

RENDERED: SEPTEMBER 30, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: DECEMBER 2, 2005; 2:00 P.M.

Commonwealth Of Kentucky
Court Of Appeals

NO. 2004-CA-002623-MR

MORRIS H. MOOR

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CI-01671

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; AND LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Morris H. Moor appeals from an order by the Fayette Circuit Court affirming a determination by the Kentucky Unemployment Insurance Commission (Commission) that he is disqualified from receiving unemployment benefits because he was discharged for misconduct. Moor contests the Commission's finding that he refused to comply with a reasonable instruction by his employer. In the alternative, Moor contends that his

employer's instructions were unreasonably vague and overbroad. We agree with the circuit court that the Commission's findings were supported by substantial evidence and that the employer's instructions were reasonable. Hence, we affirm.

We take our recitation of facts from the referee's findings, as adopted and corrected by the Commission. Moor was employed as a plumber in the Lexington-Fayette Urban County Government (LFUCG) Department of Parks and Recreation. On September 5, 2003, he was assigned the task of replacing a drinking fountain in Shillito Park. Upon arriving at the work site, Moor noticed another fountain located approximately two-hundred feet away from the fountain to be replaced. In addition, while the new drinking fountain was to be handicapped-accessible, the spot where the drinking fountain was to be replaced was not handicapped-accessible as it was located in a grassy area.

In an effort to clarify and ensure that the fountain was intended to go where designated, Moor contacted park designer Michelle Kosianiak. Kosianiak is not in Moor's chain of command. Kosianiak indicated that she would visit the site and contact Moor with her opinion. Kosianiak was later told not to give Moor any information because he should not have contacted her. On September 26-27, 2003, Moor continued to work

on the project by digging valve access for the replacement fountain.

On March 3, 2003, Moor received a written notice regarding a disciplinary action for an incident which occurred in January 2003, when he failed to follow instructions from his supervisor and took alternative measures in completing a task without permission.¹ The notice advised Moor:

If you have a question about any assignment or perceive a method of completing an assignment that may be better but different than your assigned method, you must discuss it with your supervisor. Failure to do this will result in discipline for insubordination and, eventually, if this behavior continues, dismissal.

When LFUCG discovered Moor's contacts with Kosianiak, it determined that Moor had violated the previous warning. Consequently, LFUCG dismissed Moor for insubordination.

Thereupon, Moor filed a claim for unemployment insurance benefits. LFUCG contested his eligibility. Moor's application for benefits was first denied in a notice of determination dated November 18, 2003, due to his discharge for misconduct. Moor appealed the ruling, and following a hearing

¹ The referee's decision characterizes the notice as a reprimand. However, the letter, from Bill Carman, Acting Deputy Director of LFUCG Parks and Recreation Department, specifically states that the Department had decided not to formally reprimand Moor at that time. LFUCG acknowledges that the letter served as a warning to Moor and not as a formal reprimand.

before a referee, his disqualification was affirmed on February 4, 2004. The Commission affirmed the referee's decision, and Moor appealed to circuit court. On December 9, 2004, the circuit court issued an opinion and order affirming the Commission's order. Moor now appeals to this Court.

In Burch v. Taylor Drug Store, Inc.,² this Court set out the applicable standard of review as follows:

The standard of review before the circuit court and before this Court is the same. Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness. . . .The findings of fact of an administrative agency which are supported by substantial evidence of probative value must be accepted as binding by the reviewing court. . . .The court may not substitute its opinion as to the weight of the evidence given by the Commission Upon determining that the Commission's findings were supported by substantial evidence, the court's review is then limited to determining whether the Commission applied the correct rule of law³

As the referee noted, KRS 341.370(1)(b) disqualifies a worker from benefits following a discharge for misconduct connected to the work. KRS 341.370(6) defines "discharge for misconduct" to include "refusing to obey reasonable instructions." Moor disputes the referee's conclusion that his

² 965 S.W.2d 830 (Ky.App. 1998).

³ Id. at 834-35 (*citations omitted*).

conduct constituted an "unjustified refusal to comply with a reasonable request or order of a superior." Moor points to the specific wording of the March 3, 2003 warning, which merely required him to discuss with his supervisor any alternative means of completing an assigned task. Moor also notes the referee's finding that he actually performed the work which he was instructed to do. Moor contends that he was only required to discuss the matter with his supervisor if he intended to deviate from his work orders. Since he replaced the drinking fountain as directed, Moor argues that his conduct could not have constituted insubordination sufficient to disqualify him from receiving unemployment insurance benefits.

At first blush, Moor's argument has some appeal. But when considered in context with other instructions from his supervisors, the March 2003, warning required that Moor discuss alternative means of completing a task with his supervisor, rather than acting without permission or discussing the matter with an individual outside of his chain of command. By contacting Kosianiak to discuss the placement of the fountain, Moor deviated from his instructions prior to completing the job as directed. Therefore, there was substantial evidence to support the referee's finding that Moor's actions in contacting an individual outside of his chain of command prior to beginning

work on the job constituted an unjustified refusal to comply with an order of his superior.

Moor next argues that the scope of the work order was unreasonable, or in the alternative, that it violated his constitutional free-speech rights. Moor attempts to discredit the instruction by reducing it to absurdity: He contends that the order required him to discuss any concern that he might have about a job assignment, regardless of how minor or trivial. This is not a reasonable interpretation of the March 2003 warning. Moor was not compelled to ask any questions he had about his employer's orders, but was required only to follow his chain of command when he elected to pursue alternative means of carrying out those orders.

Furthermore, the March 2003 warning was reasonable in its scope. LFUCG points out that, if Moor had spoken to his supervisor about his questions concerning the location of the fountain, Moor would have been told that the Parks Department had plans to expand the recreational areas near the fountain and to add sidewalks when funding became available. Moor's inquiries outside of his chain of command resulted in a delay in the start of his work to replace the fountain. In addition, Moor's actions required Kosianiak and her office to spend time considering the legitimacy of his request. By requiring Moor to

follow his chain of command, LFUCG's sought to prevent Moor from inefficiently using LFUCG time and resources.

Finally, Moor asserts LFUCG's instruction to discuss the wastefulness of a project with his supervisor violated his statutory right to report waste in a public agency under Kentucky's Whistleblower Act. KRS 61.102 prohibits a public employer from retaliating against an employee who makes a good-faith report of "actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety." The statute further provides that an employer shall not require prior notice before an employee makes a report. However, the statute specifically protects an employee who makes such a report to an "appropriate body or authority." Moor provides no support for his assertion that Kosianiak or her department was an appropriate body to which the report should have been made. Therefore, he is not entitled to the protection of the whistleblower statute.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Abell
Lexington, Kentucky

BRIEF FOR APPELLEE
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION:

B. Amy O'Nan
Education Cabinet
Office of Legal Service

Frankfort, Kentucky

BRIEF FOR APPELLEE
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT:

Andrea L. Weddle
Lexington-Fayette Urban
County Government
Department of Law
Lexington, Kentucky