RENDERED: May 26, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001207-MR

JOANN CREMEANS — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM JENNINGS, JUDGE
ACTION NO. 98-CI-00635

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND KOKOKU RUBBER, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, SCHRODER AND JOHNSON, JUDGES.

BARBER, JUDGE: JoAnn Cremeans appeals from an Order of Madison Circuit Court affirming the Kentucky Unemployment Insurance Commission's denial of benefits for misconduct. The essential facts are not in dispute. On appeal, the standard of review is whether the law was correctly applied to those facts. Commonwealth, Department of Highways v. Cardwell, Ky., 409 S.W.2d 304 (1966). We affirm.

Cremeans worked for Kokoku Rubber, Inc. as a press operator for approximately six and a half years. In February 1998, she was placed on a period of light duty for a back problem

which was apparently work-related. Cremeans continued to work and continued having back problems. On March 8, 1998, she went to the emergency room. Cremeans requested vacation leave from March 9 through March 13, 1998, due to her back problem. While on vacation leave, Cremeans was contacted by Sherri Cornelison, Human Resources Superintendent, who advised her to see one of the "workers' compensation" physicians.

Cremeans saw a physician at Instant Care in Richmond on March 13, 1998. At that time, she was given a referral to see an orthopedic specialist in Lexington on March 20, 1998, and a form stating she could return to work on March 13, 1998, with no lifting over ten pounds. On March 16, 1998 -- a Monday – Cremeans called Kokoku, spoke to a supervisor, and said, "I won't be in to work today." Cremeans admitted that "for the rest of the week I didn't call in because I started thinking, well, this is work – I'm on workman's comp anyway, so why should I have to call in every day. I didn't think you had to call in when you're on workman's comp. That's what I was thinking." When asked why she had called in that Monday, if she did not think she had to call in while she was "on workman's comp," Cremeans responded, "Well, I don't know. I just called in Monday, I guess, it's uh, I don't know why I called in on Monday."

Cremeans admitted her familiarity with company policy. She knew she was required to call in when absent. Cornelison testified that they did not hear from Cremeans on March 17, 18, or 19, 1998. Cremeans showed up on the afternoon of March 20, 1998 to get her paycheck. Cornelison explained that she had

attempted to contact Cremeans several times by phone, but was unable to reach her. Cornelison testified about Kokoku's policy – if absent, an employee is required to call in no later than one hour after the start of the shift. The policy is uniformly enforced. Kokoku had no documentation from a physician that Cremeans had been taken off work while she was absent, but had not called in on March 17, 18, 19 or 20, 1998. Cremeans was terminated for having been absent three days without notice in violation of company policy.

Cremeans filed for unemployment benefits. The initial determination reflects that Cremeans' absence was either unnecessary or not properly reported, and that her actions showed a willful disregard of the employer's interests. Her discharge was for misconduct in connection with work. Cremeans appealed and a hearing was held on May 6, 1998. The referee affirmed in a decision dated May 13, 1998. The referee found that the evidence established Cremeans was aware of the employer's attendance policy, that the policy of reporting all absences prior to the start of the working shift was reasonable, and that Cremeans' failure to follow the policy was misconduct under KRS 341.370(6).

Cremeans appealed to the Commission which affirmed the referee decision. The Commission reviewed the record, and determined that the referee had correctly applied the law:

> Although claimant contends that she did not think it was necessary to call and report her absences from March 17 through 20 because she thought she was to be off on Worker's Compensation, the evidence clearly shows otherwise. She was not told to be off by any doctor – including her family doctor – and she was released to return to work as of

> March 13. Also, although she filled out some Workers' Compensation forms, she was never advised by anyone that she was to be off for that reason. She was, therefore, absent without good cause and failed to properly report her absences as required by the reasonable rule of the employer. Such actions constitute misconduct under the law.

Cremeans filed a verified Petition for Review of the Commission's order in the Madison Circuit Court. The circuit court affirmed by order entered April 23, 1999. On appeal to this Court, Cremeans contends that her acts did not constitute misconduct "within the meaning of unemployment insurance law."

The statute provides, in pertinent part:

> 341.370 Disqualifications -- Length of time.
>
> (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, ...
> . . . .
>
> (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.

Cremeans contends that in order to deny unemployment on the basis of misconduct, "her actions must rise to the level of 'intentional' as required by law" in reliance upon City of Lancaster v. Trumbo, Ky. App., 600 S.W.2d 954 (1983). That reliance is misplaced. Trumbo, id. involved sanitation department employees who were asked to take over picking up refuse in the public square – a task that formerly had been performed by a 73 year old part-time employee in about an hour. The sanitation workers repeatedly refused and were ultimately discharged. The issue on appeal was whether the Commission's determination -- that the employees were disqualified on ground of discharge for misconduct -- was supported by substantial evidence. We held that:

> An employee is obligated to render, loyal, diligent, faithful and obedient service to his employer and failure to do so is a disregard of the standards of behavior which the employer can expect of his employee. Brown Hotel Company v. White, Ky., 365 S.W.2d 306 (1963). There is no right to reject the tasks of employment on the basis that work methods have changed and the employee suspects (without trying it) that he will be unable to satisfactorily do the new assignment. Kentucky Unemployment Insurance Commission v. Day, Ky., 451 S.W.2d 656 (1970). Where an employee manifests an intent to disobey the reasonable instructions of his employer, the denial of unemployment compensation benefits on the basis of misconduct is proper. Brown Hotel Company, supra; 76 Am.Jur.2d Unemployment Compensation S 55. There was substantial evidence in the record which indicates that the order to clean the public square in this case was within the appellees' ability to perform and would not result in any undue hardship and was, in essence, a reasonable

> request. It is undisputed that when the subject was first brought up, they refused to do so, and they have continued in that refusal. We hold that there was substantial evidence in the record to support the action of the Unemployment Insurance Commission in holding that the appellees were disqualified under the provisions of KRS 341.370 on the grounds of discharge for misconduct.

Trumbo, id. at 956.

KRS 341.370(6) speaks for itself. A knowing violation of a reasonable and uniformly enforced rule is ground for disqualification for misconduct. Cremeans admitted knowing of the employer's policy about calling in within one hour of the start of the shift when absent. Cremeans submits that her failure to call in was, at most, an isolated error in judgment, rather than an act of misconduct sufficient to disqualify her from benefits, in reliance upon Shamrock Coal Co. v. Taylor, Ky., 697 S.W.2d 952 (1985). Shamrock, id., is distinguishable on its facts. There, a dozer operator had permitted his dozer to slip and overturn. This Court noted that the dozer operator had some discretion in the performance of the work and that no job – especially one as rigorous as coal mining – can be performed free of misadventure. Cremeans did not make an isolated error in judgment while performing her job. Cremeans knew she had to call in to work, if absent. Cremeans failed to show up for work, without notifying her employer, not once but four times, after she had been released to return to work. The Commission correctly applied the law to the facts of this case. The order of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Dabney Luxon
Richmond, Kentucky

BRIEF FOR APPELLEE:

Thomas J. Birchfield
Louisville, Kentucky