

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE & HOSPITAL	:	
EMPLOYEES' INTERNATIONAL UNION,	:	
AFL-CIO,	:	
	:	
Complainant,	:	Case IX
	:	No. 14974 Ce-1369
vs.	:	Decision No. 10560-A
	:	
MEMORIAL HOSPITAL,	:	
	:	
Respondent.	:	

Appearances:

Mr. Jay Schwartz, Attorney at Law, and Mr. William Knudsen,
 Business Representative, appearing on behalf of the
 Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at
 Law, by Mr. James C. Mallien, and Mr. Donald A. Kincade,
 Administrator, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 150, Service & Hospital Employees' International Union, AFL-CIO, having on September 27, 1970, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Memorial Hospital had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Herman Torosian, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice issued by the Examiner on September 29, 1970, hearing on said complaint having been held in Burlington, Wisconsin, on October 27, 1970, before the Examiner; and the Examiner having considered the evidence, arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, Service & Hospital Employees' International Union, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 135 West Wells Street, Milwaukee, Wisconsin.
2. That Memorial Hospital, hereinafter referred to as the Respondent, is a hospital located at 301 Randolph Street, Burlington, Wisconsin.
3. That at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive collective bargaining representative of certain of its employes, including Robert E. Smith, employed in its facilities at Burlington, Wisconsin; and that the

Complainant and Respondent signed a collective bargaining agreement effective June 1, 1970, which was to remain in effect for a period of one year and thereafter until terminated by at least thirty (30) days written notice.

4. That the collective bargaining agreement in effect between the parties at the time contained the following provision material herein:

"Article XVII - Discharge.

The Hospital will not discharge an employee except for just cause. The term "just cause" includes:

- (1) Dishonesty;
- (2) Incompetency;
- (3) Violation of an established Hospital Rule;
- (4) Failure to carry out the orders of the supervisor;
- (5) Use of abusive language toward another person while on hospital property;
- (6) Being under the influence of alcohol or narcotics or unauthorized possession or use of narcotics while on duty;
- (7) Deliberate misconduct which results in damage to any person or property;
- (8) Violating a provision of this Agreement."

. . .

"Article XIX - Grievance Procedure.

. . .

Section 2. Grievances involving a claimed breach of the agreement may, if they have not been resolved pursuant to the foregoing paragraph, be handled pursuant to Section 111.07, Wisconsin Statutes.

. . ."

5. That at all times material herein Donald A. Kincade has been employed by Respondent as Administrator of Memorial Hospital, Florence Koch, as Assistant to the Administrator, C. S. Barrows, as Maintenance Superintendent, and Lawrence A. Gums, as Assistant Supervisor of Maintenance.

6. That Robert E. Smith was hired, by Respondent, in 1968 and employed as a maintenance man; that due to an ulcerated leg his last day of work for the Respondent was October 23, 1970; that on October 23 or 24, Smith's wife, Pauline, called Barrows and reported that her husband had seen his doctor and that the doctor was planning surgery and that her husband "wouldn't be in for a while" but that she would call back and let him (Barrows) know when said surgery would take place.

7. That on October 30, 1970, Robert Smith spoke to Lawrence Gums, by telephone, and told him that he felt it was best for him to have his leg amputated and that he "was going to hang it up"; that on the same day Gums informed both Koch and Kincade that he received a call from Smith and that Smith "was quitting because he was having his leg taken off".

8. That pursuant to Respondent's normal procedure in cases wherein an employe terminates his employment, a termination of service slip was completed and became part of Smith's personnel file; that said termination of service slip had an entry dated 10/30/70 stating the following: "Leg surg. - L. Gums received tel. call that Mr. Smith was resigning because of leg surg."

9. That Smith's wife had a telephone conversation with Barrows on November 10, 1970, and informed him that her husband was going in for surgery that day; and that nothing more was discussed, concerning the matter, in said conversation.

10. That at no time material herein did Robert Smith request a leave of absence either for illness or for his leg surgery; that from November 10 to June 24, 1971, when Smith received a release from his doctor authorizing him to return to work, neither Smith nor his wife contacted the Employer concerning his operation, his status as an employe, or his intention to return to work; that Smith's first contact subsequent to November 10, 1970, was sometime between June 24 and June 29, 1971, at which time Smith reported to Barrows and stated that he was ready to return to work; that Barrows stated he would have to talk with Mr. Kincade concerning the matter and that he would advise him of the outcome; that shortly thereafter Barrows called Smith and informed him that he would have to meet with himself and Kincade concerning the matter; that on June 28 or 29, Smith had a meeting with Kincade and Barrows at which time he was told that he was no longer considered an employe inasmuch as he had called in and quit his job in October of 1970; and that at the same meeting Smith filed a written grievance, dated 6-28-71, with the Respondent stating the following: "I hereby apply for my job as a maintenance man, as I have recovered from surgery which occurred due to the amputation of my left leg.

"I hereby present a doctor's certificate which allows me to return to work."

11. That Smith received a letter dated June 29, 1970, over the signature of Barrows stating that Respondent could not consider Smith's complaint as a grievance under the contract inasmuch as their office records indicated his resignation in October, 1970; that also with said letter Barrows sent an application for employment in the event Smith wanted to be considered for re-employment as a new employe; that William Knudsen, Business Representative for Complainant labor organization, wrote a letter, dated July 13, 1971, to Kincade requesting that Smith be returned to work and paid for loss of time from the date he applied to be reinstated and further that said letter was to serve as the last step of the grievance procedure; that Kincade responded to said letter by letter dated July 19, 1971 advising Knudsen that Smith was not entitled to return to work at the Hospital because "1) He quit his job; 2) If it is found that he did not quit, but was "on leave" he failed to comply with Article VII and Article IX of the contract; 3) Mr. Smith is physically unable to meet all of the requirements of the job of Maintenance man."

12. That the Complainant unable to resolve said dispute to its satisfaction initiated the instant action pursuant to Article XIX, Section 2 of the collective bargaining agreement.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That Memorial Hospital, Burlington, Wisconsin, by not allowing Robert E. Smith to return to work on or about June 24, 1971, with full seniority rights has not violated the collective bargaining agreement between it and Local 150, Service & Hospital Employees' International Union, AFL-CIO, and therefore 111.06(1)(f) of the Wisconsin Statutes.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

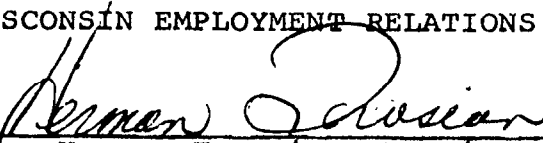
ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 14th day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 27, 1970, the Union filed a complaint with the Commission alleging that Memorial Hospital, Burlington, Wisconsin, had committed unfair labor practices within the meaning of Section 111.06(1)(f) 1/ of the Wisconsin Employment Peace Act by refusing to re-employ Robert E. Smith on June 24, 1971, the date Smith received a doctor's slip authorizing him to return to work, after having been absent since October 24, 1970 due to leg surgery. On October 20, 1971, the Hospital filed an Answer denying all of Complainant's allegations and alleging affirmatively that Robert Smith resigned on October 30, 1970 and shortly thereafter entered Respondent Hospital for amputation of one of his feet; that Smith never requested a leave of absence from Respondent and that the first Respondent heard from him with respect to employment following his surgery was on June 28, 1971; that Smith was not physically able to properly perform all the duties of Maintenance Man; that Respondent has not terminated Robert Smith's employment, but on the contrary has sent him an application form for employment, so that he can apply for work for which he is suited; that Smith has not filed said application for employment. Hearing was held in the matter on October 27, 1971, at Burlington, Wisconsin. Respondent filed a post-hearing brief on November 26, 1971.

Whether or not there has been a violation by Respondent as alleged depends on whether or not Robert Smith resigned his employment on October 30, 1970 or if he in fact was constructively discharged.

Smith testified that he at no time quit his employment. On direct examination he testified that although he did not at any time

1/ In its complaint, Complainant alleged a violation of 111.06(2)(f), Wisconsin Statutes, but it is apparent from the contents of Complainant's complaint and from the hearing held in said matter that Complainant mistakenly cited a violation of Section 111.06(2)(f) instead of Section 111.06(1)(f) of the Wisconsin Statutes.

talk to the Employer concerning his absence his wife, Pauline, had called Barrows twice, on October 23 and on November 10, 1970, concerning his illness and surgery. Pauline Smith testified that on October 23 or 24 she called Barrows to report her husband's absence from work and further that his doctor recommended he have surgery performed on this leg. She informed Barrows that she would call back and advise him when the surgery would take place. On November 10, she again called Barrows and advised him that her husband was going into the Hospital for surgery on the following day.

Lawrence Gums, Assistant Supervisor of Maintenance, testified that on October 30, 1970, Smith called and informed him that it would be best for him to have his leg amputated and that he "was going to hang it up". Gums reported said conversation to Donald Kincade, Administrator, and Florence Koch, the Administrator's Assistant, informing them that Smith had quit his employment. As standard procedure Smith's resignation was recorded on a "termination of service" card which became part of his personnel record. The entry on said card, dated October 30, 1970, reads as follows: "Leg surg. - L. Gums received tel. call that Mr. Smith was resigning because of leg surg."

When Smith reported for work on or about June 28, 1971, with his doctor's release, he was informed that he had resigned his employment. He was told said resignation was evidenced by a "termination of service" card which was part of his personnel file. Smith was later told he could reapply as a new employe if he so desired.

In regard to the October 30 conversation testified to by Gums, Smith's testimony is somewhat contradictory and confusing. First on cross-examination (page 8) Smith testified that his wife had a conversation with Barrows on October 23 and that he had no recollection of meeting or of talking to Gums the following week. Smith was then asked, "Do you recall talking to Mr. Gums and saying something to the effect that: 'I am going to have a leg amputated, and I am going to hang it up.'?" A - No. Q - You can't recall that? A - No, sir. All I told him was I was going in for surgery." (page 9) Later when Smith was recalled as a witness he testified, on direct examination, that he did not at any time call Gums or tell him that he was going to "hang it up". (page 33) However on cross-examination his testimony in this regard is as follows: "Q - It is your story, Mr. Smith, that at no time in November did you talk to Mr. Gums about having your leg amputated? A - What did you say? Q - At no time in November of 1970 did you talk to Mr. Gums about having your leg amputated? A - No. Q - Never talked to him at all? A - Just that I was going to be off and go into the hospital." (page 33 and 34) Then, still under cross-examination he testified that the above conversation with Gums was between Gums and his wife, and not himself. Smith was once again asked: "Q - I'm asking now about a conversation that you personally had with Mr. Gums. It is your story that at no time in November of 1970 did you talk to Mr. Gums about having your leg amputated? A - No, I didn't talk to him about anything else, just that I was going to have my leg amputated. Q - You personally talked to Mr. Gums about having your leg amputated? A - Yes." (page 34)

Finally, Smith under cross-examination later testified as follows: "Q - . . . Now did you in October of 1970 talk to Mr. Gums about going into the hospital or about having your leg amputated? A - Not that I recall, no. Q - And how about in November of 1970;

did you have any conversation with Mr. Gums as to your going into the hospital to have your leg amputated? A - No. Q - It's your story then at no time did you talk to Mr. Gums? A - Not to the best of my recollection I did not. Q - I see. You don't recall. A - No, sir, I don't." (page 34 and 35)

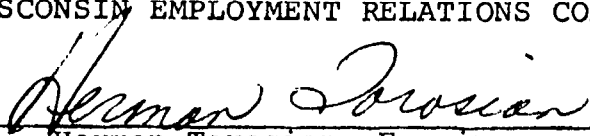
In considering Smith's contradictory testimony in regard to the October 30 conversation with Gums, as outlined above; Gums' own testimony; and the fact that Smith's personnel file supports Gums testimony, the Examiner concludes that such conversation did take place as testified by Gums. Gums testified that on October 30 Smith called and stated that it would be best for him to have his leg amputated and that he "was going to hang it up". The Examiner credits said testimony and concludes that Smith, by making said statement intended to communicate his intention to quit his employment and, further, Gums in interpreting said statement to mean he quit his employment was a reasonable interpretation of said statement. Smith's intent to quit becomes even more apparent, in the opinion of the Examiner, in light of the fact that Smith at no time requested a leave of absence, even though he was absent from work approximately eight months, nor did he at any time contact Respondent during said time concerning his employment.

Having concluded that Smith quit his employment on October 30, 1970, the Examiner further concludes that the Respondent by refusing to allow Smith, in effect, to withdraw his resignation, some eight months later, and allow him to return with full seniority rights did not violate 111.06(1)(f) of the Wisconsin Statutes which makes it an unfair labor practice to violate the terms of a collective bargaining agreement.

Dated at Madison, Wisconsin, this 14th day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner