

RENDERED: November 20, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001540-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 96-CI-000573

RITA M. VANCE; and
MANPOWER TEMPORARY SERVICES

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: HUDDLESTON, JOHNSON and MILLER, Judges.

JOHNSON, JUDGE: The Kentucky Unemployment Insurance Commission (the Commission) has appealed from the decision of the Barren Circuit Court entered on June 4, 1997, which reversed the order of the Commission denying unemployment benefits to the appellee, Rita M. Vance (Vance). Having concluded that the circuit court applied the correct law, we affirm.

The facts underlying this action are not in dispute. Vance was employed by the appellee, Manpower Temporary Services (Manpower) as an "in-house temporary." Vance originally worked part-time for Manpower, but at the time of her separation in July 1996, she was working 40 hours per week. Vance's job as an in-house temporary involved placing employee/clients with employer/clients.

On June 26, 1996, a client/employee named Terry Carter came into the office, which Vance was manning alone, and complained that he was not treated fairly at Plytech, an employer/client of Manpower. Carter made threats that he was going back to Plytech and "whip" certain people. Vance told him that she could not advise him of his rights but showed him the labor laws posted in Manpower's office. She also relayed Carter's complaints to the receptionist at Plytech over the telephone. Plytech was upset and threatened to terminate its business relationship with Manpower. The manner in which Vance handled this incident caused her superiors at Manpower to lose confidence in her ability to perform her work.

Sonya Borton (Borton), the branch manager for Manpower, testified that after this incident she did not want to fire Vance because she was a hard worker. However, her superiors gave her an ultimatum to "either [] let [Vance] go or to come up with some way to see that she worked within the parameters [of her job as an in-house temporary]." The solution Borton devised was to reduce Vance's hours from 40 hours per week to 16 to 24 hours per

week, and to prepare a written job description for the in-house temporary position for Vance's signature. These conditions for further employment were communicated to Vance on June 28, 1996.

On Vance's next day at work, July 9, 1996, Borton presented Vance with the written job description. Vance was told by Borton that her failure to sign the document would result in her dismissal. Vance decided not to sign the written job description and did not work for Manpower after that date.

Vance filed a claim for unemployment benefits. On July 26, 1996, the Division of Unemployment Insurance notified Vance that her claim for benefits was denied for the reason that she "voluntarily quit due to dissatisfaction with the job." Vance appealed that decision pursuant to Kentucky Revised Statutes (KRS) 341.420(2), and an evidentiary hearing was conducted before a referee. The referee also determined that Vance was not entitled to unemployment benefits. The referee made the following relevant findings of fact:

[Vance] was employed by [Manpower] for two months as an in house temporary. [Vance's] duties were to assist the service representative. At hire, [Vance] was not given a written job description. She did on a few occasions contact [Manpower's] worker and employer customers via telephone to resolve minor work related problems.

On June 26, 1996, one of [Manpower's] worker-customers complained to her that the employer with whom he had been assigned work had denied him a rest break and made verbal threats. In that conversation, [Vance] showed the work customer the labor laws posted in

[Manpower's] office and later communicated with the employer's management staff concerning the worker's complaint. The employer customer contacted [Manpower] threatening to terminate all of [Manpower's] worker customers assigned to their company. After this situation, a decision was made to set forth written in house temporary job descriptions and to require those workers to sign a copy of the duties acknowledging they had read and agreed to comply with the job description.

. . .

When [Vance] elected to refuse to sign the job description because of the aforesaid requirement her actions constituted insubordination. The resulting discharge was for misconduct connected with the work.

Vance appealed the referee's decision to the Commission pursuant to KRS 341.430. In affirming the referee's decision, the Commission's order of November 27, 1996, stated that the referee had "adequately set forth the salient facts and correctly applied the pertinent law. . . ." It also rendered a finding that on June 26, 1996, Vance went to Plytech in person and was "rude" to the plant manager.

Vance appealed to the Barren Circuit Court which reversed the decision of the Commission based on the law established in International Spike, Inc. v. Kentucky Unemployment Insurance Commission, Ky. App., 609 S.W.2d 374 (1980). The circuit court noted that the Commission's order failed to contain any finding or reference to the reduction in hours and pay that Manpower imposed on Vance as a condition of continued employment, and

held: "An employee who receives a substantial reduction in pay has good cause for voluntarily quitting her job and is not disqualified from receiving unemployment compensation benefits."

In this appeal, the Commission argues that the circuit court exceeded the bounds of its authority in that it substituted its factual findings for those of the Commission, and that since the Commission's factual findings are supported by substantial evidence, the circuit court was required to affirm the denial of benefits.

The standard of review in appeals from the Commission is set forth in Commonwealth, Department of Education v. Commonwealth, Kentucky Unemployment Insurance Commission, Ky. App., 798 S.W.2d 464, 467 (1990), which states in pertinent part as follows:

When the findings of fact of an administrative commission are supported by substantial evidence of probative value, the findings are binding upon a reviewing court. H & S Hardware v. Cecil and Kentucky Unemployment Insurance Commission, Ky. App., 655 S.W.2d 38, 40 (1983); Brown Hotel Company v. Edwards, Ky., 365 S.W.2d 299, 302 (1963). Evidence is substantial if when taken alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable persons. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). The reviewing court must then determine whether the agency applied the correct rule of law to its factual findings. H & S Hardware, supra. If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. Brown Hotel Company, supra. The position of the circuit court in

administrative matters is one of review, not of reinterpretation. Kentucky Unemployment Insurance Commission v. King, Ky. App., 657 S.W.2d 250 (1983).

Having reviewed the entire record, including the transcript of the hearing before the referee, it is apparent to this Court, as the circuit court has determined, that some of the Commission's findings of fact are inaccurate and some are not supported by any evidence of record. For example, the Commission's finding that Vance went to Plytech on June 26, 1996, and confronted those in management was not supported by any evidence and was contrary to all the evidence of what occurred on that day. More importantly, the circuit court correctly determined that the Commission's findings were not only inaccurate, but incomplete.

A settled principle of administrative law is that a claimant "is entitled to have [her] claim decided on the basis of correct findings of basic facts." Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684, 689 (1985). See also Whitaker v. Peabody Coal Co., Ky., 788 S.W.2d 269 (1990). The undisputed facts in this case are that Manpower was unhappy with Vance's performance of her job duties. Rather than dismiss her (at a time she would have been entitled to unemployment compensation), it gave her the choice to voluntarily leave or to stay and work under two conditions which included, (1) execution of a document in which she acknowledged and agreed to abide by her employer's job expectations, and (2) a substantial reduction in her work hours,

and a concomitant reduction in pay. The Commission's argument that the imposition of these conditions constituted separate events thereby justifying the Commission's failure to recognize the legal implications inherent in the reduction of hours is simply not tenable. Vance's immediate supervisor, Borton, was clear in her testimony that her superiors required that she simultaneously reduce Vance's hours and get her to sign the written job description as a result of their loss of confidence in Vance after the Plytech incident. Inexplicably, neither the referee, nor the Commission recognized or addressed the second condition. In reviewing the Commission's decision in light of the undisputed facts, the circuit court did not improperly substitute its findings of fact for those of the administrative body, but followed the mandate of Cook, supra.

When an administrative body has reached a decision without making the correct findings of basic facts, the reviewing court would normally remand for an assessment of the claim by the administrative body considering the correct facts. However, remand was not necessary in this case as the law is settled that one who has incurred a reduction in pay to the extent suffered by Vance has "good cause" for leaving her employment for purposes of establishing entitlement to unemployment benefits. In International Spike, supra, employees whose salaries were reduced between 21% and 32% were determined to have sufficient cause to quit their employment and met the test set forth in Kentucky Unemployment Insurance Commission v. Murphy, Ky., 539 S.W.2d 293

(1976). That is, the employees were "faced with circumstances so compelling as to leave no reasonable alternative but loss of employment." 609 S.W.2d at 376.

Although Vance's income from Manpower was reduced from 40% to 60%, the Commission insists that International Spike is not controlling because Vance's hourly salary was not reduced, merely the number of hours she was allowed to work was reduced. Given the purposes of the statutory scheme for unemployment benefits, that is, "to mitigate the hardships inherent in the forced unemployment of the worker," Ford Motor Company v. Kentucky Unemployment Compensation Commission, Ky., 243 S.W.2d 657, 658 (1951), such a distinction is irrelevant. Clearly, Vance's income was substantially reduced and the circuit court's application of International Spike to the undisputed facts was not erroneous.¹

The Commission insists that Vance did not quit, nor was she constructively discharged. Instead, the Commission characterizes her separation from Manpower as a dismissal for misconduct. The Commission's characterization of Vance's separation from Manpower as one attributable to insubordination is erroneous as a matter

¹The Commission has also cited two foreign cases, Hendrick v. Employment Division, 548 P.2d 526 (Ore. 1976), and White v. Levine, 383 N.Y.S. 438 (N.Y. App. 1976), suggesting that a reduction in the number of hours does not provide good cause for leaving one's employment. As Vance points out, both cases concern an across-the-board reduction for all workers either because of the seasonal nature of the work or the loss of revenue by the employer. Even if we did not already have controlling case law, we would not find either case applicable in the instant situation.

of law. "Misconduct" is defined in the nonexclusive list contained in KRS 341.370(6), to include "refusing to obey reasonable instructions." As the circuit court observed, "[a]n employee's refusal to sign and agree to abide by a written job description would unquestionably constitute insubordination deserving termination." However, in the context of the circumstances surrounding Vance's separation from employment, circumstances which included a substantial reduction in salary, Vance's behavior cannot be construed as "refusing to obey reasonable instructions." Instead, Vance was merely exercising the option given her by Manpower to accept her changed working conditions or be dismissed.

For the foregoing reasons, the judgment of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Randall K. Justice
Frankfort, KY

BRIEF FOR APPELLEE:

Hon. Woodford L. Gardner, Jr.
Glasgow, KY