IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2005

LATIF A. GIRGIS,

Appellant,

v.

STATE OF FLORIDA, UNEMPLOYMENT APPEALS COMMISSION and **PALM BEACH COUNTY BOARD OF COUNTY COMMISSIONERS,**

Appellees.

CASE NO. 4D03-4267

Opinion filed March 2, 2005

Appeal from the State of Florida, Unemployment Appeals Commission; L.T. Case No. 03-09829.

Latif A. Girgis, West Palm Beach, Pro Se.

John D. Maher, Tallahassee, for Appellee-Unemployment Appeals Commission.

STONE, J.

The appellant/claimant, Latif A. Girgis, appeals an Unemployment Appeals Commission order affirming the decision of an appeals referee disqualifying Girgis from receiving unemployment compensation benefits because he was discharged from employment for misconduct connected with work. We affirm.

The referee made the following findings:

> The claimant was employed full-time as a lift station attendant in the water utilities division. The claimant's duties required the use of a county vehicle. In mid-2002 the claimant had an accident causing damage to his county vehicle which he did not report as required. On August 18, 2002, with the advice and consent of his union representative and his attorney, the claimant entered into an agreement "in lieu of termination" to resolve the accident problem. The agreement stipulated that the claimant would serve a "10-day (80 hour) suspension without pay" and that "any additional cause for discipline occurring within the next 12 months will be grounds for immediate termination of employment". The claimant served the suspension period and had no additional problems until April 30, 2003. On that day the claimant, while on duty in his vehicle, made a wide turn to avoid a parked "black Mustang" and hit a 38 inch, six inch diameter concrete, yellow painted post at the side of the road, causing damage to the right side of his county vehicle. The claimant immediately reported the accident and told his supervisor when he arrived at the scene that he had been looking out for the black mustang and did not see the post before he hit it. The supervisor surveyed the scene and determined that the claimant could have seen the post prior to hitting it if he had kept a proper look out as he made the turn. The employer's risk management team reviewed the matter and on May 8, 2003 determined that the accident was "avoidable". Upon receipt of this determination the employer again reviewed the matter and on May 28, 2003 the claimant was discharged for violating the terms of the August 18, 2002 agreement by "destruction" of company property in an avoidable accident.

Based on the above, the appeals referee found "that the claimant did not keep a proper lookout at the time of the accident" and that in doing so, he violated his obligations to the employer. The appeals referee concluded that this constituted misconduct.

An employee who is discharged for misconduct is not eligible to receive unemployment compensation benefits. *See Anderson* v. *Unemployment Appeals Comm'n*, 822 So. 2d 563 (Fla. 5th DCA 2002). Whether Mr. Girgis' conduct amounted to "misconduct"

is governed by section 443.036(29), Florida Statutes (2003), which provides in pertinent part:

> "Misconduct" includes:
>
> (a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has the right to expect of his or her employee; or
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

We have considered *Lyster v. Florida Unemployment Appeals Commission*, 826 So. 2d 482 (Fla. 1st DCA 2002) (holding that truck driver who was fired due to his involvement in five accidents in a ten-month period was not disqualified from receiving unemployment compensation based on misconduct), and *Maxfield v. Unemployment Appeals Commission*, 716 So. 2d 859 (Fla. 5th DCA 1998) (holding that evidence that driver had been involved in three car accidents in a twelve-month period did not support a finding that claimant's acts of misjudgment leading to multiple vehicle accidents constituted misconduct). In some respects, this case is distinguishable from *Lyster* and *Maxfield*, because, here, in addition to the previous accident, there was the attempted "cover-up" of that accident, together with Girgis' entering into the probationary agreement. However, because those cases are otherwise so close, we certify conflict with *Lyster* and *Maxfield,* and conclude that each claim of misconduct arising out of an accident or accidents should be resolved on its own merits.

Here, the record supports a finding of misconduct and the employee's willful disregard of his employer's interests. The referee did not find Girgis' story credible, and determined that he was driving without looking where he was going. Girgis' only excuse for driving off the road, and into a clearly visible yellow post, was that he was trying to avoid a parked car.

We conclude that driving without looking where you are going, particularly after past driving misconduct and other related misconduct resulting in employment probation on the terms agreed to here, meets the willfulness standard of the statute. Although the accident itself is not willful, the misconduct, driving without looking where you are going resulting in damage under the totality of these circumstances, is willful and the commission did not abuse its discretion.

GUNTHER, J., concurs.
TAYLOR, J., dissents with opinion.

TAYLOR, J., dissenting.

I respectfully dissent. Though the vehicle accident may have been grounds for firing Mr. Girgis, it was not a sufficient basis for determining that he engaged in Amisconduct@ within the meaning of section 443.036(29), Florida Statutes (2003). Conduct that provides an employer with sufficient grounds to terminate employment does not necessarily warrant forfeiture of unemployment compensation benefits. *See Anderson v. Unemployment Appeals Comm'n*, 822 So. 2d 563 (Fla. 5th DCA 2002); *Barnes v. Unemployment Appeals Comm'n*, 717 So. 2d 120 (Fla. 4th DCA 1998)(holding that misbehavior serious enough to warrant an employee's dismissal is not necessarily serious enough to sustain forfeiture of unemployment compensation benefits).

"In defining misconduct, courts are required to liberally construe the statute in favor of the employee. Additionally, awards determinations must be made against the backdrop that the remedial aspect of the unemployment compensation statutory scheme requires a liberal construction in favor of awarding benefits." *Mason v. Load King Mfg. Co.*, 758 So. 2d 649, 655 (Fla. 2000)(citations omitted); *see also Anderson*, 822 So. 2d at 566. The disqualifying provisions must therefore be narrowly construed. *See Maynard v. Fla. Unemployment*

Appeals Comm'n, 609 So. 2d 143 (Fla. 4th DCA 1992).

In this case, Mr. Girgis and his employer entered into an agreement following the first accident that Mr. Girgis would be subject to immediate termination if he engaged in any activity that caused him to be disciplined within the next twelve months. Almost a year later, Mr. Girgis had another accident. Determining that Mr. Girgis could have avoided the accident had he kept a proper look-out, the employer terminated him pursuant to their agreement. Their agreement, however, does not control whether Mr. Girgis is disqualified from receiving unemployment benefits. *See Hall v. Fla. Unemployment Appeals*, 700 So. 2d 107 (Fla. 1st DCA 1997)(holding that the question of whether an employer has the right to terminate an employee's employment and the question of whether the terminated employee has engaged in misconduct that meets disqualification criteria set out in the unemployment compensation statute are separate issues).

Here, the referee made a factual determination that Mr. Girgis failed to "keep a proper lookout at the time of the accident." This finding, at best, establishes that Mr. Girgis was careless or negligent in causing the accident. However, there is nothing in the referee's factual findings or in the record that justifies a conclusion that his carelessness or negligence was "to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his … employer." The referee's factual findings do not support a conclusion that the claimant's driving conduct demonstrated "willful or wanton disregard" of his employer's interests or that the claimant committed "a deliberate violation or disregard of the standards of behavior."

I would follow the reasoning of the first district in *Lyster v. Florida Unemployment Appeals Comm'n*, 826 So. 2d 482 (Fla. 1st DCA 2002), and the fifth district in *Maxfield v. Unemployment Appeals Comm'n*, 716 So. 2d 859 (Fla. 5th DCA 1998). In those cases, the accident rates of the claimants were much worse than Mr. Girgis's. Lyster had five accidents in a ten-month period, and Maxfield had three car accidents in a twelve-month period. Yet, both courts recognized that these accidents were, in fact, accidents, and that they did not result from reckless or intentional violations of the law. They concluded that the claimants' misjudgment in these multiple vehicle accidents did not amount to misconduct.

The claimant in this case had only one accident in the previous year, and he promptly reported this second one. He was not arrested for reckless driving nor issued a traffic citation. While his failure to keep a proper lookout may have met the employer's criteria for discharge, it did not meet the statutory criteria for disqualification from unemployment benefits. His operation of the company vehicle, as determined by the referee, was careless. But it was not misconduct, under the plain language of the statute and the rule of liberal construction favoring employees.

I would therefore reverse the Commission's order disqualifying Mr. Girgis from receiving unemployment benefits.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.