COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3157 **Cir. Ct. No. 02 CV 2912**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LINDA S. MERKEL,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND TEACH 'N' TOYS, INC., D/B/A LEARNING SHOP,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Linda S. Merkel appeals from a trial-court order affirming a decision of the Labor and Industry Review Commission. The Commission concluded that Merkel was not eligible for unemployment benefits because she engaged in misconduct when she sent an e-mail to managers and

employees of Teach 'N' Toys, Inc., d/b/a/ the Learning Shop, criticizing management. Merkel claims that: (1) the Commission's conclusion that she engaged in misconduct is not supported by the record; and (2) the denial of unemployment benefits violates her right to freedom of speech under the First Amendment to the United States Constitution. We affirm.[1]

I.

¶2 Linda S. Merkel was an assistant store manager at Teach 'N' Toys, Inc., d/b/a the Learning Shop. On September 11, 2001, she called Todd Merryfield, a co-owner of the store, to discuss a staff shortage because of a scheduling problem. During the telephone conversation, Merryfield told Merkel that he thought it was "retarded" to close malls in the Milwaukee area for security reasons. After the telephone conversation, Merkel sent an e-mail message to approximately twenty store managers and employees commenting on the decision to keep the Learning Shop open:

> Obviously, this is a very frightening and sad day for everyone in our country. Here, in Wisconsin, we all know someone who is affected by these terrible events. It is very hard to concentrate on business as usual while the world is turned upside down, and the the [sic] hatred that strangers feel for us makes itself known in unimaginable ways that will change our lives forever.
>
> On a day like this, the people who work for us will be torn between spending their time with us, or being with their families. These are decisions that must be respected. There is no training for working on a day when our country is under attack by terrorists. There is no plan for this. The management teams should be supportive, rather than judging decisions that are being made in a major

[1] *See* ***44 Liquormart v. Rhode Island***, 517 U.S. 484, 489 n.1 (1996) (The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.).

> metropolitan area for the safety of the population as being, "retarded".
>
> We cannot know, nor are we privy to security information that others may have when deciding to close airports or malls or stadiums. We need to pull together as teammates, and Americans. This is not just another day. Being open for business and serving the customer is a responsibility that we will fulfill to the best of our ability under such unusual circumstances. But let us recognize that things are not "normal", and will never be completely "normal["] again.

¶3 Merryfield fired Merkel approximately one month later, on October 9, 2001. Merkel applied for unemployment benefits. The Department of Workforce Development determined that she was eligible for benefits. The Learning Shop appealed and an administrative hearing was held on November 20, 2001.

¶4 At the hearing, Merryfield testified that Merkel had been warned three times before not to criticize management decisions in front of other employees. According to Merryfield, the mass September 11 e-mail was the "last straw." He claimed that he terminated Merkel because she was disrupting the employment atmosphere:

> [The situation] was impacting my ability to run this company and the management team ability to run the--the company.
>
> ….
>
> [W]e do stress this with all of our staff, that if you have a question, a problem, you want to challenge any decision, theory that's put out by the management team or--or anyone else for that matter, you go to that person individually and--and ask the question. What is going on, why is it this way when we've trained in a different way? Which is totally acceptable. What we end up doing is investing a lot of time working, not only with Linda [Merkel], but with how the challenge is put forth. That we have to go back and let everyone else in the company--and

> that's essentially everyone in the company because these … e-mails are printed out for all the staff to read. We have to fall back and re-train all of our staff. And it was seriously impacting my role and the members of the management team.

When asked by his attorney, he testified that he did not fire Merkel until October 9, 2001, because he was under a deadline to close another store.

¶5 Merkel also testified. She acknowledged that she received a "think time" memorandum dated June 12, 2001. The memorandum gave Merkel a day off to think about "whether [she] want[ed] to work at The Learning Shop" and informed her:

> If you choose to return to the company, you will be measured on the manner in which you execute the duties and responsibilities of an Assistant Store Manager. This means, in part, public support of company directives with private challenges, being positive versus argumentative in your communications with Company co-workers and maintaining a high level of productivity. The choices you choose to demonstrate will determine the consequences of your employment.

Merkel testified that the September 11 e-mail was not meant to be disruptive:

> I sent [the e-mail] out because after I spoke to Todd [Merryfield] and I had received another phone call from an employee who said her husband did not want her to come in tonight because he wanted her to be home with their family…. [T]hat left nobody to work beside myself from--I would say from 3 o'clock until 8 o'clock, our normal business hours. Also I really had no experience in handling--how do you counsel or talk to your employees during a terrorist attack or a war. How do--how do I say to her, well you better--do I say you better come in, or no, I understand, but then I still had the responsibility of keeping the store open for business. And since I had ready [sic] spoken to Todd [Merryfield] and that had been his feedback to me, I felt I was not getting support from the management team. I was basically asking for help on how to problem solve, being open for business that day.

¶6 The administrative law judge determined that Merkel had not engaged in misconduct for three reasons: (1) the Learning Shop condoned Merkel's actions by waiting to terminate her; (2) Merkel did not violate any company rules; and (3) the Learning Shop did not warn Merkel that her job was in jeopardy.

¶7 The Commission reversed the administrative law judge. It determined that Merkel was not eligible for unemployment benefits because she was terminated for misconduct:

> The employee was discharged for criticizing the employer's management in an e-mail to other management staff. The employee had been talked to about challenging decisions in private, rather than in public, and had been given a paid day of "think time" for challenging a decision made by the employer in a manner it deemed inappropriate. The commission believes that the employee's actions in including the employer's comment in an e-mail to staff members and indicating her disagreement with that comment evinced a deliberate and substantial disregard for the employer's interests and standards of conduct the employer had a right to expect of her.

At the end of the decision, the Commission noted why it had disagreed with the administrative law judge:

> The commission conferred with the administrative law judge about witness demeanor and credibility. The administrative law judge indicated that he did not credit the employer's explanation as to why the employee was discharged, based upon the fact that the employee was not fired until a month after the incident in question. The administrative law judge stated that if the employer believed the employee's conduct was egregious enough to warrant her discharge, it would have discharged her immediately. However, the commission finds credible the employer's testimony that it delayed in discharging the employee because it was busy with other matters related to the closing of one of its stores.

¶8 Merkel sought judicial review of the Commission's decision and the trial court affirmed.

II.

A. Misconduct

¶9 "In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the [Commission], not that of [the administrative law judge or] the circuit court." ***Lopez v. Labor & Indus. Review Comm'n***, 2002 WI App 63, ¶9, 252 Wis. 2d 476, 642 N.W.2d 561. We will uphold the Commission's findings of fact as long as they are supported by substantial and credible evidence. ***Cornwell Pers. Assocs., Ltd. v. Labor & Indus. Review Comm'n***, 175 Wis. 2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." ***Id.*** When more than one inference may be drawn from the evidence, the inference drawn by the Commission is conclusive. ***Bernhardt v. Labor & Indus. Review Comm'n***, 207 Wis. 2d 292, 299, 558 N.W.2d 874, 875 (Ct. App. 1996).

¶10 Whether an employee engaged in misconduct is a question of law that we review *de novo*. ***Charette v. Labor & Indus. Review Comm'n***, 196 Wis. 2d 956, 959, 540 N.W.2d 239, 241 (Ct. App. 1995). We give great weight to the Commission's decision because the legal question of misconduct is intertwined with factual and policy determinations. ***Id.***, 196 Wis. 2d at 960, 540 N.W.2d at 241.

¶11 Under WIS. STAT. § 108.04(5) (2001–2002), an employee who is terminated "for misconduct connected with the employee's work" may not receive unemployment benefits.[2] Misconduct is defined as:

> [C]onduct evincing such willful or wanton disregard of an employer's interests 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 of 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. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct."

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259–260, 296 N.W. 636, 640 (1941).

¶12 Merkel claims that the Commission's decision is not supported by the record because it did not make any findings "concerning [her] intent, attitude or credibility." The intent of an employee is a question of fact. ***Bernhardt***, 207 Wis. 2d at 303, 558 N.W.2d at 878. As we have seen, the Commission made the following findings of fact: (1) Merkel was discharged for sending an e-mail to other staff members that "criticiz[ed]" a management decision; (2) Merkel had

[2] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise noted. WISCONSIN STAT. § 108.04(5) provides, as relevant:

> DISCHARGE FOR MISCONDUCT. An employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government.

been previously warned not to challenge management decisions in front of other employees; and (3) Merkel's action in sending the e-mail "evinced a deliberate and substantial disregard" for the Learning Shop's interests.

¶13 It is evident from these findings that the Commission found Merkel's e-mail to be "an intentional and substantial disregard" of the "standards of behavior which [the Learning Shop] ha[d] the right to expect." Deliberate is defined as "characterized by … fully conscious often willful intent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 596 (1993). As we have seen, Merkel acknowledged that she received a memorandum that contained the Learning Shop's policy on challenging management. Moreover, Merryfield testified that Merkel had been warned in the past not to challenge management decisions. Thus, Merkel knew that the Learning Shop had a policy against challenging management decisions in front of other employees. Despite this knowledge, Merkel sent an e-mail to other managers and employees challenging a co-owner's comment that closing malls because of the September 11 terrorist attacks was "retarded" and implying that management was not supporting the employees in a time of crisis. From this evidence, it was reasonable for the Commission to find that Merkel's actions were an intentional violation of the Learning Shop's standards.

¶14 Merkel claims that the e-mail was not contrary to the Learning Shop's interests because it "evinced a clear intent to encourage the management teams to act in a manner that was consistent with both the interests of the country and the employer." This is one possible interpretation of her actions. As noted, however, when more than one inference may be drawn from the evidence, the inference drawn by the Commission is conclusive. *See* ***Cornwell***, 175 Wis. 2d at

544, 499 N.W.2d at 707. We accept the Commission's findings on Merkel's intent.

¶15 We also accept the Commission's conclusion that Merkel's behavior was misconduct. The Learning Shop had a right to expect that Merkel would not challenge management decisions in front of other employees. Despite its repeated statement of this policy, Merkel sent an e-mail "criticizing" management to approximately twenty employees. This evinced a clear disregard for the interests of the Learning Shop in maintaining a congenial and effective work place. Indeed, Merryfield testified that Merkel's e-mail adversely affected management's ability to run the company and required the Learning Shop to retrain all of its employees. The Commission was entitled to accept this statement as true. Under these circumstances, the Commission's conclusion that Merkel committed misconduct is affirmed.[3]

[3] Merkel also appears to claim that the Commission erred because it overruled the administrative law judge without consulting the judge about witness credibility. She misreads the record.

> [I]t is the rule in Wisconsin that where the [Labor and Industry Review Commission] differs with its hearing examiner, acting as an appeal tribunal, in regard to material findings of fact based on an appraisal of the credibility of the witnesses, it must (1) consult the record with the examiner to glean his or her impressions of the credibility of the witnesses and (2) include an explanation for its disagreement with the examiner in a memorandum opinion.

Bernhardt v. Labor & Indus. Review Comm'n, 207 Wis. 2d 292, 309, 558 N.W.2d 874, 880 (Ct. App. 1996). As we have seen, the Commission fulfilled these requirements. In a written opinion, it specifically noted: "The commission conferred with the administrative law judge about witness demeanor and credibility.… [T]he commission finds credible the employer's testimony that it delayed in discharging the employee because it was busy with other matters related to the closing of one of its stores."

B. First Amendment

¶16 Merkel also argues that the Commission's denial of unemployment benefits violates her right of free speech under the First Amendment of the United States Constitution. A denial of unemployment benefits cannot be based on an individual's exercise of First Amendment rights absent a compelling state interest. ***Frigm v. Unemployment Comp. Bd.***, 642 A.2d 629, 633 (Pa. Commw. Ct. 1994). Where the claimant was discharged by a private employer, as Merkel was here, we must balance the claimant's interest in commenting on a matter of public concern and the State's interest in protecting the unemployment compensation fund by disqualifying individuals whose unemployment is due to intentional misconduct. ***Messina v. Iowa Dep't of Job Serv.***, 341 N.W.2d 52, 61 (Iowa 1983); ***Bala v. Unemployment Comp. Bd.***, 400 A.2d 1359, 1369 (Pa. Commw. Ct. 1979). This is a two-step analysis, *see* ***Frigm***, 642 A.2d at 633 (denying First Amendment claim after concluding that employee's speech was not a matter of public concern), and Merkel does not pass the first step.

¶17 "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." ***Connick v. Myers***, 461 U.S. 138, 147–148 (1983). Matters of public concern are those which can "be fairly considered as relating to any matter of political, social, or other concern to the community." ***Id.*** at 146. Conversely, speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern. *See* ***id.*** at 148.

¶18 Merkel claims that the September 11 e-mail addressed a matter of public concern because it commented on a "national emergency"—namely, public

safety in the wake of the September 11 terrorist attacks. We disagree. As found by the Commission, Merkel "criticiz[ed]" a management opinion on safety and implied that management was not supporting its employees. The content of the e-mail related to a personal dispute over matters of internal policy and procedure at the Learning Shop.

¶19 Moreover, the form and the context in which the e-mail was sent do not support Merkel's claim that the e-mail addressed a matter of public concern. Merkel used the company's private e-mail system to disseminate the contents of a private conversation to other employees. *See* ***Burkes v. Klauser***, 185 Wis. 2d 308, 345–346, 517 N.W.2d 503, 518 (1994) (while form and context may overlap, form refers to the tone of the speech and the forum in which it was made while context refers to the circumstances in which the speech arises). We see nothing in either the form or the context that implicates a matter of social or political concern. Merkel's underlying reference to the September 11 terrorist attacks does not automatically place the e-mail into the realm of public concern. *See* ***Connick***, 461 U.S. at 148 n.8 (Private speech does not become a matter of public concern simply "because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.").

¶20 Accordingly, the denial of benefits does not infringe on Merkel's First Amendment rights, and we do not reach the second step of the test.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.