STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

GENERAL TRIAL DIVISION

ANDREW SHIRVELL,

Claimant/Appellant,

v.

DEPARTMENT OF ATTORNEY GENERAL,

Employer/Appellee.

STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY,

Agency/Appellee.
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OPINION AND ORDER REVERSING AGENCY DECISION

Case No.: 12-344-AE

Hon. Paula J.M. Manderfield

Appellant appeals a finding by the Michigan Compensation Appellate Commission ("the Commission") that he was not entitled to unemployment insurance benefits because he was discharged for misconduct connected with his work. Appellant claims the Commission's decision is contrary to law because the activities for which he was terminated constituted the exercise of his First Amendment right to freedom of speech, and therefore could not constitute misconduct for purposes of denying him unemployment benefits.

For the reasons set forth below, the Court finds that the Commission's decision was contrary to law. Accordingly, the Court reverses the Commission's decision and remands this case for further proceedings not inconsistent with this opinion.

BACKGROUND

Appellant was hired by the Department of Attorney General ("the Department") in November 2006 as a legal analyst, and then promoted to the position of assistant attorney general in May 2007. Appellant completed his work apparently satisfactorily from that time until 2010.

In April 2010, Appellant began a personal blog concerning the then newly-elected University of Michigan student body president, Chris Armstrong, who was also a gay and lesbian rights activist. Over the next few months Appellant also protested and demonstrated against Armstrong and his policy positions. Throughout, Appellant identified himself simply as a "Concerned Michigan Alumnus." He did not in any way identify himself as an assistant attorney general.

From at least May 2010, Appellant's superiors were aware of his blogging and political activities. At no time did they request that Appellant take his blog down or cease his political activities. In fact, even after his supervisors were aware of the blog and its content, and the fact that it was drawing publicity, Appellant received a very positive performance evaluation from his immediate supervisor, including an "outstanding" rating in professionalism,[1] and was assigned tasks that specifically involved gay and lesbian rights issues, for which work he received high praise from his supervisors.[2]

[1] Performance evaluation, located in the certified agency record at pp 223-231.

In August 2010, Appellant granted an interview to a local television station regarding his blog and his political activities. He gave this interview from his home, and refused to discuss the details of his own employment in that interview. Appellant did not advise his employer of this interview, or request their permission to grant this interview. Several days after the interview, the Department learned of the interview. Appellant was then privately criticized for failing to contact the Department's Office of Communications before doing the interview.

Less than a week after this interview, Appellant's supervisor publicly reprimanded Appellant, via an email sent to all division staff, for handling a court matter differently that the supervisor believed was proper. Appellant angrily confronted his supervisor about the email, and a heated argument took place between them. As a result of this argument, on August 31, 2010, the Department sanctioned Appellant with a 2 ½ day suspension.

Several weeks later, CNN's Anderson Cooper contacted Appellant and requested to interview him. Appellant advised the Department of this request, and the Department at first refused him permission, then reversed itself and informed Appellant that though it thought Appellant should not agree to do the interview as it would reflect poorly on both Appellant and the Department, it could not prevent him from granting the interview.[3]

While Appellant was still deciding whether or not to do the interview, the Department issued Appellant with a formal letter of reprimand for violating the Department's media contacts policy by failing to inform the Department of the interview request from the local television station before agreeing to do that interview.

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[2] Email from Appellate Division Chief to then-Attorney General Cox, located in the certified agency record at p 233.

[3] Hearing Transcript dated August 30, 2011, located in the certified agency record at pp 95-97, 119-120.

Ultimately, Appellant decided to do the Anderson Cooper interview, though he again attempted to prevent any discussion of his association with the Department from being discussed in the interview. Around that same time Appellant was invited to appear on The Daily Show, and accepted that offer with the Department's permission.

In late September 2010, Attorney General Mike Cox did an interview with CNN, during which he was specifically questioned regarding Appellant and Appellant's blogging and other political activities. Cox stated that regardless of whether the Department agreed with Appellant's activities and views, his actions were protected by the First Amendment.[4] Cox also explicitly stated in that interview that Appellant's blogging was not impacting the mission of the Department and likewise was not impacting Appellant's work as an assistant attorney general.[5]

The day following Cox's appearance on CNN, Appellant took a short medical leave of absence, due to death threats he had received and harassment he had suffered as a result of his blogging and political activities. That same day, Appellant shut down that blog. Also that same day, Chris Armstrong served Appellant with notice of his application for a personal protection order against Appellant.

On October 1, 2010, the Department announced that it was initiating an internal investigation into appellant. A disciplinary conference was subsequently set for November 5, 2010. In the meantime, on October 12, 2010, the Michigan Civil Rights Commission issued a resolution condemning Appellant's activities, and the Ann Arbor City Council followed suit less than a week later.

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[4] See show transcript, located in the certified agency record., p 150
[5] *Id*, at p 151.

On October 25, 2010, several hours before the scheduled hearing in the matter of Armstrong's request for a personal protection order, Armstrong voluntarily dismissed his request. The following day the Washtenaw County Prosecutor's Office, which had been considering stalking charges against Appellant, issued a memorandum advising that it would not be issuing any charges against Appellant, because his activities constituted constitutionally-protected freedom of speech.[6]

On November 5, 2010, Appellant returned from his medical leave of absence. That same day the disciplinary conference took place in connection with the Department's internal review of Appellant. The following week the conference was reconvened and Appellant was informed that he was being dismissed from his position with the Department.

Following his dismissal, Appellant filed a claim for unemployment benefits. In January 2011 the Unemployment Insurance Agency ("the UIA") issued a determination finding Appellant disqualified from receiving benefits pursuant to MCL 421.29(1)(b) of the Michigan Employment Security Act on the basis that Appellant had been suspended for misconduct connected with his work. Upon Appellant's request, the UIA issued a redetermination, again finding that Appellant was disqualified from benefits under MCL 421.29(1)(b).

Appellant appealed and requested a hearing before an ALJ. The ALJ affirmed the redetermination. Appellant appealed to the Commission, which upheld the ALJ's decision. Appellant then filed the present appeal.

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[6] Denial of Request for Prosecution, located in the certified agency record at p 144.

STANDARD OF REVIEW

MCL 421.38(1) of the Michigan Employment Security Act ("the MESA"), MCL 421.1, *et seq.*, provides the standard of review, stating:

> The circuit court . . . may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

Substantial evidence is evidence that a reasoning mind would accept as sufficient to support a conclusion. It consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance of the evidence.[7]

Because the MESA is a remedial statute, its provisions are to be construed liberally, while its disqualification provisions are to be narrowly construed.[8]

ANALYSIS

MCL 421.29(1)(b) disqualifies an individual from receiving unemployment benefits if he or she was discharged for misconduct connected with his or her work. The Michigan Supreme Court has defined misconduct as follows:

> Conduct evincing such a willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.[9]

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[7] *Tompkins v Dep't of Social Services*, 97 Mich App 218, 222; 293 NW2d 771 (1980).
[8] *Motycka v General Motors*, 257 Mich App 578, 582; 669 NW2d 292 (2003).
[9] *Carter v Employment Security Commission*, 364 Mich 538, 541; 111 NW2d 817 (1961).

A finding of misconduct may be based upon a series of infractions even though no one infraction taken by itself would constitute misconduct.[10] Moreover, off-duty conduct, under the right circumstances, can constitute misconduct under the Michigan Employment Security Act.[11] Specifically, the Michigan Court of Appeals has held that "improper conduct by employees in positions of public trust may undermine their ability to function in an official capacity and damage the prestige of the public employer."[12] In that case, however, the conduct at issue was not conduct that was constitutionally protected, but rather illegal gambling.

A different rule applies where the activity is constitutionally protected. The U.S. Supreme Court set forth the rule in this regard as follows:

> For at least a quarter-century, this Court has made clear that, even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[13]

Specific to unemployment insurance benefits, courts in other jurisdictions have held that a claimant cannot be disqualified from receiving unemployment benefits simply for expressing political views, even if the claimant does so while on the job, for instance by wearing a button or badge on clothing:

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[10] *Christophersen v Menominee*, 137 Mich App 776, 780; 359 NW2d 563 (1984).
[11] *Bowns v city of Port Huron*, 146 Mich App 69, 75-76; 379 NW2d 469 (1986).
[12] *Id.*
[13] *Perry v Sinderman*, 408 US 593, 597; 92 S Ct 2694; 33 L Ed 2d 570 (1972).

> We do not take issue with the right of an employer to discharge an employee for reasons which in the employer's view would have an adverse effect on business. However, when, as in this case, an agency of the Sate steps in and denies a claimant unemployment benefits based upon that employee's exercise of his right of freedom of speech as guaranteed by the First amendment of the Federal constitution, we are squarely presented with an instance of State action violative of the Fourteenth Amendment. The withholding of employment benefits to a claimant on the basis of an exercise of free speech would constitute the equivalent of a prohibition of expression by the State. It cannot be seriously disputed here that the button worn by claimant was a manifestation of thought protected by the First Amendment. The fact that the thought conveyed by claimant's button was controversial is all the more reason for holding that the State cannot be permitted to take a position which would bring into play its power to withhold unemployment insurance benefits as a coercive factor.[14]

Here, the Department admitted at the hearing that the "content and conduct described in the blog goes directly to the reason that the investigation was conducted and the termination ultimately occurred."[15] Appellant's activities involving the blog, as well as his political activities, were all constituted constitutionally-protected freedom of speech.

Accordingly, pursuant to *Perry, supra*, the UIA and the Commission wrongly denied Appellant unemployment benefits. Accordingly, the Commission's decision must be reversed.

The Court notes that the Department has argued, and the ALJ and Commission found, that Appellant's "misconduct" was not simply his blogging and other political activities, but also his actions that led to his two disciplinary actions (the memorandum reprimanding Appellant and the 2 ½ day suspension). From the Department's own testimony at the hearing, as quoted above, it is clear that the primary factor motivating the discharge was the constitutionally-protected activities in which Appellant engaged.

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[14] *De Grego v Levine*, 362 NYS2d 207, 208-209 (NY APP Div 1974).
[15] Hearing Transcript, located in the certified agency record at p 47.

Two isolated and relatively minor rule violations on their own do not amount to evincing such a willful or wanton disregard of an employer's interest as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. Nor does it amount to such carelessness or negligence in degree or recurrence as to manifest equal culpability, wrongful intent, evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer.

For the above-stated reasons, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED that the agency decision is **REVERSED.**

This decision resolves the last pending claim and closes the case.

October 17th, 2012

Hon. Paula J.M. Manderfield (P-34319)
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the Opinion and Order Reversing Agency Decision upon Andrew L. Shirvell, Julie M. Jensen, Jeanmarie Miller, and Denise Barton by placing said Order in an envelope and placing same for mailing with the United States Mail at Lansing, Michigan, on October 17, 2012.

Jean M Smydra

Jean M. Smydra
Judicial Assistant to Judge Manderfield