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NO. COA08-311

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

N.C. DEPARTMENT OF LABOR,
Petitioner.

v.

Wake County
No. 07 CVS 13159

SYDNEY C. SUTTON

and

EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA,
Respondents.

Court of Appeals

Appeal by Petitioner from Judgment entered 6 December 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 September 2008.

Slip Opinion

Attorney General Roy Cooper, by Special Attorney General Victoria L. Voight, for Petitioner-Appellant North Carolina Department of Labor.

Charles E. Monteith, Jr. and Shelli Henderson Rice for Appellee Sydney S. Sutton.

Fred R. Gamin, Sharon Johnston and Camilla McClain for Respondents-Appellees Employment Security Commission of North Carolina.

ARROWOOD, Judge.

The North Carolina Department of Labor (DOL) appeals from a Judgment affirming the Decision of the Employment Security Commission (ESC) that claimant Sydney S. Sutton (Sutton) was discharged for "substantial fault" as opposed to "misconduct" and

that she should be disqualified from receiving unemployment benefits for four (4) weeks from 24 September 2006 until 21 October 2006.

On 24 September 2006, Sutton filed a claim for unemployment benefits with ESC. ESC's Claims Adjudicator found that Sutton was disqualified from receiving benefits. Sutton appealed. On 11 May 2007, ESC's Appeals Referee held that Sutton was discharged for substantial fault on her part in connection with her work but that due to mitigating circumstances, Sutton was disqualified from receiving benefits for only four weeks.

Sutton and DOL both appealed. On 19 July 2007, ESC affirmed the Appeals Referee decision. On 17 August 2007, DOL sought judicial review. On 6 December 2007, Judge Stephens affirmed the ESC decision. DOL appealed. We Affirm.

In ruling on Sutton's 24 September 2006 claim for unemployment, the Commission made the following pertinent Findings of Facts:

3. The claimant was discharged from this job because of alleged unsatisfactory job performance and unacceptable personal conduct.
4. The claimant was employed by the employer from June, 1987 until January 18, 2006.
5. For approximately six years prior to her dismissal from employment, the claimant held the position of safety compliance officer within the occupational health and safety division of the employer.

6. According to the State of North Carolina's Office of State Personnel's Position Description Form for a safety compliance officer, the purpose of the officer was "to recognize, evaluate, and control occupational safety and health hazards in virtually all places of employment within the state of North Carolina."
7. The claimant was aware of the expectations and requirements of her position.
8. The claimant was unwillingly placed under the supervision of district supervisor, Thomas O'Connell (hereinafter O'Connell), effective May 7, 2004. Prior to her transfer, the claimant had been under the supervision of another district supervisor, Tom Wells (hereinafter Wells).
9. After being placed under the supervision of O'Connell, the claimant was presented with a form labeled "Request for Clarification". The purpose of the form was to have the claimant, in writing on the form, address any directions or instructions of O'Connell with which she disagreed or questioned. The claimant was to proceed with the directions and instructions of O'Connell while the claimant's written concerns in the form were reviewed and addressed by the employer. The claimant never used the "Request for Clarification Form".
10. The "Request for Clarification Form" was not uniformly required of other employees. O'Connell was the author of the form, and he created it for his district in anticipation of the claimant's transfer to his district. He probably would not have created the form had the claimant not been assigned to his district.
11. On June 4, 2007, the claimant received a "Written Warning for Insubordination and Inappropriate Conduct". The warning was issued by O'Connell. The warning alleged

insubordination and inappropriate conduct by the claimant on May 20, 2004 and May 21, 2004.

12. According to the warning of June 4, 2007, the following took place on May 20, 2004 and May 21, 2004: the claimant reported to work on May 20, 2004 and indicated that she was too ill to conduct an assigned inspection. O'Connell instructed the claimant to provide a doctor's note to confirm her illness. The claimant questioned the requirement that she produce a doctor's note. The claimant had the discussion with O'Connell in the presence of other employees. Without completing a "Request for Clarification Form", the claimant went directly to Tom Hayes (hereinafter Hayes), eastern bureau chief for compliance officers, to discuss the situation. On May 21, 2004, O'Connell requested the doctor's note for May 20, 2004. The claimant did not produce a doctor's note.

. . . .

15. In the warning of June 4, 2007, O'Connell instructed the claimant that "any absences from work due to illness must be supported by a doctor's note".
16. According to Section 5, page 7 of the State Personnel Manual regarding sick leave, "to avoid abuse of sick leave privileges, a statement from a medical doctor or other acceptable proof may be required."
17. While under the supervision of Tom Wells, the claimant received two annual performance appraisals with ratings of "good", and she had not been subject to any formal disciplinary action by Wells.
18. On July 7, 2004, after her transfer to O'Connell's district, the claimant received a "Written Warning for Unsatisfactory Job Performance". The warning was issued by Tom Hayes, supervisor over the claimant, O'Connell, and Wells. The warning addressed concerns

about the claimant for alleged conduct while she had been under the supervision of Wells, during which time she received no formal disciplinary action from Wells for any of the issues addressed in the July 7, 2004 warning letter.

19. On May 16, 2005, the claimant received a "Final Written Warning for Unsatisfactory Job Performance and Unacceptable Personal Conduct". The warning was issued by O'Connell. The warning alleged unsatisfactory job performance and unacceptable personal conduct on April 27, 28, and 29, 2005.
20. According to the warning of May 16, 2005, the following occurred: on March 28, 2005, the claimant was notified that she was next in line for a fatality investigation. The claimant was assigned a fatality investigation on April 27, 2005. On April 28, 2005, the claimant telephoned O'Connell and indicated that she hoped he did not expect her to go out on the inspection due to her illness and asked if another employee could take the assignment. The claimant indicated that she believed the assignment to be retribution and/or retaliation against her. The claimant had previously exhibited similar types of behavior in which the claimant questioned the reason for being given certain assignments, believing them to have been assigned for manipulative purposes by management. The claimant was out of work due to illness on April 25, 2005 through April 27, 2005. After being previously instructed in the written warning of June 4, 2004 that a doctor's note would be required for absences due to illness, the claimant indicated that she thought O'Connell's request for a doctor's note for her absences to be "unreasonable", although the claimant did subsequently comply with the request.
21. The claimant did question the assignment issued by O'Connell.

22. The claimant did question the reasons for assignments previous to the assignment of April 27, 2005.
23. The claimant did question the directive by O'Connell that she produce a doctor's note, although she had been placed on notice from the 2004 warning that she would be required to do so in the future.
24. On January 18, 2006, the claimant was dismissed from employment, and the reasons for dismissal were listed in a dismissal letter from Hayes and signed by O'Connell. The dismissal letter referred to the previous warnings issued to the claimant and addressed additional concerns between the last warning issued to the claimant on May 16, 2005 and the date of termination from employment.
25. The dismissal letter addressed and alleged the following issues: on December 1, 2005, O'Connell assigned the claimant a fatality investigation. The claimant questioned the assignment and contacted Hayes to complain about the assignment. Although the claimant reported to the assignment, the claimant left the site without determining whether the site was safe. The claimant was aware that O'Connell had also reported to the site, and the claimant left the site without informing O'Connell that she was leaving. The claimant did not meet the expected number of inspections within a certain time frame according to an Interim Performance Evaluation given to the claimant by O'Connell in December, 2005. The claimant failed to work with O'Connell on developing a corrective action plan for the claimant. On June 29, 2005, the claimant was assigned three supervised inspections. The claimant was directed via e-mail from Hayes to contact the supervisors and have the inspections completed by July 29, 2005. She did not do so within the time allotted. After conducting one supervised inspection with supervisor Bruce Miles (hereinafter Miles), the claimant ignored his instructions and recommended certain

citations after being instructed not to do so.

26. The claimant did question the fatality investigation assignment of December 1, 2005.
27. The claimant did contact Hayes after speaking with O'Connell about the assignment of December 1, 2005.
28. The claimant did leave the site of the fatality investigation without notifying O'Connell that she was leaving the site.
29. The claimant did not meet the number of investigations expected by the employer.
30. The claimant did not work with O'Connell on her corrective action plan, which resulted in O'Connell issuing a memorandum addressing the issue on August 24, 2005.
31. The claimant did not comply with Hayes' instruction to contact the supervisors and complete the investigations within the time allotted indicated in his e-mail to the claimant on June 29, 2005.
32. The claimant did fail to follow the instructions of Miles.
33. Mitigating circumstances surrounding claimant's conduct are as follows: the employer's actions of unilaterally assigning the claimant to the supervision of O'Connell after not being disciplined or warned regarding any conduct while under the supervision of Wells, requiring the claimant to submit a "Request for Clarification Form" after being placed under the supervision of O'Connell, and the warning of July 7, 2004 issued by Hayes addressing past issues that were not addressed as concerns by her former supervisor, Wells, while under his supervision, gave the claimant a reasonable belief that there was, at a minimum, some animosity towards her by the employer. Further, the claimant was unable to meet the expectations of the

employer regarding the number of completed inspections due to either the nature of the inspections or personal and/or family illness that prevented her from being present at work.

Based upon these Findings the Appeals Referee determined that Sutton was discharged for substantial fault on her part in connection with work but that due to mitigating circumstances she should only be disqualified from benefits for four weeks. The Commission and the Superior Court affirmed.

Appellant first argues that the Superior Court erred in affirming ESC's decision because portions of the Referee's finding of Fact 8, 17, 18, 20 and 33 were not supported by competent evidence. N.C. Gen. Stat. § 96-15(i) (2007) in pertinent part provides:

In any judicial proceeding, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court limited to questions of law.

Our examination of the record convinces us that there is competent evidence in the record to support all the material portions of each of these findings, therefore the Assignment of Error is overruled.

Appellant next argues that the Superior Court erred in affirming the decision of ESC that Sutton's actions constituted "actions over which she had reasonable control" in that it was not supported by the findings of fact and was erroneous as a matter of law. Appellant contends that ESC's legal conclusion that

claimant's actions constituted "substantial fault" rather than "misconduct" was not supported by the findings of fact. Sutton argues that the Commission's findings, which are binding on review, fail to support a conclusion that Sutton was discharged for misconduct connected with her work. We agree with Sutton.

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. N.C. Gen. Stat. § 96-14(2a) (2007).

On the other hand, "misconduct" is defined as:

conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrences 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 employer's duties and obligations to his employer.

N.C. Gen. Stat. § 96-14(2) (2007).

Substantial fault implies a lesser degree of fault on the part of the claimant than misconduct. *Department of Crime Control & Public Safety v. Featherston*, 96 N.C. 102, 105, 384 S.E.2d 306, 308 (1989). In *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 590, 406 S.E.2d 609, 612 (1991), this Court held that an employee has "reasonable control" when he has the physical and mental ability to

conform his conduct to the employer's job requirements. Reasonable control coupled with failure to live up to a reasonable employment policy equals substantial fault. *Id.*

Appellant relies on three cases in support of its contention that Sutton's actions constituted misconduct rather than substantial fault. These cases are: (a) *Butler v. J.P. Stevens & Co.*, 60 N.C. App. 563, 299 S.E.2d 672 (1983), where the claimant was discharged for being absent from work on four separate occasions without excuse or notice; (b) *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982), where the claimant was discharged for calling his supervisor a "God-damned liar"; and (c) *Douglas v. J. C. Penney Co.*, 67 N.C. App. 344, 313 S.E.2d 176 (1984), where the claimant was discharged for violating a known work rule that prohibited her from discussing security matters with sales personnel. Appellant argues that Sutton's actions are comparable to those previously found by this Court to constitute "misconduct". We disagree.

The ESC found in Finding of Fact 3, which was not objected to by the DOL, that "claimant was discharged from this job because of unsatisfactory job performance and unacceptable personal conduct." Clearly Sutton's substandard performance was reflected throughout her work and her inability to work well with others. There is no question that Sutton's performance was unsatisfactory and even deteriorated toward the end of her tenure. However, mere inefficiency, unsatisfactory conduct or unsatisfactory job performance does not amount to misconduct. *In re Kidde & Co. v.*

Bradshaw, 56 N. C. App. 718, 720, 289 S.E.2d 571, 572 (1982).

While the materials presented by DOL might have evidenced a willful or wanton disregard of the employer's interest, the facts as found by the ESC do not rise to the level of "misconduct" as previously established by this Court. Since the ESC's findings were either not objected to or supported by competent evidence, they are binding. Therefore we do not address the additional evidence proffered by DOL.

Appellant also argues that the Superior Court erred in affirming ESC's decision that "mitigating circumstances" warranted a reduction of the disqualification period from nine to four weeks. N.C. Gen. Stat. § 96-14(2a) provides that a claimant shall be disqualified from receiving unemployment insurance benefits:

For a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault connected with his work not rising to the level of misconduct. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error. G.S. § 96-14(2a).

In the instant case, ESC expressly found mitigating circumstances in Finding of Fact 33. Above, we held that Finding

of Fact 33 is supported by competent evidence. Therefore the assignment of error is overruled.

Finally, Appellant contends that ESC's failure to make necessary findings constitutes plain error. However, Appellant made no showing of how ESC committed plain error other than to argue that ESC should have made findings that were more favorable to NCDOL. We hold this argument is without merit.

The ESC complied with G.S. § 96-14(2a) when it made a finding of mitigating circumstances and reduced Sutton's disqualification to four weeks. For the foregoing reasons we conclude there was no reversible error in the Superior Court's decision affirming ESC that claimant was discharged for "substantial fault" as opposed to "misconduct" and that she should only be disqualified to receive benefits for four weeks.

Affirmed.

Judges MCCULLOUGH and BRYANT concur.

Report per Rule 30(e).