Affirmed as Modified and Memorandum Opinion filed June 10, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00108-CV

VICTOR ELGOHARY, Appellant

V.

TEXAS WORKFORCE COMMISSION, G.A. HERRERA & CO., HERRERA PARTNERS, L.P., HERRERA PARTNERS, AND GILBERT HERRERA, INDIVIDUALLY, Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2008-00814

M E M O R A N D U M O P I N I O N

Appellant Victor Elgohary challenges the trial court's judgment affirming the administrative ruling of the Texas Workforce Commission ("TWC") denying unemployment compensation benefits. We modify the judgment and affirm as modified.

Background

Herrera Partners, L.P., a financial consulting company, hired Elgohary to serve as its Director of SEC Compliance and FASB Consulting Services in November 2006.[1] Elgohary's duties included training Alex Tittel, an associate at Herrera Partners, on all aspects of Herrera Partners' SEC compliance service practice and financial consulting duties. Elgohary generally began working from his home at 7:30 a.m. and arrived at Herrera Partners' offices between 9:00 a.m. and 10:00 a.m.

Gilbert Herrera, President of Herrera Partners, sent Elgohary an e-mail on April 13, 2007, stating that he was unsatisfied with Tittel's training and did not want Elgohary's practice of working from home to interfere with Tittel's training. Elgohary also attended meetings and events at various times on behalf of Herrera Partners. Herrera also requested that Elgohary provide a written plan outlining Tittel's training schedule.

On May 8, 2007, Elgohary received an e-mail from Herrera stating that Elgohary was required to (1) adhere to a basic schedule of working from Herrera Partners' office between 8:30 a.m. and 5:30 p.m.; (2) avoid deviating from this schedule without written approval; (3) complete the training of an associate; (4) provide client activity reports; and (5) provide written daily activity summaries.

On May 16, 2007, Elgohary did not report to Herrera Partners' office by 8:30 a.m. Elgohary was attending a work-related meeting at a different location at that time. Elgohary did not request and did not receive written approval to report to Herrera Partners' office after 8:30 a.m. on May 16, 2007. Herrera fired Elgohary that day.

Elgohary filed an application for unemployment benefits with the TWC on July 30, 2007. The TWC initially approved Elgohary's application. Herrera Partners appealed the TWC's initial decision, and the TWC Appeals Tribunal reversed the initial decision; the tribunal ruled that Elgohary was disqualified from receiving unemployment

[1] "SEC" stands for "Securities and Exchange Commission." "FASB" stands for "Financial Accounting Standards Board."

benefits pursuant to Texas Labor Code section 207.044. Under section 207.044, an individual is disqualified from receiving unemployment benefits if the individual was discharged from the individual's last job for misconduct. Tex. Labor Code Ann. § 207.044 (Vernon 2006).

Elgohary filed his original petition on January 4, 2008, appealing the TWC's ruling. Herrera Partners, L.P., Herrera Partners, G.A. Herrera & Co., and Gilbert Herrera filed their original answer, motion to abate and application to compel arbitration, and request for disclosure on February 5, 2008. The TWC filed its original answer on February 15, 2008. On July 25, 2008, the trial court signed an order imposing $1,000 in sanctions on Elgohary for discovery abuse.

A trial *de novo* was conducted by the trial court on October 20, 2008. After Elgohary rested, appellees moved for a directed verdict, which the trial court denied. Appellees then rested without presenting any further evidence. The trial court signed its judgment in favor of appellees on October 20, 2008, and incorporated its July 25, 2008 Order Imposing Sanctions on Plaintiff into the judgment. Elgohary timely appealed from the trial court's judgment.

Analysis

Elgohary presents five issues on appeal. In his first and second issues, Elgohary contends that the trial court erred by (1) imposing discovery sanctions against him; and (2) denying his motion to compel discovery. In his third issue, Elgohary contends that the trial court erred in granting appellees' motion for directed verdict. In his fourth and fifth issues, Elgohary contends that the trial court erred by finding that the TWC's administrative ruling was supported by substantial evidence. We first address Elgohary's third, fourth, and fifth issues, which focus on whether this record contains evidence of misconduct that would foreclose his receipt of unemployment benefits.

I. Directed Verdict

In his third issue, Elgohary argues that the trial court erred in granting appellees'

motion for directed verdict. The appellees moved for a directed verdict at the close of Elgohary's evidence. The trial court denied appellees' motion for directed verdict. After the motion was denied, appellees rested. The trial court then rendered judgment in favor of appellees. Because the trial court did not grant appellees' motion for directed verdict, we overrule Elgohary's third issue.

II. Substantial Evidence

In his fourth and fifth issues, Elgohary contends that the trial court erred in finding that the TWC's administrative ruling denying Elgohary unemployment compensation benefits was supported by the evidence. In his original appellate brief, Elgohary frames his argument as a challenge to the legal and factual sufficiency of the evidence. Elgohary also filed a reply brief, in which he argues that the TWC's ruling is not supported by substantial evidence.

The trial court reviews a TWC administrative ruling *de novo* to determine whether there is substantial evidence to support the TWC's ruling. Tex. Lab. Code Ann. § 212.202(a) (Vernon 2006); *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986). The party challenging the decision has the burden of proof. *Mercer*, 701 S.W.2d at 831. Substantial evidence must be more than a mere scintilla, but need not be a preponderance. *Arrellano v. Tex. Employment Comm'n*, 810 S.W.2d 767, 769 (Tex. App.—San Antonio 1991, writ denied).

Under the substantial evidence standard of review, the TWC's ruling carries a presumption of validity. *Mercer*, 701 S.W.2d at 831. The evidence introduced in the trial court must show facts in existence at the time of the TWC's ruling to reasonably support the decision. *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998). This determination is a question of law. *Mercer*, 701 S.W.2d at 831. The reviewing court may not set aside a TWC ruling merely because it would reach a different conclusion. *Id.* It may do so only if it finds that the TWC's ruling was made "without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious." *Id.*

If the TWC's ruling is correct, it is immaterial that the TWC may have proceeded to the conclusion on an erroneous theory or may have given an unsound reason for reaching it. *Tex. Employment Comm'n v. Hays*, 360 S.W.2d 525, 527 (Tex. 1962). However, a reviewing court may not sustain a TWC ruling upon a factual basis not passed upon by the TWC. *Pub. Util. Comm'n of Tex. v. Sw. Bell Tel. Co.*, 960 S.W.2d 116, 121 & n.7 (Tex. App.—Austin 1997, no pet.).

The Texas Labor Code provides that "[a]n individual is disqualified for benefits if the individual was discharged for misconduct connected with the individual's last work." Tex. Labor Code Ann. § 207.044. "Misconduct" means "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and safety of employees." *Id.* § 201.012 (Vernon 2006). "Mismanagement" requires (1) intent, or (2) "such a degree of carelessness as to evidence a disregard of the consequences, whether manifested through action or inaction." *Mercer*, 701 S.W.2d at 831.

The TWC Appeal Tribunal concluded as follows:

> Although the claimant may have felt he had some legitimate areas of disagreement with the employer, he chose to resolve the disagreement by not adhering to all of the requests made by the employer on May 8, 2007, including the request that he report each day by 8:30 AM and have written permission to deviate from the basic schedule. He could have avoided the final incident by notifying the employer in advance that he would be late on May 16, 2007, because he was going to attend a work-related meeting. However, he did not do so, and the employer was left to conclude that he was late without notice or a valid excuse. . . . Therefore, I conclude that the claimant mismanaged his position of employment by his action, which amounted to misconduct connected with the work. The determination dated July 30, 2007, that approved his claim without disqualification under Section 207.044 of the Act, will be reversed.

Elgohary asserts that he was discharged because of a "miscommunication," and that this "miscommunication" cannot support the TWC's ruling "that [Elgohary] was guilty of misconduct through mismanagement of his position" because "[n]othing about the

miscommunication between [Elgohary] and his employer demonstrates any intent on the part of [Elgohary] or that [Elgohary] was so careless as to demonstrate a disregard for the consequences of a failure to communicate."

We conclude that this determination is supported by substantial evidence. Herrera sent Elgohary an e-mail on April 13, 2007, stating that he was dissatisfied with Tittel's training and did not want Elgohary's working from home to interfere with Tittel's training. Herrera also requested that Elgohary provide a written plan outlining Tittel's training schedule. Herrera never received a written training plan for Tittel.

On May 8, 2007, Elgohary received an e-mail from Herrera stating that Elgohary was required to adhere to a basic schedule of working from Herrera Partners' office between 8:30 a.m. and 5:30 p.m. and was not to deviate from this basic schedule without written approval. Elgohary acknowledged receiving this e-mail. Elgohary testified that part of his duties under his employment contract with Herrera Partners "would include those that were assigned by Mr. Herrera from time to time[.]" He also testified that Herrera has the "right" or "ability and authority" to require Elgohary to work from the Herrera Partners' office between 8:30 a.m. and 5:30 p.m.

On May 16, 2007, Elgohary did not report to Herrera Partners' office by 8:30 a.m. Elgohary testified that he was attending a work-related meeting at a different location at that time. Elgohary testified that he did not request and did not receive written approval to report to Herrera Partners' office after 8:30 a.m. on May 16, 2007. Elgohary testified that he did not send Herrera an e-mail seeking permission to report to the Herrera Partners' office after 8:30 a.m. because "[he] thought it was more appropriate to . . . have a face-to-face conversation because [he] didn't think that e-mail was the best way to handle it." Elgohary never had a face-to-face conversation with Herrera regarding reporting to the Herrera Partners' office after 8:30 a.m. on May 16, 2007. Elgohary offered no other explanation for his failure to request written approval from Herrera.

This is substantial evidence to support the TWC's denial of benefits to Elgohary. Elgohary failed to adhere to Herrera's request that Elgohary work from Herrera Partners'

office between the hours of 8:30 a.m. and 5:30 p.m. unless given written permission by Herrera to do otherwise on May 16, 2007. Elgohary was aware of these requirements and, at a minimum, was so "careless as to evidence a disregard for the consequences" of his failure to comply with the requirements. This evidence constitutes misconduct under the Texas Labor Code. *See* Tex. Labor Code Ann. § 201.012. Elgohary has failed to carry his burden to establish that the TWC's ruling was not supported by substantial evidence. *See Mercer*, 701 S.W.2d at 831.

We overrule Elgohary's fourth and fifth issues.

III. Discovery Sanctions

Elgohary contends in his first issue that the trial court erred in imposing monetary discovery sanctions against him.[2] We review a trial court's ruling on a motion for sanctions under an abuse of discretion standard. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). A trial court abuses its discretion when its ruling is arbitrary and unreasonable, without reference to any guiding rules and principles. *Id.* at 838-39. In conducting our review, we are not limited to a review of the "sufficiency of the evidence" to support the trial court's findings; rather, we make an independent inquiry of the entire record to determine if the court abused its discretion by imposing the sanction. *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230, 234 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (op. on reh'g).

Texas Rule of Civil Procedure 215.2 allows a trial court to enter "just" sanctions for a party's failure to comply with a discovery order or request. Tex. R. Civ. P. 215.2. A sanction is "just" if (1) there is a direct nexus between the offensive conduct, the offender, and the sanction imposed, and (2) it is not excessive. *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam). The sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction should be visited upon the offender. *Id.* Further, a sanction imposed for discovery abuse

[2] TWC does not address this issue in its briefing. Herrera Partners, L.P., Herrera Partners, G.A. Herrera & Co., and Gilbert Herrera did not file a brief.

should be no more severe than necessary to satisfy its legitimate purposes: (1) securing compliance with discovery rules; (2) deterring other litigants from similar misconduct; and (3) punishing violators. *Id.* Courts must consider whether less stringent sanctions would fully promote compliance. *Id.*

As stated in the trial court's July 25, 2008 Order Imposing Sanctions on Plaintiff, the trial court assessed a $1,000 sanction against Elgohary payable to Herrera Partners, L.P., Herrera Partners, G.A. Herrera & Co., and Gilbert Herrera for submitting "discovery requests [that] constituted an absurd fishing expedition and/or unreasonable harassment of the HERRERA defendants." This sanction was prompted by Elgohary's request that the "Herrera defendants"[3] produce copies of Herrera Partners' hard drives and other data storage devices.

Nothing in the record on appeal indicates how the trial court arrived at the amount of the sanction assessed against Elgohary in this case. The Herrera defendants did not submit any evidence to establish the fees and expenses they incurred as a result of Elgohary's alleged discovery abuse.

If a monetary discovery sanction is not supported by evidence in the record and the basis of calculating the amount is unknown, the sanction constitutes an impermissible arbitrary fine. *Stromberger v. Turley Law Firm,* 251 S.W.3d 225, 226-27 (Tex. App.—Dallas 2008, no pet.). Arbitrary fines are not susceptible to meaningful review. *Id.* at 227. In examining whether the trial court has abused its discretion, we must be able to determine not only that the trial court's decision to sanction the conduct at issue was proper, but that the sanction the trial court chose was just. *Id.* Absent supporting evidence or some basis for calculation, there is no way to determine whether the amount of a monetary sanction is excessive. *Id.*

The record does not support the trial court's decision to impose a $1,000 sanction. Without evidentiary support for the amount of the monetary sanction imposed, we have

[3] The "Herrera defendants" are "Herrera Partners, L.P., Herrera Partners, G.A. Herrera & Co., and Gilbert A. Herrera."

no means to determine whether the amount of the sanction is just. Therefore, we conclude that the trial court abused its discretion in assessing a monetary discovery sanction against Elgohary. *Id.* at 226-27.[4]

We sustain Elgohary's first issue.

IV. Motion to Compel

In his second issue, Elgohary argues that the trial court erred in denying his motion to compel discovery.

We review a trial court's ruling on a motion to compel discovery for abuse of discretion. *See Johnson v. Davis*, 178 S.W.3d 230, 242 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (citing *Cire*, 134 S.W.3d at 838). Trial courts have broad discretion in discovery matters. *Id.* An appellate court should reverse a trial court's ruling on a motion to compel only when the trial court acts in an arbitrary and unreasonable manner, without reference to any guiding principles. *See Barnett v. County of Dallas*, 175 S.W.3d 919, 924 (Tex. App.—Dallas 2005, no pet.).

Discovery requests must be reasonably tailored to include only matters relevant to the case. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). Discovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the

[4] Relying on Texas Civil Practice and Remedies Code sections 38.003 and 38.004, some of our sister courts have held that a trial court is entitled to take judicial notice of the usual and customary attorney's fees awarded as discovery sanctions, and that a rebuttable presumption exists as to the reasonableness of usual and customary attorney's fees. *See Trahan v. Lone Star Title Co. of El Paso*, 247 S.W.3d 269, 284 (Tex. App.—El Paso 2007, pet. denied); *Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.—Fort Worth 1992, no writ); *In re Estate of Kidd*, 812 S.W.2d 356, 359 (Tex. App.—Amarillo 1991, writ denied). Section 38.004 allows a court to take "judicial notice of the usual and customary attorney's fees" in "a proceeding before the court." Tex. Civ. Prac. & Rem. Code Ann. § 38.004 (Vernon 2008). Section 38.003 states that "the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable. The presumption may be rebutted." *Id.* § 38.004. Section 38.001 sets forth the following claims for which a party may recover reasonable attorney's fees: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract. *Id.* § 38.001 (Vernon 2008). We have rejected this approach and held that a trial court cannot take judicial notice of reasonable attorney's fees recovered outside of the context of Texas Civil Practice and Remedies Code section 38.001. *See Charette v. Fitzgerald*, 213 S.W.3d 505, 514-15 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *London v. London*, 94 S.W.3d 139, 147-49 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

opposing party. *Id.* at 181. A trial court may limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Tex. R. Civ. P. 192.4(b).

Elgohary sought copies of Herrera Partners' computers' hard drives "in an attempt to prove that some or all of the documentation provided to the [TWC] in support of its decision was false." Specifically, Elgohary asserts that Herrera fabricated two memoranda dated May 1, 2007 and May 5, 2007.[5] Herrera Partners, L.P., Herrera Partners, G.A. Herrera & Co., and Herrera objected to Elgohary's requests arguing that they were overbroad.

Given the expansive nature of Elgohary's discovery requests, Herrera Partners, L.P.'s, Herrera Partners', G.A. Herrera & Co.'s, and Herrera's objections were not unreasonable or abusive. We conclude the denial of the discovery was not so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. *See Austin v. Countrywide Homes Loans*, 261 S.W.3d 68, 75 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The trial court did not abuse its discretion by denying the requested discovery. *See Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (per curiam).

We overrule Elgohary's second issue.

Conclusion

We vacate the trial court's July 25, 2008 sanctions order, modify the judgment to the extent the sanctions order was merged into it, and affirm the judgment as modified.

We have also taken Elgohary's Motion for Rebate of Fees filed on February 10, 2010 with this case. In his motion, Elgohary requests that this court "order that all fees

[5] The record does not contain memoranda dated May 1, 2007 and May 5, 2007. Further, there is no mention of a May 1, 2007 or May 5, 2007 memorandum in the appellate record. Elgohary does not specifically identify any other allegedly fabricated documents.

paid to the district court, court reporters, and Appellate court by [Elgohary] be refunded under [Texas Labor Code section 207.007(a)(2)]."

Elgohary did not raise this claim in the trial court. Therefore, we do not address it on appeal. *See* Tex. R. App. P. 33.1.

We deny Elgohary's motion.

/s/ William J. Boyce
Justice

Panel consists of Justices Yates, Frost, and Boyce.