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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001368-MR

VERNON L. STARR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 11-CI-004110

LOUISVILLE GRAPHITE, INC.
AND KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Vernon Starr appeals from an order of the Jefferson Circuit Court affirming a decision of the Kentucky Unemployment Insurance Commission (KUIC). That decision denied Starr unemployment benefits by finding that Starr

was terminated from his employment due to misconduct. We find no error and affirm.

On March 6, 2009, Starr was fired from his job at Louisville Graphite, Inc. (LGI). The Division of Unemployment Insurance found that Starr's termination was not for misconduct related to the work and granted him unemployment benefits. LGI appealed and the matter proceeded to a referee hearing. The hearing took place over three days. Ultimately, the referee affirmed the award of benefits. LGI appealed the referee's decision to the KUIC. The KUIC reversed the decision and found Starr was terminated for misconduct and not entitled to unemployment benefits. Starr appealed to the Jefferson Circuit Court, which affirmed. This appeal followed.

The incident giving rise to Starr's termination arose when he was assigned to test a heat exchanger. The test required water to be run through the heat exchanger in order to find leaks. Starr was testing the unit with his boss, Keith Cummins. During the testing, another employee, Donna Ward, intervened and told Starr and Cummins that they needed to perform a different test first. Cummins advised Ward that the test had already been completed, but Ward began arguing with Cummins. Starr apparently grew frustrated and walked off from the testing area. As he walked away he told Cummins to "figure out what needs to be done and let me know."¹ A different employee, Jeff Jones, came over and

¹ Or something to this effect.

completed the testing with Cummins. Starr was fired that same day, while Ward was fired the next day.

This Court's standard of review for an administrative adjudicatory decision is the clearly erroneous standard. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). A decision is clearly erroneous if it is not supported by substantial evidence. *Id.*

Substantial evidence is defined as evidence, 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. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 624 (Ky. App. 2002). “[A] reviewing court, whether it be one of the circuit courts, the Court of Appeals, or [the Kentucky Supreme Court], should refrain from reversing or overturning an administrative agency’s decision simply because it does not agree with the agency’s wisdom.” *Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002) (citation omitted).

Kentucky Revised Statute (KRS) 341.370(1)(b) states that an employee is disqualified from receiving unemployment benefits if he has been discharged for misconduct related to work. KRS 341.370(6) states:

“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. (Emphasis added).

The KUIC found that Starr was fired for misconduct due to his refusal to obey an instruction and for violating a reasonable rule of the employer.

The KUIC found that Starr refused to obey an instruction when he walked away from the testing area after having been told by Cummins to turn on the water to begin the testing. We find that there is substantial evidence in the record to support this conclusion. Starr admitted that he walked away from the testing area. Cummins, Jones, Mark Eagle, and Michael Hines all testified that Cummins instructed Starr to turn on the water and begin testing the unit, but that Starr walked away.² Four witnesses testified that Cummins instructed Starr to turn on the water and begin testing. This constitutes substantial evidence showing Starr was discharged for failing to follow an instruction given to him by his employer.

² Even though Starr and Cummins were the ones testing the heat exchanger, other employees were nearby and witnessed this event.

The KUIC also found that Starr was terminated for violating a reasonable and uniformly enforced rule. LGI has an employee handbook which states that unhealthy attitudes toward work or personnel will be considered insubordination and be grounds for dismissal. Examples included in the handbook include loose cannon attitudes, repeatedly losing your temper, or using inappropriate language. Also included in the handbook is a rule that fighting of any kind will not be tolerated. Starr admitted that he had the employee handbook. The KUIC found that Starr violated a reasonable rule by exhibiting insubordinate behavior when he walked away from Cummins and the testing area. The KUIC held that this was an example of an unhealthy attitude toward work.

The KUIC also discussed the relationship between Starr and Ward. It found that the two had an antagonistic relationship and would argue with each other, causing Cummins to have to intervene. Eventually, Cummins held a safety meeting to discuss the fighting between Starr and Ward and caution the employees that such behavior was unacceptable.³ This behavior also violates a provision of the employee handbook which states that fighting in any form is not tolerated.⁴

Starr's walking away from the work area before completing the testing and his fighting with Ward were testified to by Cummins, Hines, and Eagle. This is substantial evidence to support the KUIC's findings. In addition, the rules regarding unhealthy attitudes toward work or personnel were uniformly enforced

³ Starr was not present at this meeting, but Ward did attend.

⁴ Cummins testified that "fighting in any form" includes both physical and verbal fighting.

in this situation because the two employees involved in the March 6, 2009 incident, Starr and Ward, were fired.

For these reasons we affirm the judgment of the Jefferson Circuit Court.

TAYLOR, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN RESULT WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN RESULT: I agree with the majority's conclusion upholding the Commission's decision to deny unemployment benefits to Starr, but I do so on slightly different grounds. Based on the definition of "discharge for misconduct" in KRS 341.370(1), the KUIC found that Starr refused to obey his employer's reasonable instruction, and that he committed a "knowing violation of a reasonable and uniformly enforced rule of an employer." With regard to the former, the KUIC found that Starr refused to obey an instruction when he walked away from the testing area after having been told by Cummins to turn on the water to begin the testing. I must admit that all of the parties involved in this incident handled the matter badly and Starr was not solely at fault. However, the evidence is undisputed that Starr walked away without performing the test as directed by his employer. Based on this evidence, the KUIC could reasonably find this action alone was sufficient to constitute misconduct related to Starr's employment.

On the other hand, I cannot agree with the KUIC or the circuit court that there was evidence showing that Starr knowingly violated a reasonable and uniformly established rule of his employer. As the majority notes, LGI's employee

handbook states that “unhealthy attitudes” toward work will be considered insubordination and can be grounds for dismissal. The handbook set out examples such as loose cannon attitudes, repeatedly losing your temper, or using inappropriate language.

There was no evidence that Starr was arguing with Ward during the exchange over the water test. Ward was the one who was arguing with Cummins. Starr merely made a sarcastic comment to Cummins about the situation and walked away. I do not condone such behavior in a workplace environment. However, LGI’s broad interpretation of the rule against “unhealthy attitudes toward work” fails to give an employee reasonable notice of what conduct is prohibited and is open to arbitrary enforcement. Consequently, I would reverse the KUIC’s finding on this point, but I would affirm the KUIC’s ultimate conclusion that Starr was discharged for misconduct and therefore ineligible for unemployment insurance benefits.

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