



NO. 13-1242

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

LIGHTING ENERGY SERVICES, LLC,

Petitioner,

v.

Civil Action No. 13-AA-77
Carrie Webster, Judge

BOARD OF REVIEW, WORKFORCE
WEST VIRGINIA; RUSSELL L. FRY, AS
COMMISSIONER AND/OR ACTING
EXECUTIVE DIRECTOR OF WORKFORCE
WEST VIRGINIA; JACK CANFIELD, AS
CHAIRMAN OF THE BOARD OF REVIEW,
WORKFORCE WEST VIRGINIA; AND
AARON SHANE HORNE,

Respondents.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
HONORABLE CARRIE WEBSTER, JUDGE

BRIEF OF APPELLEE, AARON SHANE HORNE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

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**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

On November 5, 2013, the Circuit Court of Kanawha County affirmed the decision of the Board of Review, WorkForce West Virginia entered on May 21, 2013 finding that the appellee, Aaron

Shane Horne, was not disqualified from receiving unemployment compensation benefits. Appendix at 172. The appellee, Aaron Shane Horne, was entitled to unemployment benefits based upon being terminated from his employment on January 15, 2013. Appendix at 172.

On or about January 23, 2013 the appellee, Aaron Shane Horne, filed a claim with WorkForce West Virginia seeking unemployment compensation benefits. Appendix at 56. The initial decision of the Deputy determined that the appellee had voluntarily quit, however, that decision was overturned by the Administrative Law Judge following the hearing held on March 15, 2013. Appendix at 55 and 59. The Administrative Law Judge determined that the appellee was discharged but not for misconduct and therefore was not disqualified from receiving unemployment compensation benefits. Appendix at 60.

The appellant, Lightning Energy Services, LLC, dissatisfied with the decision of the Administrative Law Judge, appealed to the Unemployment Compensation Board of Review. Appendix at 63. A hearing before the Board of Review was held on May 9, 2013 with the Board affirming the decision of the Administrative Law Judge on or about May 21, 2013. Appendix at 87.

Dissatisfied with this second unfavorable decision, the appellant appealed to the Circuit Court of Kanawha County on or about June 21, 2013. Appendix at 2. The Final Order of the

Circuit Court of Kanawha County affirming the Board of Review was entered on November 6, 2013. Appendix at 172. The appellant now appeals the decision of the third tribunal which disregarded its efforts to deny the appellee the unemployment compensation benefits to which he was entitled.

II. Assignments of Error

The appellee, Aaron Shane Horne, respectfully asserts that the Circuit Court of Kanawha County, West Virginia, was correct in affirming the West Virginia Unemployment Compensation Board of Review. The Board of Review determined that the Administrative Law Judge was correct in finding that the appellee was discharged from his employment on January 15, 2013 and that this discharge was not based on any misconduct by the appellee.

III. Statement of Facts

1. The appellee, Aaron Shane Horne, was employed as the Chief Operating Officer for the appellant, Lightning Energy Services, LLC, from November 21, 2011 up through and including January 15, 2013. Appendix at 22.

2. On January 15, 2013 the appellee was terminated from his employment. Appendix at 22.

3. The Request for Separation Information completed by the appellant on or about January 29, 2013 clearly states that "official paperwork was completed 1/15/2013 stating he [appellee] was discharged". Appendix at 52. Despite all of the efforts of

the appellant to deny that Mr. Horne was fired in response to the Request for Separation Information from the unemployment compensation division of WorkForce West Virginia the appellant clearly stated that the appellee was "discharged". Appendix at 52.

4. The appellee was employed by the appellant as its Chief Operating Officer. Appendix at 77.

5. As Chief Operating Officer the appellee reported only to the Board of Directors of the appellant, none of whom are residents of the State of West Virginia. Accordingly, the appellee was the highest ranking officer of the appellant located within the State of West Virginia. Appendix at 78.

6. On January 15, 2013 Mr. Horne was working in the "shop area" which is a facility operated by the appellant "a couple miles" from its main offices when he was contacted by the Chief Financial Officer, Michael Illuchi, to meet with Mr. Illuchi and Tracy Turner, a member of the appellants Board of Directors. Appendix at 78.

7. During that meeting Mr. Horne was advised that as he did not return Mr. Turner's phone call on January 14, 2013, in a timely manner he was being terminated. Appendix at 78.

8. As the Chief Operating Officer it was Mr. Horne's responsibility to run the day to day operations of the appellant. Appendix at 78. As part of these duties and responsibilities Mr. Horne was many times either out of the office at various remote

locations or in the shop maintained by the appellant at a facility separate from its main office. Appendix at 78.

9. The appellee while at remote well site locations many times did not have adequate cellular telephone service. Appendix at 60.

10. At the hearing before the Administrative Law Judge it was the uncontroverted testimony of the appellee that he was advised by numerous sources that he was to be terminated. In order to avoid an embarrassing situation of removing personal items from his office after termination on Sunday, January 13, 2013, Mr. Horne removed most of the personal items from his office. Appendix at 33.

11. On January 14, 2013, Mr. Horne conducted himself as usual with respect to his employment, meeting with employees at the shop location and traveling to a remote well site located in Jane Lew, West Virginia. Appendix at 35.

12. On January 15, 2013, Mr. Horne was in his office when he was requested by Mr. Illuchi, the Chief Financial Officer, to meet with Mr. Illuchi and Mr. Turner. At that time keys to the office as well as the company vehicle were taken from Mr. Horne and he was advised of his termination. Appendix at 36-37.

13. Mr. Horne was paid what the appellant purports to be his final paycheck within 72 hours of January 15, 2013 and, as found by the Administrative Law Judge and the Circuit Court, this is

consistent with termination from employment. Appendix at 59 and 179.

14. Mr. Horne does not believe he was paid all amounts due as wages in accordance with West Virginia Code § 21-5-4 and has instituted a separate civil action in the Circuit of Harrison County, West Virginia with respect to this and other issues.

15. In responding to request for information from the Unemployment Compensation Commission the appellant stated that Mr. Horne "refused to communicate or answer phone calls of Chairmen, [claimant] did not show up for work nor contact anyone regarding his absence", therefore he was discharged. Appendix at 174.

16. As found by the Circuit Court the entire basis for the appellant's position that Mr. Horne was not entitled to unemployment benefits both before the Deputy and the Administrative Law Judge was that Mr. Horne had abandoned his job as indicated by cleaning out his office, failing to report to his office and failing to return phone calls. Appendix at 175.

17. This factual assertion by the appellant was rejected by the Administrative Law Judge after all parties had a full and complete opportunity to present testimony and/or evidence.

18. Despite the assertion of the appellant, Mr. Horne was asked during cross examination if he had been charged with embezzlement. Mr. Horne truthfully stated that he had been charged with embezzlement. The Administrative Law Judge then inquired as

to whether or not there had been any adjudication with respect to those charges to which the Administrative Law Judge was informed that there had been no such adjudication. Appendix at 81.

19. The Administrative Law Judge then informed the parties that "the charges are not proof of misconduct". Appendix at 81.

20. Although Mr. Horne was charged with embezzlement based upon allegations made by representatives of the appellant on or about February 22, 2013, Mr. Horne has not been indicted with respect to that charge nor have any other criminal proceedings been conducted. Although Mr. Horne has been charged, he has neither entered a plea nor been convicted with respect to that charge.

21. Despite the efforts of the appellant to paint Mr. Horne as a criminal, the appellant has consistently asserted that Mr. Horne was not discharged but instead abandoned his employment. Appendix at 81. Therefore, any assertion that the Administrative Law Judge should have considered criminal charges that have been filed against Mr. Horne as an appropriate basis to discharge him when the appellant asserts Mr. Horne was not discharged is unfounded.

IV. Summary of Argument

The Circuit Court of Kanawha County was correct in affirming the Unemployment Compensation Commission Board of Review. Likewise, the Board of Review was correct in affirming the decision of the Administrative Law Judge based upon the March 15, 2013 hearing.

The Administrative Law Judge was able to judge the credibility of the witnesses and was not clearly wrong in factually finding that the appellee was discharged and that this discharge was not based upon any misconduct.

V. Statement Regarding Oral Argument

Pursuant to Rule 18(a) the appellee, Aaron Shane Horne, believes that oral argument is unnecessary as this appeal is groundless. The appellant has requested oral argument, however as the appellee believes that this case involves the application of settled law, any oral argument should be pursuant to Rule 19(a) of the West Virginia Rules of Appellate Procedure. The appellee does not believe that this case presents a question sufficient for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

VI. Points and Authorities

State Cases

Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994)

Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)

Board of Education of County of Mercer v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994)

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VII. Discussion

A. Standard of Review

Despite efforts by the appellant to characterize its assertions of error as being "as a matter of law", the gravamen of the appeal is that the Administrative Law Judge; the Board of Review; and, the Circuit Court of Kanawha County, the appellant incorrectly alleges that Mr. Horne was not discharged and even if he was discharged that the discharge involved gross misconduct. The appropriate standard of review with respect to this appeal is that the Board of Review is entitled to substantial deference unless this Court believes that the findings of fact are clearly wrong. Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994).

The clearly erroneous standard does not entitle a reviewing court to reverse the finder of fact simply because the reviewing court may have decided the case differently. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Board of Education of County of Mercer v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994). Accordingly, the decision of the three (3) lower tribunals must be affirmed unless the factual determination made by the Administrative Law Judge was clearly wrong.

B. The Appellee Established That He Was Terminated from His Employment and That His Termination Was Not Based upon Any Misconduct.

The unemployment compensation statutes being remedial in nature must be liberally construed to achieve the benign purposes intended to the full extent thereof. Verizon Services Corporation v. Epling, 230 W.Va. 439, 739 S.E.2d 290 (2013). Accordingly, the Unemployment Compensation Statutes must be liberally construed in favor of Mr. Horne and the finding of fact that he was discharged must not be disturbed unless clearly wrong.

Although the appellee continues to assert that Mr. Horne abandoned his job the factual finding by the Administrative Law Judge is contrary to this assertion. The appellee then attempts to establish that if Mr. Horne was discharged, that discharge was for gross misconduct based upon the allegations of embezzlement. Although the Administrative Law Judge allowed questioning of Mr. Horne with respect to the charge of embezzlement the appellant was precluded from submitting checks made payable to Mr. Horne from a steel salvage company as they were not properly disclosed. Appendix at 35-36. As stated by the Administrative Law Judge and determined by the Circuit Court the mere placement of criminal charges is not evidence of misconduct. Noble v. Sheahan, 132 F.Supp.2d 626 (N.D. Ill. 2001). Appendix at 81 and 172.

In any event, the discharge of Mr. Horne was not based upon any alleged embezzlement. By the appellants own assertions it was based upon Mr. Horne not returning telephone calls and not being in his office on January 14, 2013. Appendix at 52.

Based upon the foregoing the Administrative Law Judge; the Board of Review; and, the Circuit Court of Kanawha County were not clearly wrong in their determination that Mr. Horne was terminated on January 15, 2013 and that this termination was not based upon any misconduct. As these findings of fact are not clearly wrong, the decision of the Circuit Court of Kanawha County must be affirmed.

VIII. Conclusion

Based upon the foregoing, the appellee respectfully requests that the November 5, 2013 Order affirming the Final Decision of the Board of Review, WorkForce West Virginia be affirmed.

Dated this 19th day of March, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2014, I served the foregoing **BRIEF OF APPELLEE, AARON SHANE HORNE** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Amy M. Smith, Esquire
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