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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002141-MR

JAMES P. COUCH — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 03-CI-00012

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION; AND SECURITY CONSULTANTS GROUP — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY,[1] JUDGES.

JOHNSON, JUDGE: James P. Couch has appealed from a judgment of the Breathitt Circuit Court entered on September 20, 2004, which affirmed a decision of the Kentucky Unemployment Insurance Commission (KUIC) which had denied Couch unemployment insurance benefits. Having concluded that the KUIC's factual findings were supported by substantial evidence but that it misapplied

[1] Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Supreme Court of Kentucky. Release of the opinion was delayed by administrative handling.

the law to the facts as found, we reverse the circuit court and remand this matter for entry of a new order consistent with this Opinion.

Couch was hired by Security Consultants Group (SCG) on September 20, 2001, as a security guard at the Social Security Administration office in Pikeville, Kentucky. He worked at the Pikeville office for eight months and was then transferred to the Jackson, Kentucky, office where he was employed until his termination on August 23, 2002.[2]

Couch's employment with SCG was contingent upon his passing a General Services Administration (GSA) test. Employees are given two opportunities to pass the examination before being terminated from employment.[3] Couch was given two opportunities to pass the test, and after failing both attempts he was terminated from his employment with SCG.

Following his termination from SCG, Couch applied for unemployment benefits. Couch was denied benefits in a Notice of Determination dated September 17, 2002, after the KUIC determined that he had been discharged for misconduct and therefore was not eligible for unemployment benefits. Couch

[2] The employer states that Couch's termination date was August 26, 2002; however, Couch filed his application for unemployment benefits on August 25, 2002. In any event, the exact date of his termination is not relevant to this appeal.

[3] After an employee is terminated for failing the examination, he can retake the examination one year from the date he failed the second test.

appealed the determination and the Referee also found he was not eligible for unemployment benefits. However, in categorizing Couch's termination from SCG the Referee determined Couch had "voluntarily left the employment without good cause attributable to the employment." Couch appealed the Referee's decision to the KUIC, which affirmed the Referee's decision in an order dated December 27, 2002.

Pursuant to KRS[4] 341.450(1),[5] Couch filed a petition for judicial review of the KUIC decision in the Breathitt Circuit Court on January 16, 2003. In an order entered on September 20, 2004, the circuit court affirmed the KUIC's decision and noted that the purpose of its review of a decision by the KUIC is not to reinterpret the facts of the case but to determine if the KUIC correctly applied the law to the facts of the case. This appeal followed.

A finding of fact made by an administrative agency must be affirmed by the reviewing court if it is supported by substantial evidence; and the agency's determination must be affirmed if it has applied the correct rule of law to the facts.[6]

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[4] Kentucky Revised Statutes.

[5] KRS 341.450(1) provides in relevant part that a party aggrieved by a decision of the KUIC concerning unemployment benefits may, after exhausting administrative remedies, secure judicial review by filing a complaint against the KUIC in the circuit court of the county where the claimant was last employed.

[6] Brown Hotel Co. v. Edwards, 365 S.W.2d 299, 302 (Ky. 1962). See also H & S Hardware v. Cecil, 655 S.W.2d 38, 40 (Ky.App. 1983).

"The test of whether evidence is 'substantial' is 'whether taken alone or in light of all the evidence' . . . it has sufficient probative value to induce conviction in the minds of reasonable [people]" [citation omitted].[7] 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.[8] Furthermore, "'the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.'"[9] A court's function in administrative matters is one of review, not reinterpretation.[10]

In this Commonwealth, it is well-settled that "[g]ood cause" for purposes of determining if an employee voluntarily left suitable employment "exists only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment."[11] Further, "voluntary" connotes a decision to quit that is "'freely given'" and

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[7] Blankenship v. Lloyd Blankenship Coal Co., 463 S.W.2d 62, 64 (Ky. 1970).

[8] Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 855 (Ky. 1981).

[9] Transportation Cabinet, Dept. of Highways, Commonwealth of Kentucky v. Thurman, 897 S.W.2d 597, 600 (Ky.App. 1995) (quoting Commonwealth, Transportation Cabinet, Dept. of Vehicle Regulation v. Cornell, 796 S.W.2d 591, 594 (Ky.App. 1990)).

[10] Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250, 251 (Ky.App. 1983); Piper v. Singer Co., Inc., 663 S.W.2d 761, 763 (Ky.App. 1984).

[11] Barren River Mental Health-Mental Retardation Board, Inc. v. Bailey, 783 S.W.2d 886, 888 (Ky.App. 1990). See also Murphy v. Kentucky Unemployment Insurance Commission, 694 S.W.2d 709 (Ky.App. 1985).

"'proceeding from one's own choice or full consent.'"[12] A claimant who voluntarily leaves his employment bears the burden of showing that he did so for good cause attributable to his employment.[13]

In the case before us, Couch argues that he did not voluntarily quit his employment and, therefore, he should be entitled to unemployment compensation benefits. As a basis for denying Couch unemployment benefits, the KUIC and the circuit court have relied upon Murphy, where an insurance agent understood that in order to continue his employment he was required to obtain a license by successfully passing a state examination. Murphy failed the examination and his employment was terminated due to the fact that he had not fulfilled a condition of his employment.

In affirming the determination that Murphy was not entitled to unemployment benefits, this Court placed great reliance on Davies v. Mansbach,[14] even though Davies involved a breach of an employment contract and not a claim for

[12] Nichols v. Kentucky Unemployment Insurance Commission, 677 S.W.2d 317, 321 (Ky.App. 1984) (quoting Kentucky Unemployment Insurance Commission v. Young, 389 S.W.2d 451, 453 (Ky. 1965) where the Court held that it was improper to deny unemployment compensation benefits to an employee who was required to retire from his employment at age 65; "the word 'voluntary' must certainly be defined as meaning 'freely given' and 'proceeding from one's own choice or full consent'").

[13] Kentucky Unemployment Insurance Commission v. Day, 451 S.W.2d 656, 657 (Ky. 1970).

[14] 338 S.W.2d 210 (Ky. 1960).

unemployment compensation benefits. Davies was employed by the Mansbach family to set up and manage Mansbach Steel Company, a family-owned-and-operated scrap-metal business. Davies was given broad discretion to enter into purchase contracts and contracts of sale on behalf of Mansbach Steel Company. Davies agreed to perform the services of general manager to the best of his ability and to devote his skill for the advantage of the steel company. After serving as general manager for two years, the Mansbachs requested Davies's resignation for the breach of his commitment to exert his utmost skill to benefit the company's best interests.[15]

Relying on Davies, the Court in Murphy stated that "an employee may be released should he display conduct indicative of unskillfulness or incompetence."[16] Certainly, Murphy could have been discharged from his employment on the grounds relied upon by the employer, but having grounds to terminate a contract of employment or terminating an at-will employee as a matter of right are not necessarily sufficient grounds to avoid liability for unemployment compensation benefits. Unemployment

[15] The Court in Davies, stated that "[t]he claimed justification of the right to abrogate the contractual relationship is made up of numerous instances and items, some of which are of relatively minor consequence. No one or two of them in isolation could be said to serve as sufficient legal reason for discharge. But when all are combined and considered together, there is much force in the aggregate to establish the breach of Davies' commitment . . . ." Id. at 212.

[16] Murphy, 694 S.W.2d at 710.

compensation is a legislatively created right and our Legislature has provided specific grounds for denial of benefits.[17] Thus, while we question the soundness of the Court's ruling in Murphy since it relied upon the language in a breach of contract employment case and not the rule dealing with misconduct in the unemployment context, we nevertheless conclude that regardless of the unsoundness of the holding in Murphy the case before us is clearly distinguishable on the facts.

By its very nature, an insurance agent is required to possess special skills and knowledge of the insurance field in which individuals of the general public do not possess. Insurance agents have a duty to understand the insurance field in order to advise their clients of the best available insurance

[17] At KRS 341.370(6) the following definition is provided for misconduct:

> "Discharge for misconduct" as used in this section shall include, but not be limited to, separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during work hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work.

See also Douthitt v. Kentucky Unemployment Insurance Commission, 676 S.W.2d 472 (Ky.App. 1984) (citing Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941)).

plan or policy for them. Thus, Murphy's failure to pass the insurance agent examination was indicative of unskillfulness in his employment and Murphy's termination for failing the exam was for the good of the public since his clients would rely on his knowledge in the insurance business.

In the case before us, the evidence was contrary to the evidence in Murphy since Couch's inability to pass the GSA examination is not indicative of his unskillfulness as a security guard. Couch was terminated from his employment as a security guard solely for his failure to pass a required examination. It was undisputed that Couch was an excellent employee and there was no evidence that his failure to pass the GSA examination was an indication of his lack of ability to perform the duties of his job. All the evidence indicates that Couch took the appropriate steps to prepare himself for the examination. He testified that he read the study materials multiple times and believed he was well-prepared for the test. In fact, he stated that he thought he had passed the exam. However, despite his optimism about the outcome of the exam, he failed the test. Due to his failing score, Couch's employer terminated his employment and denied him unemployment compensation benefits, despite the fact that he was a reliable employee and had no intention of leaving his employment at the time of his termination. While in the context of employment law

the employer was well within its rights to terminate Couch's employment, under Kentucky unemployment compensation law that rightful termination of employment in this case does not also result in sufficient grounds to deny unemployment benefits. Couch did not voluntarily quit his job and his discharge was not for misconduct.[18] Accordingly, the case before us is distinguishable from Murphy because the insurance examination in Murphy had a direct relationship to his ability to serve as an insurance agent, but Couch was fully capable of performing his duties as a security guard regardless of his failure of the exam. Based upon the undisputed evidence, we must conclude as a matter of law that Couch's departure from SCG was not voluntary. Rather, he was terminated for a reason other than misconduct and he cannot be disqualified from receiving unemployment compensation benefits.

[18] For cases that reject the court-created fiction of the employee having "voluntarily quit" his employment as a substitute for a finding of misconduct, see Primecare Medical, Inc. v. Unemployment Compensation Board of Review, 760 A.2d 483, 487 (Pa.Commw.Ct. 2000) (holding that a registered nurse who failed the state licensing examination had made a good faith effort and was not "at fault in his failure"); and Washington Regional Center Board of Review v. Director, Employment Security Department, 979 S.W.2d 94, 96 (Ark.Ct.App. 1998) (holding that a respiratory therapist's failure of the state licensing examination "was not the result of a conscious or deliberate disregard of her employer's interests"). See also Clarke v. North Detroit General Hospital, 470 N.W.2d 393 (Mich. 1991); Means v. Hamilton Hospital, 412 A.2d 1053 (N.J.Super.Ct.App.Div. 1980); and Gulf County School Board v. Washington, 567 So.2d 420 (Fla. 1990) (holding that claimants who failed certain licensing or certification requirements had not committed misconduct or voluntarily quit their employment and were entitled to unemployment compensation benefits).

For the foregoing reasons, the order of the Breathitt Circuit Court is reversed and this matter is remanded for entry of a new order consistent with this Opinion.

ALL CONCUR.

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