

RENDERED: OCTOBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002064-MR

CINDY ROBERTS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00529

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
JOHN P. HAMM, APPOINTING AUTHORITY; AND
PERSONNEL BOARD, COMMONWEALTH OF
KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Cindy Roberts appeals from an order of the Franklin
Circuit Court affirming an order of the Kentucky Personnel Board (Board). The

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Board's order adopted the hearing officer's findings of fact, conclusions of law, and order recommending Roberts' dismissal. For the reasons stated herein, we affirm.

On November 3, 2004, the Cabinet for Health and Family Services (Cabinet) notified Roberts that it intended to seek her dismissal. At the time of the notification, Roberts was employed as a Social Service Clinician I for the Cabinet. The letter cited three grounds as the basis of her dismissal: (1) the falsification of her employment application due to her failure to sufficiently disclose her criminal history; (2) her recent commission of criminal offenses including driving under the influence, resisting arrest, and escape; and (3) her failure to report the physical abuse of a client.

On December 2, 2004, Roberts attended a pre-termination hearing where she was provided an opportunity to explain why she should not be dismissed. On December 8, 2004, Roberts was notified by letter that she was officially dismissed from the Cabinet based on the allegations cited in the initial letter. After she appealed her dismissal, a hearing officer conducted an evidentiary hearing and then issued findings of fact, conclusions of law, and an order recommending Roberts' dismissal.

In his findings of fact, the hearing officer found that Roberts did not intentionally falsify her employment application. While finding that Roberts failed to report the physical abuse of a client, the hearing officer found this failure was greatly mitigated by Roberts' supervisor's failure to train her to enter such events into the computer system. The hearing officer, however, did find that Roberts'

misdemeanor convictions in 1998 and 2004 were incompatible with her position as a social worker and related to her capacity and fitness to perform her duties. The hearing officer found that this conduct constituted a lack of good behavior pursuant to 101 KAR 1:345.²

On March 21, 2006, the Personnel Board adopted the hearing officer's findings of fact, conclusions of law, and recommended order terminating Roberts' employment from the Cabinet. After Roberts appealed, the trial court issued an order on September 12, 2007, affirming the Board's decision to terminate Roberts' employment. This appeal followed.

Roberts contends that her dismissal was contrary to existing law because she could not be terminated for committing misdemeanors. Citing KRS³ 18A.146(2), she contends that state merit employees can only be terminated "for cause" for the commission of felony offenses. We disagree.

Although KRS 18A.146(2) provides that any "state employee who is convicted of a felony may be subject to . . . dismissal from the state service," the legislature has not limited a state employee's permissible dismissal to his commission of a felony criminal offense. To the contrary, any employee's conduct, including off-duty behavior, which directly conflicts with or jeopardizes an employee's capacity to effectively perform his or her job can serve as sufficient grounds for dismissal. *Perkins v. Stewart*, 799 S.W.2d 48, 51 (Ky.App. 1990).

² Kentucky Administrative Regulations (KAR).

³ Kentucky Revised Statutes (KRS).

While every “private short coming” does not merit dismissal, conduct which harms the ““legitimate interests of the government”” can result in an adverse employment action. *Id.*, quoting *Board of Educ. of Hopkins County v. Wood*, 717 S.W.2d 837, 840 (Ky. 1986). Therefore, the fact that Roberts did not commit a felony offense did not preclude her dismissal from state employment.

Roberts next contends that her dismissal was unsupported by substantial evidence and was excessive considering all of the circumstances of her case. She contends that there was no proof that her professional responsibilities had been compromised or that the public had lost confidence in her capacity to do her job. She further contends that other employees had not been terminated for committing DUIs, and thus, her punishment was excessive. We disagree.

Our standard of review for evaluating the circuit court's affirmation of the Board's decision is whether there is substantial evidence in the record to support the Board's findings. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Under this standard, a board's findings of fact must be accepted as conclusive if they are supported by substantial evidence of probative value. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002).

Substantial evidence is evidence that has sufficient probative value to create conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). If the findings of fact are supported by substantial evidence of probative value, the court

must then determine whether or not the agency has applied the correct rule of law to the facts. *Landmark*, 91 S.W.3d at 578.

An appellate court cannot decide whether alternative disciplinary actions should have been made available to the dismissed employee, but rather, we limit our review to whether the dismissal was arbitrary. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky.App. 1995). Regardless of our view of the penalty, we can only reverse if the Board's decision to dismiss was "arbitrary and capricious or a clear abuse of discretion." *City of Louisville v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990).

Based on the facts of this case, the Board's decision to dismiss Roberts was supported by substantial evidence. On October 7, 1998, Roberts was convicted of public intoxication (alcohol); she was convicted of resisting arrest and escape on March 31, 2004; and she was convicted of a DUI on July 20, 2004. While Roberts contends that her crimes did not occur during her working hours and did not affect her job performance, her off-duty conduct directly conflicted with and jeopardized her capacity to effectively perform her job.

In this case, Roberts' continued engagement in alcohol-related conduct was in direct conflict with her responsibilities to provide social services to Kentucky's citizens. Specifically, Roberts' job responsibilities required her to transport children and drive herself within her service area. Her alcohol-related conduct certainly provided the Cabinet with sufficient grounds to prevent Roberts from exposing citizens to the unnecessary risks associated with drinking and

driving. Although the record does not reveal that Roberts drove her clients while under the influence, the Cabinet was not required to delay action until such conduct occurred. Therefore, under the circumstances of this case, Roberts' off-duty conduct constituted sufficient grounds to terminate her employment.

Further, Roberts' contention that other employees who committed DUIs were not punished is insufficient to reverse the Board's decision. Our role is not to "second-guess" the Board's decision regarding employee discipline but to ensure that its decision was not "arbitrary and capricious or a clear abuse of discretion." *Milligan*, 798 S.W.2d at 458. In this case, the Board's grounds for dismissing Roberts were not arbitrary and capricious.

Roberts next contends that the Board violated KRS 335B.030 when it dismissed her. Specifically, she contends that the Board did not notify her that committing misdemeanors could result in her dismissal. She further contends that the Board impermissibly expanded its statutory power by citing legal authority which the legislature had not expressly permitted the Cabinet to apply. We disagree.

The Board's dismissal of Roberts did not run afoul of KRS 335B.030. KRS 335B.030 does not require advance notice to employees of what conduct would justify dismissal. Moreover, it should be clear to all employees that conduct which jeopardizes an employee's capacity to satisfactorily accomplish her job responsibilities could lead to her dismissal. Further, despite the Cabinet's citation

to multiple legal authorities, Roberts' dismissal was solely based on her history of alcohol abuse.

The Cabinet made the determination that it was inappropriate to allow Roberts to advise citizens regarding drug dependency when she continued to have dependency issues herself. The Cabinet also determined that it was unwise to permit Roberts to transport citizens or herself on Kentucky's roadways with her history of driving under the influence. Regardless of the Cabinet's legal citations, Roberts' dismissal was supported by substantial evidence and was proper under Kentucky law.

Roberts next contends that her constitutional due process rights were violated when a ground for dismissal listed in her notice of intent to dismiss was substantially altered when it was listed in her notice of dismissal. However, the altered ground listed in her notice of dismissal was not the basis of her dismissal. The altered ground related to her failure to report the physical abuse of a client while her dismissal was solely based on her history of alcohol abuse. Therefore, we conclude that Roberts' constitutional rights were not violated.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donald Duff
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Alea Amber Arnett
Cabinet for Health and Family
Services
Office of Legal Services
Frankfort, Kentucky