STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
WORKER'S COMPENSATION DIVISION
P.O. BOX 7901
MADISON, WISCONSIN 53707
(608) 266-1340

2011-020424

NANCY L ROBBINS
N197 COLUMBUS STREET
WATERLOO WI 53594

Applicant,

vs. PLEASE SEE ENCLOSURE

JIM'S CHEESE PANTRY, INC.
410 PORTLAND RD
WATERLOO WI 53594-1200

Respondent,

SENTRY INSURANCE A MUTUAL CO
C/O SENTRY INSURANCE A MUTUAL CO
ATTN: WC CLAIMS
PO BOX 8032
STEVENS POINT WI 54481-8032

Insurance Carrier.

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A hearing was held in Madison, Wisconsin, on January 4, 2012 before Administrative Law Judge Nia Enemuoh-Trammell.

APPEARANCES: The applicant appeared in person and by Attorney Aaron N. Halstead. The respondent appeared by its attorney, Andrew R. Griggs.

The respondent employer conceded jurisdictional facts, an average weekly wage of $658.75 and that the applicant sustained a compensable, industrial injury on April 8, 2011.

At issue is whether the employer is liable under § 102.35(3) of the Wisconsin statutes for one year's lost wages because of its alleged refusal to rehire the applicant following her industrial injury of April 8, 2011.

Upon this issue, the Administrative Law Judge makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The applicant, Nancy L. Robbins, was born on September 1, 1957. The employer is a wholesale distributor of cheese and dry goods, which also operated a retail store. It is operated by Jim and Judy Peschel, who at one point owned equal shares of the business. The applicant began working for the respondent employer in 1978. She left the employer in January 2000. In 2003, the applicant received a letter from Ms. Peschel inviting her to return to their employ because they were having problems running the business. The applicant resumed employment with the employer on September 15, 2003 until she was terminated on April 8, 2011. During this time period, the applicant was a production manager. She performed a variety of tasks, including scheduling production, performing human resources tasks, overseeing the safety program, maintaining a price list and handling cost accounting functions. She used PeachTree and Microsoft Excel programs to perform some of her duties for the employer. There was no evidence that the applicant ever received a poor performance review from the employer. Just two weeks prior to the applicant's termination, Mr. Peschel reportedly commented that he could not run the business without the applicant.

The applicant treated with a doctor in February 2011 for a problem with her right wrist. Her doctor concluded that her right wrist condition was related to her work for the employer. Hoping her wrist problem would go away, the applicant did not report it immediately to the employer. The symptoms in her right wrist did not diminish, so she began treating with another doctor on April 6, 2011. Within a few days of visiting her doctor, the applicant reported her right wrist injury to Jim Peschel, an owner of the employer. Mr. Peschel told the applicant, "do what you got to do" when she indicated that she would file an injury report. The applicant also reported her injury to Jody Rettschlag, who handled sales, accounts receivables and worker's compensation matters for the employer. The applicant and Ms. Rettschlag worked closely together.

The applicant eventually completed an injury report. When she reported to work on April 8, 2011, she had been blocked out of using her computer. After discussing the matter with Ms. Rettschlag, the applicant learned that Ms. Rettschlag was similarly blocked from using her

computer. The applicant asked Ms. Peschel about her computer access. Ms. Peschel denied having any knowledge about why the applicant's computer access was cut off and directed her to Mr. Peschel. Similarly, Ms. Peschel told Ms. Rettschlag that she did not know why her computer access was blocked. When the applicant approached Mr. Peschel about the problem, he directed her to go to the office. In the office, the applicant was met by Ms. Rettschlag, Mr. Peschel and his son. Mr. Peschel then explained to the applicant and Ms. Rettschlag that there had been a change in management. He indicated that someone had to leave and the applicant and Ms. Rettschlag were selected to leave. Ms. Rettschlag pressed for a specific basis for their termination. She was told a reason did not have to be provided. The applicant recalled that Ms. Peschel came by her office threw a box into the office and told her to, "pack her shit and get out." She also remembered Ms. Peschel stating that, "we Peschels aren't stupid". As Ms. Rettschlag prepared to leave the employer's facility after being terminated, she recalled that Ms. Peschel told her, "it's not you, it's the people you associate with." Mr. Peschel described these events as fairly heated. He could offer no insight as to why his wife was so angry at the applicant at the time she was terminated.

In June 2011, the applicant saw three advertisements in local papers advertising a position for the employer. The position sought an individual knowledgeable in account payable receivables with experience in PeachTree and Word Excel programs. No one from the employer ever contacted the applicant about the position. She was never rehired by the employer.

Mr. Peschel was the only witness for the employer. Although the employer did not file any business records, Mr. Peschel testified that that in 2011 the business had an average year and that sales were up one percent. He further indicated that the business' costs went up and that the company had a bad debt of $120,000.[1] He testified that the decision to terminate the applicant was, "strictly a business decision." First, he indicated that in March or April of 2011, his wife and daughter assumed a 51 percent ownership of the business and his share was reduced to 49 percent. Consequently, he did not have full control of the decision to terminate the applicant. Second, Mr. Peschel noted that due to the $120,000 bad debt in 2011, Ms. Peschel and his

[1] The employer wrote off this bad debt.

daughter suggested that they cut expenses, particularly office workers. It happened that the applicant and Ms. Rettschlag were the highest paid office workers so a decision was made to let them go. Mr. Peschel stated that the employer took the job duties once performed by the applicant and Ms. Rettschlag and assigned them to other employees. Mr. Peschel denied that an employee was hired to fill the position advertised by the employer in June 2011.

No one from the employer ever contacted the applicant about the position the employer advertised in June 2011. She was never rehired by the employer for any position. There was no evidence that the applicant has held a position since her termination from the employer.

Under § 102.35(3), Stats., an employer, who without reasonable cause, refuses to rehire an injured employee may be liable to the employee for his or her lost wages during the period of refusal, not to exceed one year's wages. In relevant part, § 102.35(3), Stats., provides as follows:

> Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages....

To prove her case, a worker must establish that she was an employee with a compensable injury who was denied rehire or discharged. The burden then is on the employer to show that the worker was discharged for reasonable cause.

The applicant fulfilled her burden. She sustained a conceded work injury while employed by the respondent employer and was subsequently terminated. The employer contends that it had a legitimate business reason for terminating the applicant. More specifically, it defended its employment action against the applicant by pointing to changes in its management, rising costs to operate the business and a $120,000 bad debt, which was written off. The reasons offered by the employer for terminating the applicant were merely pre-textual.

During her tenure with the employer, the applicant was a valued member of the employer's office team. Not only did Mr. Peschel comment that the applicant's services were indispensable to the employer's business, Ms. Peschel asked the applicant to return to their employ when she left in 2000. With both Mr. and Ms. Peschel holding such high regard for the applicant's aptitude at her

job, the decision to terminate her within two to three days of her reporting a work injury is curious. While the timing of the applicant's termination is, quite bluntly suspicious, the Peschels reported behavior the day of the applicant's termination raises further questions about their motivation in terminating her. For example, Mr. Peschel testified that Ms. Peschel, as a controlling member of the employer, made the decision to terminate the applicant with her daughter. Yet, when the applicant approached Ms. Peschel on the morning of April 8, 2011 to inquire about why she lost access to her computer, Ms. Peschel denied any knowledge. This seems incongruous with the message that was later delivered to the applicant about her termination due to a change in management.

Furthermore, when Mr. Peschel informed the applicant and Ms. Rettschlag of their decision to terminate them, Ms. Rettschlag pressed for a basis for their termination. The Peschels did not at that time provide a business reason principled in economic factors. The applicant and Ms. Rettschlag were told that the employer had no obligation to provide them with a reason. The employer offered no contemporaneous personnel records documenting the reason they terminated the applicant in April 2011. Even more, Ms. Peschel exhibited an unusual amount of anger toward the applicant when she took the adverse employment action against the applicant. Mr. Peschel could not speak to the reason his wife held such inexplicable animus toward the applicant. While Ms. Peschel was instrumental in the decision to terminate the applicant, she chose not testify at hearing. She offered no insight into her decision-making process in terminating the applicant, and no business records were offered to demonstrate that the employer was experiencing economic issues at the time the applicant was terminated. What I can infer from the record is that the business reason offered at hearing by the employer to justify the applicant's termination was a mere fiction conceived after the fact.

Because I am not persuaded on this record that the employer had economic reasons for terminating the applicant. I find that the employer's decision to terminate the applicant was without reasonable cause within the meaning of § 102.35(3).

No evidence was submitted about the length of the applicant's unemployment since being terminated by the employer. Consequently, this Order shall be interlocutory to allow the parties to submit a stipulation on the length of the applicant's unemployment. In the event a stipulation cannot be reached, this matter will be set for further hearing on the issue of the length of the applicant's unemployment.

NOW, THEREFORE, this

INTERLOCUTORY ORDER

The employer shall be liable for any substantiated wage loss the applicant suffered up to the maximum of $34,255.00 ($658.75 per week times 52 weeks). No specific award however is made at this time. Jurisdiction is reserved for further findings as to the applicant's wage loss as a result of the employer's unreasonable refusal to rehire her.

Dated and mailed at Madison, Wisconsin,
this 21st day of February, 2012.

Nia Enemuoh-Trammell
Administrative Law Judge

cc:

ATTORNEY AARON N HALSTEAD
C/O HAWKS QUINDEL SC
222 W WASHINGTON AVE # 705
PO BOX 2155
MADISON WI 53701-2155

ATTORNEY ANDREW R GRIGGS
C/O GRIGGS, ANDREW R
NEUBERGER, LORENZ, GRIGG
136 HOSPITAL DRIVE
WATERTOWN WI 53098-3338