

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

ALAN RUSH,

Appellant,

v.

KIMCO CORPORATION and DIVISION OF EMPLOYMENT SECURITY,

Respondents.

DOCKET NUMBER WD72455

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: April 5, 2011

APPEAL FROM

The Labor and Industrial Relations Commission

JUDGES

Division II: Mitchell, P.J., and Ellis and Howard, JJ.

CONCURRING.

ATTORNEYS

Alan Rush
Kirksville, MO

Appellant, *pro se*,

Kenneth P. Carp
Clayton, MO

Attorney for Respondent,
Kimco Corporation,

Larry R. Ruhmann
Jefferson City, MO

Attorney for Respondent,
Division of Employment Security.



MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ALAN RUSH,)
)
) **Appellant,**)
v.) **OPINION FILED:**
) **April 5, 2011**
)
KIMCO CORPORATION and DIVISION)
OF EMPLOYMENT SECURITY,)
)
)
Respondents.)

WD72455

Labor and Industrial Relations Commission

Before Division II Judges:

Karen King Mitchell, Presiding Judge, and
Joseph M. Ellis and Victor C. Howard, Judges

Alan Rush (“Rush”) appeals the Labor and Industrial Relations Commission’s (“Commission”) order disqualifying him from unemployment benefits. Rush contends that the Commission erred in affirming the denial of the benefits in that his single instance of bad judgment did not demonstrate that he engaged in willful conduct or in conduct so negligent as to manifest culpability. We agree and therefore reverse.

REVERSED AND REMANDED

Rush was discharged from his job with Kimco Corporation (“Employer”) on July 21, 2009. The incident that led to Rush’s termination occurred when Rush violated Employer’s work rule (“the work rule”) that prohibited discussing personal or work-related conflicts or problems with clients. The incident in question involved a discussion Rush had with the employee of a client to whom Rush disclosed his receipt of a written warning. Rush also told the client that another Kimco employee had recording devices in his office and on the work premises. Employer terminated Rush for violating the work rule. However, Rush maintains that he was unaware of the work rule.

Rush filed an application for review of the decision that denied him benefits. The Commission affirmed the Appeals Tribunal’s findings that Rush was discharged for misconduct connected with his work. However, the Commission found that the Tribunal’s finding that Rush

was aware of the work rule was incorrect. Consequently, the Commission found that Rush's actions amounted to misconduct connected with work under section 288.030.1(23) because his conduct "demonstrated *negligence in such a degree as to manifest culpability*, not because he willfully and intentionally violated employer's rule." (Emphasis added.) This appeal follows.

DIVISION II HOLDS:

As we have recently held, cases noting that "mere" or "simple" negligence are not "misconduct" under section 288.030.1 do not change the fact that there is a *degree* of negligence that the statute explicitly recognizes as "misconduct." *Wright v. Casey's Mktg. Co.*, 326 S.W.3d 884, 887-90 (Mo. App. W.D. 2010).

Here, Rush's actions did not satisfy the "negligent in such degree . . . as to manifest culpability" standard. The Commission explicitly found that Rush did not act willfully. The Commission found that Rush was not aware of the rule that prohibited him from discussing with clients his conflicts with the employer and/or his co-employees. *Cf. Wright*, 326 S.W.3d at 889-90 (where the employee was clearly aware of the subject rule). Further, in the absence of knowledge of the employer's rule, Rush's discussing his problems with a client was not *plainly* wrong, improper, or injurious so as to manifest Rush's culpability. Rush's lack of discretion was merely negligent: that is, an ordinary person under the circumstances probably would have been more discreet, but his actions were not so obviously injurious to Employer as to render Rush worthy of blame or censure.

OPINION BY: Karen King Mitchell, Presiding Judge

April 5, 2011

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