20190405

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 6, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

New Freedom Center, Inc., Petitioner/Appellant, vs. Job Service North Dakota and James L. Maurer, Respondents/Appellees.	**SUPREME COURT NO. 20190405** Civil No. 08-2019-CV-01450

ON APPEAL FROM JUDGMENT DATED OCTOBER 25, 2019
STATE OF NORTH DAKOTA
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS SCHNEIDER

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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LAW AND ARGUMENT

I. Job Service Erred when it Concluded Maurer had not engaged in misconduct and when it found he had not been warned.

[¶1] In its Brief of Appellee, Job Service weaves between citing the record, when the record is more favorable to its position than its findings of fact, and citing the findings when they are more favorable than the record. This is improper. Job Service is required to proceed based on its factual findings, and those findings are not supported by the record. They do not support Job Service's legal conclusion that Maurer was not properly terminated for misconduct.

[¶2] Job Service discounts some of Maurer's bad acts because Job Service claims NFC allegedly failed to bring the wrongfulness to Maurer's attention. The inference Job Service draws from these allegations is that NFC must not have considered Maurer's wrongful behavior to be significant because it allegedly failed to take any action in response. In so concluding, Job Service ignores the unrefuted evidence that staff members at NFC had complained about Mauer's wrongful behavior to Maurer's immediate supervisor and friend, James Knopik, and that Knopik failed, for the most part, to take action. It was only after Knopik had announced he was leaving NFC that the truth of Maurer's wrongful conduct was communicated to Josh Olson, the owner of NFC. (Appendix (A) at 12, 29, 35, and 43.)

[¶3] NFC did not ignore Maurer's prior poor behavior. It just did not learn of some of it until after Maurer had been placed on probation.

[¶4] Job Service also erred when it concluded Mauer's wrongful acts only constitutes only misconduct if Maurer repeated the bad behavior after being warned. There is no warning requirement, however, in North Dakota law. As Job Service acknowledges,

misconduct is such "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate . . . disregard of standards of behavior which the employer has the right to expect of his employee." Perske v. Job Serv. N.D., 336 N.W.2d 146, 148 (N.D. 1983). In Perske, this Court explained that recurrence of the behaivor is relevant in the context of "carelessness or negligence". Id.

[¶5] Amazingly, in its Brief of Appeellee, concerning Maurer using racial slurs in the workplace, Job Service contends: "no evidence was put forth showing that NFC had warned Maurer that his use of the term FBI was inappropriate and would result in discipline." (Brief of Appeelee at ¶ 37.) It should go without saying that using racial slurs in a treatment facility serving Native Amercian clients is the type of behaivor that is a "disregard of standards of behavior which the employer has the right to expect of his employee."

[¶6] The same is true as to Maurer's unwanted assaulting of fellow employees. Job Service attempts to hide the true nature of these events by selectively quoting the testimony. That testimony, however, does not support Job Service's conclusion that this was a harmless joke:

> MS. WILLIAMS: I feel that I was not singled out ... he was not singling mean to me. He portrayed himself very, very hard to talk to. So when I would need to ask him a question about paperwork I felt very uncomfortable doing that. There was one occasion, he was slightly aggressive towards me when he hit me on the head with some paperwork. I don't know if that was meant in jest. I turned around and asked him what was that for and he never gave me an answer. Other ... other than that he was very hard to approach.

(A at 32-33.)

[¶7] Maurer's striking of Ms. Williams is not a benign joke. It is proof of Maurer's hostile attitude at work. It was presented as part of NFC demonstrating Maurer's hostility – that he was very hard to work with.

[¶8] Further, even under Job Service's own standards Maurer committed misconduct. Maurer and Job Service acknowledge Maurer had been warned about his use of foul language in the office. His use of the foul langauge nonetheless continued. On the day he was put on probation, Maurer repeatedly used foul language in a hostile manner distrubing fellow employee Jackie Binstock. (A at 42-43.) She testified that Maurer had been in and out of NFC employee James Knopik's office multiple times before the staff meeting and they had been yelling at each other. (Id.) Ms. Binstock heard Maurer repeat more than three times, loudly, "it doesn't fuckin' matter, it doesn't fuckin' matter." (A at 43.) The shouting got louder and louder and Ms. Binstock was alarmed. (A at 43.) She was concerned that a client sitting in the lobby could hear the foul language. Other employees also were alarmed ("Sussie and Megan were both coming toward the door because they were like what's happeneing. . . "). (A at 43.)

[¶9] It is puzzling why Job Service did not consider this to be misconduct. It was a reoccurrence of behavior for which a warning had been issued and it alarmed a fellow employees. It was loud enough to be heard by clients.

[¶10] Finally, Job Service erred when it completely discounted Maurer's disregard of instructions that he not return to the facility. Job Service's discussion of this issue is a good example of it wanting to ignore its findings when those findings are not favorable to its position. The Hearing Officer concluded that Maurer "did not do as instructed." (A at 95.) He was instructed to stay away. He violated those instructions. Job Service contends that

disobeying a direct command to not come to work can be ignored as a "good-faith" error in judgment. The only judgment involved is whether to obey a directive of your employer or to not obey that directive. Not obeying a clear directive from an employer is misconduct.

[¶11] Based on the facts as found by Job Service, NFC established that Maurer was terminated for misconduct.

II. Job Service Erred When it Failed to Consider the Child Pornography found on Maurer's computer.

[¶12] For the first time on appeal, Job Service contends NFC did not preserve this issue for review because it claims NFC failed to raise this issue before the Hearing Officer or as part of its Petition for Judicial Review. Both of these claims are mistaken.

[¶13] There is no questions that NFC raised the issue of Maurer's unsatisfactory work performance at the hearing. In this regard, NFC introduced evidence of Maurer playing computer games while at work and it attempted to introduce evidence that Maurer was also viewing child pornography while at work. (A at 20.) Both are proof of Maurer disregarding his duties. Job Service, however, wrongly did not allow NFC to present evidence of this wrongful behavior.

[¶14] Similarly, in its Petition for Judicial Review, NFC specifically preserved this issue by claiming Job Service denied NFC a fair hearing, that its decision is contrary to North Dakota law, and that its findings of fact do not sufficiently address the evidence presented by Petitioner. (A at 99-100.) Job Service denied NFC a fair hearing when it failed to allow it to introduce evidence of the child pornography. Job Service's decision to disallow the evidence of the pornography is contrary to law. Although Job Service mentions the child pornography in its decision, that decision does not sufficiently address the evidence presented. NFC preserved this issue for appeal.

[¶15] Job Service cites to the unpublished opinion of David B. Vail & Associates v. Employment Sec. Dep't, 172 Wash.App. 1022, 2012 WL 6212618, in support of its legal conclusion that it did not error in not considering the evidence of Maurer's child pornography. In so doing, Job Service ignores one essential difference between that case and this case. Here, NFC had knowledge of the child pornography before it terminated Maurer. In Vail, the evidence of pornography was discovered after termination. "Shortly after the termination, David instructed Yumi Nagasaki–Taylor, an office assistant, to search Johnson's work computer and the flash drive. Nagasaki–Taylor found pornographic material and sexually explicit e-mail messages, some of which were in Johnson's work e-mail." Id. (emphasis added.) The holding of Vail is not relevant here.

[¶16] Further, the holding in Vail supports NFC's position that all evidence known prior to termination is relevant to determining whether Maurer was terminated for misconduct. The Court explained: "[S]ettled law proscribes that the agency only consider evidence known to the employer at the time of termination in deciding whether the employee engaged in disqualifying misconduct." Id. at 8. Job Service disallowed evidence that was known to NFC prior to Maurer's termination.

[¶17] Job Service also cites Davis v. Howard O. Miller Co., 695 P.2d 1231 (Idaho 1984). In Davis, however, the facts are materially different. In Davis, the employer testified he terminated the employee because he feared the employee would quit without providing proper notice. At the time of termination, the employer also had knowledge that the employee had failed to list a prior employment on his application. The employer could have terminated the employee for failing to accurately complete his employment application. The employer, however, offered this evidence at the hearing to justify his fear

that the employee would quit without notice – the prior unlisted job reflected the employee quit without providing notice. Although the inaccurate application may have been relevant to the employees' honesty, the employer did not rely on the inaccurate application for that reason when determining whether to terminate the employee.

[¶18] The facts here are much different. Here, NFC placed Maurer on probation so it could investigate whether or not to terminate his employment. Maurer immediately intentionally violated the terms of his probation. NFC determined it has sufficient legal grounds to terminate Maurer based on the willful violation of the probation terms and the other information which was already known. Nonetheless, NFC decided to complete its investigation so it knew the full extent of Maurer's wrong doing. That investigation revealed additional wrongdoing, including that Maurer was not devoting his work time to work duties, including playing computer games at work. NFC decided to investigate Maurer's computer to determine the extent of his computer game playing. That investigation revealed child pornography. (A at 20.) Viewing child pornography at work is an example of Maurer not devoting his work hours to work activities; and is wrongful conduct standing alone.

[¶19] Job Service allowed NFC to present evidence of the computer games and Maurer's other failures to diligently complete his job duties. Job Service, however, failed to allow NFC to present evidence of Maurer's pornography viewing at work. This inconsistency is not explained.

[¶20] Unlike in Davis, here, the excluded information is directly related to the reasons Maurer was terminated. There is no doubt that if Maurer had not violated his probation terms, he would have been terminated for his other wrongful behavior some of which was

discovered after NFC concluded it would terminate Maurer. Unlike in Davis, which involved a fact question – why was the employee really terminated, here the issue is one of law – did NFC correctly conclude that the violation of probation standing alone constituted legal misconduct? Had NFC known the violation of probation was not legally sufficient, it would have still terminated Maurer based on the other wrongful behavior uncovered during NFC's investigation, including the pornography.

[¶21] Even if Davis does apply, it should not be followed by this Court. The Davis Court does not provide any support for its legal position that all information known to an employer at the time of termination cannot be used to demonstrate misconduct. The law in North Dakota should not turn on an employer's legal conclusion on what amount of misconduct is sufficient, especially in circumstances like this where the additional evidence of misconduct was discovered as part of a contemporaneous investigation of the employees' conduct.

[¶22] If this Court concludes that all evidence of misconduct known prior to termination should have been considered by Job Service, then this Court must reverse.

III. Job Service Had Improper Ex Parte Communications with Maurer Prior to the Hearing.

[¶23] Job Service had ex parte communications with Maurer prior to the hearing ("I did have a few conversations with Mr. Maurer . . ."). (A at 7.) The substance of these ex parte communications were never disclosed to NFC as required by North Dakota law.

[¶24] Job Service contends that it is allowed to have ex parte communications regarding the Hearing Officer issuing subpoenas and that the communications here were limited to discussions about subpoenas. (Brief of Appellee at ¶ 55.)

[¶25] The record does not support Job Service's factual assertion. It is not apparent that there was no communications concerning the merits of this matter. Job Service simply presumes the communications related only to the issuance of a subpoena.

[¶26] Section 28-32-37(6) specifically places on Job Service the obligation to disclose the full substance of the ex parte communications to eliminate the exact issue presented here – uncertainty as to the contents of the communications. Job Service did not comply with the requirements of the statute. It did not either disclose to NFC any written communications or produce a memorandum "stating the substance of all oral communication received [and] all responses made."

[¶27] More disconcerting is Job Service's position that it can have ex parte communications concerning the issuance of discovery subpoenas. North Dakota law does not exempt such communications from its requirements. See N.D.C.C. § 28-32-37(3)-(4)("no party to an adjudicative proceeding . . . may communicate directly or indirectly in connection with any issue in that proceeding). Whether a subpoena should or should not be issued and the scope of the subpoena were issues in this proceeding. NFC had a right to object to any subpoena issued by the Hearing Officer on Maurer's behalf. It is wrong for Job Service to make decisions on discovery issues without notice to all parties. Job Service's position demonstrates its systematic disregard of law justifying dismissal of this matter. Kilber v. Grand Forks Pub. Sch. Dist., 2012 ND 157, ¶ 18, 820 N.W.2d 96, 105

CONCLUSION

[¶28] This Court should reverse and enter judgment in favor of New Freedom Center. In the alternative this Court should remand back to Job Service for further proceedings as to evidence of pornography on Maurer's work computer and as to prejudice caused by the undisclosed ex parte communications.

Respectfully submitted April 6, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this 6th day of April, 2020.

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Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on April 6, 2020, **Appellant's Reply Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

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Chelsey Ternes

Subscribed and sworn to before me this 6 day of April, 2020.

Notary Public

DIANN GOLDADE
Notary Public
State of North Dakota
My Commission Expires Apr 19, 2023