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Labor Law - Evidence Necessary to Sustain Allegation of Discriminatory Discharge

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effect of the approach of death, the declarant should appear to have had a consciousness of the approach of death; and this consciousness must of course exist at the time of making the declaration.[8]

Thus if a declarant believes and exhibits the belief that his death is imminent and because of this belief makes a statement naming his assailant, the declaration should be admissible as a dying declaration. However, the peculiar facts and circumstances of each case are applied to the rule and if the rule is satisfied then the statement is admissible. In the instant case, the declarant, Mrs. Allen received the last rites of her church shortly after arriving at the hospital, suffering from an abdominal wound inflicted by a bread knife. She made repeated statements to various people that she thought she was going to die, and during the 5 days she lived, she never once expressed any belief or hope of recovery. There was no evidence to indicate that Mrs. Allen thought her death was imminent or that she made her statement because of the fear of imminent death. The declaration in dispute was made to the declarant's mother about twelve hours before death in narrative fashion recounting the events of the stabbing.

It is the opinion of the writer that the Court of Appeals was correct in holding the declaration inadmissible because, applying the rule to the facts in the instant case, it is clear that the declarant, Mrs. Allen, did not speak under a sense of impending death and as a result of the sense of impending death. Therefore since the rule was not satisfied the Court of Appeals in the instant case could only reverse the judgment, assuming the settled rules as to dying declarations may not be broadened except by statute.[9]

EMIL SEBETIC

Labor Law — Evidence Necessary to Sustain Allegation of Discriminatory Discharge — Complainant union brought this action against respondent employer alleging that respondent was committing unfair labor practices in violation of the Wisconsin Employment Peace Act.[1] The Wisconsin Employment Relations Board found the following facts: respondent in its wholesale hardware business maintained a large warehouse in the city of Madison, Wisconsin; merchandise was shipped

[8] People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915).
[9] Sowell v. State, 30 Ala. App. 18, 199 So. 900 (1941).
[1] Section 111.06(1) provides "It shall be an unfair labor practice for an employer individually or in concert with others: (a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.94 . . . (c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, . . ." Section 111.04 guarantees to employes freedom in joining or refusing to join unions. Wis. Stat. (1949), Chap. 111.

to this warehouse, unloaded and reshipped by respondent to its customers; prior to April 15, 1949, respondent employed twenty-one persons in the warehouse to process merchandise; that all warehouse employes with the exception of a superintendent in general charge are production employes and properly includable in any union which may be formed; that four of the includable warehouse employes also exercised supervisory duties; for some time prior to April 15, 1949, the warehouse employes were, within the knowledge of respondent, engaged in organizational activities and on or about April 7, 1949, twenty of the said twenty-one employes had signed application cards for membership in complainant union; on April 15, 1949, respondent discharged seven of the warehouse employes, all of whom were union members and among whom were two of the four includable supervisors; at the time of the said discharges, respondent informed the said seven employes that the discharges were temporary lay-offs and were necessary because of lack of work; respondent then elevated two employes with much less experience to take the place of the two discharged supervisors; on April 18, 1949, respondent discharged an office employee, who was active in organizational activities for incompetence; on April 25, 1949, respondent discharged two more union member warehouse employes and on May 4, 1949, discharged one more union member employed in the said warehouse; respondent employed eight buyers who prior to April 1, 1949, occasionally assisted the regular warehouse employes in picking and packing orders and since April 15, 1949, these buyers have devoted a very substantial part of their time to such work; that immediately after the discharges of April 15th, respondent's manager called a meeting of the warehouse employes at which he announced a seventeen cent per hour general wage increase; also at this time the employer entered into written agreemnts with six of the retained employees;[2] that there is a decided slump in respondent employer's business; that just prior to the discharges respondent employer called a meeting of all warehouse employes and informed them of the said business slump and also of the company policy of maintaining steady employment for all employes.

On the basis of this finding of facts, the Wisconsin Employment Relations Board *held:* the discharges of the warehouse employes were discriminatory and a violation of Section 111.06 (1) (a) and (c) Wis. Stats. of 1947, and ordered reinstatement of the two discharged supervisors and the placement of the rest of the discharged employes, with the exception of the office worker, on a preferential hiring list.

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[2] In a memorandum accompaning its decision the Board stated that the written agreements signed by five of the warehouse employes on April 15th were monthly wage agreements.

In a memorandum accompanying the decision, the Board laid strong emphasis on the following factors: (1) there was a complete departure from company policy in these discharges; (2) the two supervisors who were discharged were immediately replaced by men with much less experience; (3) the plant manager had requested one of his employes to keep him informed with respect to organizational activities; (4) at the time of the discharges the manager informed the employes that they were laid off temporarily, while at the time of the hearing he testified that they were permanently discharged; and (5) remaining workers were immediately granted wage increases. *Local Union 442, Chauffers, Teamsters and Helpers, A.F.L. v. Wisconsin Hardware Co., Decision No. 2154 (WERB, 1949).*

The Board cited *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*[3] for the proposition that the existence of a reason for a discharge which would characterize it as an exercise of sound business prudence is of great importance where there is a charge of discrimination, and the Board went on to state that the discharges involved in this case, when viewed in the light of the above factors, particularly the discharge of the two supervisors, should be classified as discriminatory. It appears that the Board in so ruling completely ignored the further statement in the *Rueping* case to the effect that if a valid reason for discharge exits, then the motivating reason for a discharge may not be material unless it can be shown that in the same type of circumstances, non-union men were not discharged.[4] In so phrasing its opinion the Court appears to cast the burden of proof on the complainant to

[3] 228 Wis. 473, 498, 279 N.W. 673, 684 (1937).

[4] ". . . When a valid reason as heretofore defined is found to be present, it is relatively difficult and may be impossible to more than guess which reason motivated the discharge. The board could find discrimination here only by finding that the assigned reason for the discharge of Assaf was false because if it was not the evidence is in such state that a finding of discrimination would be purse conjecture. Furthermore, we have some misgivings whether, if a valid and sufficient reason for discharge exists, the real or motivating reason has any materiality whatever, unless it can be shown that in other cases where similar grounds for discharge of non-union men existed, no such action was taken. The latter circumstance, of course, would point strongly to discrimination . . . We are unable to read out of the alleged finding of fact any finding at all with respect to the existence of sufficient cause for discharge. It is merely stated that the evidence as to whether the entry was false was conflicting, and that if it was false, it is improbable that it was intentionally so, in view of the small amount involved. There follows a statement of the board's belief that the alleged false entry was not the real reason for the discharge, but a pretext, and that the controlling reason was his union membership. . . . Had there been a clear-cut finding that the dismissal was because of union activities on the part of Assaf, it might be argued that this included a finding that the reason for discharge assigned by defendant did not exist. However, the findings attempt specifically to deal with this question but by reason of their equivocal nature fail to resolve it, and we are not in a position to aid the situation by construction. It follows that the findings do not support the order with reference to Assaf, and that that portion of the order requiring his restoration must be set aside and the judgment modified to this extent." Ibid.

prove the lack of valid reason for the discharge in order to establish the forbidden discrimination. Indeed, in many cases the Board itself has found lack of discrimination where a valid reason, though slight, was shown and ostensibly relied upon at the time of the discharge.[5] Further illustrating this burden of proof rationale is the fact that in a number of the Board's decisions, where discrimination was found, the Board expressly found that the sole reason for the discharge was to influence in some way the discharged employee and/or remaining employes in their union relationships.[6] Thus the Board recognizes the

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[5] Andrew Lawniczak v. David Devroy, Decision No. 124 (WERB, 1940); Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 64 v. Quality Food Products Co., Decision No. 142 (WERB, 1940); Wisconsin State Council of Carpenters and United Brotherhood of Carpenters and Joiners of America, Local No. 1264 v. Jackson Box Co. and Boxmakers Independent Union No. 1, Decision No. 157 (WERB, 1941); Wilbur Lindsley v. George Hougard, Decision No. 300 (WERB, 1941); Hotel Resturant Employees' and Bartenders International Alliance v. Mrs. John Shaughnessy, Decision No. 311 (WERB, 1941); Drivers, Dairy Employee's and Helpers Local Union No. 434 v. Ryser Cheese Co., Decision No. 1089 (WERB, 1947); Norbert Peil v. Mr. Edward D. Cahoon, Decision No. 1470 (WERB, 1947); United Automobile, Aircraft and Agricultural Implement Workers of America, (CIO) Local No. 180 v. J. I. Case Co., Decision No. 1593A (WERB, 1948); International Association of Machinists Lodge No. 1825 v. Reed Motor Co., Decision No. 1681 (WERB, 1948); Clark Clary v. Flo-Torque Corporation, Decision No. 1708 (WERB, 1948); International Longshoremen's Association, Local 815 v. Terminal Storage Co., Decision No. 2026 (WERB, 1949); International Association of Cleaners and Dyehouse Workers, Local 111 v. Leo Halverson, Decision No. 2050 (WERB, 1949); General Drivers and Helpers Union Local 662 AFL v. Knapp Creamery Co., Decision No. 2093 (WERB, 1949).

[6] Truck Drivers and Dairy Employees Local Union No. 870 v. James T. Farrell, Decision No. 1336 (WERB, 1947); John Disch v. Carver Ice Cream Co., Decision No. 1803 (WERB, 1948); UAW of AFL Region No. 9 v. Gilson Bros., Decision No. 1831-B (WERB, 1948), (In this case the board also comments on the quantum of evidence necessary by stating that the discriminatory character of the discharge is shown by the preponderance of the evidence even though employer attempted to show lack of diligence on part of employee as reason for discharge); Kuaka v. E. A. Schroeder doing business as Schroeder Trucking Co. and Arnold, Decition No. 2231 (WERB, 1949); In two very recent decisions of the Board, Mrs. Myrtle Young v. Mr. Arlin De Cleene, Decision No. 2284 (WERB, 1950) and Jerry Schroeder v. Mr. Arlin De Cleene, Decision No. 2285 (WERB, 1950), both decided on the same day, the discharges of the complainants were held discriminatory in the face of the employer's contention that the discharges were necessary to reduce expenses. The finding of fact states that the respective discharges were ". . . for the purpose *primarily* of discouraging membership in the union . . ." and there is no finding negativing the existence of the employer's alleged reason for the discharge. On the basis of the Rueping case and the long line of the Board's decisions it is felt by this writer that these findings cannot sustain the Board's conclusion of law that an unfair labor practice exists and the consequent mandate of the Board ordering an offer of reinstatement in both cases and that the employer make the complainants whole for loss of pay. This follows from the fact that the Board's jurisdiction to order positive action on the part of an employer is dependant upon a valid finding that the elements of an unfair labor practice exist. In these two cases the essential finding that either the discrimination was the sole cause of the discharges or that there was no valid reason for the discharges is lacking. However, the Board might have placed itself on safe ground if it had taken advantage of the Rueping case doctrine that sudden change in job tenure coupled with

requirement that discrimination be the only reason for discharge in order to bring employers within the provisions of the anti-discrimination clauses of the statute. The above reasoning may be considered to be the broad rule as far as the Board is concerned, even though it has in its decisions made what appear to be departures from its strict application. These seeming departures are rare and usually are found in cases where company policy, as evidenced by the history of job tenure, has suddenly changed at the same time that union activity became known to the employer.[7] An example of this type of exception is found in the instant case. The Board characterized the discharge of the seven nontitled union member warehouse employes as discriminatory, even though the slump in the employer's business should characterize them as for just cause in the absence of the employer's securing replacements. It appears that the only real basis that the Board had for such a holding was the departure of the employer from its past policy of job security with attendant overall decrease in hours per man when necessary, and the adoption of a new policy of discharging enough men so that those remaining would have full time work. Therefore the Board in effect again followed the rule that discrimination must be the sole cause of a discharge in order for the discharge to be classified as discriminatory. And the discharges must still fall within the class described in the *Rueping* case, and it must be shown that in the same type of circumstances non-union men were not discharged in the past. Thus it would appear that one set of coincidences very likely to result in a finding of discriminatory discharge is sudden union activity coupled with equally sudden change of job tenure policy which results in the discharge of one or more employes active in union organization. Further, the above discussion illustrates the presence of the subjective factor and its inherent insusceptability to objective proof in the list of problems encountered by a complainant trying to sustain a charge of discriminatory discharge against an employer. In the absence of a sudden change in job tenure policy, if almost any valid cause for discharge exists the employer may seize

union activity may be the foundation of a finding that discrimination is the sole cause of the discharge and that therefore the unfair labor practice of discriminatory discharge exists. This type of finding could be predicated on the fact that complainants in these two cases were employed for a period of more than two years and more than one year respectively. The Board returned to its former type of finding in a case decided two months after the De Cleene cases in deciding Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 43, AFL v. Mariondale Farms, Decision No. 2341 (WERB, 1950), where the Board expressly found that the *sole* cause of the discharge, which was held an unfair labor practice, was discrimination. The writer has cited these cases at length because they are not digested for easy reference anywhere.

[7] Laundry Workers International Union, Local No. 229 (AFL) v. Stoughton Cleaners and Laundry, Decision No. 47 (WERB, 1940); Eau Claire Industrial Union Council v. Skogmo Cafe, Decision No. 136 (WERB, 1940);

upon it and very likely avoid a finding of discriminatory discharge. In fact the subjective factor cannot be avoided in any consideration of the term "discriminatory discharge", because by definition an employer cannot be found guilty of intentional discrimination unless he can be shown to have known of the union activity which impels the discrimination.[8] Thus the factors which must be shown to exist in order to sustain an action for discriminatory discharge are: (1) a discharge which has for its sole cause a discriminatory motive, and (2) a knowledge of union activity in the employer in order that the subjective intent may be established.

Another important consideration is apparent in the case under discussion. Discharges, in order to be characterized as discriminatory, must be shown to be individually discriminatory.[9] Though the Board found the discharges of the warehouse employes discriminatory, still the Board found the discharge of the office worker a valid exercise of the employer's prerogative to discharge for cause. Thus the Board followed the policy that a finding of unfair labor practice with respect to one or more facets of a case does not permeate the whole case and all its parts with the unfair labor practice stigma.[10]

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United Brotherhood of Carpenters and Joiners of America, Local No. 1748 v. Appleton Chair Corp., Decision No. 170 (WERB, 1941); International Union, United Automobile Aircraft and Agricultural Implement Workers of of America (CIO) v. Micron Tool and Machine Co., Decision No. 1736 (WERB, 1948); United Automobile Workers of America AFL Region No. 9 Local 963 v. Winneconne Stamping Company, Decision No. 2044 (WERB, 1949); also see discussion in note 6.

[8] C.I.O. v. Waukesha Foundry Co., Decision No. 1459 (WERB, 1947); A.F. of L. v. Aerial Cutlery Manufacturing, Decision No. 1469 (WERB, 1947); Norbert Peil v. Mr. Edward D. Cahoon, Decision No. 1470 (WERB, 1947); O. A. Jerikowic v. Midwest Transformer Co., Decision No. 1490 (WERB, 1947); Fred Wickersheim v. Yawkey-Bissell Corp., Decision No. 2088 (WERB, 1949).

[9] General Drivers, Dairy Products Employees and Helpers Union, Local No. 56 v. Sheboygan Dairymen's Cooperative Association, Inc., Decision No. 1012 (WERB, 1946); Local No. 662 General Drivers and Helpers Union Affiliated with AF of L v. Neuheisel Lime Works, Decision No. 1230 (WERB, 1947).

[10] The above discussion probably disposes of most of what is commonly thought of when the term "discriminatory discharge" is used, but a very important part of the field would be overlooked if this discussion did not concern itself with employer action in accordance with agreements between employers and unions. It is in this branch of the field that the employer must be extremely careful for if he refuses to discharge in accordance with a union demand under a valid contract which by its terms makes such discharge necessary, he is subject to an action brought under the terms of Section 111.06 (1) (f) Wis. Stats. of 1947, (". . . (1) It shall be an unfair labor practice for an employer individually or in concert with others: . . . (f) to violate the terms of a collective bargaining agreement . . ." Denver Olson v. International Union of Operating Engineers, Local No. 139, AFL, and Fielding and Shepley, General Contractors, Decision No. 259 (WERB, 1941); George Schuman v. Northern Transportation Co., Decision No. 1332 (WERB, 1947); Hugh Fitzgerald v. Myer Stores et. al., Decision No. 1466 (WERB, 1947); Laundry and Dry Cleaning Drivers Local Union No. 360 AFL v. Dy-Dee Wash, Inc., Decision No. 1634 (WERB, 1948.) whereas, if he does discharge in accordance with a union demand and either the contract is found invalid for procedural reasons or the contract does not by its terms make the discharge mandatory then