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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001607-MR

JAY SCOTT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-004033

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION AND
THE LOUISVILLE BOAT CLUB — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Jay Scott appeals from an opinion and order of the Jefferson Circuit Court affirming the Kentucky Unemployment Insurance Commission's (KUIC) unanimous decision deeming him ineligible to receive benefits due to having been discharged for misconduct related to his work as a waiter at the Louisville Boat Club (LBC). The main issue is whether Scott was dismissed on

October 6, 2008, via an e-mail from the club's general manager when he failed to report for work, or on October 7, 2008, when he got into a heated argument with the general manager and threw his uniform in her face. An additional question is whether there was substantial evidence he was terminated for misconduct related to his work. Having reviewed the record, the briefs and the law, we affirm.

FACTS

Scott began working at the LBC in November 2005. Throughout his tenure, he was lax in reporting absences and late arrivals to his superiors and in following employee rules.

In August of 2008, Jennifer Kaiser, the club's controller, reminded Scott he was to call his immediate supervisor, Jiri (George) Havlas, when he was going to be late or absent from work. Between August 26, 2008—the day a new time clock was installed at the club—and October 5, 2008—his last day of work—Scott was tardy fourteen times.

On September 15, 2008, Terry Bascher became the LBC's new general manager. Aware that employees had been ignoring club policies, Bascher set about changing the staff culture by meeting with each department head who in turn met with staff. In addition, a Service Training Manual was provided to all employees. According to the summary statement of appeal prepared by Bascher, she:

> observed [Scott] taking advantage of the Louisville Boat Club for weeks before I personally said anything to him. He was verbally coached on several occasions and

> continued to have an attitude that he could do as he pleased. He knew that playing tennis during his work shift was not allowed as the tennis courts are strictly for the use of the members. Employees know that this is forbidden. I do not even partake in tennis during off times. He did this on a number of occasions and when I caught him on our security tape, he was given a warning.
>
> He was also given several warnings about coming into work late, not calling into his supervisor when he couldn't report to work, and talking on his cell phone in the dining room in front of members. These are standard operating rules for a private club.

Matters between Scott and Bascher came to a head in early October 2008. Bascher wrote in a memorandum dated Tuesday, October 7, 2008, Scott could not be found when scheduled to work a weekend wedding and review of a security video showed him playing tennis on the club's indoor courts. On another occasion, Scott did not arrive for his scheduled shift and Bascher had asked Havlas to instruct Scott to report to her upon arrival. When Bascher learned later that day that Scott had arrived for work more than thirty minutes late, screamed at his wife on a cell phone in the dining room in front of club members, and immediately left the club without reporting to Bascher, she "telephoned [Scott] and requested that he come back to the club or contact [her] by the end of the day." He did neither.

On Tuesday, October 7, 2008, dressed in his club uniform, Scott returned to the LBC and went to Bascher's office. Bascher described their encounter in two different documents. In her October 7, 2008, memorandum, she wrote:

> he came into my office unannounced to discuss what had happened. During this discussion, [Scott] never allowed me to finish a sentence in order to discuss why we felt his

> performance had been in question. He became argumentative and threatening by throwing his shirt in my face when I told him that he if (sic) could not sit down and discuss this rationally, that he could leave. After throwing the shirt in my face he yelled a few obscenities and left my office. He was informed that he (sic) job was terminated.

Bascher's office door and interior window blinds remained open during the meeting. The disagreement was loud and Kaiser heard and watched the entire episode. In Bascher's summary statement of appeal, dated February 24, 2008, and filed with the KUIC on February 27, 2009, she wrote:

> [o]n the day that [Scott] left the club there was an incident in the dining room in which he was having an argument with someone on his cell phone. The conversation was loud and he was asked to come see me by his supervisor but he left the club. I then called him and asked him to come in to talk with me. When he came to see me he was belligerent, rude and would not allow me an opportunity to even speak. I told him that if he did not sit down and talk this through he could leave my office. He then threw his uniform in my face and yelled obscenities saying he was out of here. I never saw [Scott] again and assumed that he quit his position. I never told him he was terminated even though his behavior warranted it.

Scott recalls the events at the club differently. He asserts he did not complete his shift on October 5, 2008, due to sickness, and he called Havlas before leaving the club and Havlas agreed to relay the message to Bascher. Scott states he accompanied his mother to the hospital on the morning of October 6, 2008, and did not return home until after 6:00 p.m. when he received Bascher's voicemail[1] telling

[1] The actual message was not produced so its precise wording is unknown. Scott and Bascher disagree on what Bascher said in the message.

him he would be fired unless he returned to work that day. On October 7, 2008, believing he had already been terminated, Scott states he dressed in his uniform and went to Bascher's office with the hope of being rehired. In describing his *coup de grace*, Scott testified,

> [s]o I took my shirt threw it on her desk and walked out. I might have done it in a halfway forceful manner. I couldn't tell you, I was angry at times.

While several points are disputed or unclear, Scott's last day of actual work at the LBC was October 5, 2008.

PROCEDURAL BACKGROUND

On October 8, 2008, Scott filed for unemployment benefits. On his UI-408i Fact-Finding Report Claimant Statement, Scott identified the main reason Bascher had discharged him as his "unability (sic) to report to work on tues. (sic) oct. (sic) 7, 2008[.]" In recounting events leading to his dismissal, he wrote:

> Sun (sic) oct. (sic) 5, sick and called out for evening shift. i (sic) called supervisor and everything was ok. Before that I (sic) couldnt (sic) tell the last time i (sic) was tardy or absent[.]

In answering whether, how and to whom he had reported his absence, Scott wrote, "yes, to my supervisor George Havlas by cell phone." On Form 401, he explained his absence/tardiness as:

> FAMILY EMERGENCY KEPT ME FROM REPORTING TO WORK ON OCT 7, TOLD SUPERVISOR I HAD TO LEAVE. HE SENT ME HOME WITHOUT A PROBLEM AND GM LEFT MESSAGE WITH ME THEN FIRED ME.

On the UI-408 Fact-Finding Report Employer Statement signed by Kaiser, the LBC listed the date of discharge as "10/06/08." Twice on the form, Kaiser referred to an attached memorandum prepared by Bascher. In identifying the date and time of Scott's latest tardiness/absence, Kaiser wrote, "10/05/08 10:30 AM, 30+ minutes late" for which no reason was given. Kaiser went on to say club protocol requires an employee who is going to be tardy/absent to "call immediate supervisor." Kaiser further stated Scott was made aware of this protocol during "numerous staff meetings over his work history plus personal conversations." On Form 412A, also signed by Kaiser, she again referred to Bascher's memorandum for the dates, reasons and method of reporting prior tardiness/absences and in response to an inquiry about when Scott was warned about tardiness/absences, Kaiser wrote, "verbal warning by the controller 2 months before."

On October 29, 2008, a notice of determination was issued by the Division of Unemployment Insurance stating Scott was "discharged after becoming argumentative and threatening toward his supervisor during a performance discussion," and the evidence showed Scott had displayed "an inappropriate attitude" evincing an "intentional disregard" for the LBC's business interests. Because "discharge was for misconduct connected with the work," Scott was deemed ineligible to receive benefits.

Scott appealed the determination to a referee. Scott testified at a hearing on January 21, 2009, and called Kirk Theiler, former LBC interim general manager, as a witness on his behalf. Bascher intended to testify for the LBC, but she had

been diagnosed with pneumonia and could not attend the hearing; Havlas and Kaiser appeared on the LBC's behalf.

On February 2, 2009, the referee issued her decision, finding: before leaving the club on October 5, 2008, while Bascher was in a meeting, Scott told Havlas he had to leave and Havlas said he would relay Scott's early departure to Bascher; Scott was away from home all of October 6, 2008, due to a family emergency and finally received Bascher's message around 6:00 p.m. saying he would be fired if he did not report to work that day; Scott was discharged by Bascher "on October 7, 2008, for a reported instance of using abusive language on his cell phone and for leaving the club without telling his supervisor;" and, when Scott went to Bascher's office on October 7, 2008, "he was angry and threw his shirt on her desk." Concluding that Scott had been discharged "for reasons other than misconduct connected with the work" and that the LBC had not proved misconduct, the referee set aside the determination of ineligibility.

On February 27, 2009, the LBC appealed the referee's decision to the KUIC. Bascher submitted a written "summary statement of appeal" to which Scott did not respond. Without returning the matter to the referee for the taking of additional evidence, the KUIC issued an order reversing the referee on April 3, 2009. The KUIC found: Scott inconsistently reported absences and tardiness to his supervisor as required by employee rules; Scott was aware of the reporting requirement and was personally reminded to contact Havlas by Kaiser in early August 2008; between August 26, 2008, and October 5, 2008, Scott was tardy fourteen times;

Havlas told Scott to meet with Bascher on October 5, 2008, but Scott said he needed to leave early and Havlas agreed to relay that message to Bascher; Bascher tried to reach Scott by telephone on October 6, 2008, to tell him she needed to speak with him as soon as possible, but being unable to reach him, she left a message which Scott did not receive until that evening; and, Scott returned to the LBC on October 7, 2008, met with Bascher in her office, got into a heated argument, and when Bascher ended the meeting, Scott "removed his work shirt and threw it in Ms. Bascher's direction and left the premises." Based on the foregoing, the KUIC concluded Scott "was discharged by Ms. Bascher on October 7, 2008, for insubordination."

In explaining its analysis, the KUIC noted that while KRS[2] 341.370(6)[3] lists examples of misconduct it does not define the term. Thus, Kentucky courts routinely apply the definition coined in *Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 296 N.W. 636, 640 (1941) (adopted in *Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472, 474 (Ky. App. 1984)):

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[2] Kentucky Revised Statutes.

[3] " '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 or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work."

> the term "misconduct" . . . is limited to conduct evincing such wilful 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.

Applying the *Boynton* definition to the written record, the KUIC concluded:

> The weight of the evidence in the record will not support a finding that [Scott's] behavior was warranted; [Scott] acknowledges having removed and thrown his work shirt in Ms. Bascher's direction. The employer was simply trying to explain to [Scott] its previously stated expectation on proper procedures for calling off work and to issue claimant a formal warning that tardiness would not be tolerated in the future and that he needed to adjust her (sic) behavior accordingly. [Scott's] explanation that he disagreed with what Ms. Basher (sic) was saying in no way mitigates his behavior; [Scott's] reaction was beyond unreasonable, and was a willful and wanton disregard of a standard of behavior which his employer had a right to expect of him as an employee.
>
> Given the totality of the circumstances, and the internal inconsistency of [Scott's] testimony, [Scott's] assertion that he was discharged on October 6, 2008, in the message Ms. Bascher left for [Scott] that they needed to meet as soon as possible lacks overall credibility and is not persuasive.
>
> Therefore, the employer has met its burden of proof, as required by *Brown Hotel* [*Company v. Edwards,* 365

> S.W.2d 299 (Ky. 1962)], and the employer must prevail. [Scott] was discharged from the employment for reasons of misconduct connected with the work, as defined by law, for Kentucky unemployment insurance purposes, and is disqualified from receiving benefits.
>
> [Scott] has received benefits during the now imposed period of disqualification and [Scott] must repay the Division.[4]

Dissatisfied with the KUIC's result, Scott appealed to the Jefferson Circuit Court which issued a seven-page opinion and order on August 30, 2012. After determining the KUIC's findings of fact were supported by substantial evidence, the trial court concluded the KUIC had "applied the correct rule of law to the facts so found." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet,* 204 S.W.3d 121, 131 (Ky. App. 2006) (internal citations omitted). In affirming the denial of benefits, the trial court wrote:

> The record and statement of appeal show a history of attendance issues and compliance with legitimate company policies, in addition to Scott's misconduct in his meeting with Bascher. Scott argues he was terminated based on his attendance by means of Bascher's voicemail message on October 6, 2008, and therefore his actions on October 7, 2008, could not be the basis. Scott did not introduce the voicemail recording at the referee's hearing, and the KUIC determined that Scott's inconsistent testimony regarding his date of termination was unpersuasive. The Commission not only applied the law regarding absenteeism and tardiness, but also misconduct based on Scott's actions on October 7, 2008, the date he was actually terminated from LBC. Therefore, the KUIC's decision was based on substantial evidence and sound legal principles.

[4] Scott was directed to repay $8,460.00.

Scott has now appealed to this Court. We affirm.

ANALYSIS

We state at the outset that Scott's brief does not comply with CR[5] 76.12(4)(c)(v) which requires each argument to begin with "a statement with reference to the record showing whether the issue was properly preserved for review, and, if so, in what manner." The KUIC has called this flaw to our attention and stated we are not required to consider Scott's arguments. While we are authorized to strike Scott's brief or review his arguments under the manifest injustice standard for noncompliance, in light of our treatment of the issues raised, we choose to do neither, but remind counsel adherence to the appellate rules is critical. CR 76.12(8)(a); *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990).

Additionally, we have noticed another flaw in Scott's brief. He has relied upon *Ashland Hosp. Corp. v. Commonwealth*, No. 2006-CA-001010-MR, 2007 WL 4355450 (unpublished, 2007), but has not tendered a copy of the unpublished decision to this Court. CR 76.28(4)(c) specifies:

> Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

[5] Kentucky Rules of Civil Procedure.

Despite the foregoing flaws, we have chosen to consider the appeal.

We follow the standard of review expressed in *Kentucky Unemployment Ins. Comm'n v. Cecil,* 381 S.W.3d 238, 245-46 (Ky. 2012).

> Judicial review of a decision of the Kentucky Unemployment Insurance Commission is governed by the general rule applicable to administrative actions. "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969) (*citing Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962)). Substantial evidence has been defined as evidence which has sufficient probative value to induce conviction in the minds of reasonable people. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). If there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). An agency's findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record. *Id*. If the reviewing court concludes the rule of law was correctly applied to facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Co*., 365 S.W.2d at 302.

Scott's first complaint is that the KUIC's decision that he was fired on October 7, 2008, was arbitrary and unsupported by substantial evidence. Scott argues the KUIC erroneously considered the summary statement of appeal Bascher filed *after* the referee had rendered her decision in Scott's favor. Scott did not counter the LBC's statement by filing a written summary of his own, but argues

doing so would not have been the equivalent of cross-examination and therefore, could not have refuted or clarified Bascher's unsworn words.

As stated at the outset, the main point of contention seems to be the date on which Scott was fired. Scott maintains he received the news of his termination via Bascher's voicemail message on October 6, 2008, which also happens to be the date of termination listed on the UI-408 filed by Kaiser on the LBC's behalf. However, Bascher's memorandum of October 7, 2008, indicates Scott was not terminated until October 7, 2008, after throwing his shirt at her, yelling obscenities and leaving her office. In a subsequent letter dated February 24, 2009, and filed with the KUIC on February 27, 2009, Bascher stated she assumed Scott "quit his position" on October 7, 2008, and "I never told him he was terminated even though his behavior warranted it."

All bodies that have heard this case—the referee, the KUIC and the Jefferson Circuit Court—have determined Bascher terminated Scott's employment on October 7, 2008. Since the referee made that finding without seeing the additional proof on which the KUIC relied, it is unlikely Scott could have mustered sufficient proof at a second hearing to cause the referee to change her finding on that point.

Additionally, while the KUIC **may** direct a referee to take more proof when an appeal is filed, a second hearing is not mandatory. Unless "the commission orders cases removed to it from a referee, all appeals to the commission shall be heard upon the records of the division and the evidence and

exhibits introduced before the referee." 787 KAR 1:110 Section 2 (2)(a)(1). Thus, while the KUIC could have requested more proof, it was not required to do so.

Furthermore, "[i]n the hearing of an appeal on the record, the parties may present written arguments and present oral arguments." 787 KAR 1:110 Section 2 (2)(a)(2). In light of the foregoing provision, there was no error in the LBC submitting in its statement of appeal a summary of testimony Bascher would have given at the hearing had she not been ill and known she could have requested a continuance. Moreover, Scott could have responded to the LBC's summary, pointing out alleged inconsistencies in the LBC's responses as he does in his appellate brief to this Court, but he did not. Therefore, we agree with the trial court's statement, "[i]f [Scott] was in any way denied an opportunity to refute the record and Bascher's statement, it was by his own hand." Had Scott made a strong enough case for taking more proof, the KUIC may have returned the matter to the referee, but based upon the proof available, and the lack of any response, it was convinced it had sufficient information to issue a ruling and it did.

> While Scott may have viewed the evidence differently,
>
> > it is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, ot (sic) judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence.

Fuller, 481 S.W.2d at 308 (internal citations omitted). Bascher's memorandum of October 7, 2008, stated Scott "was informed that he (sic) job was terminated."

While this conflicted with Bascher's subsequent letter stating she "never told him he was terminated even though his behavior warranted it," the memorandum dated October 7, 2008, was nonetheless, substantial proof upon which to conclude Scott was fired *after* the heated argument in Bascher's office on October 7, 2008, rather than by voicemail on October 6, 2008. Even the referee made this determination without reference to material filed by the LBC with the KUIC *after* the hearing.

Finally on this point, Scott's citation to the unpublished case of *Ashland Hosp. Corp.*, does not compel a different result. That case firmly states hearsay may be considered and given the weight the trier of fact deems appropriate. That result is consistent with *Fuller*, breaks no new ground, and supports the KUIC's resolution of the case since upon reviewing the proof, an agency may reach a different conclusion than that reached by the referee. *Burch v. Taylor Drug Store, Inc*., 965 S.W.2d 830, 834 (Ky. App. 1998) (abrogated on other grounds by *Cecil*, 381 S.W.3d at 239). We are convinced the record supports a finding that Scott was fired on October 7, 2008.

Scott's next argument is that the evidence does not establish he was discharged for misconduct connected with his work. A worker "discharged for misconduct . . . connected with his most recent work" cannot receive unemployment insurance benefits. KRS 341.370(1)(b). If the reason for the termination is not enumerated in KRS 3411.370(6), it will constitute misconduct if the employee evinced "such a willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior

which the employer has the right to expect of his employee[.]" *Boynton Cab Co.,* 296 N.W. at 640. Alleging misconduct is "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) (abrogated on other grounds by *Cecil*, 381 S.W.3d at 245-46).

Scott contends his conduct towards Bascher at their meeting on October 7, 2008, is irrelevant because he had already been discharged from his employment via Bascher's voicemail of October 6, 2008. The referee, the KUIC, and the circuit court all found this position to be unconvincing, as was their prerogative. Despite the contradictions in Bascher's statements, she never said Scott's continued employment was contingent on his coming in or responding to her voicemail by October 6, 2008. Furthermore, Scott's appearance in uniform at Bascher's office on the day after he had received Bascher's voicemail message is inconsistent with his assertion that he believed he had received notice of termination in that voicemail. As the KUIC aptly observed,

> [g]iven the totality of the circumstances, and the internal inconsistency of the claimant's testimony, the claimant's assertion that he was discharged on October 6, 2008, in the message Ms. Bascher left for claimant that they needed to meet as soon as possible lacks overall credibility and is not persuasive.

In the alternative, Scott argues even if his behavior at the meeting with Bascher was the reason he was terminated, it did not constitute "misconduct." He

contends the KUIC erred in believing Bascher's unsworn version of the events over his sworn testimony that he did not throw his shirt, but took it off and put it on her desk. This argument is contradicted by the transcript of Scott's own testimony before the referee wherein he stated:

> I went into her office and she was telling me some things I just did not agree with and I disagreed with her and she cut me off in the middle of my disagreements and told me that this conversation was over. Which to me means that I'm no longer, you know allowed in this place of business anymore. So I took my shirt threw it on her desk and walked out. I might have done it in a halfway forceful manner. I couldn't tell you, I was angry at times. That was all irrelevant to me. It was all after they fired me.

Scott also argues the KUIC erroneously found he was terminated for his behavior at the meeting with Bascher when the LBC initially indicated he was fired for absenteeism or tardiness. Scott argues the LBC should not have been allowed to change its reason for terminating him.

The record shows the LBC consistently referred to Bascher's memorandum of October 7, 2008, in which she detailed the grounds for termination: Scott's failure to appear for work; lack of punctuality; failure to advise his manager when he would be late or absent; inability to correct his conduct; and finally, the events of October 7, 2008, when he came to her office, became argumentative and threatening, threw "his shirt in [her] face," and yelled obscenities on the way out the door. Thus, the LBC did not change its rationale for firing Scott.

Contrary to Scott's argument, there was substantial evidence supporting the KUIC's ruling that Scott's behavior at the meeting with Bascher constituted misconduct under KRS 341.360. This Court has held an employee standing over a supervisor with her finger in his face, yelling at him for five to ten minutes, telling him she did not have to listen to him, and refusing to go home, could constitute misconduct. *Burch*, 965 S.W.2d at 832. Similarly, "absent justifiable provocation, vulgar language addressed to an employer can constitute willful misconduct resulting in the denial of unemployment benefits." *Unemployment Ins. Comm'n v. Dye*, 731 S.W.2d 826, 828 (Ky. App. 1987). Arguing, yelling obscenities and throwing a uniform in a superior's face appear to be of a similar ilk to us and therefore, warrant dismissal.

Finally, Scott argues his conduct does not justify termination for absenteeism. Under KRS 341.370(6), misconduct includes "unsatisfactory attendance if the worker cannot show good cause for absences or tardiness[.]" The record shows Scott was tardy or absent on numerous occasions without valid excuse. Kaiser testified she met with Scott at the beginning of September 2008 to warn him:

> he had an excessive amount of tardiness, an excessive amount of absenteeism without phoning anyone in the club. He became very loud with me in the office to the point where people down the hallway told me they heard the entire conversation.

Kaiser also testified Scott was tardy fourteen times from August 26, 2008, until his last day of work at the LBC on October 5, 2008. "[P]ersistent or chronic

absenteeism without notice or excuse in the face of continued warnings from the employer constitutes such misconduct as requires a denial of benefits[.]" *Broadway & Fourth Ave. Realty Co. v. Crabtree*, 365 S.W.2d 313, 314 (Ky. 1962).

Despite the conflicting evidence, there was sufficient proof to support the KUIC's findings of fact—that Scott was discharged for misconduct related to his work on October 7, 2008. Under *Brown Hotel Co.*, we must affirm the opinion and order of the Jefferson Circuit Court which affirmed the KUIC's determination that Scott was ineligible to receive unemployment insurance benefits.

ALL CONCUR.

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