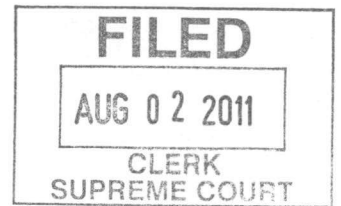


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE No. 2010-SC-000349-DG



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

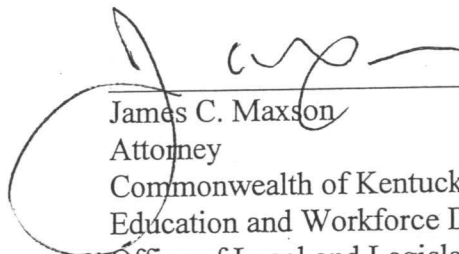
APPELLEE

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REPLY BRIEF FOR APPELLANT,  
KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

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Counsel for Appellant,



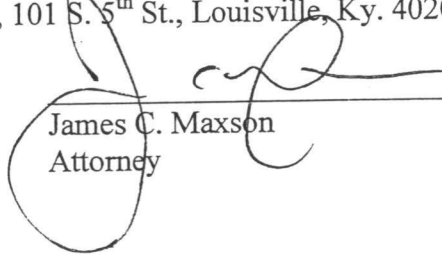
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James C. Maxson  
Attorney

Commonwealth of Kentucky  
Education and Workforce Development Cabinet  
Office of Legal and Legislative Services  
500 Mero Street - 3<sup>rd</sup> Floor  
Frankfort, Kentucky 40601  
Telephone: (502) 564-1973  
Facsimile: (502) 564-9990

CERTIFICATION

I hereby certify that a copy of this Reply Brief has been placed in the U.S. Mail to be sent first class, postage prepaid, on this 2<sup>nd</sup> day of August, 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. 5<sup>th</sup> St., Louisville, Ky. 40202.



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James C. Maxson  
Attorney

## ARGUMENT

The purpose of this reply Brief is to respond to two specific points raised in the Appellee's Brief: (1) whether the Court of Appeals' conclusions that the Commission's findings of fact were supported by substantial evidence and that the Appellee was afforded due process are final as law of the case, and (2) whether the misconduct statute may be liberally construed to stand for something other than what the Legislature expressly stated.

**THE COURT OF APPEALS' CONCLUSION THAT THE COMMISSION'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THAT THE APPELLEE WAS AFFORDED DUE PROCESS, ARE FINAL.**

Courts' review of cases such as this examine two issues: 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). Those two issues were the primary issues before the Court of Appeals below.

On the first issue, the Court of Appeals concluded that the Commission's findings of fact were supported by substantial evidence, stating: "... 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 ..." (Slip Opinion, Pg. 13-15). The two-judge majority simply went on to disagree with the Commission on the second issue, whether correctly applied the law to those facts.

The Appellee also raised a Due Process argument to the Court of Appeals. The Court of Appeals dismissed that argument, finding that she was afforded Due Process and that she had also waived that issue.

The Appellee did not file a Cross-Motion for Discretionary Review of the Court of Appeals' Opinion as permitted by CR 76.21, on either issue. As the Commission pointed out in its Brief (Pg.s 15-16), because the Appellee did not prevail before the Court of Appeals on either issue, and further because she did not file a Cross-Motion for Discretionary Review on either, the Court's of Appeals' conclusions as to both issues are now final as law of the case.

In support of her contention that she may now contest these issues to this Court, the Appellee cites a line of cases standing for the proposition that a party may argue that a court's judgment be affirmed on the "right result, wrong reason" principle. (Brief for Appellee, 18-19). However, this argument was dismissed by this Court's Opinion in *Hale v. Combs*, 30 S.W.3d 146 (Ky., 2000), wherein the Court explained: "[s]ince Appellees did not file a cross-motion for discretionary review with respect to this issue, the Court of Appeals' conclusion that there was insufficient evidence to support removal on grounds of nonfeasance is now the law of the case." *Id.* at 150 (Citing: CR 76.21; *Nelson Steel Corp. v. McDaniel*, Ky., 898 S.W.2d 66 (1995); and *Green River Dist. Health Dep't v. Wigginton*, Ky., 764 S.W.2d 475 (1989)). This Court then addressed the primary case presented in furtherance of the Appellee's argument that she did not need to file a Cross-Motion for Discretionary Review on these issues, *Commonwealth v. Vester*, explaining in footnote 2:

Appellees' reliance on *Commonwealth v. Vester*, Ky., 956 S.W.2d 204 (1997) with respect to this issue is misplaced.

Vester holds that the prevailing party need not file a cross-appeal in order to assert that the lower court (or administrative agency) reached the right result for the wrong reason. *Id.* at 205–06. Here, Appellees did not prevail in the Court of Appeals on the issue of nonfeasance, thus were required to file a cross-motion for discretionary review in order to assert that the lower court reached the wrong result on that issue.

In this case, the Appellee did not prevail below on either the issue of whether the Commission’s findings of fact are supported by substantial evidence, or whether she was afforded Due Process. Because she did not prevail on these issues, and did not file a Cross-Motion for Discretionary Review on them, they are now final as law of the case. Pursuant to *Hale*, she may now only argue “right result, wrong reason” to advance alternate theories in support of the lower court’s ruling on theories she actually prevailed on, such as alternate theories that the Commission misapplied the law in concluding she was discharged for misconduct.

**THE LEGISLATURE’S INTENT IS EFFECTED BY  
APPLYING THE LAW AS EXPRESSLY WRITTEN  
BY THE LEGISLATURE.**

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). KRS 341.370(6) then defines “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] refusing to obey reasonable instructions ...”

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). 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).

Applying the statute as written will not result in “numerous, unmanageable proof standards,” as is alleged by the Appellee. (Brief for Appellee, 14). To the contrary, applying the law as intended is simple compared to the alternative. If an instance of alleged misconduct is covered by one of the examples of misconduct the Legislature has set-forth at KRS 341.370(6), then the alleged conduct would have to be analyzed to see if it satisfied that conduct. Thus, using the instant case as an example, would still have to review for whether the claimant refused a reasonable instruction. This would not “essentially eliminate the employer’s burden of proof,” as is alleged, and this review would preclude the kind of “occupational torture” the Appellee fears. (Brief for Appellee, 9). If an instance of alleged misconduct were not covered by one of the examples, it would then be analyzed under the common-law definition of misconduct.

The Appellee argues that the additional independent requirement of “willful” or “wanton” conduct must still be read into KRS 341.370(6), to “respect the purpose of the Unemployment statute: to provide [U]nemployment benefits.” (Brief for Appellee, 15). However, the entirety of the Unemployment Insurance program is a balancing act between providing a safety net of benefits for those that are unemployed through no fault of their own, while not over-burdening the taxpayers that have to finance those benefits. The intent of the program has never been just to maximize benefits, and

KRS 341.370(6) represents the Legislature's attempt to strike a balance between providing benefits to those the program was intended to cover, but not over-burden taxpayers by providing them to individuals whom the Legislature has deemed should not receive benefit of the program.

It is for the Legislature to prescribe who the Unemployment Insurance program provides benefits for. As this Court has previously observed:

The Unemployment Compensation Law is a taxing statute. The Law itself provides that "This Act shall be liberally construed to accomplish the purposes thereof." However, there is an obvious difference between construing the Act with liberality and extending its operation to persons not within its letter. It is for the legislature to fix the limits within which the law shall operate and we can not "liberalize" its operations to one not within its metes and bounds. To do so would be to legislate ourselves.

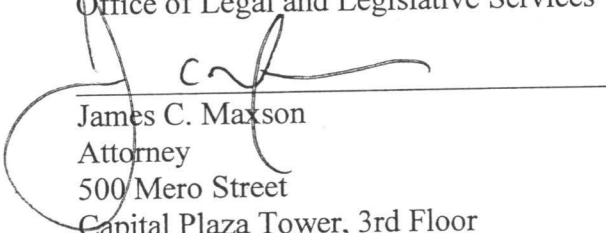
*Barnes v. Indian Refining Co.* 134 S.W.2d 620 at 622 (Ky.App.1939) (citation omitted).

### CONCLUSION

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*