

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001863-MR

SLAVEN DEMIR

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 08-CI-00483

KENTUCKY UNEMPLOYMENT INSURANCE  
COMMISSION; AND DOTSON ELECTRIC COMPANY

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: MOORE AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Slaven Demir appeals from a denial of benefits by the Kentucky Unemployment Insurance Commission which was affirmed by the Warren Circuit Court. On appeal, Demir argues that he did not engage in any “misconduct,” as

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

delineated by Kentucky Revised Statute (“KRS”) 341.370(6), which would warrant a denial of benefits. Upon a review of the record, we reverse and remand.

### **History**

Slaven Demir was hired by Dotson Electric Company on June 8, 2005. Demir was a student at Western Kentucky University, and Dotson Electric allowed Demir to work around his class schedule. He was employed as a general laborer, with his duties including such tasks as cleaning up the shop and warehouse, putting away materials, making pickups and deliveries to job sites, and occasionally acting as an electrician’s helper on jobs. Demir’s immediate supervisor at Dotson Electric was Robert Dotson (“Robert”).

In September of 2007, Dotson Electric instructed Demir to report to work at a farm in Allen County, Kentucky. The farm was owned by one of the principals at Dotson Electric.<sup>2</sup> Demir’s duties that day included picking up rocks in a field on the farm and removing them to another location. Demir was provided an all terrain vehicle (“ATV”) to accomplish this task. The ATV was the property of Dotson Electric.<sup>3</sup> Dotson Electric maintains that Demir damaged the ATV while loading the rocks into the metal bed of the vehicle. Demir was fired from his position for this alleged misconduct.

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<sup>2</sup> Although Demir was employed by Dotson Electric Company, it appears that he was also instructed to do work unrelated to the Electric Company for the principals of the company individually.

<sup>3</sup> Again, it appears that although the ATV was owned by the Electric Company, it was used on the owners’ or principals’ private farm.

Robert testified on behalf of Dotson Electric at the hearing. From his testimony, it appears that the ATV in question was a small “four-wheeler” type vehicle with a metal bed on the back of it. He testified that the bed of the ATV was dented and scratched from when Demir loaded the rocks into it. Robert acknowledged that the rocks Demir loaded into the vehicle ranged in size from “softball” size to “football” sized rocks, and that some of the rocks weighed as much as fifty to sixty pounds or more. He stated that Demir was instructed to pick up the rocks from the field, load them into a three-gallon bucket, empty the three-gallon bucket into the bed of the ATV, and then unload the rocks from the ATV at a designated rock pile on the premises. Robert admitted that some of the rocks were so large that they would not even fit into the three-gallon bucket. Demir’s task on the day in question was to remove all of the rocks from a freshly plowed six-acre field.

Robert testified that the ATV had been owned by the company for approximately two years at the time of the incident and that it was originally purchased as a used vehicle by Dotson Electric. It had previously been used for such tasks as hauling deer carcasses, hauling rocks, hauling lumber, hauling firewood, and hauling feed or corn. Demir also testified at the hearing, and stated that he had been asked to wash this particular ATV on previous occasions and that there were “dings and scratches” all over it. He further noted that, on one particular occasion, Mr. Dotson had failed to put the ATV in gear and that it had rolled down a hill and struck a tree, breaking the windshield. Demir further stated

that the only thing in the bed of the ATV to protect it from the heavy rocks being loaded onto it was a carpet remnant. Apparently, there were no pictures to depict the condition of the ATV before it was allegedly damaged.<sup>4</sup> However, Robert testified to the condition of the ATV before Demir loaded the rocks into it, stating that it did not have dents and scratches before Demir used it to load rocks from the field.

Demir testified at the hearing that he held his employers in high regard and that they frequently entrusted him with company vehicles and machinery. Demir testified that he was not disgruntled or unhappy about the request to remove the rocks from the field, stating: “I was never unhappy to do anything for them. . . Larry Dotson didn’t have problems paying, so I didn’t have problems working.” Demir further testified that he was often asked to do tasks at the farm such as put corn out for the deer, clean the barn, clean the garage, operate forklifts, trucks, boom lifts, scissor lifts, and other machinery. Demir testified that he spent two days clearing rocks from the fields and that he had to load the ATV approximately thirty-five to forty times on the first day. Demir noted that some of the rocks were so large that it would have been helpful for him to have a second person or a piece of machinery to assist him in loading them in the truck bed. As to the allegation that Demir “threw” rocks into the bed of the ATV, he stated as follows: “I don’t think I meant, you know, ‘throw’ as, throw it ten (10) yards

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<sup>4</sup> We also note that the pictures in the record taken after Demir used it for rock-loading appear to be photostatic copies of pictures and are of such poor quality as to make it virtually impossible to discern the bed of the truck or any dents or scratches thereon.

away. When I threw the rocks it was probably [from within] a hands reach of the ATV. . . .”

Demir testified that he was contacted by his superior after the first day of work in the field and was advised that he damaged the bed of the ATV. Demir testified as follows:

Yes, Mr. Dotson called me and told me that the bed was damaged. I didn't, I didn't know that I did it and that's why I told him, you know, I didn't do it, I don't know if I did it. And I still don't know if I did it. But, you know, he, he was my boss and I had to agree and take the fault either way.

(T.E., p 72). Although Demir was told that he damaged the truck bed after the first day of work, he was directed to continue with his task the very next day, albeit with the additional caution that he not further dent or scratch the ATV. Demir testified that, at the end of the second day, he believed he had done exactly what his employer requested that he do. Demir did acknowledge that, as the second day wore on, he did have more trouble loading the fifty to seventy pound rocks into the ATV. He further stated that he knew he caused one particular dent to the ATV on the second day when attempting to load an eighty-pound rock into the bed, which slipped and hit the side of the ATV before falling into the bed.

Demir was fired by Dotson Electric after this second day of work in the field. He sought unemployment insurance benefits which were denied by the Kentucky Unemployment Insurance Commission (“the Commission”) on the grounds that he was discharged for statutory misconduct. Demir appealed his

denial of benefits to the Warren Circuit Court. The circuit court found that the Commission's findings were supported by substantial evidence and affirmed the Commission's denial.

Demir now appeals the judgment of the Warren Circuit Court, alleging that the Court misapplied the facts of this case to the statutory definition, and that his behavior was not "misconduct" as contemplated by KRS 341.370(6).

### **Standard of Review**

Upon review of a denial of benefits by the Commission, we will accept the agency's decision so long as its findings are supported by substantial evidence of probative value and the agency has correctly applied the law to the facts. *Competitive Auto Ramp Services, Inc. v. Kentucky Unemployment Ins.*, 222 S.W.3d 249, 252 (Ky. App. 2007). Substantial evidence is defined as such evidence as would "induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Where it is determined that the findings of fact are supported by substantial evidence, we then ask whether the agency has correctly applied the law. *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002).

### **Analysis**

The sole question on review is whether the Warren Circuit Court erred by finding that Demir had engaged in "misconduct" as contemplated by KRS 341.370(6). We find that the court did err in this respect.

“Discharge for misconduct” as used in this section shall 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 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 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.

KRS 341.370(6) (emphasis added). While Demir was found to have caused damage to his employer’s property (the ATV), KRS 341.370(6) requires that such damage be caused, not by simple negligence, but by *gross negligence*.

As this Court has previously stated, gross negligence is something more than the failure to exercise slight care. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985). Rather, “there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or (sic) willful.” *Cooper v. Barth*, 464 S.W.2d 233, 234 (Ky. 1971). In the unemployment compensation context, this Court has defined misconduct sufficient to disqualify a worker from benefits as something more than mere unsatisfactory conduct. *Holbrook v. Kentucky Unemployment Ins. Com’n*, 290 S.W.3d 81, 87 (Ky. App. 2009). Indeed, we have stated that “an act of wanton or wilful disregard of the employer’s

interest, a deliberate violation of the employer's rules' would support exclusion from benefits whereas 'mere mistakes, inefficiency, [or] unsatisfactory conduct' would not." *Kentucky Unemployment Ins. Com'n v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983), quoting 76 Am.Jur.2d Unemployment Compensation §52 (Emphasis in original). Moreover, in unemployment compensation cases, "a misconduct allegation is in the nature of an affirmative defense to an employee's claim for benefits under the chapter, and although the employee bears the overall burden of proof and persuasion, the employer has the burden of proving misconduct." *Shamrock Coal Co., Inc. v. Taylor*, 697 S.W.2d 952, 954 (Ky. App. 1985). Further, we have also recognized that, when reviewing unemployment compensation cases, our courts must keep in mind that "the 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 Ins. Com'n*, 912 S.W.2d 452, 454 (Ky. App. 1995).

Here, there is no evidence that Demir's actions were willful or taken with malice, nor is there any evidence that he acted with a wanton disregard toward his employer's interest or property. *See, e.g. Shamrock Coal, supra.* (A dozer operator, who caused damage to a dozer when overturning it on a job site, did not engage in misconduct, but merely "an isolated case of poor judgment or minor and unintentional negligence.")

In the present case, the circuit court found that:



While [Demir] did place the smaller rocks in the bucket, toward the end of the day he became tired and was throwing the bigger rocks into the bed. The larger rocks were heavy, however Demir was very strong –he was capable of bench-pressing three hundred pounds.

Demir would get within six inches of the rail and toss the rocks over the rail into the bed. One eighty pound rock did not clear the rail and hit the side of the vehicle, causing a dent.

From these findings, the trial court agreed with the Commission that Demir’s intentional failure to heed his employer’s warning not to further damage the vehicle after he had been warned equated to gross negligence. However, the record is clear that Demir attempted to follow his employer’s instructions by loading rocks into the three-gallon bucket. Demir was not given instruction on how to load rocks which were so large that they would not fit into the bucket. We find that it is in the nature of such a difficult and laborious task with a material such as rock that is so inherently prone to causing denting and scratching to metal surfaces, that dings and scratches may result to the vehicle and that to expect otherwise would be unreasonable.

The situation may be analogized to asking someone to fill a pail with water from a well, while at the same time instructing them not to get the pail wet. We find that “getting the pail wet” in this instance, cannot be considered gross negligence. Likewise, we find that the Commission and the trial court erred by finding that Demir’s actions amounted to gross negligence. While arguments could be made as to whether this was even ordinary negligence, this is not the standard the statute uses. KRS 341.370(6).

Accordingly, we reverse and remand. While the agency's findings of fact were supported by substantial evidence, the agency failed to correctly apply the law to those facts. Thus, the circuit court's judgment must be set aside and this matter remanded to the Commission with directions to enter an order consistent with this opinion.

MOORE, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS AND FILES SEPARATE  
OPINION.

HARRIS, SENIOR JUDGE, CONCURRING: I concur in Judge Wine's well-written Opinion, both for the reasons stated therein and for the reasons expressed by Senior Judge Graves in his dissent in *Holbrook v. Kentucky Unemployment Insurance Commission*, 290 S.W.3d 81, 88-89 (Ky. App. 2009).

Even when viewed in the harshest light consistent with the record, Demir's conduct, as a matter of law, does not manifest a deliberate, malicious intent to harm his employer's business interests, nor more than simple negligence at most. All the man did was cause a little more cosmetic damage to a piece of used farm equipment while he was doing inherently strenuous menial labor. It would be a miscarriage of justice and a tortured application of KRS 341.370(1)(b) and (6) to deny him the humanitarian assistance of unemployment compensation under these circumstances.

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