

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000317-MR

STEPHEN BEATSCH

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE, V, JUDGE  
ACTION NO. 12-CI-01140

KROGER; AND KENTUCKY  
UNEMPLOYMENT INSURANCE  
COMMISSION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Stephen Beatsch brings this appeal from a January 16, 2013, Opinion and Order of the Campbell Circuit Court upholding a decision of the Kentucky Unemployment Insurance Commission to deny appellant unemployment benefits. We affirm.

Appellant was hired by Kroger on October 8, 2006. On February 5, 2012, Kroger terminated appellant for repeated tardiness. Appellant then filed a claim for unemployment benefits (first claim) on March 14, 2012. By Notice of Determination dated March 14, 2012, the Division of Unemployment Insurance (Division) denied appellant's claim because appellant was terminated for misconduct. The Division also found that due to appellant's discharge for misconduct a statutory disqualification period applied, and appellant would be ineligible for unemployment benefits until he again worked for ten weeks and earned ten times his weekly benefit rate.

Meanwhile, it appears that through a grievance procedure, Kroger reclassified appellant from being terminated on February 5, 2012, to being suspended on that date. So, on April 4, 2012, Kroger reinstated appellant; however, not long thereafter, on April 19, Kroger again terminated appellant from his employment for failing to clock out while visiting an on-site medical clinic for a work-related injury.

On April 23, 2012, appellant filed a new claim for unemployment benefits connected with the April 19 termination (second claim) and also filed an appeal from the denial of his first claim for unemployment benefits connected to the February 5 termination. On May 8, 2012, a referee for the unemployment commission dismissed as untimely the appeal from the first claim.

Then, on May 10, 2012, the Division denied appellant's second claim for unemployment benefits stemming from the April 19 termination from

employment. The Division determined that the disqualification period was still in effect; thus, appellant was precluded from receiving benefits. Appellant then pursued an appeal from the denial of his second claim, but the referee also denied the second claim. After filing an appeal with the Commission, the Commission unanimously affirmed the referee's decision to deny benefits.

Appellant subsequently filed an action in the Campbell Circuit Court seeking judicial review of the denial of his second claim for unemployment benefits. By Opinion and Order dated January 16, 2013, the circuit court concluded that appellant was disqualified from receiving unemployment benefits as he had not worked ten weeks or earned ten times the weekly rate of unemployment benefits per Kentucky Revised Statutes (KRS) 341.370(1). Our review follows.

Judicial review of the Commission's decision to deny unemployment benefits are to be "heard by the court in a summary manner." KRS 341.450(3). The court must determine whether substantial evidence supports the Commission's decision and whether the Commission properly applied the law. *Raines v. Kentucky Unemployment Ins. Comm'n*, 669 S.W.2d 928 (Ky. App. 1983).

Appellant contends that the Commission erred by denying his second claim for unemployment benefits. Appellant asserts that the Commission utilized the incorrect hire date at Kroger to determine his disqualification period under KRS 341.370. In particular, appellant maintains that he was originally terminated on February 5, 2012, but his status was changed to suspended by Kroger. Thus,

appellant believes his proper hire date at Kroger is October 8, 2006, not April 4, 2012. As October 2006 is his hire date at Kroger, appellant argues that the disqualification period was improper and that the Commission should be equitably estopped from denying appellant's unemployment benefits.

Our Supreme Court has set forth the essential elements of a claim for equitable estoppel:

(1) [C]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

*Kentucky Ret. Sys. v. Fryrear*, 316 S.W.3d 307, 311 (Ky. App. 2009). And, a governmental entity may be subject to equitable estoppel only "in unique circumstances where the court finds exceptional and extraordinary equities involved." *Weiland v. Board of Trustees of Kentucky Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000) (citations omitted).

In this case, the facts do not support a finding of exceptional and extraordinary equities in favor of appellant. It is clear that appellant's

disqualification period was imposed upon denial of his first claim of unemployment benefits. Appellant's proper remedy was to appeal the denial of his first claim and to raise the propriety of the disqualification period therein. However, appellant failed to timely appeal the denial of his first claim; thus, the disqualification period was, likewise, not challenged by appeal. Appellant is not entitled to the remedy of equitable estoppel because appellant failed to act in good faith and pursue his legal remedy; *i.e.*, a timely appeal of the first claim. *See Swain v. Martin*, 302 Ky. 381, 194 S.W.2d 855 (1946); 28 Am. Jur. 2d *Estoppel and Waiver* § 84 (2000). In sum, we conclude that appellant is not entitled to relief under the doctrine of equitable estoppel.

For the foregoing reasons, the Opinion and Order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE KROGER:

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BRIEF FOR APPELLEE  
KENTUCKY UNEMPLOYMENT  
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