Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00140-CV

TEXAS WORKFORCE COMMISSION, Appellant

V.

WAYNE A. ARCHAMBAULT, Appellee

On Appeal from the 434th Judicial District Court
Fort Bend County, Texas
Trial Court Case No. 18-DCV-254150

MEMORANDUM OPINION

The Texas Workforce Commission determined that Wayne A. Archambault was not entitled to receive unemployment benefits. Archambault appealed that ruling to a trial court, which reversed the TWC's decision. The TWC appealed the

trial court's ruling to this Court. We reverse and render judgment for the TWC, because the TWC's decision was supported by substantial evidence.

I. Background

Wayne A. Archambault was employed by Memorial Hermann as the Director of Security from 2015 to 2018. On February 18, 2018, a hospital janitor, working for a contract company called EVS, allegedly came to work with a gun and offered to pay $150 to anyone who would kill their manager. EVS immediately suspended the janitor, no gun was found, and EVS fired him four days later. Memorial Hermann claims that its policy requires that a threat assessment be conducted immediately for a potential threat to human life and that senior security leadership be informed immediately. The threat assessment involves performing a background check on the person who made the threat and assessing the potential for any ongoing risk of violence to the organization. EVS reported the incident to Memorial Hermann security the day after the janitor was fired. That same day, Archambault conducted an internal investigation, notified Memorial Hermann's security officers, and deactivated the janitor's security access badge. On February 26, 2018, three days after Archambault learned of the incident, he informed Memorial Hermann's Regional Vice President. Archambault was terminated the next day for failing to follow company policies.

After Archambault's termination, he applied to the TWC for unemployment benefits, but his initial claim was denied because he was terminated for misconduct based on a violation of company rules and policies. Archambault appealed the initial decision to the Appeal Tribunal. *See* TEX. LAB. CODE § 212.102. The Appeal Tribunal upheld the decision that Archambault was terminated for misconduct, so he appealed the decision to the Commission Appeals. *See* TEX. LAB. CODE § 212.151(2). The Commission affirmed the Appeal Tribunal's decision and adopted its findings of facts and conclusions of law. Archambault then appealed to the Fort Bend County District Court. *See* TEX. LAB. CODE § 212.201(a). The trial court granted Archambault's second motion for summary judgment, denied the TWC's amended motion for summary judgment, and denied the TWC's motion for new trial.

II. Applicable Law

A. Standard of Review

"The trial court reviews a TWC decision de novo to determine whether there is substantial evidence to support the TWC's decision." *Tex. Workforce Comm'n v. City of Houston*, 274 S.W.3d 263, 266 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986)); TEX. LAB. CODE § 212.202(a). Any evidence that existed at the time of the hearing before the Appeal Tribunal can be heard by the trial court. *See Firemen's and Policemen's Civ. Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *G.E. Am. Comm'n v.*

Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (explaining the "substantial evidence de novo" standard of review). Determining whether the TWC's decision was supported by substantial evidence is a question of law. *City of Houston*, 274 S.W.3d at 266.

The TWC's decision is presumed valid, so the party seeking to set it aside must show it was not supported by substantial evidence. *Mercer*, 701 S.W.2d at 831; *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998). A TWC decision cannot be set aside just because the trial court would reach a different conclusion. *Mercer*, 701 S.W.2d at 831. The trial court may do so only if the TWC's decision was made "without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious." *Id.*

The summary judgment rule provides a method for a court to resolve a case that involves only a question of law. TEX. R. CIV. P. 166a(c). When both parties move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both parties and determine all questions presented. S*ee Comm'rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). "We review the trial court's judgment by comparing the TWC decision with the evidence presented to the trial court and the governing law." *Kaup v. Tex. Workforce Comm'n*, 456 S.W.3d 289, 294 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (quoting *Blanchard v. Brazos Forest Prods., L.P.*, 353 S.W.3d

569, 573 (Tex. App.—Fort Worth 2011, pet. denied)). We must decide whether the evidence presented to the trial court provided substantial evidence to support the TWC's decision. *Kaup*, 456 S.W.3d at 295.

Substantial evidence is more than a scintilla but less than a preponderance of the evidence. *Id.* Evidence that only creates a mere surmise or suspicion that the fact exists is less than a scintilla. *Regal Fin. Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010). If substantial evidence exists that supports the TWC's decision, then that decision must be upheld. *See City of Houston*, 274 S.W.3d at 267. When reviewing an agency's decision, we must look at the evidence presented to the trial court and not the agency record by itself. *Mercer*, 701 S.W.2d at 831; *Nuernberg v. Tex. Emp't Comm'n*, 858 S.W.2d 364, 365 (Tex. 1993) (agency record documents may be introduced at trial but are subject to the rules of evidence). A court reviewing the TWC's decision does not substitute its findings for that of the agency; the reviewing court does not weigh the evidence. *Kaup*, 456 S.W.3d at 295; *City of Houston*, 274 S.W.3d at 267. And we review whether the TWC applied the correct legal standard to reach its decision. *See Kaup*, 456 S.W.3d at 295 (if the decision was made without regard to the law or facts, it is subject to reversal). We render the judgment that the trial court should have rendered. *See Agan*, 940 S.W.2d at 81.

B. Misconduct

A person is disqualified from receiving unemployment compensation benefits "if the individual was discharged for misconduct connected with the individual's last work." TEX. LAB. CODE § 207.044(a). Misconduct is defined as "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees." TEX. LAB. CODE § 201.012(a). "The statutory definition of 'misconduct' requires only that the employee violate a rule or policy adopted to ensure orderly work or safety." *Kaup*, 456 S.W.3d at 295 (quoting *Murray v. Tex. Workforce Comm'n*, 337 S.W.3d 522, 525 (Tex. App.—Dallas 2011, no pet.)). Mismanagement requires intent, "or such a degree of carelessness as to evidence a disregard of the consequences, whether manifested through action or inaction." *Mercer*, 701 S.W.2d at 831.

III. Analysis

The TWC argues that the trial court erred in granting summary judgment for Archambault because there was substantial evidence to support the TWC's decision that Archambault was terminated for misconduct, disqualifying him from receiving unemployment benefits. *See* TEX. LAB. CODE § 207.044(a). By granting summary judgment for Archambault, the trial court necessarily held that there was no

substantial evidence to support the TWC's decision. Here, because the TWC's decision is presumed valid, Archambault must show it was not supported by substantial evidence. *Mercer*, 701 S.W.2d at 831.

A. Was there substantial evidence to support the TWC's decision?

1. The TWC affidavit

Archambault argues that the affidavit from the TWC did not exist at the time of the TWC's decision, so it cannot be considered as evidence. The reviewing court must ask whether evidence before the trial court shows facts that existed at the time of the TWC's decision that reasonably support that decision. *Collingsworth*, 988 S.W.2d at 708. The TWC submitted the affidavit as evidence of the policy, requiring Archambault to immediately conduct a threat assessment and notify senior security leadership, and that Archambault should have been aware of it. While Archambault denies that the policy identified within the affidavit ever existed, this argument assumes that because the affidavit did not exist at the time of the TWC's decision it should not be considered.

Archambault relies on *Kaup* for the proposition that the reviewing court does not weigh the evidence but asks instead whether the evidence introduced before the trial court shows facts that existed at the time of the TWC's decision that reasonably support that decision. *Kaup*, 456 S.W.3d at 294 (quoting *Collingsworth*, 988 S.W.2d at 708). This proposition is correct, but Archambault's application of it is not. We

look at whether the facts in the affidavit existed at the time of the TWC's decision, not whether the affidavit itself existed then. *Collingsworth*, 988 S.W.2d at 708; *see Angelis v. Tex. Workforce Comm'n*, No. 14-19-00367-CV, 2020 WL 3240951, at *3 n.1 (Tex. App.—Houston [14th Dist.] June 16, 2020, no pet.) (mem. op.). The affidavit states that threat assessment protocols were adopted by Memorial Hermann, the protocols were conveyed during meetings with Archambault, and Archambault received instructions and training on the protocols the week before the incident occurred. Because the affidavit was properly before the trial court, and it contains facts existing at the time of the TWC's decision, the timing of the affidavit is irrelevant, so Archambault's argument fails.

2. Due process

Archambault argues that he was denied due process because during the appeals process the TWC changed its justification for determining that he was terminated for misconduct. A fundamental requirement of due process is the opportunity to be heard in a timely and meaningful manner with adequate notice. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Procedural due process requires that parties receive "adequate notice detailing the reasons" giving rise to the hearing so they may adequately prepare. *Id.* If the TWC's decision has reasonable support, it is immaterial that it may have reached that decision on an erroneous theory or may have given an unsound reason for it. *See Tex. Emp't Comm'n v. Hays*, 360 S.W.2d

525, 527 (Tex. 1962); *Johnson v. Harris Cnty. Dist. Att'y's Office*, No. 01-19-00736-CV, 2021 WL 126115, *7 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (mem. op.). Archambault must produce evidence that negates all reasonable support for the TWC's decision on any ground offered. *See City of Houston v. Morris*, 23 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Section 201.012(a) defines misconduct as "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees." TEX. LAB. CODE § 201.012(a).

The TWC and the courts have reviewed the same set of facts throughout this entire process, and the TWC consistently held that Archambault was terminated for misconduct. The initial finding was that Archambault was terminated for misconduct over a violation of company rules or policy. The Appeal Tribunal determined that Archambault was terminated for misconduct based on placing the lives and property of others in jeopardy. The Commission upheld the Appeal Tribunal's decision and adopted the findings of fact and conclusions of law of the Appeal Tribunal.

Procedural due process requires that parties receive "adequate notice detailing the reasons" giving rise to the hearing so they may adequately prepare. *Goldberg*, 397 U.S. at 267. Archambault has been apprised of the facts that are the basis for the

review by the TWC and the courts since the beginning. In this context, we are considering whether the evidence introduced before the trial court was based on facts that existed at the time of the TWC's decision and that the evidence reasonably supports the decision that Archambault was terminated for misconduct. *See Kaup*, 456 S.W.3d at 294 (quoting *Collingsworth*, 988 S.W.2d at 708); *see also Hays*, 360 S.W.2d at 527.

Archambault argues that because the support for his termination for misconduct changed from a violation of company policy and rules, to placing in jeopardy the lives and property of others, to including mismanagement of his position and violation of a policy or rule, he has been denied a meaningful process. But the TWC has consistently relied on the same facts, held that Archambault was terminated for misconduct, and relied on section 201.012(a) for that determination. *See* TEX. LAB. CODE § 201.012(a). Archambault has had the opportunity to be heard in a timely and meaningful manner with adequate notice at each stage of his case on whether he was terminated for misconduct, so it cannot be said that Archambault was denied due process.

3. Misconduct

The TWC argues that there is substantial evidence in support of the TWC's conclusion that Archambault had committed misconduct as defined by the Texas Labor Code. A decision by the TWC is presumed valid, and the party seeking to set

it aside has the burden to show it was not supported by substantial evidence. *Kaup*, 456 S.W.3d at 294. Archambault makes four arguments about the TWC's misconduct finding. First, he argues that he did not place the lives and property of others in jeopardy. Second, he argues that he did not engage in mismanagement by inaction. Third, he argues that he did not violate a company policy adopted to ensure the orderly work and safety of employees. Lastly, he argues that misconduct should be construed narrowly to exclude verbal instructions.

The TWC argues that mismanagement is the basis for the neglect that placed the lives of others in danger, so we address the first two arguments together.

a. Mismanagement and placing lives in danger

Archambault posits that the TWC's determination that he was terminated for misconduct is based on his failure to immediately notify the Regional Vice President of the incident, and by not doing so, he placed people's lives in jeopardy. He argues there was no evidence presented of how or why any lives were in jeopardy by failing to notify senior management. He argues that no evidence showed that he committed misconduct by mismanaging his position with "such a degree of carelessness as to evidence a disregard of the consequences." *Mercer*, 701 S.W.2d at 831. To the contrary, Archambault argues that the same day he was notified of the incident, he informed his security officers of the threat, deactivated the employee's security badge, and began an internal investigation. Three days after learning of the incident,

Archambault informed the Regional Security Vice President. He also maintains that there was no policy that he failed to adhere to.

Mismanagement requires intent or such a degree of carelessness that shows a disregard of the consequences. *Id.*; *see Elgohary v. Tex. Workforce Comm'n*, No. 14-09-00108-CV, 2010 WL 2326126, *4 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (mem. op.) (holding that when an employee is aware of requirements from an employer and does not follow those requirements, that employee can be said to be so careless as to show a disregard of the consequences for failing to comply).

Archambault describes the role of Security Director as having "complete operational control of all security at Memorial Hermann." Archambault was notified of the solicitation for murder five days after it occurred.[1] The janitor who made the threat was fired by EVS before Archambault was notified. Archambault admitted that he did not take the report of the incident seriously, and he did not believe the incident rose to a level of immediate attention or notification without more information. He then went home for the weekend and did not follow up on the incident until the following Monday.

Archambault argues that for the TWC's determination to be supported there must be evidence establishing that Memorial Hermann's Regional Vice President

[1] Appellee's brief describes it as six days after the incident, but the date of the incident was February 18, 2018, and the date Archambault was informed was February 23, 2018.

had the power to mitigate any related risk, or establishing how reporting the incident to the Regional Vice President three days after he found out placed lives at risk. Archambault asserts that absent such evidence the delay of notifying a supervisor does not justify a determination that lives were placed in jeopardy, so any determination made by the TWC relying on that logic is arbitrary and unsupported.

Archambault must show that there was not substantial evidence to support the TWC's decision. *Mercer*, 701 S.W.2d at 831. The affidavit submitted by the TWC and the affidavit of Archambault provide details of a violent threat against a person's life. There was also evidence submitted—an affidavit by Archambault's former supervisor, the Memorial Hermann Health System Policy, and the Memorial Hermann disciplinary records—showing that Archambault should have been aware of Memorial Hermann's policy on threat assessments, the steps required by that policy, and the possibility of discipline for not following any policy. Even though Archambault took action, he did not take the threat seriously and did not follow the company's procedures for when a life has been threatened. *See* TEX. LABOR CODE § 201.012(a); *Elgohary*, 2010 WL 2326126, at *4.

When reviewing the TWC's decision, it does not matter whether there was contrary evidence presented because we do not reweigh the evidence and substitute our findings. *See Kaup*, 456 S.W.3d at 295, 298. Instead, we only consider whether there is more than a scintilla of evidence in support of the TWC's decision. *Id.* at

295. Here, there was an affidavit stating that a policy existed, requiring Archambault to immediately conduct a threat assessment and notify senior security leadership, and that Archambault should have been aware of it. *See Burton v. Tex. Emp't Comm'n*, 743 S.W.2d 690, 693 (Tex. App.—El Paso 1987, writ denied) (considering affidavits that stated an employee was given specific instructions and that she violated policy when she did not follow those instructions); *see also Edwards v. Tex. Tex. Emp't Comm'n,* 936 S.W.2d 462, 467–68 (Tex. App.—Fort Worth 1996, no writ) (considering evidence of a policy's existence absent evidence of there being a written copy of the policy). Implicit in the TWC's ruling is the rejection of Archambault's argument that the policy in dispute did not exist. The reviewing court may not set aside a decision by the TWC simply because it would have reached a different conclusion. *Mercer*, 701 S.W.2d at 831. The evidence is more than a scintilla, supporting the decision that Archambault was aware of a policy that required him to take specific time-limited actions, and by not adhering to those requirements it showed a careless disregard for the consequences of failing to comply and that neglect endangered lives. Because the evidence provided to the trial court, based on existing facts at the time of the TWC's decision, are more than a scintilla, Archambault has not satisfied his burden.

We sustain the TWC's sole point of error. Because of our disposition on this point of error, we need not address TWC's remaining arguments. TEX. R. APP. P. 47.1.

IV. Conclusion

Because substantial evidence supported the TWC's decision, the trial court erred by granting Archambault's motion for summary judgment and denying the TWC's motion for summary judgment. Accordingly, we reverse the trial court's judgment and render judgment affirming the TWC's decision that Archambault is not entitled to unemployment benefits.

Sarah Beth Landau
Justice

Panel consists of Justices Goodman, Landau, and Countiss.