

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2004-CA-002222-MR

KIMBERLY F. MARCUM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 04-CI-001296

KENTUCKY UNEMPLOYMENT INSURANCE  
COMMISSION; FORD MOTOR COMPANY

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

ROSENBLUM, SENIOR JUDGE: Kimberly F. Marcum appeals from an order of the Jefferson Circuit Court affirming the Kentucky Unemployment Insurance Commission's (Commission) decision denying her request for unemployment benefits. Because substantial evidence supports the Commission's findings, and

---

<sup>1</sup> Senior Judge Paul Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

because the Commission correctly applied the relevant unemployment compensation law to those findings, we affirm.

Marcum began employment with Appellee Ford Motor Company in October 1999. Marcum was discharged on August 14, 2003. At the time of her termination, Marcum was a Material Handling Supervisor.

Prior to her termination Marcum had been disciplined for attendance violations on several occasions, including a verbal warning in June 2000; a one-week suspension without pay and warning of progressive discipline for further attendance violations in May 2001; a two-week suspension without pay and warning of progressive discipline for further attendance violations in November 2001; and a four-week suspension without pay and warning of termination for further attendance violations in August 2002. In association with the August 2002 disciplinary incident, Ford issued a letter of discipline to Marcum which stated, in relevant part, as follows:

You were absent from work on Sunday, June 2 in violation of the Attendance Guidelines. You failed to [provide] adequate medical documentation for that day's absence. You also failed to report to work on June 4 as scheduled and failed to provide appropriate medical documentation. It is your responsibility and job related obligation to report to work on time when scheduled or completely follow the Attendance Guidelines you have been placed [sic].

You are advised that . . . if your absences are a result of a personal nature, that our Total Health group could assist you[.] [P]lease seek their assistance.

This letter of discipline is being issued to advise you that you are being given a disciplinary penalty of four weeks (without pay) and any further recurrences of this matter or similar incidents will result in more severe disciplinary action, up to and including termination from the Company. (Emphasis added.)

At the time of her discharge, Marcum's schedule was 6:00 p.m. to 4:30 a.m. Tuesday through Friday.<sup>2</sup> Due to a neurological disorder, Marcum was under restrictions issued by her family physician to limit her work schedule to 50 hours per week.

On Friday, June 20, 2003, Ford directed all material handler supervisors to work a "regular day off." As a result, though she would normally have been off that day, Marcum was ordered to report to work at 6:00 a.m. on Monday, June 23. On Friday evening, Marcum e-mailed her supervisor that due to her work-restriction limitations, she would be unable to work on June 23 because the additional work hours would place her above her 50 hour work-restriction limit. Nevertheless, on Sunday, June 22, Marcum's supervisor called her and instructed her to

---

<sup>2</sup> Marcum states that her work schedule was 5:30 p.m. thorough 6:00 a.m. Tuesday through Friday; however, the discrepancy is irrelevant to the issues presented herein.

report on Monday, and to confirm her restrictions with the company physician.

Marcum reported on June 23 at 6:00 a.m. The company physician was not on-site at the time. Pending the arrival of the company physician, Marcum attended a staff meeting, and, according to Ford, was assigned duties for the day's work-shift. Marcum saw the company physician at approximately 8:00 a.m. According to Marcum, the physician confirmed the 50 hour work-restriction issued by her family doctor, and she understood that to mean that she did not have to work the rest of her shift on June 23. Marcum accordingly left the plant immediately after her meeting with the physician without discussing the matter with anyone, though Marcum did leave a voice mail notifying her supervisor of her departure.

Sometime around midday of June 23, Ford realized that some of Marcum's assignments had not been completed. According to Ford, it was only then that her supervisor realized that Marcum had left the plant. Marcum reported to work as scheduled on June 24. When confronted with the previous day's events, Marcum claimed that she understood that the plant physician had accepted the 50 hour work-restriction imposed by her family doctor, and interpreted this as meaning that she did not have to complete the June 23 shift. Ford adopted the position that even if the 50 hour work-restriction had been agreed to by all

parties, it was Ford's decision as to when Marcum would work those 50 hours, not Marcum's. Because Marcum had been ordered to work on June 23 and had left without permission, Ford perceived the absence as an unexcused absence.

As a result of the June 23 incident, and in light of her prior disciplinary record relating to unexcused tardiness and absences, Ford terminated Marcum's employment effective August 14, 2003. Marcum subsequently filed a claim for unemployment benefits. On September 12, 2003, the Department of Employment Services, Division of Unemployment Insurance, granted Marcum's claim for benefits. Upon becoming aware of the award, pursuant to Kentucky Revised Statutes (KRS) 341.420, Ford appealed the decision, claiming that Marcum was discharged for misconduct. The matter was referred to a Referee.

On December 8, 2003, an evidentiary hearing was held before the Referee. On December 10, 2003, the Referee issued a Decision wherein he determined that Marcum had been discharged for misconduct. In accordance with this Decision, the Referee set aside the determination that Marcum was entitled to unemployment benefits.

Pursuant to KRS 431.430 Marcum appealed the Referee's decision to the Commission, claiming that she had not engaged in misconduct in relation to the June 23, 2003, incident but, rather, had acted in accordance with her understanding that she

did not have to work that day because she thought that the 50 hour per week limitation had been ratified by the company physician and the work-shift for that day would be in contravention of the work-restriction. Because she believed she was authorized to depart, Marcum alleged that she had not engaged in misconduct. On January 27, 2004, the Commission issued an Order affirming the Referee's Decision that Marcum had been discharged for misconduct.

Pursuant to KRS 431.460 Marcum appealed the Commission's decision to the Franklin Circuit Court. On September 9, 2004, the circuit court entered an opinion and order affirming the Commission's decision. Marcum subsequently filed a "motion to reconsider," which was denied. This appeal followed.

Before us, Marcum contends that the circuit court erred in affirming the Commission's order denying Marcum benefits because the Commission's Findings were not supported by substantial evidence and the Commission incorrectly applied the law to the facts so found.

The legislative purpose in enacting the unemployment compensation act was "to provide benefits for only those employees who have been forced to leave their employment because of forces beyond their control and not because of any voluntary act of their own." Kentucky Unemployment Insurance Commission

v. Kroehler Manufacturing Company, 352 S.W.2d 212, 214 (Ky. 1961). Moreover, an employee is not entitled to unemployment benefits if he is discharged for misconduct. KRS 341.370. The employer has the burden of proving that the employee's actions constituted misconduct. Burch v. Taylor Drug Store, 965 S.W.2d 830, 835 (Ky. App. 1998).

If there is substantial evidence in the record to support an agency's findings, they are not clearly erroneous or arbitrary and will be upheld even though there may be conflicting evidence in the record. Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). "The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency." Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 582 (Ky. 2002).

The fundamental question before us, therefore, is whether the facts found by the Commission are "supported by substantial evidence," Kentucky Unemployment Insurance Commission v. Springer, 437 S.W.2d 501, 502 (Ky. 1969), and, if so, whether the Commission "incorrectly applied the correct rule of law to the facts presented to it." Kentucky Unemployment Insurance Commission v. Stirrat, 688 S.W.2d 750, 751-52 (Ky.App.

1984). Stated another way, the applicable standard of review is 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.

Burch, supra, at 834 (citations omitted).

The Commission made findings to the effect that Marcum was required to report to work on June 23, 2003, pursuant to a blanket order requiring supervisors in the material handling department to work on their regularly scheduled days off; that as a result of the order Marcum was required to work June 23, 2003, commencing with the 6:00 a.m. shift; that upon receiving the order to work, Marcum e-mailed her manager that she was on a 50 hour per week work-restriction per her personal physician, and that she would not be reporting to work on Monday June 23; that on Sunday June 22 Marcum's supervisor left Marcum a voice mail message telling her that she could not schedule her own 50 hour work week, and that she was to report to work on June 23 and see the company physician; that Marcum reported for work at

6:00 a.m. on June 23, but following her consultation with the plant physician Marcum left the plant without permission from her supervisor.

The foregoing findings of the Commission are supported by substantial evidence in the record. In fact, Marcum essentially concedes these basic facts, and her arguments go more toward the proper interpretation to be given to the facts. We conclude that the facts as found by the Commission are supported by substantial evidence and, as such, are not arbitrary or clearly erroneous.

Having determined that the Commission's findings are supported by substantial evidence, we next review as to whether the Commission applied the correct rule of law. Upon application of the applicable unemployment insurance law to its findings of fact, the Commission determined that Marcum had been discharged for misconduct. As a basis for this conclusion, the Commission cited to Marcum's prior disciplinary history and her having left the plant on June 23, 2003, without permission of her supervisor and despite having been ordered to work that day. Our decision in the present case turns upon the application of KRS 341.370, which provides, in relevant part, as follows:

- (1) A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which:

. . . .

(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, "unsatisfactory attendance if the worker cannot show good cause for absences or tardiness," and "refusing to obey reasonable instructions [.]". Although the employer bears the burden of establishing misconduct (See Shamrock Coal Company, Inc. v. Taylor, 697 S.W.2d 952, 954 (Ky.App. 1985)), the employee has the overall burden of proof and persuasion to show good cause for the absences or tardiness.

"Good cause usually is regarded as a reason sufficient in ordinary circumstances of an urgent and personal nature to justify leaving employment[.]" Cantrell v. Kentucky Unemployment Insurance Commission, 450 S.W.2d 235, 237 (Ky. 1970) (quoting In re Lauria's Claim, 18 A.D.2d 848, 236 N.Y.S.2d 168 (Sup.Ct.App.Div. 1963)). In order to be ineligible for unemployment benefits, a fired worker's conduct must evince some bad faith or give rise to an inference of culpability in the form of willful or wanton conduct. See generally Shamrock Coal, supra.

Ford presented documentary and testimonial evidence concerning Marcum's disciplinary history for attendance problems

and established that she had been warned that further breaches of the company's attendance policies may result in escalating disciplinary measures. In light of its finding that Marcum left the plant on June 23 without permission, we must uphold the Commission's determination that Marcum failed to obey a reasonable instruction and that she was discharged for misconduct. The Commission properly applied the applicable unemployment compensation law to the facts of the case.

We are not persuaded by Marcum's contention that she properly left the plant on June 23 because she was under the impression that after the company physician confirmed her 50 hour work-limitation she was authorized to leave the work site. The Commission's findings reflect that while Marcum was told to report to the company physician on June 23, nevertheless, she was also under an order to work that day. Moreover, the Commission's findings reflect that even if she was under a 50 hour restriction, the company, and not Marcum, would schedule the 50 hour week. As stated by the Commission "[t]he claimant's prior disciplinary actions put her on notice that her job was in jeopardy. In such situations, it behooves the employee to make a greater effort to ensure that instances pertaining to attendance are forthright and beyond reproach.

Regardless of whether we would have held the same, we are not permitted to substitute our judgment for the

Commission's. Our review is limited to the question of whether the Commission misapplied the relevant unemployment benefits law to the facts of the case, and we cannot say that it did. We therefore conclude that the Commission properly determined that Marcum 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 and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel G. Hayward  
Louisville, Kentucky

BRIEF FOR APPELLEE FORD MOTOR  
COMPANY:

R. Thad Keal  
Carla Foreman Dallas  
Prospect, Kentucky

BRIEF FOR APPELLEE KENTUCKY  
UNEMPLOYMENT INSURANCE  
COMMISSION:

Tamela A. Biggs  
Frankfort, Kentucky