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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001061-MR

TARSIS HICKS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 13-CI-00926

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION and FAIRVIEW COMMUNITY HEALTH CENTER — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: JONES, STUMBO AND TAYLOR, JUDGES.

JONES, JUDGE: This appeal comes to us from the Warren Circuit Court. The Appellant, Tarsis Hicks, asserts that the circuit court erred when it affirmed the Kentucky Unemployment Insurance Commission's decision to deny her request for

unemployment benefits. For the reasons more fully explained below, we REVERSE AND REMAND.

I. Procedural and Factual Background

Hicks began working for Fairview Community Health Center ("Fairview") on March 8, 2006. Hicks worked as an interpreter helping Fairview's Spanish-speaking patients communicate with its medical staff.

During the summer of 2012, Hicks was diagnosed with breast cancer. On July 31, 2012, she informed her supervisor that she would be traveling to Nashville, Tennessee, the following day to begin treatment. Thereafter, Hicks took leave under the Family Medical Leave Act ("FMLA"). On October 24, 2012, after completing twelve weeks of chemotherapy, Hicks went to Fairview and requested permission to work from home due to the fact that her doctor did not want her exposed to sick people while still taking chemotherapy. Hicks's doctor estimated that she would not be able to return to regular full-time, in-office employment until April 1, 2013.

Fairview did not accommodate Hicks; instead, it terminated her employment effective October 25, 2012. Her termination letter states:

> We regret to inform you that your employment with Fairview Community Health Center is being terminated, effective 10/25/2012. Your FMLA (12 week) benefit terminates 10/24/2012 and you are still dealing with a serious health issue which prevents you from returning to work. You are eligible for COBRA benefits for your short term disability coverage and we will forward that information to you.

> Your last paycheck will be available on Friday, October 26, 2012.
>
> I wish you the best of luck in dealing with your medical situation. Please remember to contact us when you are considering returning to work as we will make every effort to return you to your translator position.[1]

In December of 2012, Hicks applied for unemployment insurance benefits. The Cabinet denied Hicks's application on the basis that she "voluntarily left work due to a health condition." Hicks appealed. Following a telephone hearing, the hearing officer affirmed the notice of termination. Hicks appealed that decision to the Unemployment Insurance Commission ("Commission"). The Commission affirmed. Hicks appealed to the circuit court, which also affirmed.

This appeal followed.

II. Standard of Review

The standard of review of an unemployment benefit decision is whether the Commission's findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. *Thompson v. Kentucky Unemployment Ins. Comm'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). Substantial evidence is evidence that has enough probative value to make reasonable people agree as to a conclusion. *Id*. When substantial evidence supports the Commission's decision, a reviewing court must defer to the finding even when the record contains evidence to the contrary. *Urella v. Kentucky Bd. of Med. Licensure,* 939 S.W.2d 869, 873 (Ky. 1997); *Kentucky Comm'n on Human*

[1] Hicks testified that she attempted to return to work in February 2013, but was told her job was no longer available.

Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). While the court must defer to findings of fact, it reviews issues of law *de novo*. *Wilson v. Kentucky Unemployment Ins. Comm'n,* 270 S.W.3d 915, 917 (Ky. App. 2008).

III. Analysis

The case before us involves the proper application of the provisions of KRS[2] 341.370(1)(c). In relevant part, that statute provides: "A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which . . . [she] has left [her] most recent suitable work . . . *voluntarily* without good cause *attributable to the employment*." (Emphasis added). "[T]he word 'voluntary' . . . [is] defined as meaning 'freely given' and 'proceeding from one's own choice or full consent.'" *Kentucky Unemployment Ins. Comm'n v. Young*, 389 S.W.2d 451, 453 (Ky. 1965). On appeal, Hicks argues that the evidence irrefutably establishes that she did not voluntarily leave her employment with Fairview. We agree.

The only "evidence" the Commission relied upon to support "voluntariness" was the fact that Hicks told her supervisor she was unable to physically return to work immediately following the expiration of her FMLA leave. To this end, the Commission noted that "the claimant has been on FMLA leave previously with this employer and knew or should have known, her maximum leave time available under FMLA was twelve weeks." In affirming the

[2] Kentucky Revised Statutes.

Commission, the circuit court concluded that Hicks initiated the separation because, due to her medical condition, she was unable to perform available work.

Hicks was diagnosed with breast cancer. She informed her employer of her diagnosis. She used all her accrued leave. She then applied for and received FMLA. When her twelve weeks of FMLA expired, Hicks went to see her supervisor, Chris Keyser. Hicks presented Ms. Keyser with a form from her doctor indicating that she would not likely be able to return to in-office work until April of 2013. Hicks then requested the accommodation of being allowed to perform her job from home by interpreting over the telephone. Hicks testified as follows:

> I went over there on the twenty-fourth to ask her to let me work like a[n] interpreter from my home. She set up phone lines like she use. . . . She was just over there when I was ready with the paper [from Hicks' doctor] for termination. She told me, "I don't need no paper from you, doctor or nothing. Here is your letter and you can go and apply for unemployment."

(4/18/2013 Hrg. Trans. at 20). At another point in the hearing, Hicks testified unequivocally, "I didn't voluntary quit. You fired me." (*Id.* at 25). Moreover, Hicks engaged in no misconduct leading up to her termination. Hicks's supervisor even testified during the hearing that Hicks stayed in contact with her throughout her FMLA leave.[3]

Hicks's conduct is entirely inconsistent with Hicks having "voluntarily" separated herself from her employment. Indeed, even Hicks's

[3] Ms. Keyser testified: "We had several conversations throughout her Family Medical Leave."

employer was clear during the hearing of this matter that Hicks did *not* voluntarily quit after her FMLA expired. Ms. Keyser testified:

> Just to clarify for Ms. Hicks, Fairview has never claimed that she voluntarily quit. That determination and that language was used by the unemployment office in their determination. We provided her, after her twelve weeks in which it was substantiated by the medical information we received that she was not able to come back to work after twelve weeks and ***she was terminated because she could not come back to work after twelve weeks***.

(*Id.* at 46).

While one who is seriously ill might make a personal choice to leave the work force for a time, the evidence is undisputed that Hicks desired to remain with her employer and was willing to work with accommodations or to return to work after the completion of her treatment. Even her employer was clear, Hicks wanted to stay employed, but the employer was unwilling to accommodate her limitations or timeframe. We find the Commission's findings of voluntariness to be totally inconsistent with the facts of this case and contrary to our case law on the issue of voluntariness. To be clear, only one conclusion can be drawn from the evidence: Hicks did not quit; Hicks was fired.

The fact that the employer was no longer legally obligated to keep Hicks's job open under the FMLA does not mean that Hicks was not entitled to unemployment benefits in the event of termination. The FMLA says nothing about the availability or lack thereof of state unemployment benefits when a termination is occasioned by a health condition requiring leave longer than three months. It

was certainly the employer's prerogative whether to terminate Hicks, accommodate her situation, or allow her to take additional, unpaid time off work. The employer made the choice to terminate Hicks. The point here is that the *choice was made by the employer, not Hicks*.

In *Young*, 389 S.W.2d 451, our Supreme Court considered the case of an employee who was required by company policy to leave his employment at the age of 65. The issue was whether he could be said to have left work "voluntarily" upon reaching the age of mandatory retirement. The court held that Young was forced from his employment because of forces beyond his control, and therefore had not voluntarily left. *Id.* at 453 ("We can discover no act or conduct of Young from which it can be said he voluntarily discontinued his employment.").

An even more analogous case is that of *Kentucky Unemployment Ins. Comm'n v. Henry Fischer Packing Co.*, 259 S.W.2d 436 (Ky. 1953). In *Henry Fischer*, the employee, a butcher, suffered an epileptic seizure while at work. Since his duties required his use of sharp knives in proximity to his fellow employees, the company concluded that his dismissal was in everyone's best interests. His claim for unemployment insurance benefits was initially approved, but that determination was reversed upon judicial review in the circuit court. However, upon appellate review, the court held that the claimant "did not voluntarily leave his job but was discharged from it for reasons beyond his control." *Id.* at 440.

More recently, in *Kentucky Unemployment Ins. Comm'n v. Blakeman*, 419 S.W.3d 752, (Ky. App. 2013) (discretionary review denied Feb. 12, 2014), this Court considered the case of an employee terminated after she was unable to pass a physical assessment examination. The employee, Blakeman, suffered a non-work injury that led to her missing several weeks of work. Upon return to work, the company's policies required Blakeman to pass a physical fitness test. Despite her best efforts, she was unable to do so. As a result, the employer terminated Blakeman. Blakeman's application for unemployment benefits was denied on the basis that her separation was "voluntary." We disagreed, holding that Blakeman's termination was occasioned by a condition beyond her control. *Id.* at 754.

While not binding precedent, we also note that separate panels of this Court have reached outcomes similar to the present one. In *Medairos v. Kentucky Unemployment Ins. Comm'n*, No. 2012-CA-000162-MR, 2013 WL 645820, at *3 (Ky. App. Feb. 22, 2013), we considered the case of a truck driver, Medairos, who was terminated after he became an insulin-dependent diabetic. Under federal regulation, this prevented him from being able to drive a commercial truck engaged in interstate commerce. As a result, his employer terminated him. The Commission denied Medairos unemployment benefits on the basis that he "voluntarily left the employer without good cause attributable to the employment." On appeal, we reversed upon holding that it was error to characterize Medairos's

departure as voluntarily because "his separation from the employment was an event over which he had absolutely no free choice." *Id.*

Even more recently in *Kentucky Unemployment Ins. Comm'n v. Carter*, No. 2012-CA-000888-MR, 2014 WL 4049884, at *1 (Ky. App. Aug. 15, 2014), we considered whether Carter, who was terminated by Dollar General after she was unable to secure a medical release in accordance with company policy after she was injured in a car wreck unrelated to her employment, was entitled to unemployment benefits. Again, the Commission argued that Carter left "voluntarily" because her injuries and inability to secure a release were unrelated to her employment. We held:

> [W]e believe the Commission's arguments disregard the concept of voluntariness noted in *Young*. It is misleading and disingenuous for the Commission to characterize Carter as freely choosing not to return to work for medical reasons. According to Carter's undisputed testimony, she contacted Dollar General to inform them of her condition and ongoing treatment. Prior to receiving the termination letter, Carter was released to return to work under light-duty restrictions but Dollar General refused to accommodate those restrictions. Dollar General gave her ten days to obtain a medical release or be terminated. It extended no further opportunities for Carter to return to work. She was not medically cleared to return to her normal work until after she had been terminated based on her failure to obtain such a release. Compliance with Dollar General's demand was clearly impossible and beyond Carter's control.

Id. at *3.

As demonstrated by a review of the above cases, the Commission's position in these types of cases is at odds with the plain meaning of the word

voluntary. Time and time again, as in this case, it argues that a termination was "voluntary" even when the employer readily concedes that it was not. In every way, Hicks demonstrated that she desired to remain employed and was willing to work with accommodations until she was medically cleared to return to work in the office. Fairview had a right to terminate Hicks, but we cannot be any clearer, the choice was made by Fairview. Hicks did not voluntarily quit. Accordingly, she was entitled to unemployment benefits.

IV. CONCLUSION

For the reasons set forth above, we reverse and remand.

STUMBO, JUDGE, CONCURS.

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