

1-29-2010

Mussman v. Kootenai County Appellant's Reply Brief Dckt. 36693

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MARK W. MUSSMAN,

Claimant/Respondent,

vs.

KOOTENAI COUNTY, Employer,

Respondent/Appellant.

and,

IDAHO DEPARTMENT OF LABOR,

Respondent/Respondent on Appeal.

Supreme Court Docket
No. 36693-2009

Industrial Commission
IDOL No. 2300-2009

APPELLANT'S REPLY BRIEF

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION,
COMPRISED OF R.D. MAYNARD, CHAIRMAN, and THOMAS E. LIMBAUGH
AND THOMAS P. BASKIN, COMMISSIONERS

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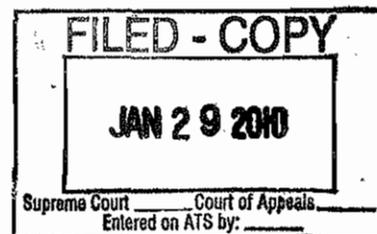


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I. ARGUMENT

Respondent State of Idaho, Department of Labor (hereinafter "Department"), misunderstands the reason Employer Kootenai County (hereinafter "Kootenai County"), discharged Claimant Mark W. Mussman (hereinafter "Mussman"). The Department repeatedly argues that the basis for discharge was simply for signing an affidavit.¹ (Department's Brief, pp. 2-3, 9-10, 11). Mussman was not discharged simply for executing an affidavit. Mussman was discharged for intentionally undermining the decision of his supervisor. Tr. p. 6, Ll. 9-14; p. 25, Ll. 9-24; p. 26, Ll. 2-12.

The evidence is undisputed that Mussman's supervisor, the Director of the Planning Department, made a final decision regarding the interpretation of a county Setback Ordinance, and in particular, as applied to the Graham Project. Tr. p. 24, Ll. 11-25; Tr. p. 26, Ll. 21-23; p. 27, Ll. 3-5. Mussman disagreed with the Director's interpretation and decision. Tr. p. 25, Ll. 7-9. The evidence is undisputed that the Director instructed Mussman, and that Mussman acknowledged such instruction, that the Director's interpretation and decision on the matter was final. Tr. p. 26, Ll. 21-23; p. 27, Ll. 3-5. The evidence is undisputed that after Mussman was admonished that the Director's interpretation was final, Mussman executed an affidavit for the benefit of

¹The Department argues that prior to Mussman's discharge, he had never been disciplined for signing affidavits. (Department's Brief, pp. 3, 11). The Department's argument is accurate but not relevant. Mussman did not disclose to Kootenai County that he had signed any previous affidavits.

"Question: The 2006 affidavit, did you share that affidavit with your then director?

Answer: No. No.

Question: The 2008 affidavit, did you share that with your –

Answer: No."

Tr. p. 22, Ll. 16-20. Thus, Kootenai County could not have disciplined Mussman for conduct of which it was not aware.

Graham, the developer, describing prior interpretations of the Setback Ordinance which were contradictory to the Director's interpretation. Tr. p. 11, LI. 4-13; Tr. p. 20, LI. 4-8; Tr. p. 18, LI. 11-16; Tr. p. 25, LI. 7-13. The evidence is undisputed that Mussman executed the contradictory affidavit, which intentionally undermined the decision of the Director, without the knowledge or approval of the Director or legal counsel for Kootenai County. Tr. p. 25, LI. 13-15; p. 18, LI. 6-8.

The Department argues that the Industrial Commission's conclusion that Kootenai County's expectations were not adequately communicated to Mussman is supported by the record. (Department's Brief, p.11). The Industrial Commission's conclusion is clearly erroneous. Mussman testified that he was subject to a policy that interpretations of county ordinance are required to be reviewed or approved by the Director and legal counsel prior to submitting to the public.

“Question: Well, on February 27 or March 9, your previous supervisor talked to you hear about the need to have the Director review policies and –

Answer: There were performance memos that I received from the Interim Director in early 2007 that contained some inaccuracies that I was uncomfot –

Question: What did the Director tell you about the need for having legal counsel or the Director review documents –

Answer: That was a –

Question: – before you submitted them to the public?

Answer: **That was a policy**, as I recall, and – that was perhaps not clearly written, but taken for granted **that in interpretations of the language of the ordinance**, especially major ones that were questionable, **had to be run through the Director**, and typically it was run through the entire staff, **and if there were still questions, run by legal counsel.**”

Tr. p. 17, LI. 10-25 (emphases added). Further, Kootenai County has a policy against insubordination, or refusal to comply with instructions, or failure to perform reasonable duties which are assigned, and against conduct which reflects adversely on the County. Tr. p. 7, LI. 15-21. Mussman was clearly aware of such policy and signed acknowledging such. Tr. p. 7, LI. 22-25.

The Department argues that there is no evidence that providing “historical” interpretations of structure setbacks violated Kootenai County’s policy. The Department’s argument ignores the evidence. Mussman himself acknowledged that he was instructed by the Director that the Director’s decision regarding an interpretation of a Setback Ordinance was final. Tr. p. 26, LI. 21-23; p. 27, LI. 3-5. Mussman disagreed with the Director’s decision and decided to undermine it by executing an affidavit for the benefit of Graham, the developer, by describing that the Director’s interpretation was contradictory to interpretations that had been made prior to the Director’s tenure at Kootenai County.

“I was not making an interpretation that had not already been made in years previously . . .”

Tr. p. 29, LI. 13-14. Mussman described in the affidavit his previous interpretations:

In number six you [Mussman] wrote previously I [Mussman] and other members of the staff, at the request of Mr. Graham and his designated team, agreed to the property line setback measured as follows. This is an interpretation consistent with – and it goes on.

Tr. p. 11, LI. 9-13. Mussman testified that he knew that he was prohibited from providing members of the public with interpretations of county ordinances without approval of the Director. Tr. p. 17, LI. 10-25. Mussman was prohibited from

insubordinate behavior or conduct which reflects adversely on the County. Tr. p. 7, Ll. 15-21. As such, Kootenai County had a reasonable expectation which was adequately communicated, that Mussman would not execute an affidavit describing prior interpretations of a county ordinance that Mussman knew conflicted with and compromised and undermined the interpretation decision of the Director, which can only be said to reflect adversely on the County.

Similarly, the Department argues that without the corrective action documentation and affidavit, the Industrial Commission could not determine whether Mussman's conduct adversely affected Kootenai County. The Director read into the record excerpts of the corrective action documentation and affidavit, and the Director and Mussman testified as to the contents or requirements, where relevant. As discussed above, neither Mussman nor the Appeals Examiner objected to or requested that the documents be admitted. If anyone had objected or requested such, the County could have and would have supplemented the record when the record was open. As noted by the Department, the Industrial Commission refused to open the record after it excluded the evidence. (Department's Brief, p. 13). The Industrial Commission's rejection of the evidence after the record was closed and refusal to open the record violates due process, is fundamentally unfair, and is prejudicial to the County, in that the County had no opportunity to respond when the record was open.

In any event, the Industrial Commission ignored the evidence discussed above. That is, after Mussman was admonished that the Director's interpretation was final, Mussman knowingly and intentionally executed an affidavit for the benefit of Graham,

the developer, describing prior interpretations which contradicted the Director's interpretation. Tr. p. 11, Ll. 4-13; Tr. p. 20, Ll. 4-8; Tr. p. 18, Ll. 11-16; Tr. p. 25, Ll. 7-13. Mussman executed the contradictory affidavit, which intentionally undermined the decision of the Director, without the knowledge or approval of the Director or legal counsel for Kootenai County. Tr. p. 25, Ll. 13-15; p. 18, Ll. 6-8. Clearly, under the circumstances, Mussman's conduct of providing a developer with an affidavit that describes that the Director's final decision on the interpretation of the Setback Ordinance contradicts prior interpretations, can only be said to be for the purpose of undermining the Director's decision, resulting in an adverse effect on the County. Thus, the Industrial Commission erred when it determined that Mussman's conduct did not affect Kootenai County.

Finally, the Industrial Commission erred when it failed to address whether Mussman's conduct was a deliberate violation of Kootenai County's reasonable rules. There are three (3) mutually exclusive grounds to determine if there has been misconduct. Misconduct in connection with employment means:

1. A willful, intentional disregard of the employer's interest;
2. A deliberate violation of the employer's reasonable rules; or,
3. A disregard of the standards of behavior which the employer has a right to expect of his or her employees.

Smith v. Zero Defects, Inc., 132 Idaho 881, 884, 980 P.2d 545, 548 (1999); Kivalu v. Life Care Centers of America, 142 Idaho 262, 264, 127 P.3d 165, 167 (2005); IDAPA 09.01.30.275.02. "The Commission must consider all three grounds to determine if there has been misconduct." Smith, 132 Idaho at 884, 980 P.2d at 548;

Dietz v. Minidoka County Highway Dist., 127 Idaho 246, 248, 899 P.2d 956, 958 (1995).

As such, the Industrial Commission erred when it failed to address whether Mussman's conduct constituted a deliberate violation of Kootenai County's reasonable rules.

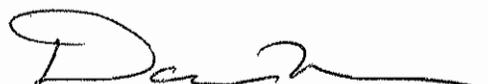
In its initial brief, Kootenai County discussed and analyzed Mussman's misconduct under all three of the grounds for determining misconduct. Mussman's conduct of intentionally undermining the decision of his supervisor by executing an affidavit on behalf of and in support of Graham, which described interpretations of a Setback Ordinance that Mussman knew contradicted the Director's interpretation, and which asserted what the Director knew or didn't know, without any review or authorization of the Director, was an intentional violation of the County's reasonable rules. As such, Mussman's behavior constitutes misconduct, and the Industrial Commission erred in failing to address whether Mussman's conduct constitutes a deliberate violation of the County's reasonable rules.

II. CONCLUSION

Based on the foregoing and the record before the Court, Appellant respectfully requests that the Decision of the Industrial Commission be reversed, and the matter be remanded.

DATED this 27th day of January, 2010.

Kootenai County Prosecuting Attorney



Darrin L. Murphey, Civil Deputy
Attorney for Employer/Appellant,
Kootenai County

CERTIFICATE OF SERVICE

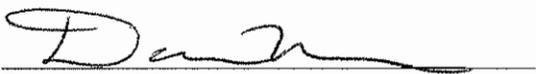
Pursuant to I.A.R. 34, I hereby certify that on this 27th day of January, 2010, I caused an original and six (6) bound copies and one (1) unbound, unstapled copy of Appellant's Reply Brief to be sent via first class mail, postage prepaid, to be filed with the Clerk of the Supreme Court, and further certify that I caused to be served two (2) true and correct copies of the foregoing via first class mail, postage prepaid, and addressed to the following:

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Pursuant to I.A.R. 34.1, I further certify that I have sent a signed, electronic copy of the Appellant's Reply Brief in searchable PDF format to the following e-mail addresses:

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