

RENDERED: DECEMBER 7, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-001105-MR

LISA HUGHES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 15-CI-003877

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION,  
EDUCATION AND WORKFORCE  
DEVELOPMENT CABINET; AND  
CENTER FOR WOMEN AND INFANTS

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Lisa S. Hughes brings this appeal from a May 30, 2017, order of the Jefferson Circuit Court affirming the denial of unemployment insurance

benefits by the Kentucky Unemployment Insurance Commission. We reverse and remand.

Hughes worked as a registered nurse at the Center for Women and Infants (Center) from 2011 until she was terminated on December 11, 2014. On that date, Hughes met with the Center's clinical manager and human resources manager to discuss patient care. During the meeting, Hughes removed patient medication administration records (MAR) from her bag to utilize during the discussion. The clinical manager then questioned Hughes as to why the MAR were in her personal bag. At this point, the human resources manager informed Hughes that she was terminated for possession of the MAR, which contravened the Center's policy enacted pursuant to the Health Insurance Portability and Accountability Act (HIPAA).

Thereafter, Hughes filed a claim for unemployment insurance benefits. The Division of Unemployment Insurance initially determined that Hughes was disqualified from receiving unemployment insurance benefits as she was discharged for misconduct. Hughes then appealed the decision to a referee. Kentucky Revised Statutes (KRS) 341.420.

A telephonic hearing was held by the referee. Three people testified at the hearing – Valerie Charlesworth (current human resources manager for the Center), Susan Ladd (registered nurse previously employed by the Center), and

Hughes. Charlesworth testified for the Center, and her relevant testimony was, as follows:

Q 12 So did something happen to [Hughes'] employment then? In other words, was she discharged, voluntarily quit, laid off, put on suspension?

A. She was terminated on that date.

Q 13 And who would have been the person who discharged her, Ms. Charlesworth?

A. That would have been her clinical manager, Diane Eckert, and also the HR Manager, my predecessor, Karen Nutgrass.

Q 14 Okay, and what was the reason then for the discharge?

A. A HIPAA violation.

Q 15 And was there any rule or policy regarding HIPAA violations, Ms. Charlesworth, do you know?

A. A policy, yes sir. Our Department has a policy and so does the entire hospital.

Q 16 Okay, well then was this also a violation of the policy or just a HIPAA violation?

A. Both, Your Honor.

Q 17 Okay, then if you can, can you describe to me the relevant parts of the policies that pertains to this particular incident?

A. Sure. The exchange of information, of patient information, is to be under lock and key and Ms. Hughes

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Q 18 How was she made aware of this policy then, the exchange of patient information needs to be under lock and key?

A. There was a - - she signed off on it when she was initiated in her employment with us and then there was also an annual piece of paper that she signed and acknowledged it.

Q 19 Was there an incident then that led to the decision to discharge her?

A. Yes, there were papers found in her personal bag and she pulled them out in front of her clinical manager and in front of Karen, the HR Manager at the time. The papers contained personal information including prescription medicine.

.....

Q 1 Ms. Charlesworth, regarding the specifics of the policy that you allege that exchange of patient information needs to be under lock and key, is that literally under lock and key? What are the specifics of that alleged policy?

A. No, really not take out of the hospital. The hospital would be considered the safe area and when the papers entered into her car and home, that was a direct violation.

Q 2 You have -- this specific policy, it was a written policy? Was it in any kind of literature promulgated?

A. Yes, it is in the HIPAA policy that annual competencies that she signs off on or that all employees sign off on annually.

Transcript of Evidence at 13-15, 17-18. Thereafter, Hughes testified, in pertinent part, as follows:

Q 15 So why don't you tell me what happened, if you can, in your own words.

A. Yes, I was asked to join Diane in the Human Resources Office to talk about the sections about patient care that I had provided prior to the meeting. Questions about the quality of care and the reasons for the care that I had provided. The manager, Diane Eckert, did not have any background information. So I referenced the report sheet where I had documented the things that I needed to put in the computer regarding this care to refresh my memory so that I could answer the questions appropriately. As I referenced these papers, I was told by Ms. Nutgrass that having been in my presence was a HIPAA violation.

Q 16 Did you have any kind of knowledge that what you did would have been a HIPAA violation?

A. I was floored; I have never considered that before because it was routine practice. Most of the nurses saved their report sheets to use again when they came back in.

Q 17 Were you aware of any policy the employer had regarding HIPAA compliance?

A. Not specific to our report sheets. Like I said, it was routine practice for nurses to review the same report sheets when they work over a period of time with the same patient.

Q 18 So did you ever remove these documents from the hospital, from the employer's premises?

A. I kept them in my work bag with all of my tools for work. It was never opened anywhere else or used in any other capacity.

Q 19 Did you ever take them from the hospital, take them home with you, remove these documents from the hospital?

A. Yes, Your Honor, I did.

Q 20 Are you aware of anyone else who would have removed them from the hospital?

A. Oh, yes, Your Honor, I am very aware.

Q 21 So do you have any specific people?

A. I could tell you that yes, I know of several.

Q 22. What you are trying to describe to me is that the policy is not uniformly enforced. I have to know specifics and the employer will have to know specifics in order to show that there was a lack of uniform enforcement of the policy in this regard, Ms. Hughes.

A. That is exactly what I am trying to do, Your Honor.

Q 23 That is why I kept asking you, can you give me specifics. Do you know particular individuals who have done the same thing you did and did not get disciplined?

A. Absolutely. She acts as the charge nurse, Pamela Brown Hoskins, kept her report and put that in her bag every single night or morning - - we worked night shift, when we went home. She pulled this same report out when she came back into work at the beginning of every other shift. That one I know I have seen personally.

Transcript of Evidence at 21-24. The next witness, Ladd, was called by Hughes to testify, and she stated, in relevant part:

Q 5 Now, Ms. Ladd, what can you tell me about any practice you may have been aware of regarding nurses or other medical people keeping treatment records or any other medical information in purses or work bags?

A. I would say probably the majority of the nurses I worked with, and again I worked at University Hospital for 26 years but the majority of them carry a work bag and it has personal items as well as work items as I did myself. Other nurses, they would take their - - they call it a clipboard and we kept our report sheets on it and nurses would just take them and stick it in their work bag because they worked 12-hour shifts. So pretty much, we would go home, go to bed, turn right around and come back in. The reason that we kept them, we would come back, we'd have the same patient unless they were discharged. So it was, if anything, it was just for convenience to have all that information and not have to rewrite everything because everything was right there and we could just update it as need be.

Q 6 Okay, and to your knowledge, was the managers or supervisors aware of this practice?

A. I am sure they must have been but I can't say 100 percent for sure but I can tell you that nurses would leave their clipboard - - I saw them lay them in the locker room with their report sheets. I saw them all over the nurses' station, totally unprotected from anyone that could come up and see them, see that information. So I will say that the nurse, and especially speaking for myself, I was not taking the worksheets home with me to share with anyone. They were in my work bag; they were protected. Again, it was not to share. It was to keep them on my person so I would have them and have them the next day.

Q 7 Were you aware of HIPAA?

A. Yes, I am very well aware of HIPAA.

Q 8 And any employer policy regarding HIPAA compliance?

A. I am not sure of the question.

Q 9 The question is were you ever made aware of any employer policy regarding about having to be [in] compliance with HIPAA rules and regulations?

A. Yes, absolutely.

Q 10 And what was your understanding of those in terms of this carrying along a clipboard and keeping it in your work bag?

A. It was never directly brought up. To my knowledge, there is no policy specific to nurses' carrying home report sheets. My knowledge is as long as you don't share the information, you keep it protected.

.....

Q 1 Ms. Ladd, to your knowledge, have you ever taken an MAR home and if so, were we aware of it?

A. An MAR?

Q 2 Yes.

A. No, not to my knowledge.

Transcript of Evidence at 30-32.

The referee rendered a decision in favor of Hughes and determined that Hughes was entitled to unemployment insurance benefits. The referee initially



recognized that the Center possessed the burden of proving by a preponderance of credible evidence that Hughes engaged in misconduct that had resulted in her termination. The referee acknowledged that a knowing violation by the employee of a uniformly enforced rule of the employer qualified as misconduct. The referee decided that the Center failed to demonstrate that Hughes knowingly violated its policy concerning MAR or that its policy was uniformly enforced:

The employer discharged the claimant for an alleged violation of its policy. To prevail, the employer must prove by a preponderance of evidence the claimant violated the employer's policy, did so knowingly, that the policy was reasonable, and it was uniformly enforced. The employer had a policy requiring employees to follow HIPAA regulations. **The claimant was aware of the policy, but not that transporting her report sheet or other documents used in patient care was a HIPAA violation.** Many other employees also transported medical documents in their work bag. The employer failed to prove the claimant knowingly violated the policy, or that the policy was uniformly enforced. Therefore, the employer discharged the claimant for reasons other than misconduct connected with the work and the claimant is not disqualified.

May 14, 2015, order at 2. (Emphasis added.)

Being dissatisfied with the referee's decision, the Center appealed to the Kentucky Unemployment Insurance Commission. KRS 341.430. The Commission rendered an order reversing the referee's decision and concluding that Hughes was disqualified from receiving unemployment insurance benefits. The

Commission determined that Hughes engaged in misconduct by knowingly violating a uniformly enforced policy of the Center:

In the case herein under appeal, the claimant was discharged from the employment on December 11, 2014, for violating HIPAA rules. Any rules the employer promulgated as a result of or in compliance with HIPAA are deemed to be reasonable for unemployment insurance purposes; the rules were known or should have been known and understood by the claimant; and, despite the claimant's assertions to the contrary, the Commission finds the rules to have been uniformly enforced by the employer, as the weight of the evidence of record supports a finding that the employer was unaware that anyone was removing patient information from the facility on a daily basis and taking it home with them, and had they known, discipline would have issued forthwith, as it did in the claimant's case.

Before a disqualification for misconduct may be imposed, it must be proven by a preponderance of evidence. The employer bears this burden of proof.

The claimant acknowledges having routinely removed patient information from the facility. Her stated reason(s) for doing so was for her own personal convenience, and not for any devious purpose. Regardless of her reason(s) or intention(s), her actions constituted a clear violation of established employer rules.

May 21, 2015, order at 3.

Hughes then filed an original proceeding in the Jefferson Circuit Court seeking judicial review of the Commission's order. KRS 341.450. By order

entered May 30, 2017, the circuit court affirmed the Commission's order. This appeal follows.

To begin, a worker is disqualified from receiving unemployment insurance benefits if terminated for misconduct. KRS 341.370(1)(b). Relevant herein, misconduct is statutorily defined as a knowing violation of a uniformly enforced rule of the employer. KRS 341.370(6). And, the employer possesses the burden to prove by a preponderance of the credible evidence that the employee engaged in misconduct justifying termination. *Masonic Homes of Ky., Inc. v. Ky. Unemployment Ins. Comm'n.*, 382 S.W.3d 884, 887 (Ky. App. 2012).

The primary argument raised on appeal by Hughes is that the Commission's order is not supported by substantial evidence of a probative value. Specifically, Hughes argues that the Commission solely relied upon hearsay evidence to find that Hughes knowingly violated a uniformly enforced policy of the Center prohibiting removal of MAR. Hughes submits that Charlesworth was hired after Hughes' termination, so Charlesworth's testimony constituted hearsay as Hughes was allegedly informed of the policy at the time she was hired and yearly thereafter.

Judicial review of an administrative agency's decision is concerned with arbitrariness. *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning and Zoning Comm'n.*, 379 S.W.2d 450, 456 (Ky. 1964); *Masonic Homes*

*of Ky., Inc. v. Ky. Unemployment Ins. Comm'n.*, 382 S.W.3d at 886. Arbitrariness has many facets, but relevant to this appeal is whether the findings of fact made by the Commission are supported by substantial evidence of a probative value. *Miller v. Ky. Unemployment Ins. Comm'n.*, 425 S.W.3d 92, 96-97 (Ky. App. 2013); *Runner v. Commonwealth*, 323 S.W.3d 7, 10 (Ky. App. 2010).

The Commission is directed to conduct all hearings “informally without regard to common law, statutory, or technical rules or procedure and in a manner as to determine the substantial rights of the parties.” 787 Kentucky Administrative Regulations (KAR) 1:110 Section 4(4)(a). So, hearsay evidence is generally admissible in an administrative hearing if reliable. KRS 13B.090; *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 321 (Ky. App. 2011); *Miller*, 425 S.W.3d at 99. However, hearsay evidence alone is regarded as insufficient to support an agency’s finding of fact unless a recognized exception to the hearsay rule is applicable. KRS 13B.090(1); *Miller*, 425 S.W.3d at 99.

At the hearing before the referee, the only witness to testify for the Center was Charlesworth. Charlesworth was the current Human Resources Manager for the Center. The record reflects that Charlesworth was not the Human Resources Manager at the time Hughes was hired or at any time during her employment, and apparently was not involved in the decision to terminate Hughes’ employment. Therefore, Charlesworth lacked firsthand knowledge concerning

whether Hughes acknowledged the policy preventing removal of patient MAR at the time she was hired or at any time thereafter. Also, Charlesworth lacked firsthand knowledge concerning whether the policy was uniformly enforced during Hughes' tenure.

From the transcript of the hearing, it appears that Charlesworth was utilizing a computer in order to answer questions by accessing records of the Center. In response to a question about Hughes' employment with the Center, Charlesworth replied:

A. Sure, just one second. I'm sorry, my computer is just a bit slow right now.

Transcript of Evidence at 12. And, before the circuit court, the Center seemed to acknowledge that Charlesworth had utilized the business records of the Center during her testimony and argued that these records were not hearsay under the business records exception.

Kentucky law recognizes a business records exception to the hearsay rule. Kentucky Rules of Evidence (KRE) 803(6) provides:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other

qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Thereunder, a business record is admissible if the information contained therein is made near the time of the event and by a person with knowledge of same. *Kirk v. Commonwealth*, 6 S.W.3d 823, 828 (Ky. 1999). Further, the record must be kept in the course of a regularly conducted business activity, and it must be a regular practice of the business to make such record. *Id.* Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers* § 29:11 (2017).<sup>1</sup>

During the hearing, Charlesworth did not testify as to how the records were kept or where the information contained in the records originated. In fact, we know absolutely nothing about the records other than the records were purportedly business records of the Center. For this reason, these businesses records must be considered hearsay and inadmissible.

As hereinabove stated, hearsay evidence is not “sufficient in itself to support an agency’s findings of facts unless it would be admissible over objections in civil actions.” KRS 13B.090(1); *Miller*, 425 S.W.3d at 99. Charlesworth’s testimony was the only evidence supporting the Commission’s findings that the

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<sup>1</sup> Although not at issue herein, we observe that business records may be self-authenticating if the certification requirements of Kentucky Rules of Evidence 902(11) are satisfied. *Baker v. Commonwealth*, 545 S.W.3d 267, 275 (Ky. 2018).

Center's policy as to MAR was known to Hughes and such policy was uniformly enforced by the Center during Hughes' employment. As Charlesworth possessed no independent knowledge concerning the events that took place during Hughes' employment, she necessarily must have relied upon the information contained in the Center's inadmissible hearsay records to answer the above two pivotal questions. The Center possesses the burden to prove that Hughes knowingly violated a uniformly enforced policy. Because Charlesworth's testimony relied upon inadmissible hearsay records, we conclude that the Center failed to meet its burden and that the Commission's findings of fact are not supported by substantial evidence. We further agree with the referee that there is no substantive evidence in the record that the Center's policy as concerns MAR was uniformly enforced.

For the foregoing reasons, the order of the Jefferson Circuit Court is reversed and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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