COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2010-SC-000349-DG

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION,
&
LOUISVILLE WATER COMPANY, APPELLANTS

V. APPEAL FROM KENTUCKY COURT OF APPEALS
HONORABLE MICHAEL CAPERTON, PRESIDING
No. 2008-CA-002248-MR

DIANA CECIL APPELLEE

BRIEF FOR APPELLEE,
DIANA CECIL

It is hereby certified that on this 15th day of July, 2011, a true and correct copy of Appellee's Brief was mailed, via U.S. Mail, postage prepaid to: Hon. Sam Givens, Court of Appeals, 360 Democrat Drive, Frankfort, Ky 40601; Hon. Martin McDonald, Jefferson Circuit Court, Div. 6, 700 W. Jefferson Street, Louisville, KY 40202; Donna King Perry, Esq., Dinsmore & Shohl, 2500 National City Tower, Louisville, Kentucky 40202, Counsel for LOUISVILLE WATER COMPANY; James C. Maxson, Counsel for KENTUCKY UNEMPLOYMENT, INSURANCE COMMISSION, Office of Legal Services, 500 Mero Street, 207 Capital Plaza Tower, Frankfort, KY 40601.

Respectfully submitted,

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MAY IT PLEASE THE COURT

I. STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that the Court of Appeals correctly decided this matter and applied the correct rule of law. The Parties have thoroughly briefed the facts and legal issues involved in this case. Appellee does not believe that oral argument is necessary for a determination of this matter, but would be pleased to present her case should this Court determine oral argument appropriate.

II. COUNTER-STATEMENT OF POINTS AND AUTHORITIES

III. COUNTER-STATEMENT OF THE CASE

This matters involves the Kentucky Unemployment Commission ("**Commission**") and the Louisville Water Company's objection to Ms. Diana Cecil's ("**Ms. Cecil**") receipt of unemployment insurance benefits. The objection is based upon the unsupported allegation that she was guilty of "misconduct" under KRS 341.370(6) for refusing to sign a false Last Chance Agreement. Ms. Cecil does not accept the Appellants' Statement of the Case, and sets forth below the facts and issues pertinent to a resolution of this matter.

Background Facts

From October 2001 to November 2, 2005, Ms. Cecil worked for the Louisville Water Company ("**Employer**") as a Right-A-Way Associate. [2/28/07 Hearing Transcript at p. 59].[1] Ms. Cecil was discharged from her employment on November 2, 2005. Her discharge occurred on the same day she returned from an approved medical leave. Ms. Cecil's medical leave started on October 7, 2005 and ended November 1, 2005. For a full year before her medical leave, Ms. Cecil had not received any written notice of any tardy issue. [2/28/07 Transcript at p. 50, 77]. On October 7, 2005, Ms. Cecil was handed paperwork that included a list of alleged tardy dates. She was then ushered out of the building, after having been told to clean out her desk. [2/28/07 Transcript at p. 79-80]. When she returned from her medical leave on November 2, she was terminated for "excessive tardiness."

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[1] The January 2, 2007 and February 28, 2007, Referee Hearing Transcripts, were made part of the Record on Appeal as confirmed by the Jefferson Circuit Court Clerk's Certification, of Record on Appeal "**RA** __", at p. 158].

Unemployment Determinations and Appeals

Ms. Cecil timely filed her application for unemployment benefits, but was denied benefits, on December 8, 2005, by an administrative determination, that held that she was discharged for misconduct for "excessive tardiness." [Ms. Cecil's Verified Complaint marked "**Exhibit 1**", Determination at **Tab A, RA p. 9**]. Ms. Cecil appealed that Determination and ***initial*** hearings were held on June 13, 2006 and September 5, 2006. On September 11, 2006, an initial Referee Decision denied her benefits finding ***not*** that she was guilty of misconduct (for any reason), but instead had "voluntarily quit without good cause." [Determination attached as part of Exhibit 1, **Tab B, RA p. 14-15**]. This ruling applied a completely different standard. Ms. Cecil appealed that Referee Decision to the Commission. [**Exhibit 1, Tab B, RA 12-13**].

Ms. Cecil asserted in her Appeal that her termination had nothing to do with misconduct, and that she did not voluntarily quit her employment without good cause. She submitted that her termination was retaliation due to her pursuit of gender discrimination, and harassment claims before the Equal Employment Opportunity Commission, the United States Department of Labor, Office of Federal Contract Compliance Programs, as well as Federal and State Court lawsuits, styled, Diana Cecil v. Louisville Water Company, U.S. District Court, Western District of KY, No. NO. 3:03-CV-540-S and Diana Cecil v. Louisville Water Company, Jefferson Circuit Court, Div. 4, No. 04-CI-006792. At the time of her termination, all of these cases were pending before the respective Courts and Agencies. *It was not until these cases were initiated that the Employer made the tardy allegations against Ms. Cecil.* [2/28/07 Transcript at p. 65-66].

Appeal Remanded for New Hearing

On October 20, 2006, the Commission issued an Order Remanding Ms. Cecil's Appeal for a *de novo* hearing. [Order Remanding, attached at **Exhibit 1, Tab C, RA 18-19**]. The primary reason for the remand was that a portion of the prior hearing transcripts had been misplaced leaving the Commission without a record to review. *See Order Remanding.* The Order Remanding required a new Hearing Officer to conduct a hearing and make new findings of fact and issue a new decision.

March 5, 2007 Referee Decision

The new Hearing Officer held hearings on January 2, 2007 and February 28, 2007. The Hearing Officer submitted a Referee Decision on March 5, 2007. [March 5, 2007 Referee Decision attached marked **"Exhibit A," at Tab D, RA 20-22**]. The March 5, 2007, Referee Decision held in Ms. Cecil's favor finding that her discharge was for "reasons other than misconduct" and that Ms. Cecil did ***not*** act unreasonably in failing to sign what she knew to be a false statement regarding alleged tardiness. **[Id at RA 22]**. The Referee Decision further held that the Employer admitted that Ms. Cecil would not be subject to discharge for the alleged tardiness problem. **[Id].**

Hearing Evidence

At the March 5, 2007, Referee Decision was based upon testimony and evidence submitted by Ms. Cecil and the Employer. Ms. Cecil testified that on the day of her termination, November 2, 2005, she was called into a conference room to meet with her Employer. The Employer demanded that Ms. Cecil sign a statement called a "Last Chance Agreement" admitting that she was guilty of excessive tardiness. [2/28/07, Hearing Transcript

at p. 41]. The alleged tardies were based upon the Employer's SymPlex System Reports. The SymPlex System Reports record when an employee enters the Parking Garage at the Employer's Third Street office location. However, the Symplex System is not monitored or operated out of the Third Street location where Ms. Cecil worked. Instead, it is located and operated out of the Employer's Allmond Avenue location.

Importantly, the Hearing Officer admitted into evidence the Affidavit from Ms. Billie Jo Patton. [**RA 99-103**, Affidavit p.4, par. 14, attached marked ("**Exhibit 2**")]. Ms. Patton's Affidavit described that the Employer's purpose for the SymPlex System was not to monitor tardiness, but solely for admission to the building. *Id.* Ms. Cecil confirmed that she was never told that the SymPlex System was to be used to monitor timeliness to work. [2/28/07 Transcript at p. 68]. The Employer admitted that Ms. Cecil was never advised that the System was to be used for tardy monitoring. [1/2/07 Transcript at p. 52]. Given this information, there was no way for Ms. Cecil to challenge the tardy claims presented by the SymPlex System at the initial meeting.

In preparation for the unemployment hearing, Ms. Cecil was able to obtain the information necessary to show that the SymPlex System was unreliable in showing whether she was timely to the Third Street Location. Ms. Cecil produced an email from Mr. Glen Mudd who worked at the Allmond Avenue location with the SymPlex System access cards. The email confirms that the Allmond Avenue time clock is ahead of the Third Street location clocks. [2/28/07 Transcript at p. 69-71]. The Allmond Avenue access System ran, at least, eight (8) minutes faster than the computer clocks at the Third Street location. [**R A 105,** 2/28/07 Transcript at p. 69, Glen Mudd E-mail, attached hereto marked "**Exhibit 3**")].

Therefore, Ms. Cecil's evidence was that for the majority of the alleged tardies, Ms. Cecil was actually ***on time to work***. Ms. Cecil objected to admission of the Symplex System Reports as she had shown them to be unreliable, unsubstantiated, not trustworthy, and irrelevant to whether Ms. Cecil was actually tardy. [1/2/07 Transcript at p. 39].

Ms. Cecil further testified that she was timely to work, was allowed to work on a flex time schedule, and properly reported to her supervisor when she was to be late. [2/28/07 Transcript at p. 59-60]. Ms. Cecil also testified that for over a year (from July 2004 to October 7, 2005), the Employer had failed to issue any written warning regarding any alleged tardy. [2/28/07 Transcript at p. 62].

She advised that the information used to support the alleged tardies was also not substantial, reliable or trustworthy because the Employer did not have a central time clock, and its own computer clocks showed varying times. [1/2/07 Transcript at p. 45; 2/28/07 Transcript at p. 53, 69-72]. In all, there was no reliable way to show whether she was tardy or not.

Ms. Cecil testified that her male co-worker was often late and not terminated or disciplined for tardiness [2/28/07 Transcript at p. 84]. Additionally, the Employer's own policy provided that tardiness does not begin until ten (10) minutes after the start time. [1/2/07 Transcript at p. 54]. Despite this Policy, the Employer had complained that Ms. Cecil was tardy before its own stated period [2/28/07 Transcript at p. 52-54].

Nothing about the Employer's evidence regarding tardies had any probative value. It was, in fact, largely fabricated, false, and against its own Policy. The Employer ultimately admitted in the hearing that Ms. Cecil's alleged tardies were not sufficient to cause her termination on November 2, 2005. [2/28/07 Transcript at p.39 (ln.22-25) - 40].

Last Chance Agreement

The Employer next turned its attention to a Last Chance Agreement that it had provided to Ms. Cecil. Unbelievably, the Employer's Last Chance Agreement required that Ms. Cecil admit that she was guilty of "excessive tardiness" in order to retain her job. Ms. Cecil was denied the opportunity to dispute the statements of the Employer in the Last Chance Agreement. [2/28/07 Transcript at p. 44, and 60-61]. She was not given the option to write anything on the Last Chance Agreement expressing her concern regarding its falsity, even though she offered to mark through that section, and ***then*** sign the document. [2/28/07 Transcript at p. 61-62]. She even said that she agreed with the policies of the company and would sign that portion of the document. *Id.* The Employer ignored her plea, and demanded a signature or termination.

Understandably, Ms. Cecil testified that she felt like she had no choice in this situation. *Id.* She could not sign a false document. She could not dispute the false document. She could not even submit proof of the false timeliness issue. Instead, she repeatedly advised her Employer that she loved her job and wanted to stay. [2/28/07 Transcript at p. 60]. All of this occurred in a situation where the Employer offered her flex time, and she was not late as defined by the Employer's own tardy policy. The events also occurred in a situation where the Employer allowed others in Ms. Cecil's department come in late without discipline.

Additionally, Ms. Cecil had always acted in the Employer's best interest, using the offered flex time to make up for any late arrivals. She often worked overtime to the benefit of the Employer. [2/28/07 Transcript at p. 71]. Ms. Cecil acts had never been against the Employer's interests or interfered with any business initiative, operation or purpose.

The Hearing Officer also heard evidence directly from the Employer's Human Resource Manager, Kathy Schroeder, and Employee Relations Manager, Cindy Kowalski. Ms. Schroeder admitted that the Employer's own policy provides that tardiness begins at ten (10) minutes after the hour of arrival. [1/2/07 Transcript at p. 54]. The Employer's tardy report included alleged tardies that were before its own stated ten minute mark. Both Ms. Schroeder and Ms. Kowalski conceded that Ms. Cecil's alleged tardiness were ***not*** sufficient to cause her termination, as she would have remained employed had she signed the false statement. [1/2/07 Transcript at 63; 2/28/07 at 39-40].

Despite this important point, the Employer still required Ms. Cecil to admit to a tardiness problem, or lose her job. Both Employer representatives admitted that Ms. Cecil did not have the right to object in any way to the tardiness statement. [1/2/07 Transcript at p. 41]. Ms. Cecil was required to lie *or* be fired.

After hearing all of the evidence, the Hearing Officer entered her findings in the March 5, 2007 Referee Decision. **[Exhibit 1, Tab D, RA 20-22**] The Referee Decision findings support Ms. Cecil's position. The Referee Decision holds that the Employer:

(1) would *not* permit Ms. Cecil to dispute the alleged tardies;

(2) *admitted* that Ms. Cecil could not make any notation of dispute;

(3) *admitted* that signing the notation meant that Ms. Cecil was admitting guilt of a tardy problem; and

(4) *admitted* that the alleged tardy problem was not sufficient to cause her termination. **[Id].**

On March 19, 2007, the Employer filed an appeal from the Referee Decision to the Commission. The Commission did not hear or accept any additional evidence, but used the

same record supporting the March 5, 2007 Referee Decision. The Commission decision did not alter any of the March 5, 2007 Referee Decision holdings. In fact, they are affirmed findings. Nonetheless, on May 25, 2007, the Commission mailed its Order Reversing the March 5, 2007 Referee Decision. *See* **RA 32-37.**

The May 25, 2007 Commission Opinion holds that Ms. Cecil is disqualified from benefits for "failing to follow a reasonable instruction of her employer." *See Commission Opinion.* This holding was a ***completely*** new reason for denial of benefits. Ms. Cecil next initiated a timely Appeal to the Jefferson Circuit Court on June 13, 2007, styled Diana Cecil v. Louisville Water Co., and Kentucky Unemployment Insurance Commission, Civil Action No. 07-CI-05529. **[RA 1-38, Verified Complaint at Exhibit 1]**.

On November 11, 2008, the Jefferson Circuit Court caused to be entered its Order denying the Appeal, and affirming the Commission's decision. **[RA 146-151]** On December 1, 2008, Ms. Cecil timely filed her Notice of Appeal to the Court of Appeals. **[RA 152-53]**. Ms. Cecil submitted therein that the Jefferson Circuit Court's Order and the Commission's decision are not supported by substantial evidence, are against the rule of law, and are arbitrary and capricious.

On February 12, 2010, the Kentucky Court of Appeals reversed and remanded the matter to the Jefferson Circuit Court. The Court of Appeals correctly held that the Employer failed to meet its well settled proof obligations. The Opinion holds that:

> . . . the standard for "determining misconduct is whether the employee's actions evidenced a willful and wanton disregard of the employer's interests." *See Burch v. Taylor Drug Store, Inc, et al.* 965 S.W.2d 830, 835 (Ky. App. 1998)." [Opinion p. 16-17].

Based on the applicable law, the Court of Appeals held that the Commission did not correctly apply the law to the facts of this case as there was no showing by the Employer that Ms. Cecil's actions were in any way "willful or wanton."

Ms. Cecil respectfully submits that the Court of Appeals has correctly applied the law. She respectfully submits that the decision should stand, and this Court should affirm.

IV. ARGUMENT

The primary issue before this Court is whether the Kentucky Court of Appeals correctly held that the Commission failed to apply the correct law to this case. The Court of Appeals confirms Ms. Cecil's position holding that:

> . . . the standard for "determining misconduct is whether the employee's actions evidenced a willful and wanton disregard of the employer's interests." *See Burch v. Taylor Drug Store, Inc, et al.* 965 S.W.2d 830, 835 (Ky. App. 1998).[Opinion p. 16-17].

The Court of Appeals held that the Commission failed to correctly apply the law to the facts of this case as there was no showing by the Employer that Ms. Cecil's actions were in any way "willful or wanton."

The Commission argues that this Court should abrogate the long standing requirement that an employer show "willful or wanton" behavior on the part of the employee in order to deny the employee the economic security of unemployment benefits. Such a result would essentially eliminate the employer's burden of proof. Such a result would give employers, already having the upper hand, the license to commit occupational torture. As in Ms. Cecil's case, such a result would sanction the treatment she suffered, to wit: while your lawsuits are pending against us (the Employer); you must sign this paper that you assert to be false, admit

your guilt and give up all of your future rights and objections to it, or else you're fired. It's the equivalent of holding a gun to an employee's head.

The other arguments presented by the Commission rest squarely on the determination of whether "substantial evidence" supports its findings. That question, brought in the Motion for Discretionary Review and argued in the Commission's Brief, relies upon the disputed issue of Ms. Cecil's alleged tardiness, and her reasonable refusal to sign a false Last Chance Agreement. The Commission initiated that argument, thus Ms. Cecil is entitled to defend herself as she did in the Court of Appeals.

Ms. Cecil, as the prevailing party, may argue to this Court, as she does, that the Court of Appeals decision should be upheld based upon the reasons contained in the Opinion or on any other basis. Ms. Cecil respectfully re-asserts her positions below, and submits that the Commission's Decision is not supported by substantial evidence, nor does it apply the correct rule of law. Ms. Cecil further asserts that the Commission in changing the type of alleged disqualifying "misconduct" after the hearing, denied Ms. Cecil due process.

A. Standard of Review

Judicial review of an administrative agency's action addresses the question of arbitrariness. *Kentucky Board of Nursing v. Ward*, 890 S.W. 2d 641, 642 (Ky. App.1994). This Court must address the issues of arbitrariness, capriciousness, and unreasonableness. *Burch v. Taylor Drug Store, Inc., et al.*, 965 S.W. 2d 830, 834 (Ky. App. 1998). "Arbitrariness" is defined as "clearly erroneous," which means "unsupported by substantial evidence. *Id; Kentucky Unemployment Insurance Commission, et al. v. Landmark Community Newspapers of Kentucky, Inc., et al.*, 91 S.W. 3d 575, 578 (2002).

In determining whether an agency's ruling is, in fact, arbitrary, this Court must consider three factors: 1) whether the agency acted within the constraints of its statutory powers or whether it exceeded them; 2) whether through the agency's procedures a party to be affected by the administrative order was afforded her procedural due process; and 3) whether the agency's action was supported by substantial evidence. *Ward, supra at p. 642-643, citing Commonwealth, Transportation Cabinet v. Cornell,* 796 S.W.2d 591 (Ky. App. 1990). If ***any*** of these three tests are failed, this Court may find that the agency's action was arbitrary. *Id.*

An administrative agency's decision is binding *only if* its findings of fact are supported by substantial evidence of probative value. *Landmark,* 91 S.W. 3d at 578. However, even if the findings of fact are supported by substantial evidence of probative value, a determination must still be made as to whether the administrative agency applied the correct rule of law to the facts found. *Id.*

In following the provisions of the *Landmark* case, this Court has the power to correct an "erroneous administrative decision." *Id at 582.* When the Commission draws a conclusion of law different from the Referee Decision, a reviewing Court may reverse. *J.T. Nelson Co. v. Comstock,* 636 S.W.2d 896 (Ky. Ct. App. 1982) (commission reversed after adopting referee factual determinations, and then drawing a contrary conclusion of law). This is exactly what the Commission did to Ms. Cecil. The Commission adopted the findings of the Referee then made a contrary conclusion of law.

B. The"Willful and Wanton" Proof Standard Should Continue to Apply

Proof regarding misconduct, including proof of any willful and wanton behavior, has always been the obligation of the employer. *Shamrock Coal Company, Inc.v. Taylor, et al.*, 697 S.W. 2d 952, 954 (Ky. App. 1985). In *Duro Bag,* the Court of Appeals recently held that:

> The law is well established that we review the unemployment insurance act ("Act") liberally in favor of applicants. *See, e.g., Department of Education v. Commonwealth*, 798 S.W.2d 464, 467 (Ky. App. 1990). Also, we note that whether an employee's termination is for lawful cause or for misconduct under the Act is a distinct question. Thus, while an employee may be discharged for cause, the Act provides mitigating circumstances which would permit statutory benefits. *See, e.g., Alliant Health System v. Kentucky Unemployment Insurance Commission*, 912 S.W.2d 452, 454, 43 1 Ky. L. Summary 2 (Ky. App. 1995). We 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*, 237 Wis. 249, 296 N.W. 636 (1941). The principles in *Boynton* have been adopted by our Court. *See Douthitt v. Kentucky Unemployment Insurance Commission*, 676 S.W.2d 472, 474 (Ky. App. 1984). *Duro Bag Manufacturing Co.* 250 S.W.3d 351 (Ky. App. 2008).

In this case, the Employer failed to offer any proof that Ms. Cecil's failure to sign a false Last Chance Agreement was in any way willful or wanton. In fact, all evidence was to the contrary, including, Ms. Cecil's statement that she acted in good faith, wanted her job, and would sign the Agreement if given the opportunity to write out her disputes. Ms. Cecil's failure to sign the false Last Chance Agreement was, at the absolute most, a single "isolated instance" of what *might* be unsatisfactory conduct.[2]

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[2] It should be noted that neither the Commission, nor the Employer have challenged Ms. Cecil's contention *that her behavior is* **"an isolated instance of unsatisfactory conduct"** which **does not constitute** "misconduct" under the Act. *Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). This Court may uphold Ms. Cecil's benefits based upon this contention alone.

The Commission does not dispute these evidentiary failures on the part of the Employer, but argues that the "willful and wanton" standard should not be applied to Ms. Cecil's type of case. The Commission and the Employer seek to confuse what has been the long standing law of this Commonwealth. Both argue that the standard of proof regarding misconduct is somehow uncertain. This Commonwealth has not shifted from requiring proof of bad faith or an inference of culpability in the form of willful or wanton conduct in order to deny benefits. *See Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941)*; *See also Douthitt v. Kentucky Unemployment Comm.,* 676 S.W.2d 472, 474 (Ky. App. 1984);*Burch v. Taylor Drug Store, Inc. et al*, 965 S.W.2d 830, 835 (Ky. App. 1998); *Kentucky Unemployment Insurance Commission v. Duro Bag Manufacturing Co.,* 250 S.W.3d 351 (Ky. App. 2008).

The Commission attempts to support its argument by noting that Section Six (6) of KRS 341.370, the "misconduct" provision post dates *Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941)*. However, the statute is essentially the same as its predecessor. The purpose of the statute is exactly the same. There are reasons why Kentucky Courts, and practitioners, have continued to apply the *Boynton* proof standard. *See Douthitt v. Kentucky Unemployment Comm.,* 676 S.W.2d 472, 474 (Ky. App. 1984);*Burch v. Taylor Drug Store, Inc. et al*, 965 S.W.2d 830, 835 (Ky. App. 1998); *Kentucky Unemployment Insurance Commission v. Duro Bag Manufacturing Co.,* 250 S.W.3d 351 (Ky. App. 2008). The *Kentucky Unemployment Insurance Digest,* Section 4000, Misconduct, makes repeated reference to precedent requiring the willful and wanton showing in all types of misconduct.

The Commission cites only one case (*Hutchison v. Kentucky Unemployment Ins. Comm.*, 329 S.W.3d 353 (Ky. App. 2010)) in support of the contention that there is

"confusion" about the application of the standard. The *Douthitt, Burch, Duro Bag, and The Kentucky Unemployment Insurance Digest,* Section 4000, confirm the lack of "confusion" in the application of the standard. Additionally, the *Hutchison* matter involved a school teacher dismissed after having been charged with numerous criminal violations. The Court applied the employer's rule against "conduct unbecoming" found in KRS 161.790(1)(b). The issue of evidence regarding "willful and wanton" conduct was not addressed by the Court.

The Commission argues that the 1982 enumeration of a ***type*** of misconduct in KRS 341.370(6) prohibits a court from considering whether the alleged misconduct was willful or wanton. In turn, the Commission admits that the statute is not exhaustive in its examples, and the test would necessarily continue to apply to any non-listed type of misconduct. The Employer disagrees with the Commission to the extent that it argues that the "willful and wanton" standard should be completely abolished.

A misconduct allegation is in the nature of an affirmative defense to an employee's claim for benefits. *See Brown Hotel v. Edwards*, Ky., 365 S.W.2d 299 (1963). Since the employer will always have the burden of proving misconduct, requiring the same proof across the board makes sense. Applying a separate standard to each type of "misconduct" would make for inconsistent and confusing decisions, and numerous, unmanageable proof standards.

The Court of Appeals in *Shamrock*, aptly pointed out:

> . . . , in construing a statute imposing disqualification for misconduct, the rule of strict construction applies. Such a rule is justified in maximizing the purpose of the statute in relieving the stress of economic insecurity due to unemployment through little or no fault of the worker. *76 Am. Jur. 2d Unemployment Compensation § 6 (1975). Shamrock, supra at* 954.

Without question, "[t]he underlying principle of the statutory scheme for unemployment compensation evinces a humanitarian spirit and it should be so construed." *Alliant Health System v. Kentucky Unemployment Insurance Commission,* 912 S.W.2d 452, 454 (Ky. App. 1995). It is a basic premise of statutory construction that the language used in a statute should be interpreted and administered to carry out the purpose of the statute. *See Singleton v. Commonwealth*, 175 S.W. 372 (1915). The Courts of this Commonwealth have consistently adhered to this rule, reinforcing the concept that the purpose of statutory construction is to give effect to the legislative intent. *See Martin v. Louisville Motors*, 125 S.W.2d 241, 245 (1939).

> As the Sixth Circuit Court of Appeals stated in *Egyptian Supply Co. v. Boyd:* In carrying out legislative purpose which is the prime and sole object of all rules of statutory construction, the courts are not always confined to the literal meaning of a statute and to this end will disregard the literal import of words used, when the reason of the law is indicated by its general terms and when adherence to its strict verbiage or punctuation will defeat its purpose. 117 F.2d 608,611 (6th Cir. 1941).

Neither the Commission's nor the Employer's arguments would not appropriately apply the statutory law, or respect the purpose of the Unemployment statute: to provide unemployment benefits. Confirming that an employer will continue to be required to prove willful or wanton conduct on the part of the employee to deny benefits would serve the purpose of the statute.

The Commission further argues that in KRS 341.370(6) the Legislature simply picked examples that already included a "knowing" or malfeasance element. The statute does not set this out. The Legislature has not declared these examples to include an element of culpability. The statute is a list of examples, ***not*** "definitions." *See Alliant, supra at 453.* The statute does not eliminate the ability to ascertain both the intent of the employee and employer regarding

the circumstances of the termination. Since the statute is intended to protect the employee's financial well being, removing the culpability analysis is inappropriate.

The Commission seeks to have the listed "misconduct" categories morphed into "misconduct" *per se.* Such a result would be license for employers to conduct occupational warfare, especially when the employer has been sued. The *Alliant* Court recognized this risk declaring that refusing to consider the circumstances of the charged "misconduct" would give the employer the ultimate authority in determining who got benefits. *Alliant, supra* at 454. Such a result ". . . was not the intent of the Legislature." *Id.*

It should not be forgotten that these cases involve individuals who want to work, who were likely living paycheck to paycheck, and who were doing so at the "will" of their employers. To eliminate the Employer's proof of "willful and wanton" behavior would "constitute an adoption of a rule barring a great mass of workers from benefits under a statute enacted for their protection." *Shamrock, supra at* 955.

Finally, the Commission asks for deference from this Court on its interpretation of the statute. This Court does not owe the Commission this deference. The Commission has repeatedly cited its own Opinion Number 61582 in support of its finding of insubordination. *See Wilson v. Berea Tool & Cutter Grinding, Inc., Commission Opinion No. 61582* at **RA 114-115**. In that Opinion, the Commission provides its own definition of insubordination as ". . . the unjustified refusal to comply with a reasonable request or order of a superior." *See Opinion No. 61582 at p. 1.* The terms "unjustified refusal" and "reasonable request" reveal that even the Commission is continuing to consider the "intent" or "willful and wanton" nature

of the Employee's acts, or lack thereof, in making determinations involving specifically listed types of "misconduct." This proof standard should continue to apply.

C. The Commission's Ruling is Not Supported by Substantial Evidence

1. Ms. Cecil, as the Prevailing Party, Requests that this Court Affirm the Court of Appeals Opinion Based upon the Willful Wanton holding and Her Other Arguments Presented Below

The Court of Appeals found that the Employer did not present evidence of misconduct associated with the refusal to sign the false Last Chance Agreement. The Commission's Motion for Discretionary Review, presented two issues, both of which are predicated on the issue of Ms. Cecil's alleged misconduct. One issue deals with whether Ms. Cecil was tardy and whether her refusal to sign a Last Chance Agreement would amount to "misconduct." *See Commission's Motion at p. 7.* The Commission's Motion further argues that the "context in which the Last Chance Agreement arose shows that the Employer's request that the Respondent sign it was entirely reasonable." *Commission's Motion at p. 10.* The Motion accuses the Court of Appeals of not taking into ". . . account all of the facts which definitely establish that the Employer's request was indeed reasonable." *Id at p. 11.*

Despite the Commission's interpretation, the Court of Appeals actually held that:

> However, whether the employee was, or was not tardy is a determination to be made by the Commission, at least insofar as eligibility for receipt of unemployment benefits is concerned. In the matter *sub judice,* the Water Company, ***demanded*** that Cecil sign the Last Chance Agreement without being allowed to dispute or modify any portion with which she disagreed. In so doing, Cecil was essentially being asked to tender a signed admission acknowledging behavior, which in and of itself, constitutes a basis upon which she could be denied benefits to which she might otherwise be entitled. ***We simply cannot find that such a request is reasonable,*** . . . [Emphasis Added]*[Opinion at p. 14]*
>
> . . . .

> Further, we would agree that the employer would be entirely justified in doing so, if the employee were fired on the basis of the employer's belief that the employee had been tardy an unacceptable amount of time, and not on the basis that the employee refused to make an admission which he or she believed to be false. If the Water Company terminated Cecil on the basis of her tardies, it would have been ultimately up to the Commission to make the factual termination as to whether or not this was to warrant a denial of benefits. The Water Company was tantamount to usurping the Commission's role in that regard. [Emphasis Added]*[Opinion 14-15]*.

Thus, both the Commission and the Court of Appeals found that tardiness was the not the basis for denial of benefits. This is a result that is in Ms. Cecil's favor. Ms. Cecil requests that this Court affirm the Court of Appeals decision. The Commission's attempt to bolster its case by arguing that Ms. Cecil is precluded from presenting her "misconduct" evidence is improper.

Regardless, Ms. Cecil is the prevailing party in the Court of Appeals. As the prevailing party, Ms. Cecil need not file a cross-appeal in order to assert that the lower court reached the right result . . . ." *Commonwealth Corrections Cabinet v. Vester*, 956 S.W.2d 204 (Ky. 1997). In March 2007, Ms. Cecil received her unemployment benefits. Ms. Cecil requests only that she continue to have the right to keep those benefits. Where the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal, that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention. *Id.*

In *Carrico v. City of Owensboro*, 511 S.W. 2d 677 (Ky. 1974), the city (without filing a cross appeal on the issue of Carrico's standing, an issue the city had lost below) was permitted to argue the issue of standing before the Court. The Court held, "[t]he appellees seek *only* to have the judgment affirmed, therefore, without filing a cross-appeal, they are entitled to argue that the trial court reached the correct result for the reasons it expressed and

for any other reasons appropriately brought to its attention." *[Emphasis Added]. Id citing, Dudley v. Goddard*, 480, 12 S.W. 382 (1889).

Even the cases cited by the Commission do not support precluding Ms. Cecil from continuing to argue that there was not substantial evidence of "misconduct" for tardiness or otherwise. *See e.g., Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 927 (Ky. 2007). In *Steel Technologies, Inc.* the non-appealing party was permitted to present issues decided against it in the lower Court as they were intertwined with the contentions before the Court, and it was the prevailing party. *Id.* This is exactly what this case involves regarding the "tardy" issue. By virtue of the Court of Appeals decision in her favor, and the arguments raised by the Commission's Motion, the issues of whether there was "substantial evidence" of tardiness is before this Court for review.

2. <u>Employer Failed in its Proof Burdens on Both the Tardy and the Refusal to Follow Reasonable Instructions Issue Such that the Commission's Ruling Was Not Supported by Substantial Evidence.</u>

An Employer's belief that it rightfully terminated an employee is not enough, it must have sufficient grounds to deny unemployment benefits. *Couch v. Kentucky Unemployment Commission,* 2006 Ky.App.LEXIS 245 (2006). The two issues differ markedly. As stated, the Employer has the burden of proving misconduct. *Shamrock Coal Company, Inc.v. Taylor, et al.*, Ky. App., 697 S.W. 2d 952, 954 (1985).

"'Substantial evidence'" of misconduct has been defined as '... evidence of substance and relevant consequence, *having the fitness to induce conviction in the minds of reasonable men.*'" *Kentucky Board of Nursing*, 890 at 643; *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). The test of substantiality of evidence is whether, when <u>taken</u>

alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. *Id.*, *citing Kentucky State Racing Commission v. Fuller*, 481 S.W. 2d 298, 208 (1972). The court must take into account *whatever* in the record "fairly detracts from its weight." *Id.* In *Kentucky Board of Nursing*, the Court of Appeals stated that what must be questioned is whether, given all the facts as found by the Board, reasonable men would have been induced to convict the employee. *Id.*

In this case, we have strong evidence in favor of Ms. Cecil. In fact, we have an admission on the part of the Employer that her alleged tardies were not sufficient to support termination. Such evidence is ***not*** proof of misconduct. It is exactly the opposite. It is proof that Ms. Cecil was not guilty of disqualifying misconduct.

There was no evidence in the record of anything that Ms. Cecil did that equals misconduct. No evidence was introduced by Employer that Ms. Cecil otherwise engaged in "misconduct" under the applicable statute.[3] The facts as presented at the hearing simply do not substantiate any evidence of probative value.

Ms. Cecil submits that she was not discharged for misconduct, but based upon retaliation for having complained about discrimination. She was not tardy under the Employer's own time clock, Policy Manual and flex time policy.

There is much made of Ms. Cecil's alleged tardies between September 21, 2005 and October 7, 2005. However, when you consider the Symplex time clock differential of eight

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The only evidence regarding tardiness is the SymPlex System Report. Ms. Cecil respectfully submits that this evidence cannot be used as evidence to support a claim of misconduct. It should have been excluded as irrelevant, unreliable, and completely untrustworthy. *See Kentucky State Racing Commission, supra.*

(8) minutes in Ms. Cecil's favor, the Employer's own tardy Policy (not tardy until after 10 minutes), and the flex time environment, Ms. Cecil was tardy only **two (2) times, at most**. She repeatedly testified that she always stayed late to more than make up for any missed time. Simply put, two tardies does not support a finding of "unsatisfactory attendance." *See KRS 341.370(6).*

In light of all the facts, one cannot conclude that reasonable men would convict Ms. Cecil of wrongdoing such that her benefits should be denied. In fact, the Commission did not even "convict" her for this behavior. It found as follows:

> By the employer's own admission, the claimant would have not been discharged had she not refused to sign the written warnings. *Commission's Order page 5.*

Based on this analysis, the decision is not supported by sufficient evidence and must be overturned. The supporting facts show that Commission's Decision is arbitrary and, therefore, its ruling must be reversed.

The Commission, faced with the Employer's admissions on the tardiness point, and its own finding that tardiness was not sufficient to cause Ms. Cecil's termination, focused its decision on whether Ms. Cecil failed to "obey reasonable instructions". The Commission finds that Ms. Cecil was guilty of insubordination for unreasonably failing to follow the instructions of her employer. This result is based upon Ms. Cecil's refusal to sign the false Last Chance Agreement.

> The Commission Opinion includes its findings that:
> [Ms. Cecil] informed her employer that she could not sign the statements because she believed to be ***false*** that portion of the "Post Decision Making Leave Statement" that states "I Diana Cecil, acknowledge that my act of repeated tardiness to my workstation violates the company Code of Conduct .... [Ms. Cecil] wanted to modify the statement to provide a written denial of

> chronic tardiness somewhere on the page. The employer informed the claimant that the statements stood as written, that neither statement would be modified, and that **claimant would not be allowed to make any written comments** on the statements. Furthermore, if claimant did not sign the documents, she would be terminated. [Emphasis Added][*Commission's Opinion at p. 3].*

As before, the Employer has the burden to show that Ms. Cecil's action constituted misconduct ***and*** that its request was reasonable. The Employer did not make any showing of misconduct, ***or*** that its request was reasonable. In fact, the March 5, 2007 Referee Decision confirms the Employer's admissions to the contrary.

An Employer's "instructions" cannot be reasonable when it is based upon inaccurate time information. An Employer request cannot be reasonable when it admits that: (1) its tardy report included alleged tardies that were before its own stated tardy deadline; (2) Ms. Cecil's alleged tardiness was ***not*** sufficient to cause her termination; (3) despite the lack of reason to terminate, the Employer still demanded that Ms. Cecil admit to a tardiness problem, or lose her job; and (4) signing the notation meant that Ms. Cecil was admitting guilt of a tardy problem. These admissions prove that the Employer's request was, in fact, **unreasonable**.

If the underlying reasons for the Last Chance Agreement are not sufficient to prove misconduct, it must follow that refusal to sign a document accusing you of excessive tardiness is *also not* misconduct. As the Court of Appeals aptly noted the Employer's decision that tardiness was not sufficient to cause Ms. Cecil's termination, was ". . .tantamount to usurping the Commission's role in that regard." *Opinion at p. 16.* The Commission's ground work for support of its denial of benefits is completely missing.

The Commission puts great emphasis on Ms. Cecil's alleged tardiness as support for the reasonableness of the Employer's request that she sign the Last Chance Agreement. In

doing so, the Commission conveniently ignores the fact that the Commission's disqualifying finding was not tardiness. The Commission ignores the Employer's admission that the alleged tardy issue was ***not sufficient*** to cause Ms. Cecil's termination. The Commission ignores Ms. Cecil's repeated attempts to dispute the tardy accusations, and her evidence that she was not, in fact, tardy. The Commission ignores the fact that Ms. Cecil was not provided any written or verbal warning regarding tardiness for over a year (between July 2004 and October 2005). The Commission ignores the overwhelming evidence of the Simplex System unreliability, and the conclusive proof that she was, in fact, not tardy. The Commission ignores the fact that the Employer knew this at the time it demanded that Ms. Cecil sign the Last Chance Agreement.

The Commission ignores the fact that the Employer also knew of Ms. Cecil's pending lawsuits and administrative claims. Attempting to force her to sign this document was an impermissible attempt to undermine her civil litigation. Certainly, the Employer would have used that document against her as a "defense" to her discrimination claims in the litigation. In such a situation, the request **cannot be reasonable**, and Ms. Cecil's refusal to sign the document is **justified**.

As noted above, the Commission cites to Opinion Number 61582 in support of its finding of insubordination. [*Wilson v. Berea Tool & Cutter Grinding, Inc., Commission Opinion No. 61582* at **RA 114-115**]. That Opinion defines insubordination as ". . . the unjustified refusal to comply with a reasonable request or order of a superior." *See Opinion No. 61582 at p. 1.*

The Commission actually fails to follow its own holding. That Commission holding provides that an employee is ***not*** guilty of insubordination in the circumstances when the

employee is not given the opportunity to provide a written response to a disciplinary document. *Id.* This is the situation that Ms. Cecil faced. She was not given the opportunity to dispute anything about the document. All the evidence proves this fact. When a document, like the Last Chance Agreement, is not formatted to provide this right, then the employee is not unreasonable in refusing to sign the document.

The Commission's decision is entirely against the evidence in this case. It is certainly not supported by substantial evidence. It is not even supported by its own cited Opinion. The holding of the March 5, 2007 Referee Decision confirms these points. The March 5, 2007 Referee Decision uses the exact same Opinion in support of granting Ms. Cecil her benefits.

Once again, this Court is faced with a situation where no evidence was introduced by Employer that Ms. Cecil otherwise engaged in "misconduct" sufficient to deny her benefits. Ms. Cecil was justified in refusing to sign the document. The document included false information. Reasonable men would ***not*** convict an employee for refusing to sign a false document. Therefore, the decision is not supported by sufficient evidence and must be overturned. It is completely ridiculous and unreasonable that an employee could be denied benefits for wanting to protect themselves. The Commission's denial of benefits on the basis of failing to "obey reasonable instructions" is arbitrary.

D. <u>The Commission Did Not Apply the Correct Rule of Law to the Facts.</u>

Even if this Court finds that the Commission's findings of fact are supported by substantial evidence, the Court must still determine whether the Commission applied the

correct rule of law in denying Ms. Cecil her eligibility for benefits. Based on the facts and the current law, this Court cannot find that the Commission acted correctly.

The Court of Appeals appropriately found that the Commission "erred in applying the law to the facts in this instance." [Opinion at p. 16]. The Court of Appeals holds that:

> . . . the standard for "determining misconduct is whether the employee's actions evidenced a willful and wanton disregard of the employer's interests." *See Burch v. Taylor Drug Store, Inc, et al.* 965 S.W.2d 830, 835 (Ky. App. 1998)." [Opinion p. 16-17].

Based on the facts and the applicable law, the Court of Appeals found that the Commission did not follow the law as there was no showing that Ms. Cecil acted in any willful or wanton way. That holding was based, in part, on the Commission's own finding that her alleged tardiness was not sufficient to cause termination. That holding was based, in part, on the Employer's own admission that the tardy issue was not grounds to terminate Ms. Cecil.

The test for determining misconduct should continue to be whether the employee's actions evidence a "willful and wanton disregard of the employer's interests." *Burch, supra* at 835. In order to constitute misconduct under the statute, there must be bad faith or an inference of culpability in the form of willful or wanton conduct. *Id.* The conduct must be something more than a "mere error of judgment." *Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941).* The *Boynton* court went on to state that ". . . ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute." *Id. at 640; Douthitt v. Kentucky Unemployment Comm.*,676 S.W.2d 472, 474 (Ky. App. 1984).

In the instant case, Ms. Cecil has not exhibited such behavior. Instead, Ms. Cecil, at most, acted in good faith in saying she wished to remain employed, and denying the tardiness

issue. The evidence was undisputed that Ms. Cecil: (1) offered to sign the document if she could mark out the false information; (2) repeatedly said that she respected the Employer's policies and rules and would sign that part of the document; and (3) requested the ability to dispute of the false information. In making these statements, Ms. Cecil complied with the Act, and the Commission's own precedent. *See Commission Opinion No. 61582 at p. 1.*

Ms. Cecil's actions do not constitute bad faith or willful or wanton conduct. There was no showing on the part of the Employer that Ms. Cecil's actions were in any way willful or wanton. The Commission claims that the refusal to sign the paperwork is unreasonable. However, such action does not constitute bad faith or willful or wanton conduct. Ms. Cecil submits that in a situation where you are instructed to sign a false document *on the spot without benefit of help, instruction or explanation,* the failure to sign can be said to be nothing more than a good faith action or a mere failure of judgment. Ms. Cecil's situation is illustrative of a situation when the act was not wanton or willful or in bad faith. This is exactly why a *per se* approach cannot work. It defeats the intent of the statute.

The Last Chance Agreement, just like Employment Manuals are non-negotiated documents, clearly written for the benefit of the Employer. They should not automatically become vehicles for forced admissions meant to prohibit unemployment benefits. Such a document, or "instruction" to sign a document, without more, should not usurp the Employer's burden of proof, or other legal standards applicable to awarding unemployment benefits. It should not eliminate an employee's right to dispute charges brought against her. Such a result would be the same as saying that since an employer claims in its "Manual" that it is an Equal Opportunity Employer, an employee has automatically agreed with that provision, and

therefore, is prohibited from suing it for discrimination. The Commission's Decision cannot stand.

E. Ms. Cecil Was Denied Due Process

Finally, the Commission's Opinion represents the ***third*** arbitrary excuse used to deny Ms. Cecil her benefits. This "hide the ball" tactic denied Ms. Cecil due process. In order to provide Ms. Cecil with due process, she must have notice of the actual reason for the denial of her benefits. Here, Ms. Cecil was told that she was discharged for misconduct due to tardiness. When the Commission made its determination it arbitrarily decided that the new reason would be "insubordination" or "refusal to obey reasonable instructions" due to failure to sign a false document. Ms. Cecil was denied due process in this regard. For this reason alone, the Commission's decision is arbitrary and capricious and should be reversed. *See Ward, supra at p. 642-643, citing Commonwealth, Transportation Cabinet v. Cornell*796 S.W.2d 591 (Ky. App. 1990). The Commissions refusal to provide even basic notice before the Hearing took place is grounds for reversal.

V. CONCLUSION

Ms. Cecil respectfully requests that this Court Affirm the Kentucky Court of Appeals decision. As in the Court of Appeals decision, Ms. Cecil requests that this Court uphold the long standing requirement that Employer's prove "willful and wanton" behavior on the part of terminated employees in order to deny them unemployment benefits.

Otherwise, this Court may reverse the Commission's decision based upon the Employer's failure to present "substantial evidence" regarding misconduct for tardiness. This Court may reverse the Commission decision based upon the Employer's failure to present

"substantial evidence" of Ms. Cecil's refusal to "obey reasonable instructions." The request was not reasonable, and Ms. Cecil was justified in her refusal to sign. Finally, the Employer failed to meet its burden of proof that Ms. Cecil's refusal to sign was willful or wanton.

Dated: July 15, 2011

Respectfully submitted,

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