

RENDERED: NOVEMBER 2, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000860-MR

KAREN RENEE PRESTON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KEN M. HOWARD, JUDGE  
ACTION NO. 16-CI-01021

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION; QUEST  
DIAGNOSTICS, INC.; TALX, AS AGENT  
FOR QUEST; AND EQUIFAX, AS AGENT  
FOR QUEST

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, JOHNSON AND JONES, JUDGES.

ACREE, JUDGE: Karen Preston appeals the Hardin Circuit Court's April 13, 2017 order affirming the finding by the Kentucky Unemployment Insurance Commission that she had been discharged for misconduct and dishonesty

connected with her work. On appeal, Preston argues there was insufficient evidence to support the Commission's finding, that the Commission incorrectly applied the law to the facts and violated her due process rights, and that the circuit court erroneously affirmed. We disagree and affirm.

Appellee Quest Diagnostics, Inc. employed Preston as a phlebotomist beginning June 26, 2006. Preston worked at an off-premises patient services center for Quest's clients. Quest discharged Preston on February 17, 2016, for falsifying her time-keeping records.

Preston applied for unemployment benefits. Quest challenged her eligibility for benefits, contending Preston had been discharged for misconduct and dishonesty. In her "claimant statement," Preston stated:

Time punches are done on a phone system. [o]n February 3, 201[6] I clocked out to drop some things off at the facility my son is in this can be done once a month on Wednesday morning. I clocked out using phone system but didn't record. At the end of the week was contacted to send a time punch edit form said I didn't clock out for lunch, this is a busy site I submitted the form without thinking I had left at a different time than normal. Feb 11, 201[6] punch didn't record said I was 15 min late and I wasn't. I have been a good and valued employee and would not have had any financial gain in an hour and 15 min incorrect time reporting and risk a 10 yr positive employment history.

(R. 5). The Division of Unemployment Insurance concluded Preston was entitled to receive benefits because she had not engaged in misconduct or dishonest behavior.

Quest appealed to a referee.<sup>1</sup> In its statement of appeal, Quest stated:

02/11/2016 [Preston] arrived to work at 7:15am. [Preston] is scheduled to arrive to open the office building at 6:50am. [Preston] sent adjustments logs to change all of her late arrivals since 02/01/2016. See attached time card. This is considered theft of time as [Preston] was not available and ready to work when clocked in. [Preston] violated Time Report Policy by calling in her work time from a outside phone. [Preston] has been stealing time by leaving facility on the clock, and requesting manual time adjustments.

A referee conducted a hearing on April 27, 2016. Quest submitted Preston's signed "Tele-Time Clocking In/Out Acknowledgment," dated November 18, 2014, wherein Preston acknowledged she was obligated to use a landline to clock "in or out on Tele-Time" and if for any reason she missed a "punch," she was obligated to notify her supervisor or "Group Lead" by "filling out a Workforce Center Adjustment Log."

Pari Troiana, the Patient Services Supervisor for Quest, testified on Quest's behalf. Troiana stated that Quest discovered Preston had left the premises on February 3, 2016, for two hours to visit her son. Preston did not notify Troiana

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<sup>1</sup> Kentucky Revised Statute (KRS) 341.420(2).

or her group lead/supervisor, Valerie Ferrell, that she was leaving, did not clock out or clock in for the time she was gone, and she received pay for that time.

Preston's time record showed that, on February 3, 2016, she clocked in for work at 6:52 a.m., clocked out for lunch at 11:57 a.m., clocked in from lunch at 12:27 p.m., and clocked out for the day at 6:26 p.m. Troiana testified that Preston admitted leaving that day for a period of time but gave no explanation except "that was the only day that she could take care of that matter." Troiana did not know the exact times Preston was gone from the office, only that it was in the morning. Troiana also testified that Preston had on numerous other occasions submitted adjustment sheets to fix her time.

Preston testified in her defense. She stated she informed her group lead, Valerie Ferrell, that she was leaving the premises on February 3, 2016, that she left at 10:15 a.m., was gone for about an hour, and that she tried to clock out but she received an error message. Troiana responded that she questioned Ferrell and Ferrell "said it was news to her. She said nobody ever contacted her about leaving [on February 3, 2016] . . . . So no, me or Valerie, we were never notified that she was leaving." (Transcript of Hearing, April 27, 2016, pp. 37-38).

Following the hearing, the referee issued a decision reversing the Division and concluding Preston had been discharged for dishonesty and misconduct connected with her work. The referee explained:

[Preston,] however, testified that she left work for at least an hour on February [3<sup>2</sup>], 2016, to take care of personal business while she was supposed to be at work. The employer's timekeeping records were entered into the record and those records indicated that [Preston] failed to clock in and out during this time period. [Preston] disputes that she falsified her time keeping records because when she attempted to clock in and out during that time period that she received an error message and informed her Group Lead Valerie [Ferrell] verbally of the missed punches. It is less than credible that [Preston] informed Ms. [Ferrell] that she missed three punches or that she received any error messages because [Preston] was aware that she was required to submit an adjustment sheet if she missed any punches, had on many previous occasions submitted the adjustment sheet, and there is no evidence in the record that [Preston] ever submitted this to the employer to fix her time on this date.

(Referee Decision, May 5, 2016, Administrative Record, p. 197).

Preston appealed the decision to the Commission.<sup>3</sup> The Commission affirmed the referee's decision.

Preston then appealed the Commission's order to the Hardin Circuit Court,<sup>4</sup> arguing a due process violation and that the referee's dishonesty and misconduct findings were in error because: there was no evidence of willfulness

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<sup>2</sup> The hearing officer addressed two alleged misconduct on two dates, February 3 and February 11, 2016. It is obvious from the context that the hearing officer intended to identify February 3 as the date in this paragraph rather than February 11.

<sup>3</sup> Pursuant to KRS 341.430.

<sup>4</sup> Pursuant to KRS 341.450.

on her part; the evidence presented by Quest was not credible; and the referee erred as a matter of law when it stated in its findings that Quest's timekeeping rule did not need to be uniformly enforced.

The circuit court reviewed the evidence and the arguments of the parties and affirmed the Commission. In so doing, the circuit court held Preston had adequate notice of her rights and the issues to be raised at the hearing, that substantial evidence of probative value was received by the Commission supporting its position, and that the Commission applied the correct law in reaching its conclusion. Preston appealed.

### **STANDARD OF REVIEW**

“The standard of review of an unemployment benefit decision is whether the Commission's findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts.” *Downey v. Ky. Unemployment Ins. Comm'n*, 479 S.W.3d 85, 88 (Ky. App. 2015). Substantial evidence is “evidence which has sufficient probative value to induce conviction in the minds of reasonable people.” *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238, 245 (Ky. 2012). “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.” *Id.* at 246.

Our function here is review, not reinterpretation. *Sunrise Children's Serv., Inc. v. Ky. Unemployment Ins. Comm'n*, 515 S.W.3d 186, 190 (Ky. App. 2016). Like the circuit court, we are constrained to consider only the evidence presented to the Referee to determine the propriety of the decision to grant or deny unemployment benefits. *Id.*

### ANALYSIS

Preston argues her conduct did not amount to misconduct or dishonesty sufficient to warrant the denial of benefits. She also argues her due process rights were violated because she did not have sufficient notice of the subject of the hearing before the referee. We disagree.

KRS 341.370 provides, in relevant part:

(1) 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, or from any work which occurred after the first day of the worker's base period and which last preceded his most recent work[.]

KRS<sup>5</sup> 341.370(1)(b) (emphasis added). The statute did not define “misconduct” when originally enacted. Consequently, Kentucky courts adopted the standard set forth in *Boynton Cab Company v. Neubeck*, 237 Wis. 636, 296 N.W. 636 (1941),

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<sup>5</sup> Kentucky Revised Statutes.

which stated that “‘misconduct’ required a showing of ‘bad faith or . . . culpability in the form of willful or wanton conduct.’” *Cecil*, 381 S.W.3d at 247 (quoting *Shamrock Coal Co., Inc. v. Taylor*, 697 S.W.2d 952, 954 (Ky. App. 1985)).

The Kentucky General Assembly remedied its oversight in 1982 when it enacted a statutory definition of misconduct. *Id.* Noticeably, it chose not to include the bad faith or willfulness standard. *Id.*; KRS 341.370(6). Now, “misconduct” is defined by statute as:

[S]eparation 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) (emphasis added).

Preston first argues that her due process rights were violated because Quest’s notice of appeal to the referee did not make it sufficiently clear as to the grounds being raised to deny her employment benefits. Had she known the hearing before the referee would include discussion of the February 3, 2016



incident, Preston argues, she would have brought witnesses and evidence to support her claim that she attempted to clock out and informed her group lead she was leaving the premises. We see no due process violation.

“Fundamentally, the hallmarks of procedural due process are notice and an opportunity to be heard.” *Hampson v. Boone County Planning Com'n*, 460 S.W.3d 912, 917 (Ky. App. 2014). Procedural due process is satisfied when a party has sufficient notice of the claim against it and an opportunity to make his or her defense. *City of Louisville v. Slack*, 39 S.W.3d 809, 814 (Ky. 2001).

When a worker applies for unemployment insurance benefits, the Secretary of the Division for Unemployment Insurance makes an initial determination regarding the worker’s eligibility for benefits. *Miller v. Ky. Unemployment Ins. Comm'n*, 425 S.W.3d 92, 97 (Ky. App. 2013). A party to that determination who disagrees with it may then “file an appeal to a referee ***as to any matter therein***. . . .” KRS 341.420(2) (emphasis added).

In this case, Quest, upon receiving the Division’s decision awarding Preston unemployment benefits, appealed that decision to a referee. While Quest did not specifically reference the February 3, 2016 incident in its notice of appeal, it clearly stated that Preston was “discharged for a violation of a reasonable and known policy,” and Preston had “been stealing time by leaving [the] facility on the clock, and requesting manual time adjustments.” The Division then sent Preston a

Notice of Administrative Hearing which advised her that the issue was whether she “was discharged for misconduct or dishonesty[.]” As pointed out by the circuit court, “Preston testified at the hearing that she was informed upon her discharge that it was because she ‘had stolen time,’ so she must have anticipated her employer’s arguments at the hearing.” In fact, Preston specifically referenced in her “claimant statement” that the February 3, 2016 incident was part of Quest’s basis for terminating her employment. We are convinced Preston had adequate notice of the issues to be raised at the hearing before the referee. No due process violation occurred.

Preston next argues the Commission erroneously relied upon the timekeeping records submitted by Quest in reaching its decision. Preston argues those records lack persuasive value, for they fail to indicate, as admitted to by Troiana, if and when Preston’s times were manually adjusted. We find Preston’s argument unconvincing on its face. But more importantly, as explained in more detail below, we find Quest’s timekeeping records played little role in the Commission’s decision.

Preston also argues the Commission misapplied the law. She contends the referee made a finding of misconduct based upon Preston’s “knowing violation of a reasonable and uniformly enforced rule of an employer[.]” but in the next breathe found that “the policy in question is reasonable on its face and does

not require the employer to enforce the rule uniformly or to notify the worker such conduct can result in discharge.” We admittedly find the referee’s statement perplexing. But as noted by the circuit court, dishonesty is statutorily disqualifying misconduct. KRS 341.370(1)(b) (a worker shall be disqualified from receiving benefits if she has been discharged for misconduct or dishonesty). “Providing false information in response to a reasonable inquiry can certainly constitute misconduct under the statute.” *Smith v. Ky. Unemployment Ins. Comm’n*, 906 S.W.2d 362, 364 (Ky. App. 1995). Stated another way, once it is shown that an employee has acted dishonestly, the employee is disqualified regardless of whether the underlying policy is uniformly enforced or whether his or her conduct also qualifies as misconduct under KRS 341.370.

In this case, the Commission found Preston knowingly violated Quest’s policy regarding time and attendance and that Preston falsified her time sheet and was dishonest. Quest’s policy “states that an employee who falsifies time-keeping records will be discharged.” Its policy also provides that when employees “are off the premises, they have to clock out and they have to clock back in and they have to notify their supervisor why they are leaving.” Preston acknowledged receiving Quest’s time and attendance policies. The evidence at the hearing established Preston violated both policies.

Quest's representative testified that Preston left work on February 3, 2016, without clocking out and without notifying her supervisor that she was leaving the premises. Preston admitted she left the premises on this date. She testified she left at 10:15 a.m. and "was only gone about an hour, maybe little over an hour." There is no meaningful dispute that Preston left her work station on February 3, 2016. The question is whether Preston acted dishonestly in failing to clock out and failing to notify her supervisor that she was leaving.

Preston testified she tried to clock out, but the system malfunctioned. Preston did not submit an adjustment worksheet notifying Quest of the malfunction. Indeed, Quest's representative testified no other employee had issues clocking in or out that day, including Preston who clocked in or out four other times. The representative stated Preston's time records indicated she did not clock out at 10:15 a.m. on February 3, 2016. Instead, it showed Preston clocked in at 6:50 a.m., clocked out for lunch at 11:47 a.m., clocked in from lunch at 12:27 p.m., and clocked out for the day at 6:26 p.m.

Preston testified she informed her group lead, Valerie Ferrell, that she was leaving the premises and that the time system malfunctioned. Quest's representative, Troiana, refuted Preston's testimony, stating in a manner that persuaded the hearing officer that Preston did not inform her or Ferrell that she was leaving the premises.

As the foregoing demonstrates, the Commission placed little weight on Quest's physical timekeeping records in making its ruling. Instead, its decision was based in large part on the testimony offered by Quest's representative and Preston's own admission that she left her work station on February 3, 2016. While we acknowledge Preston's argument that the Commission should have believed her testimony over that offered by Quest's representative, the Commission found the representative's testimony credible, and this Court "may not substitute its opinion as to the credibility of the witnesses"; we must accept the Commission's own evaluation of the witnesses. *Thompson v. Ky. Unemployment Ins. Comm'n*, 85 S.W.3d 621, 624 (Ky. App. 2002).

Finally, Preston argues that she did not act dishonestly because there is no evidence she willfully misrepresented facts to her employer. The Commission defined dishonesty as used in KRS 341.370 as "a willful misrepresentation of facts to the employer on a work-related matter." *See Dishonesty*, Black's Law Dictionary (10th ed. 2014) (defining "dishonesty" as "[d]eceptfulness as a character trait; behavior that deceives or cheats people"). Again, dishonesty is statutorily disqualifying. KRS 341.370(1)(b) (a worker is disqualified if terminated for dishonesty).

It is for the Commission to judge the credibility of the witnesses, the weight to be given the evidence, and what inferences to draw from the evidence.

*See Thompson v. Ky. Unemployment Ins. Comm'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). As it is empowered and obligated to do, the Commission considered all the evidence, weighing the credibility of conflicting evidence, and found Quest's evidence more credible, and therefore more persuasive, than Preston's. That evidence is sufficient to show that Preston intentionally – willfully, deceitfully – did not clock out when she left the worksite at 10:15 a.m. on February 3, 2016, and did not inform her group lead or Troiana and received compensation for time when she was not at work. The testimony from Quest's representative supports this finding. Therefore, sufficient evidence supports the Commission's conclusion that Preston acted dishonestly by willfully misrepresenting that she was at work when, in fact, she was not. Preston's disqualification from receipt of employment benefits is a correct application of law to the facts.

### **CONCLUSION**

We affirm the Hardin Circuit Court's April 13, 2017 order affirming the Commission's decision denying Preston's request for unemployment benefits.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwight Preston  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Patrick B. Shirley  
Frankfort, Kentucky