

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001625-MR

KBR TECHNICAL SERVICES, INC.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CI-01783

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION AND DANIEL J. SAYRE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: KBR Technical Services, Inc. (hereinafter "KBR") has appealed from the July 20, 2005, Opinion and Order of the Hardin Circuit Court affirming the award of unemployment benefits to Daniel J. Sayre. KBR terminated Sayre's employment after he tested positive for marijuana during a random drug test. We affirm.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Sayre began working for KBR as a shipper/packer on June 1, 2002. KBR has in place a published anti-drug policy, prohibiting any employee from using, being in possession of, or being under the influence of prohibited drugs, including marijuana, and unauthorized alcoholic beverages. As a condition of employment, employees must consent to random drug testing. The policy provides that "[c]onfirmed positive test results indicating the presence of a prohibited substance in an employee's urine or blood are considered sufficient evidence of a violation of this policy, result in the termination of the employee, and preclude the hiring of a prospective employee." On June 23, 2003, Sayre was informed upon his arrival at work that he had been chosen for a random drug test. The test was positive for marijuana, and in accordance with the policy Sayre was terminated on June 26, 2003.

On July 3, 2003, Sayre filed a claim for unemployment benefits, in which he indicated that he was discharged after failing a random drug test. His claim was initially denied as Sayre was discharged for misconduct connected to his work, and was therefore disqualified from receiving benefits. Sayre appealed this decision to the appeals branch, and a hearing was held before Referee Debra Cook. During the hearing, Sayre testified that had been assaulted by two acquaintances the day before the random drug test. The two men held him down and blew

marijuana smoke into his mouth. He neither reported the assault to the police nor informed KBR about the incident prior to the drug test. The Referee affirmed the determination on September 12, 2003, finding that Sayre had been discharged for misconduct connected with his work and was therefore disqualified from receiving benefits pursuant to KRS 341.370(6). The Referee held that Sayre had knowingly violated a reasonable and uniformly enforced rule and did not dispute the positive test result. Furthermore, the Referee held that Sayre's testimony regarding the assault lacked credibility and that he should have brought it to the attention of the police and KBR on the day he was tested.

Sayre appealed the Referee's decision to the Kentucky Unemployment Insurance Commission (hereinafter "the Commission"), which initially reversed the Referee's decision on the basis that KBR failed to present any witnesses to lay a foundation regarding the chain of custody or the reliability of the drug test. On appeal, the Hardin Circuit Court remanded the matter to the Commission to decide the merits of the case, holding that the drug test result was competent evidence.² On remand, the Commission again set aside the Referee's order and determined that Sayre was qualified to receive benefits. The

² KBR Technical Services, Inc. v. Kentucky Unemployment Insurance Commission, action No. 03-CI-02237.

Commission determined that in order to knowingly violate a policy, the employee must be aware of the policy and then make a voluntary decision to violate the policy. Because he was forced to inhale the marijuana smoke, the Commission concluded the Sayre did not knowingly violate the policy and did not engage in misconduct.

KBR filed a Complaint and Petition for Judicial review with the Hardin Circuit Court pursuant to KRS 341.450 on September 16, 2004. In its brief, KBR argued that Sayre engaged in misconduct by reporting to work under the influence of marijuana and that just because he did not voluntarily violate the policy did not mean that the violation was not knowingly done. The Commission, in turn, argued that Sayre did not commit any misconduct and that unemployment laws are to be construed broadly in favor of the claimant while exceptions and disqualifications from benefits are to be narrowly construed. On July 20, 2005, the circuit court entered an Opinion and Order affirming the Commission's ruling, holding that the circumstances must be considered in making a determination of misconduct, and it was appropriate to consider the voluntariness of Sayre's drug use. This appeal followed.

On appeal, KBR continues to argue that a specific intent to violate an employer's policy is not necessary to establish a knowing violation sufficient to constitute

misconduct, and thereby be disqualified from receiving unemployment benefits. The only knowledge necessary is that his conduct will result in a violation. Furthermore, KBR asserts that Sayre's appearance at work with marijuana in his system, with the knowledge that he was in violation of its anti-drug policy, constituted statutory misconduct. On the other hand, the Commission argues that the law was correctly applied to the facts.

In Burch v. Taylor Drug Store, Inc.,³ this Court set out the applicable standard of review for itself and for the circuit court in administrative appeals as follows:

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 law.[]

With this standard in mind, we shall review the decision below.

At the outset, we note that there does not appear to be any argument that the Commission's findings of fact are not supported by substantial evidence of record. Sayre admitted

³ 965 S.W.2d 830, 834 (Ky.App. 1998)(citations omitted).

that he tested positive for marijuana, and KBR does not contest Sayre's report of the assault. Rather, it is the Commission's application of the law to the facts that is at issue. Our decision in the present case turns on the application of KRS 341.370, which provides in relevant part:

(1) A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which:

(a) . . .

(b) He has been discharged for misconduct or dishonesty connected with his most recent work. . . .

We recognize that although the employee has the overall burden of proof and persuasion, the employer bears the burden of proof to establish misconduct, as "a misconduct allegation is in the nature of an affirmative defense."⁴ Finally, we note that "[t]he underlying principle of the statutory scheme for unemployment compensation evinces a humanitarian spirit and it should be so construed."⁵

While KRS 341.370(6) does not actually define "discharge for misconduct," it describes the term as including, but not limited to:

[S]eparation initiated by an employer for falsification of an employment application

⁴ Shamrock Coal Co. v. Taylor, 697 S.W.2d 952, 954 (Ky.App. 1985).

⁵ Alliant Health System v. Kentucky Unemployment Insurance Com'n, 912 S.W.2d 452, 454 (Ky.App. 1995).

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 employers premises during working 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 of work. (Emphasis added.)

In situations where there is no specific definition provided in the statute, our case law instructs that "words of a statute shall be construed according to their common and approved use. . . . In addition, the courts have a duty to accord statutory language its literal meaning unless to do so would lead to an absurd or wholly unreasonable result."⁶

In Kentucky Unemployment Insurance Com'n v. King,⁷ this Court cited to 76 Am.Jur.2d *Unemployment Compensation* § 52 to define "misconduct" sufficient to disqualify a worker from receiving benefits as: "'an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules' would support exclusion from benefits whereas

⁶ Kentucky Unemployment Insurance Com'n v. Jones, 809 S.W.2d 715, 716 (Ky.App. 1991).

⁷ 657 S.W.2d 250, 251 (Ky.App. 1983)(emphasis in original).

'mere mistakes, inefficiency, [or] unsatisfactory conduct' would not." More specifically, this Court in Douthitt v. Kentucky Unemployment Insurance Com'n,⁸ addressed the term "misconduct," noting that KRS 341.370(6) defines that term "approximately the same way as it is defined" in the earlier Wisconsin case of Boynton Cab Co. v. Neubeck.⁹ The Wisconsin court defined the "intended meaning" of "misconduct" as:

[L]imited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.¹⁰

Regarding a company's "no-fault" policy, this Court addressed such a policy in Alliant Health System v. Kentucky

⁸ 676 S.W.2d 472, 474 (Ky.App. 1984).

⁹ 237 Wis. 249, 296 N.W. 636 (1941).

¹⁰ Id. at 640.

Unemployment Insurance Com'n,¹¹ at that time in terms of an attendance policy:

It is permissible for an employer to utilize a "no-fault" attendance policy and such policy may form an appropriate basis for discharge from employment. However, we disagree . . . that the principles underlying a "no-fault" attendance policy are determinative for purposes of whether one is entitled to receive statutory unemployment compensation benefits. The very nature of a "no-fault" approach to employee attendance precludes consideration of the circumstances surrounding the absence. To permit an employee's discharge under a "no-fault" policy to constitute an automatic exclusion from benefits would, in essence, give the employer the ultimate authority in determining which employees are entitled to receive benefits. Such a result was not intended by the legislature.

The Alliant court concluded that "[t]he application of a no-fault attendance policy for purposes of employee discharge is separate and wholly distinct from the context of unemployment compensation."¹²

In the present case, KBR argues that the Commission misconstrued the law as requiring drug use to be voluntary and that there be a specific intent to use drugs in violation of the company's policy in order to be disqualified from receiving benefits due to misconduct. The Commission disputes KBR's interpretation of the law, asserting that the circumstances of

¹¹ 912 S.W.2d 452, 454 (Ky.App. 1995).

¹² Id.

the violation must also be considered. We agree with the Commission that for purposes of determining whether an individual is eligible to receive unemployment benefits, the entire circumstances surrounding the violation must be reviewed. Under the unique circumstances of this case, it is clear that Sayre did not willfully disregard KBR's drug policy, in that he had marijuana in his system through no fault of his own. Furthermore, there is no evidence that Sayre knew he would fail the random drug test or that he still had a measurable amount of marijuana in his system when he reported to work. The Commission properly applied the law to the undisputed facts of this case to determine that Sayre was not discharged for misconduct, and was therefore eligible to collect unemployment benefits.

In the alternative, KBR argues that Sayre engaged in misconduct when he voluntarily reported for work with marijuana in his system, without notifying KBR of his condition. KRS 341.370(6) provides that a discharge for "reporting to work under the influence of alcohol or drugs" is a discharge for misconduct. The circuit court relied upon the Supreme Court of Idaho's decision of Smith v. Zero Defects, Inc.,¹³ for its discussion as to whether proof of impaired work performance is necessary to disqualify a claimant from being eligible for

¹³ 980 P.2d 545 (Idaho 1999).

unemployment benefits. The Idaho court noted that some states require proof of impairment, while others do not, so long as "an employer's 'zero tolerance' drug policy is communicated to its employees and the policy is reasonably related to the employer's interests[.]"¹⁴ As the Commission noted in its brief before the circuit court, KBR never raised this specific argument prior to its appeal to the circuit court, limiting its argument to whether Sayre's violation of the drug policy constituted misconduct. Therefore, this argument is not preserved for this Court's review, even though it was addressed by the circuit court in its opinion and order. However, it appears that Kentucky may indeed require proof of impairment in order to disqualify a claimant from receiving benefits under that portion of the statute. In Egnew v. Kentucky Unemployment Insurance Com'n,¹⁵ this Court addressed this issue as it pertains to alcoholism, concluding that "the use of alcohol affecting one's ability to work, such as appearing at work inebriated, would seem to disqualify the claimant from unemployment benefits." In the present case, there is no evidence to establish that Sayre was impaired when he reported to work. Therefore, although the argument was not properly preserved for appeal, we nevertheless hold that the circuit court correctly decided this issue in

¹⁴ Id. at 886.

¹⁵ 687 S.W.2d 866, 868 (Ky.App. 1984).

holding that Sayre did not engage in any misconduct by reporting to work after being forced to inhale marijuana smoke.

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

BUCKINGHAM, SENIOR JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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