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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000057-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLANT

V. — APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 97-CI-00212

JUDITH A. NEEL;
MINIT MART NO. 80 — APPELLEES

AND — NO. 1998-CA-000070-MR

MINIT MART NO. 80 — APPELLANT

v. — APPEAL FROM LOAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 97-CI-00212

JUDITH A. NEEL — APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** ** ** **

BEFORE: HUDDLESTON, KNOX and MILLER, Judges.

HUDDLESTON, Judge. Kentucky Unemployment Insurance Commission (KUIC) and Minit Mart No. 80 appeal from a judgment of the Logan

Circuit Court reversing a KUIC decision which had found Judith A. Neel to be ineligible for unemployment compensation due to misconduct pursuant to Ky. Rev. Stat. (KRS) 341.370(1)(b). We agree with the decision of KUIC and reverse the decision of the circuit court, remanding with directions to reinstate KUIC's decision.

Neel was employed at Minit Mart No.80 for slightly over four years until January 14, 1997. She worked as an assistant manager for a Minit Mart store in Lewisburg for three years before her transfer to a store in Russellville. Neel performed mostly cashier's duties three days a week and on the weekends completed the paperwork assigned to management. Part of her job responsibility was to deposit cash receipts and deposit slips in a bank night deposit.

On January 11, 1998, Neel left a money bag unattended in an unlocked office in order to correct a problem with the store's money machine.[1] Neel testified that she left the money in the office unattended for only two or three minutes. Neel was notified by her immediate supervisor, Gina Utley, that her January 11, 1998, deposit was missing approximately $1,100.00. The police conducted an investigation, but no charges were filed. Soon thereafter, Neel was suspended and her employment was terminated as a result of

[1]Neel testified that she hid the moneybag between a file cabinet and the bottom of her desk.

violation of Minit Mart's cash/deposit policy.[2] The employee manual, which Neel admits she received, states in pertinent part:

> Cash/deposit policy
>
> Other than the small amounts of cash allowed in the cash register, there are only three acceptableplaces for cash or deposits to be:
>
> a. Locked in the safe
>
> b. In the bank
>
> c. In the store manager's hands (while either counting the money or taking it directly from the store to the bank)
>
> Note: This policy applies to all employees, including the person designated by the store manager or the supervisor to do the banking on those days that the store manager is not on duty at the store. Any violation of this policy may be considered grounds for immediate dismissal.

Neel applied for unemployment insurance benefits. Minit Mart argued that Neel was not entitled to benefits because she was discharged for misconduct related to her work. The referee held:

> In this case, the competent evidence of record indicates that claimant violated the company's policy regarding the handling of cash/deposits, by leaving the shift cash

[2]Neel had received no prior warnings or reprimands under this policy.

receipts in a money bag unattended in an unlocked office on January 11, 1997. The policy is a reasonable one and claimant was made aware of the policy when hired.

Neel appealed this decision to the KUIC which affirmed. In ruling that Neel was not entitled to benefits, the KUIC stated:

> The referee decision is affirmed. The claimant remains disqualified from receiving benefits. The Commission has reviewed the records, including the evidence previously submitted and the referee decision which was mailed to each of the interested parties. Since the referee has adequately set forth the salient facts and correctly applied the pertinent law, the Commission adopts the referee's findings and conclusions of law as its own, the same as if fully set forth herein. The employer's reserve account is relieved of charges on the claim.
>
> Counsel for the claimant, in his brief, contends the employer's policy was not uniformly enforced thus claimant cannot be found guilty of misconduct. Contrary to counsel's contention, the evidence established that the employer's policy **was strictly enforced** at the store location where claimant was employed. Claimant's testimony and that of her witness, a former employee, dealt with money being counted at the opening of the store for placement into cash registers, a much smaller amount than the bank deposit which contained the proceeds

> for an entire day. Claimant's acknowledgment of leaving the money unattended constitutes a knowing violation of the employer's policy and amounts to misconduct connected with the work.

Neel appealed to Logan Circuit Court. The court found the same facts as cited by the referee and KUIC, but reversed, stating:

> The Commission's factual finding that Judith Neel violated her employers policy is not questioned; but this Court believes the legal conclusion that the isolated act constitutes misconduct disqualifying Mrs. Neel from unemployment benefits is erroneous. To permit any violation of policy - no matter how rare or inadvertent to disqualify the employee from employment benefits would lead to absurd and unjust results. The fact that a reasonable policy existed, that Judith Neel knew it existed when she was hired and that she later on one occasion violated it, does not- in and of itself- require a finding that she is guilty of misconduct.

KUIC and Minit Mart then appealed the trial court's decision to this Court. The standard of review of a decision of KUIC is as follows:

> Judicial review of an award of the unemployment Insurance Commission is governed by the general rule applicable to administrative actions. If the findings of fact are

> supported by substantial evidence of probative value, then they must be accepted as binding and it must *then be determined whether or not the administrative agency has applied the correct rule of law* to the facts so found.

Cobb v. King Kwick Minit Market, Inc., Ky., 675 S.W.2d 386, 388 (1984) (quoting Southern Bell T & T Co. v. Unemployment Ins. Commission, Ky., 437 S.W.2d 775, 778 (1969)). However, where the question is one of law rather than fact, "courts are not bound to accept the legal conclusion of [the] administrative body." Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 408 (1992).

The circuit court held that there is no testimony in the record to support a finding that the employer's cash/deposit policy was uniformly strictly enforced. The court acknowledged the testimony of Utley, who stated that she was not aware of anyone violating the policy and not being discharged. However, the court concluded that Utley's testimony was not of sufficient probative value to support the referee's and KUIC's decision since she also stated that to her knowledge "no one else had ever violated the policy."

The issue before this Court is whether an employer can establish the uniform enforcement of a rule which the record shows has never been violated. Although this is a case of first impression in Kentucky, other states have addressed the same issue.

In McClain v. Review Bd. of the Ind. Dep't of Workforce Dev., 693 N.E.2d 1314 (1998), the Indiana Supreme Court held that:

> A policy that has not been the basis for termination of an employee in the past may nonetheless be "uniformly enforced" even if only one person is the subject of an enforcement action, so long as the purposes underlying uniform enforcement are met. Uniform enforcement gives notice to employees about what punishment they can reasonably anticipate if they violate the rule and it protects employees against arbitrary enforcement.

McClain, 693 N.E.2d at 1319.

Here, KUIC found that Minit Mart had a written policy which dealt with the handling of cash and deposits which, if violated, was grounds for termination. It is undisputed that Neel had knowledge of this policy. The KUIC's factual determination on this issue is supported by substantial evidence. Thus, the circuit court did not apply the appropriate standard of review and substituted its judgment for that of KUIC.

The circuit court also held that Neel's actions did not constitute misconduct within the meaning of the statute. KRS 341.370(1)(b) provides that a worker is not entitled to unemployment benefits if termination resulted from misconduct connected with her work. KRS 341.370 further provides that "discharge for misconduct" includes a "knowing violation of a reasonable and uniformly enforced rule of an employer." The issue for review is whether Neel's conduct constituted a "knowing violation" so as to

justify her termination. The circuit court ruled that Neel's conduct was merely negligent. The court emphasized that Neel did not act with malice or consciously consider the policy and the "risk to her employer of violating it and then intentionally or recklessly set about to violate it." We disagree.

Volitional conduct which stems from wanton or wilful disregard of the employer's interest or deliberate violation of the of the employer's policies disqualifies a worker from receiving benefits. See Kentucky Unemployment Ins. Comm. v. Gooslin, Ky., 756 S.W.2d 464 (1988); and see City of Lancaster v. Trumbo, Ky. App., 660 S.W.2d 954 (1983)(denial of benefits is proper where employee's discharge resulted from intent to disobey reasonable instructions of employer); Kentucky Unemployment Ins. Comm. v. King, Ky. App., 657 S.W.2d 250 (1983)(holding that employee's wilful disregard of reasonable employer policy constitutes misconduct connected with work for purposes of disqualifying employee from receiving benefits).

Here, the referee found that Neel left the shift cash receipts in a money bag unattended in an unlocked office. The referee further found that such action was in wanton disregard of Neel's employer's business interest. While we might have reached a different conclusion, we cannot say that the referee erred by finding that her conduct warranted her discharge and disqualification from receiving benefits. Hence, that finding may not be disturbed.

The decision of Logan Circuit Court is reversed and this case is remanded to that court with directions to reinstate KUIC's decision.

MILLER, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING. I respectfully dissent.

I agree with the trial court that Neel's single act of carelessness does not amount to misconduct sufficient to disqualify her from receiving benefits. I believe the trial court was correct when it said:

> The Commission found that Ms. Neel was disqualified from receiving benefits because she was guilty of misconduct within the meaning of KRS 341.370(1)(b) and (6) by committing a "knowing violation of a reasonable and uniformly enforced rule of her employment." This Court believes that the Commission erred in its factual finding that the policy violated was uniformly or strictly enforced; however, even if this finding were correct, this Court [does] not concur in the legal conclusion that the acts of Ms. Neel constitute misconduct within the meaning of the statute.
>
> The Commission's factual finding that Judith Neel violated her employer[']s policy

is not questioned; but this Court believes the legal conclusion that this isolated act constitutes misconduct disqualifying Mrs[.] Neel from unemployment benefits is erroneous. To permit any violation of policy - no matter how rare or inadvertent to disqualify the employee from unemployment benefits would lead to absurd and unjust results. The fact that a reasonable policy existed, that Judith Neel knew it existed when she was hired and that she later on one occasion violated it, does not - in and of itself - require a finding that she is guilty of misconduct. Counsel for the Commission has correctly cited the following quote from Boynton Cab Co. [v.] Neubeck, 237 Wis. 249, 269 N.W. 636 (1941):

> [T]he term misconduct . . . is limited to conduct evincing such 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, or in carelessness of [sic] 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 interest or of the employee's duties and obligations to his employer . . . .

The principles of Boynton have been followed in this state. Douthitt v[.] Kentucky Unemployment Ins. Com[m]'n, [Ky. App.,] 676 S.W.2d 472[,] 474 [1984]. The facts as found by the referee and adopted by the Commission show no more than a single instance of negligence by an otherwise exemplary employee. There is no evidence indicating that the employee bore her employer any malice or that she, on January 11, 1997, consciously considered the policy, the risk to her employer of violating it and then intentionally or recklessly set about to violate it. The negligence exhibited is not of such a degree as to "manifest equal culpability" (presumably equal to a deliberate act), wrongful intent or evil design, or to show an intentional and substantial disregard

of the employer's interests or the employee's duties.

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