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Stark v. Assisted Living Concepts, Inc. Respondent's Brief Dckt. 38715

IN THE SUPREME COURT OF THE STATE OF IDAHO

BROOKE A. STARK, Claimant/ Respondent, vs. ASSISTED LIVING CONCEPTS, INC., Employer/ Appellant, and IDAHO DEPARTMENT OF LABOR, Respondent.	)	SUPREME COURT NO. 38715 BRIEF OF RESPONDENT IDAHO DEPARTMENT OF LABOR

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS E. LIMBAUGH, CHAIRMAN

EMPLOYER/APPELLANT
ASSISTED LIVING CONCEPTS, INC.

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CLAIMANT/RESPONDENT

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TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

(1) Nature of the Case:

Assisted Living Concepts, (Employer) appeals the Industrial Commission's (Commission) Decision and Order concluding that Brook A. Stark, (Claimant) was eligible for unemployment benefits because Employer believes the Commission inappropriately weighed the evidence in the record and made findings of fact not supported by the evidence.

(2) Course of the Proceedings Below:

Claimant filed a claim for unemployment insurance benefits after her employment with Employer ended. On November 23, 2010, the Idaho Department of Labor (Department) issued an Eligibility Determination (Determination) finding Claimant eligible for unemployment insurance benefits. Exhibit 3. In the Determination, the Department found Employer discharged Claimant, but not for misconduct in connection with employment pursuant to Idaho Code §72-1366(5), and Employer's account was chargeable for experience rating purposes pursuant to Idaho Code§ 72-1351(2)(a). Exhibit 3. Employer filed a timely appeal of the Determination with the Department's Appeals Bureau. Exhibit 4.

On December 27, 2010, an appeals examiner held a hearing in the matter. Tr. p. 2, Ll. 1-14. Claimant testified at the hearing, and Lori Bebo and Rick Parker testified for Employer. In a Decision mailed to the parties on December 30, 2010, the appeals examiner reversed the Determination. R. pp. 1-5. Claimant filed a timely appeal of the appeals examiner's decision with the Commission. R. pp. 7-16.

Claimant submitted additional documents with her notice of appeal that were not part of the record before the appeals examiner. R. p. 35. In its Decision and Order dated February 28, 2010, the Commission treated Claimant's submission as a request for a new hearing. R. p. 21. The Commission denied that request. R. pp. 22-23.

The Commission conducted a *de novo* review of the record before the appeals examiner, consisting of the audio recording of the hearing and all of the exhibits entered at that hearing before the appeals examiner. In its Decision and Order, the Commission reversed the appeals examiner's decision. Employer filed a timely Notice of Appeal to this Court. R. pp. 30-34.

(3) Statement of Facts:

Claimant began working for Employer on April 21, 2008. Tr. p. 14, Ll. 16-18. When Employer discharged Claimant, she was the residence director of Sylvan House, one of Employer's assisted living facilities. Tr. p. 14, Ll. 19-20. On October 29, 2010, Claimant received a call from Matt Cable, Employer's regional director of sales and marketing. Tr. p. 14, L. 25; p. 15, L. 1. Claimant and Mr. Cable discussed different topics, including the state of Employer's other assisted living facilities in the region. Tr. p. 15, Ll. 1-6. Claimant asked Mr. Cable what was going to happen with Teton House, one of the other facilities in the region. Tr. p. 15, Ll. 6-7. Mr. Cable said he did not know and Claimant asked him if he had heard the rumor that Teton House was closing. Tr. p. 15, Ll. 8-9. Mr. Cable said no, the conversation ended and Claimant went home. Tr. p. 15, Ll. 10-12.

Later that evening, Claimant received a call from Craig Boyes, Employer's divisional director of human resources. Tr. p. 6, Ll. 5-6; p. 15, Ll. 12-14. Mr. Boyes told Claimant he had

spoken to Mr. Cable. Tr. p. 15, Ll. 13-14. Mr. Boyes asked Claimant where she heard Teton House was closing. Tr. p. 15, Ll. 15-16. The conversation ended after Claimant told Mr. Boyes she was not going to tell him because she had lots of sources and she did not feel it was necessary to reveal something told to her in confidence. Tr. p. 7, Ll. 4-7; p. 15, Ll. 16-21.

A few minutes later, Mr. Boyes and Employer's chief executive officer, Lori Bebo, called Claimant again. Tr. p. 15, Ll. 21-25. Ms. Bebo asked Claimant where she heard the information about Teton House closing, and again, Claimant refused to tell them. Claimant did not want "anyone else in the company to get into trouble." Tr. p. 15, L. 25; p. 26, L. 1; p. 17, Ll. 9-10, 17-20. Claimant felt the information was unnecessary since the rumor was just "flying around." Tr. p. 16, Ll. 1-2. Ms. Bebo told Claimant she had one more opportunity to reveal the source of the information or she would be suspended. Tr. p. 16, Ll. 2-4. Claimant declined, telling Ms. Bebo and Mr. Boyes, she would just have to "take one for the team" because she did not want to reveal something she was told in confidence. Tr. p. 7, Ll. 20-21; p. 16, Ll. 4-8. Ms. Bebo suspended Claimant. Tr. p. 7, Ll. 21-24; p. 16, Ll. 4-6. On November 2, 2010, Employer discharged Claimant for insubordination and made the discharge effective October 29, 2010. Tr. p. 8, Ll. 20-21; p. 16, Ll. 17-24.

ADDITIONAL ISSUE ON APPEAL

I.

Is there substantial and competent evidence in the record to support the Industrial Commission's factual findings and conclusion that Claimant was not discharged for misconduct in connection with employment?

STANDARD OF REVIEW

In an appeal from a Commission decision, this Court's review is limited to questions of law. Idaho Constitution Article V,§9; Pimley v. Best Values, Inc., 132 Idaho 432, 434, 974 P.2d 78, 80 (1999). When reviewing a Commission decision, this Court "exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings." Oxley v. Medicine Rock Specialties, Inc., 139 Idaho 476, 479, 80 P.3d 1077, 1080 (2003). The Commission's findings of fact will only be disturbed if they are not supported by substantial and competent evidence. Mussman v. Kootenai County, 150 Idaho 68, 244 P.3d 212, 215 (2010). Whether an employee's conduct constitutes misconduct is a factual determination that will be upheld unless not supported by substantial and competent evidence. Id. "Substantial evidence is more than a scintilla of proof, but less than a preponderance." Painter v. Potlatch Corporation, 138 Idaho 309, 312, 63 P.3d 435, 438 (2003). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. Mussman, 244 P.3d at 215.

This Court has described the appropriate test for substantial and competent evidence for the purposes of judicial review as requiring a court to determine whether an agency's findings of fact are reasonable. Steen v. Denny's Restaurant, 135 Idaho 234, 237, 16 P.3d 910, 913 (2000). Where conflicting evidence is presented that is supported by substantial, competent evidence, the findings reached by the Commission will be sustained regardless of whether the Court may have reached a different conclusion. Harris v. Electrical Wholesale, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004).

It is up to the Commission to weigh the conflicting evidence and determine the weight and credit to be given to the testimony admitted. Mussman, 244 P.3d at 215. The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. Oxley, 139 Idaho at 479, 80 P.3d at 1080. In reviewing a decision of the Commission, this Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. Id.

ARGUMENT

There is substantial and competent evidence in the record to support the Industrial Commission's factual findings and conclusion that Claimant was not discharged for misconduct in connection with employment.

When a claimant is discharged, she is entitled to unemployment benefits if her unemployment is not due to the fact her employer discharged her for misconduct in connection with employment. Mussman, 244 P.3d at 216; Idaho Code §72-1366(5). Misconduct is defined as the willful, intentional disregard of an employer's interests; a deliberate violation of an employer's rules; or a disregard of the standards of behavior an employer has the right to expect of its employees. Desilet v. Glass Doctor, 142 Idaho 655, 657, 132 P.3d 412, 414 (2006); IDAPA 09.01.30.275.02.

Whether an employee's behavior constitutes misconduct is a factual determination that will be upheld if supported by substantial and competent evidence. Harris, 141 Idaho at 3, 105 P.3d at 269. When Claimant refused to identify a source for a rumor that Teton House was closing, Employer discharged her for insubordination. Tr. p. 8, Ll. 6-25; p. 9, Ll. 1-3. This Court has concluded however, that merely being insubordinate is insufficient to prove

misconduct. The law does not "require a standard of unswerving docility and servility." Avery v. B & B Rental Toilets, 97 Idaho 611, 615, 549 P.2d 270, 274 (1976). The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer and when the burden is not met, benefits must be awarded to the claimant. Mussman, 244 P.3d at 216; IDAPA 09.01.30.275.01.

The Commission determined that Claimant's failure to comply with Employer's directive was not misconduct, but rather a good faith error in judgment or discretion. R. p. 27. "Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, isolated instances of ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct connected with employment." IDAPA 09.01.30.275.03.

The Commission concluded there was little evidence Claimant's refusal to comply with the directive caused harm to Employer and there was no evidence to suggest Employer could have limited any harm if it learned of the source of the rumor. Instead, the Commission found the cat was already out of the bag. R. p. 27. Rather than having harmed Employer, the Commission found that Claimant actually acted in Employer's interest by providing information to Employer it had not yet heard. According to the Commission, Claimant's decision to not reveal the source of the rumor to protect others, while still informing her supervisor of the concern, was nothing more than an isolated incident of a good faith error in judgment or discretion R. p. 27.

Employer argues it is "axiomatic" that the way to stop a rumor is to go to its source. Appellant's Brief, p. 10. However, this is simply a mere assertion that is not borne out by any evidence in the record. Claimant testified that she had "lots of sources" for the rumor, "lots of friends within the company" and she did not feel it was necessary to reveal something told to her in confidence. Tr. p. 15, Ll. 16-20. Claimant also testified the rumor was just "flying around." Tr. p. 16, Ll. 1-2. The Commission found there was no evidence that revealing the source of the rumor would have put an end to it. R. p. 26; Tr. p. 17, Ll. 1-10.

Employer also argues as if it is undisputed that Ms. Bebo explained to Claimant it was important for Claimant to reveal who talked to her about Teton House. Appellant's Brief, p. 9. On the contrary, Claimant never testified that Ms. Bebo talked to her about the importance of revealing the source of the information. When the Appeals Examiner asked Claimant if Ms. Bebo explained why she needed the information, Claimant responded:

> She just said she wanted to put an end to the rumors and I felt, again, that since I wasn't spreading the rumors I was talking to one of my supervisors, regional director of sales and marketing, and that the subject of Teton House came up, that I wasn't taking it any further and I didn't feel it was necessary to tell her that information, again, because I didn't want other people to get in trouble. So, that was what she said to me.

Tr. p. 17, Ll. 1-10.

Employer further argues the Commission "glossed over" evidence that Claimant's failure to comply with the order caused the eventual closure of Teton House. Appellant's Brief, p. 11. Claimant disputed that the rumor caused residents to move out of Teton House. She testified that there were only two residents staying in Teton House when she was asked to reveal the source of the rumor and one resident had already given notice he or she was leaving. Tr. p. 20, Ll. 3-8.

While Ms. Bebo testified that such rumors were not commonplace, Claimant testified that those kinds of rumors spread all the time. Tr. p. 17, Ll. 21-25; p. 19, Ll. 6-8. Claimant worked for Employer from April 2008 until October 2010, and there is no evidence in the record she refused to obey orders in the past. Tr. p. 14, L. 18.

It is up to the Commission to weigh the conflicting evidence and determine the credit and weight to be given the testimony admitted. Mussman, 244 P.3d at 216. This Court has held "[t]he Commission's findings will not be disturbed solely because there is conflicting evidence in the record, or because this Court would have reached a different conclusion." Mussman, 244 P.3d at 215.

The Commission did not adopt any of Ms. Bebo's assertions as findings of fact. Instead, the Commission found:

> Mr. Cable informed his supervisor, Craig Boyes, of Claimant's statement regarding Teton House. Mr. Boyes called Claimant and asked Claimant from whom she had heard the rumor. Claimant refused to reveal the source. Later, on a conference call with Employer's Chief Executive Officer, Laurie [sic] Bebo, and Mr. Boyes, Claimant was again asked from whom she had heard the rumor. Claimant responded that she had several sources and friends within the company and refused to reveal the source. Ms. Bebo informed Claimant she had one more chance to reveal the source of the rumor. Claimant responded that she would not and Claimant was placed on suspension pending further investigation. Claimant was ultimately discharged for insubordination.

R. pp. 23-24. The Commission gave Claimant's testimony more weight than Ms. Bebo's testimony. Substantial though conflicting evidence supports the Commission's conclusion that while Claimant's refusal to tell Employer the source of the rumor may have been in error, Employer was not harmed by Claimant's refusal and as such her conduct was nothing more than an isolated instance of poor judgment and not misconduct.

Prior to concluding Claimant's conduct was an isolated instance of poor judgment, the Commission analyzed her conduct under the standards of behavior category of misconduct. Generally, the Commission must consider all three categories of misconduct when making a determination of misconduct. Mussman, 244 P.3d 216. The Commission did not analyze Claimant's conduct under all three categories because it determined Claimant's conduct constituted insubordination. R. p. 26. Intentional insubordination is defined as an employee's deliberate or willful refusal to obey a reasonable order or directive which an employer is authorized to give and entitled to have obeyed. Folks v. Moscow School District No. 281, 129 Idaho 833, 837, 933 P.2d 642, 646 (1997); Avery, 97 Idaho at 614, 549 P.2d at 273.

In Folks, this Court clarified where an intentional insubordination analysis fits within the three categories of misconduct. Folks, 129 Idaho at 837, 933 P.2d at 646. This Court held that its previous insubordination cases did not clearly specify under which of the three categories of misconduct such behavior falls. Id. This Court noted that previous cases had been analyzed under the "disregard of standards of behavior" category. Id. This Court held "[t]his appears to be the most appropriate of the three categories for the purposes of analysis. Intentional insubordination is merely one way in which an employer can prove misconduct as a disregard of the standards of behavior which the employer has a right to expect." Id. In this Court's most recent intentional insubordination case, Pimley v. Best Values, Inc., 132 Idaho 432, 974 P.2d 78 (1999), the analysis focused solely on a standard of behavior category of misconduct without reference to the other categories of misconduct. Following this Court's direction in Folks, the

Commission analyzed Claimant's alleged intentional insubordination under the standard of behavior definition of misconduct alone. R. p. 25.

Misconduct under the standards of behavior test requires an employer prove (1) that the employee's conduct fell below a standard of behavior expected by the employer; and (2) that the employer's expectation was objectively reasonable under the circumstances. Mussman, 244 P.3d at 216. This test does not require a showing that the employee's conduct was willful, intentional or deliberate. Adams v. Aspen Water, Inc., 150 Idaho 408, 247 P.3d 635, 641 (2011).

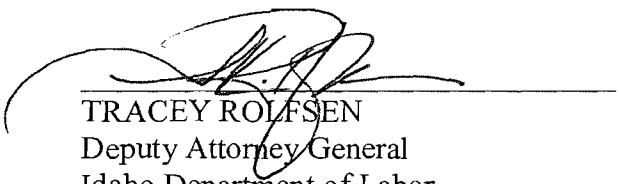
The Commission found that under the first part of the test, Ms. Bebo was authorized to order Claimant to reveal the source of the rumor and that Claimant failed to obey the order when asked. R. p. 26. However, the "crux" of the matter the Commission reasoned was whether or not the order was reasonable under the second prong of the test. R. p. 26. The question whether an employer's expectation is objectively reasonable in a particular case is also a question of fact, and the Commission's determination will not be disturbed if it is supported by substantial and competent evidence in the record. Smith v. Zero Defects, Inc., 132 Idaho 881, 884, 980 P.2d 545, 548 (1999). The Commission concluded Employer's directive was not reasonable because there was no evidence in the record that Employer's stated purpose of ending the rumor would have been met if Claimant had revealed her source, especially when there were other more viable options readily available to Employer such as holding a staff meeting or distributing a memo. R. pp. 26-27. In making this determination, the Commission also concluded that even if the Employer's directive was reasonable, Claimant's actions did not constitute misconduct because they were nothing more that a single isolated instance of poor judgment. R. p. 28.

While Employer may have felt that it had grounds for discharging Claimant, the Commission found, based on conflicting evidence in the record, that those reasons did not amount to misconduct in connection with employment. The Commission's findings clearly demonstrate Claimant's conduct was nothing more than an isolated instance of poor judgment and simply not misconduct.

CONCLUSION

The Commission based its decision that Employer discharged Claimant, but not for misconduct, on substantial and competent evidence. The Department asks this Court to affirm the Commission's Decision and Order.

Respectfully submitted,



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30th day of August, 2011, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

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