RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001933-MR

GLENDORA WATZEK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 03-CI-010667

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION
And
INTERNATIONAL SYSTEMS OF AMERICA, INCORPORATED — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Glendora Watzek (Watzek) brings this appeal from an Opinion and Order of the Jefferson Circuit Court, entered August 26, 2004, affirming the Kentucky Unemployment Insurance Commission's (Commission) decision denying her request for unemployment benefits. Because we agree that substantial evidence supports the Commission's findings and that it correctly applied the law, we affirm.

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Watzek was employed as a full-time sales representative by International Systems of America, Inc. (International) for almost ten months, from September 14, 2001, until June 11, 2002, earning $10.54 hourly. According to the employee handbook, received by Watzek when she began her employment, the hours of employment were 8:00 a.m. to 5:00 p.m. Monday through Friday, with the employee recording the arrival time, lunch departure and return, and end-of-the-day departure next to his name on a sign-in sheet at the receptionist's desk. For the employee's convenience the sign-in sheet was placed beside an "atomic" clock that kept accurate time. The handbook also directed that in the event of tardiness a call to the immediate supervisor to report same was required before the shift began.

Failure to follow handbook policy was subject to International's progressive disciplinary policy of a verbal warning, written warning, and termination.

According to International, in nine months of employment Watzek was tardy at the start of the day thirty-seven times without prior notification to her supervisor. While disagreeing with the number, Watzek admitted some tardiness without calling her supervisor and placed the cause as traffic congestion when dropping her child off at school. International's sign-in sheets evidenced that Watzek signed-in

at 8:03 a.m. on January 22, 2002; at 8:01 a.m. on January 23, 2002; at 8:02 a.m. on January 24, 2002; at 8:04 a.m. on January 25, 2002; and at 8:02 a.m. on January 29, 2002. Watzek's tardiness was addressed with her at a monthly "focus meeting" on January 29, 2002; she received a verbal warning on May 8, 2002, where she was told that her job was in jeopardy; and she received a written warning on May 28, 2002. On June 6, 2002, according to Watzek, as she was exiting her car she heard on the radio that it was 8:00 a.m. She parked four spots from the front door, and signed-in at 8:00 a.m. When she signed-out for lunch the receptionist had changed it to 8:01 a.m. On June 11, 2002, Watzek was terminated for excessive tardiness.

According to Watzek, all of her tardiness, save the one on May 28, was due to taking her daughter to school:

> [My supervisor] was aware that I have to take my daughter to grade school over at Ballard Elementary, and so the traffic's just horrendous over there. Brownsboro Road and Ballard and everything. And I never, never knew what kind of traffic I was going to get into so I had to. I couldn't, her bus comes at eight o'clock so I couldn't let her ride the bus, I had to take her over to school. So he knew that's why, if I had ran late, that's the reason why, I was taking my daughter to school.

Watzek stated that the May 28 tardy occurred due to voting before coming to work.

On June 14, 2002, Watzek filed a claim for unemployment insurance benefits. On June 25, 2002, the Department for Employment Services, Division of Unemployment Insurance, denied Watzek's claim.

Pursuant to Kentucky Revised Statutes (KRS) 341.420, Watzek appealed this decision, claiming that she was discharged as a "whistle-blower." Watzek, her supervisor, and the company comptroller appeared at a hearing before the referee. On August 6, 2002, the referee set aside the original determination, concluding that International did not meet their burden of proof as they only presented to the referee sign-in sheets for a two-week period, while Watzek was denying the list of thirty-seven dates of alleged unapproved tardiness compiled by International. As such, the referee found that Watzek was discharged for reasons other than misconduct connected with work and she was, therefore, not disqualified from receiving benefits. (Referee Docket No. 02-08575 A).

International appealed this decision to the Commission, claiming that it had only brought a "sample" of the sign-in sheets to the hearing before the referee, and asking to submit Watzek's sign-in sheets for her entire tenure with International. (Commission No. 87312A). Pursuant to Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830 (Ky.App. 1998), the

Commission conducted a *de novo* review, judging both the weight of the evidence and the credibility of the witnesses.

On October 15, 2003, the Commission issued an order reversing the referee, concluding that Watzek was discharged for reasons of misconduct connected with work and assessing, pursuant to KRS 341.330(1), $10,617.00 in repayment of benefits paid during the disqualification period. In so concluding, the Commission made similar findings of fact to the referee but reasoned that Watzek's testimony was inconsistent because although she denied the verbal warning on May 8, 2002, she signed acknowledgement of the written warning on May 28, 2002, that referenced the May 8, 2002, verbal warning. Also, Watzek's initial application for benefits admitted the verbal warning on May 8, 2002. And, she initially denied receipt of the May 28, 2002, written warning until presented with the signed form. Therefore, the Commission assigned more weight to International's sworn testimony as consistent and credible, establishing that Watzek was habitually tardy throughout her employment. Watzek, in turn, in arguing that her tardiness was due to dropping her child at school and traffic issues, failed to show good cause for a substantial amount of her occasions of tardiness. Watzek's request for reconsideration was denied on November 17, 2003.

Watzek appealed the Commission's decision to Jefferson Circuit Court, which upheld the Commission. In its Opinion and Order, the circuit court stated as follows:

> When the findings of fact of an administrative agency are supported by substantial evidence of probative value, the findings are binding upon a reviewing Court. Commonwealth of Kentucky, Department of Education v. Commonwealth of Kentucky, 798 S.W.2d 464, 467 (Ky.App.,1990). The evidence must have sufficient probative value to induce conviction in the minds of reasonable persons. Blankenship v. Lloyd Blankenship Coal Company, 463 S.W.2d 62, 64 (Ky.,1971). A Court's first role is to support the agency's findings when there is substantial evidence. A Court is responsible for review, not re-interpretation. Moreover, the reviewing Court must determine if the administrative agency applied the correct rule of law to the facts as found. Thompson v. Kentucky Unemployment Commission, 85 S.W.3d 621, 624 (Ky.App.,2002).
>
> The Court has reviewed the record, the Commission's findings and its order denying Ms. Watzek's benefits. The Court accepts the facts as reviewed and presented by the Commission. International's presentation of evidence of Ms. Watzek's repeated occasions of tardiness and the previous notices given to her regarding this problem are highly probative on the question of whether a denial of benefits was justified.
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> Contrary to Ms. Watzek's argument against the Commission's findings on witness credibility, the Court of Appeals has stated that the Commission has the authority to perform a de novo review of unemployment case appeals, which includes judging the weight of evidence and witness credibility. Burch v. Taylor Drug Store, 965 S.W.2d 830 (Ky.App.,1998). Under oath Ms. Watzek denied having discussions of her tardiness

with her manager. However, International submitted evidence showing a written warning that referenced a May 8, 2002, discussion with Ms. Watzek's manager on this issue. This written warning was signed and acknowledged by Ms. Watzek on May 28, 2002. Additionally, in her initial application for unemployment benefits, Ms. Watzek acknowledged receiving a notice regarding her tardiness on May 8th. The Commission found that "her statements are clearly contradictory' in comparison to International's testimony "[which] remained consistent throughout the hearing and is therefore more credible. As a result, the Commission assigns more weight to the employer's sworn testimony." (Commission's Order Reversing, October 15, 2003, p.2). In light of all of this information, this Court holds that the Commission appropriately weighed the facts and based its findings upon substantial evidence.

This Court also holds that the Commission correctly applied the appropriate law to the facts as found. The relevant statute is KRS 341.370(6) which reads in pertinent part "'Discharge for misconduct' as used in this section shall include . . . unsatisfactory attendance if the worker cannot show good cause for absences and tardiness". Under this statute, Ms. Watzek has the burden of rebutting the presented evidence and showing good cause for her alleged misconduct. Ms. Watzek states her "good cause" is that she encountered heavy traffic along the roadways after taking her child to school. This Court agrees with the finding of the Commission that Ms. Watzek "bore a higher responsibility to arrange her schedule and arrive at work on time to preserve her job." (Commission's Order Reversing, October 15, 2003, p.3) The Commission seems to have given fair weight to Ms. Watzek's circumstances, but unfortunately, they simply do not rise to the level of "good cause" as required under the statute.

> The Commission supported its decision with substantial evidence of probative value and correctly applied the law.

This appeal follows.

Before us, Watzek argues that the findings of fact made by the Commission are not supported by substantial evidence; that the Commission did not apply the correct rule of law; and that the Commission's reasons for disqualification of Watzek's testimony due to inconsistency are misplaced.

Kentucky's unemployment compensation system's sole function is to determine whether the affected employee meets the statutory criteria to qualify for benefits, not to inquire or make any judgments about the reasons behind an employee's termination. Board of Education of Covington v. Gray, 806 S.W.2d 400, 402 (Ky.App. 1991). The legislative purpose in enacting the unemployment compensation act was "to provide benefits for only those employees who have been forced to leave their employment because of forces beyond their control and not because of any voluntary act of their own." Kentucky Unemployment Insurance Commission v. Kroehler Manufacturing Company, 352 S.W.2d 212, 214 (Ky. 1961). The employer has the burden of proving that the employee's actions constituted misconduct. Burch, supra at 835. If there is substantial evidence in the record to support an agency's findings, they are not clearly erroneous or arbitrary and will be upheld even

though there may be conflicting evidence in the record. Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). "The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency." Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 582 (Ky. 2002).

The fundamental question before us, therefore, is whether the *facts* found by the Commission are "supported by substantial evidence" [Kentucky Unemployment Insurance Commission v. Springer, 437 S.W.2d 501, 502 (Ky. 1969)], and, if so, whether the Commission "incorrectly applied the correct rule of law to the facts presented to it" [Kentucky Unemployment Insurance Commission v. Stirrat, 688 S.W.2d 750, 751-52 (Ky.App. 1984)]," or, stated another way, the applicable standard of review is as follows:

> Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness. The findings of fact of an administrative agency which are supported by substantial evidence of probative value must be accepted as binding by the reviewing court. The court may not substitute its opinion as to the weight of the evidence given by the Commission. Upon determining that the Commission's findings were supported by substantial evidence, the court's review is then limited to

> determining whether the Commission applied the correct rule of law.

Burch, supra at 834 (citations omitted).

Herein, the Commission made factual findings that 1) International had an attendance policy requiring employees to report any occasion of tardiness prior to the beginning of the shift and violation of this policy through excessive tardiness subjected the employee to discipline up to and including discharge; 2) Watzek was aware of this policy; 3) Watzek was tardy to work on numerous occasions throughout her employment; 4) Watzek's tardiness was brought to her attention verbally on January 29, 2002, and May 8, 2002; and in writing on May 28, 2002; 5) Watzek was late on June 6, 2002; and 6) Watzek was terminated on June 11, 2002, for excessive tardiness.

As the reviewing court, we must accept these findings as correct if supported by substantial evidence, defined as:

> [E]vidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary.

Thompson v. Kentucky Unemployment Insurance Commission, 85 S.W.3d 621, 624 (Ky.App. 2002)(citations omitted). Although Watzek's testimony before the referee provides conflicting evidence in the record, we conclude that the facts as found by

the Commission are supported by substantial evidence and as such are not arbitrary or clearly erroneous.

Having determined that the Commission's findings are supported by substantial evidence, we next review as to whether the Commission applied the correct rule of law. Our decision in the present case turns on the application of KRS 341.370, which provides in relevant part:

> (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, . . .

KRS 341.370(6) defines "discharge for misconduct" as including, but not limited to, "unsatisfactory attendance if the worker cannot show good cause for absences or tardiness." Although the employer bears the burden of establishing misconduct (*See* Shamrock Coal Company, Inc. v. Taylor, 697 S.W.2d 952, 954 (Ky.App. 1985)), the employee has the overall burden of proof and persuasion to show good cause for the absences or tardiness. Upon the record as a whole, it does not compel a finding in her favor.

Herein, Watzek argues that she established "good cause" for her tardiness by being subjected to a situation over

which she had very little control – traffic in the dropping off of her child at school. We disagree.

"When all else is said and done, common sense must not be a stranger in the house of the law.... 'Good cause usually is regarded as a reason sufficient in ordinary circumstances of an urgent and personal nature to justify leaving employment; ....' In re Lauria's Claim, 18 A.D.2d 848, 236 N.Y.S.2d 168 (Sup.Ct.App.Div.1963)." Cantrell v. Kentucky Unemployment Insurance Commission, 450 S.W.2d 235, 237 (Ky. 1970). In order to be ineligible for unemployment benefits, a fired worker's conduct must evince some bad faith or give rise to an inference of culpability in the form of willful or wanton conduct. *See generally* Shamrock Coal, supra.

International provided documentary and testimonial evidence that Watzek knew of the policy; was informed of the problem with tardiness; and still failed to follow her employer's reasonable policy of notifying her supervisor, before shift, when she was going to be tardy. In Cantrell, supra, the court held that a woman who took time off from work to care for her extremely sick husband until he died did not leave her job voluntarily without good cause, and when she was replaced she was entitled to unemployment benefits. Cantrell is different from herein, however, in that the employee therein made the effort to notify her employer on a daily basis of the continuing

circumstances that made her absence a reasonable necessity. There is no such evidence herein. Watzek's willful and wanton disregard of International's policies relative to tardiness constituted misconduct as defined in KRS 341.370(6). *See generally* Broadway and Fourth Avenue Realty Company v. Crabtree, 365 S.W.2d 313, 314 (Ky. 1963); and Brown Hotel Co. v. White, 365 S.W.2d 306, 307 (Ky. 1963) for the principle that excessive absenteeism, coupled with the failure to give notice to the employer, constituted misconduct.

Lastly, we find no merit in Watzek's argument that the Commission failed to have a sound reason for disbelieving her. Watzek contends that her inconsistency in the recall of dates is not a credibility issue but a memory issue. As conceded by Watzek, the Commission has the authority to judge both the weight of the evidence and the credibility of the witnesses. Burch, supra. We decline, therefore, to disturb the Commission's findings.

Regardless of whether we would have held the same, we are not permitted to substitute our judgment for the Commission's. Our review is limited to the question of whether the Commission misapplied the statute, and we cannot say that it did. We therefore conclude that the Commission properly applied the law to the facts in this case in determining that Watzek was not eligible to collect unemployment benefits due to her

misconduct, and the circuit court was correct in affirming that decision.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephen C. Emery
Louisville, Kentucky

BRIEF FOR APPELLEE KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION:

E. Jeffrey Mosley
Frankfort, Kentucky

No brief for Appellee International Systems of America, Inc.