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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000359-MR

HIGHLANDER MORTGAGE COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 04-CI-003179

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; AND ANGELA DELFINO

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Highlander Mortgage Company has appealed from the judgment of the Jefferson Circuit Court entered on January 31, 2005, which affirmed the order of the Kentucky Unemployment Insurance Commission awarding unemployment benefits to the appellee, Angela Delfino. Having concluded the circuit court was correct in ruling that the Commission's findings of fact were supported by substantial evidence and that it applied the correct rule of law to those facts, we affirm.

While some of the facts surrounding the termination of Delfino's employment are in dispute, the circuit court summarized the facts as follows:

[Delfino] worked as a loan originator for Highlander from September 16, 2003[,]¹ until December 30, 2003. She was responsible for processing mortgages from origination until closing and making sure all the required paperwork was completed. She was not paid a salary; her compensation consisted solely of commissions.² She received commissions only for those loans that she originated - though she would pitch in to help complete work on other employees' loans if the employee was absent.

[Delfino] was absent between four and ten times during her tenure at Highlander;³ Highlander did not keep attendance records.⁴ [Delfino] admitted that she missed work once because of illness and several additional times because of required court appearances, while her former employer maintained that she missed work approximately ten days.⁵

¹ It is undisputed that Delfino signed a mortgage originator employment agreement with Highlander on September 15, 2003, in which she agreed "to expend . . . her full-time and best efforts" in her employment.

² All testimony discussed in this Opinion was obtained at the hearing before the Referee on February 25, 2004. Those who testified at the hearing were Delfino, James Heleringer, Delfino's employer, and Michael Morrison, Delfino's supervisor. Heleringer testified that loan originators, such as Delfino, were paid 50% of the fee collected by Highlander upon closing if they "got their own lead" on the loan. Otherwise, upon closing, they were paid on a sliding scale; i.e., the more loans they closed, the greater percentage of the fee they received.

³ Morrison testified that Delfino always called if she was going to be absent.

⁴ Heleringer, upon reviewing a 2003 calendar, testified that Delfino did not work on November 28, 2003, December 12, 2003, and December 19, 2003. Delfino testified that she probably did miss those three days for illness or court appearances.

⁵ Heleringer testified that, over time, Delfino's absences escalated, and that she missed mostly Fridays and some days would get to work late and leave work

However, [Delfino] insisted that she worked late every night in December 2003 to complete all of her work.

On two occasions, the officer manager, [Morrison], had to assist [Delfino] in order for a loan to close. Assisting the loan originators was one of his job duties.⁶ On one occasion, [Delfino] was unable to complete a necessary form to close a loan because the computer was down. She was due in court the following day, so she knew that she would be unable to complete the paperwork. Because of this, she made arrangements for [Morrison] to fax the required form the following day in her absence. He did this and the loan closed without a problem. The other occasion in which [Morrison] assisted [Delfino] involved him spending several hours on a particularly complicated loan of hers during another absence.⁷ This loan also closed - though it took considerably more time than the first occasion.⁸

On December 30, 2003, [Heleringer], the owner and president of Highlander requested that [Delfino] sign a statement drafted by him that required her to work a set work schedule and to contact either [Heleringer] or [Morrison] if she needed to miss work. In addition the statement read, "as a penalty for missed work and in recognition that others had to spend several hours closing up current loans, I agree to give up five percent (5%) on my December 2003

early. Morrison testified that Delfino had on one instance missed two or three days in a row.

⁶ Morrison testified that part of his job was to make sure that loans were closed if the loan originator was not present.

⁷ Morrison testified that he could not remember if Delfino was present at this closing.

⁸ Heleringer testified that he had to pay Morrison extra for this work on Delfino's loans.

scale." [Delfino] was advised by her employer that she either had to sign the statement or pack her bags and leave.⁹ She declined to sign the document, gathered her belongings, and left the building. This was her last day at Highlander.

On January 4, 2004, [Delfino] filed a claim for unemployment compensation benefits. Her claim was initially denied on January 29, 2004. [Delfino] appealed the denial, and an Unemployment Insurance Appeals Referee (Referee) conducted an administrative hearing on February 25, 2004. The Referee awarded benefits to [Delfino], finding "The evidence of record establishes that claimant quit because she was not going to be paid the entire amount of commission owed her for her loans closed in December 2003." Referee Decision at 2. The Referee further reasoned that Highlander:

has not proved by a preponderance of evidence that claimant was excessively absent or that it was policy to decrease the percentage of commission for excessive absenteeism. [Delfino] worked late on several occasions to assist with loans of other loan originators when they were absent and she was not compensate[ed] for that work. Therefore, [Delfino] quit with good cause attributable to the employment and is not disqualified.¹⁰

⁹ In its brief, Highlander denies that Delfino was given an ultimatum to sign the paper or be fired. However, Heleringer testified that, while he did not remember telling Delfino to sign the document or pack her bags, he did tell her that he needed "some sort of a commitment." He further told Delfino that he needed a "full-time" employee, and if she could not commit to the hours, "the choice was hers." Delfino testified that the December 30, 2003, letter was the first complaint that she had received about missing work.

¹⁰ The Referee's award was set out in the corrected referee decision mailed March 16, 2004. The original award was mailed on March 4, 2004, and stated that the Referee's decision was to affirm the denial of benefits to Delfino; however, this appears to be a clerical error as all other portions of the

Id. The Commission affirmed the Referee's decision.¹¹

Highlander appealed to the Jefferson Circuit Court,¹² which affirmed the decision of the Commission. The circuit court held that there was substantial evidence presented that Delfino did not voluntarily quit her job on December 30, 2003, and stated as follows:

[Delfino's] employer gave her an ultimatum either to take a retroactive pay cut for the month of December for commissions that she already earned or to quit. This ultimatum was given to her even though no one from Highlander expressed displeasure with [Delfino's] attendance prior to this date.¹³ Indeed, her employer did not even keep attendance records while [Delfino] worked there. Both of the options given to her were punitive in nature, and [Delfino] chose not to continue her employment with

decision supported the award of benefits to Delfino, as shown in the corrected decision.

¹¹ The Commission entered the order affirming the Referee's decision on April 8, 2004. In the order, the Commission adopted the Referee's findings and conclusions of law as its own. The Commission further noted that "had the separation been adjudicated as a discharge, the claimant would remain qualified to receive benefits."

¹² Kentucky Revised Statutes (KRS) 341.450(1) requires a party seeking review of the Commission's decision to file a verified complaint in circuit court.

¹³ Heleringer testified that Delfino was good at her job and problems began only after she found out she was losing her driver's license. He further testified that there was not an official meeting regarding Delfino's absenteeism, only "conversations." Delfino denied such conversations. Further, there was no written evidence to support that such discussions ever took place. Delfino testified that not one of her absences was due to her inability to drive without her license, despite Heleringer's testimony to the contrary. Delfino stated that her boyfriend carried her to and from work during this time and that she arrived early on some days and worked late many nights in December 2003. Heleringer testified that Delfino arrived early to work at least two times and that she did work late sometimes.

Highlander instead of taking the pay cut. Her choice to leave clearly was not "freely given" nor did it "proceed from her own choice or full consent." Additionally, this unreasonable ultimatum given to her by her employer gave [Delfino] good cause attributable to the employment for leaving her job. The Commission's decision was therefore supported by substantial evidence, and [Delfino] was entitled to receive unemployment compensation.

This appeal followed.

Highlander argues that Delfino chose to quit on December 30, 2003, that Delfino's action was not involuntary because of circumstances so compelling as to leave her no alternatives, and that the factual findings of the Commission were not based on substantial evidence and should be reversed.

"CR¹⁴ 52.01 requires that, in appeals of administrative agency decisions, appellate courts review the determinations of the circuit courts for clear error" [footnote omitted].¹⁵ The standard of review of an appeal from the Commission is set forth in Thompson v. Kentucky Unemployment Insurance Commission,¹⁶ which states in pertinent part as follows:

Upon review of an administrative agency's adjudicatory decision, an appeal court's authority is somewhat limited. The judicial standard of review of an

¹⁴ Kentucky Rules of Civil Procedure.

¹⁵ Fayette County Board of Education v. M.R.D. ex rel. K.D., 158 S.W.3d 195, 201 (Ky. 2005).

¹⁶ 85 S.W.3d 624 (Ky.App. 2002).

unemployment benefit decision is whether the [Commission's] findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. 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. 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. 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. A court's function in administrative matters is one of review, not reinterpretation [footnotes omitted].¹⁷

Both the circuit court's review and our review of this case are limited to reviewing the Commission's certified record.¹⁸ Our primary concern is to deal with the question of arbitrariness.¹⁹ A factual finding is not arbitrary if there is substantial evidence in the record to support an agency's finding and, thus, it is not clearly erroneous. In such cases, even though there may be conflicting evidence in the record,²⁰ we

¹⁷ Thompson, 85 S.W.3d at 624.

¹⁸ Travelodge International Inc. v. Kentucky Unemployment Insurance Commission, 710 S.W.2d 232, 234 (Ky.App. 1986).

¹⁹ Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830, 834 (Ky.App. 1998).

²⁰ Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981).

cannot make our own findings of fact nor substitute our judgment for that of the agency.²¹

Although there is conflicting evidence in the record supporting Highlander's version of the case, the Commission's factual findings as to the circumstances surrounding the termination of Delfino's employment are supported by substantial evidence. In particular, the Commission found that while the number of days Delfino was absent was in dispute and ranged from four days to ten days, Delfino "worked late every night in December 2003 to complete work on the loans she originated." The Commission further found that the owner and president of Highlander told Delfino that for the days of work she had missed that she would either have to accept a 5% penalty on the commissions she had earned for December 2003 or "pack her bags and leave." The Commission found that Delfino "quit because she was not going to be paid the entire amount of commission owed her for loans closed in December 2003[, and the] Small Claims Court of Jefferson County found in [her] favor that the employer owed her the entire commission."²² The Commission also found that Delfino was not "excessively absent" nor did Highlander have a "policy to decrease the percentage of commission for

²¹ Piper v. Singer Co., Inc., 663 S.W.2d 761, 763 (Ky.App. 1984).

²² Highlander notes that its appeal of the Small Claims judgment is pending in the Jefferson Circuit Court.

excessive absenteeism." Since these findings are not arbitrary or clearly erroneous, they are binding on this Court.

Our only remaining task is to determine whether the Commission applied the correct rule of law. Our decision in the present case turns on the application of KRS 341.370(1)(c), which provides in relevant part that a worker is disqualified from receiving unemployment benefits if "[h]e [or she] has left his [or her] most recent suitable work . . . voluntarily without good cause attributable to the employment." Delfino had the burden of proof to establish that she did not quit voluntarily without good cause attributable to her employment.²³

"'[V]oluntary' connotes a decision to quit that is 'freely given' and 'proceeding from one's own choice or full consent'" [footnote omitted].²⁴ Good cause for voluntarily quitting work "exists only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment'" [footnote omitted].²⁵ "[T]he question of good cause is essentially one of reasonableness to be determined by the particular facts of each case."²⁶ "The primary key in resolving

²³ Thompson, 85 S.W.3d at 625.

²⁴ Id.

²⁵ Id. at 624-25.

²⁶ Nichols v. Kentucky Unemployment Insurance Commission, 677 S.W.2d 317, 321 (Ky.App. 1984).

conflicts such as this must be based on who causes the employee to quit.”²⁷

Our review at this point is limited to determining whether the Commission misapplied the law to its factual findings. Highlander cites Raines v. Kentucky Unemployment Insurance Commission,²⁸ and Delfino cites International Spike, Inc. v. Kentucky Unemployment Insurance Commission, Department for Human Resources,²⁹ but these cases are not relevant to our analysis because they involved prospective decreases in the wages to the employees. As noted by the Commission, the wage dispute before us involved Highlander’s attempt to “dock” Delfino’s pay based on its belief that she had not performed all of the work required to earn 100% of the commission. The Commission made a factual finding that Highlander’s attempt to deprive Delfino of 5% of her earnings for December 2003 was not supported by the evidence. Accordingly, as a matter of law, Delfino quit her job for good cause. We therefore conclude that the Commission properly applied the law to the facts in this case in determining that Delfino was eligible to collect unemployment benefits due to her quitting for good cause and the circuit court was correct in affirming the decision.

²⁷ Kentucky Unemployment Insurance Commission v. Melvin’s Grocery Co. Inc., 696 S.W.2d 791, 792 (Ky.App. 1985).

²⁸ 669 S.W.2d 928 (Ky.App. 1983).

²⁹ 609 S.W.2d 374 (Ky.App. 1980).

For the foregoing reasons, the opinion and order of
the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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