RENDERED: JULY 21, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000628-MR

COMMONWEALTH OF KENTUCKY,
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLANT

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 14-CI-00287

WILLIAM ANTHONY HOURIGAN
AND CURTIS-MARUYASU
AMERICA, INC. — APPELLEES

AND NO. 2016-CA-000697-MR

CURTIS-MARUYASU
AMERICA, INC. — APPELLANT

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 14-CI-00287

WILLIAM ANTHONY HOURIGAN — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT, AND STUMBO, JUDGES.

LAMBERT, J. JUDGE: Commonwealth of Kentucky, Kentucky Unemployment Insurance Commission (KUIC), and Curtis-Maruyasu America, Inc. (CMA) have separately appealed from the Order and Judgment of the Marion Circuit Court reversing KUIC's decision to deny benefits to former CMA employee William Anthony Hourigan. We reverse the circuit court's order.

Hourigan began working for CMA on August 5, 2010; his position at the time of his termination was as a Group Leader. He was terminated on April 25, 2014, for failing to follow CMA's sexual harassment/personal conduct policy and report an issue of harassment reported to him by a team member. CMA's termination letter to Hourigan, dated April 29, 2014, stated as follows:

> [CMA] has a detailed Harassment/Prohibited Harassment and Personal Conduct Policy which forbids any harassing or inappropriate conduct. CMA also provides training for supervisors regarding harassment/prohibited harassment. You have reviewed the Harassment Policy on several occasions, and also attended Harassment Training.
>
> Anthony, as a Group Leader – a crucial supervisory position – you were required to meet CMA's expectations to provide a working atmosphere that is free from all forms of harassment. As a CMA supervisor, you had a unique responsibility to prevent and report harassment in the workplace, and to set a positive example for your Team Members. As a supervisor, your

> actions may be attributed to the company for purposes of determining compliance with the law.
>
> Allegations were brought forward regarding your knowledge of harassing conduct occurring within CMA, which included inappropriate physical conduct toward CMA team members including yourself. In response to these allegations, we immediately began an extensive investigation, involving numerous interviews with CMA employees. As a result, we concluded you had knowledge of the inappropriate behavior and failed to uphold your responsibilities as a management representative of this company to document and report accordingly to protect our team members from this inappropriate behavior. Your knowledge of instances of improper conduct has been corroborated through witnesses as well as through your own admission. Our findings are made all the more serious because of your position as a Group Leader with supervisory responsibility over many employees and knowingly allowing the behavior to continue. Your failure to address and report has exposed CMA to potential liability, and we simply cannot tolerate behavior of this kind from a management representative.
>
> Accordingly, as we discussed when we spoke on April 25, 2014, we have no choice but to terminate your employment with CMA, effective immediately.

While Hourigan was aware of the rule and admitted that he had violated it, he did not believe it applied in the situation. In his rebuttal statement made during CMA's investigation, Hourigan explained:

> There was horse play going on and one of the guys involved came to me laughing and was telling me what happened and I told him if it got to be a problem to come let me know[.] [He] never did and then about a month later he went to HR and told them it was sexual harassment and I was brought to HR and told I needed to write a statement on what happened so I did[.] [But] I did not know three [sic] was sexual harassment involved

> and I was accused of lying by HR president Terry Viverburg [sic] which I had no reason to lie. I was not involved in it[.] [Just] the knowledge of the horse play not any harassment.

Hourigan applied for unemployment benefits shortly after he was terminated, and CMA contested his claim. In its response to Hourigan's claim, CMA stated that its internal investigation established that he had violated its uniformly enforced sexual harassment/personal conduct policy in March of that year by allowing a person a "one time pass." A notice of determination, mailed on May 20, 2014, found that Hourigan was qualified to receive benefits effective April 27, 2014: "[Hourigan] was discharged due to alleged violation of the employer's rule or policy. The findings of fact establish [Hourigan] did not knowingly violate a reasonable and uniformly enforced rule of the employer. The discharge was for reasons other than misconduct connected with the work." CMA appealed the determination to KUIC.

A hearing on CMA's appeal was held before a referee on August 18, 2014. Annette Hughes appeared as the Human Relations Manager for CMA, but Hourigan did not appear. Ms. Hughes testified about Hourigan's employment with CMA, including his positions in the company. She discharged Hourigan on April 25, 2014, due to his violation of CMA's sexual harassment/personal conduct policy.[1] She described the policy as being:

> against sexual harassment, any intentional physical conduct of a sexual nature – touching, fondling, pinching, patting, those types of behavior. Anyone that is making

[1] The written version of the policy is not included in the record on appeal.

> unwelcomed or persistent advances toward another team member in any way; any types of jokes or things of that nature should be reported in violation of the policy. And that should be reported to an HR Manager immediately in writing.

Ms. Hughes stated that Hourigan had the policy read to him in his orientation when he was hired and had attended a supervisory training explaining "the expectations of a supervisor on how to handle those type of situations."

Ms. Hughes went on to explain the events leading to Hourigan's discharge. A Tool Room Team Member filed a complaint on April 24, 2014, stating that another team member had been sexually harassing him for a month by "constantly grabbing and touching in inappropriate places; grabbing, slapping on the butt and the [crotch.]" The victim had reported this to Hourigan, but Hourigan never informed Human Resources. Once the report was made, an internal investigation began, during which Hourigan admitted he had also witnessed the sexual harassment in addition to being informed of it. He also admitted that he had observed the team member bear hug the other team member and that he had chosen to give the team member a one-time pass. In addition, Hourigan admitted that the team member had touched him inappropriately. Hourigan failed to report continued sexual harassment when the team member reported it had happened again. Ms. Hughes confirmed that horseplay and sexual harassment should both be reported.

The referee issued a decision on August 21, 2014, finding that Hourigan was not disqualified from receiving benefits because "it is unknown if [Hourigan] was

fully aware that as supervisor that he himself was to directly report the issue to human resource [sic] on the first instance." CMA appealed the referee's decision to KUIC.

In an order mailed October 23, 2014, KUIC reversed the referee's decision following a *de novo* review, citing Kentucky Revised Statutes (KRS) 341.370(6), which addresses a discharge for misconduct. KUIC reasoned:

> Despite two complaints from a worker that the claimant supervised, and despite witnessing the harassment as to the first of those complaints, and despite having been subjected to unwanted touching by Mr. Riggs himself, the claimant admittedly did not ever report Mr. Riggs' ongoing workplace sexual harassment to human resources until later when he was confronted about the issue in a meeting with his superiors on April 24, 2014. This meeting was in response to Mr. Marlow's decision that no action would be taken by the claimant as his supervisor to help him stop the unwanted and inappropriate touching, whereupon Mr. Marlow was forced to directly complain to human resources on April 24, 2014. The claimant allowed the sexual harassment to continue without reporting it to human resources, thereby violating the employer's policy. The work rule requiring employees to report sexual harassment in the workplace is a reasonable rule, as it is designed to protect workers from unwanted sexual advances. There was no evidence that this rule was anything other than uniformly enforced, and as such it is found to be so enforced. The claimant committed a knowing violation of a reasonable and uniformly enforced rule of the employer, thereby engaging in misconduct connected with the work per the statute. The claimant is disqualified accordingly.

As a result, Hourigan was ordered to repay the benefits paid during the disqualification period in the amount of $5,395.00.

On November 10, 2014, Hourigan filed a verified complaint and administrative appeal with the Marion Circuit Court pursuant to KRS 341.450(1) seeking reversal of KUIC's order reversing. In his complaint, Hourigan contended that he was not the supervisor of the worker who was harassed and that the harassment was not described as sexual in nature. He also stated that he did not participate in the referee hearing because he had been informed by a commission member from the Bardstown office that he did not need to do so as he had obtained new employment in August of 2014 and was no longer receiving benefits. He stated that KUIC misapplied the law to the facts, noting that he had not committed the acts of harassment but rather had failed to properly use his discretion in how to deal with the report, which did not warrant a denial of benefits due to misconduct. In its answer, CMA sought dismissal of Hourigan's complaint. The parties filed briefs in support of their respective positions. Hourigan argued that he was not discharged for misconduct and was qualified for benefits, and in the alternative that he was denied his due process rights to present evidence when a commission member told him he did not need to appear at the hearing.

On April 19, 2016, the circuit court entered an order and judgment, in which it reversed KUIC's decision. While recognizing that a decision of an administrative body must be accorded due deference if it is supported by substantial evidence and is not arbitrary, the circuit court determined that the matter in this case involved the interpretation of CMA's written policy, making

this a question of law. The court held that the referee, not KUIC, interpreted the written policy correctly:

> As the referee determined the policy is unclear as to what exactly the responsibility of Mr. Hourigan was in this situation. Did his oral reprimand suffice to correct the horseplay? Or was it sexual harassment he was required to report further along the chain of command? In this matter the employee was discharged for failure to correctly determine what was horseplay and what was sexual harassment. The policy as written with terms such as "contact of a sexual nature" and descriptions of types but not an exhaustive list of all conduct that could be described as sexual harassment requires the employee to determine what sexual harassment is. The Court holds as the referee did that the employee mistakenly judging a situation as happened herein was not misconduct that disqualifies him for benefits under the statute.

These appeals by CMA and KUIC now follow.

This Court's standard of review in administrative appeals is well-settled in the Commonwealth:

> 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. *Brown Hotel Co.*, 365 S.W.2d at 302.

Kentucky Unemployment Ins. Comm'n v. Cecil, 381 S.W.3d 238, 245-46 (Ky. 2012). "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) (footnote omitted). "The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency." *Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002) (citation omitted).

First, we hold that KUIC's findings of fact are supported by substantial evidence of record and shall therefore control. KRS 341.430(1) provides that KUIC "may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case[.]" Based upon the application of this statute, "[u]nlike a conventional appellate body, the Commission conducts a *de novo* review of applications." *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834 (Ky. App. 1998) (abrogated on other grounds by *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238 (Ky. 2012)). "As the fact-finder, the KUIC has the exclusive

authority to weigh the evidence and the credibility of the witnesses." *Thompson*, 85 S.W.3d at 626.

In KRS 341.370, the General Assembly set forth when a worker is disqualified from collecting unemployment insurance benefits. That statute provides, in relevant part, as follows:

> (1) A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which:
>
> . . .
>
> (b) He has been discharged for misconduct or dishonesty connected with his most recent work, or from any work which occurred after the first day of the worker's base period and which last preceded his most recent work, but legitimate activity in connection with labor organizations or failure to join a company union shall not be construed as misconduct; or
>
> . . . .
>
> (6) "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.

In *Shamrock Coal Co., Inc. v. Taylor*, 697 S.W.2d 952, 954 (Ky. App. 1985) (abrogated on other grounds by *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238 (Ky. 2012)), this Court explained that "a misconduct allegation is in the nature of an affirmative defense to an employee's claim for benefits under the chapter, and although the employee bears the overall burden of proof and persuasion, the employer has the burden of proving misconduct. *See Brown Hotel v. Edwards*, Ky., 365 S.W.2d 299 (1963)." The Supreme Court of Kentucky confirmed in *Cecil* that "a willful or wanton, or bad faith, finding, is not an additional requirement when the employee is discharged for conduct specifically identified in KRS 341.370(6)." 381 S.W.3d at 247.

The issue before this Court is whether KUIC properly applied the law to its findings of fact. We hold that the law was properly applied in this case and that, therefore, Hourigan is not qualified to receive unemployment benefits. There is no dispute that CMA's sexual harassment/personal conduct policy is both reasonable and uniformly enforced. And KUIC was well within its discretion to not adopt the referee's conclusion that Hourigan might not have been fully aware that he was supposed to report the issue in his position as a supervisor. As set forth in its order, KUIC found that Hourigan had admittedly failed to notify Human Resources pursuant to the policy once the team member notified him of the harassment that he had experienced. Hourigan had been trained about CMA's policy and his duties

to report as a supervisor. He admittedly failed to do so and opted instead to give the harasser a one-time pass. KUIC did not commit any error in concluding that Hourigan had committed a knowing violation of CMA's sexual harassment/personal conduct policy and therefore committed misconduct, making him ineligible to receive unemployment benefits pursuant to KRS 341.370(1)(b).

For the foregoing reasons, the order and judgment of the Marion Circuit Court is reversed, and KUIC's order reversing is reinstated.

ALL CONCUR.

BRIEFS FOR APPELLANT, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION:

Patrick B. Shirley
Frankfort, Kentucky

BRIEFS FOR APPELLANT, CURTIS-MARUYASU AMERICA, INC.:

Brent R. Baughman
Louisville, Kentucky

BRIEFS FOR APPELLEE, WILLIAM ANTHONY HOURIGAN:

Elmer J. George
Jonathan R. Spalding
Lebanon, Kentucky