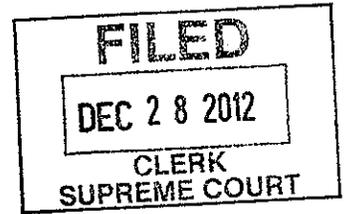


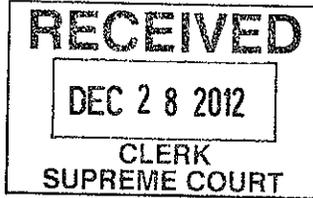
COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-000784-DG



COURT OF APPEALS CASE NO. 2011-CA-000326

WARREN CIRCUIT COURT, CIVIL ACTION NO. 2009-CI-01701
HON. STEVE A. WILSON, JUDGE

WESTERN KENTUCKY COCA-COLA
BOTTLING COMPANY, INC.



APPELLANT

V.

TREVOR RUNYON and
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

APPELLEES

**REPLY BRIEF ON BEHALF OF APPELLANT, WESTERN KENTUCKY
COCA-COLA BOTTLING COMPANY, INC.**

This will certify that ten copies of this reply brief were on this 27th day of December, 2012, forwarded by overnight FedEx to: Susan Stokley Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 209, Frankfort, KY 40601; and that a true and correct copy of same was placed in the U.S. Mail on this date to: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Steve A. Wilson, Judge, Warren Circuit Court, Warren County Justice Center, 1001 Center Street, Suite 404, Bowling Green, KY 42101; Trevor Runyon, 523A Lost Circle, Bowling Green, KY 42101; Trevor Runyon, 698 Greenbriar Road, Alvaton, KY 42122; Trevor Runyon, 828 N. Caswell Avenue, Southport, NC 28461; and Amy F. Howard, Staff Attorney, Office of Legal and Legislative Services, 500 Mero Street, Capital Plaza Tower, Room 307, Frankfort, KY 40601. This will certify that the Record on Appeal was returned to the Clerk of the Warren Circuit Court prior to the filing of this brief.

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APPENDIX --

Exhibit A—Unemployment Referee Decision, June 4, 2009

Exhibit B—Unemployment Commission Decision, September 23, 2009

Exhibit C—Warren Circuit Court Default Judgment Order, January 18, 2011

Exhibit D—Warren Circuit Court Order Affirming Commission Decision,
January 18, 2011

Exhibit E—Court of Appeals Panel Opinion, December 9, 2011

Appellant, Western Kentucky Coca-Cola Bottling Company, Inc. (hereafter "WKCC"),
by counsel, for its reply brief, states as follows:

INTRODUCTION

This is an unemployment benefits appeal. The employee, Trevor Runyon, was terminated by WKCC because he walked off of the job without permission, without giving notice and without giving any reason for leaving. The Unemployment Referee found for WKCC, concluding as follows: "By choosing to leave work without his supervisor's permission and without giving a reason, the claimant's actions constituted insubordination. Insubordination is an act of misconduct." (Unemployment Referee's June 4, 2009 Opinion, p. 3) (attached as Exhibit A).

Subsequently, the Unemployment Insurance Commission reversed the Referee's decision and held that Mr. Runyon was not terminated for misconduct. A copy of the Commission's opinion is attached as Exhibit B. Thereafter, WKCC appealed to the Warren Circuit Court, naming both Mr. Runyon and the Unemployment Insurance Commission as Defendants as required by KRS 341.450(1). After being served with process, Mr. Runyon did not ever file responsive pleadings in the Warren Circuit Court. WKCC moved for and was granted a default judgment against Mr. Runyon on January 18, 2011. A copy of the Warren Circuit Court's default judgment order is attached as Exhibit C. Neither Mr. Runyon nor the Commission moved to set aside or appealed or cross-appealed the entry of the default judgment. On the same day, January 18, 2011, the Warren Circuit Court also entered an order affirming the Commission's decision in favor of Mr. Runyon. A copy of this order is attached as Exhibit D.

WKCC then appealed to the Court of Appeals and a panel of that Court entered an opinion affirming the Warren Circuit Court on December 9, 2011. A copy of that opinion is attached as Exhibit E. The panel concluded that, even though the default judgment order and the order affirming the Commission were made on the same day, the Warren Circuit Court had abandoned the default judgment ruling (without saying so) because the order affirming the Commission was placed in the record immediately after the default judgment order. In addition, the Court of Appeals concluded that there was substantial evidence to support the Commission's decision in favor of Mr. Runyon. WKCC then moved for discretionary review in this Court and this was granted on September 12, 2012. WKCC now files this reply brief in response to the brief filed by the Commission. Mr. Runyon, consistent with his past behavior in this case, has not participated in the briefing in this Court.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed by the parties in this case.

- Trevor Runyon was employed as a night loader at the WKCC's soft drink distributorship in Warren County from June of 2006 until his termination on March 26, 2009. (Transcript of Referee Hearing, pp. 32-33).
- As a night loader for WKCC, Mr. Runyon worked from 12:00 p.m. until the soft drink trucks were loaded in the evening, sometimes as late as 10:00 p.m. (Transcript, p. 33).
- For over one month prior to his termination, Mr. Runyon had begun working at WKCC on Wednesdays. (Transcript, pp. 36-37). After this scheduling change, Mr. Runyon worked on Wednesdays from the beginning of the shift at 12:00 p.m. until 6:00 p.m. (Transcript, p. 40).
- Prior to his termination, Mr. Runyon had received prior warnings and a three-day suspension for tardiness and no call/no shows in June 2008. (Transcript, pp. 26, 38). On Wednesday, March 25, 2009, Mr. Runyon came into work at approximately 12:00 p.m. and stayed for only two hours before leaving work without prior notice or permission to leave early (well before the expected 6:00 p.m. departure). (Transcript, p. 37).

- When Mr. Runyon went to clock out on Wednesday, March 25, 2009, his supervisor, Cecil Webb, asked him if something was wrong. Mr. Runyon stated that it was not. (Transcript, p. 37). Mr. Webb then told Mr. Runyon that he could not just come and go from work as he pleased. (Transcript, p. 37). Despite that warning, Mr. Runyon still clocked out and left work without obtaining permission to do so and without giving any reason for doing so. (Transcript, pp. 25, 37).
- The next day, Thursday, March 26, 2009, Mr. Webb terminated Mr. Runyon when he arrived at work, informing him that he was being discharged for not coming in, always being late and leaving without giving a reason. (Transcript, p. 34). Mr. Runyon then told Mr. Webb: "Fuck it. I don't care." (Transcript, p. 34).

ADDITIONAL FACTUAL BACKGROUND

In addition, Mr. Runyon himself testified that, when he received his three-day work suspension in June of 2008, he was told that any future attendance issues would result in his discharge. (Testimony of Mr. Runyon, Transcript, p. 38). Cecil Webb, Mr. Runyon's supervisor, did not recall that warning but Mr. Runyon was adamant that it did occur. Thus, Mr. Runyon knowingly walked off the job site having received this warning and after being told by his supervisor on the day in question that he could not come and go from work as he pleased.

THE COMMISSION'S FACTUAL FINDINGS AND LEGAL CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In its opinion, the Unemployment Insurance Commission misstated the record and the testimony which was received by Referee Ivie. Specifically, the Commission misstated the record on page three of its opinion (attached hereto as Exhibit B) when it stated that: "It is also noted that the claimant was not discharged in June 2008 nor was he advised that his job was in jeopardy due to alleged absenteeism. (Commission Decision, p. 3) (Record on Appeal, p. 26) (emphasis added).

This statement by the Commission was made despite the fact that Mr. Runyon specifically testified that he had been given a three-day suspension in June 2008 for attendance issues and admitted that he was told at that time that any further attendance incidents would lead to his discharge. (Transcript, p. 38).

The Commission seeks to avoid the consequences of its misstatement by pointing out that Cecil Webb, the supervisor, did not recall the termination warning. However, the Commission did not premise its finding that Mr. Runyon had not been warned that his job was in jeopardy and subject to termination on any such testimony by his supervisor. There is no reference in the Commission's decision to any such testimony by Mr. Webb. Indeed, there is every reason to believe that the Commission either ignored Mr. Runyon's own admission about the warning or failed to look for it in reviewing the evidentiary record. Either way, the Commission's factual findings are incorrect and the Court owes them no deference.

This case can and should be decided on the testimony on Mr. Runyon himself. He admitted at the evidentiary hearing that he had a problem with work attendance and that he had been previously suspended for this issue and warned that any further incidents would lead to his discharge. He admits that he had been working regularly on Wednesdays from noon until at least 6:00 p.m. When Mr. Runyon chose to leave work after only two hours on Wednesday, March 25, 2009, WKCC had no notice and had to scramble to make up for his absence.

Mr. Runyon admits he gave no specific reason for leaving work early on this date nor did he seek permission from his supervisor to do so. He concedes that Mr. Webb told him as he went to clock out that he could not come and go from work as he pleased. See Kentucky Unemployment Insurance Commission v. Stirrat, 688 S.W.2d 750, 753 (Ky. App. 1984) ("An employer generally has neither an affirmative duty ... nor is required to tolerate a mode of

conduct which has the effect of reducing the efficiency of the employer's operation ..." (citing Coker v. Daniels, 593 S.W.2d 59 (Ark. App. 1980); Brown Hotel Co. v. White, 365 S.W.2d 306, 307 (Ky. 1962) ("Absences from work affect the entire work schedule of an employer and frequently make it impossible to utilize to the full extent the services of the employees who are present.")).

Despite knowing that any further incident would lead to his termination, Mr. Runyon still chose to leave work early. Mr. Runyon also cursed at his supervisor the next day. These acts constitute insubordination and they cannot be deemed anything but misconduct connected with the work. In ruling to the contrary, the Commission (and the reviewing courts that deferred to it) made a clear error of law. See Holbrook v. Kentucky Unemployment Insurance Commission, 290 S.W.3d 81, 87 (Ky. App. 2009) (insubordination is a willful disregard of an employer's instructions and such a refusal to obey reasonable instructions "may arise from one's actual verbal rejection or, more typically, by one's careless or unreasonable disregard or ignoring of an employer's reasonable instructions.").

Despite the Commission's protest to the contrary in its brief, the law does not allow an employee to come and go from work as he pleases without giving any reason for leaving work early. See Shepherd v. District of Columbia Department of Employment Services, 514 A.2d 1184, 1186 (D.C. 1986) ("Attendance at work is an obligation which every employee owes his or her employer, and poor attendance, especially after one or more warnings, constitutes misconduct sufficient to justify the denial of a claim for unemployment benefits."); Fritz v. Commonwealth Unemployment Compensation Board of Review, 446 A.2d 330, 333 (Pa. Commw. Ct. 1982) (history of tardiness and absenteeism, as well as leaving early without permission, constitutes willful misconduct). KRS 341.370(6) includes unsatisfactory work

attendance as part of the definition of misconduct that disqualifies an employee from receiving unemployment benefits. "The test for determining misconduct is whether the employee's action evidence a 'willful and wanton disregard of the employer's interest.'" Burch v. Taylor Drugstore, Inc., 965 S.W.2d 830, 835 (Ky. App. 1998) (citing Shamrock Coal Co. v. Taylor, 697 S.W.2d 952, 954-955 (Ky. App. 1985)). An employee who is terminated for misconduct is not entitled to recover unemployment benefits. KRS 341.370(1)(b).

There is no doubt that Mr. Runyon displayed no regard for his employer's interest by walking off of the job on March 25, 2009 without notice or permission. This is what Referee Ivie correctly held below. Because the Commission's factual findings and legal conclusions concerning this behavior are not supported by substantial evidence, its decision should be given no deference and should be reversed. The fact that Mr. Runyon has not participated in this case at all reveals his lack of interest and abandonment of his claim. Accordingly, it is appropriate to reinstate the Referee's decision in favor of WKCC.

**THE UNCHALLENGED DEFAULT JUDGMENT AGAINST
MR. RUNYON PROHIBITS ANY RULING IN HIS FAVOR.**

As indicated above, neither Mr. Runyon nor the Commission moved to set aside or appealed or cross-appealed the entry of the default judgment. Because the default judgment was not challenged, it is now the law of the case. See United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994) ("Under the doctrine of the law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation."). KRS 341.450(1) required WKCC to name both Mr. Runyon and the Commission as defendants in the Warren Circuit Court action. The only way to name Mr. Runyon as a defendant as required by the statute was to include him in the complaint and serve him with a summons. The summons

was personally served on Mr. Runyon on December 23, 2009 and the summons states that unless a written defense is made by the defendant within twenty days from service, judgment by default may be taken against the defendant for the relief demanded in the complaint. The relief requested in the complaint here was a reversal of the Commission's unemployment award and a reinstatement of the Referee decision and relief from WKCC's reserve account. Thus, Mr. Runyon was on notice that he must respond to the complaint and that failure to do so could result in a default judgment in this case.

WKCC disagrees with the Commission that CR 1 applies and defeats the entry of default judgment. The statute authorizing an unemployment appeal requires the affected employee to be named as a party in the circuit court action. The civil rules have been held to apply in unemployment appeals and that remains the law in Kentucky. See Brown Hotel v. Edwards, 365 S.W.2d 299, 300 (Ky. 1962). As indicated, that is done by having a summons issued to the employee/defendant. The employee is the real party at interest; the Commission is not. The Commission cannot answer for the employee in appeals to the circuit court or beyond.¹ See Stearns Coal & Lumber Co. v. Unemployment Compensation Commission of Kentucky, 285 Ky. 249, 147 S.W.2d 382, 383 (1941) ("The right to act for and on behalf of others was not conferred by the act permitting appeals to the courts from the decision of the Commission and prescribing the procedure to be followed."). Mr. Runyon's failure to participate in this case has real and meaningful consequences. The default judgment was granted and not challenged by any party thereafter. It is final and binding and should be given effect.

Likewise, the ruling of the Court of Appeals panel based solely on the placement of the Warren Circuit Court's contemporaneous orders in the record is untenable. The Warren Circuit

¹ The Commission tacitly concedes this point at pages 7-8 of its brief when it states it did not challenge the entered default judgment order and questions its standing to have done so.

Court did not indicate that it was abandoning its default judgment ruling when it contemporaneously entered the order affirming the Commission's decision. One order had to be entered first and the other had to be entered second. To base a decision in this case on the placement of the orders makes no sense. The reasoning that the default judgment was abandoned because the order affirming the Commission was placed after it in the record is faulty logic that should be given no consideration or approval by this Court.

The Court is urged to hold that the employee is the real party in interest in unemployment appeals and that the employee must participate in the appeal to be eligible for benefits. Here, Mr. Runyon has indicated to all that he has no interest in this case by abandoning his claim for unemployment benefits. He had the right to make that choice and it should now be held as binding against him. The Commission does not represent Mr. Runyon and it should not be allowed to advocate for him when he has chosen not to do so for himself.

CONCLUSION

Based on all of the foregoing, WKCC urges the Court to reverse the Court of Appeals and to reinstate the well thought out decision of the Unemployment Referee. The entry of a consistent opinion is respectfully prayed.

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