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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-002384-MR

TONYA LINDSEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 07-CI-04178

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION; and BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT, SENIOR JUDGE.[1]

MOORE, JUDGE: Appellant, Tonya Lindsey, appeals from a judgment of the Fayette Circuit Court upholding the Kentucky Unemployment Insurance

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Commission's decision to deny her claim for unemployment insurance benefits. Finding no error, we affirm.

**STATEMENT OF FACTS/PROCEDURAL HISTORY**

Lindsey began working for the University of Kentucky on May 16, 1994, as a patient relations clerk in the surgery department at the University Medical Center. Her job duties included scheduling appointments on the telephone, preparing fee entry sheets, and processing payments for deposit.

Lindsey's eventual discharge related to her fee entry responsibilities. Lindsey had been performing the fee entry process since 2003, had attended a four-hour training class on fee entry procedure, had been given several copies of UK's protocol detailing its fee entry procedure, and had extensive experience in handling fee sheet processes. As these procedures were updated, these updates were issued to Lindsey in writing. Lindsey's supervisors reviewed the updated procedures with her. In a memorandum dated January 23, 2006, Lindsey acknowledged that she understood what her job duties and responsibilities were. Lisa Turner, Lindsey's supervisor, testified that there was no doubt in her mind that Lindsey knew how to perform her fee entry duties. Indeed, on January 30, 2006, Lindsey proposed a detailed plan under which she would perform the fee entry function on a full-time basis; that offer was declined by the employer because there were other duties UK wanted Lindsey to continue performing.

Lindsey was given a written warning on February 15, 2006, resulting from an evaluation of her job performance from January 1, 2005, to December 31, 2005.[2] In relevant part, her evaluation stated:

> [Lindsey] is failing to perform daily fee entry and payment posting. The open encounters for General Surgery have remained at an unacceptable level for the majority of the year. [Lindsey] is not getting fees entered timely and her follow up on incomplete fees is poor. She is failing to identify missing batches[3] and be proactive in preventing open encounters. She continues to create errors when she bypasses error messages. Her appointment volume is also significantly disproportionate to other dept. employees.

Although UK has an established procedure for employees to contest disciplinary actions, Lindsey did not contest this written warning.

On March 10, 2006, Lindsey's supervisor, Lisa Turner, reviewed the items discussed in the written warning with Lindsey in a one-on-one "coaching session," and assisted Lindsey with organizing her filing system to improve Lindsey's ability to anticipate problems, identify missing batches, and follow up on incomplete fees. However, on July 6, 2006, Turner also issued Lindsey a written warning based upon the same concerns cited in Lindsey's prior written warning, citing several examples of the occurrence of the same problems, and noting that

[2] At the evidentiary hearing before the Division of Unemployment Insurance Appeals Branch of the Department of Workforce Investment, Lindsey testified that she was aware that UK's corrective action procedure begins with an oral warning, which does not go into an employee's record, and proceeds to a written warning, probation, suspension, and finally termination from employment. The parties acknowledge that Lindsey was given an oral warning regarding her work performance prior to February 15, 2006, but the record does not reflect the specific date and substance of that warning.

[3] Lindsey defined "batches," as the term is used here, to mean "fee sheets that need to be super billed." No other definition for this term is apparent from the record, and Lindsey did not define the phrase "super billed," either.

Lindsey's scheduling volume had not increased. Turner's written warning also cited several other breaches of UK's written protocol: Lindsay had an unacceptably high number of open fees in her drawer; she had failed to report to her supervisor that her drawer contained fees older than five days; and that she had failed to correct, in a timely manner, seventeen fee sheets that carried the "Case ID not on File" notation.[4] Turner concluded by stating:

> All of these items are work performance issues that are inconsistent with the expectations that were outlined in your PIP process and are therefore a violation of UK policy 12.1.4a. This document will serve as a written warning to document this violation. Failure to improve and sustain improvement may result in further corrective action up to and including termination.

Lindsey did not contest this second written warning.

On July 13, 2006, Turner placed Lindsey on a 90-day period of corrective action probation. In a memorandum to Lindsey, Turner cited further instances of where Lindsey had failed to make daily deposits, notify her supervisors of that fact, and complete her duties in a timely manner. Lindsey did not contest this period of probation.

Then, on July 27, 2006, Turner placed Lindsey on a three-day corrective action suspension. In a memorandum to Lindsey regarding this action, Turner cited several examples of where Lindsey was failing to recognize and process information clearly stated in some fee sheets, and failing to correct

[4] Regarding this item, Turner's written warning notes that "We have had several meetings to ensure she understood these and after major troubleshooting on May 15th, and the explanation attached, I would have expected these to be corrected by now."

incomplete elements on other fee sheets per UK protocol. In particular, Turner wrote:

> These incomplete elements were clearly stated in the transcribed notes you attached to the fee and were even identified by non-medical personnel. Chart extraction is an expectation of your position that has been addressed since last year. You continually fail to do this. We have addressed your concerns surrounding this several times and agree that if the note is not clear, there may be clarification needed. However, in these examples, the information is clearly identified and therefore indicate you are not even attempting to read the note. Other less experienced staff are doing this extraction without a problem. You have more experience and you have also been taking coding classes over the last few years during regular business hours requiring the department to flex your schedule to accommodate these classes. I would therefore expect you to do this without problems. Your failure to identify these obvious codes is not acceptable job performance.
>
> Over the course of the last 2 weeks, I have also been receiving an abnormally large amount of emails from you. Where I appreciate your willingness to ask questions, many of these questions have already been answered in previous meetings or in your Fee Entry Work Flow. . . . These types of emails are a waste of productive work time.

Lindsey did not contest her three-day period of suspension.

On August 31, 2006, in another memorandum, Turner informed UK's employee relations department that the problems with Lindsey's job performance, as she had described them in her July 27, 2006 memorandum, were persisting. She cited several examples in support. UK's employee relations department then recommended Lindsey's termination, and Lindsey was discharged September 14,

2006. UK provided Lindsey with a "separation sheet," which cited "inappropriate or unsuitable job performance" as the reason for her discharge.

Thereafter, Lindsey filed for unemployment insurance benefits. In her request, Lindsey accused her employer of criticizing her work regarding the fee entry process as a means of retaliation for her having filed a formal complaint in 2004 regarding a racial remark allegedly made by an employee with supervisory authority over her, and a lawsuit in 2005 against UK and certain UK employees. Lindsey noted that her evaluations only became unsatisfactory in 2006, which coincided with the progressive disciplinary actions.

On October 5, 2006, the Division of Unemployment Insurance denied her claim based upon a determination that the reasons for her discharge included misconduct connected with her employment.

Lindsey subsequently appealed the denial to the Division of Unemployment Insurance Appeals Branch of the Department of Workforce Investment. Following an evidentiary hearing, the unemployment insurance referee rendered a decision finding that Lindsey was discharged for misconduct and was thus disqualified from receiving unemployment benefits. The Referee acknowledged Lindsey's testimony regarding her claim that she had been discharged in retaliation for her discrimination complaint. But, in support of his determination of misconduct, the Referee cited to the several disciplinary measures taken against Lindsey and the corroborating testimony of Lindsey's supervisors, and concluded:

> The employer based its disciplinary action on work performance issues related to fee entry process. The claimant was sufficiently comfortable with the fee entry process to propose that she do it full time, yet when that proposal was rejected, proceeded to challenge the process and ask that it be re-explained over and over to her. There was a deliberate effort on her part to use the fee entry process to make matters difficult for her supervisors. She was warned, and when she did not stop, she was discharged.

Lindsey subsequently appealed to the Kentucky Unemployment Insurance Commission, and the Commission affirmed the referee's decision, adopting it in full. On September 5, 2007, Lindsey filed an original action in the Fayette Circuit Court seeking review of the Commission's decision. On November 23, 2009, the circuit court likewise affirmed. Lindsey now appeals to this Court.

**STANDARD OF REVIEW**

In reviewing an agency decision the reviewing court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 300-301 (Ky. 1972). When reviewing issues of law, the court may review them *de novo* without any deference to the agency. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. App. 1990).

On questions of fact, the court's review is limited to an inquiry of "whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable." *Cabinet for Human Resources,*

*Interim Office of Health Planning and Certification v. Jewish Hospital Healthcare Services, Inc.*, 932 S.W.2d 388, 390 (Ky.App.1996). Substantial evidence means "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglass v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

If there is substantial evidence in the record to support the agency's findings, the court must defer to those findings even though there is evidence to the contrary. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Likewise, a court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Railroad Commission v. Chesapeake & Ohio Ry. Co.*, 490 S.W.2d 763, 766 (Ky. 1973). If the court finds the rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (1963). The function of the court in administrative matters "is one of review, not of reinterpretation." *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky. App.1983).

**ANALYSIS**

On appeal, Lindsey argues that 1) as a matter of law, a termination for "inappropriate or unsuitable job performance" cannot not constitute a termination for "misconduct" for purposes of disqualification from benefits under the Kentucky Unemployment Compensation Act; and that 2) it was error for the

Commission to find that she was terminated for misconduct because, as she contends, the evidence of record could also support that UK terminated her employment in retaliation to a complaint of discrimination she filed in 2004.

As to Lindsey's first argument, this Court recently addressed whether an employee, who was terminated for what her employer similarly labeled "unsatisfactory performance of duties," was terminated for misconduct within the meaning of the Kentucky Unemployment Compensation Act. We answered that question in the affirmative. In *Runner v. Commonwealth*, 323 S.W.3d 7 (Ky. App. 2010), the trial court held that

> Ms. Runner's primary argument is a semantic one. She seems to believe that the phrase "unsatisfactory performance of duties" serves as a talisman warding off any allegations that misconduct played a role in her termination. But, in fact, the two concepts are inter-related.
>
> For example, in 2007, Ms. Runner repeatedly disregarded her supervisor's instruction to notify the back-up staff of changes in her schedule. She was subsequently suspended for "unsatisfactory performance of duties." Regardless of the label applied to the behavior . . . her conduct met the legal definition of misconduct. In relation to [Kentucky Revised Statute (KRS) 341.370(6)], her conduct was a "knowing violation" of a reasonable rule and a refusal to obey "reasonable instructions." Further, . . . Ms. Runner's actions meet the standard for misconduct because she disregarded her employer's interests and her obligations to her employer.

*Id*. at 9.

In this Court's opinion in *Runner*, we quoted the trial court's holding with approval and further elaborated upon it:

KRS 341.370(1) states, in relevant part, "A worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which: . . . (b) He has been discharged for misconduct or dishonesty connected with his most recent work[.]" Although the statute does not specifically define "discharge for misconduct," it describes the term as including, but not being limited to [a] **knowing violation of a reasonable and uniformly enforced rule of an employer**; . . . [and] **refusing to obey reasonable instructions**. KRS 341.370(6) (emphasis added).

In *Douthitt v. Kentucky Unemployment Insurance Commission*, 676 S.W.2d 472, 474 (Ky. App. 1984), a panel of this Court noted that KRS 341.370(6) defines misconduct approximately the same way as it is defined in *Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941), and that the principle of *Boynton* had been followed in Kentucky. In *Boynton*, the Wisconsin Supreme Court defined the intended meaning of "misconduct" as:

> [L]imited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or 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.

> 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). However, as noted by a panel of this Court in *Shamrock Coal Company, Inc. v. Taylor*, 697 S.W.2d 952, 954 (Ky. App. 1985), "an employer is entitled to the faithful and obedient service of his employee, and that failure to render same may constitute misconduct by the employee." *See also Brown Hotel v. White*, 365 S.W.2d 306 (Ky. 1963). Moreover, "[w]here an employee manifests an intent to disobey the reasonable instructions of his employer, the denial of unemployment compensation benefits on the basis of misconduct is proper." *City of Lancaster v. Trumbo*, 660 S.W.2d 954, 956 (Ky. App. 1983). *See also Holbrook v. Kentucky Unemployment Insurance Commission*, 290 S.W.3d 81 (Ky. App. 2009).

*Runner*, 323 S.W.3d at 10-11.

Finally, under that precedent, we found that the claimant in *Runner* had been discharged for misconduct because substantial evidence supported that the claimant was 1) aware of her responsibilities; 2) capable of performing her duties; and 3) had been warned of the consequences of her actions. *Runner*, 323 S.W.3d at 11.

In light of *Runner*, there is no merit to Lindsey's argument that "inappropriate or unsuitable job performance," which is a phrase practically identical to "unsatisfactory performance of duties," cannot, as a matter of law, encompass the term "misconduct," within the meaning of Kentucky's Unemployment Insurance Act.

As to Lindsey's second argument, even though Lindsey introduced evidence in support of her theory that UK might have terminated her employment in retaliation to the complaint of discrimination she filed in 2004, the Commission, as the ultimate fact finder, was entitled to disregard it in reaching its decision in this matter. Substantial evidence of record also supports that UK discharged her for misconduct in connection with her work, and, as stated previously, "if the record contains substantial evidence supporting the agency's decision, the [appellate] court must defer to the administrative agency, even if conflicting evidence is present. *Fraser*, 625 S.W.2d at 856. As in *Runner*, 323 S.W.3d at 11, substantial evidence supports that Lindsey was aware of her responsibilities, that she was capable of performing her duties, and that she had been warned of the consequences of her actions.[5] Taken together, it was not clearly erroneous for the Commission to adopt the referee's finding that Lindsey's actions and behavior amounted to a "challenge [to] the process" as "a deliberate effort on her part to use the fee entry process to make matters difficult for her supervisors," and find,

[5] In her reply brief, and for the first time, Lindsey argues that the Referee's decision to deny her claim for unemployment insurance benefits was not based upon substantial evidence. Raising an argument for the first time in a reply brief is not permitted by the rules of this jurisdiction. *See, e.g.*, Kentucky Rules of Civil Procedure ("CR") 76.12(4)(e) ("Reply briefs shall be confined to points raised in the briefs to which they are addressed ...."); *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006) ("The reply brief is not a device for raising new issues which are essential to the success of the appeal.") (Internal quotations and citation omitted). Nevertheless, even if Lindsey had properly raised this argument, substantial evidence in the record, cited above, supports the finding that her termination was for misconduct in connection with her work.

likewise, that it satisfied the common-law test for misconduct. *Douthitt*, 676 S.W.2d at 474.

## CONCLUSION

We hold that the Commission did not misapply the law when it found that Lindsey had been discharged for misconduct and, thus, the trial court properly affirmed the Commission's decision. The decision of the Fayette Circuit Court is affirmed.

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