Reversed and Rendered and Opinion filed December 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-00-00008-CV

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HOWARD LOHMULLER, Appellant

V.

TEXAS WORKFORCE COMMISSION ET AL., Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 718,754

O P I N I O N

Appellant, Howard Lohmuller, appeals, *pro se*, from the summary judgment rendered in favor of his former employer, Morgan Buildings & Spas, Inc. ("Morgan"), and the Texas Workforce Commission ("TWC"). In two points of error, Lohmuller contends that (1) the trial court erred in determining there was "substantial evidence" to support the TWC's decision to deny him unemployment benefits after he was terminated from his job at Morgan; and (2) he was denied due process of law. Because we find that the TWC's decision to deny Lohmuller's claim for unemployment benefits is not supported by substantial evidence, we reverse the trial court's judgment and render a decision in Lohmuller's favor.

Background

From September 23, 1998 through January 11, 1999, Lohmuller worked as a salesman for Morgan. Morgan's salesmen were required to work on commission during all "recreational and boat shows." When Lohmuller refused to work a show scheduled for January 12, 1999, without first receiving a "draw" against future commissions, he was terminated.

After he was terminated from his position at Morgan, Lohmuller filed a claim for unemployment benefits with the TWC. Lohmuller also filed a claim for unpaid wages under the "Texas Payday Law," codified at Chapter 61 of the Texas Labor Code.[1] The TWC ultimately ruled that Lohmuller was entitled to $410.31 in unpaid wages because Morgan had failed to compensate him adequately, as required by the federal Fair Labor Standards Act. However, the TWC denied Lohmuller's claim for unemployment benefits, finding that he was "disqualified" from receiving those benefits because he was discharged for misconduct.

Lohmuller appealed the TWC's decision to deny his claim for unemployment benefits. In March of 1999, the TWC Appeals Tribunal made the following findings of fact regarding Lohmuller's unemployment benefits claim:

> The claimant was hired as a commission-only sales person for the named employer [Morgan]. On January 11, 1999, the business manager told the claimant that he would have to work at an RV and boat show the following evening from 6 p.m. until 10 p.m. The claimant, having already been scheduled to work at the business from 9 a.m. until 6 p.m., said something to the effect that he was not going to work the show without being given a draw. The business manager then told the claimant that he was "finished" and that he should clear out his desk. They then spoke with the branch manager who seconded the business manager's decision to discharge the claimant.

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[1] The objective of the Texas Payday Law is to deter employers from withholding wages by providing wage claimants an avenue for the enforcement of wage claims, many of which would often be too small to justify the expense of a civil lawsuit. *See Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied). To accomplish that objective, the legislature established an administrative system vesting authority in the Texas Employment Commission, now known as the Texas Workforce Commission, to govern the payment of wages by employers. *See id.* at 190 n.1. The statute also provides for administrative review of claims for wages and for judicial review of administrative decisions. *See id.*

> A draw is an advance on incoming commissions. The claimant's contract with the employer does not guarantee any draws or any pay other than the commissions on sales, following the initial training period.

The Appeals Tribunal concluded, based on the foregoing findings, that Lohmuller was "clear[ly]" discharged for "misconduct"[2] and therefore not entitled to unemployment benefits under Section 207.044 of the Texas Unemployment Compensation Act. *See* TEX. LABOR CODE ANN. § 207.044 (Vernon 1996) (providing that individuals who are discharged for misconduct connected with the individual's last work are disqualified for benefits).

The Appeals Tribunal also made the following additional conclusion of law:

> . . . The claimant was discharged immediately after he told the business manager that he would not work the next night without receiving a draw; compensation which he had not been told that he would receive or that he was entitled to receive under the terms of the contract signed by him with the employer when hired. The claimant, himself, characterizes his response as a refusal to work, albeit with conditions. A claimant is not in a position to refuse to work at the compensation rate to which he has agreed without that refusal constituting a refusal to carry out the duties to which he agreed. This circumstance constitutes insubordination which is misconduct connected with the work as mismanagement of the claimants position of employment. The employer is not required to negotiate the terms under which the claimant will work, if those terms have already been established as they had been in this case.

Accordingly, the Appeals Tribunal affirmed the TWC's initial decision to deny Lohmuller benefits under Section 207.044 of the Act.

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[2] The Texas Unemployment Compensation Act defines "misconduct" as follows:

> "Misconduct" means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees.

TEX. LABOR CODE ANN. § 201.012(a) (Vernon 1996). The definition of misconduct "does not include an act in response to an unconscionable act of an employer or superior." *Id.* at § 201.012(b).

Lohmuller filed a petition for *de novo* review of the TWC's decision to deny him unemployment benefits in Harris County Civil Court at Law No. 1. The parties filed cross-motions for summary judgment and, on November 17, 1999, the trial court granted summary judgment in favor of TWC and Morgan. This appeal followed.

Standard of Review

Decisions by the TWC regarding unemployment benefits are subject to *de novo* review in which the trial court determines whether substantial evidence supports the TWC's ruling. *See* TEX. LAB. CODE ANN. § 212.202(a) (Vernon 1996); *Collingsworth Gen'l Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998); *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986). Because the only question before the trial court is a question of law, appeals under substantial evidence *de novo* review are uniquely suited to summary judgment. *See Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *G.E. American Communication v. Gaveston Central Appraisal Dist.*, 979 S.W.2d 761, 766 n.5 (Tex. App.—Houston [14th Dist.] 1998, no pet.). The TWC's ruling carries a presumption of validity, and the party seeking to set aside such a decision has the burden to show that it was not supported by substantial evidence. *See Collingsworth*, 988 S.W.2d at 708; *Mercer*, 701 S.W.2d at 831. Under the substantial evidence standard of review, the reviewing court must look to the evidence presented to the trial court and not the record created by the agency. *See Mercer*, 701 S.W.2d at 831. The reviewing court may not set aside a TWC decision merely because it would reach a different conclusion. *See Collingsworth*, 988 S.W.2d at 708. Rather, it may do so only if it finds that the TWC's decision was made without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious. *See id.*

Unemployment Benefits

In his first point of error, Lohmuller complains the trial court committed "clear error" because there was "no evidence" supporting the TWC's decision to deny his request for unemployment compensation benefits. In particular, Lohmuller argues that, because his employer was acting in an "unconscionable" manner, any refusal to work on his part was justified and therefore not evidence of misconduct, as defined

by the Texas Unemployment Compensation Act. Lohmuller contends he refused to work at the boat show because it would have required him to work thirteen days in a row without pay in violation of state and federal law. Lohmuller argues therefore, that his refusal to work was in response to an unconscionable request by his employer and was not misconduct as that term is defined by the Act.

As noted above, the definition of "misconduct" includes "mismanagement," and "intentional wrongdoing or malfeasance" in connection with job performance. *See* TEX. LABOR CODE ANN. § 201.012(a). However, the definition of misconduct expressly "does not include an act in response to an unconscionable act of an employer or superior." *Id*. at § 201.012(b). It is undisputed by appellees that, on the day of his termination, Lohmuller had worked six consecutive days and that he was also scheduled to work the next seven days in a row. Lohmuller maintains he only refused to work the boat show after he was told he would receive no pay "for the second week in a row." Lohmuller asserts that, by forcing him to work the boat show without any compensation, Morgan was violating the Texas Labor Code and the federal Fair Labor Standards Act. Indeed, the TWC found that Morgan had violated the minimum wage and overtime provisions of the federal Fair Labor Standard Act. Thus, there was evidence before the trial court that Morgan was forcing Lohmuller to work without proper compensation.

An employee's refusal to comply with an unreasonable request by an employer cannot constitute misconduct under the Texas Unemployment Compensation Act disqualifying an employee from benefits. *See Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796, 802 (Tex. App.—Tyler 1988, writ denied) (recognizing that the Texas Legislature "harbored no intention to disqualify employees who violate a company policy or rule which is wholly arbitrary or capricious"). In light of evidence that Morgan was requiring Lohmuller to work without proper pay, and that his refusal to work was based on his employer's unreasonable request that he continue to do so, the TWC's decision to deny his request for unemployment compensation was made without regard to the facts and therefore was unreasonable. *See Collingsworth*, 988 S.W.2d at 708. The TWC's decision to deny Lohmuller's claim

for unemployment benefits was thus not supported by substantial evidence. Accordingly, we reverse the judgment of the trial court and we render judgment granting Lohmuller's claim for unemployment benefits.[3]

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 21, 2000.

Panel consists of Justices Yates, Fowler and Edelman. (J. Edelman concurs in the result only).

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] In light of our disposition of Lohmuller's first point of error, we need not consider his contention that he was denied due process of law.