

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION No. 16-CI-631

ENTERED
OCT 19 2017
FRANKLIN CIRCUIT COURT AMY FELDMAN, CLERK

DAWN M. WILKERSON

PETITIONER

v.

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE
and
KENTUCKY PERSONNEL BOARD**

Received
OCT 20 2017
Personnel Board
RESPONDENTS

OPINION AND ORDER

This matter is before the Court upon Petitioner Dawn M. Wilkerson's Petition for Judicial Review. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **AFFIRMS** the Final Order of Respondent, Kentucky Personnel Board, and **DISMISSES** Petitioner's appeal.

STATEMENT OF FACTS

On July 31, 2014, the Petitioner, Dawn M. Wilkerson, applied for a vacant Corrections Program Administrator position with the Respondent, the Justice and Public Safety Cabinet's Department of Juvenile Justice. Ms. Wilkerson had previously been employed by the Department for two separate terms, from 2001 until 2005 and later 2006 until 2013. Ms. Wilkerson's was twice convicted of violating KRS 189A.010 for operating a motor vehicle under the influence of alcohol (DUI) during her second stint with the Department. Ms. Wilkerson resigned from the Department in 2013 to pursue private employment.

Ms. Wilkerson was interviewed for the vacant CPA position and received a conditional offer of employment from the Department on September 2, 2014, by the section's supervisor. Two days later, on September 4, 2014, the conditional offer of employment was rescinded by the Department's Commissioner, Bob Hayter. Ms. Wilkerson requested a hearing on the matter and her appeal was heard before a Hearing Officer on November 5, 2015. By Final Order dated May 19, 2016, the Personnel Board dismissed Ms. Wilkerson's appeal. Pursuant to KRS 13B.150, Ms. Wilkerson now appeals to this Court for judicial review.

ANALYSIS

Standard of Review

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its statutory authority, if the agency applied an incorrect rule of law or if the decision itself is not supported by substantial evidence on the record. *See Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. Ct. App. 1994). "Judicial review of an administrative agency's action is concerned with the question of arbitrariness." *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990), *quoting Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness means "clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence." *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is "evidence of substance and relevant

consequence, having the fitness to induce conviction in the minds of reasonable men.” *Fuller*, 481 S.W.2d at 308.

If it is determined that the Personnel Board's findings are supported by substantial evidence, the next inquiry is whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002); quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). When an administrative agency's findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

Argument

Introduction

Ms. Wilkerson alleges that the Department violated the Americans with Disabilities Act (ADA) when it rescinded her conditional offer of employment because of her disability, alcoholism. The Department argues that even if Ms. Wilkerson was suffering from alcoholism at the time, she is unable to establish a claim under the ADA because the Department had a legitimate, non-discriminatory reason not to hire her. The record reflects the Commissioner found it imprudent to hire an individual with a criminal record of multiple DUIs for a position which would require significant amounts of travel in a state vehicle.

The Personnel Board's Final Order is Affirmed

Ms. Wilkerson makes this appeal pursuant to KRS 18A.100 and KRS 13B.150. The Department bore the burden of proving by a preponderance of the evidence that Ms. Wilkerson's employment offer was rescinded with just cause and was neither excessive nor erroneous. On appeal, it must be clear to this Court that the Personnel Board's findings were supported by substantial evidence.

This appeal rests on whether the Board was able to conclude that Commissioner Hayter had a legitimate, non-discriminatory purpose for the revocation of Ms. Wilkerson's employment offer, based on substantial evidence in the record. This Court finds that to be so.

To sustain an action under the ADA or Kentucky Civil Rights Act, proof must be offered that the disability was the sole cause of the employer's adverse action against the plaintiff. *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 843 (6th Cir. 2012). The position which Ms. Wilkerson applied for, CPA, is one that Commissioner Hayter stated requires significant amounts of travel by the individual. Ms. Wilkerson, in her previous stint of employment with the Department, twice had her license suspended as a result of DUI, rendering her unable to legally operate a motor vehicle.

Ms. Wilkerson argues that alcoholism should be inferred through her two DUI convictions. A lack of knowledge to an employee's claim of alcoholism provides a defense to an ADA claim, even if the employer is aware of an arrest for DUI. *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 2012). Further, *Maddox* holds that employers subject to the ADA are permitted to take appropriate action regarding an employee's criminal conduct, such as DUI, without regard to the employee's disability.

Id at 848. “Addiction-related criminal conduct is simply too attenuated to extend the Act’s protection.” *Id.* At 847. Commissioner Hayter’s testimony reflects that he was aware of Ms. Wilkerson’s claims of alcoholism only after he rendered his decision to revoke the employment offer. Kevin Warford, the section supervisor who interviewed Ms. Wilkerson, testified during the administrative hearing on the matter that he did not notify Commissioner Hayter of Ms. Wilkerson’s condition until after the Commissioner reached his decision.

The Department possesses a further defense to Ms. Wilkerson’s allegations through 42 U.S.C. § 12114(c)(4), stating an employee who is an alcoholic may be held to the same qualification standards for employment and behavior as the employer holds its other employees, even if the unsatisfactory behavior is related to alcoholism.

Commissioner Hayter testified that he would not hire an employee with a criminal history of two or more DUIs for positions which required frequent driving, regardless of alcoholism.

Ms. Wilkerson has not established the necessary elements of an ADA claim. The Board possessed substantial evidence with which it supported the decision of its Final Order that Commissioner Hayter withdrew Ms. Wilkerson’s conditional employment offer after he reviewed her criminal background check, which was not available until the conditional offer was extended. Ms. Wilkerson may not escape the consequences of her criminal misconduct through a claim under the ADA. The Department appropriately considered Ms. Wilkerson’s criminal conduct, without regard to alcoholism, when it issued its employment decision.

Conclusion

After a thorough review of the parties' pleadings and the administrative record, this Court finds that substantial evidence supports the Department's withdrawal of Ms. Wilkerson's conditional employment offer. Finding no errors of law applied to the facts so found, the Court hereby **AFFIRMS** the Personnel Board's Final Order.

WHEREFORE, the Final Order of Respondent, Kentucky Personnel Board, is **AFFIRMED**.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 14 day of October, 2017.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 19th day of October, 2017, to the following:

Hon. Benjamin S. Basil
2303 River Road, Suite 300
Louisville, Kentucky 40206
Counsel for Petitioner

Hon. Tamara Gormley
Hon. William Codell
Department of Juvenile Justice
1025 Capital Center Drive,
Third Floor
Frankfort, Kentucky 40601
*Counsel for Respondent,
Department of Juvenile Justice*

Hon. Mark A. Sipek
Kentucky Personnel Board
28 Fountain Place
Frankfort, Kentucky 40601
Tel. (502) 564-7830
Counsel for Respondent, Board


Amy Feldman, Franklin County Circuit Court Clerk