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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001591-MR

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION — APPELLANT

v. — APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 99-CI-00234

KENNETH R. MCDOUGAL AND
FEDERAL CARTRIDGE, D/B/A HOFFMAN ENGINEERING[1] — APPELLEES

AND: NO. 2000-CA-001677-MR

HOFFMAN ENGINEERING, INC. — APPELLANT

v. — APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 99-CI-00234

KENNETH R. MCDOUGAL AND
KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: HUDDLESTON, KNOPF AND TACKETT, JUDGES.

[1]In Hoffman Engineering, Inc.'s Notice of Appeal, it notes that "Federal Cartridge, d/b/a Hoffman Engineering" is an incorrect designation.

TACKETT, JUDGE: The Kentucky Unemployment Insurance Commission (Commission) and Hoffman Engineering, Inc. (Hoffman), appeal from an order of the Montgomery Circuit Court reversing the Commission's decision to deny Kenneth R. McDougal unemployment benefits. We reverse.

In March of 1997 McDougal was hired by Hoffman as a production associate assigned to weld grind. McDougal was a full time employee and earned $11.38 per hour at the time of his discharge. On June 8, 1999, McDougal was fired by Hoffman and according to his termination letter it was because McDougal

> approached Curt Getchell, Team Leader in Assembly, in an aggressive, threatening and hostile manner; point[ed] [his] finger in [Getchell's] face, speaking to him within inches of his face accompanied by a raised voice. At no time did Mr. Getchell treat [McDougal] in a similar manner. This type of behavior is absolutely unacceptable and viewed as mis-conduct. We expect associates to adopt a business-like problem solving manner in all instances especially in disagreements. (T.E. at Page 5; Termination letter dated June 8, 1999, marked as Agency Exhibit 1).

Thereafter, McDougal made his initial claim for unemployment insurance benefits. A determination dated July 20, 1999, held that McDougal had been discharged for misconduct connected with his work, and that he was disqualified for benefits. McDougal appealed that determination and requested a hearing before a referee which was held August 26, 1999, by teleconference. The referee set aside the prior determination, stating that McDougal was discharged for reasons other than misconduct connected with his work, and holding that he was

entitled to unemployment insurance benefits. Hoffman appealed the referee's decision to the Commission.

The Commission reversed the decision of the referee and held that McDougal was discharged for reasons of misconduct connected with his work and was disqualified from receiving unemployment benefits. McDougal then filed a complaint in the Montgomery Circuit Court seeking review of the Commission's decision. The Montgomery Circuit Court reversed the Commission and now both the Commission and Hoffman Engineering separately appeal that decision.[2]

The appellants each contend that the circuit court erroneously reversed the Commission's determination that McDougal was properly discharged for misconduct. To illuminate the issues in the case, we begin our review of the circuit court's decision by reproducing relevant portions of the referee's decision, the Commission's order, and the circuit court's order.

The referee's decision, in relevant part, is as follows:

> FINDINGS OF FACT: Claimant, production worker, worked for the captioned employer for two years and three months. He worked full-time earning $11.38 per hour. Claimant was issued an informal counseling on September 4, 1998, for arguing with a team leader concerning working overtime. The incident was an apparent misunderstanding that led to a verbal argument. Claimant had no other counseling or warnings concerning his work.
>
> On June 4, 1999, claimant and his team leader got into another verbal argument concerning claimant's wife who also works for the

[2]Because the issues in the two cases are identical, we have addressed both cases in this opinion.

> appellee. The team leader accused claimant of threatening him. Claimant denied the allegations and accused the team leader of instigating the situation. The employer representative at the hearing had no first hand knowledge of the incident. Claimant was discharged on June 8, 1999, for threatening the team leader in the work place. Claimant again denied the allegations.
>
> DECISION: The determination is set aside. The employer discharged claimant for reasons other than misconduct connected with the work and claimant is not disqualified. The employer's reserve account is chargeable with benefits paid under this claim. (September 21, 1999, Referee's Decision, at Page 1).
>
> REASONS:
>
> . . . .
>
> The burden of proof to establish misconduct rests with the employer. That burden can be satisfied only with competent evidence of probative value. The evidence relied on by the employer at the hearing was hearsay. It was not competent evidence in the face of claimant's sworn testimony that he in no way threatened his team leader or instigated the situation. Claimant's discharge was therefore not proven misconduct connected with the work. (September 21, 1999, Referees Decision, at Page 2).

The December 3, 1999, order of the Commission, in relevant part, is as follows:

FINDINGS OF FACT

> Claimant was employed by the captioned employer for two years and three months as a full-time production worker on the second shift for an hourly wage, at the time of discharge, of $11.38.
>
> Early in the year, 1998, claimant was spoken to informally by Becky Shelton, human resource manager, for arguing with a security guard....

In September 1998, claimant agreed to work overtime on first shift; however, claimant was instructed by Tim Murphy, team leader, to go home after working an hour. Apparently, Mr. Murphy wanted to discuss something with the claimant before claimant went home; however, claimant refused to speak with Mr. Murphy because he did not like what he perceived to be Mr. Murphy's demeanor of always thinking he was right. Claimant was spoken to informally by Ms. Shelton about his refusal to speak with Mr. Murphy. Claimant was aware that Ms. Shelton did not consider his behavior to be acceptable and that he could be discharged for similar behavior in the future.

When claimant reported for work on June 4, 1999, he found his wife, who works for the captioned employer on first shift, in tears and distraught because someone had cut the lock off the tool box claimant had made for her. Claimant's wife used the tool box to secure a diary she was keeping at work of events which she and the claimant hoped would help in their efforts to get a union at the plant.

Claimant approached Curtis Getchell, team leader, and asked if he had cut the lock off his wife's tool box. Mr. Getchell said yes and that he had the authority to do so. Claimant, in a raised voice, told Mr. Getchell that he had violated his wife's privacy and that he was going to report the incident to the police. Just before claimant turned to walk away, he pointed his finger at Mr. Getchell and told Mr. Getchell "You guys better quit messing with my wife...."

Claimant was discharged on June 8, 1999, for approaching Mr. Getchell in an aggressive, threatening, and hostile manner; pointing his finger in Mr. Getchell's face; and for speaking to Mr. Getchell in a raised voice within inches of his face. (December 3, 1999, KUIC Decision, at Pages 1 and 2).

. . . .

REASONS

Based on claimant's account of the incident which occurred in early 1998, claimant was

being treated differently than other workers when the security guard would ask him to produce his company identification card before being allowed on company property. Therefore, claimant can not be held at fault for voicing his objection. The record does not support that the manner in which claimant voiced his displeasure was so offensive as to constitute misconduct.

Based on claimant's account of the September 1998, incident, claimant was guilty of refusing an instruction of a team leader to speak with him before going home. Claimant has neither shown that the team leader's instruction was unreasonable; nor that he had reasonable justification for refusing the team leader's instruction. Therefore, Claimant was guilty of statutory misconduct as defined [in KRS 341.370].

The question to be answered is whether claimant's behavior on June 4, 1999, based on his own testimony, was sufficiently offensive to constitute misconduct, when considering that claimant was on notice that his job was in jeopardy because of his earlier misconduct.

It is understandable that claimant wanted to come to his wife's defense; however, the claimant owed the captioned employer the duty of redressing his wife's grievance in a civil manner; preferably after first determining whether the captioned employer had the right to cut the lock off his wife's tool box. Nevertheless, on June 4, 1999, before determining whether the captioned employer had the right to cut the lock off his wife's tool box, claimant raised his voice in anger at Mr. Getchell, and pointed his finger at Mr. Getchell while issuing what reasonably could be viewed as either a veiled threat; or at the very least an attempt to intimidate management. Claimant clearly violated a standard of behavior which the captioned employer had a right to expect of him.

Therefore, the Commission is constrained to hold that claimant was guilty of misconduct on June 4, 1999, both when he failed in the duty he owed the captioned employer of redressing his wife's grievance in a civil manner; and when he blatantly violated a

> standard of behavior which he owed the captioned employer. Claimant's behavior on June 4, 1999, was especially egregious when considering that claimant was on notice that his job was in jeopardy because of his insubordination in September 1998. . . . (December 3, 1999, KUIC Decision, at Page 3).

DECISION

> WHEREFORE, the Commission, having reviewed the record and being advised, sets aside the referee decision. It is now held that the claimant was discharged from the employment for reasons of misconduct connected with the work and is disqualified from receiving benefits... (Id.).

Finally, the trial court's order reversing the Commission's order, in relevant part, is as follows:

> At the referee hearing, the only witnesses were McDougal and Becky Shelton, the human resources manager of the employer, Hoffman Engineering. Shelton apparently had little if any direct knowledge of any of the facts of the case. However, Shelton did submit three statements purportedly signed by management personnel who did have direct knowledge. None of the three statements were notarized or sworn to.
>
> At the referee hearing, McDougal disputed much of what was contained in the statements. However, since the witnesses were not available to testify, he had no opportunity to cross examine their statements or to challenge them other than through his own testimony and denials. The referee found for McDougal.
>
> The Commission, in reversing the referee's decision, relied upon the three written, unsworn statements.
>
> The appropriate standard in reviewing a decision of the Commission is that their decision must be supported by substantial evidence of probative value. Although referee hearings do not necessarily need to strictly comply with the rules of evidence,

> due process requires that they be fair. The statements which the Commission based its decision [on] were clearly hearsay, and put the Plaintiff in a serious disadvantage since he could not cross examine any of the witnesses or confront them in any manner. All he could do was deny and give his own version of the facts. The statements are not substantial evidence and violated Plaintiff's right to due process. (Emphasis added.) (June 7, 2000, Montgomery Circuit Court Order, at Pages 1 and 2).

Unlike some administrative appellate bodies, the Commission conducts a de novo review of unemployment compensation applications and may affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, may direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. Thus, while the Commission generally does not hear evidence directly from witnesses, it has the authority to enter independent findings of fact. 787 KAR 1:110(2)(4)(a). Necessarily, such authority allows the Commission to judge the weight of the evidence and the credibility of witnesses and to disagree with the conclusion reached by the referee. Burch v. Taylor Drug Store, Inc., Ky. App., 965 S.W.2d 830, 834 (1998). "To put it simply, 'the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.'" Commonwealth Transp. Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990); Bowling v. Natural Resources and Enviomental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409-410 (1994).

When the findings of fact of the Commission are supported by substantial evidence of probative value, the

findings are binding upon a reviewing court. H & S Hardware v. Cecil, Ky. App., 655 S.W.2d 38, 40 (1983); Brown Hotel Company v. Edwards, Ky., 365 S.W.2d 299, 302 (1962). Evidence is substantial if when taken alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable persons. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). The reviewing court must then determine whether the Commission applied the correct rule of law to its factual findings. H & S Hardware, at 40. Where the question is one of law rather than fact, "courts are not bound to accept the legal conclusions of [the] administrative body." Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 408 (1992). If, however, the reviewing court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. Brown Hotel Company at 302. The position of the circuit court in administrative matters is one of review, not of reinterpretation. Kentucky Unemployment Insurance Commission v. King, Ky. App., 657 S.W.2d 250 (1983). The circuit court's review is limited to the record made before the Commission. Kentucky Unemployment Insurance Commission v. Murphy, Ky., 539 S.W.2d 293, 294 (1976); Department of Education v. Kentucky Unemployment Insurance Commission, Ky. App., 798 S.W.2d 464 (1990). As an appellate court, we step into the shoes of the circuit court. See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, Ky., 379 S.W.2d 450 (1964).

The appellants contend that McDougal was discharged for misconduct, and argue that the circuit court's determination to the contrary was erroneous. KRS 341.370(6) defines "discharge for misconduct" as follows:

> "[d]ischarge for misconduct" as used in this section shall include, but not be limited to, separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work. [Emphasis added.]

An employer bears the burden of proving employee misconduct. Shamrock Coal Company, Inc. v. Taylor, Ky. App., 697 S.W.2d 952 (1985). In cases involving the issue of misconduct, the facts of each case must be examined in light of the reasonable employment relationship. Douthitt v. Kentucky Unemployment Insurance Commission, Ky. App., 676 S.W.2d 472 (1984).

Based upon their respective written decisions, the primary dispute between the Commission and the circuit court appears to be whether McDougal's testimony alone supports a finding that McDougal engaged in on-the-job misconduct which would justify his discharge. With regard to the September 8,

1998, incident concerning McDougal's refusal to talk to a team leader, McDougal testified as follows:

> I just walked away from him. I didn't say nothing to him. I walked away from him and the next day they called me in the office and they gave me an informal verbal counseling that they said I should have sit there and talked to him. (Transcript of August 26, 1999, Referee Hearing, at Page 19)

Based upon the foregoing, we agree with the Commission's conclusion that, by his own testimony, McDougal admitted to statutory misconduct with reference to the September 1998 incident. Further, with respect to the above incident, McDougal signed a document captioned "Associate Corrective Action." The form included "Manager/Team Leader Comments" stating "I/we expect no further incident in the future of this type behavior. It cannot lead to success here at Hoffman." (Appellant Hoffman's Brief, at 25). Based upon McDougal's executing the Corrective Action Form, the Commission's conclusion that he was aware that his future conduct could jeopardize his job is supported by substantial evidence.

With regard to the June 4, 1999, confrontation with leader Curtis Getchell, McDougal testified as follows:

> You know, I figured all we had was words. You know, <u>I raised my voice a little bit</u>. I never cussed at him. I was never aggressive toward him. I never threatened him or anything. They are blowing it all out of proportion. The only reason they're blowing it out of proportion is because of the union. Me wearing the union shirt and my wife wearing the union shirt. (T.E., at Page 25).
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> . . . .
>
> <u>I raised my voice a little bit</u>. I voiced my opinion and I thought it was - - he was

> invading my wife's privacy for getting into that toolbox. (T.E., at Pages 25 and 26).
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> . . . .
>
> We were standing an arm's length away. We talked a little bit more and when I left I raised my arm a little bit and pointed at him and I told him, I said, you guys better quit messing with my wife, and I turned around and walked away from him. (Emphasis added.) (T.E., at Page 26).

We conclude that the emphasized portions of McDougal's testimony are substantial evidence which support the Commission's conclusion that McDougal raised his voice in anger at Getchell, pointed his finger at Getchell and issued what could be viewed as either a veiled threat, or at least an attempt to intimidate management.

The circuit court determined that the Commission relied upon the witnesses' statements presented by Hoffman at the hearing. The Commission's order, however, did not refer to these witnesses' statements, but rather implied that the Commission relied solely upon the testimony of McDougal. With regard to the witnesses' statements, even if the Commission had relied in part upon these statements, it would not have been improper per se for it to have done so. Hearsay evidence is admissible in an administrative hearing if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs. KRS 13B.090(1). This is true even though the hearsay evidence alone is not sufficient in itself to support an agency's findings of fact unless it would be admissible over objections in civil actions. Mollette v. Kentucky Personnel Bd., Ky. App., 997 S.W.2d 492, 495 (1999).

Becky Shelton, Human Resources Manger, testified that it was a uniformly enforced policy at Hoffman that if an employee acted in the manner that McDougal did on June 4, 1999, the employee would be discharged. The Commission's conclusion that McDougal was terminated for work-related misconduct was clearly based on substantial evidence. In contrast, the circuit court's conclusion that the Commission's determination was based entirely upon hearsay witnesses' statements is not supported by the record. As a result, we conclude that the Commission acted properly when it disqualified McDougal from receiving unemployment insurance benefits pursuant to KRS 341.370(1)(b).

For the foregoing reasons the decision of the Montgomery Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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