NO. COA07-410

NORTH CAROLINA COURT OF APPEALS

Filed: 04 December 2007

RIRAGGUST DUNHAM

v. Mecklenburg County
No. 06 CVS 12413

K AND S SANITATION, INC.

and

EMPLOYMENT SECURITY
COMMISSION OF
NORTH CAROLINA

Appeal by petitioner from judgment entered 20 November 2006 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2007.

J. Elliott Field, for employer-petitioner-appellant.

Employment Security Commission Legal Department, by Fred R. Gamin, Sr., for respondents-appellee.

STEELMAN, Judge.

When the Employment Security Commission's findings of fact are supported by the evidence, and those findings support the Commission's conclusions of law, the trial court did not err in affirming the Commission's decision.

I. Factual Background

In February 2004, Riraggust Dunham (employee) began working for K and S Sanitation (employer), a recycling services company in

Charlotte, N.C. During 2005, employee received several warning letters regarding his work performance. On 5 December 2005, James Knuckles (Knuckles), president and owner of employer, called employee into his office and informed him that his performance was low and that he was suspended for two days pending termination. The next day Earl Sanders (Sanders), one of employer's supervisors, went to employee's home and terminated his employment.

Employee filed a claim for unemployment insurance benefits on 4 December 2005. Adjudicator Robert Rudisill ruled that employee was not disqualified from receiving unemployment benefits. Employer appealed, and appeals referee Joseph Pearlman entered a decision holding that employee was discharged from his job "because he allegedly displayed a poor attitude after an episode of alleged poor performance" and that he was not disqualified from receiving unemployment benefits. Employer appealed, and on 24 May 2006 the Employment Security Commission (Commission) affirmed the decision of the appeals referee. Employer appealed this decision to the Mecklenburg County Superior Court pursuant to N.C. Gen. Stat. § 96-15(h) (2005). Judge Beal entered judgment on 20 November 2006 affirming the Commission's decision. Employer appeals.

II. Findings of Fact Supported by Evidence

In its sole argument on appeal, employer contends that the trial court erred in affirming the Commission's decision when the Commission's findings of fact were not supported by the evidence, and when the findings of fact did not support its conclusions of law. We disagree.

"Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act. The employer bears the burden of rebutting this presumption by showing circumstances which disqualify the claimant." *Williams v. Davie County*, 120 N.C. App. 160, 164, 461 S.E.2d 25, 28 (1995) (citations omitted). N.C. Gen. Stat. § 96-14 provides that an individual will be disqualified from receiving benefits "if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work." N.C. Gen. Stat. § 96-14(2) (2005). The statute further provides that:

> Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id. An employee may also be disqualified from receiving benefits for a period ranging from four to 13 weeks if the employee was fired for substantial fault connected with his work. N.C. Gen. Stat. § 96-14(2a).

> Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

Id.

The standard of review on appeal of a decision from the Commission is "whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made[.]" *In re Enoch*, 36 N.C. App. 255, 257, 243 S.E.2d 388, 390 (1978). The reviewing court views the evidence in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of every reasonable inference drawn from the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). A finding of fact is conclusive on appeal if there is any evidence in the record to support it, even if there is substantial evidence to the contrary. *Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 472, 598 S.E.2d 629, 631 (2004) (citation omitted). "Moreover, the Commission is the sole judge of the credibility of witnesses and the weight to be given the evidence." *Id.* (citation omitted).

Employer contends that the following findings of the Commission were not supported by the evidence:

> 3. The claimant was discharged from this job because he allegedly displayed a poor attitude after an episode of alleged poor performance.
>
> 4. The employer's normal procedure was to pick up recycled items and take such items to the landfill during the morning hours. . . .
>
> 8. Assuming for the sake of argument that claimant had not been given directions to deviate from his normal pattern of dumping his load at landfill on the same

> morning that he collected his load, the employer has not shown that claimant had a pattern of such conduct. . . .
>
> 10. The evidence does not lead to definite conclusion that claimant acted in insubordinate manner when counseled about his work performance.

While there was conflicting testimony, there is competent evidence in the record to support the Commission's findings of fact.

With respect to finding of fact number three, employer contends that on 1 December 2005, employee failed to empty a truck, and that such conduct was contrary to company policy. Employer asserts that employee had received warnings about such conduct prior to the occasion in question, yet refused to conform his behavior to employer's expectations. Employer contends that it is this conduct, as opposed to employee's poor attitude, which was the basis for employee's termination.

However, employee testified at the appeals referee hearing that his supervisor told him "not to worry about dumping the truck because the landfill was full." Employee was asked if he believed he would have been in violation of the disciplinary policy if he had emptied his truck on Thursday, and employee responded "Yes." Further, Knuckles testified that when he called employee into his office on 5 December 2005 he was "just going to talk with him," but that during the conference employee displayed a poor attitude. Knuckles wrote a letter to the Commission on 13 December 2005 which

also indicated that employee was terminated due to his poor attitude.

We hold that there was competent evidence in the record to support the Commission's finding that employee was discharged due to his poor attitude.

With respect to finding of fact number four regarding the employer's procedures in emptying the trucks, employer contends that the appeals referee misunderstood its procedure. Employer contends that it is their policy to empty the trucks at the end of each day after the trucks have picked up their loads, as opposed to during the morning hours.

We hold that, while this finding may be incorrect, it is not essential to support the referee's conclusion of law. This finding of fact is irrelevant and may be treated as surplusage. *See City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970).

With respect to finding of fact number eight, employer contends that, since employee received two previous employment warning letters, the evidence showed a pattern of his conduct of not emptying his load on the same day that he collected his load. However, employee denied that his failure to empty his truck was a result of disobedience, and testified that he was told by a supervisor not to empty his truck. Further, the only warning letter employee received relating to the emptying of the trucks pertains to the occasion that is the subject of this appeal. The other two letters are unrelated to the emptying of the trucks, and

are irrelevant in establishing a pattern of disobedient conduct. This evidence supports the Commission's finding of fact number eight.

As to finding of fact number ten, employee denied acting in an insubordinate manner. The Commission found employee's testimony to be credible, and afforded it weight accordingly.

Employer did not except to the remaining findings of fact made by the Commission, and those findings are presumed to be supported by the evidence and are conclusive on appeal. *Beaver v. Paint Co.*, 240 N.C. 328, 330, 82 S.E.2d 113, 114 (1954).

Having concluded that the Commission's findings of fact are supported by competent evidence, we hold that those findings support the Commission's conclusion of law that the evidence fails to show that employee was discharged from the job for substantial fault or misconduct connected with his work. The trial court did not err in affirming the Commission's decision.

AFFIRMED.

Judges WYNN and GEER concur.

Report per Rule 30(e).