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NO. COA01-575

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

ASTER YEHDEGO
Petitioner,

v.

Mecklenburg County
No. 00 CVS 14706

JOHNSON C. SMITH UNIVERSITY
and EMPLOYMENT SECURITY
COMMISSION OF NORTH CAROLINA,
Respondents.

Appeal by petitioner from judgment entered 8 January 2001 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 2002.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Raymond E. Owens, Jr., and Tamika D. Lynch for petitioner-appellant.

Employment Security Commission of North Carolina, by Camilla F. McClain for respondent-appellee.

BIGGS, Judge.

Aster Yehdego (petitioner) appeals from an order of the trial court, which affirmed the decision of the Employment Security Commission of North Carolina (Commission) that petitioner was ineligible for unemployment benefits. We reverse and remand.

The relevant facts are as follows: Petitioner was employed by Johnson C. Smith University (the university) in February, 1998, as a coordinator for the university's Math Resource Center. She was hired to assist college students in the development of math skills

required for university level math courses. After petitioner held this position for a year, university administrators decided that the Math Resource Center needed an instructor with an advanced degree in math, rather than a coordinator. Petitioner's position as coordinator was eliminated, and, because she did not have the advanced degree, she was not offered the position as instructor. Instead, she was offered a position as a counselor for Upward Bound, an academic tutoring program for middle and high school students. Petitioner was reluctant to take the Upward Bound job because she was not an experienced teacher of middle and high school students, and was "terrified" of this age group. Further, the supervisor for the Upward Bound program informed her that they did not really need another counselor. She did accept the new position; she was then assigned an office that was under construction, was not issued a key to the department, and was assigned clerical duties.

Petitioner was very upset about the job change, and, as a result, she lost weight, had insomnia, developed an ulcer, and experienced clinical depression. Petitioner sought help from a campus counselor, and a psychologist, who prescribed Prozac and other antidepressant medications. She began work with Upward Bound, but after 13 days, her psychologist advised her to take sick leave. On 22 February 2000, he wrote a letter recommending that petitioner take sick leave, accompanied by a medical form stating that petitioner suffered from "major depression" and detailing some

of her symptoms. Her supervisor signed a leave form agreeing that petitioner could have two weeks sick leave.

When petitioner returned to work, she discovered that her office was scheduled for demolition, and that no other office had been prepared for her. Her supervisor had taken a leave of absence, and petitioner did not find the other Upward Bound employees to be helpful. Petitioner worked at Upward Bound for only five days following her sick leave, and resigned on 23 March 2000. Her last day at work was 24 March, although she received paid vacation leave until 16 April 2000.

After leaving the university, petitioner filed a claim for unemployment benefits, effective 16 April 2000. On 19 May 2000, petitioner filed a continued eligibility certification, or claim, for benefits for the week ending 6 May 2000. A claims adjudicator (adjudicator) for the Employment Security Commission rejected the claim for that week, on the grounds that petitioner did not file within the ten day period required, without a showing of good cause. A second adjudicator determined that petitioner was generally ineligible for unemployment benefits, in that she failed to show that she left work for compelling health reasons, and because she left work without good cause attributable to the employer. Petitioner appealed both adjudicators' determinations.

Petitioner's appeal was tried before a referee, by means of a three-way conference phone call, on 26 June 2000, and 18 July 2000. On 27 July 2000, the referee affirmed the adjudicators' decisions that petitioner was ineligible for benefits, and that she had not

filed a timely claim for the week ending 6 May 2000. On 7 August 2000, petitioner appealed to the Commission. On 15 September 2000, the Commission affirmed the referee's decisions, holding that the facts found by the referee were based on competent evidence, and that the referee had "properly and correctly applied the Employment Security law." Petitioner then filed a petition for judicial review of the determination that she was ineligible for benefits. She did not appeal the decision regarding her late filing for the week of 6 May 2000, and that issue is not before this Court. Review was granted, and, on 8 January 2001, the trial court issued an order affirming the Commission. The trial court's order concluded that "the facts found by the Commission . . . were based upon competent evidence contained in the record[, and] . . . the [Commission] properly applied the law to those fact[.]" Petitioner appeals from this order.

On appeal, the Commission's findings of fact are conclusive if supported by any competent evidence. N.C.G.S. § 96-15(i) (1999). Thus, this Court's review is to determine whether "the facts as found by the ESC [the Commission] are supported by competent evidence and if so, whether the findings of fact support the conclusions of law." *Fair v. St. Joseph's Hospital, Inc.*, 113 N.C. App. 159, 161, 437 S.E.2d 875, 876 (1993) *disc. review denied*, 336 N.C. 315, 445 S.E.2d 394 (1994) (citations omitted). Alleged errors of law are reviewed *de novo*. *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 446 S.E.2d 383 (1994).

Petitioner argues that the referee's order, which was affirmed by the Commission and the trial court, incorrectly applied the law to the facts. We agree.

N.C. Gen. Stat. § 96-14(1) (1999) governs disqualification for unemployment benefits, and provides in part that:

An individual shall be disqualified for benefits:

(1) . . . [if he is] unemployed because he left work without good cause attributable to the employer.

Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:

a. That, at the time of leaving, an adequate disability or health condition, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer. . . and

b. That, at a reasonable time prior to leaving, the individual gave the employer notice of his disability or health condition.

N.C.G.S. § 96-14(1). Thus, although an employee who leaves work without good cause attributable to the employer generally is ineligible for benefits, an exception exists for employees suffering from a disability or medical condition. *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586, 589, 344 S.E.2d 798, 800 (1986) ("employee need not continue employment which is injurious to her health").

In the present case, the order affirmed by the Commission applied N.C.G.S. § 96-14(1), which requires petitioner to demonstrate that she left work for "good cause attributable to the employer." Petitioner, however, claimed that she left the

university because she was suffering from clinical depression, with related medical symptoms; moreover, defendant "concedes . . . that depression is a disease or health condition[.]" We conclude, based on the record before us, that N.C.G.S. § 96-14 (1) (a) and (b) set out the appropriate standard for determination of whether petitioner is eligible for unemployment benefits. Thus, the referee's failure to consider the medical disability exception was error. Accordingly, the trial court's order, upholding the Commission's concurrence with the referee's decision, must be reversed, and the case remanded to the Commission for entry of a new order applying the correct standard of law.

Petitioner also argues that the record establishes that she met the eligibility standard set forth in N.C.G.S. § 96-14(1) (a) and (b).

To establish the existence of a "disability or health condition," an employee "must only show by competent evidence that the health condition existed at the time of the leaving." *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586, 590, 344 S.E.2d 798, 801 (1986). "Competent evidence may include the physician's statement or testimony." *Id.* However, a claimant is not required to produce medical documentation from a physician in order to establish the existence of a health problem. *Johnson v. U.S. Textiles Corp.*, 105 N.C. App. 680, 414 S.E.2d 374 (1992). Nor is a claimant required, if her claim is supported by a physician's statement, to produce a medical statement written *before* she left work. *Broyhill*, 81 N.C. App. at 590, 344 S.E.2d at 801 (holding

that although "[petitioner's] doctor's note was dated . . . six weeks after she left [her employment], . . . a contemporaneous, written physician's note [is not] the only competent evidence which would establish a health condition at the time of the leaving").

In the instant case, petitioner presented the following evidence of depression and other symptoms: (1) her uncontradicted testimony; (2) a letter from her psychologist recommending medical leave, accompanied by a medical form describing her symptoms, and (3) a second letter from this psychologist stating that he had been treating petitioner for "major depression directly due to her stressful job situation." Upon this evidence, the referee made findings of fact, including, in relevant part, the following:

. . . .

3. Claimant left this job because of work-related stress, anxiety and depression.

. . . .

7. As a result of claimant's disappointment over being removed from the position for which she was initially hired, she became depressed. She began experiencing physical symptoms, which required treatment with medication, and was under a doctor's care. . . . Claimant ultimately was unable to adjust to the change[.]

Further, the referee found that "[c]laimant resigned because she was experiencing personal and emotional problems in dealing with a job reassignment." Having reviewed the record, including the transcript of the hearing before the referee, we conclude that these findings are supported by competent evidence, and are, therefore, conclusive on appeal. *Milliken & Co. v. Griffin*, 65

N.C. App. 492, 309 S.E.2d 733 (1983), *disc. review denied*, 331 N.C. 402, 319 S.E.2d 272 (1984). We further conclude that these findings establish the existence of "a disability or health condition," as required under N.C.G.S. § 96-14(1) (a).

Defendant argues that petitioner did not demonstrate that her depression and related symptoms prevented her from "doing other alternative work offered by the employer[.]" In this regard, petitioner testified that she "pleaded" for an alternate position. Defendant did not dispute this, but offered the testimony of petitioner's HR supervisor that, although petitioner discussed a job change with her several times, petitioner had not made a specific appointment with her to find some other job on campus for which petitioner might apply, and also that petitioner had not filled out a university transfer request form.

We conclude that there was no evidence that the university ever "offered" petitioner a position other than Upward Bound. The Commission, however, argues that petitioner is ineligible for unemployment benefits because she did not take the initiative to meet with her supervisor exclusively to discuss her need for another job, nor find another university job on her own. This Court addressed a similar issue in *Broyhill*. In *Broyhill*, the Commission ruled that a claimant had not provided sufficient notice to her employer of her health condition, and had not been aggressive enough in her pursuit of alternative employment within the company. This Court disagreed with the Commission, and held:

[Petitioner] would need only to have given the employer notice of the health condition at a

reasonable time prior to leaving, and be available for other alternative work offered by the employer. . . . Speculation as to what [petitioner] could have done is irrelevant. The issue is . . . whether she met the burden of showing that she constructively informed the employer or requested a transfer. . . . We have already found that by going to her immediate supervisor, [petitioner] gave at least constructive notice to her employer of her condition and desire for a transfer.

Broyhill, 81 N.C. App. at 591-592, 344 S.E.2d at 802. In the instant case, the evidence is uncontradicted that petitioner's employer was notified of her depression, with its associated symptoms. Indeed, the employer signed the request for medical leave, which cited "major depression" as the reason, and listed petitioner's other symptoms. The record also establishes that petitioner informed her employer that she wanted some position other than the transfer to Upward Bound. We conclude that petitioner established both that "at a reasonable time prior to leaving, [she] gave the employer notice of [her] disability or health condition," and that she was "available for other alternative work offered by the employer," although no alternative work was in fact offered.

For the reasons discussed above, we conclude that the referee's findings of fact adopted by the Commission are supported by competent evidence. However, we conclude that the referee's decision, adopted by the Commission, incorrectly applied N.C.G.S. § 96-14(1) to the facts. We hold that the findings establish that petitioner met the statutory requirements set out in N.C.G.S. § 96-14(1)(a) and (b), entitling her to unemployment benefits.

Accordingly, the trial court's order is reversed, and this matter is remanded to the trial court, for further remand to the Commission for an entry of an order consistent with this opinion.

Reversed.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).