

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002420-MR

SECRETARY OF LABOR,
COMMONWEALTH OF KENTUCKY

APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 94-CI-1116

ONTRAC, INC., d/b/a BLITZ
BUILDERS; and KENTUCKY
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

APPELLEES

OPINION REVERSING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; EMBERTON and TACKETT, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an opinion and order entered by the Franklin Circuit Court reversing a decision and order of the Occupational Safety and Health Review Commission (commission). The court adjudged that two of the commission's findings, which were legal prerequisites to its award, were supported by substantial evidence. However, the court found that substantial evidence did not support the findings respecting two additional legal prerequisites to the award. On appeal, appellant contends that the court erred by finding that two of

the commission's findings were unsupported by substantial evidence. We agree. Hence, we reverse and remand.

David Biggs began working for appellee Ontrac, Inc., d/b/a Blitz Builders (Blitz), in 1989. By 1990, he had been promoted to the position of foreman. Blitz is in the business of contracting, in Kentucky and Tennessee, to erect pole buildings for storage and other uses. The buildings consist of support poles, set in the ground, to which wooden frames and roof trusses are attached and then covered with metal siding.

In 1991, Biggs and two other men undertook to erect a building for the City of Hillview. Biggs claimed that when he was ready to erect the roof trusses, he called Blitz's Shelbyville office and talked to the office manager, Alice Brock, asking that he be provided a crane to lift the roof trusses because they weighed hundreds of pounds, and attempting to lift them by hand would be unsafe. Specifically, Biggs testified as to this point as follows:

Q. What did you tell Alice?

A. That I was ready to hang the trusses and I needed a boom truck or a crane.

Q. And what did she say?

A. She said they didn't bid the building high enough to afford a crane and they didn't have a boom truck available. She told me to hang the trusses any which way I could get them up there.

Q. And your response?

A. That I would not hang the trusses.

Q. Why not?

A. I wasn't getting anybody hurt or killed.

Q. You felt that it would be unsafe to try to hang the trusses by hand without a crane?

A. It would have been impossible.

Q. And you told Alice that?

A. Yes, ma'am.

Q. Okay. what happened next?

A. Well, she got kind of irritated because, you know, I wouldn't do what she told me to do. I wasn't following her orders. And she told me to come to the office.

Q. To the Shelbyville office?

A. To the Shelbyville office. We wasn't that many miles away.

Q. Okay. Did you speak to anybody else on the phone besides Alice?

A. Honestly, I don't remember. It's been so long. I don't remember if I talked to Randy right then or later when I got there.

Q. Okay. During your phone conversation with Alice, did you mention OSHA?

A. Yes, ma'am.

Q. What did you say?

A. I said, well, I said, I'll just have to go see what OSHA has to say about it. That's when she told me to come to the office.

Q. Okay. Did your whole crew go to the office?

A. Yes, ma'am. And all of us went inside.

Q. Okay. Who was present?

A. Myself, my crew, Raymond and Ricky.

Q. Okay.

A. Alice Brock, another lady who worked in the office, I don't remember her name.

Q. What did she do? Clerical staff or what?

A. I guess. She was something in there.

Q. And is that everyone?

A. Yes, ma'am. That was there when I first got there.

Q. Okay. What happened there?

A. Well, she didn't like it because I wouldn't hang the trusses.

Q. Did you repeat your safety concerns to her?

A. Yeah. I wasn't getting anybody hurt or killed. She repeated that they didn't bid the building high enough and they didn't have a boom truck. They had sold most of them. And I was suppose to get them up any way I could, but I couldn't, I wasn't going to. About that time, Jeff Littleton come in.

Q. Okay. Who is Jeff?

A. He's another foreman from that office, Shelbyville.

Q. Okay.

A. When he came in, Alice -- as soon as he walked in the door Alice said, well, here's what a real foreman looks like. Then

after that she found out, which he had been rained out where he was at. So she told him to go with us and help us hang the trusses since he had a homemade thing on the back of his truck that you could call a boom. And it was dangerous looking.

Q. At that point, did Jeff Littleton and his crew go out to the Hillview site?

A. Well, it was just one of his crew with him.

Q. Okay.

A. And, yes. Me and Jeff drove in the same truck and the other guys drove in the other truck to the job site.

Q. With this homemade boom truck?

A. With this homemade boom.

Q. Okay. Tell me what happened next.

A. Well, we got the boom out, and I seen how dangerous it was and I almost didn't want, didn't do it, you know, didn't hang the trusses, but I didn't want to lose my job, so we hung the trusses. And I was scared to death.

One of Biggs' crew, Raymond Gibbins, testified in relevant part as follows:

Q. What happened next in the construction of the building? Did you do what he said and dig the holes --

A. Yeah. We went ahead and dug the holes and set the posts and got all the side boards on. And then we were ready to set the truss. And David pointed out, and, of course, I agreed, that it was entirely too dangerous to be putting up a truss of -- I don't remember exactly the length of them, but they were average amounts of posts, four to 600 pounds anyway per truss. It would be too dangerous to try to take them up by hand. And so he called and asked for a crane. And

they denied it. And David brought up, you know, mentioned that he would call OSHA if they didn't want to furnish him with some kind of boom truck or crane or something that would lift them to keep us from getting hurt.

Q. Did you hear this conversation?

A. I heard David's part, but not Randy's part. It was over the telephone.

Q. And this was a phone call he made?

A. Un-huh (affirmative).

Q. And you were sitting in the cab of the truck?

A. In the cab right next to David.

Q. And did you specifically hear him complain about the safety aspect?

A. Yeah. You know, he said it was just too dangerous for me or my guys to be up there and try to handle these trusses by hand.

Q. And you specifically heard him mention OSHA?

A. Uh-huh (affirmative).

. . . .

Q. After the phone conversation, what happened?

A. The best I can remember we went to the Shelbyville office.

Q. Were you asked to go to the Shelbyville office?

A. They told us to come on in to the office. And then they lined up having another crew come out. I can't remember the guy's last name. His first name was Jeff. But he was the one that come out with a boom truck. And that's how we attempted to raise them.

Q. Okay. Let me back you up. When you went to the Shelbyville office, did you actually go inside the office?

A. Yeah. We all went inside the office instead of staying out in the truck. But we all went in there, they had this other foreman there, Jeff. And it was him, David, myself, Ricky, Randy Brown. And then I can't remember the office manager's name up there, but she was there also.

Q. Was it Alice Brock?

A. I think that's what -- I remember her first name Alice. But I never hardly met any of them up there as far as first and last name basis.

Q. But you're certain that Randy Brown was present?

A. Yeah. Randy was present.

Q. During that discussion or meeting, did David reiterate his safety concerns to the group?

A. Well, you know, the way he said it was that it was too dangerous for us to be up there handling the trusses by hand. Unless they wanted to furnish some type of crane or boom truck or something that there was no way that, you know, he would attempt to do it.

Q. And at that point, as I understand your testimony, Jeff Littleton and another guy went out to the Hillview site with you?

A. Uh-huh (affirmative).

Alice Brock was not called as a witness, but Randy Brown testified as follows:

Q. Did you at ever, at any time, tell David to hang these trusses by hand?

A. No, sir.

Q. And I think you said he was to call and somebody was to go down?

A. He was to call or come to the office.

Q. Did somebody, in fact, go down to hang the trusses?

A. Yeah. Jeff went down to hang the trusses.

Q. Okay. Did he take anybody with him?

A. I don't know if Jeff took anybody or not.

Q. Did you have, either by telephone or in person, any conversation with David Biggs where he would have said he was going to go to OSHA because he was told to hang these trusses by hand?

A. No, sir.

Q. Did you have any conversation at all where OSHA was mentioned with David Biggs?

A. Not until -- the only time I ever heard about OSHA was back after the unemployment. I heard it from Jeff Littleton.

Q. So in late November, when this building was being built, in 1991, it's your testimony that David never said anything to you about it?

A. Never. Nothing about OSHA.

Q. Or unsafe working conditions?

A. No, sir.

Q. Or his crew members maybe getting hurt?

A. No.

. . . .

Q. Now, specifically, which office manager are you talking about?

A. Alice Brock.

Q. That's the office manager in Shelbyville?

A. Yeah.

Q. Did Alice ever mention anything to you about David saying anything to her about OSHA?

A. No, sir.

Finally, Jeff Littleton testified in relevant part as follows:

Q. When did you find out you were going to Hillview?

A. I happened into the office one day, which David and his crew was there, which it had been raining that day. And he said, you know, he needed some help hanging trusses. And which it had quit raining. And I said, well, you know, I can take my truck down there and hang them for you.

Q. Okay. At any time when you were with David or any officer down on the job, did he say anything about being afraid to hang these trusses?

A. He mentioned something about, you know, that he couldn't hang them by hand, you know, with a ladder, which a 40 footer you can't hang off of a ladder.

Q. During the time you were a foreman, were you ever instructed to hang a 40 foot truss by hand?

A. No. Never.

. . . .

Q. Okay. Did David ever say anything to you about filing an OSHA complaint?

A. Well, the day that I went down to the city of Hillview he mentioned something about OSHA, but, you know, I didn't think it was that important and just let it go in one ear and out the other.

Q. Okay. did you relay what he had said to anybody?

A. Not until probably March when, you know, when we was having an unemployment hearing, you know, I mentioned something about, you know, at one time he did mention something about OSHA, but I didn't think it was important.

Q. Okay. Now, who would you have said that to?

A. I think I told that to Randy Brown.

Q. Okay. And this was in March?

A. Uh-huh (affirmative).

Q. Was that before the referee's hearing, the unemployment hearing?

A. Yes.

Q. Okay. You never said anything about that to Alice, the office manager?

A. No.

. . . .

Q. On November 25th of 1991, do you recall being at the office in Shelbyville with David Biggs discussing the Hillview site?

A. Well, the only thing that I recall discussing was he was needing somebody to hang the trusses for him.

Q. Okay. And were you in the Shelbyville office at that time?

A. I happened in, yes.

Q. Was Alice in there?

A. Yes. She was at her desk.

Q. And David was asking for help in hanging the trusses, you said?

A. Well, apparently, he had done asked for it. He was just basically waiting for somebody to show up to help him.

Based upon the testimony quoted above, the commission found that Biggs engaged in protected activity by making safety complaints, both by phone and in person, about being directed and refusing to hang the roof trusses by hand. The commission further found that Biggs was fired because he engaged in such protected activity, and that Blitz's claim that Biggs was terminated due to the poor quality of his work performance was pretextual. On appeal, the circuit court found that substantial evidence did not support the commission's findings that Biggs was instructed to hang the roof trusses manually and that he made related safety complaints. The court therefore concluded that Biggs did not engage in a protected activity by refusing to perform such a task, and that the reasons given for Biggs' discharge were not pretextual. This appeal followed.

Appellant contends that the court erred by finding that two of the commission's key findings are not supported by substantial evidence. We are constrained to agree.

Clearly, Biggs' testimony was sufficient to support a finding that Brock directed him by phone to hang the trusses

manually, but that he refused to do so and instead threatened to report the company for a safety violation. His testimony in this vein was corroborated by Raymond Gibbins, who was present during both the phone conversation and the later conversation in the company's Shelbyville office. The testimony was also corroborated by Blitz's witness, Jeff Littleton, who acknowledged that Biggs both stated in the office that he did not want to hang the trusses manually, and suggested that he might make a complaint to OSHA.

Blitz, by contrast, adduced supporting evidence in this vein only from Randy Brown, who denied Biggs' report of the alleged conversation at the office. Alice Brock, who allegedly directed Biggs to hang the trusses manually, was not called as a witness to deny Biggs' claim. Moreover, although the testimony of Biggs, Gibbins and Littleton was not entirely consistent in all respects, it was consistent to the extent of establishing that Biggs did indeed discuss hanging the trusses manually, both by phone with Brock or Brown, and in person with both of those individuals at the Blitz office in Shelbyville. We therefore conclude, contrary to the trial court, that substantial evidence supported the finding that Biggs engaged in protected activity by making safety complaints, by phone and in person, about being directed to manually hang the trusses. Further, we fail to perceive why Biggs' unrefuted testimony, that Brock directed him to hang the trusses manually, was not sufficient to support a finding to that effect. Indeed, both Biggs and Gibbins testified

that such a direction was given, and Brown's testimony that no such conversation took place at the office does not diminish the credibility of Biggs' claim that Brock directed him by phone to hang the trusses manually. Instead, Brown's testimony simply tends to show that Gibbins was mistaken in his understanding as to who Biggs spoke with by phone. Further credence is given to Biggs' and Gibbins' testimony by the fact that Blitz never called Brock as a witness to refute Biggs' claims. We hold, therefore, that the court erred by concluding that substantial evidence did not support the commission's findings that Biggs was instructed to hang the trusses manually. In fact, as we view the matter, just the opposite is true. That being so, it follows that the court also erred by concluding that Biggs refused to perform an assigned occupational task.

We also disagree with the court's conclusion that substantial evidence does not support the commission's finding that Blitz's proffered reasons for discharging Biggs from employment were pretextual, and that he would not have been fired if he had not engaged in the protected activity. As to this issue, the commission concluded as follows:

The final question is, as is so often the case, the more difficult one. Was the employer's action (termination here) a result of the employee's having engaged in an alleged protected activity? Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 79 S.Ct. 568, 50 L.Ed.2d 471 (1977), says the question really is whether the employee's protected activity was a "substantial factor" in the employer's decision to take the adverse action.

As we found above, Biggs complained to management and refused to raise the truss on day one. He worked another day. He then went on an already scheduled one-week's vacation. He returned on working day three (following the protected activities) and was fired that morning. In other words, he was fired the third (working) day after the incident at Hillview.

One way to show a causal connection between the protected activity (the OSHA complaint and refusal) and the adverse action (termination in this case) is by demonstrating the complaint and refusal were closely followed by the termination. Donovan v. Commercial Sewing, 562 F.Supp. 548, 553 (D. Conn. 1982). Biggs was fired three working days after refusing to hang the trusses manually. Only his already-scheduled vacation intervened.

As we have found above, David Biggs received no written reprimands despite a policy of three before termination. Instead, all Blitz could produce at trial were two evaluations (respondent's exhibits 6 and 21) which show Biggs was counseled or warned about productivity, not quality. President Randy Kirts said he fired Biggs for quality problems, reciting a short list of other quality problems, but could not say why the evaluation in his own handwriting said nothing about Biggs' quality performance. Biggs was not demoted (as two other foremen were) but fired. Respondent's exhibits 6 and 21 refer to the possibility of his no longer being foreman, not his being fired. Biggs was ordered by Randy Brown, superintendent, to dig shallow holes and did. In fact the ground was so out of level one pole had to be supported by a tripod. Recall Biggs did not try to conceal the shallow holes.

In Randy Kirts eyes, Biggs' Hillview job was the "final straw." TE 171. Our hearing officer said the Hillview job was the "final straw." RO 25. It's always the final straw when the company is confronted with its adverse action following closely behind the protected activity. Donovan v. Commercial

Sewing, 562 F.Supp., 548, 553 (D. Conn. 1982).

Thus, given the above facts we have found in this case, we conclude the secretary of labor proved by substantial evidence David Biggs was terminated because of his protected activity. In fact we also conclude Biggs' protected activity was a "substantial factor" if not the only factor in Blitz Builders' decision to terminate him.

We conclude the secretary of labor met her burden of proof in this case and that Blitz Builders has failed in its burden to prove Biggs was terminated for problems with the quality of his work. Finally, we conclude Blitz' proffered reasons for terminating Biggs were pretextual. In fact, Biggs' termination was retaliatory and directly caused by Blitz Builders' reaction to his engaging in the protected activity.

We have carefully reviewed the transcript of the evidence. In our opinion, the commission's quoted conclusions are clearly supported by substantial evidence. While we agree with the trial court that we might have drawn different conclusions from those drawn by the commission if we were sitting as triers of fact, neither we nor the trial court may substitute our judgment for the commission's. In our opinion, this is precisely what the trial court did. Indeed, while evidence was adduced to show that Blitz was dissatisfied with Biggs as an employee for several reasons, evidence was also adduced to show that the main concern involved his lack of production rather than the quality of his work. Further, it was shown that although most employees received several written warnings about their work before having their employment terminated, Biggs received none.

In summary, we believe the commission's findings are supported by substantial evidence. Hence, we hold that the court erred by setting them aside.

The court's order is reversed and remanded for further proceedings consistent with our views.

ALL CONCUR.

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