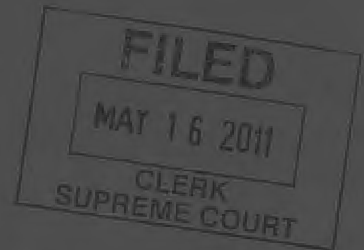


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE No. 2010-SC-000349-DG

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION — APPELLANTS

&

LOUISVILLE WATER COMPANY

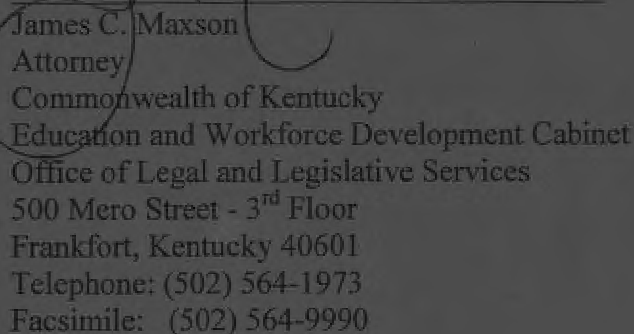
v.

APPEAL FROM KENTUCKY COURT OF APPEALS
HONORABLE MICHAEL CAPERTON, PRESIDING
No. 2008-CA-0002248-MR

DIANA CECIL — APPELLEE

BRIEF FOR APPELLANT, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

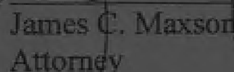
Counsel for Appellant,



James C. Maxson
Attorney
Commonwealth of Kentucky
Education and Workforce Development Cabinet
Office of Legal and Legislative Services
500 Mero Street - 3rd Floor
Frankfort, Kentucky 40601
Telephone: (502) 564-1973
Facsimile: (502) 564-9990

CERTIFICATION

I hereby certify that a copy of this Brief has been placed in the U.S. Mail to be sent first class, postage prepaid, on this 16th day of May, 2011, to the following: Hon. Martin F. McDonald, Jefferson Circuit Court, 600 W. Jefferson St., Louisville, Ky. 40202; Hon. Sam Givens, Court of Appeals, 360 Democrat Dr., Frankfort, Ky. 40601 (*via messenger mail*); Hon. Callie E. Walton, Helmers Demuth & Walton, 429 W. Muhammad Ali Blvd., 200 Republic Bldg., Louisville, Ky. 40202; and Hon. Donna K. Perry, Dinsmore & Shohl, 2500 National City Tower, 101 S. 5th St., Louisville, Ky. 40202.



James C. Maxson
Attorney

INTRODUCTION

This is an appeal of a Kentucky Court of Appeals' Opinion Reversing a Jefferson Circuit Court Opinion and Order affirming an administrative adjudication by the Kentucky Unemployment Insurance Commission, referred to hereinafter as the "Commission," in which the Commission concluded that the Appellee was discharged for misconduct, and as a result, that she is not qualified to receive Unemployment Insurance benefits during her resulting period of unemployment.

The broader issue raised in this appeal is whether a showing of "willful or wanton" conduct is required to make finding of "misconduct" based upon the specific statutory examples of such, when the legislature has not provided that a further finding of "willful or wanton" conduct is required in the examples. More specifically, the question is whether the Appellee was discharged for misconduct in this case.

STATEMENT REGARD REFERENCE TO THE RECORD

All reference made to the record will be to the Certified Administrative Record filed with the Jefferson Circuit Court pursuant to KRS 341.450(2). That record consists of all documents in the administrative record and the transcripts of the administrative hearings. There were two administrative hearings in this case. The first was conducted on January 2, 2007, and the second was conducted on February 28, 2007. The transcript of both hearings are bound together in the Transcript of Hearing, with the transcript of the January 2 hearing appearing at the front, and the transcript of the February 28 hearing appearing at the back.

The Transcript of the January 2, 2007 Hearing will be referenced hereinafter as "TE I," and then referenced by page number and then by line(s). The Transcript of the February 28, 2007 Hearing will be referenced hereinafter as "TE II," and then referenced by page number and then by line(s). The administrative record is not paginated, and all relevant documents therefrom will be attached hereto as separate exhibits for easy reference.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant, the Kentucky Unemployment Insurance Commission, does not believe that oral argument will likely be necessary in this appeal, as the issues should be sufficiently addressed by the parties' briefs. However, the Commission would be happy to present oral argument, if this Court deems such would be helpful.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT REGARD REFERENCE TO THE RECORD..............................ii

STATEMENT CONCERNING ORAL ARGUMENT.....................................iii

STATEMENT OF POINTS AND AUTHORITIES......................................iv-vi

STATEMENT OF THE CASE...1

ARGUMENT...11

THE COMMISSION'S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT CORRECTLY APPLIED THE LAW...11

A) Standard of Review 11

Thompson v. Kentucky Unemployment Insurance Commission
85 S.W.3d 621(Ky.App.2002)....................................11

Burch v. Taylor Drug Store, Inc.
965 S.W.2d 830 (Ky.App. 1998)..................................11

KRS 341.450(3)..11

Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.
91 S.W.3d 575 (Ky. 2003) 11

787 KAR 1:110(2)(2)(a)...12

787 KAR 1:110(2)(4)(a)...12

Department of Parks v. Bergee Brothers Trucking
480 S.W.2d 158 (Ky.1972)...12

Kentucky Commission on Human Rights v. Fraser
625 S.W.2d 852 (Ky. 1981)..12

Brown Hotel v. Edwards
365 S.W.2d 299 (Ky. 1963)..12

Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.
91 S.W.3d 575 (2003)....................12

B) Analysis....................13

I. The Commission's Findings of Fact Were Supported By Substantial Evidence....................13

Urella v. Kentucky Bd of Med Licensure
939 S.W.2d 869 (Ky. 1997)....................14

Transportation Cabinet v. Thurman
897 S.W. 2d 597 (Ky.App. 1995)....................15

Steel Tech., Inc. v. Congleton
234 S.W.3d 920 (Ky. 2007)....................15

Perry v. Williamson
824 S.W.2d 869 (Ky.1992)....................15

Eagle Fluorspar Co. v. Larue
237 Ky. 263, 35 S.W.2d 303 (1931)....................15

II. The Commission Properly Applied the Law....................17

KRS 341.370(1)(b)....................17

KRS 341.370(6)....................17

Metzinger v. Ky. Ret. Systems
299 S.W.3d 541 (Ky. 2009)....................18

Beckham v. Bd. of Edu. of Jefferson Co.
873 S.W.2d 575 (Ky. 1994)....................18

Boynton Cab Company v. Neubeck
237 Wis. 249, 296 N.W. 636 (1941)....................19

Unemployment Ins. Com'n v. Dye
731 S.W.2d 826 (Ky.App. 1987)....................19

Hutchison v. Kentucky Unemployment Ins. Com'n
329 S.W.3d 353 (Ky.App. 2010)....................20

Kentucky Unemployment Ins. Com'n
v. Duro Bag Mfg. Co.
250 S.W.3d 351 (Ky.App. 2008)..........................20

Douthitt v. Kentucky Unemployment Ins. Com'n
676 S.W.2d 472 (Ky.App. 1984)..........................21

Louisville/Jefferson County Metro Government
v. TDC Group, LLC
283 S.W.3d 657 (Ky. 2009)..........................22

IC 22-4-15-1, 1(d)..........................22

Wakshlag v. Rev. Bd. of In. Emp. Sec. Div.
413 N.E.2d 1078 (Ind.App. 1980)..........................23

CONCLUSION..........................26

STATEMENT OF THE CASE

Diana Cecil, referred to hereinafter as the "Appellee," accepted a position to work for the co-Appellant, the Louisville Water Company, referred to hereinafter as the "Employer," as a Right-of-Way Associate on October 29, 2001.[1] The Appellee's job was to obtain easements from landowners.[2]

The Employer has an Employee Handbook and an Employee Code of Conduct, which detail the work-rules for employees, and employees are given a copy of each when they begin working for the Employer.[3] In accepting her position, the Appellee agreed to the terms of employment set-forth in the Employee Handbook and Code of Conduct.

Like most employers, the Employer has a work-rule regarding employee tardiness, as well as a progressive disciplinary system for employee misconduct.[4] The Employer's tardy policy provides that an employee is not considered late unless they are at their work station ten (10) minutes after their scheduled start time or later.[5] An employee has violated the Employer's punctuality rule if they have three (3) or more such tardies within a revolving ninety (90) day period.[6]

In giving employees a ten-minute grace period, and then not subjecting them to discipline until the have three (3) tradies within ninety (90) days, the Employer has adopted a reasonable approach to disciplining employees that are repeatedly late to work.

---

1 TE I: 20, line 19-TE I: 21, line 3.

2 TE I: 21, lines 4-8.

3 TE I: 21, line 12-16; (*See attached Exhibit* "B," Employee Code of Conduct).

4 *Exhibit* "B"

5 *Id.*; TE I: 52, line 19-TE I: 53, line 3.

6 *Exhibit* "B"; TE I: 54, lines 1-6.

Under the Employer's progressive discipline system, if an employee commits three Code of Conduct (3) violations, including a violation of the punctuality rule, within a rotating twenty-four (24) month period, their employment comes to a crossroads; they presumptively loose their job, however, they have the option of signing a Last Chance Agreement in which they acknowledge their violations, and in doing so, have one final chance to retain their employment.[7]

This represents a more than reasonable approach by the Employer to employee misconduct, including repeated instances of tardiness to work. The Employer afforded every employee multiple infractions before their job would be in jeopardy, and even then, the Employer gave employees one final chance to retain their job if they acknowledge their past deficiencies and recommit themselves to abiding by the Code of Conduct in the future. Further, in accepting employment with the Employer, each employee accepted this disciplinary process.

While working for the Employer, the Appellee was habitually unable to regularly be at work on time.[8] The Appellee was routinely observed by her supervisors arriving at her work-station five (5) to twenty-five (25) minutes late.[9] The Appellee initially worked a standard 8:00 AM to 5:00 PM shift. The Appellee and her co-workers were then given the option starting their workday anytime between 7:30 AM and 9:00 AM, and then working until the corresponding end-time nine (9) hours later, between 4:30-6:00 PM, depending upon start-time.[10] The Appellee chose the latest possible start-

---

7 *Exhibit* "B"; TE I: 25, line 25-TE I: 26, line 7; TE I: 28, lines 1-10; TE II: 31, line 13-TE II: 32, line 4.

8 TE II: 20, line 12-TE II: 27, line 8.

9 *Id.*

10 TE II: 20, line 12-TE II: 21, line 7.

time, 9:00 AM, but her punctuality problems persisted and even worsened thereafter.[11] The Appellee was regularly observed by her manager arriving at her work-station up to twenty-five (25) minutes late.[12]

The Employer verified the Appellee's tardiness by checking the electronic log of when she entered the Employer's parking garage with her access card.[13] All employees access the parking garage with a unique electronic access card.[14] The garage electronically records when each employee enters the garage.[15] When an employee has a punctuality problem, the Employer checks the garage's records for when that employee has entered the garage.[16] However, after an employee enters the garage, it would still take them several more minutes to enter the building and reach their work-station, which is where an employee is supposed to be at the start of their shift.[17] The garage records showed that the Appellee had entered the garage after her start-time on numerous different occasions, several times already in excess of the ten-minute grace period. The evidence introduced at the eventual administrative hearing, and relied upon by the Commission, showed as follows.

On February 26, 2004, the Appellee was given a verbal reprimand for excessive tardiness.[18] On April 15, 2004, the Appellee was again given a verbal

---

11 TE II: 21, lines 1-22.
12 *Id.*
13 TE I: 35, line 6-TE I: 41, line 4; TE I: 51, line 16-TE I: 52, line 1.
14 *Id.*
15 *Id.*
16 *Id.*
17 TE II: 29, line 17-TE II: 30, line 23.
18 TE I: 28, lines 19-24; (*See attached Exhibit* "C," Code of Conduct Violation Memo).

reprimand about excessive tardiness.[19] On July 15, 2004, the Appellee received a written reprimand for repeated tardiness, which detailed numerous documented tardies in May, June and July of 2004.[20] The Appellee was called into a meeting with management on July 15, 2004, to discus the written reprimand and her ongoing punctuality problem.[21] The Appellee did not contest her various instances of tardiness as detailed in the written reprimand, but she did become very angry, stormed out of the meeting and left work.[22] The Appellee was assessed another written reprimand the next day for her inappropriate behavior and leaving work prematurely the day before.

On September 21, 2005, the Appellee was advised during a performance review that she had been regularly observed coming into work ten (10) to fifteen (15) minutes late, and she was warned that she needed to arrive at work on time.[23] The Appellee responded "point taken."[24] Thereafter, the Appellee's supervisor witnessed her continue to regularly arrive at work late. The Employer verified the Appellee's supervisor's observations by checking the parking garage log. The parking garage records showed the Appellee was late on twelve (12) consecutive work-days from September 21 through October 7, 2005.[25] The parking garage records showed that on seven (7) of these dates, she was already ten (10) minutes late or more when arriving at

---

19 TE I: 29, lines 4-6; *Exhibit* "C."

20 TE I: 29, lines 13-17; TE II: 22, line 12-TE II: 25, line 13; *Exhibit* "C."

21 TE II: 25, line 11-TE II: 27, line 8.

22 *Id.*

23 (*See attached exhibits* "D," "E" and "F"; e-mail, Code of Conduct Violation Memo, and Documented Counseling Memo, respectively).

24 *Exhibit* "D."

25 (*See attached Exhibit* "G," Parking Garage Log).

the garage.[26] The parking garage records showed the Appellee was late in arriving at the parking garage as follows:

- Wednesday, September 21, 2005, arrived at **9:12 AM**.
- Thursday, September 22, 2005, arrived at 9.07 AM.
- Friday, September 23, 2005, arrived at 9:08 AM.
- Monday, September 26, 2005, arrived at **9:19 AM**.
- Tuesday, September 27, 2005, arrived at **9:13 AM**.
- Wednesday, September 28, 2005, arrived at **9:11 AM**.
- Thursday, September 29, 2005, arrived at 9:07 AM.
- Friday, September 30, 2005, arrived at **9:12 AM**.
- Monday, October 3, 2005, arrived at 9:07 AM.
- Tuesday, October 4, 2005, arrived at **9:14 AM**.
- Wednesday, October 5, 2005, arrived at 9:05 AM.
- Thursday, October 6, 2005, (at training away from office)
- Friday, October 7, 2005, arrived at **9:20 AM**.[27]

On October 7, 2005, the Appellee was twenty (20) minutes late arriving at the parking garage. She was assessed with another written reprimand at that time.[28]

Because this was the Appellee's third Code of Conduct violation within a twenty-four (24) month period, consistent with the Employer's progressive disciplinary system as incorporated into the terms of employment, the Appellee was presumptively to lose her job. However, even though the Employer could have simply fired her for cause at that point, the Employer gave the Appellee the option of one last chance to save her employment if she would just sign a Last Chance Agreement.[29] The Last Chance Agreement stated:

> I, Diana Cecil, acknowledge that my act of repeated tardiness to my workstation violates the Company Code of Conduct Attendance Standard, Class 1.28.

---

26 *Id.*

27 *Id.*

28 TE II: 29, line 12-TE II: 30, line 6; *Exhibits* "E" and "F."

29 TE II: 31, lines 13-TE II: 36, line 3.

> I do desire to stay employed with the Louisville Water Company and will re-affirm my commitment by signing the attached Personal Quality Improvement form.
>
> In the future, I agree to arrive at my workstation by the start time assigned by my process owner, currently 9:00 a.m. I understand repeated incidents of tardiness will result in my immediate termination.
>
> Finally, I understand any additional Code of Conduct violation, of any kind, before July 15, 2006 (within 24 months of previous discipline) may also result in immediate termination.[30]

The Last Chance Agreement offered the Appellee one final opportunity to save her job.[31] The Appellee had the option of either signing the Agreement, thereby acknowledging her punctuality problem and committing herself to rectifying it in the future, or to lose her employment.[32] This process was set-forth in the terms of employment, and agreed to by the Appellee.[33] Pursuant to the Employer's policy, the Appellee was allowed to leave early that day to fully consider her options and decide what she wanted to do.[34] The Appellee was to return to work the next day, October 8, 2005, however, instead, the Appellant went on an abrupt medical leave of absence until November 2, 2005.[35]

When the Appellee returned to work on November 2, 2005, she informed the Employer that she would not sign the Last Chance Agreement.[36] The Appellee indicated that her reason for doing so was that she now suddenly contested that she had ever violated the Employer's punctuality rule. The Appellee's employment with the

---

30 (*See attached Exhibit* "H," Last Chance Agreement, "Post Decision Making Leave Statement").

31 *Id.*; TE II: 31, lines 13-TE II: 36, line 3.

32 *Id.*

33 *Exhibit* "B."

34 *Id.*

35 TE II: 36, lines 4-15.

36 TE II: 36, line 11-TE: 40, line 14.

Employer ended that day.[37] If the Appellee had signed the Last Chance Agreement, she would have retained her employment.[38]

The Appellee filed a claim for Unemployment Insurance benefits, which was denied in an initial determination on December 08, 2005, because:

> THE EVIDENCE OF RECORD ESTABLISHES REPEATED OCCURRENCES OF TARDINESS THAT WERE UNNECESSARY OR IMPROPERLY REPORTED. THE [APPELLEE'S] ACTIONS SHOW A WILLFUL DISREGARD OF THE EMPLOYER'S BUSINESS INTERESTS. THEREFORE, THE DISCHARGE WAS FOR WORK RELATED MISCONDUCT.[39]

The Appellee then appealed the denial of her claim to a Referee of the Division of Unemployment Insurance. The Referee held hearings on January 2, 2007, and February 28, 2007, at which time the above-discussed evidence was put into the record[40]. On March 5, 2007, the Referee issued a Decision which reversed the initial determination based upon the Referee's interpretation of a prior Kentucky Unemployment Insurance Commission decision.

The Employer then appealed the Referee Decision to the Kentucky Unemployment Insurance Commission, referred to hereinafter as the "Commission." On May 25, 2007, the Commission, which is the administrative agency which specializes in applying Unemployment Insurance law, issued a unanimous Order Reversing, in which it

---

37 *Id.*

38 *Id.*

39 (*See attached Exhibit* "I," Notice of Determination).

40 The case had previously been heard by a Referee which affirmed the initial determination; however, when the Appellee appealed that Referee Decision to the Kentucky Unemployment Insurance Commission, it was discovered that the tapes from the first Referee Hearing were inaudible, rendering it a nullity, so the Commission remanded the case back for these *de novo* Referee Hearings.

reversed the Referee and concluded that the Appellee was not qualified to receive Unemployment Insurance benefits because she was fired for having committed misconduct.[41] In its Order, the Commission rejected the Referee's application of its own prior decision, finding that the Referee had misapplied it. The Commission's Order went on to state:

> ... the allegations against [the Appellee], namely chronic tardiness, are clearly supported by the records. ... Since the evidence in the record supports a violation of the attendance and punctuality provisions in the code of conduct, it was a reasonable instruction to demand that [the Appellee] sign the [Last Chance Agreement] admitting to same. The [Appellee] did not act reasonably in refusing to sign. The [Appellee] "refused to obey reasonable instructions" according to the statutory example of misconduct, and is therefore disqualified from receiving unemployment benefits.

The Appellee then sought judicial review of the Commission's order from the Jefferson Circuit Court pursuant to KRS 341.450. The Jefferson Circuit Court affirmed the Commission's Order in an Opinion and Order Affirming, entered on November 1, 2008. In its Opinion, the Jefferson Circuit Court stated:

> The Court has reviewed [the Commission's] findings of fact and the transcript of the referee's hearings from which [it] made those findings. The Court finds that there is substantial evidence to support [the Commission's] findings. ... This finding limits the Court's review to ascertaining [whether the Commission] applied the correct rule of law to the facts. ... The Court finds that [the Commission] applied the correct law to the facts.

The Appellee then appealed the Jefferson Circuit Court's Opinion to the Kentucky Court of Appeals. In its Opinion, a two-judge majority of the Court of Appeals agreed that the Appellee had habitually been tardy to work. The majority stated:

---

41 (*See attached Exhibit* "K," Commission Order).

> … we do not dispute, or disagree with the findings of fact made by the Commission indicating that Cecil was, in fact, guilty of being tardy on numerous occasions … we certainly sympathize with an employer's desire to terminate an employee that is repeatedly late to work, as was the case with Cecil in this instance. Further we agree that the employer would be entirely justified in doing so … it would have been acceptable to terminate Cecil on the basis of the tardies.[42]

The majority below also observed that the Appellee's habitual tardiness constituted "misconduct," which would disqualify her from receiving Unemployment Insurance benefits under KRS 341.370(6), stating: "unquestionably, excessive tardiness in and of itself is a statutory basis for disqualification of eligibility for benefits."[43]

However, the two-judge majority went on to reverse the Jefferson Circuit Court and the Commission, concluding that the Appellee was not fired for having committed misconduct, and as a result, she was qualified to received Unemployment Insurance benefits during her resulting period of unemployment. In so doing, the majority recited the applicable test for "misconduct" as follows: "the test for determining misconduct is whether the employee's action evidence a willful and wanton disregard of the employer's interests."[44] The majority's opinion reasoned that the Employer's request that the Appellee sign the Last Chance Agreement was "unreasonable" because she suddenly claimed she had never been late to work, therefore her resulting discharge for refusing to sign the Last Chance Agreement did not constitute "misconduct," and as a result, she was qualified to receive Unemployment Insurance benefits.

---

42 *See attached Exhibit* "A," <u>Slip Opinion</u>, Pg. 13-15.
43 *Exhibit* "A," Pg. 14.
44 *Exhibit* "A," Pg. 15.

Rejecting the majority's conclusion, Judge Henry wrote a Dissenting Opinion in which he stated:

> I respectfully dissent. The majority is of the opinion that it was unreasonable for Cecil's employer to ask her to sign a statement admitting that she had been tardy numerous times in violation of company policy in order to keep her job. The statement, verbatim, reads as follows: "I, Diana Cecil, acknowledge that my act of repeated tardiness to my workstation violates the Company Code of Conduct Attendance Standard, Class 1.28." As the majority points out, Ms. Cecil verbally acknowledged that she was tardy. It is conceded in the majority opinion that she could have been discharged for being tardy. The company reprimanded her for her tardiness not once, twice, or even three times, but on four separate occasions. The Commission observed that it was reasonable for the employer to request that Ms. Cecil sign the statement because its contents were clearly supported by the evidence. I do not find any contradiction of that finding in the majority opinion. I wholeheartedly agree with the Commission and the Circuit Court that the employer's request was reasonable. This unsatisfactory employee was treated with utmost fairness completely within the bounds of the law's requirements. I would affirm.

The Commission then filed a Petition for Rehearing with the Court of Appeals, which was denied in a two-to-one Order.[45] The Commission and Employer then requested that this Court grant discretionary review of the Court of Appeals' majority Opinion, and this Court granted the same.

The Appellee did not file a Cross Motion for Discretionary Review on the Court of Appeals' conclusion that the Commission's finding that she had repeatedly been late to work, thereby committing misconduct warranting termination for cause, was supported by substantial evidence. The Appellee similarly did not file a Cross Motion for

---

45 See attached *Exhibit* "N," Order Denying Petition for Rehearing.

Discretionary review on the Court of Appeals' conclusion that she had received Due Process during the administrative process.

ARGUMENT

THE COMMISSION'S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT CORRECTLY APPLIED THE LAW.

The Court of Appeals' majority reversed the Jefferson Circuit Court and the Commission, finding that "the Commission erred in applying the law to the facts." (Slip Opinion, 15). The Commission's position is that its findings of fact were supported by substantial evidence and that it correctly applied the law in its Order, and as a result, the Court of Appeals two-judge majority was in error in reversing the Commission.

A) Standard of Review

This Court's review of the Commission's Order, like that of the Jefferson Circuit Court and the Court of Appeals before it, is a two-part process: it must determine whether the Commission's "findings of fact are supported by substantial evidence and whether the agency correctly applied the law to the facts." *Thompson v. Kentucky Unemployment Insurance Commission*, 85 S.W.3d 621, *at* 624 (Ky.App.2002); *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, *at* 834 (Ky.App.1998).

However, in reviewing the Commission's Order Affirming, this Court is limited in scope to the record on appeal. KRS 341.450(3); *Travelodge Intern. Inc. v. Kentucky Unemployment Insurance Commission*, 710 S.W.2d 232, *at* 234 (Ky.App. 1986). Evidence in the record on appeal is limited to that presented at the Referee Hearing, as has previously observed:

> [A]ppeals to the commission may be heard upon the records of the division and the evidence and exhibits

> introduced before the referee. Thus, while the Commission generally does not hear evidence directly from witnesses, it has the authority to enter independent findings of fact. Necessarily, such authority allows the Commission to judge the weight of the evidence and the credibility of witnesses and to disagree with the conclusion reached by the referee.

Burch, 965 S.W.2d at 834. (*Internal citations and quotation marks omitted*) (*Citing*: 787 KAR 1:110(2)(2)(a), formerly 903 KAR 5:130(2)(2)(a); 787 KAR 1:110(2)(4)(a)). An appellate "court has no authority to consider evidence outside the record or to incorporate new proof into the record." *Travelodge*, 710 S.W.2d *at* 234.

Thus, based upon the evidence as found by the Commission, this Court must first determine whether the Commission's findings of fact were supported by "substantial evidence."

> Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding, even though there is evidence to the contrary.

Thompson, 85 S.W.3d *at* 624 (*internal citations omitted*). In its fact-finding capacity, the Commission stands in the place of a well instructed jury. *Department of Parks v. Bergee Brothers Trucking*, 480 S.W.2d 158 (Ky.1972). An appellate court will uphold a decision of the Commission which is supported by substantial evidence, even in the presence of conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, *at* 856 (Ky. 1981); *see*: *Brown Hotel v. Edwards*, 365 S.W.2d 299 (Ky. 1963).

This Court has stated: "[a] reviewing court ... should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom." *Kentucky Unemployment Insurance Commission v.*

Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, *at* 582 (2003). Further, in an appeal from an administrative adjudication, "[a] court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation." *Thompson*, 85 S.W.3d *at* 624.

Thus, with all deference properly due unto the Commission's determinations regarding the credibility, weight and inferences to be drawn from the evidence presented at the administrative hearing, this Court should not disturb the Commission's Findings of Fact unless it is convinced they are not supported by substantial evidence. This Court must then conclude whether the Commission correctly applied the law to the facts it found. In so reviewing for whether the Commission correctly applied the law, this Court has recently cautioned that an appellate court should not "substitute its own judgment for that of the Commission and the ... Circuit Court" and "should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom." *Ky. Unmply. Ins. Comms. v. Landmark Community Newspapers of Ky., Inc.* 91 S.W.3d 575, *at* 582 (Ky.,2002).

B) Analysis

I. The Commission's Findings of Fact Were Supported By Substantial Evidence.

The Employer presented substantial evidence at the administrative hearings that the Appellee was repeatedly tardy to work. The Employer's witnesses testified that the Appellee was regularly observed by numerous supervisors arriving at her work-station anywhere from a few minutes late to twenty-five (25) minutes late. The Employer then verified those supervisors' observations by checking them against the

time log of when the Appellee gained access to the parking garage. The Appellee was repeatedly warned about her punctuality problem, and until she refused to sign the Last Chance Agreement, she had never denied her instances of tardiness when confronted about them by the Employer. Although the Appellee argued to the Commission that she had not violated the Employer's punctuality rule, the Commission found the Employer's evidence to the contrary to be more credible. Based upon the substantial evidence presented, the Commission found that the Appellee had committed the punctuality violations alleged by the Employer. Such was not only within the Commission's sole province as the finder of fact, but is also final as a matter of law.

This Court has stated: "[w]e have long held that where an administrative agency's findings of fact are supported by substantial evidence, those findings are binding on the reviewing court. This is true even though there may be ***conflicting evidence*** in the record." *Urella v. Kentucky Bd of Med Licensure*, 939 S.W.2d 869 *at* 873 (Ky. 1997) (citations omitted) (*Emphasis added*).

In *Thompson v. Kentucky Unemployment Ins.*, 85 S.W.3d 621 (Ky.App. 2002) it was stated:

> ***If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence.*** A court's function in administrative matters is one of review, not reinterpretation.

Id. at 624. (*Emphasis added*).

"[T]he trier of facts in an administrative agency may consider all of the evidence and choose the evidence that [it] believes.... Although a reviewing court may

arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not deprive the agency's decision of support by substantial evidence." *Transportation Cabinet v. Thurman*, 897 S.W. 2d 597 *at* 600 (Ky.App. 1995).

Thus, based upon the substantial evidence presented at the administrative hearings, which the Commission deemed to be most credible, the Commission found that the Appellee had repeatedly violated the Employer's punctuality rule. Not only is this weighing of the evidence by the Commission not subject to review, the Court of Appeals' conclusion that the Commission's finding in this regard were supported by substantial evidence, is final.

As this Court stated in *Steel Tech., Inc. v. Congleton*, 234 S.W.3d 920 (Ky. 2007): "... any issues decided against the Appellees at the Court of Appeals cannot be raised before this Court without a cross-motion for discretionary review." *Id. at* 926 - 927 (Citing: *Perry v. Williamson,* 824 S.W.2d 869 (Ky.1992) "*Our rules are specific that if the motion for discretionary review made by the losing party in the Court of Appeals is granted, it is then incumbent upon the prevailing party in the Court of Appeals to file a cross-motion for discretionary review if respondent wishes to preserve the right to argue issues which respondent lost in the Court of Appeals, or issues the Court of Appeals decided not to address. If the party prevailing in the Court of Appeals wishes further consideration of such issues along with the issues for which discretionary review has been granted, the prevailing party* <u>*must*</u> *file a cross motion for discretionary review*"; and *Eagle Fluorspar Co. v. Larue,* 237 Ky. 263, 35 S.W.2d 303 (1931) "*[F]ailure to file a cross-motion for discretionary review precludes further review in this Court*").

The Court of Appeals' majority opinion below, found that the Appellee had repeatedly violated the Employer's punctuality rule, stating:

> It was within the discretion of the Commission to review that evidence, and to determine whether or not it found that evidence to be pervasive. In this instance, it did not, and in reviewing the record we cannot find that the Commission failed to base that determination on substantial evidence. The mere fact that the Commission could have found differently had it chosen to do so is an insufficient basis for reversal by this Court ... we do not dispute, or disagree with the findings of fact made by the Commission indicating that Cecil was, in fact, guilty of being tardy on numerous occasions ... we certainly sympathize with an employer's desire to terminate an employee that is repeatedly late to work, as was the case with Cecil in this instance. Further we agree that the employer would be entirely justified in doing so ... it would have been acceptable to terminate Cecil on the basis of the tardies.[46]

Judge Henry's Dissenting Opinion agreed, stating: "[t]he Commission observed that it was reasonable for the employer to request that Ms. Cecil sign the statement because its contents were clearly supported by the evidence. I do not find any contradiction of that finding in the majority opinion."

Although the Court of Appeals clearly concluded that the Commission's finding of fact that the Appellee had repeatedly violated the Employer's punctuality rule was supported by substantial evidence, the Appellee did not file a cross Motion for Discretionary Review on that or any other issue. As such, the Commission's factual finding that the Appellee had indeed repeatedly been late to work, in violation of the Employer's punctuality rule, is final and not subject to further review.[47]

---

[46] *See attached Exhibit* "A," Slip Opinion, Pg. 13-15.

[47] Similarly, the Court of Appeal's conclusion that the Appellee's Due Process rights had not been violated during the administrative procedures below is not subject to further review by this Court. (*Pleas see* Slip Opinion, Pg.s 16-17).

This Court must then determine if the Commission properly applied the law to the facts if found.

II. The Commission Properly Applied the Law.

KRS 341.370(1)(b) specifically provides that a "worker shall be disqualified from receiving [Unemployment Insurance] benefits ... [if she] has been ***discharged for misconduct***." KRS 341.370(1)(b) (*Emphasis added*). KRS 341.370(6) goes on to define "discharged for misconduct" by giving a non-exhaustive list of examples of conduct that the Legislature had decided constitute misconduct, including a "knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness ... [or, the example the Commission found to most applicable in this case,] ***refusing to obey reasonable instructions*** ..." (*Emphasis added*).

The words "willful or wanton" do not appear in the specific examples of misconduct the Legislature has provided in the definition of "misconduct" contained in KRS 341.370(6). In spite of that fact, the majority Opinion below stated that "the test for determining misconduct is whether the employee's action evidence a willful and wanton disregard of the employer's interests." Slip Opinion, Pg. 15.

It is an axiomatic principle of statutory construction that the Court must apply a statute pursuant to the plain meaning of the words the Legislature chose to use in the statute. This Court has recently observed:

> It is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed. Consequently, this Court has long held that when a statute on its face is intelligible, entities are not at liberty to supply words or make additions. Thus, the power

> to create exceptions by construction can never be exercised where the words of the statute are free from ambiguity, and its purpose plain.

Metzinger v. Ky. Ret. Systems, 299 S.W.3d 541 *at* 546 (Ky. 2009) (*Internal citations and punctuation omitted*). Courts "[are] not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Bd. of Edu. of Jefferson Co.*, 873 S.W.2d 575 *at* 577 (Ky. 1994).

In KRS 341.370(6), the Legislature specifically provided that a "knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness ... [or] refusing to obey reasonable instructions" constitute misconduct. The Legislature has not purported to require that any of the specific examples of misconduct provided in KRS 341.370(6), have to independently be "willful or wanton," yet the majority projected that additional requirement upon this case, leading it to erroneously reverse the Commission.

The majority's mistake in requiring such a showing was the result of a vestige in the case law, which no longer applies in circumstances such as this after having been supplanted by statute. A showing of "willful and wanton" conduct had once been required for all misconduct, back before the Legislature provided specific examples of behavior which constitute "misconduct" in KRS 341.370(6), without stating that any of those examples have to be willful or wanton. This has resulted in confusion amongst lower courts and practitioners as to what showing is required to constitute misconduct.

Prior to 1982, KRS 341.370 merely provided that an employee would not be qualified to receive Unemployment Insurance benefits if they were fired for "misconduct." There was no statutory definition of "misconduct," so the old common-

law definition first created in *Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941), which required a showing of willful or wanton conduct, applied. However, in 1982, the Kentucky General Assembly amended KRS 341.370 so as to provide in the newly created subsection (6), that "misconduct" includes, but is not limited to: a "knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness ... [or] refusing to obey reasonable instructions."

Because the Legislature did not state that any of the specific examples of misconduct contained in the statutory list have to be either willful or wanton, that old common-law requirement should no longer apply, at least in instances of misconduct the Legislature specifically included in KRS 341.370(6), which states that they alone constitute misconduct. At the same time, the examples of misconduct listed in KRS 341.370(6) are non-exhaustive, so it would seem that the old common-law requirement of willful or wanton conduct would still apply for other instances of misconduct which were not included in the statutory list. However, no court has yet addressed the effect the 1982 amendment should have upon the old common law definition, and as a result, courts seem uncertain as to whether it applies in any given case.

Courts appropriately continue to regularly apply the willful or wanton standard to instances of alleged misconduct, which are not covered by any of the specific examples of misconduct the Legislature listed in KRS 341.370(6). *See e.g.*: *Unemployment Ins. Com'n v. Dye,* 731 S.W.2d 826 (Ky.App. 1987); *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830 (Ky.App. 1998). In some cases, Courts are not applying the "willful or wanton" requirement in analyzing instances of misconduct which

fall under one of the examples listed in KRS 341.370(6), and the Commission believes that is appropriately so, as the Legislature has provided that satisfying one of these examples, in and of itself, necessarily constitutes misconduct. *See e.g.*: *Hutchison v. Kentucky Unemployment Ins. Com'n*, 329 S.W.3d 353 (Ky.App. 2010). The Commission has adopted this approach. However, in other cases, such as the majority's Opinion below, courts continue to project the additional old common law willful or wanton requirement upon cases covered by the specific examples in KRS 341.370(6). *See e.g.*: *Kentucky Unemployment Ins. Com'n v. Duro Bag Mfg. Co.*, 250 S.W.3d 351 (Ky.App. 2008). This simply should not be so.

In cases where the type of misconduct alleged is included in the statutory list but the court has still applied the additional "willful or wanton" standard, the authority cited for having done so in every case traces directly back to *Boynton Cab*, *supra* (1941), and in those cases, the courts are still applying the *Boynton* standard as if the intervening addition of the 1982 statutory examples does not effect the analysis at all. *Duro Bag*, *supra*, the case cited by the majority when dismissing the Commission's argument on this issue below (Slip Opinion, Pg. 15), illustrates this point.

In *Duro Bag*, the employee was discharged for having violated the employer's rule against having a blood-alcohol level above .02 while at work. The legislature has provided in KRS 341.370(6) that a "knowing violation of a reasonable and uniformly enforced rule of an employer [or] reporting to work under the influence of alcohol or drugs" constitutes misconduct. The analysis could have ended there. However, the *Duro Bag* court still stated: "[w]e have held (1) that, under the Act, 'misconduct' is limited to willful, wanton, and deliberate violations of rightful standards

of behavior or recurring negligence or carelessness manifesting a wrongful intent or evil design; and (2) that an isolated instance of unsatisfactory conduct does not constitute 'misconduct' under the Act. *Boynton Cab Company v. Neubeck.*" *Id. at* 354. In doing so, *Duro Bag*, and other similar cases, have failed to acknowledge the legal significance of the addition of the 1982 statutory list of examples of misconduct.

Since the legislature has expressly stated that the instances of behavior contained in the list at KRS 341.370(6) constitute misconduct in and of themselves, there is no legal authority for continuing to apply the separate "willful or wanton" element from the common law test for misconduct. Perhaps the best attempt that has been made to harmonize the old common law definition with the statutory list, came in *Douthitt v. Kentucky Unemployment Ins. Com'n*, 676 S.W.2d 472 (Ky.App. 1984), wherein the court observed: "[KRS 341.370(6)] defines misconduct and includes, 'knowing violation of a reasonable and uniformly enforced rule of employer' This section was added by the General Assembly in 1982, and defines 'misconduct' approximately the same way as it is defined by *Boynton Cab*." *Id. at* 474 (*Internal punctuation omitted*).

The *Douthitt* court was correct in that, if you look at the examples of behavior that the Legislature has said constitute misconduct in KRS 341.370(6)--

> *falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor*

> *or felony by a court of competent jurisdiction, which results in missing at least five (5) days work;*

--they all necessarily include some element of bad faith equivalent to willfulness or wantonness. Indeed, what the Legislature has done in KRS 341.370(6), is list the most common examples of willful or wanton misconduct, and said that they are misconduct per se. For that reason, in cases where the misconduct alleged is covered by one of the examples in the list, there is no reason to look beyond whether it satisfies the applicable example to see if it was also willful or wanton, because that behavior itself already contains the amount of culpability the Legislature has said is required for it to be misconduct. For example, in this case, the Appellee refused a reasonable instruction. The "refusal" necessarily was an intentional, willful act. Further, the instruction refused had to be a reasonable one. As the Legislature has said, refusal to follow a reasonable instruction necessarily is misconduct, and necessarily contains an element of willfulness.

This has been the interpretation by the Commission, which specializes in making determinations about the Unemployment Insurance program, in this and other cases. "This Court has recognized the deference afforded an administrative agency's construction of a statute that it is charged with implementing, so long as the agency interpretation is in the form of an adopted regulation or formal adjudication." *Louisville/Jefferson County Metro Government v. TDC Group, LLC*, 283 S.W.3d 657 *at* 661 (Ky. 2009) (*Internal punctuation omitted*).

Kentucky's enactment in 1982, of the statutory list of examples of misconduct, was adopted from an existing statute in Indiana, IC 22-4-15-1, 1(d). It reads:

> "Discharge for just cause" as used in this section is defined to include but not be limited to:

> (1) separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge;
> (2) ***knowing violation of a reasonable and uniformly enforced rule of an employer, including a rule regarding attendance***;
> (3) if an employer does not have a rule regarding attendance, an individual's unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness;
> (4) damaging the employer's property through willful negligence;
> (5) ***refusing to obey instructions***;
> (6) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours;
> (7) conduct endangering safety of self or coworkers;
> (8) incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction; or
> (9) any breach of duty in connection with work which is reasonably owed an employer by an employee.

Id. (*emphasis added*). This issue was addressed by the Indiana Court of Appeals in *Wakshlag v. Rev. Bd. of In. Emp. Sec. Div.*, 413 N.E.2d 1078 (Ind.App. 1980), wherein the Court said:

> "'Discharge for just cause' as used in this section is defined to include but not be limited to separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness; damaging the employer's property through willful negligence; refusing to obey instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or coworkers; incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction or for any breach of duty in connection with work which is reasonably owed employer by an employee."

> ...[the claimant] asserts that "discharge for just cause" includes an element of wilful or wanton misconduct and that, in the absence of a finding that her failure to obey instructions was wilful or wanton, the Review Board's conclusion is contrary to law.
>
> "Fault," or "just cause," as used in the Employment Security Act, means failure or volition, and does not mean something blameworthy, culpable, or worthy of censure. *Walter Bledsoe Coal Company v. Review Board*, (1943) 221 Ind. 16, 46 N.E.2d 477. ***The mere failure on the part of the Review Board to use in its findings and conclusions the words "wilful" or "wanton" does not evidence the application of an erroneous standard for measuring the employee's conduct.*** *White v. Review Board*, (1972) 151 Ind.App. 426, 280 N.E.2d 64; *Gardner v. Review Board*, (1974) 162 Ind.App. 125, 318 N.E.2d 361. ***There is no need for the Review Board to make findings of fact as to subjective intent if discharge is reasonably justified on the employee's objective behavior.*** *Osborn v. Review Board*, (1978) Ind.App., 381 N.E.2d 495.
>
> From the foregoing it is apparent that ***the Review Board's failure to include in its findings the words "wilful," "wanton," "intentional," or some other expression indicating deliberate conduct, is not fatal to its decision.***

Id. at 1082 (*Emphasis added*) (See attached *Exhibit* "O").

Furthermore, in this case, after numerous attempted interventions and counselings by the Employer, the Appellee continued to repeatedly violate the Employer's Code of conduct, and that fact is beyond question now. The majority Opinion rightfully observed that the Appellee's tardiness constituted cause for termination, and that her tardiness also constituted "misconduct" which would disqualify her from receiving benefits. However, the Employer went above the reasonable response of just firing the Appellee, and generously offered her one last chance to keep her job if she would sign the Last Chance Agreement. The majority believed that, because the

Appellee was given the benefit of this extra opportunity, but declined it, she should receive the windfall of benefits. Aside from leading to an absurd result, the majority's legal reasoning in reaching it was flawed.

The majority concluded that the Employer's request that the Appellee sign the Last Chance Agreement was unreasonable. However, the context in which the Last Chance Agreement arose shows that the Employer's request that the Appellee sign it was entirely reasonable. Pursuant to the express terms of employment she accepted, the Appellee was to be fired for her repeated tardiness, but was given the option of provisionally retaining her position if she would sign the Last Chance Agreement. The Last Chance Agreement merely acknowledged the fact that the Appellee had repeatedly been tardy in the past, and commemorated her commitment to rectifying it in the future. When considered in the context of the factual occurrences that necessitated it, it is clear that the Employer's request that the Appellee sign the Last Chance Agreement in order to retain her position was entirely reasonable, and both parties had even agreed to it in the terms of employment. As Judge Henry stated in his dissent:

> I wholeheartedly agree with the Commission and the Circuit Court that the employer's request was reasonable. This unsatisfactory employee was treated with utmost fairness completely within the bounds of the law's requirements. I would affirm.

As such, the Commission correctly applied the law when it concluded that the Appellee refused to obey a reasonable instruction, and as a result, that she was not qualified to receive Unemployment Insurance benefits during her resulting period of unemployment.

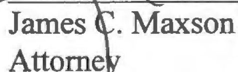
CONCLUSION

For all of the above-stated reasons, the Commission's findings of fact were supported by substantial evidence and it correctly applied the law. Therefore, the Commission respectfully requests this Court reverse the Court of Appeals' majority Opinion and affirm the Commission's Order.

Respectfully Submitted,

COMMONWEALTH OF KENTUCKY

Education and Workforce Development Cabinet
Office of Legal and Legislative Services



James C. Maxson
Attorney
500 Mero Street
Capital Plaza Tower, 3rd Floor
Frankfort, Kentucky 40601
Telephone: (502) 564-1973
Facsimile: (502) 564-9990
Counsel for Appellant:
Kentucky Unemployment Insurance Commission