3-26-2015

Copper v. Ace Hardware/Sannan, Inc. Appellant's Brief Dckt. 42873

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLARENCE L. COPPER, Claimant/Appellant, vs. ACE HARDWARE / SANNAN, INC. Employer/Respondent, And IDAHO DEPARTMENT OF LABOR, Respondent.	)	**Supreme Court No. 42873**

APPELLANT'S OPENING BRIEF

Appeal from Idaho Industrial Commission

CLARENCE L. COPPER
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Appellant, pro se

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Idaho Administrative Procedures Act

Idaho Rules of Civil Procedure

Idaho Rules of Evidence

Other References

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Claimant was terminated from employment when his father purchased store merchandise using his employee discount, as was customary. This case involves whether the Industrial Commission (*Commission*) clearly erred as a matter of law by failing to make required factual findings, and, by the Commission's Decision that Claimant committed misconduct by failing to obey "Employer's expectations". See Decision, (Agency Record p.14, *hereinafter* "Record").

B. COURSE OF THE PROCEEDINGS

On August 18, 2014, the Appeals Examiner held a telephonic hearing from which he allowed Claimant benefits. (Record p.1). Respondents appealed. (Id. p.8). On December 22, 2014, the Commission reversed the Examiner's Decision and held that Claimant was discharged for misconduct under I.C. § 72-1366(5). (Id. p.14). Claimant appeals that reversal. (Id. pp.23-25).

C. STATEMENT OF FACTS

Claimant worked for Employer for ten years without incident. (Transcript of Hearing p.12 L.18)(*hereinafter* "RT"). The Employer testified he discharged Claimant because Claimant's father used his employee discount while Claimant was "on the clock". (RT p.9 L.23; p.10 L.11). The "Employer does not take issue with whether the merchandise that was purchased qualified under its policy." (Record, p.20, *Decision and Order, p.7*).

Claimant testified it was customary for family members to make discount purchases, and that employees make purchases while at work such as sodas, food, gloves, tape measures and work-related items. (RT p.13 L.11+; p.16 L.15+). The Appeals Examiner held Claimant's testimony was undisputed fact, i.e., that employees "**are** allowed to purchase items while on the

clock". (Record p.2, Appeals Examiner's "*Findings of Fact*" at No.8). This fact went unchallenged by the Employer.

The Employer never alleged specific misconduct, i.e., (1) willful violation, (2) deliberate violation or (3) disregard for Employer's behavioral expectations. Instead they argued: "*our handbook clearly states 'only the employee can make the purchase*' and '*all purchases must be made on your own time .... What is the point in having policies if employees are not held accountable for misconduct*?'". (Record p.8) Consequently, the Commission chose to disregard the first two benchmarks governing misconduct to focus on the third. Infra.

The Commission determined that Claimant was discharged for the portions of the policy that require purchases be made by the employee and on the employee's time. (Record, p.20, *Decision and Order,* p.7). This, the Commission reasoned, constitutes misconduct pursuant to IDAPA 09.275.02(c)(i), for conduct falling "*below the standard of behavior Employer expected*". (Id. at p.21, *Order* at 8).

II.

ISSUES

A. The Employer's Discount Policy is Vague and Overbroad.

B. The Employer's Discount Policy is NOT Uniformly Enforced.

C. The Commission failed to apply both prongs of the "standard of behavior" analysis.

D. The Commission disregarded State law.

III.

STANDARD OF REVIEW

Employers carry the burden of proving the employee was discharged for employment-related misconduct. IDAPA 09.01.30.275.01. The determination of whether an employee's conduct constitutes misconduct is a question of fact. *Marriott v. Shearer Lumber Products*, 127

Idaho 620, 622, 903 P.2d 1317, 1319 (1998); *Adams v. Aspen Water, Inc.*, 150 Idaho 408, 412, 247 P.3d 635, 639 (2011). Misconduct has been defined by this Court as (1) a willful, intentional disregard of the employer's interest; (2) a deliberate violation of the employer's rules; or (3) a disregard of standards of behavior which the employer has a right to expect of its employees. *Laundry v. Franciscan Health Care Center*, 125 Idaho 279, 282, 869 P.2d 1374, 1377 (1994).

The Commission disregarded the first two forms of misconduct to settle on the subjective "standard-of-behavior test". The standard-of-behavior test for employee misconduct is a two-part inquiry encompassing (1) whether the employee's conduct fell below the standard of behavior expected by the employer; ***and*** (2) whether the employer's expectation was objectively reasonable in the particular case. *Taylor v. Burley Care Center*, 121 Idaho792, 793, 828 P.2d 821,822; *In Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094–95, 695 P.2d 1231, 1234–35 (1984).

In *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094–95, 695 P.2d 1231, 1234–35 (1984), this Court held that some expectations and duties "flow normally from an employment relationship." Other expectations however, do not "flow naturally." If certain practices or expectations are not common among employees in general or within a particular enterprise, and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct. (Id.)

On appeal, this Court reviews whether the Industrial Commission's findings of fact are supported by substantial and competent evidence. *Eckhart v. Indus. Special Indem. Fund*, 133 Idaho 260, 262, 985 P.2d 685, 687 (1999). Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion. *In re Wilson*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

However, "This Court may set aside the Commission's order when the findings of fact do not as a matter of law support the order. We exercise free review over the Commission's legal conclusions." *McNulty v. Sinclair Oil Corp.*, 152 Idaho 582, 585, 272 P.3d 554, 557 (2012). "We only disturb factual findings if those findings are clearly erroneous, meaning they are not supported by substantial and competent evidence." *Henderson v. Eclipse Traffic Control & Flagging*, Inc., 147 Idaho 628, 631, 213 P.3d 718,721 (2009).

"When erroneous evidence is considered in arriving at a factual decision, particularly where the ultimate factual issue is close, the case should be remanded to the fact finder to reconsider the factual issue without the erroneous evidence." *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 685, 905 P.2d 82, 86 (1995).

IV.

ARGUMENT

A. EMPLOYER POLICY IS AMBIGUOUS AND INCONSISTENTLY APPLIED

1. First, "Purchases made during the day must be paid for and kept in the office until you leave the store." This directive conflicts with the requirement that "The merchandise should be removed from the store once the sale transaction is complete." (Record p.9, *Discount Policy*). These policy mandates are inconsistent and ambiguous.

2. Second, both parties testified employees purchase merchandise for myriad reasons "*while on the clock*". (RT p. 13 L.11; p.16 L.15; p.17 L.13; p.18 L.4). Conversely, the Employer then contradicts himself by arguing that employees can only make discount purchases when they are "*off the clock*". (RT p.17 LL.19-20). The Appeals Examiner rejected the Employer's *off the clock* argument and held in fact that employees "are allowed to purchase items while on the clock". (Record p.2, Examiner's "*Findings of Fact*" at No.8). The Employer's erratic and confusing application of the discount policy shows the ambiguous and vacillating nature of the policy.

3. Third, the testimony that purchases are made "*while on the clock*" contradicts the directive that "Purchases may only be made on the employee's off-duty time". "Off duty" is defined as: "of, pertaining to, or during a period when a person is not at work." See, *Webster's New Universal Unabridged Dictionary*, p.1344. Thus, employees are never truly "off duty" until they leave the workplace, making "off duty" purchases ambiguous since purchases are undeniably made "during the day". (RT p. 13 L.11; p.16 L.15; p.17 L.13; p.18 L.4).

4. Fourth, the Employer's reasoning for firing Claimant was that he violated policy by not making the purchase. (RT. p10 L.6-9; p.11 LL. 7-8). On the other hand, the inclusion of family members into the employee policy creates conflict in policy interpretation. For example, if Claimant goes on vacation how does a family member receive the product discount? It stretches the limits of logic to suggest Claimant must return home to make the purchase or all parties forfeit the sale. The policy infers that family members are allowed to make discounted purchases beneficial to the company and the family member. It is more reasonable that Claimant inadvertently violated the confusing policy. This is not misconduct. See, IDAPA 09.275.03

5. Fifth, the Commission's Decision reasoned that Claimant committed misconduct for conduct falling "below the standard of behavior Employer expected". See, (Record p.21, *Decision and Order* p.8). The two-prong test for misconduct in "standard of behavior cases" is: (i) Whether the claimant's conduct fell below the standard of behavior expected by the employer; ***and*** (ii). Whether the employer's expectation was objectively reasonable in the particular case. See, IDAPA 09.275.02(c)(i)(ii). The Commission failed to evaluate whether Claimant's conduct was objectively reasonable. This is plain error.

6. Sixth, "To meet the standard-of-behavior test and prove discharge for misconduct, an employer's expectations are ordinarily reasonable only where they have been communicated to

the employee." *Harris v. Electrical Wholesale*, 141 Idaho 1, 4, 105 P.3d 267, 271 (2004). If certain practices or expectations are not common among employees in general or within a particular enterprise, and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct. *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094–95, 695 P.2d 1231, 1234–35 (1984).

Here, Claimant received notice of the policy but the Employer never communicated their expectation as to how that policy was to be interpreted. (RT p.11 LL.9-14). Claimant was then told that employees must follow all policies or face dismissal. (RT p.15 LL.1-5).

Pursuant to the Idaho Administrative Procedures Act:

> "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 09.275.03 (*emphasis added*).

"The rule by its clear terms refers to an employee's unintended substandard performance of his or her duties." *Stark v. Assisted Living Concepts, Inc.*, 152 Idaho at 510, 272 P.3d at 482 (2012). The record is clear that Claimant's behavior was, at most, no more than a negligent good faith effort to interpret and comply with the vague discount policy. See, (RT p.13 L.17; p.15 LL.4-5).

B. EMPLOYER'S POLICY IS NOT FOLLOWED REGULARLY

The Parties swore that employees purchase merchandise while they are on the clock earning wages. (RT p.l6 L.15; p.l7 LL.13-19 p.18 LL.4-22). The Examiner agreed. (Record p.2, "*Findings of Fact*" at No.8).

Moreover, the testimony established that for ten (10) years Claimant and other employees have engaged in purchasing practices the Employer now argues is misconduct. (RT p.13 L.11; p.16 L.15; p.17 L.13; p.18 L.4). The other employees referred to were listed in Claimant's Protest/Appeal Letter. (Record, p.23). One referred-to employee was Kathy Whitehead. [**NOTE**:

Claimant could not obtain Ms. Whitehead's statement prior to the Examiner's hearing but faxed it to the Commission on February 10, 2014, shortly after its Decision. See attached, (Appendix at p.14, *Statement of Kathy Whitehead*). In the interests of justice Claimant respectfully requests Ms. Whitehead's statement be appended to the Agency Record.

The Commission's Decision centers on whether Claimant could establish that the policy was not consistently enforced:

> "Claimant asserts Employer's policy was not the common practice." (Record, p.19; *Decision and Order*, p.6). Unfortunately, Claimant's mere assertion alone is insufficient to establish a contrary course of conduct. (Record, p.20; *Decision and Order*, p.7); Unfortunately, Claimant did not provide sufficient evidence to support his contention and failed to show there was a contrary course of conduct to the Employer's policy. (Record, p.21; *Decision and Order*, p.8).

This Court has repeatedly held that:

> "Appellate court review is 'limited to the evidence, theories and arguments that were presented . . . below.'" *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (quoting *State v. Vierra*, 125 Idaho 465, 468, 872 P.2d 728, 731 (Ct. App. 1994)).

Claimant presented his argument by sworn testimony and argued the policy was not enforced. (RT p.13 L.11; p.16 L.15; p.17 L.13; p.18 L.4); (Record, p.19 ¶3; *Decision and Order*, p.6 ¶3). "An employer's expectation... is not reasonable if it is contrary to an established course of conduct." *Adams v. Aspen Water, Inc.*, 150 Idaho 408, 412, 247 P.3d 635, 638 (2011). The burden is on the employer to prove by a preponderance of the evidence that the policy was routinely followed. E.g., *Adams*, 150 Idaho at 413, 247 P.3d at 640. Significantly, the Employer did not dispute Claimant's argument on this material fact.

The Commission abused its discretion by flouting the Examiner's Findings of Fact No.8 by holding that Claimant's uncontested sworn testimony was a "mere assertion... insufficient to establish a contrary course of conduct". (Record, p.20; *Decision*, p.7).

C. THE COMMISSION DISREGARDED STATE LAW

On appeal, this Court reviews whether the Industrial Commission's findings of fact are supported by substantial and competent evidence. *Eckhart v. Indus. Special Indem. Fund*, 133 Idaho 260, 262, 985 P.2d 685, 687 (1999). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The Court "must set aside the order of the Commission where it failed to make a proper application of law to the evidence." *Bortz v. Payless Drug Store*, 110 Idaho 942, 945, 719 P.2d 1202, 1205 (1986).

Claimant's testimony revealed the policy was not applied evenly and refers to employees using the policy as did Claimant. (RT p.14 L.20; p.16 L.15; p.17 L.13; p.18 L.4). ***His was the only testimony offered to demonstrate routine practice***. (Id.) The Employer did not dispute that this was their practice. The Examiner held Claimant's testimony was fact. (Record p.2, "*Findings of Fact*" No.8). Thus, Claimant's undisputed sworn testimony is relevant and material evidence establishing the Employer's routine practice.

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Idaho Rules of Evidence*, Rule 401.
>
> Evidence of a habit of a person or of the routine practice of an organization, ***whether corroborated or not*** and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. *I.R.E.* Rule 406 (*emphasis added*).
>
> Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect. *I.R.E.* Rule 1102.

The Commission abused its discretion by failing to acknowledge Claimant's undisputed testimony as evidence going to the foundation of the case which reasonable minds might accept to support Claimant's argument that the policy was not strictly enforced. *In re Wilson*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). Moreover, it clearly contravened the letter and spirit of I.R.E. Rule 406 by holding that Claimant was required to submit corroboration.

An analogous argument for what constitutes substantive evidence arises in the context of summary judgments. Courts may properly grant a summary judgment motion where there are no genuine issues of material fact. I.R.C.P. 56(c)(e); *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). Accordingly, the Commission abused its discretion by its erroneous interpretation of what constitutes substantive evidence.

D. THE COMMISSION FAILED TO CONDUCT FULL MISCONDUCT ANALYSIS

1. Commission erred by concluding the Employer's conduct expectations were reasonable AND sufficiently communicated

Misconduct benchmarks are defined as (1) a willful, intentional disregard of the employer's interest; (2) a deliberate violation of the employer's rules; or (3) a disregard of standards of behavior which the employer has a right to expect of its employees. *Laundry v. Franciscan Health Care Center*, 125 Idaho 279, 282, 869 P.2d 1374, 1377 (1994). The Commission focused solely on the third criterion, the two-prong "standard of behavior test". (Record p.17).

The standard of behavior test requires a two-part inquiry encompassing (1) whether the employee's conduct fell below the standard of behavior expected by the employer; ***and*** (2) whether the employer's expectation was objectively reasonable in the particular case. IDAPA 09.275.02(c)(i)(ii). *Taylor v. Burley Care Center*, 121 Idaho792, 793, 828 P.2d 821,822; *In Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094–95, 695 P.2d 1231, 1234–35 (1984).

The Commission ruled Claimant committed misconduct for conduct falling "below the standard of behavior Employer expected". (Record p.21, *Decision and Order* p.8).

As argued above in Sec. IV(A)(5), if certain practices or expectations are not common among employees in general or within a particular enterprise, and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct. *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094–95, 695 P.2d 1231, 1234–35 (1984). Employer has no right to expect compliance with an uncommunicated standard. *Welch v. Cowles Pub. Co.*, 900 P.2d 1372 (Idaho 1995). Here, normal behavior was for employees "to purchase items while on the clock". (Record p.2, Examiner's "*Findings of Fact*" at No.8).

The Employer never relayed its' expectations on how the policy should be interpreted and applied. Instead, it only provides a general warning that any policy violation would result in discharge. Thus, the Commission erred by holding the Employer communicated proper expectations regarding the discount policy.

2. The Commission failed to determine whether Claimant's behavior was objectively reasonable as required by IDAPA 09.275.02(c)(ii)

The Commission addressed the first prong of the standard of behavior test and ignored the second-prong inquiry as to whether Claimant's actions were objectively reasonable, **as required** by IDAPA 09.275.02(c)(ii). Without making this finding, the Commission simply assumes Claimant's behavior was unreasonable because he failed to produce additional evidence showing the policy was not routinely followed. However, once Claimant provided uncontested evidence on the routine policy practice the burden shifted to the Employer to dispute such. It chose not to.

Thus, the Commission's failure to conduct a second-prong analysis of the standard of behavior test is plain error and REMAND is required.

V.

CONCLUSION

Claimant's father visited the hardware store to buy merchandise. Claimant walked over to give his ID code. Claimant did not make the purchase because for ten (10) years this process was the norm for employees and their family members. The Employer did not dispute this fact. Thus, the Claimant did not commit misconduct.

WHEREFORE, Claimant prays this Honorable Court will REVERSE, UPHOLD the Decision of the Appeals Examiner, and allow Appellant costs.

CERTIFICATION OF SERVICE

Appellant Certifies the foregoing Appellant's Brief was mailed, first class postage prepaid, to:

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RESPECTFULLY SUBMITTED this 23 day of March, 2015

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APPENDIX

Fax Cover Sheet To Industrial Commission

Statement of Kathy Whitehead To Industrial Commission (2 pg.)

From: Clarence Copper

To : Unemployment Appeals

Attn: Ken

Page 1 of 3

FILED
FEB 10 2015
INDUSTRIAL COMMISSION

02/10/2015 TUE 15:20 [TX/RX NO 6124] 001

Your Honor 2/8/15

Thank you for allowing me to submit this letter on behalf of Mr Copper. My name is Kathleen Whitehead. I worked for Knights Ace Hardware from Aug. 2004 thru Sept 2014 the last eight years as the head cashier.

Clarence's dad is an immediate family member living in the same house as Clarence. He has duel residency as many people in our area do. So when he is here, he is a resident. As far as his dad paying for merchandise, I can list several employees who pay for purchases at the store including my own and those of some of the supervisors. One cashier's fiance is allowed to pay for purchases. This is allowed only if the employee is in the store, either shopping with them or working.

As far as making purchases while on the clock is concerned, I can't think of a single employee who hasn't done that at some point in time. We all have purchased a soda pop or candy bar for our break time. Employees remain on the clock for the ten minute breaks. The purchases made

by and with spouses were usually while the employee was on the clock.

I'd like to end by saying that I left Ace Hardware on my own. I have no ill feelings towards the Swigerts. I'm simply making the point that Clarence did nothing different than anyone else. If this was cause for dismissal then they should fire everyone and start over. Thank you for you time

Sincerely
Kathleen Whitehead