

RENDERED: AUGUST 21, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001044-MR

ANTOINETTE C. TAYLOR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CI-003385

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; 3B ENTERPRISES, LLC,
D/B/A 3B HOLDING CO., INC., AND
HOME INSTEAD SENIOR CARE

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Jefferson Circuit Court affirming an Order of the Kentucky Unemployment Insurance Commission (hereinafter “the Commission”). Based upon the following, we affirm the decision of the circuit court.

BACKGROUND INFORMATION

The Appellant, Antoinette Taylor, was an employee at 3B Enterprises, LLC d/b/a Home Instead Senior Care (Home Instead). Taylor worked as a full-time caregiver with Home Instead from December 19, 2006, until June 25, 2012. On June 17th, 2012, issues arose while Taylor was providing care for a patient (H.R.) at Sacred Heart Village (hereinafter "Sacred Heart"). While there is a dispute between Taylor and Home Instead about the exact events, Taylor faxed a letter to Kim Thieneman, the director of Sacred Heart on the morning of June 18, 2013. The letter provided as follows:

Yesterday morning (June 17, 2013) at approximately 5:10 a.m., I witness[e]d one of your staff being rough with patient H.R. Patient H.R. requested your staff to stop being so rough and fast with him. I also witnessed your staff failed to change his brief after I reported it, until four hours later. That same morning, I witnessed your staff failed to wash him up because he had a body odor and only put his clothes on. At approximately 5:20 a.m. on June 17, 2013, I reported the above incident to your staff nurse (Marshall) who was on duty. That same morning at approximately 7:05 a.m., I reported the above incident to my employer Home Instead Senior Care. At approximately 8:40 p.m., your staff unprofessionally approached me with a threaten[ing] tone in the hallway while I was briefly talking to my co-worker from Home Instead Senior Care.

It is my belief that I have been retaliated [against] by your staff who I heard reported that I was sleeping on the job. That is not true of me. Defamation of character and falsely reporting are two serious offenses. This false reporting has caused me embarrassment, humiliation, and emotional distress in front of both my co-workers and your staff. Because of the retaliation and intentional false statement, your staff has caused me harm. I have

suffered economic loss, my reputation damaged, and psychological stress.

I ask you to review this matter within the next 24 hours and I can be reached at the above number if you have any questions.

Taylor disclosed that she had sent the letter to the Home Instead human resource manager, Christina Reising, when the latter requested a statement regarding the unsubstantiated rumors that she had been sleeping during her shift. After an investigation, it was determined that the rumors were untrue. Additional issues arose, however, which prevented Taylor from returning to work. Taylor was asked to come to the Home Instead office for a meeting with its president, Becky Beanblossom, but she did not appear. Reising then advised Taylor that her employment was terminated for rule violations and for failing to meet Home Instead's expectations, specifically, her:

1. Failure to immediately report a witnessed incident of client neglect to the employer;
2. Failure to attend to the personal needs of the patient in the absence of other care;
3. Failure to report allegations of client neglect;
4. Failure to report the incident to Home Instead before reporting to Sacred Heart, in violation of policy;
5. Sending a legally threatening fax to the director of Sacred Heart without prior notification to Home Instead;
6. Failure to remain in patient's room at all times; and
7. Violation of client confidentiality.

Taylor applied for unemployment, but benefits were denied on the basis of misconduct. She then appealed the denial and several hearings were held at which she had the opportunity to testify on her own behalf and to call witnesses in support of her position. Robin Lovett (a co-worker of Taylor's at Home Instead), Reising and Beanblossom testified on behalf of Home Instead at the hearing.

After hearing proof, the referee found in favor of Taylor regarding the divulging of confidential information and accusations that she had left the patient alone as well as failing to immediately contact Home Instead regarding the patient's treatment and her actions in reporting the incidents to Sacred Heart, rather than Home Instead. The referee ultimately denied Taylor benefits, however, finding that she had failed to assist H.R. with needed personal care in violation of a known, reasonable and uniformly enforced rule of Home Instead. Taylor appealed the referee's decision to the Commission.

Upon Taylor's appeal, the Commission conducted a *de novo* review of the proceedings and determined that Taylor was in violation of four reasonable instructions given to her by Home Instead. The Commission determined that this exhibited a willful and wanton disregard for the interests of Home Instead and rose to the level of common law misconduct. Taylor then appealed this decision of the Commission to the Jefferson Circuit Court which held as follows:

The Court is satisfied that substantial evidence exists to support KUIC's determination that Taylor was terminated for misconduct. The Court has reviewed the record, witness testimony and written documentation relevant to the matter at hand. While Taylor vehemently

denies many of the accusations made against her, the Court cannot overlook statements Taylor made contemporaneously with the events in question. In her letter to Thieneman, Taylor maintained that patient H.R. had a soiled undergarment which was not changed for approximately four hours, either by Sacred Heart staff or Taylor herself. In accordance with Home Instead policies, Taylor was required to take action on behalf of a client if the staff of the residential facility failed to provide adequate care. Taylor's letter confirms that she failed to assist H.R. when Sacred Heart staff failed to do so for a considerable amount of time. That inaction constituted misconduct under [Kentucky Revised Statutes] KRS 341.370.

Circuit Court Opinion at p. 7.

The circuit court went on to find that Taylor's due process rights were not violated by the referee and the manner in which the hearings were conducted.

Taylor then brought an appeal to this Court.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, an appellate court must determine whether the decision was based upon substantial evidence in the record. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). With this standard in mind, we review the circuit court's decision.

DISCUSSION

Before we address the merits of Taylor's appeal, we must address the issue raised by the Commission of whether Kentucky Rules of Civil Procedure (CR) 60.02(f) provides the circuit court with the ability to re-enter its Order. CR 60.02(f) allows the court to fix errors it may have made after the original jurisdictional time has run. In this case, the circuit court determined that Taylor had not received a copy of its Order due to an error it made. Specifically, the envelope which contained the Order had Taylor's name on it, but there was no address. This was an error of the court and it had the ability under CR 60.02(f) to remedy it. *See Kurzinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002). Thus, the court correctly used CR 60.02 and Taylor's appeal is properly before us.

KRS 341.370 provides that:

(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, or from any work which occurred after the first day of the worker's base period and which last preceded his most recent work....

....

(6) “Discharge 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.

In *Douthitt v. Kentucky Unemployment Ins. Com’n*, 676 S.W.2d 472, 474 (Ky. App. 1984), a panel of our Court defined the term “misconduct” in the same way the court in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941), did, which is:

[L]imited to conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed “misconduct” within the meaning of the statute.

Taylor argues on appeal that the circuit court applied the incorrect standard of review and the correct matter of law to the facts; that it substituted its own views of the evidence when the Commission's decision was not supported by substantial evidence; by failing to consider her testimony; and, by failing to address the question of arbitrariness. We disagree.

In reviewing the decision of an administrative agency, a circuit court acting as an appellate court must review the decision to determine whether there is substantial evidence to support the decision. Its role is neither to reinterpret the decision of the administrative agency nor to reconsider the merits of the claim. *Kentucky Unemployment Ins. Com'n v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983). See also *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

As set forth above, the circuit court was charged with reviewing the Commission's decision to determine whether there was substantial evidence to support it. The circuit court found that there was substantial evidence presented at the hearings to determine that Taylor was guilty of misconduct and that, based upon the statutory definition of misconduct, she was not entitled to benefits. The circuit court determined this based upon the record and the testimony (including Taylor's) that was presented at the hearings. We, therefore, affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Antoinette C. Taylor, *Pro Se*
Shelbyville, Kentucky

BRIEF FOR APPELLEES:

Amy F. Howard
Frankfort, Kentucky