

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001111-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CI-00579

NGA NGUYEN-TRAN and TOPY
CORPORATION

APPELLEES

& NO. 2002-CA-001154-MR

TOPY CORPORATION

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NGA NGUYEN-TRAN and
KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. The Kentucky Unemployment Insurance Commission (Commission) and Topy Corporation (Topy) appeal from an order entered by the Franklin Circuit Court on May 10, 2002, which reversed the Commission's decision denying unemployment benefits to the appellee, Nga Nguyen-Tran (Tran). The Commission and Topy contend that the Commission's decision was supported by substantial evidence and that the circuit court erred in substituting its opinion for that of the Commission. Topy also challenges the jurisdiction of the circuit court at the threshold level. Having reviewed the record, we find no error. Thus, we affirm.

Tran was employed by Topy in November 1997. She was assigned to move steel posts, work that was too demanding for her physically and which caused her considerable pain. After complaining to her supervisors, she received lighter work. Because of a shortage of other workers, Tran was later re-assigned to her original work area. Near the end of September 2000, Tran told her employer that she could no longer perform the work. She agreed to continue the job for two weeks. On October 13, 2000, Tran consulted a doctor about the symptoms she was suffering as a result of the heavy manual labor she was performing. She returned to work with a statement from the doctor containing several restrictions, which included no

lifting, pulling, or pushing anything weighing more than ten pounds. Hoping to be assigned to lighter work, Tran was instead told to turn in her uniform and to sign a "quit job paper."

On October 23, 2000, Tran filed a claim for unemployment benefits. On November 8, 2000, the Division of Unemployment Insurance (Division) issued a notice of determination finding that Tran had voluntarily quit her employment without good cause and that she was disqualified from receiving benefits.

She appealed that determination to an unemployment insurance referee. The referee conducted a hearing on two dates – December 4, 2000, and February 19, 2001. Topy did not offer any evidence on the first day and did not send a representative to the second day of the hearing. Finding that Tran was entitled to unemployment benefits, the referee held as follows:

[W]ithout notice or explanation, claimant was moved to the input area to move steel case wheels on to a conveyor belt on or about the end of September 2000.

Immediately into the job, claimant began to develop headaches, pain in her arm, and shoulder. Claimant complained to Tommy Sharp, line leader, that she could not perform the duties in the input area. The work was hard with the continuous lifting and pulling of her muscles. Claimant continued to complain and was told to perform her job.

Within days of claimant's last day of work, she again made it known to Mr. Peacock

[Tran's supervisor] and Jim Nelson, personnel manager, her pain was unbearable to continue working, but management would not listen to claimant's request. On October 13, 2000, claimant's pain did not diminish. Claimant scheduled an appointment with Health Works. Claimant was placed on restrictions of no lifting and no lifting over the shoulders. Claimant was advised to seek physical therapy and prescribed medication to relieve her pain.

Claimant's last plea to be transferred to her regular position was not acknowledged. Again, management would not adhere to her request. Claimant realized she had no other choice but to sever her employment effective October 13, 2000.

DECISION: The determination is set aside. Claimant voluntarily left the employer with good cause attributable to the employment and is not disqualified from benefits. . . .

. . . .

A worker acts reasonably, and with good cause, when quitting unsuitable work. A quitting occasioned by the unsuitability of work is attributable to the employment. Work becomes unsuitable whose character is unilaterally altered by the employer to the material disadvantage of the worker.

In this case, the claimant's employment dramatically changed when Mr. Peacock assigned claimant duties that resulted in severe pain in her left arm. Claimant experienced headaches, illness, and was placed in therapy and prescribed medication. The employer was not present to provide testimony. In the absence of the employer, the claimant has met the burden of proof that the working conditions were unsuitable. Within the meaning of the law, it is held the claimant voluntarily quit with good

cause attributable to the employment.
(Emphasis added.)

Topy appealed the referee's decision. The Commission entered its own findings of fact, reversing the referee and concluding that Tran did not quit for good cause:

In late September 2000, [Tran] was assigned to the sanding area, a lighter duty job, for two shifts. Then she was reassigned to inspecting for two shifts. Thereafter she was reassigned to the input area. She again complained to Mr. Peacock and to Mr. Nelson, personnel manager, that she could not continue to work in the input area because the job was causing her pain. Mr. Nelson recommended that she see a doctor for treatment. Claimant did not attempt to see a doctor then because she did not want to miss work to do so. By missing work she thought she would lose an attendance bonus day. Claimant continued to work until the morning of October 13, 2000, when she quit the employment.

After she had already quit the employment, claimant saw a doctor on the afternoon of October 13, 2000. He treated her for muscle strain of her left arm and shoulder and placed restrictions on her activities of no lifting over ten pounds, no pushing or pulling over ten pounds and no lifting above her left shoulder. Thereafter she returned to the work site to give the employer paper work from the doctor's office. She made no attempt to return to work.

. . .

In this case, claimant quit her job on the morning of October 13, 2000 **before** seeking medical treatment. She had not been medically advised to quit the employment. Although the work in the input area may have caused her physical problems the evidence is

insufficient to show that she had no reasonable alternative to quitting the employment. If she had gone to the doctor earlier, as recommended by the personnel manager, she possibly could have returned to the employer with a statement of her medical restrictions and been placed on lighter duty work until released from restrictions by the doctor. Instead of going to the doctor earlier, as recommended by the personnel manager, claimant chose to remain working rather than risk losing an attendance bonus day. If she were truly unable to do the assigned work, she surely would have gone to the doctor earlier. She has failed to prove that she had good cause attributable to the employment for quitting her job. (Emphasis in original.)

The Commission held that Tran was not entitled to unemployment benefits and ordered that she repay the Division the sum of \$6,996.00.

The Commission's order was mailed to Tran on April 17, 2001. She requested reconsideration. The Commission denied her motion in an order entered April 24, 2001. Both orders set forth Tran's right to seek judicial review within twenty days as provided by KRS¹ 341.450(1). On May 14, 2001, within twenty days of the Commission's last order, Tran filed a verified complaint in the Franklin Circuit Court seeking review of the Commission's decision.

The appellants immediately moved to dismiss the appeal as untimely. They contended that Tran was required to seek

¹ Kentucky Revised Statutes.

judicial review within twenty days of the Commission's original decision rather than twenty days from the subsequent order denying the motion for reconsideration. Their argument was based on 787 KAR² 1:110, §3(6)(b), which reads:

An application for reconsideration of a decision of the commission shall not stay the running of time for appeal to the circuit court if the application is denied.

Because Tran's complaint was filed more than twenty days after the original order, the appellants argue that the circuit court was compelled to dismiss the appeal.

In an order entered on June 28, 2001, the court rejected the appellants' argument, finding that the administrative interpretation of the pertinent regulation was arbitrary and that it violated Tran's right to due process. It also determined that KRS 341.450 was ambiguous with respect to which decision should be used for appeal purposes, holding that the pertinent statute could not be construed to bar the appeal.

After disposing of the jurisdictional hurdle, the court then reversed the Commission as to the merits of the appeal. In a thorough and well-reasoned opinion, the court concluded as follows:

The Commission's Order denying benefits focuses on the fact that Tran went to the doctor only after she quit. The Commission did not consider whether the injury to Tran

² Kentucky Administrative Regulations.

was good cause, but merely that she did not seek advice from a physician until after she had quit. The Commission accepted TOPY's position that Tran's not seeing a physician prior to quitting was sufficient evidence to establish Tran quit voluntarily without good cause. The Commission and TOPY correctly state that Tran had the burden of proof to establish she quit for good cause. See *Kentucky Unemployment Ins. Comm'n v. Murphy*, Ky., 539 S.W.2d 293, 294 (1976). The evidence in this case is largely undisputed. The employer submitted no evidence on the record. The record reveals that Tran told her employer the job task was too strenuous causing her health to deteriorate. The employer acknowledged this by moving the employee but then shifted her back to the original task because of a shortage of employees. She proceeded to tell her employer that she shall have to quit due to health reasons unless something changes. She quit her employment and on the same day, after quitting, obtained a doctor's opinion stating the work was too strenuous and placing her on lifting restrictions incongruous with the former position. The record indicates the employer chose to place Tran in this labor intensive [position] because of an employee shortage. No evidence in the record indicates a contrary reason.

The issue presented to the Commission was whether Tran was faced with "circumstances as to leave no reasonable alternative but loss of employment." 539 S.W.2d at 294. "The primary key in resolving conflicts such as this must be based on who causes the employee to quit." *Kentucky unemployment Inc. Com. V. Melvin's Grocery Co.*, Ky.App., 696 S.W.2d 791, 792 (1985). An individual may not be held to have quit voluntarily unless that decision stems from one's own choice or full consent. See *Nichols v. Kentucky Unemployment Comm'n*, Ky.App., 677 S.W.2d 317, 321 (1984).

"Unemployment compensation is social legislation adopted into statutory law designed to afford protection to those workers who become unemployed through no fault of their own." *Gatliff Coal Co. v. Anderson, Ky.*, 814 S.W.2d 564, 565 (1991). Did Tran quit voluntarily or was she forced to quit because her employer placed her into a position her body could not withstand. We believe that in answering this question the Commission incorrectly focused on whether she should have sought medical treatment before quitting.

It is a rare thing when we are presented with a record that compels the Court to make a finding contrary to that of the Commission. However, this is such a case. The evidence of record was exclusively supplied by Tran at the administrative level and mandates a finding in her favor. That evidence of record is that she was placed in a position that caused her great pain because of the lifting required. She complained and was temporarily moved to a less labor-intensive position. However, TOPY was experiencing employee shortages which lead to Tran's being placed back in the manually intensive input department. The record further reveals that Tran warned of her impending resignation because of the pain she suffered. She was forced to quit and sought the advice of a physician who placed lifting limitations upon Tran that made a return to the input position impossible. The physician also affirmatively established that work at the input department was far too intense for Tran's body. The record compels a finding that Tran was placed in the Scylla or Charybdis quandary of doing serious harm to her body by continuing or quitting. She is also a Vietnamese immigrant with little mastery of the English language, evidenced in by [sic] use of an interpreter at her hearing. Her understanding of cultural mores in the

American workplace was likely limited as well. We find that the determination of the [Commission] is clearly not supported by substantial evidence on the record and, indeed, compels a finding contrary to that of the Commission.

These appeals follow.

We shall first address Topy's argument that Tran's appeal was untimely and that it should have been dismissed accordingly. Topy argues that the court departed from abundant case law characterizing as fatal the failure to comply strictly with statutory provisions for obtaining judicial review of an agency's decision. See, e.g., Taylor v. Duke, Ky.App., 896 S.W.2d 618, 621 (1995), and Board of Adjustments v. Flood, Ky., 581 S.W.2d 1 (1978). We agree with the court's ruling that the appeal was timely pursuant to the statute. The pertinent portion of KRS 341.450(1) provides as follows:

Except as provided in KRS 341.460, within twenty (20) days after the date of the decision of the commission, any party aggrieved thereby may, **after exhausting his remedies before the commission**, secure judicial review thereof by filing a complaint against the commission in the Circuit Court of the county in which the claimant was last employed by a subject employer whose reserve account or reimbursing employer account is affected by such claims. (Emphasis added.)

Topy contends that the statute contains an "unqualified requirement" that a claimant seek review within twenty days after the initial decision. That interpretation

misconstrues the subsequent, unequivocal statutory language that a claimant be allowed to exhaust all his available administrative remedies. Those remedies include the filing of a motion to reconsider. Thus, the statute encompasses the extra time needed to file and to await an order on a motion to reconsider. It contains two alternate time frames from which the twenty days might run: (1) "after the date of the decision of the commission" or (2) "after exhausting ... remedies before the commission" The second participial phrase would be a mere redundancy or worthless surplusage unless it be construed to provide a claimant the opportunity to pursue the last possible recourse of review before the commission. Procedurally, that final step is the filing and adjudication of a motion for reconsideration.

Constitutional due process guarantees and indeed mandates the right of a claimant to exhaust such an administrative alternative. If -- instead of actively pursuing and implementing her remedies -- Tran had neglected to exhaust a remedy (a failure that arguably would have barred access to the courts), that omission most assuredly would have been cited by the Commissioner and Topy to raise a jurisdictional bar. Due process will not tolerate the denial of meaningful access to judicial review by arbitrary manipulation of administrative procedures. The court has ruled recently that administrative

agencies cannot erect procedural barriers that effectively create arbitrary impediments to meaningful judicial review of their final actions.

Next, both appellants complain that the trial court abused its discretion by substituting its opinion for that of the Commission. They argue that the record adequately supports the finding of the Commission that Tran quit her job before seeking medical attention and its conclusion that she voluntarily quit her job without good cause. We disagree.

Judicial review of unemployment issues:

is governed by the rule that if the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law.

Raines v. Kentucky Unemployment Insurance Commission, Ky.App., 669 S.W.2d 928 (1983). The court carefully and extensively analyzed the standard governing its role in reviewing agency action. It was wholly aware of the proper parameters of its authority and discretion. It is true that it made findings not previously addressed by the Commission -- findings which addressed Tran's national origin, her difficulty in communicating in the English language, and her lack of knowledge concerning the culture and mores of the workplace. However, these expanded findings in no way contradicted the findings of

the Commission. They were just, humane, and legitimate observations as to the circumstances affecting her ability to cope with her dilemma -- certainly relevant to the issue of whether her departure was attributable to the nature of the employment. A reviewing court is not required to mirror the exact language employed by the agency. See, Kentucky Board of Nursing v. Ward, Ky.App., 890 S.W.2d 641 (1994). The court correctly applied the substantial evidence standard set forth in Raines and was accordingly compelled to set aside the deficient findings of the Commission.

The appellants rely on the fact that Tran quit her job before seeking medical attention. They argue that the Commission correctly characterized this action as detrimental to her claim and that the court erred in overruling the Commission on this point. They have cited cases from other jurisdictions holding that an employee who quits for health reasons is not entitled to benefits unless he is able to document that he was advised by a physician to do so prior to actually quitting. See e.g. Green v. Unemployment Compensation Board of Review, 68 Pa. Commw. 101, 448 A.2d 118 (1982).

Kentucky law has no requirement of a doctor's advice as a condition precedent for a worker to quit a physically harmful job in order to establish "good cause." Rather, as the court correctly stated, "good cause" is established when the

worker is confronted with "circumstances so compelling as to leave no reasonable alternative but loss of employment." (Opinion of the court, citing Murphy, supra at 294). See also, Raines, 669 S.W.2d at 928, and Nichols, supra, 321. There is absolutely no evidence in the record to support the Commission's finding that if Tran had gone to the doctor earlier, Topy might have accommodated her condition by placing her in a light-duty position. On the contrary, the evidence amply demonstrated that Topy deliberately placed her back in an impossible assignment after it had become fully aware of its detrimental impact on her health.

Additionally, as distinguished from the cases cited by appellants from other jurisdictions, Tran communicated her impaired condition to Topy and sought accommodation prior to quitting. The appellants countered that she attempted "to hide the ball from the employer by withholding evidence of a medical condition." Nothing in the record supports that allegation.

The evidence of record does reveal that Tran informed her superiors that her workload was too strenuous and that it was causing her serious problems. She warned them that she would have to quit if they did not change her work. She continued to work for two weeks and then consulted the doctor to whom Topy had referred her. She returned to Topy from the doctor's office with a statement advising that she could not

perform the lifting tasks assigned to her. She anticipated that she would be reassigned. Instead, she was told to turn in her uniform and to sign a "quit job paper." The evidence is uncontradicted that Topy was intransigent in its unwillingness to accommodate her reasonable needs. Thus, the court correctly determined that Tran was left with no reasonable alternative but to terminate her employment in order to preserve her health.

Finally, Tran cannot be disqualified from receiving unemployment benefits because she did not seek workers' compensation benefits or file a grievance. As the entire record demonstrates, there is no evidence to indicate that any action taken by Tran would have affected Topy's treatment of her.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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