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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001516-MR

LINDA L. PERRY APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 07-CI-01273

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; AND HEAD COVERS, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CAPERTON, JUDGE: Linda Perry appeals the opinion affirming the Kentucky Unemployment Insurance Commission ("the Commission") by the Boone Circuit Court which denied her unemployment benefits following her termination of employment with Head Covers, Inc. ("Head Covers") on the basis that she voluntarily left without good cause attributable to the employment. Perry argues

that the court erred in finding that the Commission's decision was supported by substantial evidence of probative value as Perry's wages were improperly garnished by her employer; thus, the employment became unsuitable and Perry did not have any other reasonable alternative but to quit. Alternatively, Perry argues that even if the Commission's factual findings were correct, then the Commission either misapplied the law or applied the wrong law. We disagree and, accordingly, affirm the opinion of the Boone Circuit Court.

The facts that give rise to this appeal were testified to at the hearing held by the Referee of the Division of Unemployment Insurance and have been summarized herein below. Perry started working for Head Covers in June 2003. Head Covers had a policy that employees are deemed to have quit after missing three days of work without notice.

Perry had an ongoing attendance issue and was issued a warning regarding her attendance in July 2006. She then was absent from work from September 6th through the 8th of 2006, for which she gave notice. However, from September 11th through the 15th Perry was again absent. She claims to have left voicemail messages regarding her absences. Head Covers denies receiving the messages. Perry's boss, Ms. Fullerton, called to ask about her absence, and testified that Perry responded that she thought she would be fired. Perry never returned to work, even though Fullerton testified that Perry's employment was not terminated during the telephone conversation.

In an unrelated issue, Perry's wages had been garnished. A set amount of $83.20 was taken from her check, even though her wages fluctuated. According to Perry, this often resulted in garnishment greater than the 25 percent maximum established by Kentucky Revised Statutes (KRS) 427.010(2).[1] She complained to her boss, who consulted Head Covers' Chief Financial Office and the creditor's attorney, both of whom verified the garnishment was proper. Perry also claims that the money garnished was not paid directly to the creditor, but was instead held and paid at various times, for which she was charged 24 percent interest. Perry discussed the matter with Head Covers in December 2005, March 2006, and August 2006.

Thereafter, on October 1, 2006, Perry filed for unemployment benefits. The Division of Unemployment Insurance issued a determination denying Perry's claim, finding that she had voluntarily quit her employment without good cause attributable to employment. At the Referee hearing, evidence was submitted that Perry had quit in anticipation of discharge, while Perry argued that the employer's improper garnishment of her wages provided good cause for quitting.

The Referee, post-hearing, affirmed the earlier denial. In affirming the denial of unemployment benefits, the Referee specifically found that "[Perry's] dissatisfaction with her garnishment played a part in her decision to quit, however, the controlling issue is that she quit in anticipation of being discharged." The

[1] She testified to one instance where on December 16, 2005, Perry received a paycheck for $0.00, after taxes, garnishment, and other discretionary deductions.

Referee concluded that quitting in anticipation of discharge did not provide good cause attributable to the employment. Perry appealed to the Kentucky Unemployment Insurance Commission, and the Commission affirmed the denial of benefits. She next appealed to the Boone Circuit Court, arguing that her job was unsuitable or that she had good cause to quit. The circuit court affirmed.

In its opinion affirming the Commission's order, the circuit court determined that the Commission's findings of fact were supported by substantial evidence and not unreasonable. Moreover, the court found that the Commission correctly applied the law to those facts. While Perry submitted to the circuit court persuasive case law from a sister state, the circuit court was unprepared to establish a new rule of law in this Commonwealth. Thus, the circuit court was not persuaded that the garnishment issues made Perry's work unsuitable or that she had good cause to quit as a matter of law in light of KRS 341.100, which defines suitable work, and the dearth of precedent on this issue. Accordingly, the circuit court upheld the Commission's ruling that Perry quit in anticipation of being discharged for failing to call in and report to work on September 11-14. It is from this opinion that Perry now appeals.

On appeal Perry presents two main arguments. First, that the circuit court erred in finding the Commission's decision was supported by substantial evidence of probative value; to which Perry additionally argues that the Commission impermissibly relied upon hearsay evidence. Second, Perry argues that the Commission incorrectly applied the law to the facts. Her argument is

centered on the garnishment issues, the improper withholding by her employer in light of KRS 427.010, and the employer's failure to remit the funds to the creditor. Perry argues that these actions made her work unsuitable. Alternatively, Perry argues that she had a lack of reasonable alternatives to quitting her employment.

The Commission disagrees and argues that its findings of fact were supported by substantial evidence and that it correctly applied the law based on (1) KRS 341.100, the definition of suitable work; (2) KRS 341.450, judicial review of the Commission; (3) KRS 341.370, disqualifications for unemployment benefits; and (4) the accompanying case law.

At the outset we note that our review of the Commission's decision is limited to whether the findings of fact were supported by substantial evidence, and whether the Commission correctly applied the law to the facts. *Thompson v. Kentucky Unemployment Ins. Com'n,* 85 S.W.3d 621, 624 (Ky.App.2002). In assessing the Commission's decision, we are a court of review, not of reinterpretation. *Thompson, supra.* In so reviewing, we must bear in mind that:

> Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence.

Thompson at 624 (internal citations omitted). However, Perry is correct that matters of statutory construction are the province of the courts and thus are subject

to *de novo* review. *Board of Com'rs of City of Danville v. Davis,* 238 S.W.3d 132, 135 (Ky.App. 2007).

In the matter *sub judice*, we find the statutory interpretation of KRS 341.370 to be controlling. KRS 341.370(1)(c) states that a worker shall be disqualified from receiving unemployment benefits when: "[h]e has left his most recent suitable work or any other suitable work which occurred after the first day of the worker's base period and which last preceded his most recent work voluntarily without good cause attributable to the employment." The claimant bears the burden of showing that she left her job voluntarily with good cause attributable to her employment. *Thompson, supra* and *Brownlee v. Commonwealth,* 287 S.W.3d 661, 664 (Ky. 2009).

Our jurisprudence has required three definitive terms contained in KRS 341.370. First, in a "voluntary quit" case, such as the case *sub judice*, "voluntary" as used in KRS 341.370, necessarily bears the connotation that the "decision to quit...is freely given...." *Thompson* at 625 (internal citations omitted). Second, "good cause" as held in *Kentucky Unemployment Ins. Commission v. Murphy,* 539 S.W.2d 293, 294 (Ky. 1976), "exists only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment." Third, KRS 341.100 defines "suitable work" for Chapter 341 as:

> 1) In determining for any purpose under this chapter whether or not any work is suitable for a worker the secretary shall consider, among other pertinent conditions, the degree of risk involved to his health, safety and morals; his physical fitness and prior training;

> his experience and prior earnings; his length of unemployment and prospects for securing local work in his customary occupation; and the distance of the available work from his residence.
>
> 2) For the purpose of this chapter, no work shall be suitable nor shall benefits be denied under this chapter to any otherwise eligible worker for refusing to accept new work or new conditions of work under one (1) or more of the following:
>
> > (a) If the position offered is vacant due directly to a strike, lock-out or other labor dispute;
> >
> > (b) If the wages, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality;
> >
> > (c) If, as a condition of being employed, the worker would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;
> >
> > (d) If the acceptance of such work would be prejudicial to the continuance of an established employer-employee relationship to which the worker is a party.

KRS 341.100. With these parameters in mind we turn to the parties' arguments.

Perry first argues that the Commission's findings of fact were not supported by substantial evidence, to which the Commission disagrees. After a review of the record, it is apparent that the Commission was faced with conflicting evidence as to why Perry quit her employment. Regardless of the conflict in the evidence, there was substantial evidence to support the Commission's finding that Perry voluntarily quit in anticipation of being discharged by her employer. Accordingly, we must affirm the findings of the court below in this regard.

Perry next argues that if there was substantial evidence to support the trial court's finding that she voluntarily quit, then (1) the Commission did not apply the correct law concerning the garnishment issue, or (2) did not correctly apply the correct law to the facts.

Perry argues that the garnishment issues, the improper withholding in light of KRS 427.010, and not remitting the funds to the creditor, made her work unsuitable. We are of the opinion that this argument is better couched in terms of whether she had good cause to quit in light of KRS 341.370.[2] Perry's argument is misplaced. The basis for the Commission's denial of benefits was that Perry had voluntarily quit in anticipation of discharge, not that the employment had become unsuitable. Since the Commission's finding is supported by the record, we must defer to it. *Thompson, supra.* As such, Perry's legal argument is not supported by the Commission's factual findings and we therefore affirm the circuit court's decision to uphold the Commission.

While Perry argues that the Commission misapplied the law on the garnishment issue, which was the competing theory as to why Perry quit, this argument is not persuasive as the record supports the Commission's findings that Perry quit in anticipation of discharge. The Commission was faced with conflicting reasons for Perry leaving her employment. It chose which reason to

[2] In *Brock v. Kentucky Unemployment Ins. Com'n.,* 693 S.W.2d 69, 70 (Ky.App.1985), this Court did speak in terms of an employer's act rendering appellant's employment unsuitable. However, the crux of the holding was that the employer's act gave good cause to the employee for voluntarily quitting the employment. *See also Brownlee, supra.*

give credence to and as a reviewing court, we must defer to this finding. Thus, we now turn to Perry's second claimed misapplication of the law.

Perry briefly argues that even if we accept the Commission's findings, then case law within the Sixth Circuit supports the conclusion that when an employee resigns in anticipation of being discharged, that discharge must be judged by the same criteria as if the discharge had actually taken place for unemployment compensation purposes. In support, Perry has submitted one unpublished case from a neighboring state. While there is no precedent directly on point in this Commonwealth, we do not find this argument persuasive based on our case law which addresses similar fact situations.

In *Barren River Mental Health-Mental Retardation Bd., Inc. v. Bailey*, 783 S.W.2d 886 (Ky.App. 1990), this Court held that the claimant was entitled to unemployment benefits as

> Mary's departure had already been decided-it was inevitable. Her act of leaving a few days early did not result in Barren River's decision to discharge her....However, her compensation begins from the date her employer terminated her, April 29th, and not from the date she quit, April 20th.

Id. at 888.

Similarly, in *Thompson,* 85 S.W.3d at 627 (Ky.App. 2002), this Court held that "[t]he referee correctly analyzed Thompson's unemployed status during the two-week notice period as a discharge initiated by the company, and the subsequent period as a quitting initiated by Thompson[,]" when the claimant gave his two-week notice of his intention to quit and the employer terminated his

employment immediately. Thus, Thompson was only entitled to unemployment benefits for two weeks.

In light of these cases we conclude that in order for an employee to be eligible for unemployment benefits when they voluntarily quit, the employer must communicate to the employee that the employer has decided to terminate the employee. To hold otherwise would require the Commission to delve into a nebulous fact situation where the employer may have contemplated terminating the employment but neither communicated the fact to an employee nor actually terminated the employee. Accordingly, the Commission did not misapply what we believe is the law in this Commonwealth to Perry's voluntary act of quitting in anticipation of discharge.

Finally, we address the argument raised in Perry's reply brief that the Commission impermissibly relied upon hearsay evidence offered by Head Covers. We note that this argument was first raised in Perry's reply brief in defending her position that the Commission's findings were not supported by substantial evidence, and lacks citation to where the issue was raised below.

It is the appellant's duty to provide this Court with adequate citation to the record and as to the preservation of the issue under Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv)-(v). Moreover, reply briefs are to be limited "to points raised in the briefs to which they are addressed, and shall not reiterate arguments already presented." CR 76.12(4)(e). Additionally, as noted in *Wilson v. Kentucky Unemployment Ins. Com'n.,* 270 S.W.3d 915, 917 (Ky.App.

2008)(internal citations omitted), "[i]t is well-settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review . . . ." This Court is not obliged to scour the record on appeal to ensure that an issue has been preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Thus, in light of the aforementioned reasons, we will not review this argument as it is not properly before our Court.

Having found that the Boone Circuit Court correctly determined that the Commission's finding of facts were supported by substantial evidence and that the Commission correctly applied the law to the facts, we hereby affirm the Boone Circuit Court's opinion affirming the Commission's order denying Perry unemployment benefits.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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