

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case I
No. 21352 Ce-1716
Decision No. 15280-A

Ms. Mary Lynne Donohue, appearing on behalf of the Complainant.
Dewitt, McAndrews and Porter, Attorneys at Law, by Mr. Jon P.
Axelrod, appearing on behalf of the Respondents.

The above-named Complainant having on February 15, 1977, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed an unfair labor practice within the meaning 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, Conclusion of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Madison, Wisconsin on March 31, 1977 and April 1, 1977; and a transcript of said proceedings having been received on April 25, 1978, and the Examiner having considered the evidence and arguments of counsel makes and files the following Findings of Fact, Conclusion of Law and Order.

1. That Back Door Limited, herein Respondent Back Door, is an employer operating a bar in Madison, Wisconsin known as the Back Door; that Rodney Scheel, herein Respondent Scheel, is Respondent Back Door's owner and that Ron Turner is the manager of the Back Door, and at all times material herein functioned as Respondents' agent.

2. That Donna J. Wipperfurth, herein Complainant, was employed as a bartender by Respondents from approximately April 1, 1975 until her discharge on November 29, 1976; that Complainant and other employees would constantly engage in wide ranging discussions about various subjects which on occasion included their conditions of employment; that Complainant and Turner often casually discussed the merits of various management policies regarding the operation of the bar; that following such discussions, Complainant would periodically ask for an increase in pay; that on one occasion Complainant and Turner had a philosophical discussion about unions; that during said discussion Turner indicated that he didn't think the employees at the Back Door would ever unionize because they were generally part-time students who left Respondents' employ after relatively short periods of time.

3. That in early September, 1976, Complainant and several other employees were discussing their conditions of employment and their relationship with employees of the Washington Hotel which Respondent Scheel managed; that Complainant suggested that the employees from the Back Door and the Washington Hotel should meet to discuss their relationship and other mutual concerns about working conditions and offered her home as the site for such

a meeting; that Complainant subsequently invited employees from both the Back Door and the Washington Hotel to such a meeting; that she also invited Turner and Respondent Scheel to said meeting; that Turner and Respondent Scheel, at Complainant's request, informed various employees at both establishments about the meeting and its purpose; that Turner and Respondent Scheel did not discourage any employee from attending said meeting; and that no one other than Complainant attended said meeting in mid-September, 1977.

4. That in October, 1976, Turner began to work on a schedule at the Back Door which exposed him to the regular cocktail hour clientele who were typically present during the Complainant's working hours; that as a result of said exposure, Turner began to receive complaints from certain customers who indicated that Complainant had on occasion embarrassed them or made them feel uncomfortable when she was bartending; that at least one such customer stated that he would no longer patronize the Back Door as long as Complainant was employed; that several employees and customers also told Turner that Complainant was giving away a substantial number of free drinks; that certain employees complained to Turner about Complainant's "bossiness" and interference while they were working; and that employees also informed Turner that Complainant occasionally took bottles of liquor for personal use while saying she would pay for them later.

5. That in October, 1976, Turner became aware that the Back Door was experiencing a drop in profit which appeared to be caused by losses in liquor inventory which could not be accounted for; that in an attempt to control the inventory problem Turner discharged two employees and also decided to install a liquor control system which he hoped would eliminate any problem with free drinks and over-pouring of drinks; that when Complainant became aware of the impending installation of the control system she informed Turner of her opposition thereto; that on November 24, 1976, the liquor control system was installed at the Back Door; that while working on said date, Complainant twirled a component of the system around in her hand thereby bouncing it off the floor and ceiling; that Complainant also allowed certain customers to drink free for the remainder of her shift; that on or about November 25, 1976, an employee informed Turner of Complainant's conduct on November 24; and that based upon his knowledge of Complainant's November 24 conduct, and the customer and employee complaints set forth in Finding of Fact 4, Turner discharged Complainant on Respondent's behalf on November 29, 1976.

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

CONCLUSION OF LAW

That Respondents Back Door Limited and Rodney Scheel, by discharging Complainant Donna J. Wipperfurth, did not commit an unfair labor practice within the meaning of 111.06(1)(a) or (c) of the Wisconsin Employment Peace Act.

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

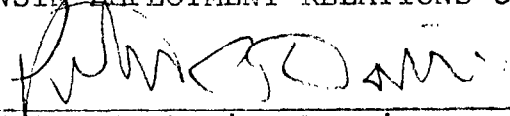
ORDER

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

Dated at Madison, Wisconsin this 30th day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Complainant alleges that Respondents discharged her because she was engaging in and had engaged in lawful concerted activity protected by Section 111.04 of WEPA, and that Respondents thereby committed an unfair labor practice within the meaning of Section 111.06(1)(a) of said Act. Respondents deny Complainant's allegations. Complainant's assertion that Respondents committed illegal interference is based upon a belief that her discharge was a result of Respondents' adverse reaction to her allegedly protected concerted activity. To meet her burden of proof with respect to the discriminatory nature of the discharge, Complainant must prove by a clear and satisfactory preponderance of the evidence that she was engaged in concerted activity which is protected by WEPA; that Respondents were aware of Complainant's protected concerted activity; that Respondents were hostile toward said activity; and that the discharge was motivated at least in part by Respondents' opposition to said activity. 1/. If Complainant were to meet her burden of proof, the Examiner would find Respondents to have committed not only the illegal interference under Section 111.06(1)(a) which Complainant pleaded but also an unfair labor practice within the meaning of Section 111.06(1)(c) of WEPA.

Section 111.04 of WEPA states "Employees shall have the right of self-organization and the right to form, join, and assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all such activities."

Complainant appears to urge that both her efforts to organize an employee meeting in September, 1976, and her purported presentation of employee "grievances" qualify as "lawful, concerted activities for the purpose of . . . mutual aid or protection." With respect to the efforts to organize a meeting at which working conditions were to be discussed, the Examiner agrees with Complainant and finds that said effort did constitute lawful concerted activity within the meaning of Section 111.04 which is protected by WEPA. However, with respect to the alleged presentation of employee grievances, the record simply does not contain sufficient evidence to support a conclusion that Complainant ever presented such grievances to Respondents. It would appear that when Complainant discussed wages and other working conditions with Turner, she was acting on her own behalf and did not purport to, nor did she in fact, represent other employees. Such individual complaints do not fall within the scope of activity which Section 111.04 of WEPA protects inasmuch as they do not constitute concerted activity.

Having concluded that Complainant's September, 1976 organizational activity did constitute protected concerted activity, the question becomes one of determining whether Respondent was aware of said activity and hostile thereto. Inasmuch as Complainant invited both Turner and Respondent Scheel to the meeting, there can be no question that they were aware of Complainant's activity. However, it is the undersigned's conclusion that Complainant has failed to meet her burden of proof regarding Respondents' "hostility" toward her actions.

The record does reveal that during a philosophical discussion with Complainant, Turner indicated his belief that there would never be a union at the Back Door and Complainant would appear to argue that such a statement creates an inference of hostility toward any protected concerted activity, such as Complainant's September 1976 efforts, which might be preliminary to

1/ St. Joseph's Hospital, (8787-A, B) 10/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage, (9781-A,B,C) 3/71, 4/71, 7/71; and A. C. Trucking Co., Inc., (11731-A) 11/73.

the formation of a labor organization. However, it is the undersigned's conclusion that such an inference is unwarranted inasmuch as Turner credibly testified that said statement was simply a prediction of the future based upon brief employee turnover. It is also noteworthy that Turner and Respondent Scheel told other employees about the meeting which Complainant had scheduled and made no effort to discourage any employee from attending said meeting. It would seem highly improbable that Turner and Scheel would have acted in this manner if they were hostile toward Complainant's activity. Finally, the record demonstrates that on the date Complainant was discharged, Respondents were aware of certain complaints about Complainant's conduct as an employee and said knowledge presents a highly plausible motivation for the discharge which further weakens Complainant's assertion that the discharge was a result of Respondents' animus toward concerted activity. In light of the foregoing the Examiner simply cannot conclude that Complainant has met her burden of proof regarding Respondents' hostility toward her protected concerted activity. Therefore, the instant complaint must be dismissed.

Dated at Madison, Wisconsin this 30th day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner