

RENDERED: OCTOBER 21, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001895-MR

BERTHA MASON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE ERNESTO M. SCORSONE, JUDGE  
ACTION NO. 09-CI-01918

DON DAUGHERTY; MICHELLE BELL;  
UNITED TRANSPORTATION COMPANY, INC.;  
LOUISVILLE TRANSPORTATION; AND  
KENTUCKY UNEMPLOYMENT INSURANCE  
COMMISSION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Bertha Mason (Mason) appeals from the circuit court's order affirming the order of the Kentucky Unemployment Insurance Commission (the Commission) denying her application for benefits. On appeal, Mason argues the

referee and Commission erroneously denied her claim based on reasons that had not been listed in the initial Notice of Determination, and that the circuit court erred in affirming the Commission. The Appellees argue that there is substantial evidence in the record to support the Commission's decision; that the referee and Commission did not deny Mason's claim for reasons outside the Notice of Determination; and that the referee and Commission were authorized to go beyond the Notice of Determination in making their findings. Having reviewed the record, we affirm.

## FACTS

Mason began working as a van driver for United Transportation Company, Inc. (United) on September 10, 2007. During the course of her tenure at United, Mason received generally good to very good performance reviews and no negative reviews regarding her attendance. In mid-September 2008, Mason telephoned her supervisor to report that she would not be at work due to illness. The supervisor did not answer the phone, so Mason left a voicemail message. Mason reported to work later that day. The supervisor told Mason that, if she was not coming to work, she should talk to someone, such as a dispatcher, and not just leave a voicemail message. The supervisor believed that this conversation constituted a verbal warning; however, Mason interpreted it as a suggestion.

On September 22, 2008, Mason again called in to report that she would not be at work and again left a message on the supervisor's voicemail. The next day, Mason's supervisor asked her to sign a written warning regarding her

failure to follow call-in procedures, which Mason refused to do. The supervisor and Mason then met with the facility manager, Don Daugherty (Daugherty). Daugherty attempted to explain to Mason the reason for the written warning; however, Mason kept interrupting Daugherty. Mason and Daugherty then argued about: who should or should not be speaking and listening; who would or would not sign the written warning; who had or had not prepared the written warning; and who was or was not showing respect to whom. After approximately ten minutes, Daugherty stated that the conversation was at an end and he asked Mason to leave his office. When she did not leave, he advised her that her services were no longer needed.

After being discharged, Mason filed an application for unemployment benefits. United filed a response, stating that Mason had been discharged for insubordination. Additionally, United stated that Mason had been warned not to leave a voicemail message when calling in sick but that she had done so twice.

The Commission issued a "Notice of Determination" finding that "[t]he evidence of record establishes that there were repeated occurrences of absences which were unnecessary or improperly reported. The claimant's actions show a willful disregard of the employer's business interests. Therefore the discharge was for misconduct in connection with the work." Mason appealed this determination and requested a hearing.

At the hearing, Daugherty testified that he discharged Mason for insubordination because she argued with him and would not leave his office when

he asked her to do so. He stated that he did not discharge her for excessive absences because her attendance was never a problem.

Mason's supervisor testified that Mason did not follow the proper procedure for calling in when she was going to be absent; that she received a written warning; and that she became argumentative when Daugherty attempted to explain the warning to her. The human resources manager testified that she had dealt with Mason regarding her complaints about Daugherty and a problem with Mason's paycheck. On both occasions, Mason was argumentative and difficult to handle.

Mason testified she was upset about the written warning because it had been prepared by Daugherty and had the wrong date. She also played an audio recording of her conversation with her supervisor and Daugherty from the day she was discharged.

Following the hearing, the referee affirmed the Notice of Determination, finding that Mason had been discharged for misconduct. Specifically, the referee found that Mason failed "to obey reasonable instructions" when she refused to leave Daugherty's office. Mason appealed the referee's findings to the Commission and the Commission affirmed.

In affirming, the Commission found that

[t]he weight of the evidence in the record will not support a finding that claimant's behavior was warranted. The employer was simply trying to explain to claimant its previously stated expectation on proper procedures for calling off work and to issue claimant a formal warning

that her recent improper call-ins would not be tolerated in the future and that she needed to adjust her behavior accordingly. Claimant's reaction to this was unreasonable, and was only exacerbated by her behavior subsequent to being instructed to leave the office by Mr. Daugherty in an effort to defuse the situation. In doing so, claimant both willfully and wantonly disregarded a standard of behavior which her employer had a right to expect of her as an employee.

Mason then appealed the Commission's order to the circuit court. The circuit court reviewed the administrative record, including a transcript of the recording of the confrontation between Mason and Daugherty, and affirmed. In doing so, the court found that the Commission's findings were "supported by substantial evidence of probative value" and that "the Commission applied the correct rule of law to the facts." Mason appeals from that judgment.

#### STANDARD OF REVIEW

The circuit court must determine if the agency's findings of fact are supported by substantial evidence of probative value and whether or not the agency applied the correct rule of law to the facts. *Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775, 778 (Ky. 1969). We defer to the circuit court on issues of fact, unless the court's judgment was clearly erroneous. *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, 833 (Ky. App. 2001). However, we review questions of law *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). Because Mason raises primarily a question of law, we review the circuit court's judgment and the Commission's order *de novo*.

## ANALYSIS

Mason argues on appeal that, following the Notice of Determination, United impermissibly changed the reason for her termination. United argues that it did not change the reason for Mason's termination and, even if it had, the referee and Commission are authorized to accept additional evidence and to modify the Notice of Determination. The Commission argues that its order affirming the referee was supported by evidence of substance and that it correctly applied the rule of law to the facts.

Mason's argument that United changed the basis for termination from absenteeism to insubordination is not supported by the record. In documentation that it filed with the Commission prior to the issuance of the Notice of Determination, United stated that Mason was discharged for "[i]nsubordination, which had occurred several times in the past." By way of explanation, United stated that Mason "refused to listen" when confronted about her violation of the call-in policy, and became "unruly," which was a "pattern over her time of employment." United did not state in those documents that Mason had been terminated for or had any problems related to absenteeism other than properly reporting when she would be absent. United has maintained its position that Mason was discharged for insubordination throughout these proceedings; therefore, Mason's argument that United stated it discharged her for absenteeism is without merit.

Mason's issue, to the extent she has one, is with the referee and/or the Commission, not United. The Notice of Determination does state Mason "was discharged due to absenteeism from work." However, apparently ignoring the Notice of Determination, the referee found that Mason was discharged for insubordination, a finding adopted by the Commission. Thus, the referee and/or the Commission, not United, "changed" the reason for Mason's discharge.

While we believe we could stop our analysis at this point, we address what we perceive to be the real issue - whether a referee or the Commission can base a denial of benefits on a reason not specifically listed in the Notice of Determination. Based on the record before us, we hold that they can.

First, we note that there is nothing in Kentucky Revised Statute (KRS) Chapter 341 or the pertinent administrative regulations that limits a referee or the Commission on appeal to addressing only the reasons for discharge listed in the Notice of Determination. Second, KRS 341.420(2) states that "[a] party to a determination may file an appeal to a referee as to any matter therein." The Notice of Determination stated that Mason's "actions show a willful disregard of the employer's business interests. Therefore the discharge was for misconduct in connection with the work." That statement is sufficiently broad to encompass insubordination even though insubordination was not specifically listed as a reason. Third, 787 KAR 1:110 § 1(4)(a) provides that "[t]he claimant and any other party to the appeal may present evidence as may be pertinent" and "[t]he referee may take any additional evidence which he deems necessary." Thus, if not

explicitly, certainly by implication, the regulations permit a referee to consider matters outside the evidence presented before issuance of the Notice of Determination. Fourth, KRS 341.430(1) provides that the Commission may "affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case or direct the taking of additional evidence . . . ;" thereby providing the Commission with wide latitude in considering matters appealed from the referee.

Based on the preceding, we hold that, if the referee and Commission did consider matters beyond the explicit reasons listed in the Notice of Determination, they did not commit error by doing so. Furthermore, the record contains sufficient evidence of substance to support the Commission's findings; therefore, the circuit court appropriately affirmed those findings.

#### CONCLUSION

Having discerned no error in the findings of the referee, the Commission, or the circuit court, we affirm.

ALL CONCUR.



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