

RENDERED: DECEMBER 17, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001718-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION; AND
ANTHONY D. ADKINS

APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00018

SUN VENTURES, INC.

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: This appeal concerns a judgment rendered by the Lawrence Circuit Court, which set aside a decision issued by the Kentucky Unemployment Insurance Commission. After careful consideration of the issues presented on

appeal, we affirm in part, reverse in part, and remand this case to the Commission for further proceedings.

Sun Ventures, Inc. owns and operates a gas station and convenience store in Kenova, West Virginia, where Anthony D. Adkins was employed as a cashier from June 10, 2008, until August 10, 2008. When he was hired, Adkins advised the manager, Charlie Pigg, that he needed to work forty hours per week. Thereafter, Adkins worked as a cashier and earned \$6.55 per hour for a forty-hour workweek. On August 7, 2008, Adkins learned that his hours would be reduced to less than forty hours per week. Adkins then gave his manager three days' notice that he would be leaving his employment with Sun Ventures due to the reduction in hours. Adkins worked his last "full time" shift on August 10, 2008.

Following his separation from employment, Adkins sought unemployment benefits, which were denied. Adkins appealed the initial decision, and an appeals referee conducted an evidentiary hearing on October 22, 2008. The referee heard testimony from Adkins, Pigg, and Brian Unrue, the store supervisor. Adkins testified that he "quit" his employment at Sun Ventures because of the decreased work schedule. Pigg testified that the company reduced employee hours due to a decrease in business, and Unrue characterized the reduction as a "winter schedule."

On November 6, 2009, the referee rendered a decision affirming the initial denial of benefits, concluding that Adkins was disqualified from receiving benefits because he voluntarily quit his job at Sun Ventures. Adkins appealed the referee's decision to the Commission and the Commission subsequently reversed the

referee's decision. The Commission found that Sun Ventures reduced Adkins's hours due to business needs, and Adkins left the employment once the new schedule with reduced hours was instituted. In its decision, the Commission stated:

In Unemployment Insurance Program Letter Number 984, issued September 20, 1968, the United States Department of Labor addressed the issue of what constitutes 'New Work.' The Department held, in part, that if a worker's present employer tells the worker that terms, or conditions of his employment, which are not authorized by the existing employment contract, then the worker has been discharged and offered 'New Work.'

The Commission concluded that Sun Ventures "implemented new conditions of employment beginning August 11, 2008. The changes in the conditions of work, that is, part time work beginning August 11, 2008, constituted a new offer of work." The Commission held that Adkins had been "discharged for reasons other than misconduct and is not disqualified from benefits based on this job separation." As a result, the Commission reversed the Referee's decision on the job separation issue, and remanded the claim to the local office to address whether it was reasonable for Adkins to reject Sun Ventures' offer of "new work."¹

Thereafter, Sun Ventures filed a complaint in Lawrence Circuit Court seeking judicial review of the Commission's decision. On August 27, 2009, the circuit court rendered a judgment setting aside the Commission's decision. The court found that the Commission misapplied the law, and the court concluded that

¹ We note that the parties have indicated in their briefs that Adkins was awarded benefits after the local office addressed the work refusal issue on remand. That determination was not appealed.

the federal program letter was inapplicable to Adkins's separation from employment. As a result, the court held that Adkins was disqualified from receiving unemployment benefits because he voluntarily quit his employment without good cause. The Commission and Adkins now appeal the circuit court's judgment.

I. Standard of Review

In *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834-35 (Ky. App. 1998), this Court stated as follows:

The standard of review before the circuit court and before this Court is the same. Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness. *American Beauty Homes Corp v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). 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. *Kosmos Cement Co. v. Haney*, 698 S.W.2d 819, 820 (Ky. 1985). The court may not substitute its opinion as to the weight of the evidence given by the Commission. *McCracken County Health Spa v. Henson*, 568 S.W.2d 240, 242 (Ky. App. 1977). 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. *Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775, 778 (Ky. 1969).

II. Findings of Fact

We are mindful that the Commission sits in a unique position, as it is free to review an appeal of a referee's decision *de novo*, without deference to the referee's

findings of fact. *Id.* at 834. At the outset of our appellate review, we must determine whether the Commission’s factual findings were supported by substantial evidence. *Id.* at 835. It is well settled that substantial evidence exists where, “when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.” *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

In the case at bar, the underlying facts were largely undisputed. The Commission found, in relevant part, as follows:

On August 7, 2008, claimant was informed that his scheduled hours would be cut (exact amount not provided) due to the employer’s business needs. The claimant was the newest employee and therefore his hours were the first to be cut.

The claimant observed that the new work schedule reflected that his hours had been reduced to part-time hours. The claimant completed his fulltime work schedule on August 10, 2008. The claimant did not accept the reduced work hour schedule, and did not work after August 10, 2008.

Based upon our review of the appellate record, we conclude these findings, while minimal, were supported by substantial evidence.

III. Application of Law to the Facts

Appellants contend the circuit court erred by concluding the federal program letter relied upon by the Commission was inapplicable to Adkins’s claim, as “[s]uch Federal guidance is binding upon the Commission” pursuant to Kentucky

Revised Statutes (KRS) 341.980.² Appellants opine that the Commission correctly concluded that Sun Ventures discharged Adkins without cause by decreasing his schedule to part-time hours.

First, we believe the trial court correctly disregarded the federal program letter, as it is inapplicable to the circumstances presented here. The federal letter addresses 26 U.S.C. § 3304(a)(5)(B), which provides that a state's unemployment compensation act cannot disqualify a claimant from receiving benefits for refusing new work "if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality[.]" The analogous provision in our unemployment compensation act is KRS 341.100(2)(b). Nevertheless, we simply believe that the undisputed facts of this case indicate that Adkins quit his job after his hours were reduced; consequently, we conclude the Commission erred as a matter of law by analyzing this case as an employer discharge and subsequent offer of new work.

KRS 341.370 addresses specific circumstances that disqualify a claimant from receiving unemployment benefits, including when a claimant leaves suitable employment "voluntarily without good cause attributable to the employment." KRS 341.370(1)(c). The Kentucky Supreme Court has recently addressed this provision, recognizing, "[i]nherent in that language is the idea that work conditions must be sufficiently bad that the employee can reasonably feel compelled to quit."

² KRS 341.980(1) provides that the construction of Kentucky's unemployment compensation statutes "should be consistent with such federal act and interpretations thereof[.]"

Brownlee v. Kentucky Unemployment Ins. Comm'n, 287 S.W.3d 661, 664 (Ky. 2009). The Court went on to note, “separation is voluntarily initiated by the employee when the act of leaving is ‘freely given’ and proceeds from personal choice and consent.” *Id.*

Here, the Commission specifically found that Adkins “did not accept the reduced work hour schedule, and did not work after August 10, 2008.” We believe these facts indicate Adkins simply chose to leave his employment, rather than work less than forty hours per week. Despite the Commission’s argument to the contrary, we conclude that Adkins was not discharged by Sun Ventures and then offered a new part-time job; rather, Adkins voluntarily quit his job due to dissatisfaction with the reduced schedule. Accordingly, we affirm the portion of the circuit court’s judgment relating to Adkins’s job separation.

Because we conclude Adkins voluntarily quit his employment, he is disqualified from receiving benefits if he quit “without good cause attributable to the employment.” KRS 341.370(1)(c). The Kentucky Supreme Court has stated, “Good cause for voluntarily quitting work exists only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment.” *Kentucky Unemployment Ins. Comm'n v. Murphy*, 539 S.W.2d 293, 294 (Ky. 1976). Thus, the issue here is whether Sun Ventures’ unilateral reduction in Adkins’s schedule created circumstances so compelling that Adkins had no reasonable choice but to quit his job. Based on the record before us, however, there is insufficient evidence to review this issue. The Commission did not address

this issue, since it erroneously concluded Adkins's separation from his employment was a discharge, rather than a quit. Accordingly, the trial court erred by concluding as a matter of law that Adkins quit without good cause, and we reverse the court's judgment on that issue. We remand this case to the Commission to determine whether the reduction in work hours constituted good cause attributable to Sun Ventures for Adkins to leave his employment.

For the reasons stated herein, we affirm the Lawrence Circuit Court's judgment as to the separation of work issue, we reverse the judgment as to the good cause issue, and we remand this case to the Commission for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION:

James C. Maxson
Frankfort, Kentucky

NO BRIEF FOR APPELLANT
ANTHONY D. ADKINS

BRIEF FOR APPELLEE:

Nelson T. Sparks
Louisa, Kentucky