RENDERED: DECEMBER 22, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001082-MR

SHARON SIMPSON — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 13-CI-00294

COMMONWEALTH OF KENTUCKY, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND ITS COUNSEL, HON. PATRICK B. SHIRLEY; AND KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A KINDRED TRANSITIONAL CARE AND REHABILITATION – FOUNTAIN CIRCLE AND ITS COUNSEL, HON. CYNTHIA BLEVINS DOLL, HON. MARK J. GOMSAK, AND HON. ANNA KIMKINS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Appellant, Sharon Simpson (Simpson), appeals from a decision of the Clark Circuit Court that affirmed the denial of her claim for unemployment benefits. After our review, we affirm.

Simpson, a Licensed Practical Nurse (L.P.N.), worked for Appellee, Kindred Nursing Centers Limited Partnership, D/B/A Kindred Transitional Care and Rehabilitation – Fountain Circle (Kindred), from March 23, 2009, until November 5, 2012. After her employment was terminated, Simpson filed a claim for unemployment insurance benefits. The initial determination was in her favor. Kindred appealed. Following an evidentiary hearing, the appeals referee reversed upon determining that Simpson had been discharged for misconduct connected to the work. Simpson appealed to the Kentucky Unemployment Insurance Commission (KUIC), which affirmed the referee's decision by Order of May 31, 2013, as modified.

KUIC made the following Findings of Fact regarding Kindred's policies:

> The employer has a progressive discipline policy that provides for a progressive disciplinary path including verbal counseling, written warning, final written warning and discharge. These steps may be skipped based on the severity of the infraction.
>
> The employer also has a "standards of conduct" policy designed to comply with the requirements of the Health Information Portability and Accountability Act (HIPAA) that prohibits staff from disclosing resident names via electronic devices. In accordance with the policy, all staff are prohibited from texting personal identifying information to anyone. The employer also

> has a policy prohibiting disrespectful communication that states, in pertinent part, that employees are prohibited from participating in disruptive or distracting conduct in [the] workplace. The employer also has a policy which forbids the failure to render proper care to a patient. [Simpson] was made aware of these policies through the employee handbook, which she received on March 15, 2009, September 15, 2009, and January 20, 2011.

In addition, the KUIC made Findings of Fact regarding the events preceding Simpson's termination, which we summarize chronologically in the following four paragraphs:

On February 11, 2010, Simpson received verbal counseling for allegedly failing to complete the orders of a physician. However, she did pass them along to the next shift, which was deemed to be an acceptable practice.

On October 14, 2010, Simpson received a written warning for conduct which violated the employer's failure-to-render-care policy. She failed to document intervention for a fall and gave a patient less medication than had been prescribed because she failed to check the medication record.

On July 12, 2011, Simpson received a final written warning for conduct which violated the employer's failure-to-render-care policy. She failed to process a physician's order for a colonoscopy -- although she did appropriately pass it along to the next shift. She also failed to chart the condition of another resident's abdomen or any intervention utilized.

On July 5, 2012, Simpson received a "teachable moment" on customer service arising out of a verbal altercation with a patient's family member.

The KUIC's findings also reflect that Simpson believed that Kindred was looking for a reason to discharge her after she reported that one or more of her co-workers had been stealing medication.

On November 2, 2012, Simpson notified her supervisor about a text-message exchange with a co-worker, R. Maple, LPN, that Simpson considered harassing. The supervisor noticed that Simpson and the co-worker had been using residents' personal identifying information in their texts. The supervisor also considered the messages "to constitute disrespectful communication between co-workers which is prohibited in the employer's Code of Conduct."

The KUIC further found as follows:

> [Simpson] had never been given the permission of the employer to text personal identifying information from her cell-phone…. [Simpson] was aware that the employer's policy forbids such conduct. [Simpson] took it upon her own to communicate with her co-workers and outside physicians using personal identifying information. Other co-workers had participated in the same conduct. The employer was unaware until the claimant showed her cell-phone text messages with Ms. Maple … that [Simpson] or any other employee was violating the employer's HIPAA and cell-phone usage policies. The employer uniformly enforces the HIPAA and cell-phone usage policies whenever the employer becomes aware of a violation. [Simpson] received a written warning for violation of these policies, which resulted in a violation of her final written warning of July 12, 2011, and exhaustion of the steps of the employer's progressive discipline policy.

On November 5, 2012, Simpson was discharged for violation of Kindred's policy concerning failure to render proper patient care, violation of the

HIPAA compliance policy, violation of personal wireless communication device policy, disrespectful communication with a co-worker, and exhaustion of Kindred's progressive discipline policy.

KUIC explained that an employer trying to show a disqualification under KRS[1] 341.370(6) has the burden of proof, citing *Brown Hotel Co. v. Edwards,* 365 S.W.2d 299 (Ky. 1962). The pertinent portion of the statute provides as follows: "'Discharge for misconduct' … shall include … knowing violation of a reasonable and uniformly enforced rule of an employer . . . ." KUIC outlined the reasons for its determination that Simpson was discharged for misconduct connected with the work:

> [Simpson] was discharged in part for exhaustion of the employer's progressive disciplinary policy. Progressive disciplinary policies are mechanisms by which an employer metes out discipline …. As such, progressive disciplinary policies are not themselves, "rules" as contemplated by KRS 341.370(6). It must be determined . . . whether [Simpson] engaged in misconduct in any single incident or when the incidents are considered together. Here, all of [Simpson's] disciplinary actions were for violations of the employer's policies, and can be evaluated using the standard set forth in KRS 341.370(6), which provides that a "*knowing violation of a reasonable and uniformly enforced rule of an employer"* constitutes misconduct. (Emphasis added).
>
> The employer's policy forbidding the failure to render proper patient care is reasonable in the context of the operation of a medical facility. [Simpson] did not contend that this policy was not uniformly enforced … and the Commission therefore considers this policy to be uniformly enforced by the employer when the employer becomes aware of a violation. [Simpson] was aware of

[1] Kentucky Revised Statutes.

> the employer's patient care policy, and knowingly violated [it] on or about October 4, 2010, and on or about July 12, 2011, by failing to check a patient's medication administration record prior to, or after dispensing insufficient medication to a patient, and by failing to record observation notes about a patient's firm and distended abdomen.
>
> [Simpson's] contention that the employer was looking for a reason to discharge [her] … lacks merit as well as credibility …. It strains common sense that a worker would continue to knowingly engage in a clear violation of the employer's HIPAA compliance policy while fearing that the employer was looking for a reason for her discharge.
>
> The employer's HIPAA compliance policy … is likewise reasonable in the context of a medical facility subject to HIPAA …. [Simpson] contends that the employer did not uniformly enforce this policy …. The employer testified that the policy is uniformly enforced by the employer when the employer becomes aware of a violation. The Commission finds the employer's policy uniformly enforced when the employer becomes aware of a violation. [Simpson] admitted at hearing that she was aware of the employer's policy forbidding such conduct, but chose to violate the employer's policy. [Simpson] did not have the permission of the employer to violate the employer's policy.

KUIC declined to consider certain documentary evidence, the purported messages between and among Simpson and her co-workers, because she did not present it until after the referee hearing; therefore, it was not a proper part of the record. However, Simpson herself testified concerning similar policy violations by her fellow workers.

On June 17, 2013, Simpson appealed by timely filing a Verified Complaint in the Clark Circuit Court. By Opinion and Ruling entered June 23,

2016, the Circuit Court affirmed. The court concluded that KUIC's decision was supported by substantial evidence and concurred with the Commission's application of the law to the facts. On July 21, 2016, Simpson filed a Notice of Appeal to this Court.

On appeal, Simpson submits that the primary issues are whether the Circuit Court "incorrectly affirmed 1) that the Commission applied the correct law to the facts of this case; and 2) that the Commission's decision was supported by substantial evidence."

"On appeal, we first review the Commission's findings of fact, which are binding if they are supported by substantial evidence of probative value. We then determine whether the correct rule of law was applied to the facts." *Western Kentucky Coca-Cola Bottling Co., Inc. v. Runyon,* 410 S.W.3d 113, 116–17 (Ky. 2013).

The parties provide citations to the transcripts of the referee hearing conducted on January 15 and February 28, 2013. However, the transcripts were not included in the record before us. Therefore, we must presume that the court's decision was duly supported by the record. "It is the responsibility of the appellant to present a complete record to this Court for review. When the record is incomplete, we assume the omitted record supports the trial court's decision." *Graves v. Commonwealth,* 283 S.W.3d 252, 255 (Ky. App. 2009).

Nevertheless, we are persuaded that the transcripts would not have altered the outcome of this case. It is quite evident that KUIC was persuaded by

Kindred's proof -- as was its prerogative. "As the fact-finder, the KUIC has the exclusive authority to weigh the evidence and the credibility of the witnesses." *Thompson v. Kentucky Unemployment Ins. Comm'n*, 85 S.W.3d 621, 626 (Ky. App. 2002). Our function in administrative cases is "one of review, not reinterpretation." *Id.* at 624. We may not substitute our opinion "as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence." *Id.*

Simpson argues that KUIC did not apply the correct rule of law to the facts as found because Kindred did not offer any proof that Simpson's behavior was a "willful, wanton or deliberate violation …." Our Supreme Court addressed a similar argument in *Kentucky Unemployment Ins. Comm'n v. Cecil,* 381 S.W.3d 238, 247 (Ky. 2012):

> Finally, we address Cecil's argument that in order to constitute disqualifying misconduct under KRS 341.370, there must additionally be a finding of bad faith or an inference of culpability in the form of willful or wanton conduct. Prior to 1982, KRS 341.370 simply provided that an employee would be disqualified from receiving unemployment insurance benefits if the employee was fired for "misconduct." At that time, there was no statutory definition of "misconduct," and our case law (adopting the standard set forth in *Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 296 N.W. 636 (1941)) held that under Kentucky's unemployment insurance act, "misconduct" required a showing of "bad faith or ... culpability in the form of willful or wanton conduct." *Shamrock Coal Co., Inc. v. Taylor, et al.,* 697 S.W.2d 952, 954 (Ky.App. 1985). *See also Kentucky Unemployment Ins. Comm'n v. Duro Bag Mfg. Co.,* 250 S.W.3d 351, 354(Ky.App. 2008); *Burch v. Taylor Drug*

> *Store, Inc., et al.,* 965 S.W.2d 830, 835 (Ky.App. 1998); *Douthitt v. Kentucky Unemployment Ins. Comm'n,* 676 S.W.2d 472, 474 (Ky.App. 1984). However, when the General Assembly amended KRS 341.370 in 1982, adding section (6), it chose not to include that standard.
>
> Unemployment insurance benefits are a statutory right granted by the General Assembly, which has the right to set the standard. "Where the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written." *Lincoln County Fiscal Court v. Dept. of Public Advocacy,* 794 S.W.2d 162, 163 (Ky. 1990). Accordingly we hold that 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).

In the case before us, KUIC determined that Simpson was discharged for statutorily defined conduct connected with the work -- namely, the "knowing violation of a reasonable and uniformly enforced rule of an employer." KRS 341.370(6). We find no error.

Simpson also contends that she was denied due process because she was not provided notice of the actual reason for her termination prior to hearing. However, her brief does not include a statement at the beginning of the argument showing that the issue was properly preserved for review. CR[2] 76.12(4)(c)(v). Kindred contends that Simpson waived the argument because it was not presented to the referee or to the KUIC. Simpson has not filed a reply brief disputing that contention. Thus, we decline to address the issue. *Urella v. Kentucky Bd. of*

[2] Kentucky Rules of Civil Procedure.

Medical Licensure, 939 S.W.2d 869, 873 (Ky. 1997) ("[F]ailure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review….").

Simpson also contends that she was "denied the right to have all of the relevant text messages of other employees ... as evidence." KUIC properly declined to consider that documentary evidence because it was not presented until after the referee hearing.

> KUIC itself is limited by a Kentucky Administrative Regulation (KAR) as to the matters it may consider on appeal from a Referee. 787 KAR 1:110(2)(a)1 provides "all appeals to the commission shall be heard upon the records of the division and the evidence and exhibits introduced before the referee."

Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission, 515 S.W.3d 186, 190 n.3. (Ky. App. 2016). We find no error.

We affirm the Opinion and Ruling of the Clark Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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JOINT BRIEF FOR APPELLEES:

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION:

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