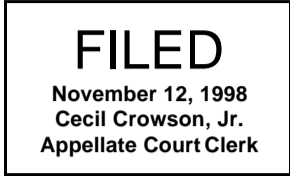


IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE



NORLIA MOYERS,)
) CA No.03A01-9803-CH00093
Petitioner-Appellant,) JEFFERSON CHANCERY
)
v.) HON. TELFORD E. FOGERTY, JR.,
) CHANCELLOR
HAZEL R. ALBERT, Acting)
Commissioner, TENNESSEE)
DEPARTMENT OF EMPLOYMENT)
SECURITY, and SMOKY MOUNTAIN)
PUBLISHING COMPANY, INC.,)
a/k/a THE SMOKY MOUNTAIN)
TRADER,) REVERSED
) AND
Respondents-Appellees.) REMANDED

JEFFREY A. ARMSTRONG, LEGAL SERVICES OF UPPER EAST TENNESSEE, INC., Morristown, for Petitioner-Appellant.

JOHN KNOX WALKUP, Attorney General and Reporter,
and
DOUGLAS EARL DIMOND, Assistant Attorney General, Nashville, for Appellee,
State of Tennessee, Department of Employment Security.

OPINION

Franks, J.

This appeal arises from a dispute over unemployment benefits.

Appellant filed a claim for unemployment benefits on January 16, 1997, and claimed that she was discharged from her former employer after refusing to quit a second job. Her employer claimed that she was a self-employed contractor who voluntarily quit her job.

The Tennessee Department of Employment Security initially determined that appellant quit her job without good cause. She appealed that decision, and the

Appeals Tribunal issued notice of hearing identifying the sole issue as whether appellant voluntarily quit without good cause, or was discharged for misconduct.

The Appeals Tribunal determined that appellant was not available for work, as required by T.C.A. §50-7-302(a)(4). The Board of Review adopted this decision. The Chancellor affirmed.

The standard of review of this action is contained in T.C.A.

§50-7-304(I)(2):

The chancellor may affirm the decision of the board or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the agency;
- (C) Made upon unlawful procedure;
- (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (E) Unsupported by evidence which is both substantial and material in light of the entire record.

The Appeals Tribunal determined that appellant was not available for work as required under the Statute, and further found that appellant worked three jobs, which would limit her availability for other employment. The evidence establishes that appellant worked as a real estate agent approximately six hours a week. It also shows that she sold home based products and had a job delivering papers.

T.C.A. §50-7-304(c)(1) requires that the Appeals Tribunal “afford all interested parties reasonable opportunity for a fair hearing. . .” Moreover, TDES rules require that the agency mail written notice of the issues involved to a claimant prior to the hearing. Tenn.Comp.R.&Regs., ch.0560-3-2-.01(2)(e). At the beginning of the hearing, the Referee typically identifies the issues as set out in the notice of hearing and gives reference to the relevant statutory sections involved. Tenn.Comp.R.&Regs., ch.0560-3-4-.01(4).

In this case, the written notice stated that the issues and statutes involved

were “T.C.A. 50-7-303(A)(1)[sic] & (2) Whether claimant voluntarily quit work without good cause or was discharged for misconduct.” The Appeals Tribunal based its decision, however, on its determination that the appellant was “ineligible for benefits according to T.C.A. §50-7-302” because she was unavailable for work.

The appellant argues that she was not given notice that her availability would be an issue, and was therefore not afforded a fair hearing. In *Yates v. Traugher*, 747 S.W.2d 338 (Tenn. App. 1987), the appellant claimed that he had not been given adequate notice of the issues to be addressed at the hearing. The Court noted the statutory requirement of a “fair hearing” but found that appellant had been notified of the issues. Additionally, the Court noted he did not claim surprise or lack of notice at the hearing, nor did he seek a continuance. The Court determined that the hearing did not go beyond the issues stated in the notice and that the appellant had an opportunity to be heard. According to the Court, “[t]his satisfies the minimal requirements of due process.” *Id.* at 340.

In this case, the notice did not mention T.C.A. §50-7-302, nor was it mentioned at the beginning of the hearing. At the beginning of the hearing, the Referee stated that “[t]he relevant T.C.A. Code is 50-7-303(a)(1) and (a)(2).” The first indication that appellant’s availability would be an issue came just before the attorneys were to begin closing statements. The Referee asked the appellant’s counsel whether her status as a licensed real estate broker affected her unemployment. He also asked “Is she unemployed or not?” Appellee concedes there is not substantial and material evidence to support a finding that appellant was not unemployed since “there was no evidence whether her part time wages were less than her benefit amount.” In response to this line of questioning, counsel for the appellant stated “I certainly don’t see it as affecting the issue before the Appeals Tribunal at this time.” Thus, while he did not specifically object to the Referee’s question, he did point out that they dealt

with matters not properly before the Tribunal. Additionally, it is not clear that the Referee's questions were addressing availability under T.C.A. §50-7-302 rather than the statutory definition of "unemployed" under T.C.A. §50-7-211(a). We therefore conclude that appellant was not provided with a fair opportunity to present evidence of her other employment, and whether it would limit her availability for work.

Although the record contains evidence concerning the amount of hours she worked as a real estate agent and selling home based products, this evidence was produced pursuant to the misconduct issue. Thus, the evidence mainly concerned whether these two positions interfered with her former job, not whether they limited her future availability.

We conclude from all the foregoing that the Trial Court erred in affirming the decision. We remand the case to the Tribunal, in order that the appellant may have appropriate notice and an opportunity to present evidence on all relevant issues.

The cost of the appeal is assessed to the appellee.

Herschel P. Franks, J.

CONCUR:

Charles D. Susano, Jr., J.

William H. Inman, Sr.J.