

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

No. 31731

FILED

December 1, 2004

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,
Petitioner Below, Appellant

v.

BOARD OF REVIEW, WEST VIRGINIA BUREAU
OF EMPLOYMENT PROGRAMS; ROBERT J. SMITH, COMMISSIONER,
WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS;
AND ELIZABETH I. CANNAFAX,
Respondents Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Civil Action No. 03-AA-2
REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 15, 2004

Filed: December 1, 2004

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Attorney for Appellees

Elizabeth I. Cannafax
Pro Se

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MAYNARD and JUSTICE ALBRIGHT concur
and reserve the right to file concurring opinions.

SYLLABUS

“The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.” Syllabus Point 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

Per Curiam:

In this appeal, the appellant, James F. Humphreys & Associates, L.C., claims that the Circuit Court of Kanawha County erred in failing to reverse a decision of the Board of Review of the West Virginia Bureau of Employment Programs, and in failing to hold that the appellee Elizabeth I. Cannafax had been discharged from employment for misconduct and was thus temporarily disqualified from receiving unemployment compensation benefits under the provisions of W. Va. Code 21A-6-3.¹

I. FACTS

On October 1, 2000, the appellee Elizabeth I. Cannafax was hired by the appellant James F. Humphreys & Associates, L.C., to work as a settlement coordinator. According to the petition in the present case, on August 23, 2002, Ms. Cannafax became involved in a disagreement with another of the appellant's employees on the appellant's premises. Later, Ms. Cannafax made threats against the employee and displayed or brandished a knife wrapped in a paper towel. Subsequently, on August 26, 2002, the appellant terminated Ms. Cannafax's employment.

¹West Virginia Code 21A-6-3 provides that an employee discharged from employment for misconduct as defined in the section, shall be disqualified from receiving unemployment compensation benefits “[f]or the week in which he was discharged for misconduct and the six weeks immediately following such week”

Following her discharge, Ms. Cannafax filed an application for unemployment compensation benefits, and the appellant took the position that she was temporarily disqualified from receiving such benefits because she had been discharged for misconduct.

Ms. Cannafax's application, as well as the appellant's objection, were considered by a deputy who, on September 19, 2002, found that Ms. Cannafax “did commit an act of gross misconduct.” The deputy's decision also stated that Ms. Cannafax “was discharged because she invited the office snitch to come to the break room and confront her. The claimant [Ms. Cannafax] took a concealed knife with her.”

Ms. Cannafax appealed the deputy's decision and hearings were conducted in the case by an administrative law judge. During hearings, Wade Miller, the office manager for the appellant, testified on behalf of the appellant. Mr. Miller was asked: “Tell me just in your words why the Employer found it necessary to discharge Ms. Cannafax from her employment.” Mr. Miller responded: “On that day, August 23, Ms. Cannafax approached a receptionist in the lobby brandishing a weapon – a knife to be exact, and made verbal threats related to inflicting bodily harm on other employees in the office.” Mr. Miller proceeded to state that Ms. Cannafax felt that employees were snitching on her, telling things about her or her work activities. He also admitted, however, that he did not personally witness any of this and that none of it was stated within his personal hearing.

Mr. Miller further informed the administrative law judge that he had affidavits of employees who did, in fact, witness the event, and he moved that they be made a part of the record. The affidavits were presented to Ms. Cannafax at the hearing, and she was asked after she had had an opportunity to review them and whether she had any objection to them. She indicated that she had no objection, and thereupon, the administrative law judge admitted the affidavits into evidence. He, however, further stated that he did this with the understanding that these were extra-judicial statements. He further stated: "I will afford them such weight as I feel appropriate under such circumstances, particularly after listening to the claimant's testimony."

Later in the hearing, Ms. Cannafax herself testified that on the day of her discharge, she had been unable to take medication for post-traumatic stress panic disorder and major depression. She admitted that she had brandished a knife at work; however, she denied doing it in a threatening manner. She stated: "I never threatened anybody. I just said if – I would like the local snitch to come down and meet me. I never threatened." When asked whether she had a knife, she responded that she did. She stated: "It was in a napkin in my pocket and then I brought it out, but it was in the napkin." When asked why she brought it out, she stated that she didn't know why.

After the conclusion of the hearings, the administrative law judge ruled that the claimant was discharged from her most recent employment, but not for misconduct. The

administrative law judge stated: “The only evidence supplied by the employer, which would indicate any misconduct on behalf of the claimant, was hearsay evidence. . . . The employer produced no competent evidence of misconduct, hence, none is found.” In ruling, the administrative law judge, in effect, reversed the decision of the deputy in the case.

The appellant appealed the decision of the administrative law judge to the Board of Review of the West Virginia Bureau of Employment Programs, and the Board of Review affirmed the decision of the administrative law judge that Ms. Cannafax was discharged, but not for misconduct.

The appellant then appealed the Board of Review's decision to the Circuit Court of Kanawha County. The circuit court, after reviewing the record developed, affirmed the decision of the Board of Review. The circuit court stated: “This Court finds the decision of the West Virginia State Bureau of Employment Programs Board of Review is not clearly wrong or in violation of applicable law.” It is from the circuit court's decision that the appellant now appeals.

II. STANDARD OF REVIEW

In Syllabus Point 3 of *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994), this Court stated:

The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

III. DISCUSSION

In the present case, the appellant claims that the evidence developed establishes that Ms. Cannafax was discharged for misconduct, and that under the circumstances, the circuit court, as well as the Board of Review and the hearing examiner, erred in holding that the evidence did not show that she was discharged for misconduct.

W. Va. Code 21A-6-3 provides for the disqualification of employees from receiving benefits under the Unemployment Compensation Act. A portion of that statute, W. Va. Code 21A-6-3(2), provides, in part, that if an employee is “discharged from his most recent work by one of the following reasons, or if he were discharged from his last thirty days employing unit for one of the following reasons: Misconduct consisting of willful destruction of his employer's property; assault upon the person of his employer or any

employee of his employer; if such assault is committed at such individual's place of employment or in the course of employment; reporting to work in an intoxicated condition . . . he shall be and remain disqualified for benefits. . . .”

It is apparent from the reading of this section that the Legislature intended that an assault by an employee upon another employee at an employer's place of business, or in the course of employment, shall constitute disqualifying misconduct.

In addition to designating misconduct as a disqualifying circumstance in an unemployment compensation case, the Legislature in W. Va. Code 27A-7-13 has specifically authorized the Board of Review to establish rules for the conduct of and determination of benefit cases. That Code section specifically provides, in part:

The board shall establish, and may from time to time modify and amend, rules and regulations for:

* * *

(4) Determining the rights of the parties; and the rules need not conform to the common-law or statutory rules of evidence and procedure and may provide for the determination of questions of fact according to the predominance of the evidence.

Pursuant to this, the Board of Review has adopted a regulation which provides, in part:

Hearings shall be conducted informally and in such manner as to bring out the facts relevant to the determination of the application. All testimony at the hearing shall be by oath or

affirmation and shall be recorded but need not be transcribed unless requested by any party in interest. The employer may make a written submission of the facts involved and shall be permitted a reasonable opportunity to present oral argument, supplemented by written briefs, upon the questions involved. The Commissioner or his special deputy may decide the questions on the basis of such stipulation and arguments, or may, in his discretion, set the questions for hearing and take such further evidence as he deems necessary.

83 C.S.R. § 17.2.

As has previously been indicated in the present case, Ms. Cannafax's own testimony indicates that on the date of her alleged misconduct, she brandished a knife wrapped in a napkin at fellow employees and stated: "I would like the local snitch to come down and meet with me." Although she also indicated that, in her own mind, she was not being threatening, the objective circumstances were such that a reasonable person might have concluded that she was, in fact, being threatening.

This Court believes that the affidavit of Amber Harper, to the admission of which Ms. Cannafax made no objection, was a written submission which should be considered evidence under 83 C.S.R. § 17.2. It plainly stated that Ms. Cannafax brandished a knife in her presence and said: "The next person who came down after her was going to get it and she was tired of everything." According to the affidavit, Ms. Cannafax said: "I'm not kidding, they're going to get it."

This Court believes that Ms. Cannafax's testimony, taken in conjunction with the affidavits filed by the employer, supports the conclusion that she did assault fellow employees in the course of her employment, and at her employer's place of business.

As has previously been stated, this conduct, under W. Va. Code 21A-6-3(2), assault on a fellow employee at the employer's place of business, does constitute misconduct sufficient to disqualify an individual seeking unemployment compensation benefits.

In view of this, this Court believes that the ruling of the Board of Review that there was no evidence showing that Ms. Cannafax engaged in misconduct sufficient to disqualify her was clearly wrong, and that the deputy was correct in concluding that she was disqualified from receiving unemployment compensation benefits. Similarly, the Court believes that the circuit court was clearly wrong in affirming the Board of Review's decision.

The judgment of the Circuit Court of Kanawha County is, therefore, reversed, and this case is remanded with directions that Ms. Cannafax be temporarily disqualified from receiving unemployment compensation benefits as provided by W. Va. Code 21A-6-3.

Reversed and remanded
with directions.