Smoking gun' evidence excluded in Kentucky unemployment claim

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The Kentucky Court of Appeals recently upheld an award of unemployment benefits despite "smoking gun" evidence against the claimant. According to the court, it couldn't consider the evidence because the employer didn't properly introduce it at the referee hearing phase of the unemployment case.

Facts

Lola Llerena worked as a counselor at Sunrise Children's Services' Elizabethtown facility. Sunrise houses and treats abused and neglected children.

One day, a child at the facility ran out of her classroom and toward a restroom. Llerena knew the child had a history of self-mutilation and attempted to stop her before she could lock herself in the restroom. They struggled over closing the door, and the child eventually came out of the restroom, but in what was described as "attack mode."

When the child moved toward her, Llerena raised her hands and made contact with the girl, who then stumbled backward. According to Llerena, she raised her hands in self-protection, but the child later claimed Llerena inappropriately hit her.

Sunrise reported the incident to two different state agencies with jurisdiction over it. The agencies conducted an investigation in which they reviewed a video recording of the incident. They ultimately cleared Llerena of wrongdoing.

About 6 weeks later, after its own investigation, Sunrise terminated Llerena "for using inappropriate physical contact" with the child. Sunrise claimed its decision was primarily based on a review of the same video recording.

Unemployment hearing

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After Llerena filed for unemployment benefits, Sunrise contested the claim. Benefits were initially denied, and Llerena appealed. An unemployment benefits referee conducted a hearing at which Llerena was the only eyewitness to testify. The video recording wasn't introduced into evidence. Instead, two Sunrise employees testified that they had reviewed the video and described what they saw.

The referee gave more evidentiary weight to Llerena's eyewitness testimony than to the testimony of the two Sunrise employees whose observations were based solely on a review of the video. The referee concluded that Llerena was discharged for reasons "not associated with misconduct" and determined that she wasn't disqualified from receiving unemployment benefits under Kentucky law.

Sunrise appealed the referee's decision to the Kentucky Unemployment Insurance Commission (KUIC). The employer asked that the referee be required to reconsider the case after reviewing a copy of the video. Instead, the KUIC affirmed the referee's conclusions with minor modifications.

Sunrise filed an appeal in circuit court, arguing the KUIC made the wrong decision. Once again, it argued that the video should be considered as evidence, and it even provided a copy for the court to review. The court refused to consider the video because Sunrise failed to introduce it at the referee hearing. It then affirmed the KUIC's determination. Sunrise appealed again.

Court's ruling

The Kentucky Court of Appeals upheld the trial court's decision. The court relied on the established principle that appellate courts have "no authority to consider evidence outside the record or to incorporate new proof into the record." Thus, in deciding whether the KUIC made a proper decision, the court could "consider only the evidence presented to the Referee."

Sunrise's failure to introduce the video at the referee hearing proved deadly to its argument. According to the court, "Although armed with a proverbial smoking gun, Sunrise failed to introduce it

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into evidence at the appropriate time—before the Referee." *Sunrise Children's Services, Inc. v. KUIC and Lola Llerena,* No. 2014-CA-000633-MR (Ky. Ct. App., Mar. 11, 2016).

Bottom line

While an unemployment proceeding may appear fairly informal, the burden falls on the employer to "prove" that it discharged the employee for misconduct. Failure to introduce evidence at a referee hearing can destroy your only opportunity to support your position.

It's understandable that Sunrise would be reluctant to place a video involving a minor child in the record, but this case nevertheless teaches us that proper introduction of evidence is vital. One strike and Sunrise was effectively out.

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