

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002236-MR

DENISE MULLINS

APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE ROBERT E. GILLUM, JUDGE  
ACTION NO. 03-CI-00107

COMMONWEALTH OF KENTUCKY,  
WORKFORCE DEVELOPMENT CABINET,  
DIVISION OF UNEMPLOYMENT INSURANCE,  
KENTUCKY UNEMPLOYMENT INSURANCE  
COMMISSION, AND LINCOLN COUNTY  
REGIONAL JAIL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Denise Mullins was discharged from her employment as a deputy jailer at the Lincoln County Regional Jail September 28, 2002. The discharge stemmed from an incident which occurred at the jail in which bond money that Mullins had handled came up missing. Her letter of discharge from Jailer William "David" Gooch set forth the following allegations of misconduct committed by Mullins as reasons for her dismissal:

(1) theft of \$504.00; (2) failure to properly use audio-video surveillance equipment; (3) failure to properly control inmate movement; (4) failure to keep control room door locked; (5) abandoning control room; and (6) chronic use/abuse of narcotics/controlled substances, impairing ability to safely competently perform duties.

It was Mullins' duty to prepare the bond by placing the money in an envelope and dropping it into a slot in a locked box while speaking on camera. The camera only took a picture every few seconds, and employees were required to move slowly while on camera so that it could record their movements. When the envelope was determined to be missing the next day, review of the tape revealed that Mullins had not followed the procedure. It could not be seen what she did with the bond. When questioned, Mullins asserted that she had dropped the bond envelope in the slot. The camera review also tended to show that, contrary to policy, Mullins did not keep the control room door closed and she prepared the bond in the presence of an inmate. The inmate was supposed to have been supervised at the time by another deputy, not by Mullins.

Jailer Gooch immediately suspended Mullins after the bond money was not recovered or repaid by her. He then inquired into Mullins' drug use as a result of this incident, attempting to explore a motive for the alleged theft. Mr. Gooch spoke with inmates who alleged that Mullins was dealing in drugs. However,

Mullins denied illegal drug use and explained her positive drug test by establishing proof through her physician that she was on prescription medication. Mr. Gooch presented a drug case against Mullins to the grand jury, which failed to indict. Thereafter, Mr. Gooch sent Mullins the letter of termination.

Following her termination, Mullins applied for unemployment benefits. She was awarded benefits on a finding that she did not act in willful disregard of her employer's interests and the discharge was for reasons other than misconduct associated with the work. Mr. Gooch appealed the decision. An appeals referee conducted a hearing and affirmed the determination that Mullins was terminated for reasons other than misconduct connected with the work. The referee concluded that there was no evidence that the claimant was guilty of dishonesty or violating the employer's policy regarding a drug free workplace.

Jailer Gooch appealed this decision to the Kentucky Unemployment Insurance Commission (KUIC), which reversed the decision of the referee. The KUIC found that Mullins:

was aware of the rule, which was emphasized by David Gooch, jailer, at monthly employment meetings, requiring deputies taking bond money to face the camera in the control room to move slowly and speak loudly while identifying what and for whom they were making a drop into the lock box. . . . Claimant even asked Mr. Gooch to go over the procedure at one of the monthly meetings.

The KUIC found that Mullins was in knowing violation of the reasonable and uniformly enforced rule requiring correct use of the camera while making a bond drop. The KUIC found that the rule's importance was emphasized monthly by Gooch and once at Mullins' request. The KUIC declared that the importance of the rule was obvious. The KUIC further found that there was no evidence that Mr. Gooch or his chief deputy were aware that anyone violated this rule.

The KUIC also found that Mullins was not guilty of the allegations that she violated the rule against leaving the control room unattended since that was done customarily, even by Mullins' supervisor. The KUIC also concluded that Mullins' being in the presence of inmates while handling the bond money was not misconduct because she was not responsible for that happening.

Mullins appealed the KUIC's order to the Lincoln Circuit Court which dismissed the claim on the basis that substantial evidence existed to support the KUIC's finding that Mullins failed to comply with a well-known rule of the employer. Mullins appeals to this Court and argues that the KUIC's finding that she knowingly violated a reasonable and uniformly enforced rule of the employer was erroneous. Mullins contends that she was actually fired because she would not confess to the theft of

the bond money. She also claims that it was improper to deny benefits based on a single act of negligence. Finally, she alleges there was no evidence that she was trained in the video procedure or that it was a uniformly enforced rule. We affirm the Lincoln Circuit Court.

KRS 341.370(1)(b) states that a worker shall be disqualified from receiving benefits for the duration of any period of unemployment if she was "discharged for misconduct or dishonesty" connected with her most recent work. KRS 341.370(6) gives examples of the misconduct contemplated by the statute, including, but not limited to, falsification of an employment application, knowing violation of a reasonable and uniformly enforced rule of an employer, unsatisfactory attendance, alcohol or drug abuse on employer's premises during working hours, endangering safety of self or co-workers, and incarceration which results in missing at least five days work.

The employer has the burden of proving that the employee's actions constituted misconduct. Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830, 835 (Ky.App. 1998). If there is substantial evidence in the record to support an agency's findings, they will be upheld even though there may be conflicting evidence in the record. Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). The agency's

findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record. Id.

Mullins first notes that KUIC's findings of fact state that "Mr. Gooch attempted to build a case for theft against" Mullins, even after the grand jury failed to indict her on the theft charge. Mullins argues that her refusal to confess to a crime is not a basis for a finding of misconduct. Mullins argues on appeal that KUIC accepted a pretextual reason for the discharge and disregarded its own findings as to why she was fired. She argues that the employer did not meet its burden of proof to establish that the discharge was for the reason given. Thus, Mullins believes that her discharge was arbitrary.

We do not agree that the findings were contradictory or that KUIC relied on a pretext to uphold the discharge on the grounds of misconduct. The employer listed its reasons in its discharge letter, which included the fact that Mullins did not correctly use the audio-video surveillance equipment. This was not a minor transgression considering what resulted in this case. The failure to properly use the equipment meant that what actually happened to the bond could not be ascertained, even if Mullins did not personally take the money. This failure went to the heart of why Mullins was discharged, and was not merely a pretext. Thus, we cannot agree that the KUIC's decision may be considered arbitrary.

Next, Mullins alleges that a person cannot be fired for misconduct for a single incident, citing Shamrock Coal Co., Inc. v. Taylor, 697 S.W.2d 952, 954-55 (Ky.App. 1985). We consider Mullins' reliance on Shamrock Coal to be misplaced. This Court stated in Shamrock Coal that an isolated instance of negligence or poor judgment was not the equivalent of misconduct under KRS 341.370. This Court perceived no bad faith or inference of culpability in the error made by the employee in that case.

In the case at bar, by contrast, the employer showed more than an instance of negligence or poor judgment. Despite Mullins' protests of innocence, there was an inference of culpability in that the only explanation was that Mullins took the bond money or allowed someone else access to it. This was not a case of mere misjudgment, moreover, since the action required by the employer could only be performed a particular way and did not involve the exercise of judgment by employees.

The test for determining misconduct is whether the employee's actions evidence a "wilful and wanton disregard of the employer's interests." Burch, 965 S.W.2d at 835, quoting Shamrock Coal, 697 S.W.2d at 954-55. We agree that Mullins' failure to follow the clear rule of the employer constituted a wilful and wanton disregard of the employer's interest in the

proper handling and safeguarding of bond money. The finding of misconduct was correct.

Next, Mullins claims that there was no evidence that she was ever trained in the video/bond drop procedure. She cites testimony from the chief deputy that he did not conduct such training. Mullins ignores the evidence from Jailer Gooch that he conducted this training himself at regular meetings. Mr. Gooch stated that he trained Mullins himself by demonstrating the procedure. We do agree with Mullins that no evidence exists to support the KUIC's finding that Mullins requested training at a meeting. However, the other findings are supported by substantial evidence and were sufficient.

Mullins also challenges the evidence that this was a uniformly enforced rule of the employer. Mullins claims that the jailer and chief deputy acknowledged that other employees may have failed to do the procedure correctly. However, they stated that they did not always know how other deputies performed the procedure because they did not routinely review the tapes. They said they had not had to because bond money had never been missing. Because the employer was not aware of any previous violations of this rule and because the employer had not previously failed to enforce the rule upon learning of a violation, the bond drop procedure was uniformly enforced. The evidence supported the finding of the KUIC.

For the foregoing reasons, we affirm the judgment of  
the Lincoln Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bradley S. Guthrie  
Harrodsburg, Kentucky

BRIEF FOR APPELLEE:

B. Amy O'Nan  
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