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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001206-MR

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE, V, JUDGE  
ACTION NO. 11-CI-00384

CAMPBELL COUNTY DETENTION CENTER  
AND JUSTIN FRYMAN

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: The Kentucky Unemployment Insurance Commission

(hereinafter referred to as the Commission) appeals from an order of the Campbell

Circuit Court which reversed its decision to award unemployment benefits to Justin

Fryman. We find that the circuit court erred in reversing the decision of the Commission; therefore, we reverse and remand.

Mr. Fryman began working for the Campbell County Detention Center on September 25, 2006. He was discharged on August 31, 2010, for allegedly violating the Detention Center's attendance policy. The policy states that employees are to be at work on time and ready to work and that excessive absenteeism would be grounds for disciplinary action. Mr. Fryman filed a claim for unemployment benefits on September 26, 2010. Kentucky Revised Statutes (KRS) 341.370(1)(b) disqualifies an employee from receiving benefits if the employee is discharged for misconduct connected with the work. KRS 341.370(6) states:

“Discharge for misconduct” as used in this section shall include but not be limited to, separation initiated by an employer for falsification of an employment application 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 employer's 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 work. [Emphasis added].

On October 14, 2010, Mr. Fryman received a notice that the Division of Unemployment Insurance found he was discharged for misconduct connected with

work and disqualifying him from receiving unemployment insurance benefits. On October 28, 2010, Mr. Fryman appealed the determination to an unemployment referee. The referee conducted an evidentiary hearing on December 9, 2010. Mr. Fryman and David Fickenscher, Fryman's supervisor, both testified at the hearing. Mr. Fickenscher testified as to the absences and tardies Mr. Fryman had received in the six months leading up to his discharge. Each time Mr. Fryman was absent or tardy, a form was completed which listed the reason for missing work. Mr. Fickenscher testified that Mr. Fryman was absent from work on February 11, 2010, (for unknown reasons because the form was missing); April 7, 2010, (for a family illness); May 29, 2010, (for being ill with vomiting and a fever); June 12, 2010, (for an eye rash); June 13, 2010, (for continuation of the eye rash); July 19, 2010, (for family illness); and August 12, 2010, (for being sick). Mr. Fickenscher also testified that Mr. Fryman was tardy to work on March 1, 2010, (for unknown reasons because the form was missing); March 5, 2010, (for car problems); April 27, 2010, (for unknown reasons because the form was missing); May 30, 2010, (for oversleeping); July 28, 2010, (for oversleeping); August 5, 2010, (for unknown reasons because the form was missing); August 11, 2010, (for oversleeping);<sup>1</sup> August 20, 2010, (for forgetting his time card and having to return home to get it); and August 25, 2010, (for car problems).

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<sup>1</sup> The form Mr. Fryman filled out for the July 28 tardy stated that he was late because he overslept due to his alarm clock not going off. The form he filled out for the August 11 tardy stated that he overslept because the power went out at his home causing the alarm clock to turn off. During the hearing before the referee, Mr. Fryman testified that he had recently been diagnosed with depression and that the depression was the reason he was oversleeping. This suggests that the alarm clock excuses were false.

Mr. Fryman testified that he had valid excuses for his absences and tardies. He also provided evidence that he had been diagnosed with depression and testified that this was the cause of his oversleeping.

The referee reversed the determination and awarded Mr. Fryman unemployment benefits. The referee stated:

The determination becomes whether claimant's attendance, taken in its totality over the last six (6) months of his employment, contains a sufficient number of instances of unsatisfactory attendance that were without good cause, to compel a finding of misconduct under . . . KRS 341.370(6). The statute does not specify any mathematical formula for making such a determination; therefore, the rule of reason must prevail. That is, each instance of unsatisfactory attendance must be judged on its own merit, with a final determination of misconduct being made based on consideration of all of the individual determinations.

The direct, sworn testimony of the claimant, uncontested by the employer, was that a majority of the instances of unsatisfactory attendance was for good cause; specifically, the majority of claimant's absences and tardies were due to either his personal illness or the illness of his family members and car problems. Claimant has met his burden, by a preponderance of evidence, to establish good cause for his unsatisfactory attendance.

On December 21, 2010, the Detention Center appealed the referee's decision to the Commission. The Commission then performed a *de novo* review of the application for benefits and the record compiled by the referee. On February 28,

2011, the Commission issued an order affirming the referee's decision and adopted the referee's findings of fact with only one minor change.<sup>2</sup>

On March 5, 2011, the Detention Center appealed the Commission's decision to the Campbell Circuit Court. The Detention Center argued that Mr. Fryman was discharged for misconduct due to his many absences and tardies. It further argued that Mr. Fryman did not meet his burden in demonstrating that his unsatisfactory attendance was for good cause. The Detention Center claimed that absences due to unverified illnesses and car problems were not for good cause.

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." Substantial evidence has been defined as evidence which has sufficient probative value to induce conviction in the minds of reasonable people. 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. An agency's findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record. 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 -246 (Ky. 2012) (citations omitted).

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<sup>2</sup> This change did not alter the findings in such a way that would alter the referee's ultimate conclusion in awarding Mr. Fryman benefits.

The circuit court reversed the decision of the Commission. It held that the record demonstrated Mr. Fryman did not meet his burden of showing good cause. The circuit court was not convinced that unspecified car problems and oversleeping were good causes for missing work. It also found that Mr. Fryman did not present evidence showing that his depression was causing his unsatisfactory attendance. This appeal followed.

We believe that the trial court erred in reversing the decision of the Commission.

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.

*Thompson v. Kentucky Unemployment Ins. Comm'n*, 85 S.W.3d 621, 624 (Ky. App. 2002) (citations omitted). “[A] reviewing court, whether it be one of the circuit courts, the Court of Appeals, or [the Kentucky Supreme Court], should refrain from reversing or overturning an administrative agency’s decision simply because it does not agree with the agency’s wisdom.” *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002) (citation omitted).

In the case at hand, the referee and Commission both found that Mr. Fryman proved good cause for his absences and tardies. Mr. Fryman missed work due to

personal illness, including depression, family illness, and car problems.<sup>3</sup> The parties do not dispute that personal illness is a good cause for missing work. Family illness and car problems have been found to be good causes in other cases. *See Alliant Health Sys. v. Kentucky Unemployment Ins. Comm'n*, 912 S.W.2d 452 (Ky. App. 1995). As for oversleeping, Mr. Fryman testified that this was due to his depression.

The circuit court in this case substituted its judgment for that of the Commission. The referee and Commission found that the excuses proffered by Mr. Fryman were uncontested by the Detention Center. The forms completed by Mr. Fryman when he was absent or tardy, as well as his sworn testimony, support this finding. Also, the Detention Center did not contest Mr. Fryman's diagnosis of depression during the hearing before the referee. Mr. Fryman provided proof he was diagnosed with depression and testified that this was the cause of his oversleeping. It is common knowledge that oversleeping is a symptom of depression. This inference could have easily been made by the referee.

The Commission found that Mr. Fryman showed good cause for his absences and tardies. This is supported by substantial evidence in the form of the uncontested testimony of Mr. Fryman and the forms completed after his absences and tardies. Testimony of the discharged employee can constitute substantial evidence. *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299, 302 (Ky.1963). While

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<sup>3</sup> The Detention Center and circuit court claim that the referee did not consider Mr. Fryman's diagnosis of depression in making its decision because the word "depression" is not mentioned in the referee's opinion. We believe that the referee's use of the phrase "his personal illness" included depression.

there were some unexcused absences and tardies, the referee and Commission found that the majority of Mr. Fryman's absences and tardies were for good cause. As stated by the referee, the unemployment insurance statute "does not specify any mathematical formula for making . . . a determination; therefore, the rule of reason must prevail. That is, each instance of unsatisfactory attendance must be judged on its own merit, with a final determination of misconduct being made based on consideration of all of the individual determinations."

For the foregoing reasons, we reverse the judgment of the circuit court and remand with instructions to reinstate the order of the Commission.

COMBS, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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