

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001915-MR

APRIL L. FETTING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CI-04941

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION AND FAZOLI'S JOINT VENTURE,
LTD., D/B/A FAZOLI'S

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: MAZE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: April Letting appeals from an order of the Fayette Circuit Court which affirmed an order of the Kentucky Unemployment Insurance Commission (hereinafter the Commission) which held that Appellant was not entitled to unemployment benefits because she was discharged from her

employment due to misconduct. Appellant also makes other arguments on appeal that do not concern the denial of benefits, but the way in which the Commission conducts itself. We find that the Commission applied the incorrect law to Appellant's claim; therefore, she is entitled to unemployment benefits. As to Appellant's other two arguments, we find no error and affirm.

Appellant was employed by Fazoli's in Lexington, Kentucky. On February 12, 2011, Appellant suffered an on the job injury. Company policy requires anyone injured on the job to undergo drug and alcohol testing. Company policy also states that if the test is positive for drugs or alcohol, the employee is immediately discharged from employment. Appellant voluntarily took the required test in which she provided a urine sample. The test results indicated Appellant tested positive for marijuana. Appellant's employment was then terminated.

Appellant was initially denied unemployment benefits. She appealed and had a hearing before an unemployment insurance referee. Appellant and the Fazoli's area supervisor, Scott Jackson, were the only ones to testify at the hearing. Appellant appeared *pro se*. Appellant denied smoking marijuana. She suggested that the positive test result might have been the result of passive inhalation.¹ The referee ultimately found that Appellant's denial of drug use brought into question the testing procedure used to analyze her urine sample. The referee held that the document showing that Appellant tested positive for marijuana was not competent

¹ She stated her son was smoking marijuana next to her the night before the drug test was administered.

evidence because there was no verification that “the body fluid tested was kept in the custody of the testing facility untampered with and that the testing method is reliable.” The referee decided that Appellant’s denial of drug use overcame the positive drug test result and awarded her unemployment benefits.

Fazoli’s then appealed that decision to the Commission. The Commission reversed the referee’s decision. The Commission stated that “based on the positive drug test results and the claim of passive inhalation in the face of that test . . . [t]he circumstances are sufficient to find the worker to have been under the influence of drugs while at work, and her behavior to constitute misconduct[.]” As to the drug test results being incompetent evidence, the Commission stated:

[t]he referee accepted claimant’s denial of drug use as a challenge to the test results. While in some cases a denial of drug use may clearly challenge the test results, such was not the case herein. Claimant acknowledged the test results and offered a reason for the positive showing for marijuana. Under these circumstances, the test results stand as offered. In addition, the document reflecting the positive marijuana test result was entered into the record of the case without objection from claimant. Again her acquiescence to the results is reflected in the record. The Commission finds the test results to be proper for consideration under the circumstances found in this case.

The Commission held that Appellant was disqualified from receiving unemployment benefits because she was discharged for misconduct. It also ordered that she repay the benefits she had already been paid.

Appellant then hired counsel and appealed the decision of the Commission to the Fayette Circuit Court. She also for the first time raised two additional issues. She argued that the Commission impermissibly caps the attorney fees for representing a claimant at 20% of the benefits payable and that an attorney cannot put an attorney lien on any judgment recovered by the claimant. She also argued that the Commission should not conduct a *de novo* review of the referee's decision.

The circuit court affirmed the Commission's decision regarding the denial of unemployment benefits and the competence of the drug test results. As to the attorney fees issue, the court found it was not properly before the court because it had not been raised at any point before the referee or the Commission. Finally, as to the Commission's ability to conduct a *de novo* review of the referee's decision, the court held that KRS 341.430(1), and case law interpreting that statute, allow for such a review. This appeal followed.

“[A]n administrative agency's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*. ‘The judicial standard of review of an unemployment benefit decision is whether the [Commission's] findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts.’” *Hutchison v. Kentucky Unemployment Ins. Com'n*, 329 S.W.3d 353, 356 (Ky. App. 2010) (citation omitted).

Appellant's first argument on appeal is that the Commission and circuit court incorrectly applied the law in this case. We agree. If an employee is discharged for misconduct, “[t]he employer has the burden of proving that the

employee's actions constituted misconduct.” *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 835 (Ky. App. 1998) (abrogated on other grounds by *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238 (Ky. 2012)) (citation omitted). In this case, the only evidence that Appellant was under the influence of drugs was the positive test results. Appellant cites to *Haste v. Kentucky Unemployment Ins. Com'n*, 673 S.W.2d 740 (Ky. App. 1984), and claims it is on point and controlling in this case. As previously stated, we review conclusions of law *de novo*.

In *Haste*, a co-worker of Herbert Haste believed he was under the influence of alcohol and reported her suspicion to their supervisor. Mr. Haste was given a blood test to determine if he had alcohol in his system. The results were positive and he was discharged. The holding in *Haste* is short, but important to this case; therefore, we will set it forth in its entirety.

We agree with the appellant that the results of the test were incompetent evidence. These results were introduced by the employer's personnel officer. He testified that he was not present when any part of the test was performed and had little, if any, knowledge of proper testing procedures, or the meaning of the results. It is beyond argument that results of such a test are incompetent when there is no foundation for its admission, no opportunity for cross-examination and no showing of the chain of custody of the blood sample. *See McCormick, Evidence* § 209 (2d ed. 1972).

The issue before this court is whether the trial court properly applied the “residuum” rule. We find that it did not. This rule is that “findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent

evidence which by itself would have been legally sufficient to support the findings.” *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526, 530 (Ky. 1973).

Without the results of the test, the evidence that Mr. Haste was under influence of alcohol is insufficient to support a finding of misconduct. No one who testified before the board expressed the opinion that Mr. Haste had been using alcohol. The testimony included opinions concerning facts that might lead one to the inference that Mr. Haste was under the influence. The witnesses’ lack of positive expression makes it apparent that the employer was relying on the results of the blood test. As those results are incompetent, it failed in meeting its burden of proof.

The employer has the burden of proof to establish misconduct. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299 (Ky. 1963).

Because the appellant otherwise qualifies for benefits, this court reverses with directions that the trial court remand this case to the unemployment commission for an award of benefits.

Haste at 740-41.

As in *Haste*, the only piece of evidence regarding Appellant’s alleged drug use was the test result. Appellant denied using marijuana and no co-worker testified that they believed she was under the influence. In addition, her supervisor, Mr. Jackson did not testify about any aspect of the drug testing procedure and no one from the testing facility testified during the hearing.

The Commission argues that *Haste* is no longer applicable due to *Mollette v. Kentucky Personnel Bd.*, 997 S.W.2d 492 (Ky. App. 1999).

[Bruce] Mollette was employed as an equipment operator with the [Kentucky Transportation] Cabinet in Martin County, Kentucky. Mollette was required to have a commercial driver's license (CDL) for this position. As an equipment operator, Mr. Mollette operated a truck and other heavy equipment classified as commercial vehicles.

On April 1, 1996, the Cabinet adopted and put into effect a "zero tolerance" drug and alcohol testing policy for employees who hold CDL licenses. Under the provisions of the policy as set forth in the Cabinet's Drug and Alcohol Testing Handbook for CDL Employees, a CDL holder performing safety-sensitive functions such as driving or operating a commercial vehicle is subject to random drug and alcohol testing. If the employee tests positive for any of five prohibited drug categories, that employee will be automatically dismissed. Mollette was subject to the zero tolerance policy since he was a CDL holder and operated commercial vehicles.

On December 16, 1996, Mollette was selected for a random drug test by the Cabinet. He went to the collection facility where he supplied a urine sample for drug testing. There were approximately 52 men providing samples for drug testing at the collection site on that day. No one personally observed Mollette while he provided his sample.

On January 2, 1997, Mollette was notified by the Cabinet that he had tested positive for cannabanoid (marijuana). Mollette was notified that as a result of the positive test, he would be dismissed from his employment effective January 17, 1997. A pretermination hearing was held on January 14, 1997. On January 17, 1997, the Cabinet issued a letter to Mollette advising him that he would be officially dismissed for cause from his position as an Equipment Operator effective the close of business on January 21, 1997. The reason for the dismissal was the positive test result by application of the zero tolerance policy. Mollette appealed the termination through administrative

channels and a hearing was held on May 30, 1997, and June 30, 1997, before the Personnel Board.

At the hearing, the Cabinet introduced various records of the testing laboratory into evidence, including test results showing that Mollette had tested positive for marijuana. No witnesses were produced to testify that they had observed Mollette smoking marijuana or had observed him under the influence of marijuana. Mollette testified that he had not been smoking marijuana but had been around individuals who were smoking marijuana the weekend before the test.

The hearing officer, in her recommended order to the Personnel Board, found that the Cabinet had properly followed testing procedures and that the evidence was competent to establish the positive test results. She recommended that the dismissal be upheld. The hearing officer's recommended order was adopted by the Personnel Board and Mollette's firing was upheld. Mollette appealed the decision to the Franklin Circuit Court. The Franklin Circuit Court upheld the decision of the Personnel Board[.]

Id. at 494.

In his appeal, Mollette's first argument was that the test results were hearsay and inadmissible. The Court of Appeals held that the results did not violate the hearsay rule due to KRE 803(6), which regards records of regularly conducted activity. That issue was not raised before this Court in the case *sub judice*. Mollette also raised the chain of custody issue that was discussed in *Haste*. He argued that the test results should have been excluded from evidence because inadequate testimony was introduced to establish the chain of custody. As to that argument, this Court found:

Documents must be authenticated prior to their introduction into evidence. KRE 901. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” KRE 901(a). This requirement may be met by the testimony of a witness with knowledge of the document by his testimony that the document is what it is claimed to be. KRE 901(b)(1).

While the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis to show that the sample tested in the laboratory was the same sample drawn from the victim.

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that “the reasonable probability is that the evidence has not been altered in any material respect.” Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.

Mollette at 495 (citations omitted).

The Commission argues that because there was no evidence that the test results were inaccurate, there is “persuasive evidence that ‘the reasonable probability is that the evidence has not been altered in any material respect.’” *Id.* at 495. While the Commission’s quotation would seem to support their argument, part of that sentence is missing. That entire sentence reads:

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as

there is persuasive evidence that “the reasonable probability is that the evidence has not been altered in any material respect.”

Id. We believe, when the sentence is read as a whole, it still requires some sort of evidence regarding the chain of custody, even if said evidence does not show a perfect or complete chain of custody. In *Mollette*, the Kentucky Personnel Board presented evidence regarding the chain of custody of the urine sample.

Here, the chain of custody of Mollette’s sample, as presented at the evidentiary hearing, was sufficient to establish the integrity of the sample. The chain of custody was established by various chain of custody forms which documented the handling of the sample throughout each phase of the testing process. Moreover, laboratory personnel testified as to the routine practice employed by PharmChem in handling a specimen to be tested. Testimony as to routine practice sufficient to dispel any inference of substitution or change in the contents of the exhibit in question may be used to establish a chain of custody.

Id. at 496.

Contrary to the Commission’s argument, *Mollette* does not overrule *Haste*. The evidence presented in *Mollette* met the *Haste* requirement for competent evidence. *Haste* is still applicable to the courts of Kentucky and is controlling in this case. Without some evidence regarding the chain of custody of the urine sample, it should not have been admitted as evidence, as the referee properly ruled. As this was the only evidence against Appellant, Fazoli’s has not met its burden in establishing misconduct; therefore, Appellant is entitled to unemployment benefits.

Appellant's second argument on appeal is that the Commission cannot limit the amount of attorney fees. We agree with the circuit court that this issue was not preserved for review because it was not raised before the Commission. "It is well settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review[.]" *Wilson v. Kentucky Unemployment Ins. Comm'n*, 270 S.W.3d 915, 917 (Ky. App. 2008) (quoting *Urella v. Kentucky Bd. of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997)).

Appellant's final argument on appeal is that the Commission should not conduct a *de novo* review of the referee's decision. This issue was also not raised before the Commission; therefore, it is not preserved for review. *Wilson, supra*. Even if it had been preserved, this issue has been settled for many years.

Following a referee decision, an aggrieved party may appeal to the full Commission. In addition, the Commission has authority "to remove to itself or transfer to another referee the proceedings on any claims pending before a referee." KRS 341.430(1). Unlike a conventional appellate body, the Commission conducts a *de novo* review of applications. As explained in the statute:

The commission may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it.

KRS 341.430(1).

"Except in instances where the commission orders cases removed to it from a referee, all appeals to the

commission may be heard upon the records of the division and the evidence and exhibits introduced before the referee.” 787 KAR 1:110(2)(2)(a); formerly 903 KAR 5:130(2)(2)(a). Thus, while the Commission generally does not hear evidence directly from witnesses, it has the authority to enter independent findings of fact. 787 KAR 1:110(2)(4)(a). Necessarily, such authority allows the Commission to judge the weight of the evidence and the credibility of witnesses and to disagree with the conclusion reached by the referee.

Burch at 834.

Based upon the foregoing reasons, we reverse and remand with directions that the trial court remand this case to the Commission for an award of benefits.

ALL CONCUR.

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