

RENDERED: NOVEMBER 26, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2013-CA-001997-MR

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE DAN KELLY, JUDGE  
ACTION NO. 12-CI-00058

BRENDA MACKIN AND  
INOAC GROUP NORTH AMERICA

APPELLEES

OPINION  
REVERSING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: The Kentucky Unemployment Insurance Commission (KUIC) appeals from a Washington Circuit Court order which reversed KUIC's order that Brenda Mackin was not entitled to unemployment insurance benefits because she was discharged from her employment at INOAC Group North

America (INOAC) for misconduct. Having reviewed the record and applicable law, we reverse the order of the circuit court.

Mackin began working for INOAC in 1991. At the time her employment was terminated on October 29, 2011, she was a second shift production supervisor, earning \$43,600.00 annually. The circumstances leading to her termination were set forth as follows in KUIC's findings of fact:

In early October 2011, an employee [at INOAC] was facing possible incarceration, unless he could prove to the Court that he had full-time employment. He needed ongoing testimony from Employer [INOAC] that he had full-time employment, and ongoing confirmation of his continued employment. The employee approached another supervisor, Ed Robson, and requested that he testify on the employee's behalf. Mr. Robson declined to testify. The employee then requested that Claimant [Mackin] testify on his behalf. Claimant agreed. Claimant was not subpoenaed to testify, but did so of her own volition. Claimant did not receive any instruction from Employer regarding her duties if asked to testify on an employee's behalf in a court proceeding, nor did she seek any. Employer's practice in situations where employees need work confirmation in a legal proceeding is to supply the requesting employee with a confirmation letter only.

On October 6, 2011, Claimant appeared in court and testified regarding the employee's employment status and work schedule. Claimant appeared in Court voluntarily and on her own time. The employee received "work release" in lieu of incarceration from the Court. Claimant gave Employer's contact information to the Court and signed a "Work Release and Reimbursement and Garnishment Order" ("Court Order") above the line for the Employer's signature.

The Court Order requires the employee to maintain employment and to reimburse the jailer for the cost of his

incarceration. It also binds the parties signing it and provides that failure to comply with its dictates can result in a party being held in contempt of Court. Claimant believed this was her personal responsibility, not Employer's, although the garnishment Order states that the employer shall be subject to punishment for contempt of court for any violation of the work release rule. Claimant did not seek permission to do this; nor did she tell any other member of management about it.

In order to provide the employee with confirmation of his employment for the Court, Claimant created letterhead on her computer with Employer's logo and address. She did this to make the documentation look more authentic. Claimant wrote letters for the employee on the letterhead confirming his continued employment. Claimant gave these to the employee to turn in, along with actual company documentation that he was still working. Claimant did not seek permission to do this; nor did she tell any other member of management about it.

Employer authorized Claimant to sign internal reports regarding employee performance and attendance; Employer did not authorize Claimant to sign checks or any other legally binding, external documents with third parties on its behalf. Nor did Employer give Claimant specific authority to act as its agent in this or any other matter.

On October 17, 2011, Employer first learned of Claimant's testimony and the Court Order from correspondence with the Court. On October 18, 2011, Employer met with Claimant to discuss the issue. Claimant had not supplied the employer with copies of the correspondence she wrote until the matter was discussed at this time.

On October 19, 2011, Employer terminated Claimant for violating its policy against disseminating and/or sharing company information and for going to a legal proceeding as a representative of the company without management

or human resources knowledge of her actions and signing a legal document on behalf of the company.

When Mackin filed a claim for unemployment insurance benefits, the Division of Unemployment Insurance issued a Notice of Determination she was disqualified because the discharge was for misconduct connected with her work. Mackin appealed to a referee who, after conducting an evidentiary hearing, rendered a decision agreeing Mackin was discharged for misconduct. Mackin appealed to KUIC, which affirmed the referee's decision. Mackin then sought judicial review in the Washington Circuit Court, which reversed KUIC's decision. This appeal by KUIC followed.

Our standard of review of an unemployment benefit decision is whether the KUIC's

findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

*Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002) (internal footnotes and citations omitted).

The sole issue on appeal is whether Mackin's actions constituted "misconduct" warranting denial of benefits. The pertinent statutory provision, Kentucky Revised Statutes (KRS) 341.370(1)(b), states, in pertinent part, "[a] worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which . . . [h]e has been discharged for misconduct or dishonesty[.]" "Discharge for misconduct" is defined elsewhere in the section as including, but not 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.

KRS 341.370(6).

Prior to the adoption of this statutory definition in 1982, Kentucky courts used the definition of misconduct found in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640 (1941), which limits "misconduct" 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.

*Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472, 474 (Ky. App. 1984).

This common law definition continues to be used because the examples provided in KRS 341.760(6) are not intended to be exhaustive. Recently, the Supreme Court of Kentucky clarified the interplay between the *Boynton* definition and the definition found in KRS 341.370(6), holding "a willful or wanton, or bad faith, finding, is not an additional requirement when the employee is discharged for conduct specifically identified in KRS 341.370(6)." *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238, 247-48 (Ky. 2012).

Here, in finding the evidence sufficient to support a finding of misconduct under *Boynton*, KUIC stated:

[t]he Claimant may have been trying to act in the Employer's best interests. However, the evidence of record establishes that the Claimant represented to the Court that she was testifying on the employee's behalf as Employer's supervisor. This could have easily been interpreted by the Court to mean that she was the Employer's official representative. Claimant also signed the Court Order as a representative for the Employer. Again, this could have easily been interpreted by the Court to mean that she was the Employer's official

representative, exposing the Employer to potential liability for contempt.

Claimant admitted she did not have the authority to sign legal documents or checks for the company. Claimant also did not ask for letterhead but formatted letterhead to use in complying with the Court's Order. Claimant's knowledge of her lack of authority and deception by failing to advise management and human resources or request company letterhead show that she knew she was intentionally disregarding the standard of behavior her employer had the right to expect from her and her duties and obligations to the employer.

The trial court agreed with KUIC to the extent Mackin had committed an error justifying termination for cause. The court further held, however, "there is no evidence to support a finding that the Plaintiff's actions exceeded the 'inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion' as cited by *Boynton*." We disagree.

Mackin's decision to testify for her fellow employee might be described as a good faith error in judgment or discretion. However, her actions in surreptitiously printing the company letterhead and submitting a letter purporting to be from her employer, coupled with signing a court order on behalf of and without informing her employer, are actions rising to the level of willful or wanton disregard of the employer's interests, or an intentional and substantial disregard of the employer's interests or her duties and obligations to the employer.

Mackin points to her uncontradicted testimony she was never previously advised these were actions she was not authorized to take on behalf of the employer, and the employee handbook she was provided when she started her

employment did not address this situation. The employer's representative and witnesses all confirmed no instruction had been given to Mackin that this was an inappropriate act, and the employer conceded this was an issue that had never before arisen. Mackin argues her mental state did not indicate wrongful intent, evil design, or an intentional substantial disregard for the employer's interest, but rather evidenced her wish to help the employer by enabling a good employee to stay on the job rather than being discharged for his inability to obtain work release. Mackin has not satisfactorily explained, however, why she decided not to approach the employer's human resources department or her own supervisor for guidance, or why she did not advise her fellow employee to do so.

The fact remains that by signing the court order without the employer's permission, she subjected the employer to potential contempt charges without the employer's knowledge; creating the letterhead shows a level of conscious deceitfulness going beyond ordinary negligence or good faith errors in judgment. In any event, substantial evidence supports KUIC's finding of misconduct, and we may not reverse its decision to deny benefits.

The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency. . . . [A] reviewing court . . . should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom.

*Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002).



For the foregoing reasons, the Washington Circuit Court is reversed, and the  
KUIC order is reinstated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Patrick B. Shirley  
Education and Workforce  
Development Cabinet  
Frankfort, Kentucky

BRIEF FOR APPELLEE  
BRENDA MACKIN:

Ben T. Haydon, Jr.  
Bardstown, Kentucky