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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002789-MR

BEVERLY J. POWELL

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CI-90172

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION AND KENTUCKY MEDICAL
SERVICES FOUNDATION

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; MILLER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Beverly Powell has appealed from the Rowan Circuit Court's order affirming the Kentucky Unemployment Insurance Commission's decision to deny her request for unemployment benefits due to misconduct. Because we agree that

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

substantial evidence supports the Commission's findings and that it correctly applied the law, we affirm.

Powell began working as a receptionist for Kentucky Medical Services Foundation (hereinafter "KMSF") in April 2002. For several years before that, she had been working for the predecessor company. On August 26, 2002, Powell filed a request for medical leave under the Family and Medical Leave Act, attaching the necessary form from her healthcare provider. Although she had not been an employee for the required twelve months, Powell was granted leave from August 21 through September 9, 2002, because she had accrued sick time sufficient to cover the time period for which she would be out of the office. Powell then received an extension of leave time until September 23, 2002. Two days after the expiration of her extended leave time, Powell verbally requested additional leave. Charles Merritt, the Director of Human Resources for KMSF, sent Powell the following letter the same day:

I received your verbal request for additional Medical Leave given in the form of a voice-mail left for Margaret Radford, the Radiation Medicine Satellite Clinic Administrator. Your request for additional leave has been granted contingent upon the completion of the enclosed re-certification. Please forward these forms to the healthcare provider who completed the original certification for your leave. You must return the completed forms to me, at the address listed below, no later than October 18, 2002 for the additional leave to be

granted. Please feel free to contact me at the number listed below if you have any questions.

Powell met with several representatives of KMSF on October 9th to discuss an office complaint she had made, and at that time she was reminded of the need to provide the re-certification forms. Powell disputed this, and later stated that she was told not to return to work until the investigation on her complaint had been completed. The following day, Merritt received a fax from Powell's healthcare provider that extended her medical leave until October 1st. By letter dated October 10, 2002, Merritt informed Powell that the faxed note did not satisfy the requirements of re-certification, and reminded her that the re-certification forms he sent with the previous letter were due October 18th. Those forms would allow her absence from work since September 24th to be considered medical leave. According to her testimony, Powell forwarded the re-certification forms to her healthcare provider, but discovered on October 18th that they had not been completed. The physician who was to complete the forms was on vacation and did not complete the forms until after the deadline had passed.

On October 21, 2002, Merritt sent Powell a letter terminating her employment for unexcused absences. At that time, Merritt had not yet received the completed re-certification forms. Powell responded in a handwritten note

dated October 29, 2002, indicating that she was unaware of KMSF's policies and procedures, as she had never received a copy of the personnel handbook. Merritt responded to this correspondence by letter dated November 4, 2002, stating that he had received the healthcare provider re-certification forms on October 31st. He reminded her that on three occasions she had been informed about the need to provide the re-certification forms by October 18th and that she had never indicated that there was any problem with this. However, in reviewing the late re-certification forms, Merritt noted that she was released to work on October 1st, so that her absences between that date and October 21st were considered unexcused.

Powell filed a claim for unemployment benefits pursuant to KRS Chapter 341 on January 5, 2003. In her accompanying statements, Powell indicated that she had been under severe physical and emotional distress due to a hostile work environment since April 15, 2002, and that she was still being treated for the condition. Regarding her absence from work, she indicated that she was discharged due to a technicality in that forms were not timely sent in because of a delay in her healthcare provider's office. Merritt filled out the employer statement forms for KMSF, in which he indicated that Powell had been discharged for failing to provide medical

re-certification pursuant to the FMLA, making her absences unexcused.

On January 31, 2003, the Division of Unemployment Insurance issued a notice of determination, ruling that Powell was not entitled to benefits because she had been discharged for misconduct connected with her work. Powell appealed the decision to a referee, who conducted an evidentiary hearing on March 4, 2003. One week later, Referee Debra Cook issued an opinion affirming the earlier determination, reasoning that based upon her factual findings, Powell was discharged for misconduct pursuant to KRS 341.370(6) when she refused to obey her employer's reasonable instructions to return the re-certification forms by October 18, 2002. The referee also relieved KMSF's reserve account of charges. Powell then sought review from the Commission pursuant to KRS 341.430. The Commission adopted the referee's findings of fact and conclusions of law and affirmed her decision, determining that the overall weight of the evidence supported the referee's findings of fact and that she correctly applied the law. The Commission also indicated that Powell had improperly attempted to enter documentary evidence during the appeal, which was not permitted and therefore not considered. Powell next sought judicial review pursuant to KRS 341.450 by filing a complaint in Rowan Circuit Court. Following briefing, the circuit court

entered an order on November 24, 2003, affirming the Commission's decision and holding that the findings of fact were supported by substantial evidence and that the law was correctly applied. This appeal followed.

In her brief, Powell argues that the Commission's finding of misconduct was not supported by substantial evidence and that the Commission misapplied the law. On the other hand, both the Commission and KMSF disagree with Powell's assertions.

In Burch v. Taylor Drug Store, Inc.,² this Court set out the applicable standard of review for itself and for the circuit court as follows:

Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness.[] The findings of fact of an administrative agency which are supported by substantial evidence of probative value must be accepted as binding by the reviewing court.[] The court may not substitute its opinion as to the weight of the evidence given by the Commission.[] Upon determining that the Commission's findings were supported by substantial evidence, the court's review is then limited to determining whether the Commission applied the correct rule of law.[]

With this standard in mind, we shall review the decision below.

Our decision in the present case turns on the application of KRS 341.370, which provides in relevant part:

(1) A worker shall be disqualified from receiving benefits for the duration of any

² 965 S.W.2d 830, 834 (Ky.App. 1998)(citations omitted).

period of unemployment with respect to which:

(a) . . .

(b) He has been discharged for misconduct or dishonesty connected with his most recent work. . . .

KRS 341.370(6) defines "discharge for misconduct" as including, but not limited to, "refusing to obey reasonable instructions." In previous opinions, this Court has observed that employers are entitled to faithful and obedient service from their employees.³ In City of Lancaster v. Trumbo,⁴ the Court stated, "[w]here an employee manifests an intent to disobey the reasonable instructions of his employer, the denial of unemployment benefits on the basis of misconduct is proper." On this same subject, the Court in Kentucky Unemployment Insurance Commission v. King⁵ cited to 76 Am.Jur.2d *Unemployment Compensation* § 52 for the proposition that "'an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules' would support exclusion from benefits whereas 'mere mistakes, inefficiency, [or] unsatisfactory conduct' would not." Finally, we recognize that although the employee has the overall burden of proof and persuasion, the employer bears the

³ Shamrock Coal Company v. Taylor, 697 S.W.2d 952 (Ky.App. 1985); City of Lancaster v. Trumbo, 660 S.W.2d 954 (Ky.App. 1983).

⁴ 660 S.W.2d at 956.

⁵ 657 S.W.2d 250, 251 (Ky.App. 1983)(emphasis in original).

burden of proof to establish misconduct, as "a misconduct allegation is in the nature of an affirmative defense."⁶

In the present case, Powell argues that the finding of misconduct is not supported by substantial evidence. We disagree. While it is true that Powell provided testimony to the contrary, based upon our review of the record we must hold that KMSF provided ample evidence to support the referee's and the Commission's findings of fact. Specifically, Merritt's letters to Powell as well as his testimony concerning the circumstances leading to her discharge all support the findings of fact.

Powell also argues that the Commission improperly applied the law. Again, we disagree. It appears that the basis of this argument is that the Commission did not place the burden of proof on KMSF to establish misconduct. This is incorrect because not only did KMSF bear the burden of proof on this issue, but was able to establish misconduct on Powell's part. The record is quite clear that KMSF provided documentary and testimonial evidence to establish misconduct on Powell's part for her failure to timely provide the re-certification forms. Merritt provided Powell with the necessary forms in correspondence dated September 25th, and reinforced the requirement in person on October 9th and by a subsequent letter

⁶ Shamrock Coal Company v. Taylor, 697 S.W.2d at 954.

on October 10th. Powell had sufficient time to obtain the completed re-certification forms. Regardless of whether there was a "mix-up" in her healthcare provider's office, Powell still had a duty to follow KMSF's instructions, which were reasonable under the circumstances of this case. It was up to Powell to establish a reason for her continued medical leave, over and above her testimony that she did not feel like she was ready to return to work. That Powell had never received a copy of the employee handbook is of no consequence because Merritt, among others, specifically informed her of the need to timely provide the re-certification forms. Furthermore, KMSF did in actuality review the re-certification forms once they were received after Powell's discharge. But those forms only provided for leave through October 1st, a date that had passed one month before the forms were ever received. Powell's willful and wanton disregard of KMSF's instructions to provide the re-certification by a specific date constituted misconduct as defined by KRS 341.370(6). The Commission properly applied the law to the facts of this case in determining that Powell was not eligible to collect unemployment benefits due to her misconduct, and the circuit court was correct in affirming that decision.

For the foregoing reasons, the opinion of the Rowan Circuit Court is affirmed.

ALL CONCUR.

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