

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CAROLE TURNER,	:	
	:	
Complainant,	:	Case II
	:	No. 20575 Ce-1674
vs.	:	Decision No. 14727-C
	:	
THEODORE P. ODELL, QUERCUS ALBA, INC.,	:	
	:	
Respondent.	:	

BARBARA L. BOLES,	:	
	:	
Complainant,	:	Case III
	:	No. 20576 Ce-1675
vs.	:	Decision No. 14726-C
	:	
THEODORE P. ODELL, QUERCUS ALBA, INC.,	:	
	:	
Respondent.	:	

KATHY CASSELMAN,	:	
	:	
Complainant,	:	Case IV
	:	No. 20588 Ce-1676
vs.	:	Decision No. 14733-C
	:	
THEODORE P. ODELL, QUERCUS ALBA, INC.,	:	
	:	
Respondent.	:	

Appearances:
 Kelly and Haus, Attorneys at Law, by Mr. William Haus, appearing on behalf of the Complainants.
 Axley, Brynelson, Herrick and Gehl, by Mr. James C. Herrick, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Carole Turner, Barbara L. Boles and Kathy Casselman, having filed separate complaints with the Wisconsin Employment Relations Commission alleging that Theodore P. Odell, Quercus Alba, Inc. committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of WEPA; and a consolidated hearing on said complaints having been held at Madison, Wisconsin on July 27, 1976, before the Examiner; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

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FINDINGS OF FACT

1. That Quercus Alba, Inc., herein Respondent, is an employer operating a bakery in Madison, Wisconsin; that Theodore P. Odell, herein Respondent Odell, is Respondent's owner and, at all times material herein, acted as Respondent's agent; that while Respondent Odell established the bakery in an effort to create employment for himself, he gradually began to employ other individuals; and that in May 1976, prior to a seasonal decrease in production, Respondent had one full-time and four part-time employes.
2. That Carole Turner, herein Complainant Turner, was first employed by the Respondent in June 1975; and that Complainant Turner worked on a sporadic basis of five to ten hours per week until March 1976 when her hours increased to fifteen to twenty hours per week, remaining at said level until her discharge on June 1, 1976.
3. That Barbara L. Boles, herein Complainant Boles, was first employed by the Respondent in August 1975; that Complainant Boles worked on a part-time basis until December 1975 when she began full-time employment with Respondent which continued until her discharge on June 3, 1976.
4. That Kathy Casselman, herein Complainant Casselman, was first employed by the Respondent from August 1973 to February 1974; that on May 4, 1976, Complainant Casselman returned to Respondent's employ on a part-time basis of twelve to fifteen hours per week and continued to work on that basis until discharged on June 8, 1976.
5. That in December 1975, Complainant Boles and co-worker Susan James began discussing complaints regarding existing conditions of employment; that in January 1976 Complainant Boles and James informed Respondent Odell that they had formed a Union; that shortly thereafter Complainant Boles and James met with Respondent Odell to discuss their complaints; that subsequently James was discharged by Respondent Odell for profanity; that Respondent Odell then asked Complainant Boles about the status of the Union; and that Complainant Boles indicated that its existence was uncertain.
6. That from January 1976 to May 1976 several employes of Respondent including Complainants Boles, Turner and Casselman discussed various complaints regarding existing conditions of employment; that the majority of said discussions took place on Respondent's premises during working hours; that Respondent Odell was aware of the discussions in which Complainants Boles and Turner were participants; that, on occasion, employes directed their complaints to Respondent Odell; and that in late May 1976 a group of employes decided to meet on June 2, 1976 to form a Union.
7. That on June 1 Complainant Turner complained to Respondent Odell about general working conditions and the absence of fringe benefits; that Respondent Odell responded by indicating that he was responsible for the existing working conditions and that only he could alter said conditions; that Respondent Odell called Complainant Turner that evening and notified her that she was discharged; that Complainant Turner told Respondent Odell that all the employes had complaints about working conditions but were afraid to approach Respondent Odell; that Respondent Odell responded by indicating that complaints could be resolved on an individual basis; and that Complainant Turner worked until June 4, 1976.
8. That on June 2, 1976, Complainants Boles and Turner met in a park with two other employes and signed a document which stated "We the undersigned do hereby join in forming the Cooley Workers Union for the purpose of bargaining the terms and conditions of our employment"; that Respondent Odell approached the employes during that meeting and asked what was happening; that Respondent Odell was informed that the employes were holding "a meeting"; and that shortly thereafter Respondent Odell left the meeting's site.

9. That on June 3, 1976, at 9:00 a.m., Respondent Odell informed Complainant Boles that, although she was a good worker, he had never intended her position to acquire full-time status and handed Complainant Boles a letter which stated, "This is to announce that I tender my resignation as employer to Barbara Boles effective June 18, 1976;" that at 10:45 a.m. Complainant Boles informed Respondent Odell that the employees had formed a Union; that at 2:30 p.m., Respondent Odell initiated a discussion with Complainant Boles stating that he was the "captain of his ship" and would be the one to determine which way to "steer his ship;" that Complainant Boles told Respondent Odell that she believed her discharge to be related to the formation of a Union; that Respondent Odell responded by stating that he was "captain of his ship," that the bakery was his dream, and that there would be no work for anyone if he hadn't created the business; that Respondent Odell later shouted angrily at Complainant Boles and placed his fist in front of her face; and that on June 4, 1976, Complainant Boles received the following written explanation for her discharge from Respondent Odell:

"I apologize for the uneven flow of affairs which has occurred since the transition to the new building (although, truth be known, I am victim of this as much as you, not the agent). You may feel that you have 8-9 months invested in this. I have 8-9 years. It has progressively dawned on me that the nature of the work I have to share is not compatible with the needs of divorced women who have children to support. In a close working relationship such as exists in such a small shop as this, the emotional chemistry of our mutual needs generates a love-hate relationship. Secondly, I never intended for this work to be the mainstay of a family's support. The jobs were not designed with that in mind. The pressure on me to keep the work flowing, knowing that two children are also dependent on it, is not a comfortable feeling for me. During the last nine months is the first time this has ever happened. Rather than depreciation, I think a word of appreciation is in order, considering that I have managed to do as well as I have.

I am trying to make a clean break with the past, with habits and patterns I never wanted in the first place.

There are better jobs for a capable person like yourself than making cookies and I recognize a duty to help you find them. Toward that constructive goal let us work."

10. That on June 8, 1976, Complainant Casselman called Respondent Odell to check her work schedule for the following week; and that Respondent Odell indicated that Complainant Casselman was terminated due to lack of work and the "disrupting activity" which had been occurring.

11. That on June 19, 1976, Respondent Odell offered to rehire Complainant Boles effective June 21, 1976; that Complainant Boles returned to work on said date and discovered that she had been assigned a job which paid at least 16% less than that which she formerly held and which had formerly been performed by Complainants Turner and Casselman; that Complainant Boles informed Respondent Odell that she had not agreed to return to work under said circumstances; that after work Complainant Boles met with Respondent Odell at his request; that Complainant Boles asked Complainant Casselman to accompany her as a witness; that during said meeting Respondent Odell discussed the history of the bakery and offered Complainant Boles a job with more responsibility if she would "stop doing these things that directed his energy . . . into these other things;" that no agreement regarding continued employment was reached during the meeting; and that on June 24, 1976, Complainant Boles informed Respondent Odell that she would not return to work until proceedings before the Wisconsin Employment Relations Commission had been concluded.

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12. That during 1975 Respondent Odell began to consider the establishment of a nutrition center; that at the same time he was developing a plan to utilize young high school students as bakery employes with earnings being donated to their school; that in the Fall of 1975 Respondent Odell contacted representatives of the City High School, Madison, Wisconsin, to discuss his proposal; that the proposal was rejected; and that as of June 1, 1976, no further steps had been taken by Respondent Odell to implement this plan.

13. That Respondent Odell was aware of the protected concerted activity of Complainants Turner and Boles and discharged them because of said activity.

14. That Respondent Odell discharged Complainant Casselman because of his fear that she had been privy to or a participant in the concerted activity of Complainants Turner and Boles.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondents Quercus Alba, Inc. and Theodore P. Odell, by their aforesaid discharge of Complainants Turner, Boles and Casselman because of their protected concerted activity, committed unfair labor practices within the meaning of Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondents Quercus Alba, Inc. and Theodore P. Odell shall immediately:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employes with regard to their terms and conditions of employment for the purpose of discouraging activity on the behalf of a labor organization.

(b) In any other manner interfering with, restraining or coercing employes in the exercise of the rights guaranteed by the Wisconsin Employment Peace Act.

2. Take the following affirmative action which the undersigned finds proper:

(a) Immediately offer to r instate Carole Turner, Barbara L. Boles, and Kathy Casselman to their former or substantially equivalent positions and make each whole by paying them a sum of money equal to that which they would have earned but for their terminations, less any amount of money that they earned or received which they would not have earned or received had they not been discharged.

(b) Notify all employes by posting copies of the notice attached hereto, marked as "Appendix A", in conspicuous locations on its premises. The notice shall be signed by Respondent, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

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(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 7th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In their complaints, filed on June 9, 1976 and June 18, 1976, the Complainants allege that Respondent committed unfair labor practices in violation of the Wisconsin Employment Peace Act. More specifically the Complainants allege that Respondent discharged them because of their union activity. The Respondent filed answers on July 20, 1976 which substantially denied the Complainant's allegations and asserted certain affirmative defenses thereto.

Initially it must be noted that the Complainants have the burden of proving the allegedly discriminatory nature of the discharges. To meet their burden Complainants must prove by a clear and satisfactory preponderance of the evidence that Respondent had knowledge of the Complainant's protected concerted activity; that Respondent was hostile toward such activity; and that the discharges were motivated, at least in part, by the Respondent's opposition to said activity. 1/

DISCHARGE OF COMPLAINANT TURNER

The rights established by Section 111.04 and protected by Section 111.06 of WEPA include the right of non-union employees to discuss their complaints regarding existing unsatisfactory conditions of employment. The record indicates that for several months prior to her June 1 discharge Complainant Turner had engaged in such discussions with co-workers and that in late May 1976, at least four of the five individuals employed by Respondent had decided to meet in early June to formally organize a Union. It also reveals that on the day of her discharge Complainant Turner had discussed her complaints with Respondent Odell. Due to Respondent Odell's close physical proximity to the location of the employees' discussions, his testimony that he was aware of "dissatisfactions with some of the methods of production," and his participation in the June 1 discussion with Complainant Turner, it can reasonably be concluded that Respondent Odell was aware of Turner's concerted activity. However there being no evidence of Respondent Odell's presence when the decision to hold an organizational meeting was made, this conclusion does not embrace that specific portion of the concerted activity. It should be noted that in light of Turner's past involvement with co-workers discussions regarding unsatisfactory conditions of employment and the formation of a Union, her individual conversation with Respondent Odell falls within the scope of "lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection" protected by WEPA. The fact that Turner had not been selected as the employees' spokesperson and was not accompanied by other employees does not remove her action from the realm of statutorily protected activity.

The record having established Respondent's knowledge of Complainant Turner's concerted activity, the Examiner turns to a consideration of Respondent's possible hostility toward said action. The testimony of Respondent Odell generally establishes his overriding need to maintain

1/ St. Joseph's Hospital (8787-A,B) 10/67, 12/69, Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A,B,C) 3/71, 4/71, 7/71; Rocky Rococo Corporation (13556-A,B 13557-A,B) 12/75; Harry Viner, Inc. (13828-A,B) 4/76.

control of the management and direction of the bakery, especially during a period when he was considering alternative avenues of production and expansion into new areas of endeavor via a nutrition center. From this attitude it can reasonably be inferred that Respondent Odell would respond negatively to anything which would threaten his control. His June 1 remarks to Complainant Turner indicating that only he could initiate change and his June 3 comment to Complainant Boles indicating that he was "captain of his ship" confirm the accuracy of this inference and lead the Examiner to conclude that Respondent Odell was hostile toward the concerted activity of Complainant Turner.

The foregoing having established Respondent's knowledge of Complainant Turner's concerted activity and hostility thereto, the ultimate question becomes one of determining whether Turner's discharge was at least in part premised upon Respondent's animus toward her statutorily protected actions.

The Respondent has asserted that Complainant Turner was discharged solely because the parties had verbally agreed that her employment would end on June 1. Complainant Turner denies that any such agreement existed. Initially it is noted that it seems highly unlikely that an employe would discuss complaints about working conditions, as Turner did on June 1, unless she had every expectation of continued employment. Yet the Respondent's assertion is plausible in light of the decrease in production which occurs during the summer and the rather informal relationship which existed between Respondent and its employes. However, the Examiner simply can not ignore the overpowering inference of discrimination which is created by the timing of Turner's discharge in relation to her concerted activity, especially her confrontation with Respondent Odell on the day of her dismissal. Therefore, the Examiner finds that Complainant Turner was discharged because of her protected concerted activity and thus that the Respondents violated Section 111.06(1)(a) and (c) of WEPA.

DISCHARGE OF COMPLAINANT BOLES

The evidence presented at the hearing indicates that Complainant Boles participated in discussions with co-workers regarding unsatisfactory conditions of employment while Respondent Odell was present. It also reveals that Respondent Odell observed Complainant Boles presence at the July 2 union meeting. From Respondent Odell's close physical proximity to the employe discussions and his testimony that he was the recipient of some employe complaints, it can reasonably be concluded that Respondent Odell was aware of the existence and content of said discussions. Furthermore, while Odell was not directly informed of the reason for the June 2 Union meeting, it can be inferred that he was aware of its general purpose due to his knowledge of employe complaints, his specific June 1 conversation with Turner, and the presence of the discharged Turner at the meeting. On this basis the Examiner concludes that Respondent Odell was aware of the concerted activity of Complainant Boles. As previously discussed Respondent Odell's need to control the direction of his business rendered him hostile to any action which could conceivably threaten his authority. Having resolved the issues of Respondent's knowledge of Complainant Boles' concerted activity and hostility thereto, the Examiner turns to the issue of whether the discharge of Complainant Boles was at least in part motivated by Respondent's hostility toward said activity.

The Respondent urges that Complainant Boles was discharged in an effort to end the full-time employment relationship which he had never intended to develop. This rationale is premised upon Respondent Odell's asserted desire to avoid a feeling of responsibility for the support of Complainant Boles' children as well as the restrictions of a formal employer-employe relationship. While this assertion verges on the improbable, the Examiner finds it sufficiently credible in the context of Respondent Odell's self-image as an employer to warrant the conclusion that

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Respondent's actions were in part based upon the cited motivation. However, the record also reveals that Boles discharge occurred the day after the Union meeting. Furthermore it indicates that Respondent Odell made post-discharge comments to Boles to the effect that he was "captain of his ship" and expressing his wish that Boles would cease those activities which forced him to "redirect his energy." The timing of the discharge in relation to Boles concerted activity and Respondent Odell's post discharge remarks create a powerful inference of discrimination which requires that the Examiner find Boles discharge to have, at least in part, been motivated by Respondent's hostility to her concerted activity. Thus, the Respondents' action is found to have violated Section 111.06(1) (a) and (c) of WEPA.

DISCHARGE OF COMPLAINANT CASSELMAN

Complainant Casselman was not a participant in those employe discussions regarding unsatisfactory working conditions which were observed by Respondent Odell. Nor was she present at the June 2 Union meeting. No significant evidence having been presented which would indicate that Respondent Odell was aware of Casselman's concerted activity prior to her discharge, the Examiner must conclude that Respondent Odell lacked knowledge of said activity. Thus it cannot be concluded that Complainant Casselman's discharge was premised upon hostility toward her concerted activity. However this determination does not preclude a finding that her discharge violated Section 111.07(1) (a) and (c) of WEPA.

The Respondent has asserted that Complainant Casselman was discharged due to a decline in production and the forthcoming utilization of high school students as volunteer employes. While the record indicates that Respondent Odell did inform Complainant Casselman that her employment might be curtailed when the "volunteer" plan was implemented, there is no evidence that said plan was going to be operable in the foreseeable future. Thus, considerable doubt is cast upon Respondent's assertions. Complainant Casselman testified that Respondent Odell told her that she should not return to the bakery due to lack of work and the "disrupting activity" which had been occurring. The comment regarding "disrupting activity" can only be a reference to the concerted activity of Respondent's employes and given Respondent Odell's hostility thereto, the Examiner finds it credible that the Respondent would attempt to discard employes who might have been privy to or conceivably engaged in said activity. The discharge of an employe in an effort to discourage concerted activity clearly constitutes discrimination which is violative of Section 111.06(1) (a) and (c) of WEPA.

THE REMEDY

The fact that on July 19 Respondent Odell offered to reinstate Complainant Boles and that said offer was ultimately rejected raises an issue with respect to the amount of back pay to which Complainant Boles is entitled.

The Wisconsin Supreme Court has consistently held that a discharged employe has a duty to seek other employment and that the Employer has a right to a credit to the extent that the employe obtains work and earns wages, or might have done so. ^{2/} Thus an employe's right to back pay may

^{2/} State ex rel. Schilling & Klingler v. Baird, (1974), 65 Wis. 2d 394, 397; Schiller v. Keuffel & Esser Co., (1963), 21 Wis. 2d 545, 552, 553; Mitchell v. Lewensohn, (1947), 251 Wis. 424, 432, Gauf v. Milwaukee Athletic Club, (1912), 151 Wis. 333, 336.

end when she refuses an unconditional offer of reinstatement. 3/ However the Court has also held that a discharged employe is not obligated to seek or accept other employment of a "different or inferior kind in order to minimize damages." 4/ While this standard has not been developed in the context of offers of reinstatement, the Examiner can find no basis for not utilizing this established test in the case at hand. The Examiner thus turns to the issue of whether the offer of reinstatement made by Respondent Odell to Complainant Boles constituted an offer of "different or inferior" employment.

The record reveals that at the time of discharge Complainant Boles was functioning as a baker earning 6¢ per dozen cookies produced and \$3.50 for each batch of granola. On June 19, 1976, Respondent Odell offered to reinstate Boles at an unspecified job which was later revealed to be that of packaging cookies at a rate of 5¢ per dozen and baking half of the granola she formerly produced. The Examiner concludes that a job paying at least 16% less than that held prior to discharge is "inferior" employment and thus that Boles' refusal of said position does not affect the back pay to which she is entitled.

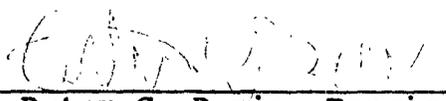
Boles' rejection of Respondent's July 21 offer of an unspecified job with "more responsibility" if she would "stop doing these things that directed his energy . . . into these other things" has no effect upon Boles' back pay inasmuch as said offer was overwhelmingly vague and contingent upon an end of Complainant Boles' concerted activity.

It is the Examiner's intent that the decrease in production which occurs in the summer months be given substantial consideration in the determination of the amount of back pay to which the Complainants are entitled.

Dated at Madison, Wisconsin this 7th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Peter G. Davis, Examiner

3/ Folding Furniture Worker, Inc. v. Wisconsin Labor Relations Board.