STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SONJA McCLURE,

Complainant,

vs.

DAIRYLAND GREYHOUND PARK, INC.,

Respondent.

Case 6
No. 51031 Ce-2153
Decision No. 28134-C

Appearances:

Ms. Dinah M. Crayton, Crayton Law Offices, S.C., 2731 Washington Avenue, P. O. Box 1404, Racine, Wisconsin 53405, appearing on behalf of Sonja McClure, referred to below as McClure or as the Complainant.

Mr. Jonathan O. Levine, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Dairyland Greyhound Park, Inc., referred to below as Dairyland.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural history of this case up to October 20, 1995, is set forth in Dec. No. 28134-B (McLaughlin, 10/95). In response to the Order stated in that decision, hearing was completed in Kenosha, Wisconsin, on January 10, 1996. A transcript of that hearing was provided to the Commission on January 23, 1996. The parties filed briefs and reply briefs by June 10, 1996.

FINDINGS OF FACT

1. Dairyland Greyhound Park, Inc., referred to below as Dairyland, is an employer, organized as a corporation regulated by the State of Wisconsin and maintaining its offices at 5522 104th Avenue, Kenosha, Wisconsin 53144. Dairyland operates a facility which presents Greyhound races. At that facility, Dairyland offers food and beverage services as well as para-mutuel betting.

2. Sonja McClure, referred to below as McClure or as the Complainant, is an

individual residing, at all times relevant here, at 1530 15th Avenue, Suite 18, Kenosha, Wisconsin 53140. Dairyland hired McClure on May 21, 1990, to serve as a Bartender. She was an employe of Dairyland until her discharge on February 15, 1994.

3. Throughout her employment, Dairyland was administered through a number of operational areas, or departments. Included among those departments were the following: the Food and Beverage Department; the Mutuels Department; the Racing Department; the Parking/ Admissions Department; and the Security Department. McClure, as a Bartender, worked in Dairyland's Food and Beverage Department. Bruce Schubrook was the Director of the Food and Beverage Department at the time of McClure's hire. Schubrook was not, however, an employe of Dairyland. Schubrook worked for a company with which Dairyland contracted the management of its Food and Beverage Department. Early in 1992, David Sloma replaced Schubrook. Sloma was replaced in June of 1993 by Andy Meckler. Meckler was a Dairyland employe. McClure's immediate supervisor, at all times relevant here, was Gary Andreucci. Andreucci, as Beverage Manager, reported to the Director of the Food and Beverage Department, but served as the immediate supervisor to Dairyland's roughly fifteen to twenty Bartenders. Each of Dairyland's departments could maintain its own policies, including, in some cases, personnel policies. In December of 1992, Dairyland published an "Employee Handbook," referred to below as the Handbook. The Handbook was designed, at least in part, to state policies common to all Dairyland employes. Included among the Handbook's provisions were the following: 1/

> **SHORTAGES AND PROPERTY DAMAGE**
>
> Shortages are a big concern for the racing industry, where most positions are cash-handling positions. We take shortages very seriously and so should you.
>
> We require employees to reimburse the track for shortages that are their fault. If a shortage is determined to be your fault, arrangements will be made for you to repay it. If you believe that a shortage is not your fault, tell your Department Head immediately and a sincere effort will be made to resolve the issue. We want to hear your side of the story. If you are not satisfied with your Department Head's decision, you may contact the General Manager for a review of the situation.

1/ Any obvious spelling errors in material quoted in the Findings of Fact have been corrected.

Excessive shortages can result in the termination of your employment. Excessive means excessive in dollar amount or in the number of shortages for which you are found to be responsible. You can make a difference. If you pay close attention to what you are doing and approach your job honestly, shortages should not become an issue for you.

Making sure that company property, the property of patrons, and your property are safe is also our concern. Everybody needs to act responsibly when it comes to the property of others. If you don't, you may be held financially responsible for damaged property and disciplined up to and including discharge.

CONDUCT

To help you succeed as a Dairyland employee, we feel that you should be aware of the conduct for which disciplinary action may be necessary. Dairyland disciplinary procedures have been designed to correct improper conduct. The rules were not designed for punishment or to alter the at-will employment relationship we have. Certain types of conduct are more severe than others and the specific disciplinary action necessary will be determined by your supervisor. That action will depend on the specifics of each case including severity and frequency of the infraction. Discipline for the following conduct may include immediate termination even if there have been no previous disciplinary actions. This conduct includes, but is not limited to, the following:

<u>THEFT</u>

. . .

<u>DRUGS AND ALCOHOL</u>

. . .

<u>PERFORMANCE</u>

. . .

Producing cash overages or shortages . . .

The "Shortages and Property Damage" and "Conduct" sections appear on page 22 of the Handbook. The reference to "overages or shortages" under the "Performance" heading of the "Conduct" section appears at page 24 of the Handbook. The Handbook also states a "Disciplinary Grievance Procedure" which, by its terms, applies to "disciplinary action resulting in time off in excess of three working days -- a suspension or termination." The procedure provides for an Advisory Committee which reports to the General Manager who makes the "final decision affirming, reversing or reducing the discipline." The Advisory Committee includes employe representation.

4. The Wisconsin Employment Relations Commission described the early history of organizational activity at Dairyland thus:

> On August 5, 1990, a petition for an election among certain of the employes of the Employer was filed by the International Brotherhood of Electrical Workers. Subsequent petitions were filed by several other unions. Unit determination elections were conducted on May 24, 1991. Representation elections were held on August 2, 1991, in three bargaining units, i.e., mutuels, maintenance and residual. The number of challenges to ballots cast by the employes in the maintenance unit election were sufficient to produce an inconclusive result. However, the parties agreed that further proceedings as to the maintenance unit should be held in abeyance. Certification of the results of the elections in the mutuels and residual units was delayed until June 26, 1992, by the resolution of objections to the elections and by litigation over an amended election petition. On August 7, 1992, runoff representation elections were conducted in the mutuels and the residual units. On August 14, 1992, objections to the election in the residual unit were filed by Teamsters Local No. 744 and by the Employer. Objections were not filed with respect to the election in the mutuels unit and the Commission issued a Certification of Results for the election in said unit on August 19, 1992. The Commission dismissed the objection filed by the Teamsters on February 9, 1993, and the Employer withdrew its objections on February 16, 1993. On March 16, 1993, the Commission issued a Certification of Results for the election in the residual unit. On June 4, 1993, the Commission dismissed the petition in the maintenance unit based on the Employer's uncontested assertion that it was no longer the employer of the individuals

performing maintenance services. 2/

McClure, throughout this period of time, supported unionization of Dairyland. She did not, however, work on behalf of any particular union. During this period of time she served as an employe representative on Dairyland's in-house grievance procedure. She was also actively involved in voicing work place concerns of other Bartenders. Her written evaluation, dated January 5, 1993, stated, among other points, the following:

> Sonja is a major part in the success of Beverage area . . . Sometimes attitude towards management can be negative. Other than that Sonja has little fault with her overall performance . . . She is a leader/spokesperson for the bar staff . . .

Andreucci prepared this evaluation.

5. The organizational activity described in Finding of Fact 4 above did not result in the Commission's certification of any union as the exclusive collective bargaining representative of employes in the unit in which McClure was an eligible voter. McClure did not, however, change her opinion that Dairyland employes should be represented by a union in their relationship with Dairyland. Sometime early in 1993, she decided to form a union which could further the interests of Dairyland employes. She named the union Wisconsin Independent Gaming Local 711, which is referred to below as WIGL. On or about July 26, 1993, McClure filed to obtain a taxpayer number for WIGL from the Internal Revenue Service. She held organizational meetings for interested employes at local taverns and at her home. A number of Dairyland employes attended such meetings and discussed with McClure the potential advantages of associating with WIGL. McClure also actively supported unionization in informal discussions with employes at Dairyland. On September 7, 1993, McClure, on behalf of WIGL, filed a petition with the WERC seeking an election to determine if WIGL could be named the exclusive collective bargaining representative for certain Dairyland employes. Shortly after this filing another union, United Food and Commercial Workers, Local 1444, intervened to become a party to the requested election. McClure served as the spokesperson for WIGL throughout the WERC's processing of the September 7, 1993 election request. This included appearing at a pre-hearing conference conducted in Madison on October 4, 1993, and the filing of a brief in mid-November of 1993. Sometime after filing the WIGL's petition for election, McClure approached Dairyland's then-incumbent President and Chief Executive Officer, Arden Hartman, and asked if Dairyland would voluntarily recognize WIGL. Hartman declined. Dairyland actively campaigned against the organizational efforts of

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2/ Dairyland Greyhound Park, Inc., Dec. No. 27925 & 27926 (WERC, 1/94) at 2-3, Finding of Fact 7.

WIGL and other unions.

6. At all times relevant here, Dairyland maintained ten bars in its Food and Beverage Area. Included in that number is a VIP lounge/sky-box and an outside portable bar. Each bar was assigned a station number. Some bars were staffed by one Bartender and some were staffed by two. Where a Bartender worked alone at a station, the Bartender could not leave the station unattended. Some Bartenders chose to stay at their station an entire shift, others chose to take short breaks during a shift. McClure typically chose to take breaks from her station. When she did, she would be relieved by a fellow employe or by a supervisor, sometimes including Andreucci. From January of 1993 through July of 1994, a Bartender starting their work shift would receive a stand sheet, which detailed the non-mixed drink inventory of that station. The inventory would include, among other things, cups, bottles of beer and wine-coolers, etc. The "beginning count" of a station would reflect the "end count" of the Bartender at that station for the prior shift. The Bartender starting a shift was responsible for the "beginning count," which was intended to verify the "end count" of the Bartender of the prior shift. During a Bartender's shift, Dairyland tracked liquor poured by a Bartender for a mixed drink or as a shot through the "Berg System." The Berg System is in part mechanical and in part electronic. The system is based on a black magnetic piece inserted in the ring of the mechanism through which a shot of liquor is poured. When inverted, the magnetic device registers a shot. Andreucci ultimately entered the number of shots registered by the Berg on a spread sheet program. Dairyland tracked the money handled by a Bartender during a shift by requiring the Bartender to obtain cash for their till from the "money room." Each Bartender would be given a money bag from the money room. The Bartender would count the money, confirm the amount and then sign a paper verifying the count. The Bartender would then return to their station and fill the cash register. At the end of a shift, the Bartender would count the money in the cash register, put the amount on a slip of paper, place the paper together with the cash in the money bag, return to the money room and sign in again. Andreucci reconciled the cash receipts from a station with that station's beginning and end counts, including Berg reports.

7. The reimbursement requirement of the "Shortages and Property Damage" policy stated in the Handbook was applied to Mutuels Clerks, but not to Bartenders. During McClure's employment with Dairyland, Bartenders were not permitted to repay shortages. An exception to this rule was made for Joe Ingrasci and for McClure. In Ingrasci's case, he over-charged a customer $20.00. He realized his mistake after the customer had left the area. He reported the problem to Andreucci, who in turn reported the matter to Sloma. Andreucci and Sloma decided to allow Ingrasci to repay the customer the $20.00. McClure once inadvertently included $8.50 in tips in her money bag. She reported the matter to Andreucci, who allowed her to retrieve the money from the money room before he reconciled the counts for her station.

8. A Shortage/Overage Policy to be consistently applied to Bartenders was first implemented by Sloma. The policy was not put into writing, and it is not apparent when the policy first became consistently enforced. The policy permitted a Bartender's till to be out of balance by no more than $5.00 or 1% of total sales. If these tolerances were exceeded, discipline was meted

through a system of progressive discipline. Under that system, the first offense resulted in a verbal warning; the second and third offenses resulted in written warnings; the fourth offense resulted in an unpaid suspension; and the fifth offense resulted in termination. Discipline was considered to remain effective for twelve months from the date of imposition of the discipline. Whenever the Shortage/Overage Policy may have first been implemented, Sloma demanded its strict enforcement starting sometime in January of 1993. Prior to that point, Dairyland had issued little formal discipline to any of its long-term Bartenders, including McClure. Between January and May of 1993, a number of Bartenders, including McClure, began to receive discipline under the Shortage/Overage Policy. Andreucci was concerned with the strictness of the policy and the level of discipline flowing from it. By May of 1993, two Bartenders, Joe Ingrasci and Lee Prueher, were at the suspension stage of the procedure. In early May, Ingrasci again exceeded the tolerances. Rather than impose a suspension, Andreucci took his concerns with the policy to Ron Sultemeier, Dairyland's then incumbent General Manager. Sultemeier agreed with Andreucci, and directed him to impose an additional written warning prior to a suspension, and not to apply the 1% tolerance unless at least $5.00 was involved. Ingrasci and Prueher each received this additional warning. The change in policy assured Andreucci that he would not lose any of his bartending staff prior to the Greyhound Race of Champions (GROC) in June of 1993. This race was a major event at Dairyland.

9. In 1990, McClure was given a verbal warning for a cash overage in her till. The overage resulted from her putting change, which a customer had forgotten to take, back into the till. In January of 1993, McClure received her next formal discipline from Dairyland. Dairyland stated the reason as "Improper cash handling . . . Left money bag unattended." The discipline was rooted in a robbery which occurred on January 26, 1993. That evening, McClure and another Bartender, Jan Mlekush, had completed their count of sales, and had deposited their receipts into money bags. Each had worked at separate cash registers which were part of a long bar. At the close of their shift, after each had completed their counts, a customer asked them a series of questions. After the customer left, McClure realized her money bag had been stolen. Mlekush's had not. Dairyland issued a written warning to McClure. Mlekush received no discipline. McClure refused to sign the discipline form, but did add the following comments to it:

> I refuse to sign this as I was robbed. The money bag was on the back bar not out in public.

10. On March 16, 1993, McClure received a verbal warning for turning in cash which was $14.50 short of her registered total sales of $1063.50. McClure again refused to sign the form, noting "I do not believe it was bartender error!" McClure and another Bartender, Sharon Feigel, handled the station that shift. Andreucci disciplined each of them. McClure believed the shortage was traceable to a malfunction of the Berg mechanism. Three Bartenders had worked the stand before McClure and Feigel. Dairyland documented a $2.00 shortage for those three Bartenders.

Two Bartenders worked the stand the shift following McClure and Feigel. Dairyland documented a $1.00 shortage for those two Bartenders for that shift.

11. On July 11, 1993, Andreucci issued a first written warning to McClure for a cash shortage of $10.25 on registered total sales of $689.25.

12. On July 31, 1993, Andreucci issued a second written warning to McClure for a cash shortage of $9.75 on registered total sales of $587.00. The counts for the Bartenders who worked the station the shifts before and after McClure balanced. Of the nine stations worked on McClure's shift, four, including McClure's, did not balance. Only McClure's exceeded the Shortage/Overage Policy tolerances.

13. On September 14, 1993, Andreucci issued an additional second warning to McClure for a cash overage of $11.00 on registered total sales of $227.50. Andreucci made the following comments on the form:

> Sonja was over 11.00 and her cash to inventory was 227.50(inv)/238.50(cash). This is over the 1% and or $5.00 limit allowed. Sonja is receiving another second warning and not a 3 day suspension for this occurrence. Sonja claims to have sold more 3.00 bergs than computer registered . . .

McClure added to the form: "I do remember selling more $3.00 bergs than recorded." After she emptied her register for that shift, she found a twenty dollar bill in her work area. She attributed the balance of the overage to the Berg mechanism's failure to record three $3.00 shots of liquor. The counts for the Bartenders who worked this station the shifts before and after McClure balanced.

14. On December 9, 1993, Andreucci issued a three day suspension to McClure for a $10.00 cash shortage on registered total sales of $269.75. McClure added to the form that she was "(n)ot (the) only person in till." The counts for the Bartender who worked this station the shift after McClure balanced, but the counts for the Bartender who worked this station the shift before McClure shows a $0.75 shortage. Andreucci originally scheduled the suspension for December 27 through December 29, 1993. McClure, however, was unwilling to permit Dairyland to schedule the suspension for a slow time. She ultimately served her unpaid suspension from December 11 through December 14, 1993. McClure filed a grievance regarding this suspension. She filed a five page statement of her position with Sultemeier and Robert Otto, then employed by Dairyland as a Human Resources Consultant. In her statement, McClure asserted that other Bartenders had received preferential treatment under the Shortage/ Overage Policy; that the discipline rooted in the January robbery was unwarranted; that the March and September disciplines were traceable to Berg malfunctions; and that her performance as a Bartender warranted consideration Dairyland was not affording her.

15. On February 12, 1994, the station worked by McClure did not balance. Andreucci discovered the shortage and reported the matter to his supervisor, Andy Meckler. Meckler, in turn, reported the matter to Terry Gaouette, Dairyland's then incumbent Chief Financial Officer. Neither Otto nor William Apgar, then Dairyland's General Manager, were at the Kenosha facility at that time. Meckler wanted guidance on whether to terminate McClure. Gaouette reviewed the file, consulted with Otto by phone, and directed Meckler to proceed with the termination. On February 15, 1994, Dairyland terminated McClure. The termination form states under the heading "REASON FOR THIS NOTICE" the following: "Producing cash overages/shortages according to Dairyland Handbook pg. 22 & pg. 24." The cash shortage was $10.00 on registered sales of $136.25. McClure noted on the form: "Was not only person in till." The counts for the Bartender who worked the station the shift before McClure show a $1.00 overage, while the counts for the Bartender who worked the station the shift after McClure balanced. Meckler escorted McClure from the track. Dairyland issued a letter confirming the termination, dated February 16, 1994, which states:

> This is to inform you that your termination with Dairyland Greyhound Park, Inc. has been acknowledged as of February 15, 1994 for the following reason:
>
> Dismissed/excessive cash shortages/overages.
>
> Enclosed is the grievance procedure . . .

McClure filed a grievance regarding her termination. On February 25, 1994, she appeared before the Grievance Committee. She made a presentation to the committee. She read the committee a prepared statement which reads thus:

> First I would like to turn everyone's attention to pages 22 & 23 of the employee handbook.
>
> D.G.P. has listed a minimum of 38 rules for which disciplinary action may be necessary. I am sitting before you today because of one violation of approx. 38 rules -- "Shortages."
>
> All of you should know that I count my money bag when I pick it up from the money room and I am the only one that counts it before I return it to the money room.

> As you can see by my comments on my write ups I am never the only person in my till during any performance. Someone, whether it's another bartender or a manager has to use the same till while I am on break.
>
> Also the problem could be with the "berg system."
>
> For those of you that do not know what the berg system is -- it's the metered system with which we use in order to pour liquor. Every bartender at D.G.P. has had a problem at one time or another.
>
> For quite sometime a few of the Bergs were not functioning at all and two bartenders would have to use one berg.
>
> The week before the G.R.O.C. Gary was running around trying to get them all in working order or replace what he couldn't fix.
>
> I asked him why he did not call the company and have them fix the bergs. Gary said it costs 2-3 hundred dollars for a service call so he had to fix them himself with the help of the bar back Aaron.
>
> Thinking back on the 3 1/2 years I have been here at D.G.P. taking an average of 5 sessions per week that I have worked -- times 50 weeks per year -- at an average of $500.00 that I have rung up per session -- comes to a total of $437,500.00 and at the 1% shortage or average set up by the Food & Beverage department that puts me at an average of approx. 99.99 percent correct.
>
> I feel I should be reinstated as a bartender here at D.G.P. with full pay.

In a letter to McClure dated February 28, 1994, Otto stated the committee's determination thus:

> The Grievance Committee has met and made its recommendation to the General Manager. Mr. Apgar has reviewed the committee recommendation and your termination with Dairyland Greyhound Park stands.

16. McClure's support of unionization efforts at Dairyland, her serving as spokesperson

for fellow employes' concerns, and her role in forming and advocating WIGL constitute lawful, concerted activity. Andreucci specifically, and Dairyland management generally, did not discriminatorily apply the Shortage/Overage Policy to McClure. Dairyland did not discipline or discharge McClure based on hostility toward McClure's exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. McClure, while employed by Dairyland, was an "Employe" within the meaning of Sec. 111.02(6)(a), Stats. McClure is not an "Employe" within the meaning of Sec. 111.02(6)(b), Stats.

2. Dairyland is an "employer" within the meaning of Sec. 111.02(7), Stats.

3. McClure's discipline and discharge do not constitute a violation of Sec. 111.06(1)(a), (b) or (c), Stats.

ORDER 3/

3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may

The complaint, as initially filed on May 23, 1994, and as subsequently amended, is dismissed.

Dated at Madison, Wisconsin, this 5th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

DAIRYLAND GREYHOUND PARK, INC.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint was initially filed by McClure on her own behalf. The factual allegations of the complaint consist of four sentences. The complaint asserts violations of Secs. "111.04, 111.06 (a), (b), (c)." At the first day of hearing, the complaint was discussed at some length, and was amended to state allegations of Secs. 111.06(1)(a), (b) and (c), Stats.

THE PARTIES' POSITIONS

Complainant's Initial Brief

After a review of the factual background, the Complainant contends that the Wisconsin Employment Peace Act (WEPA) and the Municipal Employment Relations Act (MERA) state "an identical right to engage in concerted activities." Complainant contends that authority governing the application of MERA is appropriately applied to this WEPA case. Complainant also notes that these rights parallel federally granted rights, thus making certain federal authority applicable.

With this as background, Complainant argues that the application of Sec. 111.06(1)(a), Stats., requires an objective evaluation of whether Dairyland's conduct "reasonably tends to impair the free exercise of protected rights." This evaluation, Complainant notes, is to be made without regard to Dairyland's intent in terminating McClure. Because McClure's discipline punished her for concerted activity, Complainant concludes an unfair labor practice must be found. Pointing to Krauski's and Cline's testimony, Complainant asserts that "Dairyland employes could reasonably perceive McClure's discipline and termination as retaliatory based upon the timing of that discipline in relation to her activities with WIGL." A review of McClure's actions in processing the WIGL election establishes that "it was not until the Respondent was made aware of McClure's increased and aggressive organizing efforts concerning WIGL in 1993 that she began receiving disciplinary warnings with increased intensity."

Beyond this, the Complainant asserts that the following considerations dictate the conclusion that Dairyland meted disparate disciplinary treatment to McClure:

> (1) the Respondent disparately meted out . . . discipline for shortages and overages in that it allowed one employee (Joe Ingrasci) to make up a shortage; (2) . . . it did not discipline a co-worker (Jan Mlekush) for a shortage that occurred during the robbery on 01/27/93; (3) . . . it suspended her in 1993 and did not suspend Joe Ingrasci or Lee Prueher when they had accumulated a sufficient number of write-ups to warrant a suspension; and (4) . . . it, in bad faith, terminated her for excessive shortages.

That Dairyland reassigned Cline based on her association with McClure underscores this assertion.

Noting the "in-part" test governing Sec. 111.06(1)(c), Stats., Complainant urges that the stated reasons for McClure's discipline and termination are "pretextual" in nature. The "timing of McClure's discipline and subsequent termination and its treatment of her the day that she was terminated . . . manifest the Respondent's hostility of McClure for her union activity." A review of the evidence establishes, according to Complainant, that "(b)ecause McClure was at the forefront of WIGL's organizing campaign, the Respondent increased its efforts at ousting her." The law will not, Complainant urges, condone this:

> Although the Respondent has a right to conduct an anti-union campaign, that right does not extend to unlawfull(y) terminating an otherwise good employe who is engaged in concerted activity.

Complainant concludes that "it has established its prima facie case and that the evidence in the record supports a finding that Respondent" committed the alleged unfair labor practices. It necessarily follows that appropriate remedial orders should be entered, including "reinstatement and backpay along with any interest that may have accrued."

Dairyland's Reply Brief

After a review of the factual background, Dairyland asserts that the Wright Line 4/ analysis should be applied to the complaint's allegations. Under that standard, Complainant has failed to "come close to making even a prima facie showing."

4/ Wright Line, Wright Line Div., 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F2d 899, 108 LRRM 2513 (CA 1, 1981), *cert. denied*, 455 US 989, 109 LRRM 2779 (1982).

More specifically, Dairyland contends that it had no idea McClure was active in organizational activity until she filed an election petition with the WERC in September of 1993. By this time, McClure had already received three levels of discipline. This establishes that she "was a victim of the shortage policy, not anti-union animus." Complainant's attempts to avoid the implications of this conclusion are undercut by the inconsistency of her testimony viewed in light of the allegations of the complaint and the balance of record evidence.

Nor can the timing of McClure's discipline be considered a valid basis to infer discrimination. Her disciplinary history tracks that of other Bartenders. The bulk of that history precedes Dairyland's knowledge of her concerted activities. Beyond this, the imposition of a third written warning within a week of her filing an election petition shows no more than a continuing problem involving the Berg System. That Complainant "failed to produce a shred of evidence that Dairyland could or did tamper with (the) Berg System" precludes drawing the inferences sought by Complainant. That McClure did not allege anti-union animus tainted the discipline until well after the fact underscores, according to Dairyland, the lack of substantial evidence of discrimination.

Dairyland contends that in marked contrast to the weakness of evidence indicating discrimination must be weighed substantial evidence establishing McClure was treated even-handedly. She received each level of progressive discipline mandated by the Shortage/Overage Policy. Her attempt to characterize the Berg System as flawed cannot excuse her arrearage since other Bartenders worked the System without problem. More significantly, Andreucci treated each Bartender alike in his application of the Shortage/Overage Policy. No exceptions were granted to any Bartender for flaws in the Berg System or for having another Bartender share the same till.

Complainant failed, according to Dairyland, to adduce any credible evidence of disparate treatment. McClure, unlike Mlekush, was disciplined for the loss of a $500 cash drop. Mlekush, however, had not negligently left her drop unattended. Even if it is assumed Dairyland was "out to get" McClure, this incident inexplicably produced a verbal warning, not a termination. Beyond this, Dairyland contends that Complainant has failed to document its assertion that other Bartenders received preferential treatment under the Shortage/Overage Policy.

The record fails to manifest credible evidence of proscribed animus, according to Dairyland. Its active campaign against WIGL and other unions demonstrate no more than the exercise of First Amendment rights, and the honest expression of opposition to organizational campaigns. That Dairyland has gone through several representation elections without, prior to this complaint, any accusation of conduct constituting an unfair labor practice demonstrates the absence of the proscribed hostility Complainant alleges. Beyond this, Dairyland urges that the evidence adduced at hearing demonstrates no more than honest disagreement between supervisors and employes concerning the benefits of unionization. Allegations that Wilkomm, Krauski or Cline were effectively disciplined for associating with McClure have no credible support.

Even if Complainant had demonstrated some basis to infer proscribed animus on the part of Dairyland, NLRB and judicial precedent establishes that "(p)roof of an unlawful motive cannot be presumed merely by establishing the existence of union animus." Since the evidence demonstrates only that "McClure violated a well-known rule" which called for the very progressive discipline she received, the complaint "is easy to decide." That McClure subjectively feared discharge constitutes less than objective proof of unlawful conduct. Complainant's case demonstrates no more than McClure's "general complaint about what she perceives as the overall unfairness" of the Shortage/Overage Policy. That complaint is, however, "not a complaint the WERC can remedy." Dairyland concludes the complaint must be dismissed.

Complainant's Reply Brief

Acknowledging that the complaint turns on the application of the Shortage/Overage Policy, Complainant argues that "this policy was used arbitrarily and capriciously against her in such a way that she was set up by the Respondent so that she would appear to have excessive shortages and overages to justify its termination of her." The policy was, Complainant urges, a tool behind which Dairyland masked its intent to silence a known union activist before her activism spread.

The allegation that Dairyland knew nothing of McClure's organizational activity prior to September of 1993 is "simply incredulous." A review of the evidence establishes that "it was common knowledge around Dairyland that McClure was organizing a union and involved in union activities well before she filed the petition in September of 1993." Dairyland's treatment of Wilkomm and Cline underscore this conclusion, as well as Dairyland's hostility to her organizational efforts.

Beyond this, Complainant contends that the Berg System was both flawed and the vehicle chosen by Dairyland to accomplish the unlawful end of terminating McClure. The evidence establishes that the System was flawed and that when both McClure and another Bartender shared the same till, only McClure would receive discipline.

The evidence establishes violations of Secs. 111.06(1)(a), (b) and (c), Stats. The termination came about because McClure "had intensified her union activities and involvement as evidenced by her filing of the petition for election in September of 1993." That filing "was the spark that lit the flame and caused the Respondent to summon its legal counsel to advise it on how to terminate McClure." Complainant contends that the evidence establishes that Andreucci served as Dairyland's "eyes and ears" to manipulate the Shortage/Overage Policy to yield McClure's termination. Dairyland's preferential treatment of Ingrasci and Prueher underscores the discriminatory application of the policy. The absence of uniformity in the application of the policy precludes viewing McClure's discharge as legitimate. Complainant concludes that unfair labor practices must be found and appropriate remedial orders entered.

DISCUSSION

Section 111.04, Stats., states the right of employes covered by WEPA to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." Employer conduct violating the rights granted in Sec. 111.04, Stats., is characterized as an "unfair labor practice" under Sec. 111.06(1), Stats. The subsections of Sec. 111.06(1), Stats., enforce the rights granted under Sec. 111.04, Stats., and specify the type of conduct sanctioned as an employer unfair labor practice. A review of the complaint's allegations and of the evidence and argument offered in support of those allegations establishes that the only subsection which can be considered significantly at issue is Sec. 111.06(1)(c), Stats.

Section 111.04(1)(a), Stats., makes it an unfair labor practice for an employer to "interfere with, restrain or coerce . . . employes in the exercise of the rights guaranteed in s. 111.04." Threshold to a determination of interference under this subsection is the determination of the exercise of lawful, concerted activity protected by Sec. 111.04, Stats. In this case, the existence of such activity is not in doubt. From early in her employment, McClure took an active and vocal interest in organizational activity. Andreucci's January, 1993 evaluation acknowledged that she served as an advocate for Bartenders' concerns. Her advocacy role in the formation and development of WIGL is undeniable. Each of these broadly stated types of conduct reflect the lawful, concerted activity protected by Sec. 111.04, Stats.

The next step necessary to an application of Sec. 111.06(1)(a), Stats., is to isolate the employer conduct alleged to interfere with this exercise of concerted activity. Complainant's argument focuses on Dairyland's discipline of McClure from January of 1993 through her termination in February of 1994.

The next step necessary to an application of Sec. 111.06(1)(a), Stats., is to determine whether McClure's discipline constitutes proscribed interference with concerted activity. This determination cannot, however, be made without considering the motivation for the discipline. This makes it impossible to determine the existence of an independent violation of Sec. 111.06(1)(a), Stats., and forces the analysis onto Sec. 111.06(1)(c), Stats.

Violations of Sec. 111.06(1)(a), Stats., can be independent or derived from the existence of a violation of another subsection. 5/ The Commission, in its application of Sec. 111.06(1)(a), Stats., has tended not to state a standard determining what constitutes interference. Rather, the Commission has tended to focus on the facts of each case, assessing whether a given set of facts constitutes interference. As Complainant asserts, however, the Commission has developed a

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5/ Oconomowoc Plumbing Inc. and Oconomowoc Plumbing Systems, Inc., Dec. No. 20214-B (WERC, 3/84).

standard for this determination in applying the parallel provision of MERA. The Commission has stated that standard thus:

> Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights . . . If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere . . . (E)mployer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer has valid reasons for its actions. 6/

The Commission has, in certain cases under WEPA, implied that intent can be a relevant consideration under Sec. 111.06(1)(a), Stats. 7/ Doing so, however, does not parallel the development of the law under MERA, and unnecessarily blurs the distinction between the application of Secs. 111.06(1)(a) and (c), Stats. The elimination of the consideration of intent from an analysis of employer interference allegations is rooted on the difficulty of determining intent in any case and on the fact that the exercise of lawful, concerted activity can be coerced even in cases where an employer does not specifically intend to coerce employes. If, then, Sec. 111.06(1)(a), Stats., is to state a meaningful independent source of unfair labor practice conduct, the more objective standard developed under MERA should be applied.

This objective standard cannot, however, be meaningfully applied in all cases. 8/ More significantly, it cannot be meaningfully applied here. As McClure repeatedly testified, she and fellow employes feared her organizational activity would cost her a job. This perception cannot be dismissed as unreasonable. That the discharge of a union advocate could reasonably be expected to chill other employes' desire to assume an advocacy role cannot be dismissed as an unreasonable assessment of the effect of Dairyland's discharge of McClure. The difficulty with these points is that no less a case can be made for the reasonableness of the perception that repeated violations of the Shortage/Overage Policy should be expected to yield discipline, including discharge. Pushed to

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6/ Cedar Grove-Belgium Area School District, Dec. 25849-B (WERC, 5/91) at 11-12.

7/ See, for example, Shady Lawn Nursing Home, Dec. No. 7516-B (WERC, 8/66).

8/ See, for example, Milwaukee Board of School Directors, Dec. No. 27685-A (McLaughlin, 8/94); aff'd by operation of law Dec. No. 27685-B (WERC, 9/94).

its extreme, the objective standard of Sec. 111.06(1)(a), Stats., can become a shield for otherwise disciplinable conduct.

These inalterably posed extremes can be reconciled by considering the issue of intent. Only if Dairyland intended to punish McClure, or other employes through her, for the exercise of lawful, concerted activity, can her discipline and discharge be considered proscribed by Sec. 111.06(1), Stats. This makes the application of Sec. 111.06(1)(a), Stats., derivative to the application of Sec. 111.06(1)(c), Stats.

Section 111.06(1)(b), Stats., makes it an unfair labor practice for an employer to "initiate, create, dominate or interfere with the formation or administration of any labor organization. . . ." The standard appropriate to an application of this section has been stated thus:

> The type of conduct contemplated by that statutory provision involves active employer participation in the formation of the labor organization. 'Interference' requires employer participation to the degree that the employer is the moving force behind the creation of the labor organization, however the degree of employer control over the organization is less than that required to find 'domination.' 'Domination' requires such employer control over the formation of the labor organization as to constitute it 'a mere tool of the employer, rather than the freely chosen representative of the employes.' 9/

The statement of this standard establishes the inapplicability of this section to the facts posed here. There is no evidence of employer involvement in, or domination of, WIGL at any point in its history. At most, Complainant's arguments indicate that McClure's discipline and discharge effectively determined the viability of WIGL. This point, however, is speculative and adds nothing to the analysis required by Sec. 111.06(1)(c), Stats. As noted below, that subsection requires a determination whether McClure's discipline and discharge was motivated by hostility toward her assertion of the lawful, concerted activity manifested by her formation and advocacy of WIGL. The record demonstrates no persuasive evidence of the type of conduct proscribed by Sec. 111.06(1)(b), Stats.

Section 111.06(1)(c), Stats., makes it an unfair labor practice for an employer to "encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of

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9/ West Side Community Center, Inc., Dec. No. 19212-A (Shaw, 4/83) at 23, all citations omitted; aff'd in relevant part, Dec. No. 19212-B (WERC, 3/84).

employment . . ." Dairyland urges this provision is best determined by the Wright Line analysis stated by the NLRB. 10/ The Commission has, however, considered and rejected this contention. The Commission has determined that the Muskego-Norway line of cases determine the appropriate standard for this subsection and for its companions in the MERA and the SELRA. The Commission considers this line of cases to have legislative and judicial approval. 11/ Against this background, it is unnecessary to address Dairyland's defense of the Wright Line analysis. It should also be noted that the application of either doctrine would dictate, in my opinion, the same ultimate conclusion.

The Muskego-Norway standard requires that Complainant prove, by a clear and satisfactory preponderance of the evidence 12/, (1) that Dairyland was aware of McClure's exercise of activity protected by Sec. 111.04, Stats.; (2) that Dairyland was hostile toward the activity; and (3) that Dairyland disciplined her based at least in part on this hostility. 13/

The evidence leaves no doubt that Complainant has proven the first element of the standard. McClure's exercise of concerted activity appears to have been continuous from her date of hire. The point at which Dairyland became aware of this activity is problematic. It is, however, apparent in Andreucci's January, 1993 evaluation of McClure that he understood her to be an advocate of employe concerns. Dairyland management generally was aware of her role in WIGL not later than the WERC's service of her election petition in early September of 1993. When Dairyland became aware of her activity poses a potentially significant issue, but that issue must be left to an examination of the latter two elements of the standard.

Contrary to Complainant's assertion, the record will not support a conclusion that Dairyland was hostile to McClure's exercise of concerted activity at any point during her tenure. It is important to underscore that "hostility" under the standard connotes more than "opposed to." It is apparent that Dairyland opposed the unionization of its work force, and campaigned to prevent it. Dairyland, like its employes, enjoys a right of free speech and the right to act, within legal limits, to express that right. 14/ The determination to be made here is whether Dairyland's opposition to the

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10/ Cited at Footnote 4/ above.

11/ See, generally, West Side Community Center, Inc., Dec. No. 19212-B (WERC, 3/84) and Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

12/ Sec. 111.07(3), Stats.

13/ Dec. No. 19212-A at 15, aff'd in relevant part, Dec. No. 19212-B at 4-6.

14/ See, generally, Mt. Carmel Nursing Home, Dec. No. 6352 (WERC, 5/63); Deaconess Hospital, Dec. No. 7008-D (WERC, 10/65); and Pavillion Nursing Home, Dec. No. 8127 (WERC, 7/67).

organization of its work force crossed the line between free speech and proscribed interference. If its opposition did so, the issue becomes whether that general hostility motivated, in part, specific conduct toward McClure.

The record will not support a conclusion that Dairyland's conduct crossed this line. The campaign literature submitted into the record cannot, standing alone, establish the level of interference necessary to support the inference Complainant seeks to have made. There has been no showing that any of Dairyland's election conduct has been successfully challenged. For example, the "voting bonus" pointed to by Complainant was unsuccessfully challenged before the WERC. 15/

Nor can the timing of the discipline meted to McClure serve to support the inference of hostility Complainant seeks. The timing of the discipline must, as Complainant asserts, be considered a relevant factor in assessing Dairyland's conduct. However, the evidence must make it persuasive to conclude the timing of the discipline was something more than coincidental. Here, it does not. McClure secured a tax number in July of 1993 for WIGL. She received written warnings on July 11 and July 31 of that month. There is, however, no persuasive evidence that Dairyland was aware of this activity on her part. Even if it was, McClure filed for the tax number on July 26. Thus, only the second discipline could be considered evidence of hostility. Beyond this, the presence of the July 11 discipline makes the inference that the discipline furthered the Shortage/Overage Policy at least as valid as that sought by Complainant. Similarly, McClure filed WIGL's election petition on September 7, and received another written warning one week later. Here too, there is no reliable evidence which would make this timing appear more than coincidental. Complainant notes that McClure was discharged roughly two weeks after prevailing before the WERC in a determination regarding the timeliness of WIGL's petition and on the need of that petition to include a showing of interest. This fact cannot be denied, but the significance of the fact is difficult to assess. Another union had intervened in the matter, and it is not apparent McClure's discharge aborted the organizational effort of that union. If it did not, it is not apparent why Dairyland would interfere with WIGL while ignoring the other union. Beyond this, it must be noted that there is no dispute that McClure's till was off in each of the instances she received discipline. Nor is there any dispute she received the level of discipline appropriate under the Sloma/Sultemeier Shortage/Overage Policy. Significant questions thus surround each of the instances of "suspicious timing" pointed to by Complainant. On balance, the record makes the inference of hostility untenable.

Complainant contends that the level of discipline picked up with the level of McClure's advocacy. This assertion does not, however, account for any of the discipline meted to McClure between January and September of 1993. Nor does it account for Dairyland's not adding the

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15/ Dairyland Greyhound Park, Inc., Dec. No. 26850-H, 26851-H (WERC, 2/93), Torosian dissenting.

robbery related warning to those generated under the Shortage/Overage Policy. Beyond this, it is not apparent what Dairyland stood to gain by the hostility Complainant alleges. Dairyland had, prior to September of 1993, withstood an organizational effort by a number of well-established unions. It is not immediately apparent why Dairyland would decide to resort to unlawful conduct to contain the threat mounted by WIGL.

Most significantly here, the discipline meted to McClure does not appear to have been a personal attack. Rather, it appears to reflect the more or less rote application of a policy sufficiently onerous to have caused concern among those who administered it. Ingrasci and Prueher did receive an additional written warning to keep them available for the GROC. In September of 1993, McClure received the same warning. Ingrasci was permitted to make up one shortage. McClure, however, was permitted to make up one overage. No other Bartenders have been proven to have received this benefit. McClure, like other Bartenders, did not like the Berg System. Andreucci, however, appears to have treated Bartenders even-handedly. He did not accept Berg malfunctions as an excuse for any Bartender, and similarly refused to recognize the presence of another employe in a till as a defense to discipline under the Shortage/Overage Policy. This is not to defend the policy as an employment relations issue. Rather, the issue is whether Dairyland acted toward McClure, as a union advocate, differently than it did toward other employes. Only if such disparate treatment is proven, does the inference of hostility become persuasive. On this record disparate treatment has not been proven.

Complainant has noted that at least two employes were treated adversely for associating with McClure, and that two employes overheard Dairyland managers make statements critical of McClure and her efforts. The evidence on these points is, at most, problematic. It is apparent Dairyland experienced, and arguably caused, employe turnover. It is also apparent Dairyland management opposed McClure's organizational efforts. What is significant to the complaint is whether this is related, even in part, to hostility toward her organizational efforts. The evidence will not reliably support the inference Complainant asserts.

Even if proscribed hostility could be inferred, it is not apparent Complainant has met the third element of the Muskego-Norway standard. It is undisputed that McClure's till was off on the occasions she received discipline. This means any shortage or overage must be attributed to deliberate manipulation. Evidence of manipulation is, however, lacking. It is not apparent if, or how, Andreucci could manipulate the Berg System. Even if he did, it would appear that the manipulation would be apparent to the Bartenders who performed the end or beginning counts preceding or following McClure's shift. No such testimony has been adduced. What evidence there is on the point indicates that Bartenders tended to be union supporters. Against this background, it is impossible to conclude Dairyland manipulated the Shortage/Overage Policy to rid itself of McClure.

In sum, the evidence demonstrates that McClure engaged in an extended course of lawful, concerted activity. The evidence will not, however, support a conclusion that Dairyland was

hostile, in the sense connoted by Sec. 111.06(1)(c), Stats., to this activity. Nor will the evidence support a conclusion that Dairyland disciplined McClure based on any factor other than its Shortage/Overage Policy. It follows that the complaint, as amended, must be dismissed.

Litigation of the complaint has been protracted. The conclusions stated above, in my opinion, accurately apply governing law to the evidence. Sometimes the apparent ease of applying law to fact obscures the depth of feeling surrounding those facts. It is worthy of note that the most compelling fact surrounding this litigation is that McClure, on any view of the evidence, was good at her work and respected by her colleagues. Her testimony was sincere and credible. The sole issue posed here, however, is whether the path leading to her discharge points to hostility proscribed by WEPA. The evidence manifests not this type of hostility, but the application of a policy her organizational effort was, conceivably, aimed to address. This irony cannot, however, provide the evidence of hostility otherwise lacking in the record.

Dated at Madison, Wisconsin, this 5th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner