

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001486-MR

LA-TEMUS MARSHALL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CI-03491

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION AND KRISPY KREME
DOUGHNUT CORPORATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: La-Temus Marshall appeals from the August 21, 2012, opinion and order of the Fayette Circuit Court which affirmed the Kentucky Unemployment Insurance Commission's ("Commission") denial of Marshall's claim for unemployment benefits. In particular, the Commission held that Marshall had initiated the separation from his employment for reasons that were

not attributable to his employment. Because we hold that the Commission's findings are supported by substantial evidence and that it correctly applied the law to those facts, we affirm.

Marshall began his employment with Krispy Kreme Doughnut Corporation ("Krispy Kreme") on September 6, 2010. Shortly thereafter, Marshall was diagnosed with peripheral arterial disease in both legs. Marshall's physician recommended that Marshall undergo surgery in both legs and informed him that failure to do so could result in the amputation of his legs or possibly death. Marshall underwent the first of two surgeries on January 14, 2011 and as a result was unable to work for several days. Pursuant to Krispy Kreme's employment policies, full-time employees must be employed for six months before they are eligible for sick leave, making Marshall ineligible for sick leave at the time of his surgery. However, Marshall's supervisor was able to arrange the schedule so that Marshall's time away from work coincided with his regular days off. After returning to work on January 17, 2011, Marshall's supervisor reminded Marshall of Krispy Kreme's no fault attendance policy and that Marshall was not yet eligible for sick time.

On February 4, 2011, Marshall underwent a second, more extensive surgery, requiring approximately ten days away from work. Because Marshall's preliminary six-month period did not end until approximately March 10, 2011, Marshall was still ineligible for sick leave. During his time away from work, he remained in contact with his supervisor who, in return, contacted Krispy Kreme's

human resources and corporate office on his behalf. On February 10, 2010, Marshall's physician released him to return to work on February 14, 2011. On February 12, 2010, Krispy Kreme's corporate office informed Marshall's supervisor that Marshall was discharged due to his absences from work and his ineligibility for sick time. Following his discharge, Marshall's supervisor informed Marshall that he could reapply for his job. Marshall did not reapply for his position with Krispy Kreme but instead filed a claim for unemployment insurance benefits on February 15, 2011.

Following a Referee hearing on May 5, 2011, the Referee issued a decision which denied Marshall's claim for benefits based upon the finding that Marshall had voluntarily quit his employment without good cause attributable to employment. Marshall appealed the Referee's decision and on June 21, 2011, the Commission issued an order affirming the Referee's decision. Thereafter, Marshall appealed from the Commission's order to the Fayette Circuit Court. The circuit court issued an opinion and order affirming the Commission's order. This appeal followed.

The standard of review of an unemployment benefit decision is whether the Commission's findings of fact were supported by substantial evidence and whether it correctly applied the law to those facts. *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). A reviewing court must defer to the Commission's findings if they are supported by substantial evidence. *Id.* Substantial evidence is evidence, "that has sufficient probative value

to induce conviction in the minds of reasonable people.” *Id.* Moreover, a reviewing court may not substitute its opinion as to the credibility or weight of the evidence, including the inference to be drawn there from. *Id.*

Marshall’s sole argument on appeal is that he did not voluntarily quit his employment with Krispy Kreme. Instead, he takes the position that a series of unfortunate events, unguided by any decisions of his own, led to his required surgery and subsequent job loss. We disagree.

Under Kentucky Revised Statutes (KRS) 341.370, an employee is disqualified from receiving unemployment benefits if he or she left his or her employment “voluntarily without good cause attributable to the employment.” KRS 341.370(1)(c). Marshall maintains that the Commission improperly extended the definition of “voluntarily quit” beyond its plain meaning, resulting in improper application of the disqualifying statutes. In support of his argument, Marshall cites to several inapplicable cases, the first of which is *Alliant Health System v. Kentucky Unemployment Ins. Com'n*, 912 S.W.2d 452 (Ky. App. 1995). *Alliant*, however, involves the application of KRS 341.370(1)(b), which disqualifies an employee from receiving benefits if he or she has been discharged for misconduct or dishonesty, and is therefore irrelevant to this case which involves the application of KRS 341.370(1)(c). *Id.* Marshall also cites to the Missouri case of *Difatta-Wheaton*, which involves a medical emergency. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594 (Mo. 2008). We first note that we are not bound by the precedent of Missouri case law. Moreover, the record in the case before us

does not indicate that Marshall presented any evidence that he was faced with a medical emergency, making *Difatta-Wheaton* factually dissimilar. Accordingly, Marshall has failed to show that the Commission improperly interpreted or applied KRS 341.370(1)(c).

The evidence indicated that Marshall had been reminded several times by his supervisor that he was not eligible for sick time and that Krispy Kreme had a no fault attendance policy. Nonetheless, Marshall chose to have his second surgery approximately a month before his preliminary six month sick leave eligibility period. While we agree that Marshall may have had a good personal reason for missing work, it did not rise to the definition of good cause attributable to work, thus enabling the application of KRS 341.370(1)(c). Additionally, Marshall was encouraged to reapply for employment with Krispy Kreme and chose not to do so. Given the evidence presented to the Commission, we hold that its findings of fact were supported by substantial evidence. We further hold that it correctly applied KRS 341.370(1)(c) to those facts.

Marshall makes an additional argument that he was discharged, but not for misconduct. However, because the Commission did not address discharge for misconduct, the issue is not appropriate for our review.

For the foregoing reasons, the August 21, 2012, opinion and order of the Fayette Circuit Court is affirmed.

CAPERSON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

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