

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SUSANNA ROBINSON,
Petitioner,

v.

Case No. 16-AA-_____

ATLANTIS LEATHER COMPANY, LLC,

And

JOHN R. JUNKINS, COMMISSIONER,
BUREAU OF EMPLOYMENT PROGRAMS,
Respondents.

**PETITION FOR JUDICIAL REVIEW OF FINAL DECISION
OF BOARD OF REVIEW, WORKFORCE WEST VIRGINIA**

Pursuant to W. Va. Code 21A-7-17, and the Rules of Procedure for Administrative Appeals, Susanna Robinson, by her Counsel, William V. DePaulo, Esq., petitions this Court for judicial review of the December 9, 2015 final decision of the Board of Review, Workforce West Virginia (hereafter “Board”).

I. TITLE OF PROCEEDING BEFORE BOARD OF REVIEW

Case No. R-2015-2971

IN THE MATTER OF:

Claimant: SUSANNA ROBINSON
S.S. No. : XXX-XX-XXXX
Address : Lewisburg, WV 24901-0000

Employer: ATLANTIS LEATHER COMPANY, LLC
Address: HC 66 BOX 20 FRANKFORD, WV 24938-0000

II. KIND OF PROCEEDING BELOW AND NATURE OF RULING

The proceeding below consisted of the Respondent-Employer's appeal to the Board of Review from Administrative Law Judge F. Malcom Vaughan's October 19, 2015 order affirming Deputy Commissioner Jeff F. Farley's September 17, 2015 order awarding Petitioner-Employee Susanna Robinson unemployment compensation benefits.

The December 9, 2015 decision of the Board of Review, WORKFORCE West Virginia, reversed ALJ Vaughan's order, found that Petitioner Robinson had engaged in simple misconduct, and denied Petitioner unemployment benefits for the week of the misconduct and six additional weeks.

III. STATEMENT OF FACTS

1. The Circuit Court's jurisdiction of decisions of the Board of Review is based upon W. Va. Code 21A-7-17, which fixes venue in Kanawha County.

2. This appeal of the Board's December 9, 2015 decision, mailed on December 10, 2015, is filed on January 8, 2016, within thirty days of the mailing of the decision, the time frame for appeals fixed by W. Va. Code 21A-7-17.

3. Petitioner Susanna Robinson is a resident of Greenbrier County, WV and was, at all relevant times, an employee of Atlantis Leather Company, LLC.

4. Respondent Atlantis Leather Company, LLC is a West Virginia limited liability company, operates a retail store located on the grounds of The Greenbrier Resort in Greenbrier County, WV, and was the employer of Susanna Robinson from April 1, 2011 until her dismissal on August 31, 2015.

5. John R. Junkins is the Commissioner of the Bureau Of Employment Programs, and is a necessary party to this appeal by virtue of W. Va. Code 21A-7-17.

6. On September 1, 2015, Susanna Robinson filed by telephone a request for unemployment benefits (**PET. EXH. VOL. at p. 1, EXHIBIT A**),¹ following her discharge from employment by Atlantis Leather Company, LLC on August 31, 2015.

7. On September 17, 2015 Workfore West Virginia Deputy Commissioner Jeff F. Farley of the Unemployment Compensation Division for Ronceverte, West Virginia entered a “Deputy’s Decision” (**PET. EXH. VOL. at p. 2, EXHIBIT B**) holding that the claimant, Susanna Robinson, had worked for Atlantis Leather Company, LLC as a retail sales person from April 1, 2011 through August 31, 2015, at which time she was discharged from employment after making a posting on the internet site “Facebook.” The September 17 Deputy’s Decision held that (a) unemployment benefits could only be denied if the employer proved misconduct, (b) that the employer had submitted no evidence of misconduct, and (c) held only that the business at which the employer was located had “required that the employer discharge the claimant.” Consequently, the Deputy’s Decision of September 8, 2015 ruled that “no elibility issue is known to exist” and awarded Susanna Robinson unemployment benefits.

8. On October 7, 2015 Administrative Law Judge F. Malcom Vaughan issued a notice (**PET. EXH. VOL. at p. 3, EXHIBIT C**) that Atlantis Leather Company, LLC had appealed from Deputy Commissioner Farley’s decision, and set a hearing for October 19, 2015.

¹ References “PET EXH. VOL. at __, Exh. __” are to the Petitioner’s Exhibit Volume submitted with this Petition.

² No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

9. At the October 19, 2015 hearing, Respondent Atlantis Leather Company, LLC appeared in the person of Kathy Kaylor, a member of the limited liability company, and with counsel, William F. Forbes, Esq., and Petitioner Susanna Robinson appeared with counsel, William V. DePaulo, Esq. The hearing was conducted by ALJ Vaughan, and evidence received in the form of testimony of both parties and various exhibits, the transcript is submitted herewith as **PET. EXH. VOL. at p. 6, EXHIBIT D.**

10. Exhibits admitted into evidence at the ALJ's October 19, 2015 hearing included:

- a July 28, 2015 document on letterhead of The Greenbrier, entitled Policies and Procedures for the Treatment of VIP Guests and Media Requests (**PET. EXH. VOL. at p. 21, EXHIBIT E**);
- a letter from Alfred A. Lierman, dated September 22, 2015, on letterhead of The Greenbrier addressed to Kathy Kaylor of Atlantis Leather (**PET. EXH. VOL. at p. 22, EXHIBIT F**);
- a document dated August 26, 2015 identified as a Facebook posting by Petitioner Susanna Robinson (**PET. EXH. VOL. at p. 23, EXHIBIT G**), which stated, in full, the following:

"I'm working that day at the hotel, but my spirit is with any of you who can make him feel unwelcome in any way! Go!!!"

- a document dated August 31, 2015 identified as an email to Petitioner Susanna Robinson, from Thomas Eure, a principal of Respondent Atlantis Leather Company, LLC (**PET. EXH. VOL. at p. 24, EXHIBIT H**).
- a document dated August 31, 2015 identified as a copy of an email to Al Lierman of The Greenbrier, from Thomas Eure, a principal of Respondent Atlantis Leather Company, LLC (**PET. EXH. VOL. at p. 25, EXHIBIT "EYE"**), which stated, inter alia, that:

"Our employee Susanna was just responding to friends post. She did not initiate any of this and told me she doesn't really have an opinion on Cheney. . . . if there's anything she can do to help them understand that she is

not a threat she is willing. You can look at her Facebook page and see she is not political in any way and has taken that response down. She is our best employee, intelligent, honest, dependable and personable. Kathy has gotten several compliments on her from guests she helped in our shop. She's very poor and depends on her salary from us to exist. Please help her and us in anyway you can, we would be grateful forever."

- a document dated from June 5, 2015 through August 31, 2015 identified as a series of communications between Petitioner Susanna Robinson, and Thomas Eure, a principal of Respondent Atlantis Leather Company, LLC (**PET. EXH. VOL. at p. 26, EXHIBIT J**).

11. In her testimony before ALJ Vaughan, Kathy Kaylor, a member of Respondent Atlantis Leather Company, LLC, stated under oath the following:

- that Respondent Atlantis Leather Company, LLC leased a retail shop on the grounds of The Greenbrier for approximately 21 years (**PET. EXH. VOL. at p. 8, EXHIBIT D, Tr. p. 11**);
- that a document dated July 28, 2015 (**EXHIBIT E**) admitted into evidence as The Greenbrier's "media policy" (Tr. 13, **Exhibit D** at x) was shared with Petitioner Robinson because Ms. Kaylor "*took a copy and we have a folder at the shop of things that they email me or tell me. I just stick it in the folder.*" (**PET. EXH. VOL. at p. 9, EXHIBIT D, Tr. p. 15-16**);
- that a letter (**EXHIBIT F**) from The Greenbrier to Ms. Kaylor stated that Ms. Robinson was no longer permitted on the grounds of The Greenbrier, because of a posting Ms. Robinson had made on Facebook which encouraged people at a public protest to make a speaker at The Greenbrier feel unwelcome (**PET. EXH. VOL. at p. 10, EXHIBIT D, Tr. at 17**);
- The speaker against whom the protest was directed was identified as former Vice President Richard Cheney) (**PET. EXH. VOL. at p. 10, EXHIBIT D, Tr. at 19**), and Ms. Kaylor testified that Cheney's Secret Service personnel had made The Greenbrier aware of Petitioner Robinson's Facebook post (**PET. EXH. VOL. at p. 10, EXHIBIT D, Tr. at 20**);
- Asked on cross examination if she had a document such as a signed receipt indicating that Susanna Robinson had ever received the "media policy" of The Greenbrier, Ms. Kaylor responded "*No, I have no proof that she read it.*" (**PET. EXH. VOL. at p. 11, EXHIBIT D, Tr. at 21**);

- The phantom “media policy” of the Greenbrier provided as follows:

Please be reminded that, as a matter of strict policy, employees are never allowed to solicit autographs from celebrities, ask to take their photograph (or do so without their knowledge,) approach them, or to invade their privacy in any way. Protecting the privacy of our high-profile guests while they are at The Greenbrier is of the utmost importance.

The room number, phone number, or any type of personal information about any guest of The Greenbrier - including VIP guests - should never be shared.

All media inquiries should be directed to Erik Hastings, Director of Communications, at ext. 7493 or by email (erik.hastings@greenbrier.com). Please remember that no staff member should have any discussion with any member of the press without prior approval from Mr. Hastings. This includes all press, whether it be trade press, travel press, travel writers, novelists, newspapers, freelance writers, etc. Even if the individual claims to have been given permission by management, the above procedures should always be followed.

Likewise, all information concerning conferences at The Greenbrier is absolutely confidential. Anyone inquiring as to the name, dates, or attendees of any conference should politely be told that such information is confidential and cannot be shared. If further assistance is needed, the caller should be referred to our Event Services Department (extension 7241).

PET. EXH. VOL. at p. 21, EXHIBIT E.

- Asked to review the document identified as The Greenbrier “media policy,” Ms. Kaylor admitted that Susanna Robinson never solicited an autograph of a guest at The Greenbrier (**PET. EXH. VOL. at p. 12, EXHIBIT D, Tr. at 8**), never asked for a photograph (**PET. EXH. VOL. at p. 12, EXHIBIT D, Tr. at 28**), never approached a guest **PET. EXH. VOL. at p. 12, EXHIBIT D, Tr. at 28**), hadn’t invaded a guest’s privacy **PET. EXH. VOL. at p. 12, EXHIBIT D, Tr. at 28**), and had not disclosed a guest’s room number or phone number or identity or any other personal information (**PET. EXH. VOL. at p., EXHIBIT D, Tr. at 28**);

- Ms. Kaylor further conceded that she had no evidence that Susanna Robinson had received a media inquiry from the press (**PET. EXH. VOL. at p. 13, EXHIBIT D, Tr. at 29**), or had discussions with the media (**PET. EXH. VOL. at p. 13, EXHIBIT D, Tr. at 29**), including trade press, travel press, travel writers, novelists, newspapers, freelance writers (**PET. EXH. VOL. at p. 13, EXHIBIT D, Tr. at 29**);
-
- Ms. Kaylor further testified that she had no evidence that Susanna Robinson had conveyed any information concerning the conference (at which Vice President Cheney was scheduled to speak) (**PET. EXH. VOL. at p. 13, EXHIBIT D, Tr. at 30**), no evidence that Susanna Robinson had disclosed any information regarding the name, date or attendees of any conference at The Greenbrier (**PET. EXH. VOL. at p. 13, EXHIBIT D, Tr. at 30**);
- Ms. Kaylor further conceded on cross examination that nothing in Susanna Robinson's Facebook posting was disparaging of former Vice President Cheney (**PET. EXH. VOL. at p. 14, EXHIBIT D, Tr. at 34**);
- Ms. Kaylor also authenticated a document authored by her husband, Tom Eure, also a member of the Atlantis Leather Company, LLC, in which Mr. Eure, in a communication with Susanna Robinson, states:

"Hey, Kiddo Just have to tell you that one of your favorite people we be speaking at the hotel on Thursday. Yes, the architect of treason himself, Dick Cheney, will be there. At least that's what Leslie said. She's already made her sign. Mine will say 'What did you do with all that gold in the basement of the WTC.'"

PET. EXH. VOL. at p. 15, EXHIBIT D, Tr. at 37

- Ms. Kaylor further conceded that Susanna Robinson had not done anything objectionable on the premises of The Greenbrier, at the Atlantis Leather store or otherwise, and that the sole ground for any disqualification from unemployment benefits was the one sentence Facebook entry, (**PET. EXH. VOL. at p. 16, EXHIBIT D, Tr. at 44**);
- And Kaylor admitted that she had no evidence that Susanna Robinson's Facebook entry had ever been shown to Cheney

Q. "You don't have any evidence today that Mr. Cheney in fact was the recipient of whatever degree of discourtesy this was. Correct?"

A. "No."

PET. EXH. VOL. at p. 16, EXHIBIT D, Tr. at 43

12. Susanna Robinson testified at the October 19, 2015 hearing regarding the “media policy” of The Greenbrief that:

“I had never seen that policy. When I was terminated I asked to see the policy that I was supposedly in violation of. I was never provided with anything. This is the 1st time I’ve seen it today. I feel that I was not saying anything disparaging toward Dick Cheney. That I was only supporting someone’s right to do it. I had no intention of making him feel unwelcome, but I support someone’s right to protest.”

PET. EXH. VOL. at p. 18, EXHIBIT D, Tr. at 49-50.

13. Ms. Robinson further testified regarding notice of Facebook postings as follows:

Q. “Did anybody ever give you anything in writing that stated that responding to a Facebook posting in a way indicating support of what that person was going to do would constitute misconduct justifying your dismissal?”

A. “Never.”

PET. EXH. VOL. at p. 19, EXHIBIT D, Tr. at 54.

14. On October 21, 2015, ALJ Vaughan issued a decision denying Respondent Atlantis Leather Company’s appeal, awarding Petitioner Susanna Robinson unemployment benefits, and finding the following facts: Among the express findings of fact by ALJ Vaughan were the following:

10. The employer had no problem with the claimant. It is clear from the employer's testimony at hearing and the documentary evidence, that the employer did not consider the claimant's actions as any sort of misconduct.

11. The employer stated at hearing that it was appealing the prior decision of the Deputy because the employer was going to have to pay higher premiums if she were to receive benefits.

12. The resort has a policy, which was never given or seen by the claimant that states, in pertinent part,

"[E]mployees are never allowed to solicit autographs from celebrities, ask to take their photograph (or to do so without their knowledge,) approach them, or invade their privacy in any way. ...[N]o staff member should have any discussion with any member of the press without prior approval from Mr. Hastings . This includes all press, whether it be trade press, travel press, travel writers, novelists, newspapers , freelance writers, etc. . . ."

The claimant's action in responding to the Facebook posting in no way offends the stated policy of the resort. Moreover, she had never seen the policy which was in a file in the employer's office and had never been presented to her.

13. The claimant committed no misconduct.

14. The claimant was discharged from her employment with the above employer, but not for misconduct.

PET. EXH. VOL. at p. 33, EXHIBIT K .

15. Based upon the foregoing findings of fact, ALJ Vaughan concluded as a matter of law that:

The Supreme Court of Appeals of West Virginia has defined misconduct to include a willful act on the part of an individual which is contrary to the best interest of the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in job performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion, are not deemed to be misconduct within the meaning of the Code. The burden is on the employer to prove misconduct.

* * *

In this case the employer clearly failed to meet its burden. The employer, by its members, did not feel that the claimant had done anything worthy of sanction....

* * *

What the claimant did do is exercise her constitutional right of free speech. She did not offend the policy of the resort as quoted above. Her Facebook response, while it can be seen by others, is not covered by the policy. She never received a copy of the policy in any event. She committed no misconduct either towards her employer or the resort from which the employer leases space. She was discharged because she was physically banned from the resort's premises and could no longer get in to work.

* * *

At worst, the claimant's conduct constitutes a good faith error in judgment or discretion, which is not deemed to be misconduct within the meaning of the Code.

* * *

DECISION:

The decision of the deputy is affirmed. The claimant is not disqualified. The claimant was discharged, but not for misconduct.

PET. EXH. VOL. at p. 34, EXHIBIT K

16. Respondent Atlantis Leather Company, LLC appealed ALJ Vaughan's October 27, 2015 decision to the Board of Review, and included in its appeal a document not admitted in the hearing before the ALJ, and offered no justification for the failure to offer the exhibit earlier. The document, attached as an exhibit to Respondent's appeal, consisted of an extended email exchange (**PET. EXH. VOL. at p. 27-31, EXHIBIT J**) between Martin A. "Marty" Kochell – a "Senior Investigator" employed by Dominion Resources Services, Inc., a subsidiary of the large electric utility in the Commonwealth of Virginia, and Michael Miller, a mid-level administrative person at The Greenbrier.

17. The email chain recites, in sequential order, that Dominion Resources investigator contacted The Greenbrier initially to conduct a security inspection on behalf of an individual named Robert C. Orndorff, a West Virginia employee of Dominion

Resources who was scheduled to speak at the annual convention of the West Virginia Chamber of Commerce, at which former Vice President Richard Cheney was billed as the keynote speaker. Mr. Orndorff is Dominion Resource's leading advocate for "fracking" of natural gas in the Marcellus Shale, and has had numerous encounters with Leslee McCartee of Lewisburg, WV, a leading opponent of natural gas pipelines proposed by Dominion to transport Marcellus natural gas across West Virginia and Virginia, destined for Atlantic ports and international markets in Virginia. Mr. Orndorff and Ms. McCartee know each other and have interacted in vigorous opposition to each other.

18. In the course of conducting his security review, the Dominion Resources "Senior Investigator" Kotchell monitored the internet postings of Leslee McCartee, discovered McCartee's plans to protest the appearance of Dick Cheney at The Greenbrier in White Sulphur, just 8 miles from Lewisburg, and stumbled into Petitioner Susanna Robinson's Facebook posting on McCartee's site, in which Ms. Robinson expressed support for the protestors but indicated she couldn't participate because she would be working that day "at the hotel," which "Senior Investigator" Kotchell recognized to be The Greenbrier.

19. In the December 9, 2015 decision, without citing any evidence, testimonial or documentary, the Board of Review, found as a matter of fact that:

The Secret Service considered the claimant's Facebook page posting reply to be a threat to the former Vice-President, which resulted in the Greenbrier Resort banning the claimant from the Greenbrier Resort premises.

Petition for Review, Section VI at p 27.

20. Based upon the foregoing findings relating to Petitioner's posting on

Facebook, the Board of Review held that Susanna Robinson “was discharged for an act of simple misconduct. The claimant is disqualified for the week of discharge and the next six weeks.” **Petition for Review, Section VI at p 27** (emphasis added).

21. By limiting the finding of misconduct to “simple misconduct,” and confining the period of disqualification to “the week of discharge and the next six weeks,” the Board of Review side-stepped (and tacitly accepted) ALJ Vaughan’s unambiguous finding of fact, based on a full evidentiary basis, that Respondent Atlantis Leather had never given Petitioner Robinson a copy of the purported “media policy” of The Greenbrier prior to the October 19, 2105 hearing.

Had the “media policy” been given to Petitioner in writing, Respondent would argue they satisfied the requirement for “gross misconduct” and a full disqualification of Petitioner Robinson from benefits, under the provisions of W. Va. Code 21A-6-3. See Dailey v Board of Review, 214 W. Va. 419, 589 S.E.2d 797, 801 (W.Va. 2005)(“[t]he legislature, by requiring notice in writing, obviously intended to interject minimal standards of due process into the procedure where acts of ordinary misconduct can trigger full disqualification for unemployment compensation”). That argument is now foreclosed by the decisions of both the ALJ and the Board of Review.

IV. ASSIGNMENTS OF ERROR

The Board's December 9, 2015 decision was erroneous as a matter of fact and law in the following respects:

A. The Board of Review's denial of unemployment compensation benefits on the basis of Petitioner's posting on the internet of views in support of non-violent political protest, violates Petitioner's rights of free speech and association guaranteed by First Amendment to the United States Constitution.

B. Petitioner's posting on the internet of views in support of non-violent political protest cannot constitute a ground for disqualification, partial or full, from unemployment compensation under the vague and overbroad heading of "*a deliberate disregard of the employer's interest*" absent codification of the policy in a manner that clearly differentiates between protected free speech and offensive behavior.

C. The Board of Review's December 9, 2015 findings of fact that "the secret service guarding the former vice-president and the hotel became aware of the posting," and "the secret service considered petitioner's facebook posting to be a threat to the former vice-president" had no evidentiary basis.

V. POINTS AND AUTHORITIES RELIEF UPON AND RELIEF SOUGHT

A. The Board of Review’s denial of unemployment compensation benefits on the basis of the content of Petitioner’s views (posted on the internet in support of non-violent political protest), violates Petitioner’s rights of free speech and association guaranteed by First Amendment to the United States Constitution.

The First Amendment to the United States Constitution, extended to the States via the Fourteenth Amendment,² provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The speech of Susanna Robinson, purportedly justifying denial of unemployment compensation benefits -- posted on the Facebook page of a friend soliciting support for a non-violent protest of former Vice President Cheney’s speech at The Greenbrier -- consisted entirely of the following statement:

"I'm working that day at the hotel, but my spirit is with any of you who can make him feel unwelcome in any way! Go!!!"

The question before this Court is whether the State of West Virginia can deny Susanna Robinson unemployment compensation benefits because of her statement, whether or not it offends the so-called “media policy” of The Greenbrier Resort. To be clear, this is not an unlawful termination case. The issue to be decided is not whether the Respondent had grounds for dismissing Petitioner because of purported violations of the so-called “media policy” of The Greenbrier Resort, or Petitioner’s exclusion from the resort.

² No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., amend. XIV, Section 1.

The rules governing the employer's power to terminate Petitioner's employment are not coterminous with the protections afforded the Petitioner by the First Amendment, or the limits on the State of West Virginia in restricting unemployment benefits to one engaged in speech protected by the First Amendment.

The very narrow issue is whether the Board of Review may deny unemployment compensation benefits because the Petitioner expressed First Amendment protected political views in an internet posting. This is particularly the focus of the inquiry where, as set forth below, there is no evidence that the internet posting in fact violated the so-called "media policy" of The Greenbrier, and where the Petitioner had no notice whatsoever that her protected First Amendment actions violated any policy or worked to the detriment of either her employer, Atlantis Leather Company, LLC or the employer's landlord, The Greenbrier. As enforced by the Board of Review's December 9, 2105 decision, denies Petitioner's rights of free speech and association, without any showing required by controlling precedent.

The First Amendment occupies a special place in the pantheon of American values; it is first for a reason. As expressed by Chief Justice Holmes, "the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919). Equally powerful in the decisions of the U.S. Supreme Court upholding First Amendment speech is the firmly held belief that free speech is indispensable to the effective operation of a Democracy. Stromberg v. California, 283 U.S. 359, 369 (1931).

Historically, the U. S. courts have resolved First Amendment cases along two tracks. The first track, involving direct sanctions of the speech, based either on its content or its effect, has tended toward the finding of absolute rights, i.e., interpreting the First Amendment as a complete bar to the punishment of speech based on content, explicitly including speech which makes those in power uncomfortable.

The second track, involving cases where the government enforces rules which have the effect of discouraging the communication of ideas, has addressed government enforcement of rules not directly related to speech which, in a particular context, have the effect of unduly constricting the flow of information. To the extent that the second track

cases focus on the context of the rules being enforced, it can be said to involve a balancing test. That balance recognizes that, in a particular instance, there may be another governmental value competing with the First Amendment values, but includes as a distinctive feature a requirement that the judicial “thumb” be placed on the scale in a manner to insure the values of the First Amendment are preserved.

Cases involving “track one” abridgments of free speech -- the enforcement of direct bans on First Amendment speech -- require the demonstration of a “clear and present danger,” initially articulated by Chief Justice Holmes in Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). Track two cases -- involving indirect bans on First Amendment rights of free speech and association -- require that the government demonstrate the existence of a compelling governmental interest and simultaneously show that the compelling governmental interest does not unduly or unnecessarily impinge on First Amendment rights.

As verbalized in Schneider v State of New Jersey, 308 US 147 (1939), the balancing test was as follows:

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

308 US 161.

This Court need not burden itself with a detailed analysis of the test applied, or the manner of its application, by the Board of Review, WORKFORCE West Virginia, for the simple reason that the Board totally disregarded the First Amendment issue, explicitly resolved in Petitioner’s favor by ALJ Vaughan, and fully preserved in Petitioner’s pleadings before the Board. To be sure, the Board Chairman acknowledged at oral argument the need to consider the “free speech” issue in tandem with the unemployment compensation determination; by contrast, the Board’s opinion is silent on the topic.

B. Under any test, Petitioner’s posting on the internet of views in support of non-violent political protest cannot constitute a legal ground for disqualification, partial or full, from unemployment compensation, where the balancing fact opposing the interest in free speech is described under the vague and overbroad heading of “a deliberate disregard of the employer’s interest,” and the purported codification of the policy fails to differentiate clearly – or in this case, at all -- between protected free speech and offensive behavior.

In order to withstand scrutiny under the First Amendment, any “media policy” of an employer must, at a minimum, put the employee on notice of the activity prohibited. Failing such protections, the enforcement of an overbroad and vague standard, such as “deliberate disregard of the employer’s interest” impermissibly chills protected First Amendment activities. As the U.S. Supreme Court has held, the government must distinguish clearly between competing interests, where First Amendment freedoms are at issue:

A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.” [citations omitted].

Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

The Greenbrier “*VIP Guest Policy*” – at least the July 28, 2015 version of it – was admitted into evidence and included the following “rules”:

Please be reminded that, as a matter of strict policy, employees are never allowed to solicit autographs from celebrities, ask to take their photograph (or do so without their knowledge,) approach them, or to invade their privacy in any way. Protecting the privacy of our high-profile guests while they are at The Greenbrier is of the utmost importance.

The room number, phone number, or any type of personal information about any guest of The Greenbrier - including VIP guests - should never be shared.

All media inquiries should be directed to Erik Hastings, Director of Communications, at ext. 7493 or by email (erik

hastings@greenbrier.com). Please remember that no staff member should have any discussion with any member of the press without prior approval from Mr. Hastings. This includes all press, whether it be trade press, travel press, travel writers, novelists, newspapers, freelance writers, etc. Even if the individual claims to have been given permission by management, the above procedures should always be followed.

Likewise, all information concerning conferences at The Greenbrier is absolutely confidential. Anyone inquiring as to the name, dates, or attendees of any conference should politely be told that such information is confidential and cannot be shared. If further assistance is needed, the caller should be referred to our Event Services Department (extension 7241).

Employer Exhibit 1, admitted at Transc. p. 15.

What did the employer representative testify to regarding the employees violation of these policies? The employer's representative could not, even after the fact, identify a single provision of the "media policy" which Petitioner had violated; not one:

Q Did Susanna Robinson solicit an autograph to your knowledge?

A No.

Q Okay.Did she ask for a photograph?

A No.

Q Did she approach them?

A Nope.

Q Invade the privacy of them?

A I don't know if you'd interpret that as an invasion of privacy . I doubt it.

Q Okay.Stop down to the next paragraph. Did Susanna Robinson disclose or share the room number,

phone number or any other type of personal information about Cheney and/or his daughter?

A No, not that I know of.

Q Okay. Do you have any evidence that any member of the media directed an inquiry to Susanna Robinson?

A No.

Q Do you have any evidence that Susanna Robinson had any discussion with a member of the press?

A No.

Q That would include trade press, travel press, travel writers, novelists, newspapers, freelance writers?

A Well , they all have free access to social media.

Q That's not listed here in the policy though is it?

A I don't see a phrase social media .

Q All right. This is dated July 28, 2015 . Correct?

A Yes.

Q Many years after social media has been on the scene?

A Yes.

Q Okay. Do you have any evidence that Susanna Robinson conveyed any information concerning the conference at the Greenbrier?

A No.

Q Do you have any evidence that she disclosed any information for the name , date or attendees of any conference?

A No .

PET. EXH. VOL. at p. 12-13, EXHIBIT D (Tr at 28-33).

In short, nothing in the purported “media policy” of The Greenbrier Resort, even as interpreted after the fact by the Respondent’s owner and witness, can be identified as having been violated by the Petitioner. At the same time, Petitioner’s communication, indicating moral support for the non-violent protesters of Vice President’s appearance as a keynote speaker at the West Virginia Chamber of Commerce’s annual convention, at The Greenbrier, clearly constituted speech. Unpleasant speech for some, perhaps, and offensive to others, probably.

But the First Amendment was not designed to make resort guests, or commercial associations, or former political figures feel “welcome.” It is designed for precisely the opposite result: to cause sufficient disruption in the luxury of the rich and powerful to facilitate at least the possibility of political change, and certainly political discourse.

This is emphatically not a case of a direct confrontation of a resort guest, on the resort premises, which in fact jeopardized any aspect of business of the resort, or here a retail tenant of the resort. All of the reported speech occurred “off campus” while the Petitioner was at lunch in a forum unrelated to The Greenbrier. If one cannot express a political opinion – of any type, offensive or otherwise – outside of their employer’s premises and in a public space, then the policy sought to be enforced is facially violative of the First Amendment.

The failure to codify the purported “media policy” in a way that differentiates clearly between protected free speech and offensive behavior, violates controlling U.S. Supreme Court precedent. And that failure to codify clearly offends notions of due process recognized under the decisions of the West Virginia Supreme Court of Appeals, which recognized that such a policy must, as a prophylactic matter, be reduced to a written employment policy in fact delivered to the employee. See Dailey v Board of Review, 214 W. Va. 419, 589 S.E.2d 797, 801 (W.Va. 2005)(“[t]he legislature, by requiring notice in writing [W. Va. Code 21A-6-3], obviously intended to interject minimal standards of due process into the procedure where acts of ordinary misconduct can trigger full disqualification for unemployment compensation”).

The Board of Review's decision applying the "media policy" of The Greenbrier in precisely this fashion must be reversed under the long line of cases upholding political speech under the First Amendment.

C. The Board of Review's December 9, 2015 findings of fact that "the secret service guarding the former vice-president and the hotel became aware of the posting," and "the secret service considered petitioner's facebook posting to be a threat to the former vice-president" had no evidentiary basis, proper or otherwise.

In her October 19, 2015 testimony before ALJ Vaughan, Respondent witness and owner Kathy Kaylor was asked about what evidence she had, if any, that information regarding Petitioner Robinson's posting on Leslee McCarty's Facebook page had been communicated to Mr. Cheney, and responded as follows:

Q Well , how do you know he was even made aware of it?

A Because they contacted the hotel and said they considered her a threat.

Q The Secret Service contacted the hotel?

A Yes.

Q Do you have any evidence that they communicated?

A No, they did not talk to him.

Q You don 't have any evidence today that Mr. Cheney in fact was the recipient of whatever degree of discourtesy this was. Correct?

A No.

Q All you know is that somebody at the Greenbrier told you that somebody from the Secret Service got their nose out of joint?

A Well , I actually saw the Secret Service's emails.

Q You did?

A To the hotel.

Q Do you have copies of those?

A No, they have confidentiality notices on the bottom and I didn't feel I could legally share those.

Q Do you have a copy of it in your residence or I mean at your office?

A Yeah, I have it. I just can't share it legally with you.

Q I understand that's your understanding of the situation. I just want counsel to understand I consider that a relevant document for this proceeding and any appeal that might follow or any litigation that may follow.

PET. EXH. VOL. at p. 16, EXHIBIT D (Tr at 43-44).(emphasis added).

A review of the extended repetitious "confidentiality" clauses at the end of the "Dominion Resources--to--The Greenbrier" email chain, make it clear that the purported Secret Service emails referred to at the hearing before ALJ Vaughan, are one and the same as the "Dominion Resources--to--The Greenbrier" email chain that Respondents failed to introduce before ALJ Vaughan, but included in their appeal to the Board of Review.

Petitioner clearly moved to strike the email chain from the proceeding before the

Board of Review, because it had not been introduced in the proceeding before ALJ Vaughan, and Respondent made no effort to justify the delay (as they obviously couldn't, given the owner's clear familiarity with and possession of a copy of the document, discussed below).

The Board of Review decision on review before this Court did not even rule on Petitioner's motion to strike the email chain. Simultaneously, the Board clearly and unambiguously relies upon the demonstrably false statements in that email chain as the evidentiary foundation for its core finding of disregard of the employer's interest.

And a careful reading of that exhibit discloses that Miller was engaged in nothing more than self-promoting puffery with his reference to Cheney and his security personnel's purported concerns. The email chain in its entirety includes the following communications:

- An August 28, 2015, 12:18 PM email from Dominion's Kotchell to The Greenbrier's Miller introducing himself, and advising he would like to familiarize himself with the hotel because Dominion's Orndorff would be speaking there.
- Miller's reply barely an hour later at 1:21 PM on August 28, telling Kotchell to call when he arrived at The Greenbrier.
- A brief email from Kotchell to Miller at 11:47 on August 31, 2015, asking Miller if Petitioner Susanna Robinson worked at The Greenbrier.
- Miller's reply one minute later at 11:48 on August 31 stating that Miller would have to look up Respondent Robinson's name and "I'll call you in a moment."
- Kotchell's additional email to Miller four minutes later at 11:52 AM on August 31, 2015 transmitting a copy of Petitioner Robinson's Facebook posting, and a picture of her.
- And Mitchell's internal email to The Greenbrier staff -- 14 minutes later at 12:46 PM, on August 31, 2015 -- attaching Petitioner Robinson's Facebook posting, stating that he has discovered that Petitioner worked

at Atlantis Leather, identifying the Vice President as the person who was the subject of Petitioner's post, and expressing his belief that it was of "utmost urgency" that Petitioner be "terminated" from employment at Atlantis Leather "before she makes good on her claim."

- Miller adds to this concocted hysteria the gratuitous falsehood that

"This information was provided to me by Cheney's security personnel and they feel she is a threat."

PET. EXH. VOL. at p. 26-31, EXHIBIT J.

Obviously, this information – transmitted a mere 14 minutes earlier – came from Dominion's internal security personnel whose job was to protect a West Virginia natural gas lobbyist, not from Secret Service personnel charged with protection of the former Vice President of the United States. The presence of no less than seven "confidentiality" notices at the end of the email chain removes any doubt that this email chain is, in fact, the phantom "Secret Service" emails which Respondent's Kathy Kaylor referred to, but failed to produce, at the October 7, 2015 hearing before ALJ Vaughan.

And this bogus, self-serving claim from one Martin Miller in a puffing email to his staff subordinates – plus Kathy Kaylor's uninformed reading of that email – is the only evidence in the record on which the Board of Review's could have based its finding that "The Secret Service considered the claimant's Facebook page posting reply to be a threat to the former Vice-President..."

Apart from its fact finding regarding the "threat to the former Vice-President," the Board of Review made a *de novo* finding, without reference to the exhibits and/or testimony before the ALJ, as follows:

"The Board of Review considers the claimant's Facebook page posting reply to be inappropriate and inconsistent with the goals,

standards, and policies of the Greenbrier Resort and, vicariously, the employer. The Board considers the employer to be in the customer service business, and the claimant's inappropriate August 26, 2015, reply expresses encouragement that a potential customer be made feel unwelcome in anyway, which is a deliberate disregard of the employer's interest and constitutes simple misconduct.

Petition for Review, Section VI at p 27 (emphasis added).

As the review of Repondent witness Kathy Kaylor, and the email chain itself make clear, no evidence in the record, properly admitted or not, supported the finding that Petitioner in fact engaged in any activity that involved the “media” or that in fact came to the attention of any guest, let alone made them feel unwelcome.

Of course, the irony in the present case is that the incompetent Dominion gumshoe never picked up on the truly inflammatory (but Petitioner hastens to add, fully protected First Amendment free speech) comments of Tom Eure, the husband of the Respondent’s witness, and co-owner of the Respondent, who directed his own Facebook message (quoted by ALJ Vaughan in his decision) to Petitioner Susanna Robinson, his employee, stating:

“Hey kiddo, I just have to tell you that one of your favorite people will be speaking at the hotel on Thursday! Yes the architect of treason himself dick Cheney will be there. At least that’s what Leslee said! She’s already made her sign and mine will say “what did you do with all that gold in the basement of the WTC.” ”

PET. EXH. VOL. at p. 25, EXHIBIT “EYE (emphasis added).

For all of the foregoing reasons, Petitioner Susanna Robinson respectfully requests that this Court reverse the Board of Review’s December 9, 2015 decision in its entirety, and reinstate Administrative Law Judge Malcom Vaughan’s October 19, 2015

order affirming Deputy Commission award of unemployment compensation benefits to
Petitioner.

Respectfully submitted,

SUSANNA ROBINSON

By Counsel

William V. DePaulo, Esq. #995
122 N Court Street, Suite 300
Charleston, WV 24801
Tel: 304-342-5588
Fax: 866-850-1501
william.depaulo@gmail.com

VI. Copy of Decision Subject to Petition for Review.

CASE NO. R-2015-2971
SUSANNA ROBINSONDeonBrd.dot
Page 1

**Board of Review
WORKFORCE West Virginia
112 California Avenue
Charleston, West Virginia 25305
304-558-2636/1-800-635-0189**

SUSANNA ROBINSON
RT. 2 BOX 246
LEWISBURG, WV 24901 0000

Case No. R-2015-2971

IN THE MATTER OF:

Claimant: SUSANNA ROBINSON
S.S. No. : XXX XX XXXX
Address : LEWISBURG, WV 24901 0000

Employer: ATLANTIS LEATHER COMPANY LLC
Address : HC 66 BOX 20 FRANKFORD, WV 24938 0000

APPEARANCE:

CLAIMANT in person.
WILLIAM DEPAULO, Claimant Attorney.
WILLIAM FORBES, Employer Attorney.

ISSUE:

This case came on for hearing before the Board on December 3, 2015, upon the Employer's appeal from the decision of F. Malcolm Vaughan, Administrative Law Judge, in which he affirmed the decision of the deputy, which held: "Claimant not disqualified; discharged but not for misconduct."

The claimant worked for the above employer as a Retail Sales Person from April 1, 2011, to August 31, 2015. The employer business is situated inside the Greenbrier Resort at White Sulphur Springs, West Virginia. The claimant was discharged. The Greenbrier Resort was visited by a former Vice-President of the United States, Dick Cheney, and his daughter. The claimant responded to a friend's Facebook posting which indicated that the claimant's friend was going to be a part of a protest when the former Vice-President was at the resort. On August 26, 2015, the claimant replied to the posting of her friend, the claimant replied, "I'm working that day at the hotel, but my spirit is with any of you who can make him feel unwelcome in any way! Go!!!" Subsequently, the Secret Service guarding the former Vice-President and the hotel became aware of the posting, the Secret Service considered the claimant's posting reply to be a threat to the former Vice-President. As a result of a request from the Secret Service, the Greenbrier Resort banned the claimant from the Greenbrier resort's premises. When

CASE NO. R-2015-2971
SUSANNA ROBINSONDecnBrd.dot
Page 2

the employer was advised that the claimant was banned from the Greenbrier resort premises, the employer determined the claimant could not work, so the employer discharged the claimant. The Board considers the claimant's reply to the Facebook posting to be inappropriate and inconsistent with the standards, goals and policies of the Greenbrier resort, and vicariously the employer business which operates a retail establishment selling merchandise retail to the public on the Greenbrier resort premises. Consequently, the Board finds the claimant's August 26, 2015, reply to the Facebook page posting to be a deliberate disregard of the employer's interest and simple misconduct.

West Virginia Code Chapter 21A-6-3(2) provides that if an individual is discharged for misconduct, the individual shall be disqualified from receiving unemployment compensation benefits for the week in which the discharge occurred and for the next six weeks. Since the claimant was discharged, the issue in this case is whether the claimant was discharged for an act of misconduct.

The Courts have interpreted this Statute as follows: In order for violation of work rules and procedures and attitude to constitute misconduct, which would exclude benefits within the meaning of the Unemployment Compensation Act, there must be an act of wanton or willful disregard of an employer's interest or deliberate violation of an employer's rule evidencing the disregard of the standards of behavior which the employer has a right to expect of its employees. Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to the employer, would amount to misconduct. The burden of proving misconduct is upon the employer.

The claimant was discharged. In a discharge case, the employer has the burden of proving the claimant committed misconduct. In this case, the claimant replied to a Facebook page posting which indicated the claimant's friend was going to be part of a protest when the former Vice-President was at the Greenbrier Resort. On August 26, 2015, the claimant replied to the Facebook posting, "I'm working that day at the hotel, but my spirit is with any of you who can make him feel unwelcome in any way! Go!!!" The Secret Service considered the claimant's Facebook page posting reply to be a threat to the former Vice-President, which resulted in the Greenbrier Resort banning the claimant from the Greenbrier Resort premises. Since the employer business was situate on the Greenbrier Resort premises, the claimant was not able to continue working for the employer, so the employer discharged the claimant. The Board of Review considers the claimant's Facebook page posting reply to be inappropriate and inconsistent with the goals, standards, and policies of the Greenbrier Resort and, vicariously, the employer. The Board considers the employer to be in the customer service business, and the claimant's inappropriate August 26, 2015, reply expresses encouragement that a potential customer be made feel unwelcome in anyway, which is a deliberate disregard of the employer's interest and constitutes simple misconduct. Therefore, it is held the claimant was discharged for an act of simple misconduct. The claimant is disqualified for the week of discharge and the next six weeks.

DECISION:

The decision of the Administrative Law Judge is reversed. The claimant was discharged for an act of simple misconduct. The claimant is disqualified for the week of discharge and the next six weeks.

The Board of Review denies the claimant's motion for financial sanctions. It is beyond the scope of the authority of the Board of Review to impose such sanctions.

CASE NO. R-2015-2971
SUSANNA ROBINSONDecnBrd.dot
Page 3

If West Virginia is in an Extended Benefit period when your regular benefits are exhausted, this decision, if it becomes final, will have the effect of denying entitlement to Extended Benefits in accordance with the West Virginia Unemployment Compensation Law [§21A-6A-1(12)(G)].

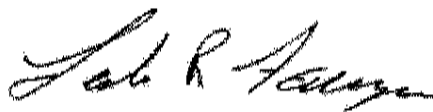
This decision, if it becomes final, may result in an overpayment of benefits to the claimant, which will be collected as provided for in the Statute.

This, the 9th day of December 2015.

BOARD OF REVIEW
WORKFORCE West Virginia



JACK CANFIELD, Chairperson



LESLIE R FACEMYER, Member

JC/db

Date Mailed: 12/10/2015

By: db

This decision is final unless an interested party appeals to the Circuit Court of Kanawha County, West Virginia, within THIRTY DAYS after mailing date. A petition for appeal to the Circuit Court must be timely delivered in person or mailed to the Clerk of the Circuit Court, 111 Court Street, Charleston, WV 25301, phone number - 304-357-0440. The Clerk will not accept for filing any purported petition for appeal unless it is in proper form and is accompanied by the required fee.

Proper form for a petition includes: (1) Civil Case Information Statement naming all required parties, including the Board of Review and the Commissioner of WorkforceWV, typed or clearly printed; (2) Administrative Appealing Docketing Statement; and (3) a true copy of the decision of the Board of Review. (These requirements are based upon Local Rules 5 and 19 of the Local Rules for Trial Courts of Record contained in Volume 1A of the West Virginia Code.)

You must enclose with the petition a cashier's check or money order made payable to the Clerk of the Kanawha County Circuit Court in the amount of \$200.00 for the filing fee and a cashier's check or money order made payable

CASE NO. R-2015-2971
SUSANNA ROBINSONDecnBrd.dot
Page 4

to the Kanawha County Sheriff in the amount of \$25.00 for the service of process fee. Alternatively, you may, if you qualify, file an affidavit of pecuniary inability to pay these fees.

Should you desire an attorney to represent you but are unable financially to retain private counsel, it is suggested that you contact Legal Aid of West Virginia at (866) 255-4370(toll free) to determine whether you meet their requirements for representation at no cost by one of their attorneys.

A corporate employer who wishes to appeal to the Circuit Court must be represented for all purposes (including preparation of the petition) by an attorney at law authorized to practice in this state.

The Circuit Court will dismiss any appeal if error is not assigned with specificity. This means that you may not assert generally that the decision of the Board of Review is wrong. You must, instead, state which parts of the record indicate that the decision is plainly wrong on the facts and/or exactly why the Board's conclusion(s) of law is/are erroneous. The Court will not consider any evidence not presented to the Board of Review but will decide the appeal based upon the existing record. After receiving the record from the Board of Review the Court may, if it deem necessary, direct the parties to file briefs (written legal arguments) in accordance with Local Rule 21. The Court will hear oral argument of counsel only in a rare case.

CC: William C Forbes Attorney at Law 1118 Kanawha Blvd E Charleston, WV 25301
WILLIAM V DEPAULO 179 SUMMERS STREET SUITE 232 CHARLESTON, WV 25301
One Stop Field Operations 5600
Patti Hardin 5106
Andy Osborne 5105
Michelle Blaney 5105
Julie Roberts 5600