

Teachers and brothels

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Facts
Decision
Comment

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The Supreme Court recently confirmed an appellate court's decision and ruled that a school teacher who had moonlighted as a brothel manager had been eligible for termination because this sort of behaviour could be considered a breach of trust and damaging to the school's reputation.

Facts

A student spread a rumour that one of her teachers was moonlighting as the managing director of a limited liability company which operated a brothel. The teacher in question worked at the Federal Commercial Academy and was therefore employed by the Republic of Austria (the school operator).

In late 2016 the teacher had notified his employer of his secondary occupation as a lecturer with another educational institution and his ancillary activities as the managing director of a limited liability company. The teacher had disclosed the company's full name but not its operating activities.

In early Spring 2018, as a result of the student's whistleblowing, the Austrian education authority learned that said teacher had been acting as the managing director of a brothel and promptly reacted with a summary dismissal.

The teacher sued for reinstatement, arguing that:

- he had properly disclosed his other employer on a form provided by the school and therefore had not misled his superiors as to the other type of occupation he was pursuing;
- his operating activities as managing director were restricted to processing payment transactions;
- he had never held himself out as a managing director to the public at large; and
- he held an office position and his managerial activities as a corporate officer did not amount to a violation of decency or decorum.

The Republic of Austria, as his employer, argued that teachers are role models whose positions require discretion and that schools must safeguard their own reputation and authority.

Decision

The district court upheld the teacher's claims that he had not concealed his activity or misled his superiors and that his employer had failed to expressly request that he terminate his position as managing director of the brothel. Without such a request, none of the grounds for a summary dismissal under the applicable statute could be met.

The district court also denied that the teacher's secondary occupation was a breach of trust, as off-duty activities are exempt from the applicable law. Further, social values have changed over time and the teacher's payment and accounting responsibilities as managing director of a brothel did not meet the threshold for termination.

The district court referred to earlier Supreme Court case law that had denied grounds for the dismissal or ordinary termination of civil servants who had attended erotic fairs and private swingers clubs. Accordingly, the employer's summary dismissal could not be transformed into an ordinary termination as a lesser penalty.

The appellate court reversed the district court's decision in part, confirming that the summary dismissal was without merit but that the termination notice should stand as an ordinary termination. The court reaffirmed that, without a formal request, the teacher should resign from his secondary occupation (as is mandated by law) and that summary dismissal with immediate effect is unlawful.

The appellate court also reaffirmed the lower court's rationale that because the teacher had neither lied to his superiors about his secondary occupation nor concealed any major facts about it, a summary dismissal would be unjustified. Ultimately, acting as the managing director of a brothel is considered a legal activity. Citing earlier Supreme Court case law that had denied a teacher the right to summary dismissal after they had been caught shoplifting, the appellate court reasoned that performing a lawful activity cannot be grounds for summary dismissal.

However, an unfounded summary dismissal can be reinterpreted as an ordinary termination with statutory notice terms where the employee's activity prompts a breach of trust that is rooted in their improper conduct. The appellate court added that off-duty conduct can amount to such grounds for ordinary termination if the public perceives it as, and objective criteria determine it to be, incompatible with the status of teaching professionals. Thus, reaffirming teachers' role model status, the court further noted that school children's mental and emotional development must be nurtured, and that they should be protected against "moral or other dangers".

Unlike the district court, the appellate court concluded that although social values change over time, the teacher in the case at hand had been more than a mere customer of the brothel (which apparently would have been acceptable and not morally reprehensible), and had derived additional income from assisting in and operating one. Therefore, close ties to the red-light district were unavoidable. Further, although red-light districts are not illegal *per se*, the general public associates such marginal areas with criminality. According to the appellate court, such public reservations matter and must be taken into consideration. Teaching positions are therefore incompatible with professional activities in red-light businesses. A teacher earning an income as the managing director of a brothel forfeits their respect and authority and damages the reputation of their school. However, the fact that the teacher in the case at hand performed ancillary activities for the brothel protected him from summary dismissal, but ordinary termination was justified under the circumstances.

The Supreme Court confirmed this ruling in every respect.

Comment

The case was eventually decided in view of the perceived criminality of sex workers and their employers among the general public. Arguably, this perception depends on who is asked and the divergence of opinion as to what constitutes morally reprehensible conduct is best illustrated by the controversial position of the district court, which took no issue with the teacher's 'red-light' activities, versus the appellate court and Supreme Court, which upheld stricter and more traditional positions.

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