

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000176-MR

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION, COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
ACTION NO. 98-CI-00336

WAYNE COUNTY BOARD OF EDUCATION
and DONALD W. HUMBLE

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: EMBERTON, CHIEF JUDGE; COMBS and HUDDLESTON, JUDGES.

EMBERTON, CHIEF JUDGE: The Kentucky Unemployment Insurance Commission appeals from a judgment of the Wayne Circuit Court reversing a finding of the Commission that Donald Humble is entitled to unemployment insurance benefits.¹ Because there is no substantial evidence to support the Commission's decision and we believe the Commission made an erroneous conclusion of law, we affirm.

¹ A review of the record reveals that the Commission filed a notice of appeal naming Humble as an appellee. Humble took no steps to appeal the circuit court's decision, therefore, he is a named appellee in this appeal.

Donald Humble was employed by the Wayne County Board of Education as principal at the Turner Intermediate School. In February 1997, John Dalton, school system superintendent, received a written complaint from a female janitor at Turner alleging that Humble had made inappropriate sexual remarks. Although an investigation did not substantiate the allegations, Dalton became aware of speculation that Humble was having an affair with a teacher, Rhonda Shepperd. Teachers at the school informed Dalton that Shepperd frequently left her classroom to go to Humble's office and that Shepperd was able to travel freely. Dalton sent a letter to Humble setting forth the following behavioral guidelines when dealing with school employees:

1. Be sensitive to any speech or conduct that could be interpreted in any manner as demeaning to women.
2. Do not engage in any conduct or make any comments which could be interpreted in any way as sexual advances.
3. Do not use language which contains obscenity or sexual innuendo.
4. Avoid any language which could be interpreted as containing embarrassing comments or terminology addressed directly to any employee.
5. Avoid any conversation or language which could suggest that women in general or any specific woman is unfit for the work.
6. Avoid any language or conduct which is sexually demeaning in attitude toward women.

On subsequent visits to Turner, Dalton observed that Shepperd was away from her classroom to visit Humble, and in April 1997, Shepperd was given notice of termination of her employment. In August 1997, she reapplied for a teaching

position at Turner and was eventually rehired. Initially, Dalton did not forward Shepperd's application to Humble for consideration to fill the vacancy left by her own termination but following Humble's request for additional applicants, Dalton submitted all qualified applicants' names, including Shepperd's. Shepperd was ultimately selected for the position by Humble after consultation with the Site Based Decision Making Council. After Shepperd was rehired, her room assignment was changed, placing her closer to Humble's office. In September 1997, Dalton verbally informed Humble to have no personal contact with Shepperd.

Ultimately, the affair between Humble and Shepperd ended, and in May 1998, Dalton received a written complaint from a teacher, Ms. Kinnett, who alleged that Humble made sexual advances toward her and discussed with her his affair with Shepperd. Shepperd subsequently filed a complaint alleging that after the end of their affair, Humble took discriminating actions against her. She also alleged that during the affair she received preferential treatment and now feared repercussions from Humble and his wife. During the investigation of the complaints it was disclosed that after the termination of the affair, Humble harassed Shepperd and had in his possession nude pictures of Shepperd which he threatened to publicly disclose. Ms. Kinnett stated that Humble had made sexual remarks and disrespectful comments. She complained that in 1994 he tried to grab her and in 1995 asked her for a date. He also discussed with her his personal life and relationship with Shepperd. Another teacher

stated that Humble made sexual gestures toward her and on two occasions came to her home uninvited. Other teachers questioned told of inappropriate remarks, sexual advances, or comments regarding his affair with Shepperd. Humble admitted that he had an affair with Shepperd which lasted over a two-year period but denied taking any retaliatory action. He further admitted discussing the relationship with others on his staff and that the affair with Shepperd resulted in threats of physical violence outside the school by their respective spouses.

On June 18, 1998, Humble was terminated from his employment for immoral character and conduct unbecoming the profession. On June 21, 1998, Humble filed a claim for unemployment insurance benefits. After a preliminary investigation, the Division of Unemployment Insurance issued a notice of determination holding that Humble was discharged for misconduct connected with his employment and disqualified him from receiving unemployment insurance benefits. Humble appealed to the unemployment insurance referee pursuant to KRS 341.420(2). The referee, although noting that Humble committed acts that "society would readily view as immoral," refused to characterize Humble's behavior as misconduct related to his employment because of the failure of Dalton to take immediate definitive action in February 1997, when he first heard of the affair.

The Board of Education appealed to the Commission which adopted the referee's Findings of Facts and Conclusions of Law. In affirming, the Commission stated:

By affirming the referee decision, the Commission is not condoning claimant's sexual

liaison with a teacher under his direct supervision. Rather, the Commission believes the referee reasoned correctly that the captioned employer, in effect, condoned said relationship when it took no disciplinary action against claimant for an extended period of time.

The Board of Education filed a "Complaint for Review or Appeal" to the Wayne Circuit Court which reversed the findings of the Commission and held that Humble was not entitled to benefits. The Commission then filed a notice of appeal to this court.

The Commission correctly notes that the circuit court, when reviewing a decision of an administrative agency, is not free to substitute its findings for that of the agency. It must affirm if the decision is correct under the law, and supported by substantial evidence.² However, the Commission is bound to correctly apply the law. KRS³ 341.370 disqualifies a worker from receiving unemployment benefits if discharged for work-related misconduct. The misconduct must be a wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of standard of behavior which the employer has a right to expect of the employee.⁴

It is undisputed that Humble, a married man, was involved in an affair with Shepperd. There is substantial evidence that Humble permitted the affair to enter into his relationship with Shepperd as a teacher, both during and after

² Brown Hotel Company v. Edwards, Ky., 365 S.W.2d 299 (1962).

³ Kentucky Revised Statutes.

⁴ Kentucky Unemployment Commission v. King, Ky. App., 657 S.W.2d 250 (1983).

the affair, and that the affair was carried on during school hours. It is clearly not unreasonable for a school system to expect their employees, particularly those in high profile public positions and who are examples not only to other employees in the system but also young children, to refrain from such behavior. This is particularly true where, as here, the affair was open and obvious enough that other employees were aware of the relationship. Our legislature and our courts have expressed that teachers and school administrators are held to a higher moral standard than other members of the general public.⁵ As stated in Board of Education v. Wood:⁶

A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students. (Citation omitted).

Despite the recognition that a school system has the right to expect a married principal to not engage in an open affair with a teacher under his supervision and during school hours, the Commission excused Humble's behavior on the basis that Dalton condoned the behavior. When Dalton first learned of a possible affair between Humble and Shepperd his knowledge was based only on hearsay. In response, he sent a letter to Humble outlining future behavior which included the direction that Humble refrain from conduct or comments that could be interpreted

⁵ See KRS 161.790(1)(b) permitting termination of a teacher's contract for immoral character or conduct unbecoming a teacher.

⁶ Ky. 717 S.W.2d 837, 839 (1986).

as sexual advances. This language would clearly encompass refraining from a sexual affair with a teacher. Armed with his suspicions, Dalton visited the school frequently to find that indeed Shepperd did leave her room frequently to visit Humble. He then terminated Shepperd, only to have Humble rehire her as he is empowered to do under KRS 160.345(2)(h). At this point, and at the commencement of a new school year, Dalton gave a verbal warning to Humble to have no personal contact with Shepperd. Obviously, Humble did not heed Dalton's instructions and continued the affair.

Given these facts, we do not believe, as did the referee and the Commission, that by permitting Humble to remain in his job after learning of the affair that Dalton, and therefore the school system, condoned his behavior. First, as the trial court noted, the actions of the superintendent are governed by statute. Dalton had no authority to arbitrarily transfer a teacher from one school to another.⁷ Although he did have the authority to terminate Shepperd's contract, by statute, Humble had the authority to, and did, rehire Shepperd. Thus, Dalton's attempts to control the situation were defeated by Humble. His inaction during the remainder of the school year is no doubt attributable to his belief that Humble would cease the affair and there would be no further problems.

There is no substantial evidence in the record on which to base a finding that Dalton condoned or otherwise approved of Humble's conduct. Assuming, however, there was such evidence

⁷ KRS 161.790(1)(b).

there is no authority, statutory or otherwise, that gives a superintendent power to permit a principal to engage in immoral conduct.

Unlike employment positions held in the private sector, the conduct of public school teachers and administrators is governed by statute.⁸ The public interest in the conduct of those charged with the responsibility of educating our children is great. They are not only the academic educators of our children but also moral educators and the principal is one of the most visible moral examples in the lives of our children. The legislature, therefore, has held them to the highest standard of moral conduct and has explicitly stated that immoral conduct is a basis for discharge from employment. No single person or entity can usurp the legislatively declared policy. Even if Dalton knew of the affair, applauded Humble's conduct, and took no action to prevent it, it remained immoral conduct which constitutes misconduct related to Humble's employment.

The order of the trial court is affirmed.

HUDDLESTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING. I heartily concur with the majority opinion in this case, which eloquently affirms a very sound decision of the Wayne Circuit Court. I am sorely puzzled, however, that this case ever appeared before us. I cannot comprehend that the Kentucky Unemployment Insurance Commission would have had the temerity to appeal this case (§ 115 of the

⁸ See KRS 161.790.

Kentucky Constitution notwithstanding) and to waste the mental and monetary resources of the Commonwealth on such a wholly unworthy cause. The subject matter of this appeal is beyond frivolous; it is simply foolish.

BRIEF FOR APPELLANT:

Randall K. Justice
CABINET FOR WORKFORCE
DEVELOPMENT
Frankfort, Kentucky

BRIEF FOR APPELLEE WAYNE
COUNTY BOARD OF EDUCATION:

Gordon T. Germain
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