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MAILED MAY 29 2020
COUNTY FAYETTE

COMMONWEALTH OF KENTUCKY
KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION
FRANKFORT

APPELLANT

TREE TOP LANDSCAPING
901 TODDS ROAD
LEXINGTON KY 40509

APPELLEE

[redacted]
LEXINGTON KY 40515

ORDER REVERSING

The employer appeals from a referee decision mailed March 13, 2020, which found the claimant was discharged for reasons other than misconduct connected with the work. The employer's reserve account was denied relief from charges based on the separation issue.

FINDINGS OF FACT

The claimant began working for the employer on May 21, 2018. He was employed full time as a director of marketing and business development. His work was based out of Lexington, Fayette County, Kentucky. He last worked on December 27, 2019, when Doug Vescio, president, discharged the claimant. Mr. Vescio discharged the claimant because he had determined that the claimant had been dishonest with the employer, had unsatisfactory work performance, and had used the employer's truck for personal use.

The claimant was assigned one of the employer's vehicles to drive for business purposes. This vehicle was equipped with a GPS location service that Mr. Vescio reviewed. The employer's policy states that the employer's vehicles are not to be driven for personal use. The policy is in the employer's employee manual. Mr. Vescio has never known any other employee to violate that policy, but there are "only a few who are allowed to do that." The claimant signed for a copy of the policy manual, and he was present at staff meetings where Mr. Vescio reminded staff to not use the employer's vehicles for personal travel.

On multiple occasions, Mr. Vescio asked the claimant why the vehicle was being driven at times that the claimant was not working, based on GPS records. Mr. Vescio concluded that the vehicle had been driven to Elizabethtown, Kentucky and Western Kentucky during non-business hours. He also determined that the claimant had driven the employer's vehicle to an SEC tournament across state lines. The claimant told Mr. Vescio he had not driven the vehicle off hours or for personal use.

The claimant did drive the employer's vehicle for personal reasons, even after attending the meetings where Mr. Vescio reminded him of the policy. The claimant reasoned his personal use of the employer's truck made up for the mileage he had put on his own vehicle while he awaited being assigned the employer's vehicle the first few months of his employment. He was not reimbursed for using his personal vehicle because he did not submit requests for reimbursements or "any receipts."

The claimant also drove the employer's vehicle to the SEC tournament. He "worked (his) way down" through Logan County, and Hopkinsville, on business appointments, and met Gino Miller, "the AD" from Paducah Tilghman, at the tournament. Mr. Miller was a potential client.

On December 8, 2019, the claimant was responsible for setting up a booth at an event and manning the booth for the day. Mr. Vescio sent the claimant some help. The helper reported that the claimant was not there that entire day. The booth had been set up, and the person in the neighboring booth reported that the claimant had asked him to close it down if he did not return.

At one point, there was "a lady" who told Mr. Vescio that she had met the claimant at a ballgame four months prior to the date that the claimant had told Mr. Vescio that he met with the lady as a potential client at a school.

Just before his discharge, the claimant had told Mr. Vescio that he was meeting a potential client, an architect, in Louisville Kentucky. Mr. Vescio concluded from the GPS records that the work vehicle was at the claimant's friend's house. The claimant had messaged Mr. Vescio that day and told him that the meeting went well.

APPLICABLE LAW

KRS 341.370(1)(b) and 341.530(3) combine to impose a duration disqualification from receiving benefits, and to grant reserve account relief to the employer when a worker has been discharged for **misconduct or dishonesty** connected with the work. (Emphasis added.)

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.)

The examples of misconduct set forth in KRS 341.370(6) are not an all-inclusive list. If an alleged behavior leading to discharge is not covered by a specific example of misconduct found in KRS 341.370(6), then and only then, shall the behavior be evaluated under controlling case law.

> "[M]isconduct" . . . is limited to conduct evincing such wilful [sic] 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.

Boynton Cab Co. v. Neubeck, 296 N.W. 636, 640 (Wis. 1941), as adopted in *Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472, 474 (Ky.App. 1984).

The employer trying to show a disqualification under KRS 341.370 must bear the burden of proof by a preponderance of credible evidence. *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299, 301 (Ky. 1962).

KRS 341.415 provides for repayment to the Office by a worker of an amount equal to the sum of benefits received by the worker during the weeks for which the worker was disqualified or held ineligible.

KRS 341.430(1) gives the Commission authority to affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted. 787 KAR 1:110 Section 2 (2)(a) and (4)(a) combine to give the Commission authority to hear all appeals upon the records of the division and the evidence and exhibits introduced at the referee hearing; and to make a separate findings of fact, decision and reasons therefore, if the Commission disagrees with the referee in these matters.

The Kentucky Court of Appeals, in *Burch v. Taylor Drug Store, Inc.,* 965 S.W.2d 830 (Ky.App. 1998), held that the above cited statute and regulations give the Commission the authority to conduct a de novo review of cases under appeal, and to judge both the weight of the evidence and the credibility of the witnesses. Further, in *Thompson v. Kentucky Unemployment Ins. Comm'n*, 85 S.W.3d 621, 626 (Ky.App. 2002), the Kentucky Court of Appeals held that "As the fact-finder, the KUIC has the exclusive authority to weigh the evidence and the credibility of the witnesses."

REASONS

If it is found that the claimant was discharged for misconduct or dishonesty connected with the work, he will be disqualified from receiving unemployment insurance benefits. If misconduct or dishonesty is not found, the claimant will be qualified to receive benefits.

An allegation of misconduct is in the nature of an affirmative defense to benefit entitlement; thus, the employer bears the burden of proof on any asserted allegation. The employer must sustain its burden, as it is not necessary for a claimant to show the negative of an asserted allegation when a prima facie case as to the positive has not been established. *Mollette v. Kentucky Personnel Board*, 997 S.W.2d 492, 496-97 (Ky.App. 1999). In administrative hearings, findings of fact shall be based exclusively on the evidence of record. *Miller v. Kentucky Unemployment Ins. Comm'n*, 425 S.W.3d 92, 99 (Ky.App. 2013).

The Commission has broad authority to weigh the evidence presented, to make a final determination based on that evidence, and to base its findings relative to disqualification on the worker's conduct, rather than merely the specific rules cited by the employer as a basis for the discharge. *Alford v. Kentucky Unemployment Ins. Comm'n*, 568 S.W.3d 367 (Ky.App. 2018).

Unsatisfactory work performance is behavior that is not covered by any of the specific examples of misconduct set forth in KRS 341.370(6). Therefore, it is aptly adjudicated under the common-law standard set forth in *Boynton Cab Co.*

Dishonesty is generally characterized as a willful perversion of the truth for the purpose of deceiving, cheating, or defrauding another party. Dishonesty is separately listed in KRS 341.370(1)(b) as conduct mandating disqualification.

As to three of the employer's allegations, involving unsatisfactory work performance and dishonesty, Mr. Vescio had no first-hand knowledge of the incidents and relied upon reports from others or GPS reports. On December 8, 2019, Mr. Vescio was told that the claimant failed to man a booth at an event. On an unknown date, "a lady" told Mr. Vescio that she had met the claimant at a ballgame four months prior to the date that the claimant had told Mr. Vescio that he met with her. And, just before his discharge, the claimant had told Mr. Vescio that he was meeting a potential client, an architect, in Louisville Kentucky, which Mr. Vescio determined had not occurred based on GPS reports.

The GPS reports referenced by the employer's witness were not proffered as exhibits for the hearing. The "Best Evidence Rule," stated in Kentucky Rule of Evidence (KRE 1002), provides, "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules . . ." The employer did not produce the document, and its contents are not in the record. The claimant was not given the opportunity to view the report during the referee hearing; Mr. Vescio was not present during the trips. Thus, the reference to the GPS reports are incompetent evidence.

As to the alleged dishonesty in meeting "the lady" or manning the booth, the employer's testimony regarding the claimant's purported behaviors was based on hearsay. The employer's witness was not present during the alleged incidents and had no first-hand knowledge. Hearsay evidence is admissible in administrative hearings; however, fact-finding or conclusions cannot be based upon such hearsay alone. In the final analysis, to sustain a decision that affects the substantial rights of a party, there must be a residuum of legally competent evidence to support it.

The evidence offered by the employer is insufficient to meet its burden of showing that the claimant failed to meet the client or man the booth, as there did not exist, absent the incompetent hearsay statements offered, a residuum of competent evidence to corroborate the employer's allegations. *See Haste v. Kentucky Unemployment Ins. Comm'n*, 673 S.W.2d 740 (Ky.App. 1984).

The employer's evidence was entered into the record of the referee hearing and has been given the weight and consideration it is due. However, there is no competent evidence in the record upon which to base a finding that the claimant violated these three instances of unsatisfactory work performance or dishonesty as alleged by the employer.

As to the claimant's use of the employer's vehicle, the claimant, while not specifying which trips were made for personal reasons, admitted in his testimony to using the employer's truck for personal travel. He had continually denied this to Mr. Vescio. Therefore, his actions must be analyzed both as to the policy violation and to his dishonesty about the policy violations.

By admitting he drove the employer's vehicle during the hearing, and not denying he told Mr. Vescio that he had not done so, the record supports the claimant was dishonest with Mr. Vescio. This corroborates Mr. Vescio's testimony. Therefore, the claimant is disqualified for dishonesty under KRS 341.370(1)(b).

He also admits it was a violation of a policy, which he had signed for upon hire and that was reiterated to him at employee meetings. KRS 341.370(6) contains a listing of behaviors considered misconduct. One of the listed examples is a "knowing violation of a reasonable and uniformly enforced rule of an employer."

The policy is reasonable as the employer may set limits on the use of its own property. The claimant admits to knowing the policy and to violating it. The employer had not had any other employee violate the policy; thus, the employer has never failed to enforce its policy. Thus, the record supports that the claimant committed misconduct by violating this policy.

The employer has met its burden, as required by *Brown Hotel Co.*, and must prevail. Therefore, it is held that the claimant was discharged for misconduct and dishonesty connected with the work and is disqualified from December 22, 2019, through the duration of the unemployment period. Benefits paid during the disqualification period constitute an overpayment that the claimant must repay to the Office.

The employer, in its appeal to the Commission, and the claimant in his response, have offered information not presented at hearing. Such will not be considered because it was not presented until after the referee hearing and it is not, therefore, properly a part of the record.

DECISION

WHEREFORE, the Commission, having reviewed the record and being advised, **REVERSES** the referee decision. It is now held that the claimant was discharged for misconduct and dishonesty connected with the work and is disqualified from December 22, 2019, through the duration of the unemployment period. The employer's reserve account is relieved of charges. Benefits paid during the disqualification period constitute an overpayment in the amount of . Under KRS 341.415, this overpayment must be repaid to the Office by the claimant.

The full Commission concurs.

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Melissa A. Aguilar
Chair

Katherine Forgy
Associate Commissioner

Craig Hendricks
Associate Commissioner

APPEAL RIGHTS

An order of the Kentucky Unemployment Insurance Commission may, within twenty (20) days of the mailing date of the order, be appealed, to the appropriate Circuit Court, under the provisions of KRS 341.450 (1), which provides:

"(1) Except as provided in KRS 341.460, within twenty (20) days after the date of the decision of the Commission, any party aggrieved thereby may, after exhausting his remedies before the Commission, secure judicial review thereof by filing a complaint against the Commission in the Circuit Court of the county in which the claimant was last employed by a subject employer whose reserve account is affected by such claims. Any other party to the proceeding before the Commission shall be made a defendant in such action. The complaint shall state fully the grounds upon which review is sought, assign all errors relied on, and shall be verified by the plaintiff or his attorney. The plaintiff shall furnish copies thereof for each defendant to the Commission, which shall deliver one (1) copy to each defendant".

If benefits are denied by this Order, and further appeal to Circuit Court is initiated, claimants should continue to report to the local office and claim benefits. UI-446 (rev/08)