RENDERED: APRIL 26, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000842-MR

L. FORGY & ASSOCIATES, PLLC — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01076

ZANDA L. GILLOCK AND
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER,[1] JUDGES.

KELLER, JUDGE: L. Forgy & Associates, PLLC, (L. Forgy), appeals from the Franklin Circuit Court's opinion and order reversing the Kentucky Unemployment Insurance Commission's (the Commission) order denying Zanda Gillock's (Gillock) application for benefits. On appeal, L. Forgy argues that the Commission

[1] Judge Michelle M. Keller authored this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

correctly applied the law to the facts, and the circuit court's reversal was erroneous. For the following reasons, we disagree and affirm.

FACTS

Gillock began working as an associate attorney for L. Forgy in May 2004. On November 6, 2007, Gillock and the firm's managing partner, Lawrence E. Forgy, Jr. (Mr. Forgy), met to discuss a case on which Gillock had been working (the Disney case). Mr. Forgy advised Gillock that the client in the Disney case was unhappy with Gillock's representation and had requested that she be removed from the case. The next day, Gillock and Mr. Forgy again discussed the Disney case and Mr. Forgy indicated that the client was not only dissatisfied with Gillock's representation but also with her personal appearance. Specifically, Mr. Forgy indicated that the client made negative comments about Gillock's weight and the length of her skirts. Gillock became upset and, according to Mr. Forgy, Gillock advised him that she was leaving the firm. Because the Disney case was scheduled to go to trial on December 6, and neither Mr. Forgy nor the firm's other associate were familiar with the Disney case, Mr. Forgy asked Gillock to remain until after the trial. According to Mr. Forgy, Gillock agreed to do so. We note that two of the firm's other employees testified that Gillock stated she would be leaving after the trial.

On November 14, 2007, Mr. Forgy acknowledged in writing that he was accepting Gillock's resignation, which was to be effective at the end of the Disney

trial. On November 15, 2007, Gillock responded to Mr. Forgy's letter denying that she had resigned or that she had any intention of resigning.

On December 5, 2007, in anticipation that the trial of the Disney case would be continued, Mr. Forgy advised Gillock that December 6, 2007, would be her last day at L. Forgy. On December 6, 2007, as Mr. Forgy had anticipated, the trial court granted the continuance, re-scheduling the Disney trial for May 2008.

Gillock applied for unemployment benefits, and L. Forgy contested her claim, arguing that Gillock had voluntarily resigned when she stated she would be leaving after the Disney trial. Furthermore, L. Forgy argued that, because the Disney trial had been continued, her resignation was effective as of the date the trial had originally been scheduled to begin. Gillock argued that she had not resigned and that Mr. Forgy had terminated her employment.

Following a hearing, the referee found that Gillock had resigned and that her resignation was to be effective at the conclusion of the Disney trial. However, since the Disney trial had not taken place, the referee found that Mr. Forgy's announcement that Gillock's last day would be December 6, 2007, amounted to a termination of her employment. Therefore, the referee determined that Gillock was entitled to benefits.

L. Forgy appealed the referee's decision to the Commission. The Commission reversed, finding as follows:

> The "end of the trial", which [Gillock] announced as her last day to three separate individuals, was not definite at the time of the utterance. Indeed, the trial was continued

> until a date some months in the future. Such an open-ended notice period, due to an indefinite date of departure, creates an unreasonable burden for an employer, for a myriad of valid business reasons. Suffice it to say, that **had an identifiable date certain been established by claimant as her last day,** then such an intervening act by an employer would be considered a discharge from the employment.
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> . . .
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> The Commission finds that it is reasonable for an employer, where a date certain has not been identified by an employee who has announced an intention to quit, to determine that date for its own convenience. The employer's insistence that a date of separation be established does not alter the nature of the separation, as the weight of the evidence supports a finding that the claimant announced her intention to quit.
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> . . .
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> Additionally, the Commission points out the fact that claimant continued in the employment approximately one (1) month subsequent to her announced intention to quit, said period being recognized generally as a reasonable length of time of a notice to quit from a member of management or professionals in their industry to the employer, or conversely, of a notice from an employer to same of impending termination of employment. In that sense, that the employer set the date of separation caused no injury, prejudice or detriment to claimant.

(Emphasis in original). In addition to reversing the referee's decision, the Commission ordered Gillock to repay the benefits she had received.

Gillock then sought review in the Franklin Circuit Court. The court agreed with the Commission's finding that Gillock had resigned but it disagreed with the

Commission's finding as to the effective date of Gillock's resignation. It is from the court's opinion reversing that L. Forgy now appeals.

STANDARD OF REVIEW

> Judicial review of a decision of the Kentucky Unemployment Insurance Commission is governed by the general rule applicable to administrative actions. "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n,* 437 S.W.2d 775, 778 (Ky. 1969) (*citing Brown Hotel Co. v. Edwards,* 365 S.W.2d 299 (Ky. 1962)). Substantial evidence has been defined as evidence which has sufficient probative value to induce conviction in the minds of reasonable people. *Kentucky State Racing Comm'n v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972). If there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record. *Kentucky Comm'n on Human Rights v. Fraser,* 625 S.W.2d 852, 856 (Ky. 1981). An agency's findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record. *Id.* If the reviewing court concludes the rule of law was correctly applied to facts supported by substantial evidence, the final order of the agency must be affirmed.

Kentucky Unemployment Ins. Comm'n v. Cecil, 381 S.W.3d 238, 245-46 (Ky. 2012).

ANALYSIS

The circuit court determined that substantial evidence supports the Commission's finding that Gillock resigned without good cause; therefore, it did not disturb that finding. We agree with the circuit court that the evidence supports

that finding, thus we cannot disturb it on appeal. However, as noted by the circuit court, the analysis cannot stop there because an issue exists regarding when Gillock's resignation became effective. L. Forgy and the Commission argue that the Commission correctly determined that Gillock's resignation was "open-ended," leaving L. Forgy free to determine an end date of employment "for its own convenience." Gillock argues that L. Forgy "prematurely and unilaterally" terminated her employment prior to the resignation date, thus entitling her to benefits. As noted by the Commission and the circuit court, the resolution of this issue depends on how the holding in *Thompson v. Kentucky Unemployment Insurance Commission,* 85 S.W.3d 621 (Ky. App. 2002) is applied to these facts.

In *Thompson*, Mr. Thompson gave his employer notice that he was resigning, with an effective date of resignation two weeks later. The next day, the employer advised Mr. Thompson that it accepted his resignation and that he was being terminated immediately. Mr. Thompson filed a claim for unemployment benefits, which was initially denied based on a finding that Mr. Thompson quit work without good cause. Following a hearing, a referee found that Mr. Thompson had quit work without good cause. However, the referee modified the initial complete denial of benefits, finding that Mr. Thompson was entitled to benefits for the two-week period between the date he gave notice of his intent to resign and the effective date of his resignation. On appeal, the Commission, the circuit court, and this Court affirmed the referee's determination.

In its opinion, this Court focused primarily on whether the referee and the Commission correctly found that Mr. Thompson resigned without good cause. This Court held that the evidence supported that finding and we affirmed as to that issue. As to the award of two weeks of benefits, this Court held that:

> Thompson submitted his voluntary resignation before [his employer] terminated him, so his unemployed status following the two-week notice period was not due to the company's action. Thompson would have left his job after September 5th, regardless of his immediate termination . . . . The referee correctly analyzed Thompson's unemployed status during the two-week notice period as a discharge initiated by the company, and the subsequent period as a quitting initiated by Thompson.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 626-27 (Ky. App. 2002).

The Commission herein distinguished *Thompson* because Mr. Thompson gave a date certain for his resignation, while Gillock's resignation was timed to coincide with the end of the Disney trial. According to the Commission, because "the end of the trial" was not a date certain, L. Forgy was entitled to fix a date so as to avoid an unreasonable burden.

The circuit court, on the other hand, found *Thompson* to be dispositive. The court agreed that Gillock's resignation was timed to the occurrence of an event rather than to a specific date. However, the court also noted the similarities between this case and *Thompson.* As in *Thompson,* Gillock gave advance notice of her intent to resign. Mr. Forgy, like the employer in *Thompson*, accelerated her

date of resignation. Furthermore, the court noted that it was Mr. Forgy who asked Gillock to remain until after the trial; thus, at least in part, fixing the trigger for Gillock's resignation. Under these circumstances, we agree with the circuit court that L. Forgy is liable for benefits from the date of Gillock's termination through the date of the Disney trial.

We recognize the arguments by L. Forgy and the Commission that a resignation which is not triggered by a date certain could cause a burden on the employer. However, when the employer requests that the resignation be tied to the occurrence of an event and the employee agrees, the employer cannot argue that it was unduly burdened. Furthermore, we recognize the argument that, if the Disney trial had been further continued, L. Forgy could have been saddled with a disgruntled employee for an indefinite time period. However, that is not what occurred, and we must deal with what actually occurred, not what could have occurred. Furthermore, we note that L. Forgy could have avoided the uncertainty of Gillock's termination date, by simply accepting her resignation when it was offered in November 2007.

CONCLUSION

The circuit court correctly applied *Thompson* to the facts in this case; therefore, we affirm.

CLAYTON, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent because I do not agree that the date of Ms. Gillock's resignation was uncertain or "open-ended." When the parties negotiated the terms of resignation on November 6, both Ms. Gillock and Mr. Forgy intended for the resignation to become effective on or about December 6, 2007, following the Disney trial. They operated under this agreement until trial was precipitously continued on December 5. By notifying Ms. Gillock that December 6 would be her last day of employment despite the continuance, Mr. Forgy was not accelerating the date of resignation, nor surprising her, but merely enforcing the terms of resignation to which Ms. Gillock had agreed. I would reverse.

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