However, for DILHR to make a determination on the "meritoriousness of the excuse" in such a case would admittedly be much more difficult.

The dissent then shifted its focus to an argument that

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91. *Id.* at 124-25, 287 N.W.2d at 772 (footnote omitted).

92. *Id.* at 126, 287 N.W.2d at 772.

93. *See* text accompanying note 62 *supra.*

claimant voluntarily terminated because he effectively quit when he chose to follow a mandate of his conscience rather than to conform to the union security agreement.[94] But as the facts demonstrate, Nottelson believed that the law would protect him in refusing to pay dues while continuing to work and the majority found that there was reasonable basis in fact for such a belief.

Next, the dissenters suggested that perhaps the majority meant to hold that the claimant voluntarily terminated his employment with good cause attributable to his employing unit, but could not so hold because, in this case, it was the union, not the company, which was at fault.[95] This argument is weak, however, in view of the circuit courts' consistent holdings that an employer as much as a union has a duty to accommodate. The fact that the union fails to meet its obligation does not mean that the employer is thereby relieved of responsibility.

Finally, the dissent expressed sympathy for the discrimination that Nottelson had suffered, but maintained that his remedy should have been sought in the federal courts and not in the form of state unemployment compensation.[96] Noting that he had been granted judgment in his federal action,[97] the dissent suggested that the majority wanted to grant him a double recovery. The *Nottelson* decision may or may not have that effect in view of the split in authority on whether unemployment compensation should be deducted from a back pay award in a Title VII action.[98] The more significant point which this argument raises is how far the state unemployment commission can be called upon to consider federal legislation when making its judgments.

One argument which the dissent might well have raised, but did not, is language in *Hanmer v. ILHR Department*[99] which initially appears to be a direct contradiction of *Nottelson*. In *Hanmer*, the owners/employees of a small business

94. 94 Wis. 2d at 126, 287 N.W.2d at 773.

95. *Id.* at 126-27, 287 N.W.2d at 773.

96. *Id.* at 127, 287 N.W.2d at 773.

97. *See* note 13 *supra*.

98. *See* Annot., 21 A.L.R. Fed. 472, 539-40 (1974); 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 55.37(c) (1979 and Supplement).

99. 92 Wis. 2d 90, 94, 284 N.W.2d 587, 589 (1979).

had filed for bankruptcy and then applied for unemployment compensation. In affirming DILHR's rejection of the claim on the basis that the owners/employees had voluntarily terminated, the court said: "In determining whether an employee voluntarily terminated his employment . . . whatever justification he may have had for doing so is not relevant. The initial question is not why the employee terminated his employment, but whether he in fact did so."[100] The court went on to say that justification *is* relevant to the issue of whether termination was for good cause attributable to the employing unit.[101] Presumably, the majority in *Nottelson* would maintain that the term, "justification," in *Hanmer* is used in the sense of personal reasons for actions rather than in the sense of an "exemption" from a particular requirement. So while the claimants in *Hanmer* may have had compelling business reasons for filing for bankruptcy, they nevertheless intended to terminate their employment. However, Nottelson, under Title VII, was exempt from the requirement to pay union dues and so by refusing to pay them, he did not intend to terminate his employment.

VI. Conclusion

In *Nottelson,* the Wisconsin Supreme Court reviewed a decision of DILHR's denying unemployment compensation to a worker who was discharged for failing to pay union dues. Described in this manner, the case is hardly an unusual one. Indeed, there are elements of the decision which follow traditional patterns. For example, the court spent some time reviewing the problems presented by mixed questions of law and fact, cited case authority for its view that this situation presented a question of law (although acknowledging that precedent is far from consistent in this area) and then detailed the reason for its substitution of judgment. The court also reaffirmed the traditional case law definition of the crucial statutory concept in the case, "voluntary termination."

What makes this case unusual is the *reason* for claimant's refusal to pay union dues — a religious belief. DILHR, the circuit court and the dissent all viewed the case as one where

100. *Id.* (footnote omitted).
101. 92 Wis. 2d at 94 n.2, 284 N.W.2d at 589 n.2.

an employee voluntarily terminated his employment for a personal reason. But, as noted, the Unemployment Compensation Act no longer recognizes a "compelling personal reason" as an exemption to the voluntary termination disqualification. The *Nottelson* majority, however, attached a different and crucial significance to this "reason." The majority held that the religious nature of the refusal to pay dues triggered the involvement of the federal Civil Rights Act. And once this federal legislation was called into play, it could, under the right fact situation, relieve an employee of the obligation to pay dues. The majority held that the instant case presented such a fact situation — that there was a reasonable basis to believe that Nottelson need not pay dues; that he had not acted inconsistently with the employment relationship; and that he had not, therefore, voluntarily terminated.

The problem this decision presents for DILHR is manifest. Read narrowly, the decision requires the department to inquire into the meritoriousness of an employee's excuse for particular conduct in light of federal legislation and its judicial interpretation when there is a conflict between Title VII and a union security clause. Read broadly, however, the decision requires DILHR to develop an expertise in (and to consider in future decisions) all federal legislation relating to employment discrimination and its rapidly developing interpretation in federal case law.[102] So broad a mandate could easily require funding for additional personnel. That, in turn, would involve the legislature. In view of the closeness of the decision, it seems likely that the department may wait for further direction from the court or the legislature before undertaking such an expanded role.

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LABOR LAW—Fair Representation—Punitive Damages in Fair Representation Actions. *IBEW v. Foust*, 442 U.S. 42 (1979). Nearly forty years ago, in *Steele v. Louisville & Nashville R.R.*,[1] the United States Supreme

102. *See* notes 68, 85 & 88 *supra*.

1. 323 U.S. 192 (1944).