

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 659, ALLIED INDUSTRIAL :
WORKERS OF AMERICA, AFL-CIO, :
Complainant, :
vs. : Case VIII
S-B MANUFACTURING COMPANY, : No. 26647 Ce-1877
LTD., : Decision No. 18020-B
Respondent. :

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Examiner Stuart S. Mukamal having, on January 9, 1981, issued Findings of Fact, Conclusion of Law and Order, and Memorandum accompanying same, in the above-entitled matter, wherein he concluded that the above-named Employer did not violate the collective bargaining agreement existing between it and the above-named Union, by terminating the employment of Kathleen Nicosia on the basis of her absentee record, and that therefore the Employer did not commit any unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Union having, on January 19, 1981, timely filed a petition requesting the Wisconsin Employment Relations Commission to review said decision of the Examiner; and the parties have filed briefs in support of, and in opposition to, the petition for review; and the Commission having reviewed the record, the Examiner's decision, the petition for review, and the briefs filed with regard thereto, and being satisfied that that Examiner's Findings of Fact, Conclusion of Law and Order be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusion of Law and Order issued in the instant matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman
Morris Slavney
Morris Slavney, Commissioner
Herman Torosian
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND:

In its complaint, the Union asserted three bases to support an allegation that the Employer committed an unfair labor practice in violation of Sec. 111.06(1)(f), Stats., by discharging Kathleen Nicosia for excessive absenteeism. First, the Union alleged that said discharge violated Article 5, Section 5, of the collective bargaining agreement between the parties which provided that: "Seniority shall cease . . . (if) the employee is discharged for just cause." Second, the Union alleged that the discharge violated a grievance settlement reached by the parties in July 1979 concerning Ms. Nicosia's absenteeism. Finally, the Union alleged the discharge violated Ms. Nicosia's rights under Wisconsin's Fair Employment Act. The Employer denied any violation of the labor agreement or the settlement agreement, and affirmatively asserted that the discharge was for just cause, traceable to excessive absenteeism caused by Ms. Nicosia's chronic asthma.

THE EXAMINER'S DECISION:

The Examiner concluded that Ms. Nicosia's discharge was for just cause. To reach that conclusion, the Examiner drew from the Commission's decision in Andis-Clipper Company:

. . . where chronic absenteeism is due to genuine illness beyond the control of the employee and where progressive discipline will have no effect on the absences, discharge of an employee may be proper even without progressive discipline.
1/

The Examiner concluded that the collective bargaining agreement which governed Ms. Nicosia's employment, required that "just cause" be defined with reference to the Employer's published rules, and that said rules revealed a clear Employer interest in the employees' prompt and regular attendance. The Examiner phrased the rule for decision thus:

. . . the Respondent had just cause to discharge Ms. Nicosia if it can prove that her absences, even if excused by illness, were in fact excessive and if her continued employment would place an undue burden upon the respondent.

The Examiner found that Ms. Nicosia's absences were in fact excessive and placed an undue burden on the Employer. Prior to the July, 1979 grievance settlement regarding her absenteeism, Ms. Nicosia lost, according to the Examiner's calculations, approximately 22% of her total working time to absence, tardiness or early departure. The Examiner characterized her attendance record after the settlement as follows:

Ms. Nicosia's attendance record improved following . . . July 3, 1979. However, subsequent to January 1, 1980, her attendance record once again deteriorated.

This deterioration was statistically analyzed by the Examiner, and he concluded that the deterioration was primarily caused by Ms. Nicosia's hospitalization and resultant request for a 32 working day leave of absence in June, 1980.

1/ (10634-A at 8) 11/72.

The Examiner concluded that Ms. Nicosia's hospitalization and request for an extended leave of absence in June 1980, coupled with her previous attendance record viewed as a whole, formed a basis from which the Employer could reasonably conclude that absences due to her asthma had occurred, and would continue to occur regardless of any effort on her part. Since she worked on an assembly line which could not be efficiently run without prompt and reliable employee attendance, it followed that Ms. Nicosia's continued intermittent absences would unduly burden her employer.

The Examiner concluded that the "rule" of the Andis-Clipper Company decision applied to Ms. Nicosia, and that her discharge without progressive discipline was for "just cause" as that term was used in Article 5, Section 5, of the labor agreement, and in the relevant Employer work rules.

THE PETITION FOR REVIEW:

The Union argues that the Examiner's decision should be overturned for four reasons. First, the Union agrees that Article 5, Section 5, must be read together with Employer work rules, but asserts that the relevant rules provide that excessive excused absences "may be the basis for disciplinary action." "Disciplinary action", the Union asserts, on its face and in light of past practice, means progressive discipline. Second, it argues that the discharge was based on an unsubstantiated belief that Ms. Nicosia's asthma would continue unchecked in the future. This belief was unreasonable, the argument goes, because of Ms. Nicosia's improved attendance record since the grievance settlement of July, 1979. Third, the Union asserts that the Examiner's decision violates the Wisconsin Fair Employment Act, by effectively assuring that no future employer will ever hire Ms. Nicosia because of her handicap. Finally, it asserts that the Examiner's decision condones discrimination against Ms. Nicosia since other employees had worse attendance records in the period of July, 1979 to June, 1980.

The Employer would have the Commission affirm the Examiner's decision. It asserts that under Article 5, Section 5, of the labor agreement "just cause" can be an employee violation of a provision of said agreement. It notes various contractual benefits provided full-time employees, and asserts that Ms. Nicosia has violated the agreement by receiving full-time benefits even though she had not fulfilled the attendance standard for full-time employees set out in Article 4, Section 2. The Employer also asserts that it did not have the burden to prove Ms. Nicosia's asthma would not improve.

DISCUSSION:

Both parties agree that the labor agreement must be read together with the work rules. Those work rules indicate the Employer's clear interest in prompt and regular attendance. The Union, however, asserts that the plain meaning of a work rule which provides that excessive excused absenteeism may be the basis for "disciplinary action" limits the expression of the Employer's interest in regular attendance to progressive discipline. This assertion is not reflected in the language of the work rule which generally refers to "disciplinary action". In addition, the fact that the Employer had chosen to employ progressive discipline in the past does not mean it was forever bound to do so. To require an Employer, absent a clear contractual requirement, to continue to use progressive discipline where that discipline could serve no useful purpose, would violate past decisions of the Commission, 2/ and would only serve to discourage the use of progressive discipline in cases similar to Ms. Nicosia's.

Thus it becomes necessary to examine the reasonableness of the Employer's belief that progressive discipline would prove useless in Ms. Nicosia's case. This issue is ultimately a dispute on the time period relevant to the Employer's assessment of Ms. Nicosia's attendance record. The Union asserts that only the period since the grievance settlement of July, 1979 is relevant, and that in this period Ms. Nicosia's attendance record was better than some of her fellow employees. The Examiner, however, concluded that the entire period from Ms. Nicosia's application for employment to the time of her discharge was relevant.

2/ Ibid.


The Examiner's approach was proper. There is nothing in the grievance settlement of July, 1979 which obligated the Employer to ignore Ms. Nicosia's prior attendance record. In light of that attendance record, the Employer had a reasonable basis to believe, on June 25, 1980, when Ms. Nicosia requested an extended leave of absence, that her condition was chronic and uncontrollable. On March 6, 1973, in an employment application, Ms. Nicosia stated her asthma was "seasonal, light, and has not interfered with work." By the date of her discharge, the Employer had ample reason to believe the condition was in fact more serious, and was in fact beyond her control.


With respect to the Union's claim that Ms. Nicosia enjoys the protection of the Wisconsin Fair Employment Act, this Commission has no jurisdiction to administer same. The precise issues before the Commission concern the amenability of Ms. Nicosia's condition to progressive discipline, and the reasonableness of the Employer's belief that this condition precluded Ms. Nicosia from efficiently performing her job.

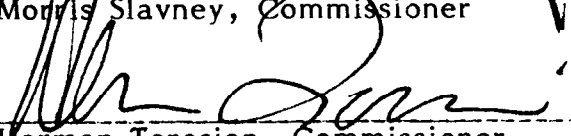
Since no evidence was submitted on the circumstances of employees with worse attendance records than Ms. Nicosia, the Examiner properly concluded that sustaining any claim that Ms. Nicosia was discriminated against would be too speculative. We have sustained the decision of the Examiner.

Dated at Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner