

such as the one last night will not happen again. Unless you return to the Eggplant on Wednesday, June 28, at 3:30 P.M., or unless you propose over the phone other mutually agreeable arrangements for your return to work, I will assume that you are no longer interested in working at the Eggplant and that you have resigned.

Because of our current situation at the restaurant, I have sent a copy of this letter to the union representative.

7. That Boehm returned to work after his suspension; that on August 18, 1978, Boehm answered a telephone call and indicated to Hockett that it was for him; that Hockett turned the stereo down because he believed it was too loud for conversation in the restaurant and for using the phone; that Boehm wanted Hockett to use the phone in the back of the restaurant so that the volume of the music could be made louder; that Hockett indicated to Boehm that the music would remain at the lower volume and also that he had frequently turned down the music in the past; that Boehm argued with Hockett, and replied, "Bullshit," and, consequently, Hockett told Boehm that he should leave; that Boehm attempted to apologize to Hockett for starting the argument, however, Hockett informed Boehm that he had been previously warned and to sign out in that he was terminated; that prior to Boehm's departure, he pointed his finger at Hockett and told him to "shut up"; and that Koepke, on behalf of Respondent, sent the following letter to Boehm:

As a result of yesterday afternoon's incident at the Eggplant, you have been terminated. I understand you insisted on turning the music up after Virgil told you that the music was loud enough and was for the benefit of the customers. You used abusive language and said that you would turn the music up when Virgil left. Virgil then said that you better leave, reminded you of having been warned about insubordination on several occasions, and instructed you to sign out for the last time.

I truly regret that this incident of insubordination occurred, but you have been warned about similar incidents several times. In my letter to you of June 24, 1978, I gave you a final warning for such incidents. I stated then that if you were involved in another serious incident, you would be immediately terminated.

I understand that you have received your paycheck.

8. That Boehm was involved in the organizational efforts of Complainant to be the exclusive collective bargaining representative for Respondent's employees; that Respondent's agents were cognizant of Boehm's participation in said activities; and that Respondent's discharge of Boehm was not motivated by any animus against the Union or for reasons related to the exercise of his rights under Section 111.04 of the Wisconsin Employment Peace Act.

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

CONCLUSION OF LAW

That Respondent, by the acts of its agents in discharging Boehm, did not discriminate against him because of his lawful, protected exercise of his rights under Section 111.04 of the Wisconsin Employment Peace Act, and did not commit a prohibited practice within the meaning of Section 111.06(1)(a) or (c) of the Wisconsin Employment Peace Act.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner enters the following

ORDER

IT IS ORDERED that the complaint of unfair labor practices filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 27th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant basically contends that during its organizational drive at The Eggplant, Inc. in 1978, the Respondent changed its working relationship with Boehm and its other employees. Complainant indicates that Boehm, in concert with other employees, participated actively in the union organizing drive at the Eggplant and that Hockett and Koepke were cognizant of Boehm's active participation in said activities. Complainant avers that Hockett and Koepke harbored an animus against Boehm and other employees because of their activities, and consequently, that Boehm's discharge was motivated, at least in part, by Respondent's animus against the union. On the other hand, the Respondent maintains that Boehm was discharged for just cause and that the termination of his employment relationship with the Eggplant was not predicated upon any anti-union considerations.

The gravamen of the complaint herein is that Respondent discriminated against Boehm and otherwise interfered with his rights under the Wisconsin Employment Peace Act by discharging him. Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's discharge of Boehm was based, at least in part, on anti-union considerations. 2/ To prevail, Complainant must establish that Boehm was engaging in protected activity, that Respondent had knowledge of such activities, that Respondent bore animus against Boehm because of such activity, and that, finally, Respondent's stated reason for discharging Boehm was pretextual in nature, or that one of the reasons which motivated Respondent to discharge Boehm was based on the fact that Boehm engaged in protected activity.

It is clear that Boehm, in conjunction with other employees of The Eggplant, Inc. actively participated in the union organizing drive of The Eggplant, Inc., that said conduct constitutes protected concerted activities, and that Respondent was cognizant that Boehm was involved in the exercise of such activities. Complainant failed, however, to prove to the satisfaction of the Examiner that Hockett or Koepke harbored any union animus against Boehm for engaging in said activity. 3/ Even assuming arguendo that the Respondent did develop an anti-union animus because of the employee's participation in the union organization campaign, it is clear that Boehm's discharge was not motivated by any anti-union animus harbored by the Respondent. If anything is painfully obvious from the record, it is that it was Boehm, himself, rather than Respondent, who provoked Boehm's discharge.

Boehm's problems with Respondent began prior to Complainant's entry into the scene at The Eggplant, Inc. Prior to the union organization

2/ St. Joseph Hospital (8787-A, B) 10/69, 12/69; Earl Wetenkamp, d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71 and AC Trucking Company, Inc. (11731-A) 11/73.

3/ The record does indicate that Koepke made a statement to the effect that "There won't be a union here," in response to some employees' initial desire to have a union represent them. Said statement, along with Hockett's and Koepke's preferences that the restaurant not be organized, that its employees not become affiliated with Complainant, and if the restaurant did become organized, that they not be the entrepreneurs, do not demonstrate to the undersigned's satisfaction that Hockett or Koepke harbored any anti-union animus against Boehm. At most, it represents the candid reactions of Respondent's agents of being told about the possibility of a union representing its employees. Furthermore, although Complainant's witnesses testified that Koepke and Hockett were more hostile toward employees after the election petition was filed, they could not cite concrete examples of such hostility.

campaign, Boehm had difficulty getting along with Respondent's agents. His problems continued after Complainant filed its election petition. Although he had no authority to do so, he scheduled himself as a waiter, and when Koepke confronted him about his scheduling himself as a waiter, Boehm was rude and used abusive language towards Koepke. Boehm was told that if he utilized such language in the future, he would be disciplined. Then, on another occasion, when Koepke informed Boehm that he had sent an employe home because business was slow, Boehm told Koepke to "get out of my kitchen," and was condescending, rude, and insubordinate towards Koepke. Koepke instructed Boehm to leave the restaurant, but Boehm left only after Koepke made continued requests of Boehm to do so. Boehm returned to work, after his suspension, with a final warning notice. Then, the incident occurred which was the straw that broke the camel's back. After Hockett had turned down the music in the restaurant and informed Boehm that it would remain at its present level, Boehm told Hockett "Bullshit." Although Boehm attempted to apologize to Hockett for starting an argument, Hockett informed Boehm that he had been previously warned and to sign out since he was terminated. Upon Boehm's departure, he pointed his finger at Hockett and told him to "shut up."

The record reveals that a significant conflict existed between Boehm and Respondent's agents, a conflict that developed prior to the union organizing campaign. This conflict resulted in some unpleasant confrontations between Boehm and Respondent's agents which involved variations of the theme relating to Boehm's unwillingness to cooperate and his inability to work harmoniously for his employer.

The Examiner is convinced that the record supports a finding that Respondent's motive for discharging Boehm was based exclusively on its perception of Boehm as an insubordinate employe. The Examiner need not make any finding herein concerning whether Boehm's discharge was for cause. Having ascertained that Boehm was not discharged because of an animus borne by Respondent towards Boehm's protected concerted activity, it is the Examiner's judgment that Respondent did not commit an unfair labor practice within the meaning of Section 111.06(1)(c), of the Wisconsin Employment Peace Act. The finding that Boehm's discharge was not predicated upon a discriminatory motive also requires that the related allegation concerning a violation of Section 111.06(1)(a), be dismissed.

Dated at Madison, Wisconsin this 27th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner