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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001845-MR

DAPHNE ALLEN — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 12-CI-00906

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND CORETRANS, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Daphne Allen appeals from an opinion and order of the Kentucky Unemployment Insurance Commission's denying her unemployment benefits. Allen argues: (1) the Commission's findings of fact are not supported by substantial evidence; (2) the Commission misapplied the law to the facts; and (3)

the Commission and the court did not consider the reason Allen was on leave. We affirm.

From January 28, 2010 through November 17, 2011, Allen was employed as a recruiter with Coretrans LLC, a trucking company. On August 10, 2011, Allen began twelve weeks of approved Family and Medical Leave (FMLA). Her FMLA leave expired on November 1, 2011.

On October 5, 2011, Coretrans received a note from Allen's healthcare provider excusing Allen from work until December 1, 2011, for "illness." The note did not explain the nature of Allen's illness, whether the health care provider was aware of Allen's job duties or whether Allen could perform her duties with reasonable accommodations.

On October 20, 2011, PeopLease, the agency that oversees employee benefit issues for Coretrans, sent Allen a letter reminding her that her FMLA leave would expire on November 1, 2011, and advising her that she may be eligible for post-FMLA leave. Allen was instructed to coordinate her return to work with her supervisor.

Allen did not return to work on November 1, 2011. Coretrans did not terminate her at that time but, instead, sent her a letter advising her of a procedure she could follow that might permit Coretrans to give Allen additional leave under the American Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq*., as a reasonable accommodation. The letter directed Allen to sign an enclosed medical authorization if she wanted to be considered for leave under the ADA. The letter

instructed Allen that the deadline for receipt of the signed medical authorization was November 14, 2011, and if not received by that date, Allen was to return to work on November 15, 2011. Finally, the letter stated that if Allen had any questions, she was to contact Sue Strunk, Coretrans' controller.

On November 14, 2011, Allen's attorney mailed a letter to Coretrans objecting to the medical release because it demanded disclosure of Allen's medical records. Allen did not contact Strunk, did not complete and return the medical authorization form, and did not return to work on November 15, 2011. On November 23, 2011, Coretrans sent Allen a letter from its attorney stating Coretrans considered Allen as having voluntarily resigned on November 17, 2011, the third consecutive day she was scheduled to work.

Allen was initially denied unemployment benefits. A referee decision was rendered finding Allen was not discharged for misconduct connected with her employment and, therefore, she was not disqualified from receiving benefits. Coretrans appealed to the Commission.

The Commission concluded Allen was discharged for misconduct connected with her employment and reversed the referee's decision. To support its decision, the Commission found as follows:

> This is a simple case involving instructions to an employee. The claimant read/received the instructions and failed to follow them. The only question to be determined is whether the employer's instructions were reasonable. The claimant had been off work for twelve weeks on Family Medical Leave. At the time her leave expired, she still had not been released to return to work.

> The employer advised the claimant that additional leave may be available to her. However, medical information would be required to determine whether she would qualify for the additional leave. The claimant was told to return the medical authorization by November 14, 2011, or return to work on November 15, 2011. If the claimant had questions, she was to contact the employer. *The claimant neither called the employer to address any concerns, nor returned the authorization or returned to work.* The instructions were reasonable under the circumstances. The employer was trying to assist the claimant with retaining her position. The claimant failed to obey those reasonable instructions and she was accordingly, discharged for misconduct connected with the work[.]

(emphasis added). Allen appealed the Commission's order to the Pulaski Circuit Court, which affirmed. This appeal followed.

The Commission is not a conventional appellate body in that it "conducts a *de novo* review of applications." *Burch v. Taylor Drug Store, Inc.,* 965 S.W.2d 830, 834 (Ky.App. 1998), abrogated on other grounds by *Kentucky Unemployment Ins. Comm'n v. Cecil,* 381 S.W.3d 238 (Ky. 2012). "[W]hile the Commission generally does not hear evidence directly from witnesses, it has the authority to enter independent findings of fact." *Id.* "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." *Id.*

Our 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 the facts. *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621, 624 (Ky.App. 2002). Substantial evidence is evidence

that has enough probative value that reasonable people could agree to the conclusion reached. *Id.* While the court must defer to findings of fact, it reviews issues of law *de novo. Downey v. Kentucky Unemployment Ins. Comm'n,* 479 S.W.3d 85, 88 (Ky.App. 2016).

Allen testified that the reason for her termination was for being a "no call, no show or something, and because [she] wouldn't release [her] medical documentation and [she] didn't return to work on November 15." Although the letter sent to Allen on November 23, 2011, stated she was deemed to have voluntarily resigned, according to Allen, she was terminated by Coretrans. The Commission agreed with Allen and concluded that the issue was whether Allen was terminated for misconduct rather than a voluntary quit. We will not disturb that factual finding based on substantial evidence. *Thompson*, 85 S.W.3d at 624. The question is whether the Commission's finding that Allen failed to follow the reasonable instructions of her employer is based on substantial evidence and the denial of benefits a correct application of the law. *Id.*

The unemployment compensation statutory scheme "evinces a humanitarian spirit" and it has been construed to effectuate that spirit. *Alliant Health Sys. v. Kentucky Unemployment Ins. Comm'n,* 912 S.W.2d 452, 454 (Ky.App. 1995). However, the statutory scheme also recognizes the principle that "[a]n employee is obligated to render loyal, diligent, faithful and obedient service to his employer and failure to do so is a disregard of the standards of behavior which the employer can expect of his employee." *City of Lancaster v. Trumbo*, 660 S.W.2d 954, 956

(Ky.App. 1983). That principle is codified in Kentucky Revised Statutes (KRS) 341.370 which provides, in part:

> (1) A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which:
> ...
>
> (b) He has been discharged for misconduct or dishonesty connected with his most recent work, or from any work which occurred after the first day of the worker's base period and which last preceded his most recent work, but legitimate activity in connection with labor organizations or failure to join a company union shall not be construed as misconduct;
> ...
>
> (6) "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). Under the clear and unambiguous language of the statute, "a willful or wanton, or bad faith, finding, is not an additional requirement when the employee is discharged for conduct specifically identified in KRS 341.370(6)." *Cecil*, 381 S.W.3d at 247.

Allen argues that the Commission's findings of fact are not supported by substantial evidence because the Commission based its denial of benefits on her failure to return the medical release or speak with Strunk about the release, reasons not given by Coretrans or Allen for her termination. She asserts that as evidenced by the letter dated November 23, 2011, she was terminated for failing to comply with Coretrans' "no call no show" policy.

Coretrans' employee handbook states: "Regular and prompt attendance at work is required of all employees." It then states that an employee is to notify their manager prior to time when their shift commences or, if the manager is unavailable, to speak with the next level of management. The handbook also contains a "no call no show" policy. Under that provision, an employee who is scheduled to work, but neither reports to work nor "calls in" as directed for three consecutive days, is considered to have "voluntarily terminated" their employment.

Allen argues she was terminated for being a "no call no show" for three consecutive days beginning on November 15, 2011, which she maintains was ignored by the Commission. Although she did not personally contact Coretrans during this time, she argues the letter from her attorney satisfied the "no call no show" policy. This argument is flawed for many reasons.

First, there is no indication that the letter, which was not before the referee, stated any reason why Allen did not report to work as instructed but only stated Allen would not sign the medical authorization. Additionally, there is no indication that the letter was addressed to a manager as required by the Coretrans

policy. Moreover, a letter sent by mail the day before Allen was to report to work, which would not arrive until after Allen failed to report to work, is not a "call in" as required by the policy.

Finally, the "no call no show" provision is irrelevant in the present context. Allen's FMLA time expired on November 1, 2011. "Under the Act, an employee who exceeds the leave time afforded is not entitled to be restored to his or her former position." *Highlands Hosp. Corp. v. Preece*, 323 S.W.3d 357, 361 (Ky.App. 2010). After Allen's leave expired and Allen did not return to work, it could either terminate her, accommodate her situation, or permit her to take additional time off work. Despite the exhaustion of her leave and that she did not return to work on November 1, 2011, Coretrans did not terminate Allen but provided the opportunity to sign and return the medical authorization to obtain additional leave time under the ADA. The instructions given by Coretrans were to either sign the medical authorization by November 14, 2011, or return to work on November 15, 2011. She did neither.

The Commission found Allen was terminated for her failure to follow the instructions of her employer after her FMLA leave expired, not that she failed to follow the "no call no show" policy. We conclude this finding was based on substantial evidence. The remaining question is whether Coretrans' instructions were reasonable as required by KRS 341.370(6).

To determine Allen's eligibility for reasonable accommodations under the ADA, Coretrans relied on the procedures set forth in the Equal

Employment Opportunity Commission's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the American Disabilities Act*, which permits an employer to require an employee to sign a limited medical authorization. The medical authorization was limited to contacting Allen's physician with specific questions regarding her condition related to her FMLA leave and provided that she could revoke the authorization at any time. There was nothing unreasonable in requiring that Allen sign and return the authorization by November 14, 2011 or return to work on November 15, 2011.

Allen's final contention is that the referee erred when it did not permit her to introduce evidence that she was sexually harassed while working at Coretrans as the reason she was on FMLA leave and the Commission failed to consider the sexual harassment as a basis for not returning to work. If Allen had contended before the referee that she "quit" her job because of sexual harassment, evidence pertaining to that allegation would be relevant to whether she quit "voluntarily without good cause attributable to [her] employment." KRS 341.370 (1)(c). "[C]ertainly illegal acts of harassment or racial discrimination can constitute good cause to voluntarily terminate one's employment when it rises to a level 'so compelling as to leave no reasonable alternative.'" *Thompson*, 85 S.W.3d at 625. (footnote omitted).

As noted above, Allen has maintained throughout this litigation that she was terminated from her employment, not that she quit. In fact, by her own testimony,

she had planned to return to work on December 1, 2011. This is not a "voluntarily quit" case but, as noted by the Commission, "simply a case involving instructions to an employee." Allen's sexual harassment allegations are irrelevant to whether she was terminated for misconduct.

Based on the foregoing, the order of the Kentucky Unemployment Commission is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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