

IN THE COURT OF APPEALS FOR THE NORTHERN DISTRICT OF MISSOURI

Erica Barry	)	
	)	
	)	
v.	)	Case No. ND45371
	)	
A1 Quality Hotel System, Inc., d/b/a/ Hotele Internationale	)	
and Division of Employment Security,	)	
	)	
	)	

Before Dyson, Cain and Colon

Dyson, J.

This is an appeal from the determination of the Labor and Industrial Relations Commission (“Commission”) that Claimant Erica Barry was disqualified for benefits by reason of misconduct connected with her work pursuant to §§ 288.030.1(23) and 288.050.2.¹ We reverse.

Facts and Procedural History

Barry worked for Employer as a hotel housekeeper from January 2006 until she was terminated on September 19, 2014, for liking and sharing a Facebook post that criticized her employer.

The evidence at the hearing revealed that Barry worked cleaning hotel rooms at Employer’s hotel in Mokans City, Missouri. About a year ago, management changed at the hotel and it began advertising for a more international clientele. At the same time, Employer began to demand more of its employees, increasing the number of rooms housekeepers had to clean in each shift. Some of the housekeepers found rising to the new demands to be difficult, and there was evidence of rumors that some of the housekeepers had begun cutting corners (not cleaning all areas to standards) to meet the quotas. Barry had not personally engaged in cutting corners, nor had she personally observed or heard of anyone actually doing so. She did find herself frequently working at maximum capacity to meet the new demands, but generally felt that was part of the “new normal” and something employees eventually had to accept.

The evidence also established that several of the housekeepers who had been working at the hotel for a long time were upset because they believed, based on talk in the lunch area, that newly hired housekeepers who had the ability to speak (even just a small amount) to guests in other languages were being paid more than long-time employees who did not have foreign language capabilities due to a change in the branding of the hotel. They had approached Employer with their concern, and Employer gave them CD’s so that they could learn some relevant phrases in several languages, promising that if they did (on their own time), that would be considered in future compensation. Several of the housekeepers, including Barry, had used the tapes in an effort to learn what was

¹ References to sections 288.030 and 288.050 are to RSMo Supp. 2014.

necessary. None of them really knew whether they had received a larger raise than those who had not participated in the program, but one of the housekeepers, Rakel Romani, was convinced the promise of increased wages had not been kept and had been complaining to other employees about it. No evidence was introduced regarding whether there was any truth to Romani's belief.

The final incident that led to the Facebook postings occurred on September 18, 2015. Barry was off that day and had just come back from shopping. She sat down at the small computer she had in her bedroom to check Facebook. She believed her daughter had posted some new pictures of her new grandson, who Barry had not seen yet, since her daughter and family live in another state. Barry's son created her Facebook account shortly after her granddaughter, who is now four, was born. She uses Facebook primarily to see pictures of her family as well as share pictures with others. Over the years, she has accepted "friend" invitations from other housekeepers at the hotel. She has about 35 Facebook "friends," and her son had set modified privacy settings on her account when he set it up for her. In response to questions, it was clear that Barry didn't really understand who could see her posts and underestimated the ability for what she posted, liked or shared to be viewed by others.

When Barry signed into her Facebook account, she saw a post from Romani, another housekeeper at the hotel. The post read:

Hey work friends. Today was the last straw. Took my uniforms to the laundry room, was told now we have to pay for cleaning – aren't they making enough money on our back? First cutting the incentives and giving us the quotas. Don't they know the corners we have to cut to make that work? Don't think the guests would like to know about those. And that damn language training we had to do on our own time in order to be able to talk to the new kinds of guests we've been getting – the ones we're supposed to get those bonus raises for – hell, if I was good at learning foreign languages, do you think I'd be in this job? Then the stupid test they give us is absolute bullshit and even if you pass you never see the money in your paycheck. I'm tired of the lying and taking advantage. And soon guests are going to notice things are not what they should be, and when that happens, tips are going to go down, down down and we'll all really be screwed.

Barry was used to seeing posts from Romani, who she generally viewed as an unhappy, somewhat disgruntled person who would never be satisfied with anything. But at that moment, the post really hit home, because Barry was upset that she had seen something she really wanted to get for her grandson while shopping, but she knew couldn't afford it. She thought she would look on line to see if she could find it cheaper, but with this new charge Romani was talking about², that wasn't even going to be possible. And Barry had put a lot of time and effort into the optional language training, and Romani's post made her very nervous about the test she would have to take next week. Although she was unable to say exactly why she did it, Barry liked and shared Romani's post.

² Evidence at the hearing indicated that Romani misunderstood what she was told at the laundry, and that employees were being asked for a small uniform deposit, not being asked to pay for the laundering of their uniforms.

She had never liked, commented on or shared a co-workers post before. In fact, other than for family pictures, Barry virtually never posted on Facebook.

Apparently, a “friend” of one of her “friends” who knew Paul Manning, the Assistant Manager at the hotel, saw the post when it appeared on her newsfeed and sent a copy to him. The next day, when Barry returned to work, her supervisor was waiting for her and told her the Assistant Manager wanted to see her. The supervisor escorted her to the Manning’s office. He asked her if she had posted about the company on Facebook. Barry responded, I didn’t post, I just hit “like” and “share.” Manning responded, “so you shared the post. You know we have a policy³ about saying derogatory or disparaging things about the company in public. This is a blatant violation of policy, and I’m going to have to let you go. Turn in your badge at HR, arrange to bring in your uniforms and they’ll send you your final check next week. I’m sorry to have to do this. You’ve been a hard worker. But the company cannot tolerate this. With your profile picture in your hotel uniform and the name of the hotel listed in your profile, it’s clear where you work. This is bad for business. We’re in a very competitive environment and we have no choice but to let you go.

Barry was flabbergasted. It never dawned on her that liking and sharing a post without writing anything could violate the rules. She didn’t even think that the post itself was a violation. She started crying and said, “Are you serious? Am I really fired? For liking a post on Facebook.” Manning responded, “Yes, you are fired. Now go on to HR.” When she got to there, she saw Romani, who had also been fired for the Facebook post, turning in her badge.

On September 22, 2014, Barry filed a claim for unemployment benefits. Employer filed a formal protest stating that Barry’s termination was based on work-related misconduct arising out of her posting on Facebook. On October 6, 2014, a Deputy’s Determination found that Barry was discharged by the Employer for misconduct connected with work in that Barry posted derogatory and disparaging material on Facebook in violation of company policy. In addition, Barry’s action in posting negative things about her workplace for potential guests to see constituted a knowing disregard of the employer’s interest and a knowing violation of the standards which an employer expects of his or her employees. Barry appealed and a hearing was held by the Appeals Tribunal on October 23, 2014.

On October 30, 2014, the Appeals Tribunal rendered its decision finding that Barry was terminated for misconduct connected with work. § 288.050.2. The Appeals Tribunal specifically found credible

³ The rule, contained in the Employee’s Policy Manual, states, in relevant part:

¶ 7B Protection of the Company, our employees, guests and competitors

- (1) Employees are prohibited from disclosing, without authorization, any confidential or otherwise protected information, including without limitation confidential employee and guest information, trade secrets, and proprietary information, to anyone outside the organization.
- (2) Employees are prohibited from making public statements that are defamatory, disparaging, derogatory or discriminatory with regard to the company, its employees, guests or prospective guests.

Barry's testimony that she knew she was liking and sharing the Facebook post and that people with whom she was "friends" could see it, but she didn't fully realize that if they shared the post it might eventually be available to a much broader audience. The Appeals Tribunal concluded that not only had Barry shown poor judgment in liking and sharing the post, she also knowingly acted in disregard of the employer's interest and knowingly violated the standards that the employer had a right to expect of its employees. § 288.030.1(23). Moreover, the Appeals Tribunal found that Barry may well have violated an employer rule relating to public disclosure of derogatory information by liking and sharing Romani's post, and that she had not demonstrated that the rule was unlawful. *Id.* at (23)b. Therefore, the denial of unemployment benefits was appropriate.

Barry appealed to the Labor and Industrial Relations Commission ("Commission"). On January 19, 2015, the Commission affirmed the decision of the Appeals Tribunal, finding that the decision was fully supported by competent and substantial evidence and properly applied the law. The Commission adopted the Tribunal's decision. This appeal followed.

Standard of Review

"Article V, section 18 of the Missouri Constitution provides for judicial review of the commission's decisions to determine whether they are supported by competent and substantial evidence upon the whole record." *Fendler v. Hudson Services*, 370 S.W.3d 585, 588 (Mo. banc 2012). "The appellate court's review of the Commission's decision in an unemployment compensation case is governed by section 288.210[.]" *Harris v. Division of Employment Sec.*, 350 S.W.3d 35, 38 (Mo.App.W.D. 2011). Section 288.210.6 provides:

The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the decision was procured by fraud;
- (3) That the facts found by the commission do not support the award; or
- (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

We defer to the Commission on matters of witness credibility and the weight given to testimony. *Fendler*, 370 S.W.3d at 588. While we defer to the Commission's findings of fact, so long as they are supported by substantial and competent evidence, we do not defer to the Commission's conclusions of law or application of law to the facts. *Frisella v. Deuster Elec., Inc.*, 269 S.W.3d 895, 898 (Mo.App.E.D. 2008). "Whether the Commission's findings support the conclusion that an employee was guilty of misconduct is a question of law." *Frisella*, 269 S.W.3d at 898 We review

issues of law de novo. *Comeaux v. Convergys Customer Mgmt. Group, Inc.*, 310 S.W.3d 759, 762 (Mo.App.E.D. 2010).

Analysis

A claimant is disqualified from unemployment compensation benefits when he has been discharged for “misconduct connected with the claimant's work”, § 288.050.2, “regardless of whether such conduct or failure to act occurs at the workplace or during work hours.” § 288.030.1(23). In the context of this case, misconduct is defined as conduct “demonstrating knowing disregard of the employer's interest or a knowing violation of the standards which the employer expects of his or her employee,” § 288.030.1(23)(a) or a “violation of an employer's rule,” unless the employee can demonstrate that the “rule is not lawful.” § 288.030.1(23)(e)b. As noted, whether the Commission's⁴ findings support the conclusion that an employee was guilty of misconduct is a question of law.

Disregard of the Employer's Interests

Barry first contends that she should not have been denied benefits by the Commission based on conduct allegedly “demonstrating knowing disregard of the employer's interest or a knowing violation of the standards which the employer expects of his or her employee[s].” § 288.030(23). Initially, it “is essential to keep in mind that whether an employer has solid grounds to terminate an employee is not the same issue as whether the former employee qualifies for compensation.” *Miller v. Kansas City Station Corp.*, 996 S.W.2d 120, 124 (Mo.App.W.D.1999). As Missouri courts have repeatedly stated, “There is a vast distinction between the violation of a rule of an employer that would justify the discharge of the employee and a violation of such rule that would warrant a determination of misconduct connected with the employee's employment so as to disqualify him or her for unemployment compensation benefits.” *Buckley v. Safelite Fulfillment, Inc.*, 299 S.W.3d 757, 761 (Mo. Ct. App. S.D. 2009), *quoting from Hoover v. Cmty. Blood Ctr.*, 153 S.W.3d 9, 13 (Mo.App. W.D.2005).

“While generally, an employee ‘may be terminated for poor judgment and irresponsible actions,’ ‘such actions are generally not a ground for denying compensation.’” *Buckley*, 299 S.W.3d at 762, *quoting from Miller*, 996 S.W.2d at 124. In this case, Barry's actions reflect poor judgment and not a knowing disregard of “those basic ‘standards of behavior’ that apply universally in the workplace.” *Seck v. Dep't of Transp.*, 434 S.W.3d 74, 83 (Mo. banc 2014). If there was a universal duty not to disparage the company in any public way, it would be unnecessary for Employer to have a policy against it. *See id* at 84 (the relevant category of misconduct “applies only to those standards of behavior for which no such notice is needed because they are fairly understood by both the employer and the employee even where not included in the employer's express rules.”).

⁴ “[W]here, as here, the Commission adopts the decision of the Appeals Tribunal, we consider the Tribunal's decision to be the Commission's for purposes of our review. *Sheridan v. Div. of Employment Sec.*, 425 S.W.3d 193, 198-99 (Mo. App. W.D. 2014), *quoting from Ashford v. Div. of Employment Sec.*, 355 S.W.3d 538, 541 (Mo. App. W.D. 2011) (citation omitted). Accordingly, we will refer to the decision as the Commission's.

Moreover, despite the fact that our Supreme Court held that the “disregard of standards of behavior which the employer has the right to expect of his or her employee” basis for misconduct in the pre-2014 version of the statute had no scienter requirement, the Missouri General Assembly, in amending the statute, did insert a scienter requirement of “knowing.” That change must be afforded meaning. *See, e.g., State ex rel. Dir. Of Revenue v. Gaertner*, 32 S.W.3d 564, 567 (Mo. banc 2000)(“When the legislature has altered an existing statute such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act.”). The evidence here does not support the conclusion that Barry *knew* she was disregarding universal standards of employee conduct when she impulsively hit “like” and “send” on her computer. Nor did she *know* the extent to which her post would become public. In the circumstances of this case, Barry did not commit misconduct under that prong of the statute.

Violation of Workplace Rule

The Commission also found that Barry violated a workplace rule that prohibited employees from making public statements that were defamatory, disparaging, derogatory or discriminatory with regard to the company, its employees, guests or prospective guests. Barry argues that her conduct in merely liking and sharing the Facebook post of another employee does not violate that rule, even if she may have had some question about the veracity of Romani or the accuracy of the post. While there is some attractiveness to that argument, we need not address it, because even if she violated the rule, she has met her burden and shown that, both on its face and as applied here, the rule is unlawful. § 288.030.1(23)(e)b.

Section 7 of the National Labor Relations Act (NLRA)⁵ provides that “[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157 (2006). Section 8(a)(1) states that it is an unlawful labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158 (2006). The NLRB and federal courts have applied these statutes to proscribe both adverse employment actions as well as policies that have the effect of inhibiting concerted action among employees. *See generally* Alexandra Hemenway, *The NLRB and Social Media: Does the NLRB “Like” Employee Interests?*, 38 J. Corp. L. 607 (2013)(discussing authorities); Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. Pa. J. Bus. L. 957 (2012).

While the National Labor Relations Board has been less than clear in articulating when social media policies and employer actions rise to the level of unlawful practices under Section 8, *e.g., compare* Advice Memorandum, Office of the Gen. Counsel, NLRB, *American Medical Response of Connecticut*, No. 34-CA-12576, 39 N.L.R.B. A.M.R. 15 (Oct. 5, 2010) *with* Advice Memorandum, Office of the Gen. Counsel, NLRB, *Sears Holdings (Roebucks)*, No. 18-CA-19081, 2009 WL 5593880 (Dec. 4, 2009), here the employer policy, which broadly prohibits defamation, disparagement,

⁵ The parties agree that Employer is not unionized and that there has never been an attempt to unionize Employer’s workforce. They also agree that Employer has sufficient volume of business to fall within the jurisdiction of the NLRA.

derogatory and discriminatory statements without sufficient limiting language, certainly has the potential to chill protected activity, And where the policy has been actually used to fire two employees who could be seen as acting in concert, that further confirms that the policy violates Section 8 and is therefore unlawful. Accordingly, Barry has met her burden of demonstrating that the employer rule is unlawful, and she cannot be denied benefits on the basis of that rule.

Conclusion

For the foregoing reasons, we reverse the decision of the Labor and Industrial Relations Commission and direct that the Claimant be awarded benefits.

Colon, J., dissenting.

I am unable to agree with my colleagues on either issue, and I therefore respectfully dissent.

Initially, I think the Commission was correct in concluding that misconduct had been established in this case. It is well established in Missouri that employees have a duty of loyalty to their employers separate and apart from any fiduciary duties they may or may not have. *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 15 (Mo. banc 2012); *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. banc 2005); see also *Nat'l Rejectors Inc. v. Trieman*, 409 S.W.2d 1, 41 (Mo. banc 1966) and Rest. (3d) Agency § 8.01. Part of this duty is necessarily an obligation not to harm your employer through conduct that constitutes disparagement, defamation, derogatory, or discriminatory statements. Thus, in my view, Claimant's action in liking and sharing Romani's post, which indicated her agreement with the sentiments contained therein that were disparaging, derogatory and potentially defamatory to the Employer, easily violated the standards an employer expects from its employees. And while the statute does require that she act knowingly, her knowledge that Facebook pages are not private, and that these statements would be seen not only by co-workers, but, at a minimum, her family and friends and likely others, is sufficient knowledge to constitute misconduct.

Further, I am not the least bit bothered by the fact that this conduct occurred at her home and while she was not scheduled to work. In our electronic age, time and place have much less meaning than in the past. Moreover, section 288.030.1(23), as amended by the legislature in 2014, explicitly allows for a finding of misconduct "regardless of whether such conduct or failure to act occurs at the workplace or during work hours." If we construe the "cold, clear words of the statute," as we are required to do, *e.g.*, *Frazee v. Partney*, 314 S.W.2d 915, 921 (Mo. 1958), there is no question that Claimant's conduct qualifies as misconduct. And since her conduct involved liking and sharing a post that explicitly talked about her employer and its practices, it was undoubtedly related to work, so there is no impediment to finding misconduct on this record. I would, therefore, uphold the decision of the Commission.

As to the second issue, I also disagree with the analysis and result of the majority. In order for an employer's policies to violate Sections 8(a)(1), the rule in question must have a reasonable tendency to chill employees in their exercise of Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where a policy or rule does not explicitly restrict such rights, the rule is lawful unless, when read in the context of the employer's policy as a whole, it either would be reasonably construed by employees to restrict activity protected under Section 7, *Lutheran Heritage Village – Livonia*, 343 NLRB 646, 1 (2004), have been promulgated in response to union activity, or the rule has been employed in fact to restrict the exercise of Section 7 rights. *Fiesta Hotel Corp.*, 344 NLRB 1363, 1368 (2005). It is clear that none of those apply in this case. Accordingly, Claimant has failed to meet her burden of showing that the work rule in this case was unlawful, and she is not entitled to benefits.

IN THE MISSOURI SUPREME COURT

Erica Barry	)	
	)	
	)	
v.	)	Case No. SC4583
	)	
A1 Quality Hotel System, Inc., d/b/a/ Hotele Internationale	)	
and the Division of Employment Security,	)	
	)	
	)	

ORDER

Appellant's motion for transfer is hereby granted; the decision of the Court of Appeals for the Northern District of Missouri is vacated; and the case is hereby transferred to this Court. The parties are invited to appear at a special session of this Court, to be held in October 2015, to argue the following issues:

1. Can an employee, consistent with Missouri law defining misconduct, be denied unemployment benefits for “liking” and “sharing” a co-worker’s social media post containing derogatory and disparaging information about the employer that is made outside of work hours and off the employer’s premises?
2. Is the denial of unemployment benefits for violation of an employer’s rule prohibiting making defamatory, disparaging, derogatory or discriminatory statements with regard to the company, its employees, guests or prospective guests permissible based on misconduct under Missouri law in light of sections 7 and 8 of the NLRA?