RENDERED: JULY 29, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000576-MR

MICHAEL J. MILESKO — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-003632

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND TRILLIUM INDUSTRIES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

HENRY, JUDGE: Michael Milesko appeals from an opinion and order of the Jefferson Circuit Court affirming the Kentucky Unemployment Insurance Commission's denial of unemployment benefits. Upon review, we affirm.[1]

[1] Trillium raises the argument that it is not a proper party to this appeal because of a confidential settlement agreement it reached with Milesko in a related action. However, because of our ultimate disposition of this case, and because we have been presented with conflicting versions of what this agreement actually says but nothing of an evidentiary nature to support either argument, we will not consider Trillium's argument here.

Milesko was employed by Trillium Industries, Inc. from June 13, 1999 to December 5, 2000 as a repair technician. Trillium has a point-based attendance policy that results in points being awarded or taken away based upon an employee's timeliness in reporting for work. Every employee begins his or her employment with ten points, and for every unexcused tardy, early leave, or absence, points are deducted from the employee's total. Specifically, one-half of a point is deducted for tardies or early-leaves, and two points are deducted for each absence. Employees have the right to appeal any points deducted. Up to two points are added to the employee's total for each month that he or she has no unexcused absences or tardies. Employees receive an oral warning when their total is down to six points, a written warning at four points, and a final warning at two points. When all points are exhausted, the employee is terminated.

On November 13, 2000, following multiple oral and written warnings about excessive tardiness, Milesko's immediate supervisor, Robert Couvillion, issued a final written warning to Milesko, informing him that he had only 1.5 points remaining. On December 4, 2000, Milesko was presented with a time sheet showing that he was tardy by seven or more minutes for each of the work days of the previous week. He was terminated from his employment the next day due to the alleged multiple violations

of Trillium's attendance policy that had resulted in an exhaustion of all of his available points.

Following his termination, Milesko filed for unemployment benefits. Following an investigation by the Division of Unemployment Insurance, a notice of determination was issued on December 29, 2000 awarding him benefits, finding that Milesko was terminated for reasons other than misconduct connected with his work. Specifically, the determination noted that there was a problem with the accuracy of the Trillium time clock and that Trillium's attendance policies were not uniformly enforced. Trillium appealed this determination, and on March 22, 2001, the Division Referee reversed the unemployment insurance determination, denying Milesko benefits after finding that his termination was due to misconduct connected with his work, specifically, the multiple tardies on his record. Milesko appealed this decision to the Commission, but the Commission affirmed the Division Referee's decision in a May 8, 2001 order that adopted the Referee's findings of fact and conclusions of law (with some modification and expansion) as its own.

On May 25, 2001, Milesko filed a complaint in the Jefferson Circuit Court seeking a reversal of the Commission's decision that he was ineligible for unemployment benefits. Milesko specifically alleged that the actions taken by his supervisor as to the assessment of points, which ultimately led

to his discharge, were in retaliation for his assisting his fellow employee in her sexual harassment claim. He further alleged that the Commission's order was arbitrary and unsupported by the evidence presented at the administrative level. The trial court issued an opinion and order on February 19, 2004 affirming the Commission's ruling. This appeal followed.

As a general rule, our review of an administrative agency's adjudicatory decision is limited to a primary concern with the question of arbitrariness. Thompson v. Kentucky Unemployment Ins. Com'n, 85 S.W.3d 621, 624 (Ky.App. 2002) (Citation omitted); Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830, 834 (Ky.App. 1998) (Citation omitted). "CR[2] 52.01 requires that, in appeals of administrative agency decisions, appellate courts review the determinations of the circuit courts for clear error." Fayette County Board of Education v. M.R.D. ex rel. K.D., 158 S.W.3d 195, 201 (Ky. 2005) (Citation omitted). We cannot make our own findings of fact, as the administrative agency is charged with fact finding, or substitute our judgment for that of the agency unless the latter acted in an arbitrary and capricious manner. Piper v. Singer Co., Inc., 663 S.W.2d 761, 763 (Ky.App. 1984).

[2] Kentucky Rules of Civil Procedure.

More specifically, judicial review of the Commission's decision here is governed by the rule that if the Commission's findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding. It is then our duty to determine whether or not the Commission has applied the correct rule of law. Thompson, 85 S.W.3d at 624 (Citations omitted); Kosmos Cement Co. v. Haney, 698 S.W.2d 819 (Ky. 1985) (Citations omitted); Raines v. Kentucky Unemployment Ins. Comm'n, 669 S.W.2d 928, 929 (Ky.App. 1983) (Citation omitted). "Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people." Thompson, 85 S.W.3d at 624 (Citations omitted). "If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary." Id. (Citations omitted). "A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence." Id. (Citations omitted); see also Johnson v. Galen Health Care, Inc., 39 S.W.3d 828, 832 (Ky.App. 2001) (Citations omitted). We are instead "limited to review[ing] the record made before the [Commission], and, where it has found against [the appellant], the findings of fact of the [Commission] will not be disturbed unless the evidence is so

persuasive that one would have no choice but to find for [the appellant].” Johnson, 39 S.W.3d at 832. (Citation omitted). “It is beyond the review of this Court to determine the facts of the case. That is the province of the Committee.” Id. at 832-33. Accordingly, the burdens that must be overcome by Milesko here in his challenge of the findings of fact and legal conclusions rendered by the Commission are substantial ones.

Our review of the administrative record compels us to find that the Commission’s findings of fact are supported by substantial evidence of probative value under the standards set forth above. Milesko alleges that the real reason for his termination is that he assisted a fellow employee with a sexual harassment complaint by providing her with a written statement. After this, he alleges that he was harassed by his supervisor, Robert Couvillion, and unfairly treated differently than other employees. Milesko also argues that a cause for many of his occasions of tardiness was the fact that the electronic time clock used for employees to punch-in at Trillium was constantly malfunctioning and that, although he told his supervisors of this problem, it was never corrected.

As specifically noted by the trial court and the Commission, evidence in the record indicates that Milesko lost attendance points because his time cards reflected that he was habitually tardy for work by seven or more minutes. Trillium

representatives testified that Milesko was the company's only employee who had time sheets that reflected persistent tardiness of seven or more minutes per day, a problem that became particularly acute in the week before his termination. Moreover, Trillium employees, including Milesko, were specifically told by management that, because of consistent issues with the internal clock of the company's electronic time keeping system, they should allow extra time to arrive at work, to punch-in, and to be at their workstations by 7:00 a.m. so that there would be no question of their tardiness. They were also told that tardiness would be determined based upon the punch-in time recorded by the time clock, and not by what any visible clock indicated their punch-in time to be.[3] Testimony was also presented that the time clock was regularly checked by Trillium's IT department, and that the clock was generally off by only one to two minutes. The administrative record further reflects that Milesko was given repeated oral and written warnings, and a final warning concerning his persistent tardiness and the fact that it would not be tolerated, consistent with the findings of the Referee and the Commission. Despite this fact, Milesko engaged in the repeated practice of

[3] The time clock in question here apparently did not have a face by which the punch-in time could be determined, nor did it produce any immediate tangible record by which an employee could determine the time the clock recorded as his punch-in time. Despite this fact, evidence in the administrative record shows that no other employee was considered late as often as Milesko, even though all employees used the same time clock to punch in.

arriving to work at approximately 6:50 a.m., only to then sit in his car and listen to the radio until he went to clock in. Along with blaming the time clock for his tardiness, testimony showed that Milesko also used as excuses his being a single parent or being held up at a train crossing.

Moreover, the record reflects that, even though Milesko believed that Couvillion was "against him," he did not approach any other management or human resources personnel about this belief, nor did he utilize Trillium's written appeal procedures to appeal any points deducted from his total for tardiness or any disciplinary actions taken against him. The record further reflects, contrary to Milesko's assertions, that he actually was originally afforded the opportunity, on occasion, to work late to make up for tardiness, but was eventually denied this privilege because his tardiness had become habitual, and he did not appear to be making any efforts to correct it. The record further shows that Milesko was also originally afforded the opportunity to use personal leave time to make up for any time lost to tardiness, but that this privilege was also eventually denied once Couvillion determined that it was being abused.

As to Milesko's accusations that he was terminated because he supplied a fellow employee with a statement pertaining to her alleged sexual harassment, a Trillium

representative, Meredith Tervree, testified below that Trillium never received any statement from Milesko about that matter. Tervree further testified that the company's internal investigation into the matter did not involve Milesko or any statements from Milesko, and that the company had no way of knowing that he had actually supplied a statement because the matter was never litigated. Tervree also testified that neither she nor Couvillion had any personal knowledge that Milesko had given such a statement.

Consequently, even accepting, as the Commission did, that there is conflicting evidence in the record supporting Milesko's version of the case, after our review of the administrative record, we must defer to the Commission's factual findings as to the grounds for Milesko's termination because they are supported by substantial evidence under the standards set forth above. Accordingly, they must be accepted as binding on this court.

We must next determine if the correct rule of law was applied in light of these findings of fact. KRS 341.370(1)(c) provides that a benefit disqualification is justified if the employee "has been discharged for misconduct connected with his most recent work." As noted by the trial court and the Commission, in Broadway & Fourth Ave. Realty Co. v. Crabtree, 365 S.W.2d 313 (Ky. 1963), this state's highest court held that

"[h]abitual tardiness in the face of warnings in reporting for work constitutes misconduct which disqualifies a claimant from receiving benefits." Id. at 314 (Citations omitted); see also KRS 341.370(6). Given that a misconduct allegation is in the nature of an affirmative defense to an employee's benefit claim, and although the employee bears the ultimate burden of proof and persuasion, the employer has the burden of proving misconduct under the statute. Shamrock Coal Co., Inc. v. Taylor, 697 S.W.2d 952, 954 (Ky.App. 1985) (Citation omitted).

For reasons noted above, we believe that Trillium met its burden of proving misconduct—specifically, habitual tardiness—on the part of Milesko. As habitual tardiness is a ground for disqualification from receiving benefits, we must conclude that the Commission applied the "correct rule of law" here.

Milesko finally offers an argument that his rights to due process were violated on the administrative level because of the way in which the Commission handled a number of evidentiary matters and because of its supposed failure to follow through on his request to subpoena witnesses. However, Milesko raised no due process arguments before the circuit court. Accordingly, we find that they are not preserved for review here. To the extent that Milesko's arguments can be construed as an objection to the Commission's decisions as to which items to include or exclude

in the record as proper evidence, we believe that these decisions are best left to the discretion of the Commission, and we find no indication that this discretion was abused. See Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 530 (Ky. 1973). As to Milesko's complaint that the Commission failed to follow through on his request to subpoena witnesses, 787 KAR[4] 1:110 Section 4(1) indicates that subpoenas "shall be issued only upon a sworn statement by the party applying for the issuance thereof setting forth the substance of the anticipated proof to be obtained and the need therefore." Milesko failed to meet this requirement. Instead, he merely sent a fax to the Division of Unemployment Insurance Appeals Branch requesting that certain individuals be made available to testify on his behalf. Even with this failure, the Referee still attempted to contact Milesko's proposed witnesses during the hearing on this matter. Consequently, we find no error here.

The opinion and order of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

[4] Kentucky Administrative Regulations.

BRIEF FOR APPELLANT:

Sherry Howard Long
Louisville, Kentucky

BRIEF FOR APPELLEE:

Tamela A. Biggs
Frankfort, Kentucky

Lisa C. Hester
Louisville, Kentucky