

RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001972-MR

JOHN BAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-002246

C SQUARED, INC.; KENTUCKY
UNEMPLOYMENT INSURANCE
COMMISSION; EDUCATION AND
WORKFORCE DEVELOPMENT
CABINET, OFFICE OF EMPLOYMENT
AND TRAINING, DIVISION OF
UNEMPLOYMENT INSURANCE
APPEALS BRANCH; AND EDUCATION
AND WORKFORCE DEVELOPMENT
CABINET, OFFICE OF EMPLOYMENT
AND TRAINING, DIVISION OF
UNEMPLOYMENT INSURANCE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: John Baker brings this appeal from an April 23, 2010, Opinion and Order of the Jefferson Circuit Court affirming a decision by the Kentucky Unemployment Insurance Commission (KUIC) to deny unemployment benefits to Baker. We affirm.

Baker began employment as a plumbing superintendent and supervisor with C Squared, Inc., on August 20, 2007. Baker worked for C Squared for over a year without incident. Then, on September 4, 2008, C Squared received a call from one of its customers, a restaurant in Jefferson Mall, reporting a suspected gas leak. C Squared's service dispatcher, Mary Lash, contacted General Manager Ed Eichberger about the call. Eichberger instructed Lash to send Baker on the call as he was working on a job site near Jefferson Mall. Lash contacted Baker and instructed that Eichberger wanted him to investigate the possible gas leak. Baker responded to Lash that "it wasn't his job and he really didn't know anything about it and he wasn't going to go." Lash relayed Baker's response to Eichberger. Baker contacted a fellow supervisor, Jeff Burkes, and explained the call he received from Lash. Baker alleges that he told Burkes that he could not go to the restaurant because his clothes were contaminated with sewage. Baker further claims Burkes told him not to worry about it.¹ A few days later, Eichberger terminated Baker's employment with C Squared. During Baker's exit interview, Baker informed Eichberger that he did not respond to the call about the suspected

¹ Jeff Burkes was not John Baker's supervisor at the time of the incident; nor did Baker call Burkes to testify at the referee hearing.

gas leak because it was a restaurant located in a public place and his clothes were contaminated with sewage.

Following termination of Baker's employment, Baker filed a claim for unemployment insurance compensation benefits with the Division of Unemployment Insurance. In the Initial Determination issued by the Division September 29, 2008, Baker was deemed disqualified from receiving unemployment insurance benefits because he was discharged for misconduct. *See* Kentucky Revised Statutes (KRS) 341.370(6). Baker appealed the Initial Determination to the Appeals Branch of the Division of Unemployment Insurance. Following a hearing, the referee affirmed and agreed that Baker was disqualified from receiving benefits due to misconduct. Baker then appealed to the Kentucky Unemployment Insurance Commission (Commission). On January 12, 2009, the Commission affirmed the determination that Baker was disqualified due to misconduct. Baker then sought judicial review of the Commission's decision with the Jefferson Circuit Court. KRS 341.450. By order entered April 23, 2010, the circuit court affirmed the Commission's decision. This appeal follows.

Baker contends that the Commission improperly decided that he was disqualified from receiving unemployment benefits pursuant to KRS 341.370(6). For the foregoing reasons, we disagree.

As an intermediate appellate court, we step into the shoes of the circuit court and review the decision of the Commission for arbitrariness. A decision is arbitrary if unsupported by substantial evidence of a probative value or

if the Commission misapplied the law to the facts. See *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, (Ky. 1964); *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962).

Under KRS 341.370(1)(b), a worker is disqualified from receiving unemployment insurance benefits if “[h]e has been discharged for misconduct or dishonesty connected with his most recent work.” As used in subsection (1)(b), the phrase “discharged for misconduct” is defined in subsection (6) as:

(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.

KRS 341.370(6). Our case law has further interpreted “misconduct” as defined in

KRS 341.370(6) as:

[L]imited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and

substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Runner v. Com., 323 S.W.3d 7, 10-11 (Ky. App. 2010)(citation omitted). *See also*, *Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472 (Ky. App. 1984).

In this case, Baker intentionally refused to obey an instruction from Eichberger to proceed to the restaurant in Jefferson Mall to check on the suspected gas leak. This fact is undisputed. Additionally, Baker failed to give the service dispatcher or Eichberger a reason or legitimate excuse why he could not carry out his job assignment.

It is well-established that "[w]here 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." *City of Lancaster v. Trumbo*, 660 S.W.2d 954, 956 (Ky. App. 1983)(citing *Brown Hotel Co. v. White*, 365 S.W.2d 306 (Ky. 1963); 76 Am. Jur. 2d *Unemployment Compensation* § 55); *see also*, *Runner v. Com.*, 323 S.W.3d 7. As Baker intentionally disobeyed an instruction from his employer, the denial of benefits was proper if his employer's instruction is deemed "reasonable." *See City of Lancaster*, 660 S.W.2d 954.

Baker argues that the instruction was unreasonable. Baker points out that his clothing was “contaminated” with sewer waste as he was repairing a sewer line. He cites various “codes” prohibiting a person so contaminated from entering a restaurant. However, the record discloses that it was unknown to Baker at the time of his job assignment whether the suspected gas leak was located inside or outside of the restaurant. And, in fact, the gas leak was ultimately determined to be outside of the mall where the restaurant was located.

In finding that Baker committed misconduct, the Commission specifically reasoned:

The claimant was given reasonable instructions to investigate a leak, which the claimant refused. There was no knowledge at the time whether the leak was inside or outside of the building. There was no means by which the claimant could know he posed a threat to the public if he did not know if the leak was in the building. The claimant could have removed his contaminated clothing and changed into appropriate clothing to fulfill the request. In addition, the claimant never even discussed with Mr. Eichberger why he shouldn't handle Mr. Eichberger's request. He just turned down the assignment.

Upon the whole, we conclude that the Commission's decision that Baker was disqualified from receiving unemployment insurance compensation due to misconduct is supported by substantial evidence of a probative value and that the Commission did not misapply the law. Thus, the circuit court properly affirmed the Commission's denial of unemployment benefits.

For the foregoing reasons, the opinion and order of the Jefferson

Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
FOR APPELLEE C SQUARED,
INC.:

Jason Todd Hardin
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES KENTUCKY
UNEMPLOYMENT INSURANCE
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