

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001832-MR

ALEX CHERRY

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 10-CI-00804

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION AND SONOCO

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Alex Cherry appeals from an Order of the Clark Circuit Court affirming a final decision of the Kentucky Unemployment Insurance Commission denying Cherry unemployment insurance benefits. Cherry argues that the circuit court erred in failing to find that he voluntarily left his employment with Sonoco for good cause, that the court applied an incorrect standard of review, and that

Sonoco should be estopped from contesting Cherry's receipt of unemployment benefits. For the reasons stated below, we affirm the Order on appeal.

On April 10, 2005, Cherry began his employment as a production operator with Sonoco in Winchester, Kentucky. On April 26, 2008, he was laid off. He returned to work on May 19, 2008. The following month, Sonoco requested that Cherry submit to a drug test based on its suspicion of drug use by some employees who worked on Cherry's shift. Cherry refused to take the test and left his employment with Sonoco.

On October 29, 2008 (immediately after the layoff), Cherry filed for unemployment benefits and reported his final day of employment as April 26, 2008. He reported no intervening employment between the October 26, 2008, and October 29, 2008 dates, and subsequently began receiving unemployment benefits. Those benefits were exhausted on April 11, 2009, and all Emergency Unemployment Compensation benefits were exhausted by October 17, 2010. On April 27, 2010, Cherry sought to establish Extended Benefits and disclosed that the actual last date of employment was June 3, 2008. This disclosure prompted a notice to Sonoco and a subsequent investigation.

On October 1, 2010, Cherry was initially denied Extended Benefits. He then prosecuted an appeal, resulting in a Referee's determination on August 24, 2010, that Cherry was entitled to benefits because he voluntarily quit work for good cause. Sonoco appealed that decision to the Kentucky Unemployment Insurance Commission ("KUIC"), which rendered an Order on September 30, 2010,

reversing the Referee's decision. As a basis for the Order, the KUIC determined that Cherry failed to follow Sonoco's drug test policy and thereby voluntarily quit his employment without good cause attributable to the employment.

Cherry then appealed the KUIC's Order to the Clark Circuit Court. Upon taking proof, the circuit court concluded that the KUIC correctly applied the law to the facts, properly determined that Cherry failed to comply with Sonoco's drug testing policy and that Cherry voluntarily quit his employment without good cause attributable to Sonoco. Accordingly, it affirmed the KUIC's Order denying benefits. This appeal followed.

Cherry now argues that the circuit court erred in affirming the KUIC's Order denying him benefits. He first contends that the Clark Circuit Court's Opinion is inconsistent with the record, and that it improperly failed to conclude that he voluntarily left his employment with good cause. Cherry maintains that Sonoco's drug test is not authorized under the employer's policy, that it constitutes an invasion of privacy, and that Sonoco improperly required him to provide his social security number to a third party. He contends that these factors demonstrate that he left his employment for good cause, that he is therefore entitled to unemployment benefits, and that the Clark Circuit Court erred in failing to so find.

KRS 341.370(1)(c) provides a disqualification from benefits for an employee who voluntarily terminates his employment. An exception to this disqualification, however, is found where the voluntary termination was based on good cause. Good cause is found "only when a worker is faced with circumstances

so compelling as to leave no reasonable alternative but loss of employment.”

Kentucky Unemployment Insurance Commission v. Murphy, 539 S.W.2d 293 (Ky. 1976). The dispositive question for our consideration, then, is whether the Clark Circuit Court properly determined that no good cause existed for Cherry’s voluntary termination, i.e., whether Cherry was faced with circumstances so compelling as to leave no reasonable alternative but loss of employment.

In examining this issue, we are constrained to affirm the action of the circuit court if it is supported by substantial evidence. “If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained.” *Kentucky Unemployment Insurance Commission v.*

Landmark Community Newspapers of Kentucky, 91 S.W.3d 575 (Ky. 2002).

Additionally, a reviewing court must accept the Commission’s findings of fact as binding even where conflicting evidence is in the record. *Urella v. Kentucky Board of Medical Licensure*, 939 S.W.2d 869 (Ky. 1997).

In the matter at bar, the Clark Circuit Court affirmed the KUIC’s finding that Cherry failed to follow the employer’s drug test policy and thereby voluntarily quit his employment without good cause attributable to the employment. We find no error in this determination. There is conflicting evidence in the record as to whether Cherry was given notice of the policy. Cherry stated that the drug testing policy is not properly articulated in the employee handbook and that he was not aware of the policy. Conversely, the employer alleged that the policy was posted in plain view. Because substantial evidence is contained in the record to support

the KUIC's conclusions on this issue, we find no error in the circuit court's determination that the KUIC's findings of fact and conclusions of law were supported by substantial evidence. The record supports the circuit court's implicit determination that Cherry did not quit because of any conditions of his actual employment. Rather, substantial evidence exists in the record that Cherry quit because he was asked to take a drug test.

Additionally, the KUIC's decision was also based in part on Cherry's failure to reveal the correct date of his separation from employment on his original application. Though Cherry contended that he did not intentionally misrepresent the final date of employment, the record supports the KUIC's determination that such misrepresentation was made. Also supported by the record is the KUIC's finding that this misrepresentation resulted in an overpayment of benefits in the amount of \$1,550.00.

Cherry next argues that the Clark Circuit Court applied the wrong standard of review. We find no error on this issue. The circuit court properly enunciated and applied the correct standard of review, to wit, 1) whether the Commission's findings of fact were supported by substantial evidence sufficient to support conviction in the minds of reasonable people, and 2) that conclusions of law are reviewed *de novo*. See generally, *Reis v. Campbell County Board of Education*, 938 S.W.2d 880 (Ky. 1996).

Lastly, Cherry cites KRS 341.370 in support of his contention that the employer should be estopped from contesting Cherry's receipt of unemployment

benefits because the employer waited too long to contest those benefits. We must first note that this issue was not addressed by the circuit court, and Cherry has not demonstrated via CR 76.12(4)(c)(v) if this matter was raised below.¹ However, even if this issue had been raised below and addressed by the circuit court, we would find no error. Cherry was eligible for and did receive benefits effective April 27, 2008, when he was laid off from his employment. According to the record, after Cherry quit his employment in June, 2008, because of the drug test, he went to the unemployment office in Winchester and was told he was not eligible for benefits. Then on October 29, 2008, he went back to the unemployment office, did not tell the office that he quit after being asked to take a drug test, and the office assumed he was claiming benefits under his original claim. It was only in April, 2010, when Cherry made a claim for “extended benefits” that he first acknowledged that he voluntarily quit his employment. It was at this time when the employer was notified and filed an objection. In response, Cherry contends that he never intentionally concealed that he voluntarily quit because of the drug test, and that he answered all of the employment office’s questions honestly.

If, *arguendo*, this issue was raised below, and even if it were addressed by the circuit court, we find in the record support for a determination that the employer objected to benefits when it learned that Cherry was seeking benefits

¹ CR 76.12(4)(c)(v) requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant’s brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985).

based on his voluntary termination. These facts do not support the application of estoppel and laches, and we cannot conclude therefrom that the employer waived its right to object to Cherry's renewed application for benefits. As soon as the employer learned that Cherry's renewed application was based on his voluntary termination, it objected to the benefits. Accordingly, we find no error.

For the foregoing reasons, we affirm the Clark Circuit Court's Order affirming the Kentucky Unemployment Insurance Commission.

ALL CONCUR.

BRIEF FOR APPELLANT:

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KENTUCKY UNEMPLOYMENT
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