

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEE A. MAEGLIN,

Complainant,

vs.

PLYMPTON SQUARE LIMITED AND COZEE INN,

Respondent.

Case I

No. 20844 Ce-1691

Decision No. 14945-A

Appearances:

Ms. Karla Dobinski, Attorney at Law, appearing on behalf of the Complainant.

Mr. Donald F. Mitchell, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Lee A. Maeglin having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Plympton Square Limited and Cozee Inn has committed a prohibited practice within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin, on November 2, 1976, before the Examiner; and the parties having thereafter filed briefs; and the Examiner, having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Lee A. Maeglin, herein Complainant or Maeglin, was employed on a part-time basis as a waitress at the Cozee Inn restaurant, which was also called Plympton Square restaurant, from January 1975 until August 5, 1976 ^{1/}; that Maeglin generally worked two nights a week, on Friday and Sunday; and that Maeglin was terminated on August 5.

2. That Plympton Square Limited and Cozee Inn, herein Respondent, at all times material herein have operated a bar and/or restaurant in Verona, Wisconsin; that Marion Balousek is Respondent's owner; that Respondent owned and operated the restaurant and bar until about May 6, 1976, when it sold the restaurant, but not the bar, to RTV Enterprises, which was owned by Bob Van de Grift; that RTV Enterprises continued to operate the restaurant with the same personnel, including Maeglin; that on or about August 2, RTV Enterprises sold the restaurant back to Respondent and thereafter no longer operated the restaurant; that in the meanwhile, during that time that RTV Enterprises operated

^{1/} Unless otherwise noted all dates hereinafter refer to 1976.

the restaurant, Respondent continued to operate and maintain the bar, as a separate entity; and that Respondent was a successor employer to RTV Enterprises.

3. That Balousek had an office in the same building with the Cozee Inn bar and restaurant; that Balousek was in the Cozee Inn restaurant almost every evening when it was operated by RTV Enterprises; that Balousek made suggestions about the running of the restaurant to the restaurant manager Janet Linschied and to owner Robert Van de Grift; that these suggestions were sometimes acted upon; that Balousek informed Linschied on July 16 he was going to take the restaurant back and she could stay on as hostess, not manager; and that Van de Grift told Linschied on July 27 he was firing her because Balousek told him to do so; and that Balousek thereafter hired someone else to replace Linschied.

4. That it was rumored among the Cozee Inn waitresses that the new restaurant manager would be Sue Buchert, a former employee of Balousek's; that one of the manager's duties is to supervise the waitresses; that Buchert had acted as manager for a few weeks when the restaurant was under the prior ownership of Plympton Square Ltd.; and that the waitresses were then unhappy with working conditions under Buchert's management.

5. That Maeglin was involved in attempting to organize a walkout of the waitresses to protest the hiring of Buchert if she were hired as the new manager; that the walkout was planned to protest working conditions under Buchert; that the walkout was to take place on Friday, August 6, during the busiest time of the evening; that the waitresses were to leave the restaurant and walk into the bar; that both Van de Grift and Balousek knew of the planned walkout well before August 6; that Balousek knew that the walkout involved employee grievances; that Balousek knew or suspected Maeglin was one of those organizing the walkout; that the walkout was called off at some time prior to August 6 because not all the waitresses wanted to participate; and that Balousek did not know that the walkout had been cancelled until August 6.

6. That Maeglin was scheduled to work on Friday, August 6; that Balousek telephoned Maeglin on August 5 and there asked her whether she was still employed full-time for another employer; that Maeglin answered yes; that Balousek told her that since she had a full-time job elsewhere, he had found someone who needed the money more than she did and that, as a result, he would not be needing her services anymore; that Balousek never asked Maeglin whether she could work more hours; and that Balousek never asked Maeglin to choose between her full-time job and her job at the restaurant.

7. That on August 6, Balousek telephoned two of the other waitresses scheduled to work that evening and asked them about the planned walkout and about rumors that either of the waitresses might not show up for work that evening.

8. That Respondent on August 6 employed the following employees: two bartenders scheduled to work three or four nights a week; four waitresses - Kathy Belcher, scheduled to work four nights a week, Renee Jones, scheduled to work three nights a week, Sandy Wiendert, Complainant's replacement, scheduled to work three nights a week, and Diane Disch, schedule unknown; that Respondent also employed a cook, scheduled to work five or six nights a week, an assistant cook scheduled to work two nights a week, a dishwasher scheduled to work one or two nights a week; and two bus girls scheduled to work two or three nights a week, that one of the two bartenders worked during the day as a barber; and that the assistant cook, the dishwasher and the two bus girls were high school students.

9. That Kathy Belcher was scheduled to work four nights a week; that Belcher quit work the week after Maeglin was discharged; that Belcher was replaced by a waitress scheduled to work three nights a week; that after Belcher left, the total number of waitresses scheduled to work each night was the same as it has been prior to August 5.

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

CONCLUSION OF LAW

That Respondent discriminatorily terminated Lee Maeglin in violation of Section 111.06(1)(a) of WEPA.

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

ORDER

IT IS ORDERED that Respondent, its officers and agents, shall immediately:

1. Cease and desist from discriminating against Lee Maeglin.
2. Take the following affirmative action which the undersigned finds will effectuate the purposes of WEPA.
 - (a) Immediately offer to reinstate Lee Maeglin to her former position, and pay to Lee Maeglin a sum of money equal to that which she would have earned, including all benefits, had she been retained, less any amount of money that she earned or received that she otherwise would not have earned or received had she been working part-time.
 - (b) Notify all employees, by posting in conspicuous places in its offices where employees are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and 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.
 - (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 6th day of April, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

Appendix "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employees that:

WE WILL NOT DISCRIMINATE against Lee A. Maeglin, or any other employees because of their concerted protected activities.

WE WILL offer immediate reinstatement to Lee A. Maeglin to her former position and we shall make her whole.

Dated this _____ day of _____, 1977.

By _____
Plympton Square Limited and Cozee Inn

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSION OF LAW AND ORDER

Complainant Maeglin asserts that Respondent discriminatorily terminated her because of her role in the planned August 6 proposed walkout, in violation of Section 111.06(a)1 of WEPA. Respondent, on the other hand, asserts that it did not act unlawfully on the grounds that there was no employer-employee relationship and because there was no collective bargaining relationship. Respondent's contentions are without merit.

Thus, it is immaterial that there was no collective bargaining relationship herein, as WEPA is not limited to situations involving such relationships. Thus, employees have certain statutorily protected rights, irrespective of whether a collective bargaining representative is on the scene, provided that employees are engaged in concerted protected activities aimed at their "mutual aid or protection". 2/ The question of whether Maeglin was engaged in such activity is discussed below.

Also without merit is the claim that the complaint should be dismissed because Maeglin was not in an employee-employer relationship at the time of the August 5 events. It is true, of course, that Maeglin never had a chance to report for work for Balousek after the latter repurchased the restaurant from RTV Enterprises on or about August 2. Respondent's position to the contrary, however, that fact is not dispositive of the instant proceeding. This is so because the statutory proscription found in Section 111.06(1)(a) of WEPA applies to a successor employer 3/ when such an employer seeks to discriminate against employees because of their concerted protected activity. 4/ Furthermore, the record here establishes, as noted in greater detail below, that Respondent terminated Maeglin because of the latter's efforts to precipitate a walkout on Friday, August 6. Since Maeglin's activities carried over to the time that Respondent took over the business, it follows that the planned walkout was directed against Respondent, the restaurant's then current owners. In such circumstances, it must be concluded that Maeglin was not deprived of the protection accorded by Section 111.06(1)(a) merely because of the changing ownership herein.

In light of the above, it must therefore be decided whether (1) Maeglin was engaged in concerted protected activity which was aimed at "mutual aid or protection"; (2) if so, whether Respondent knew of that activity; and (3) whether Respondent refused to retain Maeglin at least in part because of said activity.

With reference to the first issue, the record shows that Maeglin was engaged in concerted protected activities. For, as set forth in Finding of Fact No. 5, Maeglin and other waitresses planned a walkout to protest what they perceived would be a change in their working conditions

2/ Section 111.04 of WEPA states that employees can "engage in lawful, concerted activities for the purpose of collective bargaining or for other mutual aid or protection" (Emphasis added). See, for example, Carver Ice Cream Company, 1803 (9/48).

3/ Since Respondent operated the same business, with the same personnel, at the same location, it was a successor to RTV Enterprises.

4/ See, for example, West Suburban Transit Lines, Inc. 158 NLRB 794.

if Sue Buchert were hired as manager. Maeglin testified that the waitresses objected to Buchert because,

"She worked there before, and she didn't know how things were run. She didn't know what to do, . . . she had us cleaning all the time which is exactly what we felt waitresses shouldn't be doing.

Q. What do you mean by cleaning?

A. In the kitchen, and doing things other than tending to the customers which we felt was our primary concern as being waitresses."

A second waitress, Kathy Belcher, also testified to the rumor that Sue Buchert would be manager and "conditions under her management were very bad." Going on Belcher testified that "we were trying to unionize so that we could get some action on it."

The Commission has characterized such employe action to protest low level management as an attempt to improve working conditions, and not as an interference with management rights. Thus, in Juneau County, the Commission held:

"Employe grievances relative to ineffective, negligent supervision which potentially holds an adverse impact upon the manner in which employes perform their jobs, . . . are protected as being for the mutual aid and protection of the employes." 5/

The planned protest here was aimed at improving or at least preventing what was perceived as a degeneration of working conditions. Further, there is testimony that the waitresses herein did not know who was the actual owner during the transition period when there was talk that the restaurant was being sold back to Plympton Square Ltd. As a result, they did not know whom to talk to during that time. In such circumstances, it is immaterial that the planned walkout never occurred, as Maeglin's activity in talking with the other waitresses and planning the walkout did constitute protected concerted activity under the Commission's decision in Juneau County, supra.

That being so, it must now be determined whether Respondent had any knowledge of Maeglin's activity and the planned walkout. As to this, Balousek acknowledged that Van de Grift, the prior owner of the restaurant, told him about the planned walkout several weeks before it was to occur. Balousek also spoke to bartender Hagen who told him that one of the waitresses, Renee Jones, had been contacted about the walkout. Going on, Balousek stated that Hagen told him that Jones had been contacted by employe Kathy Belcher or Magelin. Balousek conceded that he spoke to Jones about the matter and there told Jones that he had heard the employes were "planning a little rebellion against Van de Grift . . ." Balousek added that he again heard "rumblings" of the walkout on August 3. Based upon the foregoing, it is clear that Balousek knew of the planned walkout before it occurred and that he suspected that Maeglin may have been behind it.

Commenting on the planned walkout, it is clear that Balousek was not sympathetic towards it because, in his words,

5/ (12593-B) 1/77.

" My concern was that I owned the bar, and on Friday night at times we're all jammed up with people. I thought it would be poor public relations in having the waitresses coming in there complaining to the customers about some grievances but not indicate it."

As to Maeglin's discharge, Balousek alleges that when he repurchased the restaurant he adopted a new policy under which only those waitresses who could work a minimum of three nights a week and did not have a full-time job during the day would be retained. In support of this claim, Balousek testified that the prior restaurant owner "had most of his problems because they were people that were all part-time and had other jobs." For the reasons noted below, this claim is without merit.

Thus, Respondent hired full-time students and housewives as waitresses, even though both of those activities involve a substantial commitment of time during the day. Furthermore, although Maeglin's replacement worked three nights a week, instead of Maeglin's two, waitress Belcher left the following week and her replacement worked only three nights a week instead of Belcher's four. As a result, the total number of waitresses scheduled to work each night did not change. Additionally, it is most significant that Balousek never even asked Maeglin whether she would be available to work extra nights. That was something Balousek certainly should have asked if he in fact was concerned over Maeglin's availability. His failure to do so indicates that he really was not concerned about her availability. Moreover, Balousek did not apply the alleged new policy consistently, as the alleged new policy applied only to waitresses, even though other employees worked less than three nights a week or had other full-time jobs. Indeed, Balousek did not even contact all other employees to find out if they had other jobs. It is also important to note that Maeglin had been employed for over a year and a half during which time her work was generally satisfactory, a point which was conceded by Balousek.

In review, then, the record shows that Maeglin was one of the leaders of the planned August 6 walkout, that that walkout was planned to protest a possible deterioration in working conditions, that Balousek learned of the walkout and of Maeglin's possible role in leading it, that Balousek knew that the walkout centered on employee grievances, that Balousek feared that the walkout would hurt his business, that Balousek did not even offer Maeglin an opportunity to work more nights, that Balousek applied his purported new policy in a disparate manner, and that Balousek terminated Maeglin on August 5, only one day before the planned August 6 walkout.

In light of the foregoing considerations, it can be inferred, and I so find, that Balousek terminated Maeglin because Balousek feared that Maeglin would lead the planned walkout on August 6, thereby harming Balousek's business. Since Maeglin's activity constituted concerted protected activity, it follows that her termination was based on discriminatorily related considerations in violation of Section 111.06(1)(a) of WEPa. To rectify that conduct, Respondent shall take the remedial action noted above.

Dated at Madison, Wisconsin this 6th day of April, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner