KENTUCKY UNEMPLOYMENT INSURANCE DIGEST

A SYLLABUS OF UNEMPLOYMENT INSURANCE APPEAL DECISIONS

Welcome to the Internet edition of the

KENTUCKY UNEMPLOYMENT INSURANCE DIGEST

At the beginning of each chapter you will find three main groups to assist you in finding the topic you need. The first is CONTENTS BY ISSUE. This is basically a table of contents divided into topics by general terms. The second is the LIST OF TITLES. This is a list of decisions divided into two groups, precedent and non-precedent. The third group is a CHAPTER LIST OF COMMISSION ORDERS (in ascending numerical order). The fourth list is the LIST OF COURT CASES which includes both published and no-n-published decisions. Non-published decisions cannot be quoted as bases for any decisions but are used for guidance purposes only. Some of the Chapters may also contain introductory discussions about the general topics and how they are adjudicated.

Each Commission Order or Court Case is assigned an entry number that correlates with the chapter number. Hence all able and available issues would bear a four digit nember beginning with the numeral 1. The labor dispute issues would bear a four digit number beginning with the numeral 2 and continuing sequentially thereafter through chapter 8000. Chapters 9000 and 10,000 are MASTER LISTS. These numbers are used only as a way to locate a decision within a chapter and are not the actual Commission Order numbers.

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As new orders are issued by the Kentucky Unemployment Insurance Commission they will be added to this document.

KENTUCKY
UNEMPLOYMENT INSURANCE
PRECEDENT DIGEST

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Chapter 1000

ABLE AND AVAILABLE

CONTENTS BY ISSUE

1000 CASUAL LABORER RESTRICTS AVAILABILITY.

ISSUE: Whether the claimant, a casual laborer, was voluntarily or involuntarily unemployed during those periods of time when he chose not to make himself available for duty; and further, whether claimant was available for work during those same periods of time.

1. Worked for the captioned moving and storage company as a helper (casual laborer) virtually whenever he presented himself for duty.

2. Was not obligated to report for work, and the company was not obligated to provide work when he did.
3. There were no rights or duties in any way binding the parties between job assignments.
4. Between January 20, 1983 and March 4, 1983, and following March 21, 1983, claimant chose not to make himself available for duty with the captioned employer.

REASONS: Since there were no contractual rights or duties between claimant and the company during periods between actual job assignments, each of which generally lasted no longer than a single workday, each job assignment constituted a separate employment relationship. And each of those relationships ended when claimant completed performing the work made available to him on it. It was in that way that he completed such assignments on both January 20 and March 21, 1983. Because the assignment ended with claimant's completion of it, he did not leave the work; the work left him (KRS 341.370). All he did was cease to make himself available for new assignments.

The issue of availability (KRS 341.350) was not ruled on by the referee because the issue was not under appeal. However, the Commission found that the record supported a presumption of unavailability for work during those periods of time when the claimant chose not to make himself available for duty. Remanded on availability issue.

DECISION: Claimant held to be involuntarily unemployed (i.e., discharged) following the completion of each work assignment, and not disqualified on that ground. However, the case was remanded to the local office for its determination of the claimant's availability for work between January 21, 1983, and March 4, 1983, and after March 21, 1983, and to offer the claimant an opportunity to rebut the aforementioned presumption of unavailability.

C.O. # 35890 NONPRECEDENT

1001 RESTRICTING AVAILABILITY TO A SINGLE SHIFT.

ISSUE: Whether restricting availability to a single shift necessarily results in unavailability for work.

FACTS:
1. A divorced mother of two adolescent children.
2. Last worked as a registered nurse for a hospital, in excess of three years, on the day shift.
3. Sought only day shift work, because she was needed at home in the evening and late night hours to care for children.
4. However, her work search was extensive and included seeking employment in areas outside of that in which she last worked.

REASONS: Heretofore, claimants who limited their availability to a single shift were routinely held unavailable for work on the ground they had removed themselves from a significant portion of the labor market when the work for which they were qualified was normally performed on more than a single shift. In this precedent setting order, the Commission held that, henceforth, claimant's availability for work MUST be based on, 1) whether the claimant's limitations are based on sound and good cause, and 2) whether there remains, despite limitations, a genuine attachment to a realistic labor market (KRS 341.350). Further, the Commission established the policy:

That an employee who has been separated involuntarily from his or her employment, who has established a work history on a single shift, and who is compelled to limit a search for work, or to reject tendered employment for "good cause" when the reason for such limitation would be deemed valid and not indicative of an unwillingness to work, such is not, of itself, sufficient to support a denial of benefits.

DECISION: Claimant held available for work on grounds she remained genuinely attached to a realistic labor market, despite limiting, for good cause, her availability to a single shift.

C.O. # 22361 PRECEDENT

1002 REFEREE LACKS AUTHORITY TO RULE BEYOND TERMINATION DATE OF SECOND DETERMINATION.

ISSUE: Whether a referee has authority, when a second determination terminates an indefinite period of ineligibility, to rule on the same issue beyond the termination date of the second determination.

FACTS:
1. Claimant appealed a determination holding him unavailable for work and ineligible for benefits from July 29 through August 11 and thereafter until conditions substantially change.
2. Prior to the appeal being heard by a referee, a second determination was issued terminating the period of ineligibility on August 11.
3. The referee affirmed the first determination and extended the period of ineligibility through the hearing date of September 19.

REASONS: It is within the authority of the Division's examiners to issue determinations affecting a claimant's eligibility for benefits at any time during the claiming period regardless of the pendency of an appeal. When, as in this case, a determination is issued ending a period of ineligibility imposed by a previous determination, and that previous determination is under appeal to a referee, the scope of the referee's authority is limited to the period encompassing the commencement date set forth in the initial determination and the termination date established by the second determination.

DECISION: The Commission affirmed the referee's ruling of claimant's ineligibility through August 11, but set aside the extension through the hearing date, which has the effect of affirming the second determination holding claimant eligible after August 11.

C.O. # 21382 NONPRECEDENT

1011 WILLINGNESS TO WORK ALLEGED; BUT NO WORK SEARCH (COLLEGE STUDENT).

ISSUE: Whether a full-time college student attending day classes is available for full-time work by simply expressing a willingness to forego his studies, when there is no evidence he is seeking full-time day work.

FACTS:
1. Attends classes Monday through Friday from 10:00 a.m. to 2:00 p.m.
2. On appeal to the Commission asserted a willingness to forego studies in order to obtain a full-time position.
3. Work search limited to full-time night shift and part-time day work.

REASONS: KRS 341.350 (4) contemplates that a worker should provide evidence of an attachment to the local labor market that does not place undue restrictions upon his ability to accept full-time employment. Here, claimant has been unable to secure full-time work during the day because he attends college from 10:00 a.m. to 2:00 p.m. each day, when the greater part of the labor force is employed. Such school attendance creates the strong presumption of unavailability. In this case, the claimant's work search evidence was insufficient to overcome this presumption.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 11498 NONPRECEDENT

1040 EFFECT OF YEARLY CONTRACT DURING OFF SEASON (FEDERAL CIVILIAN EMPLOYEE).

ISSUE: What is the effect of working under a yearly contract on a claimant's entitlement to benefits during an off-season period of unemployment, when resumption of employment is expected at the end of the off-season (because the claimant is a school teacher, her entitlement to benefits would now be covered by KRS 341.360; nevertheless, this order has broad applicability).

FACTS:
1. Claimant was a tenured school teacher on a federal army post.
2. Last contract period was from August 27, 1962, through August 26, 1963.
3. Contracts are customarily negotiated near the end of the school year.
4. Last day worked was June 4, 1963.
5. Had not signed a contract for the 1963-64 school year prior to the summer vacation.
6. Filed for benefits June 27, 1963.
7. During summer vacation, claimant enjoyed, without interruption, coverage under the Civil Service Retirement Act and eligibility for life and health insurance benefits.
8. Returned to teaching following summer vacation.

REASONS: In Order Number 2720, the Commission held a baseball player, whose salary was only for the active months, to be neither unemployed nor available for work during the off-season, because he had contracted his services on a yearly basis (which contract period encompassed the off-season) to the parent baseball club. The instant case squares with the baseball case. As a general rule the Commission finds that a federal civil service employee under a contract from year to year and paid by the month is not eligible to receive Kentucky unemployment insurance benefits during the off-season unemployment (KRS 341.350), especially when resumption of the federal employment is expected at the end of the off-work period, and when certain advantages of the relationship, such as coverage under the Civil Service Retirement Act and eligibility for life and health insurance benefits, are enjoyed without interruption.

DECISION: Claimant held not unemployed; therefore, unavailable for work and ineligible to receive benefits during the off-season.

C.O. # 5412 NONPRECEDENT

1080 RURAL AREA; LIMITED WORK SEARCH; NO TRANSPORTATION (URBAN AREA CLAIMANTS COVERED IN NOTE AT THE END OF THIS ENTRY).

ISSUE: Whether the claimant, who lives in a rural area with few work opportunities and has no means of transportation, may limit his work search to employers within walking distance of his home.

FACTS:
1. Entire work experience as a coal miner.
2. On February 21, 1961, laid off for lack of work by Hurricane Coal Co.
3. Has no work prospects, except a promise of POSSIBLE recall by Hurricane.
4. Lives in a rural area with few work opportunities and has no transportation.
5. During the three months under appeal, work search consisted of contacting the four coal mines within walking distance of home.

REASONS: KRS 341.350 (4) requires that a claimant be available for and actively seeking suitable work. This has been held to mean that a claimant must establish a genuine attachment to a realistic labor market, with intentions of working. In this case, the paucity of work contacts does not demonstrate a genuine attachment to the labor market. Further, the labor market to which the claimant made himself available (i.e., employers within walking distance of his home) was so limited as to not be realistic.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

NOTE: In Order Number 9530, the Commission held the claimant, a resident of Lexington, Ky., unavailable when his entire work search for more than three months consisted of contacting four employers within walking distance of his home. Claimant had no means of transportation. In Order Number 11519, the Commission held the claimant, a resident of Louisville, Ky., unavailable when, because of a lack of funds to get around, she sought work with only five employers in two months.

C.O. # 4018 NONPRECEDENT

1081 LACK OF TRANSPORTATION; INABILITY TO REPORT AND CLAIM BENEFITS.

ISSUE: Whether lack of transportation resulting in failure to report and claim benefits necessarily renders claimant unavailable for work.

FACTS:
1. A seasonal groundskeeper for a cemetery, living in a rural area (48 miles from the local office).
2. After reporting to the local office three times to claim benefits, he notified local office by mailing in his claim card that he was unable to report for his fourth visit due to car trouble.
3. Held unavailable for work due to lack of transportation.

REASONS: In an unpublished decision (not to be cited) the Kentucky Court of Appeals reversed the referee, the Commission, and the Circuit Court and held that the claimant's lack of transportation to travel the 48 miles to the local office to claim benefits for a period of time did not NECESSARILY remove him from the rural labor market in which he resided (KRS 341.350).

Kentucky Court of Appeals, JOSEPH WREN VS. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 84-CA-1186-MR. Unpublished. Not to be cited or quoted. For guidance only.

1090 PROOF OF AVAILABILITY; FOLLOWING A QUITTING TO CARE FOR CHILDREN (QUITTING TO CARE FOR ILL RELATIVE, COVERED AT THE END OF THIS ENTRY.

ISSUE: Whether the claimant who quit work to care for her children must show a higher than ordinarily required quality of proof to show resumption of a genuine work availability status.

FACTS:
1. Claimant, a mother of eleven children, ten of whom live at home, quit her job on October 7, 1960, to care for them.
2. Gave birth to her twelfth child on May 21, 1961.
3. Thereafter, her work search, through the hearing date of December 11, 1961, consisted of a single contact with a former employer (who promised to consider her if there was an opening) and contacting local stores and a dairy, types of work for which she had no experience.

REASONS: KRS 341.350 (4) contemplates that a worker should demonstrate an active presence in a labor market with intentions of working. In determining availability status, ALL circumstances, including the reasons for the job separation, should be considered. In this case, the claimant left her job for domestic reasons. Therefore, a "high quality of proof" is necessary to show both that those domestic circumstances no longer prevent her from working, and that she is genuinely attached to a realistic labor market. Such proof is not present in this case, as evidenced by the paucity of work contacts and her failure to keep in closer contact with her last employer.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4128 NONPRECEDENT

NOTE: In Order Number 9704, the Commission held a claimant unavailable after she quit work to care for her ill husband when her work search for the more than two months under appeal consisted of contacting her former employer and two other employers.

1160 SEMI-RURAL AREA; WORK SEARCH AUGMENTED.

(SEE NOTE AT END OF THIS ENTRY FOR ADMONISHMENT AGAINST APPLYING A HARD AND FAST RULE IN DETERMINING ELIGIBILITY)

ISSUE: Whether the claimant, who resides in a semi-rural depressed labor market, must engage in a futile work search, when she has augmented an already exhaustive work search.

FACTS:
1. Resides in a semi-rural area with a small, depressed labor market.
2. Only work experience was four years as a nursing assistant and office clerk in a doctor's office practice.
3. Became unemployed in late November 1979.
4. During weeks ending March 22, March 29, and April 5, contacted one, three, and two employers respectively.
5. On April 15, 1980, claimant applied at two utilities, and her ineligibility was terminated the end of that week.
6. During the weeks under appeal, claimant made numerous inquiries through friends, of possible employment prospects.
7. Employers within the available labor market made it abundantly clear that there were no jobs available, that her applications were on file, and that they would contact her if work became available.

REASONS: KRS 341.350 (4) contemplates that a worker must make a reasonable search for work, as might be expected of a prudent worker in like circumstances, and be ready to accept work within the available labor market. In this case, the labor market available to the claimant had been diminished by the acute state of economic insecurity prevailing at that time. Considering the economic climate, it would have been unreasonable to require the claimant to engage in a futile and perfunctory work search by repeatedly contacting employers who had made it clear that they had no jobs available. In this particular case, claimant's in- person contacts with employers during the weeks under appeal, augmented by her inquiries through friends, reflects the efforts of a prudent person desiring to become employed.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 23243 NONPRECEDENT

NOTE: Commission cited FISHER PACKING COMPANY (see introduction to this chapter) as authority for not applying a hard and fast rule in determining whether a worker meets eligibility requirements. In an earlier Order Number 11250, the Commission held the referee to have erred in holding, AS A MATTER OF LAW, that three contacts in fifteen weeks were insufficient. Each case must be determined on the basis of its factual matrix.

1164 WORK SEARCH; WITHIN PHYSICAL CAPABILITIES.

ISSUE: Whether a physically-impaired claimant must seek employment within limitations imposed by his doctor.

FACTS:
1. Claimant was a chief maintenance electrician for seven years.
2. Suffered a severe heart attack and was barred by his doctors from performing his customary work.
3. Made three job contacts in five and one-half weeks seeking work as a maintenance electrician.

REASONS: KRS 341.350 (3) and (4) provide that a claimant must be able and available for work. To comply with these two eligibility requirements, the worker must conduct a diligent effort to find and pursue employment of a kind which his present state of health will tolerate. Despite physical disorders, he must show that a labor market for his services exists, and that his efforts to find work within that labor market are sufficient to attach him currently to it. There is a lack of such evidence in the present case.

DECISION: Claimant held both unable and unavailable for work and therefore ineligible to receive benefits.

C.O. # 11096 NONPRECEDENT

1170 WORK SEARCH VIA TELEPHONE AND NEWSPAPER ADS.

ISSUE: Whether a work search during the first part of unemployment made by telephone and newspaper ads satisfies eligibility requirements.

FACTS:
1. Worked seven years as a clerk typist.
2. During first two weeks under appeal, sought work via telephone.
3. Her efforts by telephone WERE NOT further developed at the hearing.
4. During the next four weeks, made personal job seeking contacts, in addition to telephone contacts and answering a blind ad in the newspaper.

REASONS: KRS 341.350 requires that a claimant be available for suitable work and making a reasonable effort to obtain work. Regarding claimant's search for work, full credit must be given to her efforts by telephone and responses to newspaper ads, as those are very good means of getting appointments for interviews for prospective clerical work. Considering that the period in question is during the first part of a series of claiming, it is found that her efforts meet at least the minimum work search requirements.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 8027 NONPRECEDENT

NOTE: Use sparingly and only after work search efforts by telephone and newspaper ads are fully developed with special attention given to whether the type of work being sought could be secured by such methods.

1180 PERFUNCTORY WORK SEARCH; INSUFFICIENT.

ISSUE: Whether work applications made only for the purpose of satisfying the technical requirements of the law are sufficient to prove availability.

FACTS:
1. After layoff on April 7, 1961, received 13 weeks of benefits.
2. Made only one work contact during weeks ending July 23 and July 30.
3. Held ineligible by an adjusted determination dated August 9, 1961.
4. On October 31, 1961, testified before the referee that she increased the tempo of her work search ONLY because she felt it necessary to satisfy eligibility requirements, not because she was desirous of securing work.

REASONS: KRS 341.350 (4) contemplates that a claimant must be available for and making such reasonable effort to secure work as might be expected of a prudent person DESIROUS of becoming employed. In this case, the claimant was not desirous of becoming employed; rather, she sought to circumvent the intent of the above-cited statute by engaging in a perfunctory work search designed ONLY to satisfy the technical requirements of the law.

DECISION: Claimant held unavailable for work and ineligible to receive benefits, until a subsequent adjusted determination dated February 1, 1962, terminated her ineligibility.

C.O. # 4160 NONPRECEDENT

NOTE: In FISHER PACKING COMPANY (see introduction to this chapter) the Kentucky Court of Appeals held that a claimant must be "...desirous to obtain employment..." and that availability "...depends to a great extent upon [her] mental attitude, i.e., whether [she] wants to go to work...."

1280 RESTRICTED WORK SEARCH; SUCCESSFUL.

ISSUE: Whether a restricted work search which proves successful within a reasonable period of time is sufficient to prove claimant available for the entirety of that time.

FACTS:
1. Last worked on January 8, 1979, as waitress and manager of a cafe.
2. Having no personal transportation, claimant had relied on others to take her to and from work during her one year at the cafe, just as she had done during previous periods of employment.
3. Those individuals who had provided her transportation continue to be willing to do the same when she becomes reemployed.
4. Secured employment on April 1, 1979, with Moonlight Barbecue.
5. From January 8, 1979, through April 1, 1979, work-seeking efforts consisted of reading ads in the newspaper, two contacts with Manpower Services, one telephone call to Jerry's Restaurant, and two personal contacts with other restaurants, one of which was with her current employer (Moonlight Barbecue).
6. Restricted her work search to day shift because of her children.

REASONS: Claimant's quantitatively limited and shift restricted work search was held to be adequate SOLELY because it was successful and spanned less than a three month period. The Commission would not conjecture whether or not the aforementioned limitations and restrictions prolonged the period of unemployment (KRS 341.350).

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 20609 NONPRECEDENT

NOTE: Use sparingly, and only after exploring whether or not the limitations and restrictions prolonged the period of unemployment.

1310 OTHER SUITABLE WORK; REFUSES RECALL TO.

ISSUE: Whether claimant, who refuses recall to other suitable work, is eligible and qualified to receive benefits.

FACTS:
1. Worked in the hotel's laundry from April 27, 1954, to August 23, 1954, when she was laid off.

2. Recalled August 27, September 19, and October 15 to work in the pantry preparing salads, with same hours, rate of pay and opportunity for advancement.
3. Refused the first two offers because of lack of experience and a rash on her hands.
4. Refused third offer, after rash had disappeared, because she had no experience in that type of work.
5. No experience was needed, as hotel customarily hired unskilled persons for that job and trained them.

REASONS: The Kentucky Court of Appeals held: There is no showing in the record of this case that the employee met the conditions of being able and available for suitable work in order to be eligible for benefits. KRS 341.350 (3) and (4). The application for a determination of benefits contains no such showing. The claimant failed to show an eligibility for benefits while the employer showed, without contradiction, offers of suitable work. KRS 341.370 (1)(a). BROWN HOTEL COMPANY V. EDWARDS, KY., 365 SW 2d 299. The award made by the referee and confirmed by the Commission was erroneous.

Appellant's reserve account is not chargeable with the benefits paid to Zula (KRS 341.420 (3)).

DECISION: Claimant held unavailable for work and ineligible to receive benefits. Further, the claimant refused an offer of suitable work without good cause and would be disqualified on this ground. Employer's reserve account relieved of charges.

The Kentucky Court of Appeals, BROWN HOTEL VS. ZULA ELMORE, 365 SW 2d 309.

PRECEDENT

1350 LIGHT DUTY WORK; LIMITED SEARCH FOR.

ISSUE: Whether a worker restricted to light duty may satisfy eligibility requirements if his work search within the general field of light work is limited.

FACTS:
1. Worked as an attendant at a V.A. hospital for eleven years.
2. Retired because of physical inability to climb and lift heavy objects.
3. During nearly two months made seven inquiries for work as a night watchman or elevator operator.
4. Also sought work with tobacco companies.

REASONS: KRS 341.350 (4) contemplates that a worker with physical limitations must make an extensive search for work within his physical capabilities. In this case, the claimant's work search was sparse and did not cover the field of light work generally.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 3886 NONPRECEDENT

1360 WORK(ED) BEYOND RETIREMENT AGE; ACTIVE SEARCH FOR.

ISSUE: Whether an older worker (72 years) who has neither applied for Social Security nor company pension should be presumed unemployable because of his age.

FACTS:
1. Last worked ten years as a night watchman.
2. Discharged when company wanted to employ a younger man.

3. From January 15 through April 9, contacted twenty employers seeking work as a night watchman.
4. From April 9 through July 25, contacted from thirty-five to forty employers seeking any available work, including clean up work.
5. No evidence that his age impaired his ability to seek or perform work.

REASONS: In this particular case, considering both the extent of the claimant's work search, and that there is no evidence he is unable to work, it was held that the claimant met the dual eligibility requirements of KRS 341.350 (3) and (4), and that the referee erred when concluding that the claimant's age precluded him from securing work.

DECISION: Claimant held both able and available for work and eligible to receive benefits.

C.O. # 4962 NONPRECEDENT

1380 TOTALLY DISABLED; PRESUMED UNABLE AND UNAVAILABLE (SEE NOTE AT END OF THIS ENTRY FOR DIVISION'S RESPONSIBILITY TO PROVIDE ASSISTANCE TO VISUALLY AND HEARING IMPAIRED CLAIMANTS).

ISSUE: Whether a totally disabled claimant's "adequate" work search is sufficient to overcome the presumption of inability and unavailability raised by his total disability.

FACTS:
1. Claimant is totally deaf, with American Sign Language being his primary language.
2. Has great difficulty understanding the English language.
3. An interpreter was not provided by the local office.
4. Had no intentions of applying for benefits.
5. Was not informed of work search requirements.
6. On his own initiative, registered with Manpower Services and contacted three employers seeking work from June 1 through September 6.
7. Adjudged totally disabled by the Social Security Administration and receives Supplemental Security Income (SSI).

REASONS: KRS 341.350 (3) and (4) require that a claimant be able to work and making a reasonable effort to secure work, as would be expected of a prudent person in like circumstances. Considering the claimant's profound hearing impairment and resultant difficulty communicating, the Commission held the claimant's work search to be "adequate." However, notwithstanding claimant's adequate work search, the Commission went on to hold that there existed a presumption of inability and unavailability for work because the claimant had been declared totally disabled by the Social Security Administration and was receiving Supplemental Security Income.

DECISION: Claimant held unable and unavailable for work and ineligible to receive benefits.

C.O. # 25346 A NONPRECEDENT

NOTE: The Commission further held that the Division was in violation of section 504 of the Rehabilitation Act of 1973 (Codified as 29 U.S.C. 794) which requires that agencies receiving federal financial assistance that must provide appropriate auxiliary aides for persons with impaired sensory, manual, or speaking skills. Subsection (3) of 84.52 (d) states: "...Auxiliary aids may include brailled and taped material, interpreters, and other aides for persons with impaired hearing or vision.

1390 PHYSICAL IMPAIRMENT, CUSTOMARY WORK.

ISSUE: Whether physical inability to perform customary work necessarily renders a claimant unavailable for work.

FACTS:

1. Claimant worked four and one-half years as a butcher and scriber for a meat packing company.
2. Suffered an epileptic seizure and was slightly injured.
3. Had not previously nor since, suffered such a seizure.
4. Discharged because of danger to self and co-workers.
5. Made a good faith effort to secure unskilled work that would not present a danger to himself or others if he had another seizure.

REASONS: In affirming the Commission, the Kentucky Court of Appeals held:
To be available for suitable work within the meaning of KRS 341.350 (4), when considered in connection with KRS 341.350 (3) and KRS 341.100, we are of the opinion that an employee must be genuinely attached to the labor market,that he must be willing and ready to work, that he has the capacity to perform some type of work although he may be unable to do his customary work, and that work within his power may be reasonably procured where he lives.

Here the claimant did not voluntarily leave his job but was discharged from it for reasons beyond his control. He was physically and mentally able to perform any number of unskilled jobs which abound in the vicinity of his residence. His illness did not preclude him from accepting or doing work not dangerous to him or to others if he should have another seizure. He remained attached to the labor market.

DECISION: Claimant held available for work and eligible to receive benefits.

Affirmed by the Kentucky Court of Appeals in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. FISHER PACKING COMPANY, Ky. 259 SW 2d 436.

PRECEDENT

NOTE: See Introduction to this Chapter for lengthy quotation from this decision.

1391 FORCED LEAVE OF ABSENCE; UNREASONABLE CONDITION OF RETURN FROM.

ISSUE: Whether a claimant who is on medical leave of absence is available after being released as able to work and then refuses an unreasonable condition of return to work.

FACTS:

1. A truck driver for six years.
2. Passes out at a red light while driving company truck.
3. Placed on medical leave of absence.
4. After six months of no other similar passing out spells, released by both company and personal physicians as able medically to return to truck driving.
5. However, company's insurance carrier increased premiums $3,500 to $4,500 a year to cover claimant.
6. Company required claimant to pay additional premium as a condition of returning to work.
7. Claimant refused to pay the additional premium and was not allowed to return to work.
8. At time of referee hearing, retained on payroll to protect seniority and to pay health insurance, pending grievance regarding company's refusal to return him to work unconditionally.

REASONS: KRS 341.350 (3) and (4) combine to provide that a claimant must be able and available for work. In this case, claimant was able to work at the time he was released as able to return to his truck driving duties. Claimant's availability for work is demonstrated by his willingness to return to the company. Claimant had good cause to refuse the company's unreasonable requirement that he pay the additional insurance premiums. His refusal to do so in no way diminished his availability for work.

DECISION: Claimant held able to and available for work and eligible to receive benefits.

Pulaski Circuit Court, SOUTHERN BELL DAIRY COMPANY VS. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND DENNIS L. COUNTS, 85-CI-323. Not to be cited or quoted. For guidance only.

1410 VOLUNTARY LEAVE OF ABSENCE; EARLY RETURN FROM.

ISSUE: Whether a claimant who requests early return to work is unavailable for the duration of the leave if the request is denied.

FACTS:
1. Requested a maternity leave.
2. Agreed in writing that leave would last six months.
3. Alleged, BUT WAS NOT FOUND AS FACT, that supervisor agreed verbally to an early return to work.
4. Request to return to work early, denied.

REASONS: The Kentucky Court of Appeals considered the question of availability while on leave of absence to be one of "first impression" in its jurisdiction. Using cases from other jurisdictions as support, the Court concluded that a claimant, on a leave for an agreed to specified period has voluntarily removed herself from the labor market for the entirety of the agreed to leave.

DECISION: Claimant held unavailable for work and ineligible to receive benefits while the agreed to leave was in progress.

Kentucky Court of Appeals, SOUTHERN BELL VS. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 437 SW 2d 775.

PRECEDENT

1411 LEAVE OF ABSENCE; EARLY RETURN FROM.

ISSUE: Whether claimant reestablishes her attachment to the labor market and availability for work by attempting to return to work prior to the expiration of a period of requested maternity leave.

FACTS:
1. While on a maternity leave, requested and received two extensions of her leave.
2. Prior to the expiration of the second extension, requested reemployment, but no work was available.
3. Filed a claim for benefits prior to the expiration of the second extension because of her willingness to work.

REASONS: By requesting an extension of her leave the claimant removed herself from the labor market. The employer was under no obligation to provide work for the claimant until the expiration of her extended leave. Claimant cannot unilaterally terminate her leave to the employer's disadvantage. Similar action by the employer would not be tolerated (KRS 341.350 (4)).

DECISION: The claimant was held ineligible to receive benefits from the date of her claim until the expiration of her extended leave of absence.

C.O. # 4098 NONPRECEDENT

1412 PHYSICAL INABILITY TO WORK; DOCTOR'S ADVICE.

ISSUE: Whether claimant is able and available for work despite her doctor's advice that she stop seeking work.

FACTS:
1. On April 13, 1980, filed for and started receiving benefits.
2. On May 23, 1980, held unavailable to work due to pregnancy, complicated by "low blood sugar" and fainting spells.
3. Fainted while at the local office.
4. Advised by doctor to stop seeking work during final two months of pregnancy.
5. Released by doctor as able to work six weeks following the birth of her child.

REASONS: KRS 341.350 (3) and (4) require that a claimant must be both able and available for suitable work. In this case, claimant, although pregnant, would have been eligible for benefits if she had been otherwise able and available for work. She was not able to work because she was subject to fainting spells, and because she had been advised by her doctor to stop seeking work.

DECISION: Claimant held unable to work and ineligible to receive benefits until released by her doctor as able to work.

C.O. # 23714 A NONPRECEDENT

1430 VOLUNTARY LEAVE OF ABSENCE; RECALL-RETURN FROM.

ISSUE: Whether a claimant who is on voluntary leave of definite duration should be either required by the company to accept early recall or allowed to require the company to return her to work prior to the expiration of the leave.

FACTS:
1. Requested a one year leave to care for her ill mother.
2. Leave granted from May 21, 1961, through May 20, 1962.
3. Purpose for leave accomplished in early August 1961.
4. Recalled to work shortly thereafter.
5. Refused recall for lack of child care.
6. Then secured child care and requested to be returned to work.
7. Vacancy had been filled, request denied.

REASONS: This case is not unlike the one before the Commission recently wherein Commission Order Number 4098 (see Entry 1411) was issued holding claimant ineligible to receive benefits due to being unavailable for work. The Commission is of the opinion that the claimant, by requesting and being granted a leave of absence from her usual employment, effectively withdrew from the active labor market for the duration of the leave. It is our position that the company, once having approved this leave, should not be then permitted to offer her reemployment with the imposition of a disqualification for her refusal thereof. By the same token, we feel that the claimant should not be permitted to request reemployment at any time, with the company's failure to furnish same resulting in allowance of benefits chargeable to the company's reserve account. We adopt the position that the claimant is unavailable for work under these circumstances and ineligible to receive benefits for the duration of the leave, or until she can effectively terminate her leave of absence by reemployment with the company.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4239 NONPRECEDENT

NOTE: See Precedent Entry 1410.

1431 VOLUNTARY LEAVE OF ABSENCE; INDEFINITE DURATION.

ISSUE: Whether a claimant who requests and is granted a personal leave of absence of indefinite duration is available while the leave remains in progress.

FACTS:
1. Paternal grandmother of an infant boy.
2. Child's mother (claimant's daughter-in-law) dies during delivery.
3. Claimant requests a leave of absence to care for child.
4. Leave of indefinite duration granted.
5. Has cared for the child continuously since its mother's death.
6. Has not contacted the captioned employer regarding returning to work.

REASONS: KRS 341.350 (4) requires as a condition of eligibility for unemployment benefits that the worker be available for work. The claimant was faced with a difficult domestic problem upon the untimely death of her daughter-in-law. She voluntarily decided to take a leave of absence which removed her from the labor market. Her employer granted her the leave of absence, and she did not complain when notified of its terms and beginning date. She will remain unavailable for work under the law while that leave remains in progress.

DECISION: Claimant held unavailable for work and ineligible to receive benefits while leave remains in progress.

C.O. # 11505 NONPRECEDENT

NOTE: See Precedent Entry 1410

1540 LAID OFF RECIPIENT OF SUB PAY; ON-CALL.

ISSUE: Whether a laid off worker receiving supplemental unemployment benefits must satisfy a strict availability standard while on call.

FACTS:
1. While on layoff signed up with the company's "reserve labor force."
2. A requirement for receipt of SUB pay.
3. In turn, was to be available for work, when called.
4. However, could not be reached by the company via telephone.
5. Sometimes leaves home on errands and to visit relatives.

REASONS: Generally, availability is measured by the number of personal contacts made and the overall effort to find work (KRS 341.350). However, in this case we are faced with a situation where a claimant is on call from his employer and, therefore, is relieved of the responsibility of seeking work and need merely be available for work if his employer calls him. He had signed for supplemental unemployment benefits and, as a result, was required to sign with "labor reserve pool." He had a greater responsibility to make himself available for and accept all work offered to him. He failed in this responsibility.

DECISION: Claimant held unavailable for work and ineligible to receive benefits for the week under appeal.

C.O. # 23855 NONPRECEDENT

1550 DISABILITY RETIREMENT; LIMITED WORK SEARCH.

ISSUE: Whether a claimant who left work because of a disability and who receives disability retirement may satisfy eligibility requirements with a limited work search.

FACTS:

1. Sixty-nine-year-old claimant last worked for the V.A. in Louisville, Kentucky, as a publications clerk.
2. Voluntarily left this work because of a "bad back."
3. Receives disability retirement from the V.A. and has applied for Social Security benefits and a WWI veteran's pension.
4. Several years experience as a teacher.
5. With "some" prospects of getting a teaching job in his "small community."
6. Only other source of work in his small community is at stores and farm work.
7. No chance of work at stores and physically unable to do farm work.
8. Also unable because of "bad back" to commute to Louisville, Kentucky, as he had done in the past while working for the V.A.

REASONS: Section 341.350 of the Kentucky Revised Statutes provides as a condition for eligibility for unemployment insurance benefits that a claimant be able to work, available for work, and makes a reasonable search for work in an area where suitable work exists. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. HENRY FISCHER PACKING CO., 259 SW 2d 436.

When a claimant has left employment because of a disability and becomes the recipient of benefits under various retirement programs, there is a strong presumption that such claimant is unavailable for work. This presumption becomes almost irrebuttable when such claimant resides in a community where little suitable work exists, and he is unwilling or unable to commute to a nearby large industrial area as previously done.

The lack of job opportunities suited to the claimant's impaired physical condition, and his failure to seek work in an area where such work exists supports a finding of ineligibility for benefits under the rules laid down by the above court decision and a long line of Commission Orders. The payment of benefits to the claimant would be merely supplementing retirement benefits which was not contemplated by the legislature.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 7023 NONPRECEDENT

1590 AGRICULTURAL EMPLOYMENT; EFFECT ON AVAILABILITY.

ISSUE: Whether a claimant fully employed in agricultural enterprises may satisfy eligibility requirements.

FACTS:

1. A loan officer for a bank.
2. Required to divest himself of substantial outside agricultural enterprises or resign.
3. Resigned, stating he paid more in taxes from those outside enterprises than he received in salary from the bank.
4. Following resignation, outside agricultural enterprises occupied him full-time.

REASONS: KRS 341.350 requires as the first condition of eligibility for benefits that a claimant must be unemployed. In its ruling on this case, the Kentucky Court of Appeals held:

> "...that as a general rule, one is not always precluded from unemployment benefits because he lives on, owns, or operates a farming enterprise as an owner, landlord, tenant, or sharecropper. We would also agree that one's need or lack of it is not a criteria for eligibility for benefits. But we are not dealing with the typical farmer who works full time during the winter or who manages to operate a small farm on a part-time basis. Here we are dealing with an individual who had a substantial farming operation which could, and after leaving the bank did, occupy him full time. We can only conclude that Coomer

would be denied unemployment benefits in most, if not all, jurisdictions. 65 A.L.R. 2d supra.

DECISION: Claimant held to be self-employed, not unemployed, and therefore ineligible to receive benefits.

Kentucky Court of Appeals, COOMER VS. NEW FARMERS NATIONAL BANK, Ky. App. 611 SW 2d 805.

PRECEDENT

1700 SHIFT PREFERENCE VERSUS SHIFT REFUSAL.

ISSUE: Whether a stated shift preference constitutes a significant restriction on availability.

FACTS:
1. Initially laid off December 30, 1977.
2. Referred to CONALCO Inc. for possible employment on "swing shift."
3. Accepted referral and placed application with employer, which is still pending.
4. Indicated to local office examiner a preference for other than swing or night shift work because of domestic consideration.
5. Returned to gainful employment, elsewhere, on March 8, 1989.

REASONS: To satisfy the provisions of KRS 341.350 (4) a worker must be actually in the labor market, free of any conditions or restrictions that would prohibit the acceptance of full-time suitable work. In this case, we feel that claimant's statement regarding swing shift work was nothing more than a statement of preference. This reasoning is supported by the fact that claimant did not refuse the referral and actually placed an application with CONALCO, Inc., hardly the act of an individual bent upon avoiding "swing shift" work. A second circumstance mitigating toward a finding of availability is claimant's abbreviated period of unemployment. By the date of the referee hearing he had, through his own efforts, secured employment.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 18506 NONPRECEDENT

NOTE: Closer questioning of the claimant could have clarified whether or not he was stating a preference or refusing night and swing shift work.

1710 SHIFT RESTRICTION; FOLLOWING A QUITTING FOR DOMESTIC REASONS.

ISSUE: Whether a claimant who quits day work for domestic reasons may limit her work search to a shift other than when her customary work is performed.

FACTS:
1. Quit day work of eighteen months duration as a seamstress to be at home with eleven-year-old daughter.
2. At the referee hearing admitted she still did not have anyone to care for child.
3. But alleged her husband could care for child after school.
4. However, sought work only where night shifts were available.
5. Did not contact former employer or any of the several other garment factories in the area.

REASONS: KRS 341.350 (4) contemplates that a claimant must be genuinely attached to a realistic labor market, free of any restriction that would significantly prohibit her acceptance of full-time suitable work. In this case we have a claimant with a domestic problem which caused her to leave her last employment. In reality that problem still exists, and we must conclude from the evidence that the

claimant is not desirous of work during the daylight hours. Although she has made some effort to secure other types of work, it is apparent that her restriction to night shift employment is of such nature that for all intent and purposes it precludes her from accepting work normally performed in her USUAL OCCUPATION.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4586 NONPRECEDENT

1740 PART-TIME WORKER; FULL-TIME WORK SEARCH.

ISSUE: Whether a claimant working part-time must be available for full-time work.

FACTS:
1. Permanently separated from full-time work (i.e., not on layoff or reduced work hours) under nondisqualifying conditions.
2. Secured part-time secretarial position for a church, working 24 hours a week.
3. No possibility of full-time work with the church.
4. Work search over several weeks consisted of answering two newspaper ads, by telephone.

REASONS: Eighty percent of the wages earned by a claimant who works less than full-time shall be deducted from the weekly benefit amount (see KRS 341.390). The resulting partial benefits are intended for those claimants underemployed through no fault of their own (see Declaration of Public Policy that prefaces the state's original law). Therefore, to be eligible for partial benefits, a claimant must be available for and stand ready to accept full-time work. KRS 341.350 (4) would require only that such claimants engage in an active search for full-time work as might be expected of a prudent person in like circumstances (i.e., full consideration and CREDIT must be given to the time spent in part-time employment when determining whether the work search is "active"). In this case, claimant's work search was so sparse and restricted as to fail to establish that she had any intention or reasonable expectation of returning to full-time work.

DECISION: Claimant held unavailable for full-time work and ineligible to receive partial benefits.

C.O. # 4842 NONPRECEDENT

1750 WORK SEARCH; PARI-MUTUEL CLERKS (CONCEPTS AND PRINCIPLES SET FORTH HEREIN MAY BE APPLICABLE TO OTHER SEASONAL WORKERS).

ISSUE: Whether pari-mutuel clerks should be required to seek work which they would keep in favor of returning to a pari-mutuel position.

FACTS:
1. A pari-mutuel clerk for seven years.
2. With several years experience in retail sales.
3. Sought only work as a pari-mutuel clerk during periods of unemployment between race meets.

REASONS: HERETOFORE, claimants similarly situated were required to seek work which they would accept in lieu of returning to a pari-mutuel position. HENCEFORTH, the Commission will apply the following guidelines:

1. Pari-mutuel clerks shall not be singled out for special eligibility reviews when first reporting to file new or continued claims for benefits, but shall be assigned codes commensurate with their employment status, and shall thereafter be treated accordingly with respect to eligibility reviews.

2. Pari-mutuel clerks shall not be required to seek employment which would supplant their positions as pari-mutuel clerks.

3. Pari-mutuel clerks SHALL BE required to seek employment in the same manner as other unemployed workers in similar circumstances, and the quantity of their search shall be judged sufficient or insufficient in accordance with established standards for all workers.

4. Finally, each case shall be decided upon its own merits.

In the instant case, the record shows that claimant has sought work only as a pari-mutuel clerk during his period of unemployment. Although possessing skills in the retail trades and professing a willingness to accept work in that area, he has made no active search for such employment. It seems to us that confinement of his search to work as a pari-mutuel clerk is self-defeating, since such a restriction effectively removes him from the labor market until such time as a new race meet begins.

DECISION: Claimant held unavailable for work and ineligible to receive benefits. However, had the claimant made a reasonable effort to secure "stop-gap" employment in the retail sales industry, then he would have been eligible to receive benefits.

C.O. # 24862 PRECEDENT

1751 OFF SEASON WORK SEARCH; SALARY LIMITATIONS.

ISSUE: Whether a seasonal worker may limit her work search during the off season to jobs which pay the same as her unusually high-paying seasonal job.

FACTS:
1. Worked seven of last eight years as a seasonal tobacco worker in Lexington, Kentucky.
2. Considering her limited qualifications, she earned wages during the six-month tobacco season equal to what she would have earned in a year at some other occupation in that area.
3. Had not previously worked during the off season.
4. Desires work during the off season which pays as much as her unusually high paying seasonal job.
5. Very little, if any, such work exists in the Lexington area.

REASONS: KRS 341.350 (4) contemplates that a claimant must be genuinely attached to a labor market with reasonable expectations of securing work. The Commission held the claimant to be unavailable for work because her wage expectation in the off-season was unrealistic for a person with her limited qualifications. The claimant cannot expect to draw benefits just because she cannot find an off-season job which pays as well as her unusually high-paying seasonal job.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4495 NONPRECEDENT

NOTE: The Commission's additional ruling in this Order that a seasonal worker must elect whether to work seasonally OR full-time at a lower wage was nullified by precedent setting Order Number 24862 which held that pari-mutuel clerks shall not be required to seek employment that would supplant their positions as pari-mutuel clerks; SEE ENTRY 1750.

1760 WORK SEARCH; SHIFT RESTRICTION.

ISSUE: Whether a shift restriction automatically renders a claimant unavailable for work.

FACTS:
1. No evidence claimant had ever worked night shift.
2. Stated she would not accept night shift work.
3. Contacted twenty employers over a three week period during the initial stage of her unemployment seeking day work.
4. Shortly thereafter secured a job.

REASONS: KRS 341.350 (4) contemplates that a claimant must make a reasonable effort, without placing significant restrictions on her availability, to secure suitable work. We are not convinced that a restriction against accepting night-time employment renders one unavailable for work, when, as here, she has been unemployed for a relatively short period, there is no evidence that she worked at night before, and she has demonstrated a very active search for work that was ultimately successful.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 20059 NONPRECEDENT

1780 REFUSAL TO CROSS PICKET LINE; FEAR OF BODILY HARM.

ISSUE: Whether a claimant who refuses to cross the picket line of a sister union for fear of bodily harm may satisfy eligibility requirements.

FACTS:
1. Claimants were full-time regular employees of a cafeteria servicing a factory.
2. Factory employees went on strike.
3. Full-time work remained available to claimants.
4. Refused to cross picket line of sister union for alleged fear of bodily harm.
5. No evidence of violence or undue threat of violence at the plant entrances.

REASONS: By precedent decisions based on court decisions, the work of the claimants in the cafeteria for the appellee-company was not in the establishment where the strike was in active progress against the factory by its employees; therefore, KRS 341.360 is not applicable.

KRS 341.350 provides that a claimant must be available for suitable work. KRS 341.100 provides in determining whether work is suitable that considerations should be given to the risk involved to the safety of the workers. The work that was available to the claimants was their regular jobs and, as such, was suitable. Further, since the record and testimony show no violence or threat of violence, it must be concluded that the claimants' fear of physical assault was not based upon reasonable grounds. It was not shown that there was any undue risk to the claimants' safety had they agreed to work.

After a careful consideration of the record and testimony, it is concluded that claimants were not unemployed through no fault of their own, and they did not meet the eligibility requirements of the Kentucky Unemployment Insurance Law.

DECISION: Claimants held unavailable for work and ineligible to receive benefits.

C.O. # 8552 NONPRECEDENT

1781 LAID OFF OR LOCKED OUT WORKER WALKS PICKET LINE (NO STRIKE EXISTED).

ISSUE: What is the effect of walking a picket line on a laid off or locked out claimant's availability for work.

FACTS:

1. Claimant and eight other union photo engravers were either laid off or locked out.
2. NO STRIKE EXISTED, and they were not withholding services from employers, they were picketing.
3. Walked picket line three or four days a week for four and one-half hours per day.
4. Work search consisted of contacting union hall, employment services, soliciting leads from employees of other engraving shops, and constantly scanning newspaper ads.
5. This type of work is predominantly union in the area.
6. Union would have referred claimant to available jobs in the area or any other area.
7. Would cease picketing to accept work.

REASONS: KRS 341.350 provides that a claimant must be available for work and make a reasonable search for work to be eligible to receive benefits.

The case does not present a problem of picketing during a strike which is a withholding of services. The claimant and other pickets were willing to return to work. Although not necessary to decide in this case, the unemployment of claimant has some aspects of a "lock-out." At least the unemployment was involuntary and there was not a withholding of services.

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. LOUISVILLE BUILDERS SUPPLY COMPANY, Ky. 351 SW 2d 157, wherein it was found that picketing employees were "locked out" by the employer, the Court said:

> "a...contention of the appellees is that the employees who walked the picket lines were not 'available for work' within the requirements of the unemployment compensation law...
>
> There is nothing in the record...to show that the employees on the picket lines had not registered for work and were not making reasonable efforts to obtain suitable work."

This same Court held that benefits received from the union did not constitute wages.

In a predominantly union area, union work was the suitable work for this claimant. His personal efforts and those through his union must be considered reasonable during the early stages of his unemployment. Because the picketing did not preclude the search for or the acceptance of work, there was no unreasonable restriction upon claimant's employability or attachment to a labor market.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 9482 NONPRECEDENT

1811 WORK SEARCH; LIMITED TO UNION HIRING HALLS.

ISSUE: Whether a claimant may limit his work search to contacting union hiring halls during the initial stage of unemployment.

FACTS:

1. A union pipefitter for twenty years.
2. Unemployed four months.
3. During which time his work search consisted of weekly contacts with union hiring halls throughout his state of residence and other states that had affiliated unions.

REASONS: KRS 341.350 (4) requires that a claimant be available for suitable work and making a reasonable effort to obtain work as might be expected of a prudent person in like circumstances.

The Commission held that during the initial stages of his unemployment claim the claimant's contacts with union hiring halls, seeking work at his regular profession at a comparable rate of pay

were sufficient evidence that the claimant was available for and making a reasonable effort to obtain suitable work. It would be unreasonable to expect a person to seek or to accept a job that might jeopardize his union membership **IF** he might expect his union to find suitable work for him in some REASONABLE amount of time.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 23410 NONPRECEDENT

1812 WORK SEARCH; RESTRICTED TO UNION WORK.

ISSUE: Whether a claimant who lives in a nonunion community may restrict his availability to union work when he has previously accepted nonunion work.

FACTS:
1. Worked nineteen months for nonunion coal mine.
2. Quit when wage reduced from $12.00 per day to $10.00 per day.
3. Job separation not an issue herein.
4. Offered reemployment at this mine at a shift rate of $12.00.
5. Refused. Insisted former employer pay royalty to his union so that he could get his welfare card back from the union.
6. Further, insisted that he be paid union scale of $24.25 per shift, because he was a union member.
7. Almost all coal mines in the claimant's labor market are nonunion.
8. Sought work at markets, stores, and a construction company.

REASONS: KRS 341.350 provides that a person must be available for work and actively seeking work in order to be eligible for unemployment benefits. Numerous Commission Orders have held that the worker must not restrict his availability to such an extent that a reasonable expectancy of obtaining employment does not obtain. A restriction to union work, when claimant had worked in a nonunion mine, in an area where mines are predominantly nonunion, seemed to the referee, and the Commission must agree, to constitute a restriction which makes claimant's hope of getting work unrealistic.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4958 NONPRECEDENT

1830 WORK SEARCH; LIMITED TO UNION BUSINESS AGENT.

ISSUE: Whether a claimant may limit work search to registering with his union business agent.

FACTS:
1. A union carpenter for twenty-seven years.
2. Worked within forty to fifty mile radius of home, on jobs referred to by his union business agent.
3. Union scale was $3.85 to $4.10 per hour.
4. No other work experience.
5. Refused referral to nonunion carpenter's job paying $2.00 per hour.
6. During first eleven weeks of claim sought work only by registering with his union business agent.
7. During final six weeks of claim (prior to securing work) registered with union business agent and contacted three employers.

REASONS: KRS 341.350 (4) requires that a claimant be available for suitable work and making a reasonable effort to obtain work as might be expected of a prudent person in like circumstances. This section

of the law first requires a determination of suitability of work under the provisions of KRS 341.100 which provides:

"(1) In determining...whether or not any work is suitable for a worker, the Commissioner shall consider among other pertinent conditions...his prior training, experience, earnings, length of unemployment and prospects of securing local work in his customary occupation."

Once the type of suitable work is determined, subsection (2) of KRS 341.100 requires it to compare favorably with the conditions of work and wages for similar work in the locality.

After considering all of these factors, carpenter work at $3.85 to $4.10 an hour is the type of work suitable to this claimant. This type of work existed in the area on only union jobs. The reliance upon his union to secure work for him, and the few independent efforts in addition to registration with the employment office was, during the interval of time herein involved, a reasonable search for work.

Additionally, the wage rate of $2.00 an hour does not compare favorably with the prevailing wage rate for carpenter work in the area, and the work offered was consequently unsuitable. The claimant cannot be disqualified from benefits for refusing unsuitable work.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 7528 NONPRECEDENT

1831 WORK SEARCH; UNREASONABLE SALARY LIMITATIONS.

ISSUE: Whether it is prudent for a claimant to require, as a starting salary, an amount equal to her last wage, which was attained only after eighteen years of service.

FACTS:
1. Compulsorily retired June 30, 1961, after eighteen years of service.
2. Salary at retirement, $80.00 per week.
3. Receives $110.00 per month Social Security.
4. In order to give up Social Security benefits must receive a salary equal to her former wage; i.e., $80.00 per week.
5. Made extensive work search.

REASONS: Under KRS 341.350, a claimant must be available for suitable work and making as reasonable an effort to find work as is expected of a prudent person under like circumstances. This means that the claimant must actively be in the labor market with some realistic expectation and intention of working. It must be concluded that the claimant is making an active search for work. However, she has placed an unreasonable salary limitation on acceptable wages. She had worked for eighteen years to attain her most recent salary. The expectation of receiving the same salary as starting wages on a new job as she received after eighteen years of experience constitutes an unreasonable limitation which renders the chance of securing employment remote. Therefore, it must be concluded that the claimant made herself unavailable for work by reason of the salary limitation even though she was making an active search for work.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 4238 NONPRECEDENT

1840 PHYSICAL IMPAIRMENT; LIMITED WORK SEARCH.

ISSUE: Whether a claimant who quits work under doctor's advice because "dust" in the factory where she worked aggravated her allergies may restrict her work search to factory work.

FACTS:
1. Worked twelve years in a factory.
2. Developed allergic condition during last two years.
3. Began medical leave of absence on July 18, 1980.
4. Her doctor then determined that "dust" in the work place aggravated her allergic condition.
5. Advised by doctor not to work around dust.
6. Voluntarily quit her job in early January, 1971.
7. Released as able to work and filed for benefits June 13, 1971.
8. From June 13, 1971, through December 1, 1971, (date of the hearing) contacted four factories seeking work.
9. Unaware if these factories had dust-free environment.

REASONS: KRS 341.350 provides that a person must be available for work and making a reasonable search for work to be eligible to receive benefits. The term availability is not defined in the statute but the Court of Appeals in the case of KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. HENRY FISCHER PACKING COMPANY, Ky. 259 SW 436, defined the term availability as follows:

> "The determination of availability is largely a question of fact...
> The basic purpose of the requirements that a claimant must be available for work...is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market. To be available for work within the meaning of the Act a person must be genuinely attached to the labor market..."

There must remain, after considering all of the conditions and restrictions, a reasonable expectancy of securing suitable work. Considering the limitation to a dust-free environment, and claimant's desire for work in a factory, she is not genuinely attached to a labor market. Without actually trying the work in the other factories, claimant is not sure that such work would be dust free and suitable for her condition. The lack of attachment to a labor market is evidenced further by the long period of unemployment and her lack of a continuous effort to get work.

DECISION: Claimant held unavailable for work and ineligible to receive benefits.

C.O. # 9506 NONPRECEDENT

1841 APPROVED TRAINING VERSUS AVAILABILITY FOR AND ACCEPTANCE OF SUITABLE WORK.

ISSUE: Whether a claimant, who is in JTPA training approved by the Secretary, shall be denied benefits for either failing to search for or refusing an offer of work.

FACTS: (See "Issue" Above).

REASONS: KRS 341.350 (6) provides that an otherwise eligible worker shall not be denied benefits under subsection (4) of this section or because of his failure to actively seek work, nor disqualified under paragraph (a) of this subsection (1) of KRS 341.370 with respect to any week he is in training with the approval of the secretary. U.S. Department of Labor publication, UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 32-83, dated June 29, 1983 gives guidance concerning benefit claims involving participants of training programs under JTPA. That publication states "that an individual taking such training may not be found ineligible for benefits on grounds that he/she is not available for suitable work, is not making an active search for work, or has refused suitable work." The publication explains that such training must be with the approval of the State Employment Service Agency. We presume that the training referred to here was with such

approval by virtue of the instructor's statements to the claimant that no work search was required while taking the training. We also find that the claimant's refusal to accept out-of-town assignments in a part-time job would not justify disqualification of benefits while participating in approved training. It is reasonable to presume that the claimant's acceptance of such work is indicative of his willingness to perform work and that his participation in the training program is indicative of his desire to improve his skills and qualifications so that he might return to full-time, suitable work. In the unique circumstances presented in this case, we find that the claimant did not quit his employment but refused particular work assignments which conflicted with participation in agency approved training under the Job Training Partnership Act.

DECISION: Claimant may not be disqualified for either refusing work or for failing to search for work if he is in training approved by the secretary.

C.O. # 42498 A PRECEDENT

1842 "ON" DUTY "OFF" DUTY PERIODS OF WORK; WHETHER UNEMPLOYED.

ISSUE: Whether claimant who works two weeks on followed by two weeks off is eligible for benefits during the off period.

FACTS:

1. Claimant is a river pilot.
2. Claimant accepted employment as a "trip" pilot.
3. Received assignments on a trip by trip basis and was not guaranteed subsequent trips at completion of a trip.
4. The practice of "off" periods is standard in the industry and are generally provided to full-time pilots since they must remain on their boat several days to several weeks at a time.
5. Some companies pay full-time pilots an "on" duty rate and an "off" duty rate.
6. The employer pays its full-time pilots $11.67 per hour twelve hours per day for each day on the boat plus provides medical, vacation and retirement benefits.
7. The employer pays "trip" pilots $12.08 per hour, twelve hours per day for each day on the boat but no medical, vacation or retirement benefits are provided.
8. Employer does not pay any wages to "full-time" or "trip" pilots when off duty but does attempt to provide all pilots "off" duty periods approximately the same length as "on" duty periods.
9. As evidenced by claimant's work schedule, employment was provided on a fairly constant two week on two week off basis.

REASONS: KRS 341.350 provides conditions of eligibility for benefits for an unemployed worker. In this case, we believe the primary issue is whether or not the claimant was unemployed for the weeks in question.

This case presents a set of rather unique circumstances. While such circumstances may potentially reoccur, we believe that cases similar to this must be scrutinized closely to arrive at an equitable decision. In this case, for the period of time in question, work was provided on a reasonably constant and consistent basis in keeping with standard industry practice and was compensated at a reasonable rate. As long as the employer continues to provide periods of employment of a duration comparable to corresponding "off" duty periods, we do not believe it reasonable to conclude that the claimant is unemployed for weeks "off" duty by virtue of his "trip" pilot status. Likewise, we believe it only reasonable to find the claimant, or a "trip" pilot, unemployed for weeks of no work in excess of the corresponding "on" duty periods.

DECISION: Claimant ineligible for benefits.

C.O. # 35868A NONPRECEDENT

1843 FULL-TIME STUDENT; AVAILABILITY FOR WORK.

ISSUE: Whether a full-time student can be held unavailable for work when a long history of going to school and working full-time has been established.

FACTS:
1. Claimant is a full-time high school senior, attending school from 8:50 a.m. to 3:05 p.m. Monday through Friday.
2. Worked for the predecessor company during his ninth, tenth and eleventh grades of high school.
3. During the past year, he has worked full-time after school and on week-ends.
4. Claimant was laid off.
5. Claimant has sought full-time employment and is available after school and on weekends.

REASONS: KRS 341.350 provides, as a condition of eligibility to receive benefits, that a claimant must be available for work and making such reasonable effort to obtain work as might be expected of a prudent person in similar circumstances.

In this particular case, claimant has established a long history of going to school AND working full-time. He has a monetarily valid claim based on wages paid him for performing just such work. The reason for claimant's restricting his availability to after school and on week-ends is compelling and not indicative of one unwilling to work. Therefore, the general rule that full-time students are unavailable for work is not controlling in this case.

DECISION: Claimant is not ineligible based on his school attendance.

C.O.# 57277 PRECEDENT

1844 RESTRICTING AVAILABILITY; SCHOOL ATTENDANCE.

ISSUE: Whether a claimant who has a history of working full-time and attending school should be held unavailable while looking to secure full-time work which would not conflict with class schedules.

FACTS:
1. Claimant employed for seven and one-half years by Nu-Kote International.
2. Claimant began nurses training in August, 1990, and continued to work full-time throughout the remainder of her employment.
3. Claimant voluntarily quit March 4, 1991, under nondisqualifying conditions.
4. Claimant is seeking full-time employment which will not conflict with her school schedule.
5. Claimant is unable to rearrange her school schedule and will not accept employment which conflicts with that schedule.
6. The Commission took official notice of the claimant's appeal letter wherein she stated she began work for Humana University of Louisville on June 3, 1991, working four hours after school on Tuesday and Thursday and eight hours a day on Wednesday, Saturday and Sunday, for a total of 32 hours a week which her employer considers to be full-time.

REASONS: Considering that the claimant had worked full-time and attended school for the last seven months of her employment with Nu-Kote International, two months of which was part of her base period, the Commission concludes that she should not be held unavailable for work simply because of her school attendance. Claimant should be allowed some reasonable period of time to find work which would not conflict with her schooling prior to being expected to forego said schooling in favor of work which would conflict with it. In this case, the Commission feels that the three months it took the claimant to secure full-time work which would not conflict with her school attendance was the very extreme limit of the aforementioned reasonable period of time.

DECISION: Claimant held available for work and, therefore, eligible to receive benefits from March 3, 1991, through June 1, 1991, if she has satisfied all other eligibility and qualification requirements for each of those weeks.

C.O.# 57977 PRECEDENT

1845 STRIKE AND LAYOFF; SAME WEEK.

ISSUE: Whether claimants are eligible to receive benefits for a week of unemployment during which a strike commenced and was resolved, then later notified no work was available the rest of the week due to equipment breakdown.

FACTS:
1. Claimants were hourly employees and union members.
2. Claimants worked various shifts. (7:00 a.m. - 3:00 p.m., 3:00 p.m. - 11:00 p.m., and 11:00 p.m. - 7:00 a.m.)
3. On Friday, June 16, 1989, claimants went out on strike.
4. The dispute ended at 3:00 p.m. on the following Monday, June 19, 1989.
5. All claimants missed one shift of work.
6. The third shift (11:00 p.m. - 7:00 a.m.) worked its normal shift Monday night. The first shift (7:00 a.m. - 3:00 p.m.) worked Tuesday morning. The second shift (3:00 p.m. - 11:00 p.m.) worked for about five hours at which time those claimants were notified, as were the others, that there would be no work available the rest of the week due to equipment breakdown.
7. The referee and the Kentucky Unemployment Insurance Commission denied benefits based on their interpretation of KRS 341.360 (1) and the commission's regulation defining "week of unemployment".
8. Franklin Circuit Court affirmed the decision made by the commission.
9. The Kentucky Court of Appeals reversed.

REASONS: At issue is KRS 341.360 (1) which provides in pertinent part as follows:

> No worker may be paid benefits for any week of unemployment: (1) With respect to which a strike or other bona fide labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed. . .

In a published decision, The Kentucky Court of Appeals held:

> Although the "cause" of appellants' loss of work was not the strike (which had been settled), and even though there was no "labor dispute. . . in active progress" at the time the appellants were laid-off, the commission declined benefits because it interpreted the statute to require disqualification whenever a claimant loses any time from work for strike-related reasons during a week, as defined by 903 KAR 5:110. Under this regulation a "week of unemployment" is defined as . . .
>
> > a calendar week of seven (7) consecutive calendar days, beginning 12:01 a.m. Sunday and ending 12 midnight the following Saturday.

This interpretation is erroneous as a matter of law for a number of reasons.

The Unemployment statutes are designed to protect workers who, through no fault of their own, find themselves without work. It is agreed by all that these appellants lost several days of work for reasons totally beyond their control. The commission's application of the disqualification statute thus works a forfeiture of benefits inconsistent with the policy and purposes of the act.

Next,the plain words of the statute dictate against its application in situations where, as here, the cause of the loss of employment is not due to a labor dispute. The disqualification applies only where (1) there "is" (not "was") a labor dispute "in active progress" which "caused" the claimant "to leave or lose his employment." Obviously this statute is meant to disqualify employees who have lost work due to a strike, from receiving benefits. By use of the present tense verb "is," the statute has no application to work lost to other causes in a week where coincidentally there "was" a labor dispute. Stated differently, if the labor dispute is not the cause of the loss of employment, that there was a strike at some other point in the week is irrelevant. if the legislature wanted to penalize workers who strike and provide for no benefits for ANY reason during any week a strike occurs

regardless of its duration, it could easily have drafted such a statute. KRS 341.360(1), however, does not, as the appellees insist, so provide.

As stated before, it is undisputed that the labor dispute in the instant case had ended before another unrelated cause arose to deprive appellants of work. Regardless of how the statute or regulations define "week of unemployment," KRS 341.360 (1) has no application to the facts of this dispute.

DECISION: Reversed. Benefits allowed.

VANCE V. KUIC, Ky. App., 814 S.W. 2d 284. PRECEDENT

1846 WEEK OF UNEMPLOYMENT; UNAVAILABLE FOR ONE DAY DURING THAT WEEK.

ISSUE: Whether a claimant is unavailable for work and ineligible to receive benefits for a week of unemployment when the claimant was unavailable for work one day during that week.

FACTS:

1. Claimant, an employee of Osh Kosh, last worked on February 24, 1989.
2. Claimant was next scheduled to work February 27, 1989.
3. Claimant attempted to drive to work on the morning of February 27, 1989, but found the roads to be too hazardous, and returned home.
4. Claimant notified his supervisor of his inability to work and was advised to contact him later that day about available work for the remainder of the week.
5. Claimant complied and was advised that no work would be available for the remainder of that week.
6. If claimant had been able to report for work on February 27, 1989, he would have been sent home "early" because of lack of work.
7. Claimant received no wages for week ending March 4, 1989.

REASONS: KRS 341.350 (3) and (4) condition an unemployed worker's eligibility for benefits on the dual requirements that he be able and available for work.

KRS 341.080 and 903 KAR 5:110 define "week of unemployment" as a calendar week of seven consecutive days beginning at 12:01 a.m. Sunday, and ending at 12:00 midnight the following Saturday, in which a claimant has worked less than full time and earned less than an amount equal to one and one-fourth (1 1/4) times his weekly benefit rate.

Claimant was unavailable to work a partial shift, February 27, 1989. He was laid off for lack of work the remainder of week ending March 4, 1989. The Commission does not believe the claimant should suffer the loss of benefits for week ending March 4, 1989, because of his unavailability for work a partial shift. Fairness and equity demand a more flexible interpretation of the above cited statutes (see Boyle Circuit Court, RUTH PEAVLER V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND MERCER DRESS CORPORATION,

A DIVISION OF BUTTE KNIT, CA Number 81-CI-284 and Oregon Court of Appeals, UNEMPLOYMENT DIVISION V. PARK, 27 Or. App. 395, 556 P. 2d 149 (Ore. App. 1976)).

In cases with similar factual circumstances, the determinative issue is whether the claimant is genuinely attached to (see KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. FISCHER PACKING COMPANY, 259 SW 2d 436, 440 (Ky. 1953)) AND generally in (PARK, supra) the labor market. Having a genuine attachment to and being generally in the labor market does not categorically require that the claimant be able and available every hour of every day in the week(s) at issue. Rather, each case must be decided on its own merits by close, precise questioning designed to elicit, among other things, the state of the claimant's mental attitude, "i.e., whether he wants to go to work or is content to remain idle. Indicative of such mental attitude is evidence as to efforts which the person has made in his own behalf to obtain work. A person who is genuinely attached to the labor market and desires employment will make a reasonable attempt to find work, and will not wait for a job to seek him out." (FISCHER PACKING COMPANY, SUPRA).

Claimant wanted to report for work February 27, 1989, however, he was unable to do so because of circumstances beyond his control. Claimant was genuinely attached to the labor market February 27, 1989, by virtue of his desire and effort to report for work, and that the fortuitous inclement weather, which is little more than an extreme of nature which might impede any worker's transit to work, does not mitigate against the claimant.

DECISION: Claimant held available for work and eligible to receive benefits.

C.O. # 53003 NONPRECEDENT

1847 WORK SEARCH; REASONABLE.

ISSUE: Whether the means used to seek work should be considered in the light of the customary way to obtain work in a particular occupation with the ultimate question being whether the search was reasonable.

FACTS:

1. Claimant was employed from November 16, 1989, to February 15, 1991, as Director of International Training.
2. Separation was due to lack of work.
3. Base period wages in excess of $105,000.
4. Claimant has 11 years executive financial experience and has both an undergraduate and graduate degree.
5. Claimant was told by local office personnel that he would have to make an active search for work but was not told he would have to have a minimum number of in person contacts each week.
6. Claimant moved to Atlanta, Georgia, subsequent to filing his claim and began claiming benefits through the interstate unit in Frankfort, Kentucky. (Initial interstate claim filed July 31, 1991)
7. On August 29, 1991, the Kentucky Interstate unit apparently sent claimant written work search requirements which stated "If your line of work is normally secured thru resume contact, such contacts are acceptable for the first twelve weeks of your claim. After that time you are required to make two (2) new in person contacts each week."
8. Claimant did not receive those written work search requirements.
9. Since claimant became unemployed he has made hundreds of telephone calls and resume contacts resulting in over one hundred in-person interviews.
10. During the two weeks ending September 21, 199l, claimant made in excess of fifty telephone contacts and mailed letters to those employers as well.
11. As a result of claimant's efforts, he was able to arrange fourteen in-person interviews for the two weeks following 9-21-91.

12. During the weeks when in-person interviews were not possible, due to the work and travel schedules of the company officials with whom he must interview, claimant made numerous telephone and resume contacts in an attempt to arrange in-person interviews.

REASONS: KRS 341.350 provides, as a condition of eligibility to receive benefits, that a claimant must be available for work and making such reasonable effort to obtain work as might be expected of a prudent person in similar circumstances.

The mere number of job seeking contacts is not a conclusive test of reasonableness of a search for work. The requirement of personal contacts with employers may be supplanted or supplemented in a particular case by registration with the Employment Service or private placement agencies or by writing letters of inquiry, answering newspaper ads or by making telephone calls.

The claimant has made an active search for work during the weeks under appeal and there is no question that he was genuinely attached to the labor market during these weeks. Considering claimant's prior work experience, his work search during the weeks under appeal was more than reasonable.

As a general rule, the requirement that claimants make two in person contacts after the twelfth week of claiming benefits is reasonable; however, if forced upon the claimant, in this particular case, the result would be to require the claimant to engage in a perfunctory work search, which is an unreasonable result. Therefore, this general rule is not controlling in this case.

DECISION: Claimant held available for work and eligible to receive benefits for the weeks in question and for all weeks properly claimed thereafter in which he made an active work search (as defined above) and during which he was able to work.

C.O. # 59285 NONPRECEDENT

Not to cited or quoted. For guidance only.

1848 SEASONAL EMPLOYMENT; OFF SEASON AVAILABILITY.

ISSUE: Whether or not an employee who has established a pattern of working seasonally for the same employer and expects future recall has a genuine attachment to the labor market and is therefore not required to make an active search for work when he is away from home visiting for a period of time.

FACTS:
1. Claimant worked for the Internal Revenue Service for several tax seasons.
2. Unemployment benefits were claimed during periods between seasons.
3. Claimant expected to return each season, but sought work while unemployed.
4. Claimant completed a tax season about August 22, 1992, and filed a re-opened claim for benefits on August 27, 1992.
5. Claimant was informed that he did not have to list job contacts on his claim cards but was to write on each card that he was "IRS job connected."
6. Not wanting to miss any calls concerning recall to IRS, claimant subscribed to a telephone answering service.
7. Claimant was away from home visiting relatives from November 25, 1992, until December 6, 1992.
8. Claimant received a message via his answering service and his neighbors concerning his returning to work for IRS.
9. Claimant contacted IRS the next day and subsequently received a confirmation form which he completed and mailed to IRS on December 3, 1992.
10. While visiting relatives claimant did make some inquiries about job possibilities although he did not go there to look for employment.

11. Claimant provided a short written statement to the Division's local office on December 7, 1992, about his visit to relatives.
12. A claim for Emergency Unemployment Compensation was signed on December 8, 1992, with an effective date of December 6, 1992.
13. The local office issued a determination dated December 9, 1992, which held that claimant was not realistically attached to the labor market, having undue restrictions or limitations regarding availability for work for the two week period commencing November 22, 1992, and ending December 5, 1992.
14. A Division entry on claimant's August 27, 1992, application to re-open his claim listed "B" as claimant's interview group code.

REASONS: KRS 341.350 provides, as a condition of eligibility to receive benefits, that a claimant must be available for work and making such reasonable effort to obtain work as might be expected of a prudent person in similar circumstances.

Employees who have established a pattern of working seasonally for the same employer may be determined to have a genuine attachment to the labor market and not required to make an active work search if the period between seasons is short and recall is expected. However, if there is a long period between seasons, the claimant should be required to look for intervening work.

Once a claimant is told he does not have to make an active work search because he has a genuine attachment to the labor market because of the expectation that he will soon return to his regular seasonal employer, he may not be held ineligible for being absent from home as long as he remains able to work and available to return to work if recalled.

An intensive work search is not necessary to establish labor market attachment and availability for work when a worker is routinely off work for a short period of time each year. The worker's absence from home during such a short period, to visit or for other non-work search activities, does not change the fact that claimant has a genuine attachment to the labor market with a realistic expectation to return to full-time employment with that same employer and is available for such recall, particularly when the provision is made to receive recall messages.

DECISION: Claimant had a genuine attachment to the labor market pursuant to a classification by the Division and was available for work, meeting the work search requirements placed upon him for the two week period beginning November 22, 1992 through December 5, 1992.

C.O. # 62981 PRECEDENT

1849 WORK SEARCH WHILE ATTENDING TRAINING SESSION.

ISSUE: Whether a claimant was available for work and, therefore, eligible to receive benefits while attending a potential employer's company training session.

FACTS:
1. Claimant was contacted by a potential employer to attend a 54 hour company training session.
2. Attendance was required to be considered for employment.
3. Classes were held July 6, 1993, through July 16, 1993.
4. Training hours were 4:30 p.m. until 11:00 p.m..
5. During the training, tests were given periodically and those test scores were used in determining who would be hired.
6. Claimant did not notify the local office of his intent to enroll in this training.
7. Claimant did not seek employment during week ending July 10, 1993, as he felt it was more important to stay at home and study to get good grades.
8. Claimant was not paid to attend training.
9. Claimant was hired by the company on August 9, 1993.

REASONS: KRS 341.350 provides, as a condition of eligibility to receive benefits, that a claimant must be available for work and making such reasonable effort to obtain work as might be expected of a prudent person in similar circumstances.

The evidence in this case shows that claimant was genuinely attached to the labor market and making a reasonable effort, considering the circumstances, to secure work. Granted he did not make a conventional work search during that week by contacting multiple prospective employers; however, his intensive effort to secure work with this one good prospect during the week at issue is sufficient to meet the requirements of the law. The best proof of that is he was hired a few weeks later.

It should be noted that in today's labor market more and more large employers are requiring similar training sessions where hopeful applicants must compete for several days to be considered for high-paying jobs. Such quality efforts should be considered as meeting the requirements of being available for work and actively seeking work.

DECISION: Claimant held available for work and, therefore, eligible to receive benefits from July 4, 1993 through July 10, 1993.

CO# 64614 PRECEDENT

1850 THE FOUR CONDITIONS OF ELIGIBILITY FOUND IN KRS 341.350 (3)& (4)

ISSUE: SEE ABOVE

FACTS: SEE BELOW

REASONS: Kentucky has FOUR (4) SEPARATE CONDITIONS OF ELIGIBILITY, set forth in KRS 341.350 (3) & (4); each of which must be met in order for a worker to be eligible to receive benefits; and each of which must be ruled upon individually:

1.) The worker must be MENTALLY ABLE to wrk.

2.) The worker must be PHYSICALLY ABLE to work.

3.) The worker must be AVAILABLE for work.

4.) The worker must make an ACTIVE SEARCH for work

NOTE: Over the years, AVAILABILITY for work has come to mean that a worker must not have an UNDUE RESTRICTION on his/her availability for work. An UNDUE RESTRICTION could be, e.g., lack of child care, lack of transportation, or school attendance (Each of which is consistent with the AVAILABILITY requirement set forth in 20 CFR Part 604).

DECISION: The four separate conditions of eligibility found in KRS 341,350 (3)& (4), listed above, must be ruled upon individually.

C.O. # 96788C PRECEDENT

Chapter 2000

LABOR DISPUTE

CONTENTS BY ISSUE

2000 LABOR DISPUTE; LOCK OUT, STRIKE, DEFINED.

ISSUE: Whether claimants who refuse to continue working under existing contract until a new agreement is reached are locked out or on strike.

FACTS:
1. National contract between UMWA and operators set to expire March 31, 1939.
2. Union proposed that work continue under existing terms until a new pact was reached or negotiations collapsed.
3. Operators countered, proposing to extend the existing contract for two years.
4. Neither proposal was accepted by the other side.
5. Workers did not report for work after expiration of the contract.

REASONS: The union accused the operators of establishing a lockout. The operators termed the situation a strike. The Commission termed the events to be a "labor dispute," which prohibited the workers from receipt of unemployment benefits by virtue of KRS 341.360 (1). The issue was ultimately appealed to the state's highest court. While the statutes do not define "labor dispute," the Kentucky Court of Appeals presumed that the legislature intended to use the term as it was used in the NATIONAL LABOR RELATIONS ACT, 29 USCA 152, wherein: "the term LABOR DISPUTE is defined to include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The terms "strike" and "lockout" were defined by the U.S. Court of Appeals, 7th Circuit, in a case styled IRON MOLDERS UNION VS. ALLIS CHALMERS, 7 Cir. 166 F 2d or Sub 2 45, 52, with the Court saying, "a strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

The Kentucky Court of Appeals held that there was nothing in the record to support an assumption that the operators desired to cease operations in order to obtain more desirable terms from the miners. On the contrary, the evidence clearly indicates that the only reason they did not continue to operate was the refusal of the union miners to work until an agreement had been reached. It is NOT the purpose of the Unemployment Insurance Compensation Act to enable those who are offered continuation of existing employment to refrain from work until they have secured advantages in addition to those previously enjoyed.

Here the operators offered to renew for two years a contract under which the miners had worked for the preceding two years, and by refusing this offer the miners brought about their own unemployment. Therefore the finding of the Commission is affirmed.

DECISION: Claimants held to be unemployed because of a labor dispute in active progress in the establishment where they were employed and disqualified from receiving benefits.

Kentucky Court of Appeals, BARNES VS. HALL, 146 SW 2d 929. PRECEDENT

NOTE: See KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION VS. LOUISVILLE BUILDERS SUPPLY, at Entry 2052 for expanded definition of "lockout."

2001 ARMISTICE IN LABOR DISPUTE; RECALL DURING.

ISSUE: Whether a claimant who refuses recall during a truce in a labor dispute is qualified to receive benefits.

FACTS:
1. When an impasse was reached in the negotiations of an initial contract, recently unionized employees called a strike on July 28, 1969, and established a picket line.
2. On September 12, 1969, with a mutual understanding that negotiations would continue, it was agreed to by the parties that workers would return to work by seniority.
3. On September 22, 1969, claimant, who previously worked on first shift was recalled to third shift.
4. Refused recall on grounds she felt she should have been given preference to the first shift.
5. Later accepted recall to first shift.

REASONS: Both the referee and Commission held the claimant to have refused an offer of suitable work with good cause on grounds the position was vacant because of a labor dispute or strike (see KRS 341.100). However, the Commission further held the mutual agreement that workers would return to work, by seniority, was nothing more than an armistice or truce in the labor dispute and did not terminate the progress of the labor dispute (see KRS 341.360).

DECISION: Notwithstanding claimant's refusal with good cause of recall to unsuitable work, claimant was unemployed due to a labor dispute in active progress and disqualified from benefits.

C.O. # 8459 NONPRECEDENT

2002 NOTICE OF STRIKE TO COMMISSION; NOT GIVEN.

ISSUE: Whether striking claimants should receive benefits simply because the employer failed to notify the Commission of the existence of the strike.

FACTS:
1. In 1941 a "work stoppage" became effective in most of the coal mines in Kentucky.
2. In that year, the stoppage was nationwide.
3. UMWA and coal operators could not agree on a new contract.
4. A number of Kentucky employers notified the Commission in writing that a labor dispute (work stoppage) was in progress.
5. However, the captioned employers failed to give required notice.
6. And SOLELY because of that failure, the striking claimants were allowed benefits.

REASONS: KRS 341.360 provides that benefits may be paid to striking claimants "unless" the employer notifies the Commission in writing within seven days after the beginning of the alleged strike or labor dispute of the alleged existence of such strike or labor dispute.

Kentucky Court of Appeals held that:

> The requirement of notice apparently was added to facilitate the administration of the Act. Under the original provision, it is conceivable the Commission may have paid claims in violation of the law simply because it had no notice of the claimant's ineligibility. It appears to us the exception in the amended section, to the effect that benefits "may be paid" where the employer's notice is not given, was designed to protect the Commission and the employee in the event such payments were made without due proof that the basis of disqualification existed.
>
> Further, the Court reasoned that to pay benefits to striking employees simply because their employers failed to give the written notice:
>
> "... seems a highly artificial construction of the language used. It overlooks the dominant intent of the law that workers out of employment under these circumstances shall as a matter of policy be disqualified. It clothes a requirement for notice with a significance wholly unrelated to the other provisions of the statute."
>
> [2] It is our conclusion that the fundamental purpose of KRS 341.360 was to prohibit benefit payments to those employees who had left their employment because of a strike or bona fide labor dispute; that the employer's notice required by that section was evidentiary in character; and that the Commission was not required to pay benefits in the absence of such notice if other evidence clearly established the existence of the disqualifying fact.

DECISION: Claimants disqualified on grounds they were unemployed due to a strike in the establishment where they were employed.

Kentucky Court of Appeals, ELKHORN AND JELLICO COAL COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 221 SW 2d 640. PRECEDENT

2010 "ESTABLISHMENT"; FACTORIES IN DIFFERENT STATES.

ISSUE: Whether claimants, employees of a Kentucky assembly plant, are disqualified when they are laid off for lack of parts to assemble due to a strike in another of the parent company's plants in Michigan.

FACTS:
1. Claimants, employees of the Ford Motor Company assembly plant in Louisville, Kentucky.
2. Laid off when the supply of parts to assemble stopped due to a strike at the Ford Motor Company's Dearborn, Michigan plant.

3. The Dearborn, Michigan local union retained the right to call a local strike (the consent of the International Union's Executive Board being necessary to insure that body's organizational and financial support).
4. International Union had no authority to call the Louisville, Kentucky, local out on strike to support Dearborn, Michigan, local (unless general strike was being called).
5. Louisville local had no power to avert the strike of the Dearborn, Michigan, local.

REASONS: KRS 341.360 provides that no worker shall be paid benefits who is unemployed due to a labor dispute or strike in the ESTABLISHMENT where he was employed.

The Kentucky Court of Appeals held that the principle of agency did not bar the Kentucky claimants from receiving benefits because neither the International Union (by consenting to the local strike) nor the Michigan local (in calling the strike) had the authority to act as agent for the Kentucky local. Thus, the Kentucky employees were not on strike.

It remains to determine whether the Kentucky employees were unemployed because of a labor dispute in the establishment where they were employed, i.e., is the "far-flung" Ford Motor Company the establishment or does the term establishment refer, in this case, to the Ford plant in Louisville? The Court held that in determining whether a certain unit of a multiple unit industry is a separate establishment, the criterion to be used is whether the unit is a single enterprise from the standpoint of employment, rather than from the standpoint of arrangement or for more efficient production of goods.

The Court concluded that:

> "Establishment" refers to single unit of employment and does not embrace entire industry, consisting of multiple units, and strike in one factory of major automobile producer did not preclude workers in other units or factories from receiving unemployment compensation when striking unit was not agent of nonstriking unit. KRS 341.360.

DECISION: Claimants held not disqualified on grounds their unemployment was not due to a labor dispute in the establishment where they were employed.

Kentucky Court of Appeals, FORD MOTOR COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 243 SW 2d 657. PRECEDENT

2011 "ESTABLISHMENT"; FACILITIES IN DIFFERENT CITIES.

ISSUE: Whether claimants employed in the company's coal mines in Lynch, Kentucky, are disqualified from benefits when they are laid off due to a strike at the company coal processing plant in Corbin, Kentucky.

FACTS:
1. The same company owns the mines in Lynch and the processing plant in Corbin (some ninety miles away).
2. Coal was transported daily from Lynch to Corbin for processing.
3. A bona fide labor dispute or strike began at the Corbin processing plant.
4. Lynch mines shut down and claimants laid off because there was no other facility to process the coal.
5. There was common ownership, common personnel department, common payroll records, the same national bargaining agreement (although different union locals), and many instances of joint handling of administrative situations.

REASONS: The Kentucky Court of Appeals, in rendering its decision in this case, restated its earlier positions on the issue of "establishment" found in FORD MOTOR COMPANY V. KENTUCKY

UNEMPLOYMENT INSURANCE COMMISSION, (see Entry 2010) and SNOOK V. INTERNATIONAL HARVESTER COMPANY, (see Entry 2012).

The Court then went on to state:

"A fair reading of SNOOK V. INTERNATIONAL HARVESTER COMPANY, Ky. 276 SW 2d 658 impels the conclusion that physical proximity, considered along with functional integrality and general unity, was a major factor in inducing the court's decision. Wide separation of the units was a prime basis for our decision in FORD MOTOR COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky.243 SW 2d 657. In both opinions, the Court sought to apply a practical layman's construction of the word "establishment." It is doubted that the average person would consider the mines at Lynch as being the same establishment as the preparation plant at Corbin. We need not suggest an arbitrary linear distance which will control the question of proximity. It suffices to say, as we do, that the distance between Lynch and Corbin is so great as to negate the thought that Lynch and Corbin constitute one "establishment."

DECISION: Claimants held not disqualified on grounds their unemployment was not due to a labor dispute in the establishment where they were employed.

Kentucky Court of Appeals, U.S. STEEL CORPORATION V. LONNIE BROWN, ET AL, 441 SW 2d 405. PRECEDENT

2012 "ESTABLISHMENT"; FACTORIES IN CLOSE PROXIMITY, (FUNCTIONAL INTEGRATION, GENERAL UNITY, AND PHYSICAL PROXIMITY).

ISSUE: Whether claimants employed in the company's foundry are disqualified from benefits when they are laid off due to a strike in the company's ADJACENT machine shop.

FACTS:

1. Within Kentucky, the company operates a mine in Benham, a sales office in Louisville, and the "Louisville Works."
2. Its "Louisville Works" consist of a foundry and ADJACENT machine shop, which together produce farm equipment.
3. Although housed in separate buildings, the foundry and machine shop have a common boundary (i.e., fenced enclosure).
4. "Louisville Works" staff serves both the foundry and machine shop, with respect to purchasing, materials control, accounting, time study, industrial relations, and personnel.
5. Sixty-eight percent of castings produced by the foundry are used by the machine shop in the assembly of tractors.
6. Employees of the foundry and machine shop were represented by three different unions.
7. Machine shop employees went on strike.
8. Foundry workers, who did not actively participate in the strike, were laid off because the machine shop uses the majority of the parts made in the foundry.

REASONS: The Kentucky Court of Appeals held that neither strike participation nor the interest of employees in a labor dispute can be the test of qualification for benefits. Rather, qualification for benefits hangs on whether unemployment is due to a strike in the establishment where the claimants were employed.

In determining whether or not separate plants or activities or functions constitute a single establishment, the following tests should be applied: (1) functional integration, (2) general unity, and (3) physical proximity. The Court held that whatever test or combination of tests were applied:

The foundry and machine shop cannot be considered separate establishments. The two are functionally integrated, there is a general unity both in the operation of the plant and in the nature

of employment, and their physical proximity is such as to constitute a single unit. In addition the plant itself, composing both departments, is "a distinct physical place of business."

An "establishment" was so defined by the Supreme Court of New Jersey in Ford Motor Company v. New Jersey Department of Labor, 5 NJ 494, 76 A 2d 256.

The Court further noted that KRS 341.060 (2) recognizes that one employing unit may have two or more separate establishments within the state of Kentucky. In this case, the employer operates three establishments in Kentucky, i.e., the mine, sales office, and "Louisville Works".

In conclusion, the Court quoted the Commission:

"The foundry and machine shop are in close proximity to each other, enjoy a common boundary, each is easily accessible to the other, and evidently the company has the right to integrate all services of the two groups insofar as permitted by the union contract. These facts lead us to the conclusion that under the test of functional integrality, general unity, physical proximity, and from the standpoint of employment, the machine shop and the foundry are conducted as a single establishment and that the strike in the machine shop was one which was in active progress in the establishment in which the claimants were employed."

DECISION: Claimants disqualified from receiving benefits on grounds they were unemployed due to a strike in the establishment where they worked.

Affirmed by the Kentucky Court of Appeals, SNOOK V. INTERNATIONAL HARVESTER COMPANY, 276 SW 2d 658. PRECEDENT

2013 STRIKE VERSUS LAYOFF (CONSTRUCTION INDUSTRY).

ISSUE: Whether employees of the prime contractor are disqualified from benefits when they are laid off for lack of work while employees of a subcontractor at the same construction site are on strike.

FACTS:
1. Claimants are laborers for the prime contractor.
2. Only a small portion of their time was spent engaged in carpenter helper duties.
3. Most of their work consisted of spreading gravel, clearing the grounds, and stacking materials.
4. Carpenters, employed by a subcontractor, at the same construction site, went on strike.
5. No picket lines; and other crafts continued working.
6. Claimants laid off because of steel stored in the area where they were to spread gravel.
7. And because ongoing steel erection made it unsafe to work on the ground.

REASONS: Admittedly there was a strike of the carpenters at their employer's establishment, and that the establishment was also that of the claimants-laborers. However, KRS 341.360 provides in part:

"No worker may serve a waiting period or be paid benefits for any week of unemployment with respect to which:

(1) A strike or other bona fide labor dispute WHICH CAUSED HIM TO LEAVE OR LOSE HIS EMPLOYMENT is in active progress in the establishment in which he is or was employed..." (Emphasis added).

The evidence of record supports the referee's findings that the strike by the carpenters WAS NOT THE PROXIMATE CAUSE OF THE UNEMPLOYMENT of the claimants-laborers. The evidence of record is that most of their work consisted of spreading gravel, clearing the grounds, and stacking and unstacking materials. Because of the undue hazard created for the ground workers by the steel erection and the lack of yard space because of the steel storage, it was

decided to layoff the laborers. It is found, based on the facts of record, that the carpenters' strike did not cause the unemployment of the claimants, and they cannot be disqualified from receiving benefits under KRS 341.360. Close questioning required to determine the PROXIMATE cause of unemployment.

DECISION: Claimants held not disqualified on grounds their unemployment was not due to a labor dispute in the establishment where they worked.

C.O. # 8849 NONPRECEDENT

2014 DIFFERENT "ESTABLISHMENTS"; SAME PHYSICAL LOCATION.

ISSUE: Whether cafeteria workers of employer A who provide services for workers of employer B on employer B's premises are disqualified from benefits when laid off due to a strike by employer B's workers.

FACTS:
1. Employer A operates a cafeteria in the basement of the main plant building of employer B.
2. Claimants serve employer B's workers on all three shifts.
3. On April 1, 1968, workers of employer B went on strike, and picket lines were formed.
4. Claimants did not participate or help finance the strike, but refused to cross the picket lines.

REASONS: KRS 341.360 provides:

"No worker may serve a waiting period or be paid benefits for any week of unemployment with respect to which:

(1) A strike or bona fide labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed."

It is not disputed that a labor dispute existed between employer B and its production employees. However, it cannot be found that a dispute existed between employer B and the cafeteria workers. Further, there was no dispute between the claimants and employer A. The issue to be resolved is whether the labor dispute existed in the establishment where the claimants are or were employed. The term establishment is not defined in the statute. Only two cases involving the definition of the term establishment have been decided by the Kentucky Court of Appeals.

After citing the two Kentucky cases on point (FORD MOTOR COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Entry 2010, and SNOOK V. INTERNATIONAL HARVESTER COMPANY, Entry 2012) the Commission then cites other authorities, concluding that the case nearest in point is KNOFF V. EGEKNIST BAKERIES, INC., Minn. 107 NW 2d 373, where employees of a bakery retail outlet which operated in a leased space in a supermarket were in a separate establishment from the supermarket employees.

DECISION: Claimants held not disqualified on grounds their unemployment was not caused by a strike in the establishment where they were employed.

C.O. # 7970 NONPRECEDENT

2015 "ESTABLISHMENT;" TRUCKING INDUSTRY.

ISSUE: Whether truck drivers of a company with terminals in seven states are disqualified when they are laid off due to a strike in several terminals other than where they are based.

FACTS:

1. The company, a freight hauler with headquarters in Wisconsin, operates terminals in seven states with drivers based at their respective terminals.
2. Claimants were based in Louisville, Kentucky.
3. Drivers of several terminals (OTHER THAN IN LOUISVILLE) went on strike.
4. Fifty-five percent of all fright arriving at Louisville originated from the terminals being struck.
5. Claimants were laid off for lack of work when this freight flow was cut off.

REASONS: The company contends that the Louisville terminal and those being struck are a single establishment because they are functionally integrated (see SNOOK V. INTERNATIONAL HARVESTER COMPANY, Entry 2012). However, the Commission held that it is apparent that the Kentucky Court of Appeals gives greater weight to the physical situs of an employing unit than to the functional integrality with other units or the general unity of such units.

In the case of FORD MOTOR COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., 243 SW 2d 657, the Court adopted the reasoning in the case of NORDLIN V. FORD MOTOR COMPANY (1950), 231 Minn. 68, 42 NW 2d 576, which held that all of the plants in the Ford Motor Company empire were not one, but were separate establishments. The Court said, in considering the factors such as integrality, unity and physical proximity, that it should look to the employment, meaning the place where the workers are hired and supervised.

This more nearly fits the present case, considering that the physical situs of work performance was more or less transitory. From the standpoint of employment, the Louisville terminal was separate from the other terminals, and the Louisville based employment was in a separate establishment from the employment based at other terminals.

DECISION: Claimants held not disqualified on grounds their unemployment was not caused by a labor dispute in the establishment where they were employed.

C.O. # 8862 NONPRECEDENT

2017 MERITS OF LABOR DISPUTE; DEPARTMENT NEUTRALITY.

ISSUE: Whether the department should consider the merits of the labor dispute when determining claimant's qualification for benefits.

FACTS:

1. Claimant is admittedly on strike against her employer.
2. Apparently she sought to have the merits of the labor dispute ruled upon by the department.
3. With her qualification for or disqualification from benefits dependent thereon.

REASONS: The Commission held that regarding labor disputes the department MUST STAND NEUTRAL.

It is not within its province to inquire into the merits of such an industrial controversy. KRS 341.360 is not penal in nature but merely requires the Division to stand aside and scrupulously avoid any implications of financing or subsidizing the striking workers through the payment of unemployment benefits. The finding in the adjusted determination constituted adherence to these PRINCIPLES, and they MUST and should BE SUSTAINED.

DECISION: Claimant held disqualified on grounds she was unemployed due to a strike in active progress in the establishment where she was employed. Merits of the labor dispute were not considered.

C.O. # 11532 NONPRECEDENT

2020 "ESTABLISHMENT"; AIRLINE INDUSTRY (FUNCTIONAL INTEGRATION).

ISSUE: Whether airline terminal employees and administrative staff are disqualified when they are laid off due to a strike by aircraft maintenance personnel employed at the same airfield.

FACTS:
1. Nonunion service agents, clerical employees, porters, and other administrative personnel work inside the terminal.
2. Union maintenance personnel were housed in a building 50 to 100 feet from the terminal.
3. Terminal manager hired and supervised both groups of employees.
4. Maintenance personnel went on strike and set up picket lines in the terminal.
5. Claimants laid off because flights were grounded.

REASONS: The question addressed by the Commission is whether the two groups of employees were sufficiently functionally integrated to constitute a single establishment. After citing SNOOK V. INTERNATIONAL HARVESTER COMPANY, (see Entry 2012) and WALGREEN COMPANY V. MURPHY, 386 Ill. 32, 53 NE 2d 390, 394, where it was held that a warehouse and various retail stores in the same city did not constitute a single establishment, the Commission acknowledged the exceeding closeness of the question at issue and held that the claimants and the maintenance personnel were not sufficiently functionally integrated to constitute a single establishment (see KRS 341.360).

DECISION: Claimants held not disqualified on grounds their unemployment was not due to a strike in the establishment where they were employed.

C.O. # 7112 NONPRECEDENT

2030 "ESTABLISHMENT"; AIRLINES INDUSTRY (DIFFERENT PHYSICAL LOCATIONS).

ISSUE: Whether employees based in Kentucky are disqualified when they are laid off due to a strike by company employees based in other states.

FACTS:
1. Of the company's 17,900 workers, 175 were employed in Kentucky.
2. None of whom were flight engineers.
3. Kentucky employees were hired, fired, and supervised by local Kentucky management.
4. Flight engineers went on strike.
5. And set up picket lines in major cities, but none in Kentucky.
6. There was no controversy between Kentucky employees and the company.
7. Company cancelled all flights because of the strike and laid off 105 of its Kentucky employees.

REASONS: The word establishment is not refined in its statutory usage by contextual words. It seems certain, however, the Legislature did not mean by "establishment" the whole compass of a large employer's business institution where it operates in differently localized components. The word establishment has strong local connotations. In common use, it often denotes a store or mercantile place of business. An industry with many localized units may have many establishments within the statutory language as we read it. An industrial controversy in one localized place affecting employment in another localized place in such an industry is not in the same establishment. (MACHENINSKI V. FORD MOTOR COMPANY, 102 NYS 2d 258).

The Kentucky Legislature, as practically all other state legislatures, did not give a definition of the word establishment, but it used the word in two separate sections of the law. Once in the section now being discussed, KRS 341.360 (1) and again in KRS 341.060 (2) which is as follows:

"All workers performing services within this state for any employing unit which maintains TWO OR MORE SEPARATE ESTABLISHMENTS within this state shall be deemed to be employed by a single employing unit for all purposes of this chapter."

It becomes apparent that the legislative intent of the word establishment is not synonymous with the word industry or business enterprise. We believe that the last quoted section of the law is sufficient authority for holding that not only an employer may have more than one establishment within this state but certainly components of an employer outside the boundaries of Kentucky may be separate establishments from those within.

We have carefully reviewed numerous cases which deal with this subject, and it is obvious that the majority rule is to the effect that in defining establishment we look to the employment and to the geographical situs. Certainly, the more weighty authority of the more highly regarded courts is to that effect. Under these conditions and the facts in this case which adequately show that the Kentucky employees of Eastern were employed and supervised by management in Kentucky, that they were hired and fired in Kentucky, and that none of the striking personnel of Eastern were employed in Kentucky, we conclude that the referee erred in holding that the Kentucky workers were out of employment because of a strike in the establishment where they were last employed.

DECISION: Claimants held not disqualified on grounds their unemployment was not due to a strike in the establishment where they worked.

C.O. # 4359 NONPRECEDENT

2032 "ESTABLISHMENT;" CONSTRUCTION INDUSTRY.

ISSUE: Whether employees of the prime contractor are disqualified when they are laid off due to a strike EITHER by workers not employed by the prime contractor or by workers in the employ of the prime contractor.

FACTS:

1. The captioned employer is the prime contractor, employing laborers, bricklayers, and carpenters.
2. Ironworkers were employed by a subcontractor.
3. On June 1, 1968, ironworkers went on strike.
4. No picket lines were formed and the strike ended July 1, 1968.
5. On July 1, 1968, bricklayers went on strike.
6. No picket lines were formed and the strike ended August 9, 1968.
7. Claimant was not a member of either the ironworkers or bricklayers union, and he was READY AND WILLING TO WORK at all times.
8. Claimant was laid off from June 1, 1968, through August 9, 1968, because of the strikes.

REASONS: Despite the causal connection between the strikes of the ironworkers and the bricklayers and the unemployment of the claimant, the disqualifying statute, KRS 341.360, is applicable only if the disputes or strikes were in the establishment where the claimant is or was employed.

The Kentucky Court of Appeals has not decided a case in point, but Commission Orders and reported cases found hold that the employees of separate employers are in separate establishments. The Commission then cited the following cases as authority for its ruling.

In EMRICK V. UNEMPLOYMENT COMPENSATION COMMISSION, (1961), Del., 173 A. 2d 743, the Court allowed benefits to employees of one subcontractor when work on the site was shut down by the strike of employees of a second subcontractor.

A New York Court, in IN RE: BUCKLAEW, (1950), 277 App. Div. 805, 96 NYS 875, allowed benefits to a claimant, who, because of interdependence of operations, was deprived of work by a strike by employees of other contractors at the job site.

Since claimant was an employee of the prime contractor, the dispute between a subcontractor and his employees, the ironworkers, was not in the establishment where claimant is or was employed from June 1 through June 30, 1968; however, when the bricklayers, also employees of the prime contractor, caused the work stoppage at the job site beginning on July 1, 1969, the dispute began in the establishment where claimant is or was employed. The rule of law by a great majority of the reported cases in point under statutes requiring the dispute to be in the establishment is that "...employees of separate employers are in separate establishments irrespective of being employed in the same physical location and having interdependency in operation..."

DECISION: Claimant was not unemployed due to a labor dispute in the establishment and not disqualified from receiving benefits from June 1 through June 30, 1968. It is further held, however, that he was unemployed because of a labor dispute in the establishment where he is or was employed and disqualified from receiving benefits from July 1 through August 9, 1968.

C.O. # 8131 NONPRECEDENT

2033 "ESTABLISHMENT"; SEPARATE UNIONS SAME EMPLOYER.

ISSUE: Whether teamster union truck drivers based at plant A are disqualified when they are laid off due to a strike by IBEW union production workers employed at the same plant.

FACTS:
1. Claimants are teamster union truck drivers based at the employer's Hopkinsville plant.
2. They deliver the employer's product to either customers or the employer's plant in Beaver Dam.
3. IBEW union production workers at the Hopkinsville plant went out on strike.
4. Claimants did not participate in the dispute, and they were willing to cross the picket line.
5. Claimants laid off because of no products to deliver.

REASONS: After citing SNOOK V. INTERNATIONAL HARVESTER COMPANY, (see Entry 2012), FORD MOTOR COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, (see Entry 2010) and U.S. STEEL INC. V. BROWN (see Entry 2011), the Commission notes that a case in point with the present case has not been decided by the Court of Appeals, and one in other jurisdictions has not been readily found. It is concluded, however, that the claimant truck drivers who were considered based at the Hopkinsville plant and who made deliveries from such plant were employed in the ESTABLISHMENT of the company wherein a labor dispute was in active progress. Because of the strike no deliveries could be made from the Hopkinsville plant, and claimant truck drivers became unemployed. It is immaterial that the claimants were members of a different union and willing to cross the picket line.

DECISION: Claimants held disqualified on grounds they were unemployed because of a labor dispute in active progress in the establishment where they were employed.

C.O. # 8551 NONPRECEDENT

2050 STRIKE VERSUS LOCKOUT (REDUCTION IN PAY).

ISSUE: Whether an employer's insistence that his employees accept a reduction in pay (so he could stay in business and they could have employment) is sufficient to render the employees cessation of work a lockout rather than a strike.

FACTS:

1. Claimants were members of UMWA.
2. Contract requires a basic shift wage of $24.25, or if paid on a production basis as were the claimants, the piece work rate must be high enough to equal the base wage.
3. Usual buyer of the company's coal ceased buying outside coal.
4. Company found a new buyer who paid 25 cents less per ton than previously received.
5. Claimants notified they must absorb 12 and one-half cents of the reduced price, in order for the mine to remain open.
6. Claimants refused and ceased working.
7. The mine shut down, but company stood ready to reopen and furnish employment at any time.
8. Reduction in pay would not have violated the contractual requirement of a basic shift wage of at least $24.25.

REASONS: A strike is a cessation of work by employees in an effort to obtain more desirable terms. A labor dispute is any controversy between employer and employees concerning terms, tenure, or conditions of employment. A lockout is a cessation of the furnishing of work by an employer in order to obtain more desirable terms. However, further light can be shed on the elements contained in a lockout by the following language:

"Insistence on onerous terms by an employer, accompanied by a threat of dismissal if not accepted, might, under certain circumstances, constitute a 'lockout.'"

To meet the definition of a lockout, there must have been an advantage accruing to the employer and arising out of a term upon which he insisted. What was it? The price of his coal had been reduced 25 cents, and if his terms had been accepted he would still have received 12 and one-half cents less for each ton than he had previously received. He did not attempt to wrest an advantage from these men; he only tried to get them to share a disadvantage with him whereby he could stay in business, and they could have employment. There was no lockout.

In Commission Order Number 1196, (Princess Elkhorn) and in Order Number 1363 (Harlan Wallins), it was held that a labor dispute continues in active progress until it is settled, terminated, or abandoned or is no longer the proximate cause of the unemployment. Here the controversy still exists as of the date of hearing. When the mine is worked, the claimants have the contractual right to the employment provided. Company will furnish employment at the reduced rate.

DECISION: Claimants held disqualified on grounds they were unemployed as the result of a strike in active progress in the establishment where they worked.

C.O. # 4078 NONPRECEDENT

2051 STRIKE VERSUS LOCKOUT (REDUCTION IN PAY AND REJECTION OF EXISTING CONTRACT).

ISSUE: Whether an employer's unilateral reduction in pay and rejection of existing contract is sufficient to render the claimant's cessation of work a lockout rather than a strike.

FACTS:

1. Claimants, over-the-road truck drivers represented by the teamster's union, received $13.00 per hour plus 32 cents per mile.
2. The company filed for Chapter 11 reorganization in bankruptcy court.
3. And reduced its number of terminals from 65 to 22.
4. Efforts to renegotiate the contract began.
5. Bankruptcy court then permitted the company to reject the existing contract.
6. Company unilaterally rejected the contract and reduced claimants' pay to $9.00 per hour and 22 cents per mile.

7. In response to these changes in the terms of employment, claimants struck the company.

REASONS: The terms strike and lockout were defined by the U.S. Court of Appeals, 7th Circuit, in a case styled Iron Molders Union v. Allis Chalmers, 7 Cir. 166 F 2d or Sub. 2 45, 52, with the Court saying, "A strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

In the case of NLRB Petitioner v. Buildisco and Buildisco, Debtor-in-Possession, et.al., 52 U.S.L.W. 4269, February 22, 1984, the U.S. Supreme Court considered a case that is similar in nature. Incidentally, it involved the same union. The court held that in circumstances such as those presented in this case, when an employer rejects a contract, it is not a violation of the National Labor Relations Act (NLRA).

Although legal, we find that the employer is the party initiating the action of rejecting the contract. The motivating factor was economic or to gain more desirable terms for the employer. That is a lockout. The strike was a result of the change in terms and was a result of changes imposed by the employer. This agency is statutorily prohibited from denying benefits when unemployment is by reason of a lockout (see KRS 341.360).

DECISION: Claimants held qualified on grounds their unemployment was due to a lockout rather than a strike.

C.O. # 40159 PRECEDENT

2052 STRIKE VERSUS LOCKOUT, (EMPLOYER ASSOCIATION).

ISSUE: Whether a strike against one member of an employer association constitutes a strike against all members of the association.

FACTS:
1. Twelve employers associated together for bargaining and contracting purposes.
2. Contract between union and employer association expired.
3. Claimants continued working while negotiations were in progress.
4. Union demanded increase in wages and other advantages.
5. Employers initially insisted that the new contract be on the same terms as the old one.
6. But then offered a wage increase less than that demanded by the union.
7. Union rejected the offer and struck one of the twelve employers.
8. The remaining eleven employers withheld work from their employees.
9. It is with the employees of the remaining eleven employers that this case is concerned.

REASONS: The union maintained that the employers had established a lockout. The employers contended that their association had acted as a collective unit in bargaining and contracting with the union, and that a strike against one member of the association was a strike against all. In affirming the Commission, the Kentucky Court of Appeals held that the immediate cause of the cessation of employment was controlling in determining whether a lockout or strike existed. Held that the claimants did not go out on strike but were prevented from working by their employers (i.e., the claimants were locked out).

The Court further reasoned that:

It is questionable whether the definitions of "lockout" set forth in the Barnes v. Hall and in the Detroit Harvester case are entirely adequate, because it would seem that if an employer ceases to furnish work for the purpose only of stopping his employees from asking for terms more favorable to them than those under an existing contract, the same policy of labor relations law is involved as where the purpose of the employer is to obtain terms more favorable to him. It may be that the test should be, as suggested by some of the language in the Detroit Harvester case,

whether the purpose of the employer is to compel the employee "to accept terms or make concessions favorable to the employer," regardless of whether the terms or concessions are to be considered "more" favorable than presently existing terms. Lastly, while a lockout may be a lawful weapon to combat the potential strike weapon of the union, it remains that KRS 341.360 limits the strength and effectiveness of the lockout weapon by permitting the locked-out employee to receive unemployment benefits.

DECISION: Claimants held to be locked out and qualified to receive benefits.

Affirmed by Kentucky Court of Appeals, Kentucky Unemployment Insurance Commission v. Louisville Builders Supply, 351 SW 2d 157. PRECEDENT

2210 VOLUNTARY QUIT VERSUS LABOR DISPUTE.

ISSUE: Whether there exists a voluntary quitting or a labor dispute when employees cease working because the employer fails to abide by certain terms and conditions of the contract.

FACTS:

1. Claimants are members of the UMWA.
2. Contract provides that the company pay a certain royalty on each ton of coal mined to the Union's Welfare and Retirement Fund.
3. Company became delinquent in the payment of this royalty.
4. Claimants would not lose union membership because of the company's delinquency.
5. However, they would lose (through union action) their hospital cards which entitled them to medical treatment and hospitalization.
6. Rather than forego this privilege, claimants "automatically quit."
7. Claimants resumed work only after the company became current on its royalty payments.
8. Claimants did not take court action to force the company to abide by the contract.

REASONS: KRS 341.360 provides:

"No worker may serve a waiting period or be paid benefits for any week of unemployment with respect to which:

(1) A strike or other bona fide dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed..."

It apparently is the contention of the claimants that they did not leave or lose their employment during this period due to the existence of a strike or bona fide labor dispute in the company's establishment, but rather they voluntarily quit when they learned that the company had not lived up to the terms and conditions of the contract relating to the payment of the royalty, and as a result thereof they were in danger of losing their hospital cards. The Commission cannot agree.

It seems clear from the evidence in the record that the question of whether the claimants lost their hospital cards was a matter between the union and the claimants. The idea of quitting was merely a means of forcing the company to abide by the conditions of the contract, which could also have been done, it seems, by the initiation of proper court action. It is not the position of the Commission to attempt to indicate that the latter course should have been followed in this case, but simply to say that by following the former course of conduct we believe that the claimants have prevented the receipt of benefits under the Kentucky Unemployment Insurance Law as outlined above.

The referee decision, we find, is correct, and it quite properly pointed out that the existence of a strike is not necessary to warrant the imposition of the disqualification. What was found to exist is a labor dispute, and we find the evidence supports this finding.

DECISION: Claimants held disqualified on grounds their unemployment was due to a labor dispute in active progress in the establishment where they were employed.

C.O. # 4108 NONPRECEDENT

2220 REFUSAL TO CROSS PICKET LINES.

ISSUE: Whether a claimant is disqualified on grounds he became involved in a labor dispute when he refused to cross another union's picket line.

FACTS:
1. Claimant is a union electrician.
2. His employer is one of several contractors on the job site.
3. The other contractors employed workers of different crafts.
4. Millwrights called a strike after the work shift began.
5. Claimant then left the job and refused to perform available work until the strike was over.
6. Neither the claimant nor his union was directly striking his employer.

REASONS: KRS 341.360 provides that no worker may serve a waiting period or be paid benefits for any week of unemployment with respect to which a strike or other bona fide labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed.

The facts reveal that neither the claimant nor his union was directly striking against the captioned company; however, a substantial number of the employees of the captioned company did not cross the picket lines at the establishment. By this refusal, claimant, in effect, became involved in a labor dispute which was the direct cause of his leaving or losing his employment; therefore, the claimant is ineligible to receive benefits for as long as he withheld his services and continued his involvement in the dispute.

DECISION: Claimant held ineligible on grounds he was unemployed due to a labor dispute in active progress in the establishment where he was employed.

C.O. # 9391 NONPRECEDENT

2221 "ESTABLISHMENT"; NONSTRIKING SUPERVISORY EMPLOYEES.

ISSUE: Whether nonstriking supervisory employees are disqualified when they become unemployed due to a strike by other employees of the company.

FACTS:
1. Production and maintenance workers struck the plant on August 20, 1962.
2. Claimants (office, sales and/or engineering employees) continued working until September 20, 1962.
3. When they were laid off for lack of work caused by the strike.

REASONS: It was insisted that the claimants were not in any way engaged in the strike activities toward the company and could not profit by the strike that did exist, but admittedly their unemployment was caused by the strike of the maintenance and industrial workers.

In the case of SNOOK V. INTERNATIONAL HARVESTER COMPANY, Ky. 276 SW 2d 658, the Court of Appeals of Kentucky defined the word "establishment" as it is used in KRS 341.360. Therein the Court wrote:

"By the use of the word 'establishment' we are of the opinion the legislature placed a localized strike situation in a category by itself and has not seen fit to declare that when a strike is in progress at a particular place all nonstrikers are entitled to benefits of the Act."

Herein the office workers were employees in the establishment of the appellee which was struck by the production workers. As there are not exceptions in the Kentucky law as there are in the laws of some other states, we conclude that these workers were unemployed because of the strike, and the law prohibits the payment of benefits to them.

DECISION: Claimants held disqualified on grounds their unemployment resulted from a strike in active progress in the establishment where they worked.

C.O. # 4638 NONPRECEDENT

NOTE: In Order Number 3698, the Commission held that laboratory workers whose employment depended upon production work in the plant were unemployed due to a strike in the establishment where they were employed, when they were laid off because of lack of work resulting from a strike by production workers.

2222 INFORMATIONAL PICKET; REFUSAL TO CROSS (STRIKE OR DISCHARGE).

ISSUE: Whether claimants are engaged in legitimate union activities when they refuse to cross an informational picket line.

FACTS:
1. Both the prime contractor and the captioned subcontractor are nonunion employers.
2. Claimant Long is not a union member.
3. Claimant Kidd is a member of Teamsters union local 505.
4. Both were concrete truck drivers.
5. At the gate of the construction site, labor union UCLA, local 1445 posted an informational picket in protest of the job being nonunion.
6. Both Long and Kidd refused to cross the informational picket line and deliver concrete to the prime contractor.
7. There was no effort by the individual manning the picket to prevent them from crossing.
8. Both Long and Kidd were discharged.

REASONS: In an unpublished decision, the Kentucky Court of Appeals held that there was neither a strike nor bona fide labor dispute in active progress in the establishment where the claimants were employed. No employees of the prime contractor or employees of any subcontractor were in a labor dispute. The lone informational picket of Local 1445 was not in a labor dispute but was merely protesting the fact that the job was nonunion. His protest does not amount to a labor dispute that would fall under the purview of KRS 341.360 (1). Now we must examine KRS 341.370 (1)(b). The Circuit Court affirmed the Commission in its finding that the appellants were not qualified for compensation benefits because they were guilty of misconduct.

The Court concluded that the claimants were not protected by KRS 341.370 (1)(b) which excludes as misconduct legitimate activity in connection with a labor organization, because there was no bona fide labor dispute in active progress at the time. The informational picket present at the entrance gate was not a strike picket. His presence there was for protest purposes, which we do not believe comes within the statutory exception of legitimate activity in connection with labor organizations. A "legitimate activity in connection with labor organizations" within the meaning of this statute requires that there be organization efforts or strikes in progress. There was no such activity present in this case.

Absent such legitimate activity, the conduct of the appellants was in disregard of their duty owed to their employer.

DECISION: Claimants disqualified on grounds they were discharged for work related misconduct.

Kentucky Court of Appeals, LONG AND KIDD V. BIG SANDY READY MIX AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 80-CA-2038 MR. Unpublished. Do not cite or quote. For guidance only.

2370 TAFT-HARTLEY INJUNCTION; EFFECT OF.

ISSUE: Whether a labor dispute continues in active progress following the termination of the strike by a Taft-Hartley injunction.

FACTS:
1. The strike by steelworkers was brought to a halt by the Taft-Hartley injunction on November 7, 1959.
2. Union members called back to work at various times between November 13 and November 22.
3. A new contract agreed to several months thereafter.
4. Claimants seek benefits for the period between November 7 and November 22, during which time they were ready, willing, and able to work.

REASONS: In BARNES V. HALL (see Entry 2000) the Court held that a voluntary return to work from a strike while negotiations for a new contract continued was a mere truce or armistice and not a cessation of the labor dispute. Relying on this reasoning, the Court, in the instant case, went on to say:

It seems to us that the basis for disqualification is stronger in this case than it was in WARD V. BARNES. If a dispute is considered to be still in active progress during a voluntary TRUCE, surely it must be so during an involuntary one.

There is no doubt that a labor dispute was in active progress until the injunction was granted. Giving to the terminology of KRS 341.360 (1) the meaning we think would be commonly accepted by lawyer and layman alike, it is our conclusion that when all that kept the dispute from taking the form of a strike was the existence of a temporary injunction it was still a "labor dispute" and was "in active progress."

DECISION: Claimants held disqualified on grounds they were unemployed due to a labor dispute in active progress.

Affirmed by Kentucky Court of Appeals, ABRAHAM JOHNSON V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 367 SW 2d 253.

PRECEDENT

2371 STRIKE VERSUS LOCKOUT; AFTER TERMINATION OF UNION CONTRACT (CONTRACT DEFINED).

ISSUE: Whether an employer's insistence that its union employees accept a nonunion contract of indefinite duration is sufficient to render the employees' cessation of work a lockout rather than a strike.

FACTS:
1. Claimants are members of UMWA.
2. Contract between the union and company could be terminated by either party with sixty days' notice.

3. Facing financial extinction, the company gave required notice on August 4, 1960, of its intention to terminate the contract.
4. On August 24, 1960, company posted its notice that "The Following Contract Will Be In Effect."
5. Which contract provided for the same wage scale, paid family health insurance IN LIEU of paid vacations, and discontinuance of payments to the UMW Welfare Fund.
6. THERE WAS NO FIXED PERIOD OF DURATION FOR THE "NEW CONTRACT."
7. When the union contract expired October 4, 1960, claimants did not report for work, thereafter stating they would work only under the old contract or a new contract negotiated with its union.

REASONS: The Kentucky Court of Appeals held that:

...if the employer merely announces that certain terms and conditions of employment will prevail for an indefinite period, without foreclosing the possibility of negotiations leading to a new contract, we do not believe his action can be classified as a lockout, regardless of whether the terms and conditions he specifies are more favorable to him than were those of the former contract. (A possible exception would be where the specified terms and conditions are so onerous or outrageous as to be the equivalent of no employment at all. See BARNES V. HALL, 285 Ky., 160, 146 SW 2d 929).

The appellees in the instant case maintain that the notice posted by the company was in effect an ultimatum that the employees must sign a contract of a fixed period of duration, on the terms stated, as a condition of continuing work. We do not so interpret the notice. The significant thing is that the notice does not set forth a requirement that the employees sign an agreement to its terms of any specified period of time. Admittedly, the notice might be considered to be ambiguous as to just what the employer had in mind in stating the "The following contract will be in effect," but in our opinion it was incumbent upon the employees to test out the situation by offering to continue to work on the new terms under a reservation of the right to negotiate for a new, fixed-term contract. Instead, the employees quit work and told the company they would not work except under the terms of the old contract or under a new contact negotiated through and accepted by the proper union officials. In these circumstances we believe it cannot be said that there was a cessation of the furnishing of work by the employer, which is necessary in order that there be a lockout. See BARNES V. HALL, 285 Ky. 160, 146 SW 2d 929; DETROIT HARVESTER COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., 343 SW 2d 365; KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. LOUISVILLE BUILDERS SUPPLY COMPANY, Ky., 351 SW 2d 157.

In substance, what we are saying is that if the employer refused to furnish work except under a contract (meaning an agreement with a fixed period of duration), he has imposed a lockout; but if the employees refuse to work except under a contract, they have gone on strike.

DECISION: Claimants held disqualified on grounds they were unemployed due to a strike in active progress in the establishment where they worked.

Kentucky Court of Appeals, DJB COLLERIES V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 385 SW 2d 772.

PRECEDENT

2372 LAYOFF; STRIKE IMMINENT.

ISSUE Whether nonstriking employees are disqualified when they are laid off immediately prior to and because of an imminent strike by co-workers.

FACTS

1. The Company is a meat packer with livestock pens and coolers.
2. When full of freshly slaughtered meat, the coolers contents are valued in the millions of dollars.
3. Claimants, members of Teamster's local 89, are loaders and truck drivers.
4. Production workers, members of Meat Cutters Union, local 227, were due to strike the company October 1, 1967.
5. To avoid being caught with a large amount of perishable goods, the company shut off its supply of livestock on September 26, 1967,
6. And laid off production workers September 28, 1967.
7. Claimants were laid off September 29, 1967.
8. Production ceased September 30, 1967, and,
9. Production workers struck the company October 1, 1967.

REASONS: In the case of SNOOK V. INTERNATIONAL HARVESTER CO., 276 SW 2d 658, denial of benefits was upheld against members of one labor union who became unemployed as a result of a strike by members of another union in the same establishment (see Entry 2012).

In the present case the referee correctly held that a strike by the production workers was in active progress in the company's establishment.

It is well established that companies may take defensive measures to avoid a tremendous economic loss in perishable products when a strike is inevitable. There is no doubt that the furloughing of the production workers as of September 29, 1967, was for no other purpose than to prevent spoilage of perishable products, and in no way negates the existence or disqualifying effect of the strike which began October 1, 1967.

The evidence of record shows the claimants, members of local 89, were unemployed because there were no products to be delivered because of a strike in the establishment where they were employed. The fact that the drivers made deliveries from the company's plant did not take their employment away from the establishment. They were employees of the struck company, and their employment was in the establishment because the deliveries were a vital incident to the production work.

DECISION: Claimants held disqualified on grounds they were unemployed due to a STRIKE in active progress in the establishment where they worked.

C.O. # 7784 NONPRECEDENT

2373 ARMISTICE IN LABOR DISPUTE; "ACTIVE PROGRESS".

ISSUE: Whether claimants are qualified for benefits when they are laid off following a truce in the labor dispute and recalled only after the dispute was settled.

FACTS:

1. For two years, company used three seven and one-half hour staggered shifts of tipple employees to achieve continuity of operation.
2. Union contended this practice violated the contract. Company denied the contention.
3. Controversy came to a head on June 1, 1950, when the union ordered the tipple employees not to work.
4. On June 8, 1950, union and company came to an understanding that the tipple would be operated on two seven and one-half hour shifts instead of three, and that staggering of employees would cease.
5. Because less coal was processed, claimants were laid off.
6. On August 24, 1950, the dispute was settled when the union, in order to return its laid off members to work, withdrew its opposition to the company operating the tipple with three seven and one-half hour staggered shifts.

7. Claimants seek benefits for the time period from June 9 through August 24.

REASONS: The Kentucky Court of Appeals held:

(1) If the labor dispute may be considered as terminated on June 9, the appellants are entitled to unemployment compensation benefits. If the arrangement for two shift between June 9 and August 24 is considered a mere truce or armistice in the labor dispute, then the appellants are not entitled to unemployment benefits under KRS 341.360, which provides in part that, "No worker may serve a waiting period or be paid benefits for any week of unemployment with respect to which: (1) A strike or other [good faith] labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed."

In BARNES V. HALL, 285 Ky. 160, 146 SW 2d 929, 935, this court adopted the definition of labor dispute given in the National Labor Relations Act, Section 2, Subsection 9, 29 USCA 152(9), that "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee," and also quoted with approval from the opinion in IRON MOLDERS' UNION NO. 125 OF MILWAUKEE, WIS. V. ALLIS CHALMERS CO., 7 Cir., 166 F 45, 52, 20 L.R.A.B.S. 315, that "A strike is cessation of work by employees in an effort to get for the employees more desirable terms."

(2) The union had obtained a cessation of the practice of staggering the men working on the tipple which was the precipitating cause of the work stoppage, and which was considered a desirable result at the time by the union officials. As it so often does, experience did not conform to expectations, and what was considered a desirable change in the conditions of work resulted in a decrease in the amount of work available. The desired changed conditions or practice continued until August 24, when a return to the former practice put the appellants back on the payroll. It is the consensus of the court that the Commission was justified in concluding that the appellants' unemployment from June 9 to August 24 was a direct result of a continuing labor dispute and hence not compensable under the governing statute.

DECISION: Claimants held disqualified through August 24, 1950, on grounds they were unemployed due to a labor dispute in active progress in the establishment where they worked.

Kentucky Court of Appeals, WARD V. BARNES, 266 SW 2d 338.

PRECEDENT

2420 "ACTIVE PROGRESS"; FOLLOWING RATIFICATION OF CONTRACT.

ISSUE: Whether claimants are disqualified for the period following formal ratification of a contract and prior to actually being returned to work.

FACTS:
1. Contract expired January 31, 1972.
2. Claimants struck the company April 7, 1972.
3. Contract negotiated during the first week of the strike and formally ratified April 14, 1972.
4. Pickets withdrawn and the area "cleaned up" April 14, 1972.
5. Because the company was not ready to resume production, claimants were not returned to work until April 18, 1972.

REASONS: The Commission held that the strike ended (i.e., was no longer in active progress) with the formal ratification of the contract by the union. (See Entry 2421).

DECISION: Claimants held not disqualified following April 14, 1972, on grounds the strike was no longer in active progress.

C.O. # 9985 NONPRECEDENT

2421 "ACTIVE PROGRESS"; PRECISE MOMENT OF SETTLEMENT.

ISSUE: Whether claimants are disqualified for the entire week, when contract ratification occurred at 6:00 PM on Sunday and they were not recalled to work.

FACTS:
1. Claimants struck the company on September 4, 1968.
2. A tentative agreement between the company and claimants' union was reached on Friday, November 22, 1968.
3. The contract was formally ratified and pickets withdrawn by the union at 2:30 PM on Sunday, November 24, 1968.
4. At 6:00 PM on November 24, 1968, union notified the company that the contract had been ratified.
5. Contract signed by both union and company on November 25, 1968.
6. Some employees returned to work at 11:30 PM on November 24, 1968.
7. However, claimants WERE NOT REHIRED by the company following the strike and filed claims for week ending November 30, 1968.

REASONS: Just as a week of unemployment cannot be divided, so too a day cannot be cut into pieces. The MOMENT OF SETTLEMENT, whether having actually occurred either at 2:30 PM, the time of ratification of the agreement; at 6:00 PM, the time of notice to the company of ratification; or 11:30 PM on Sunday, November 24, 1968, the time work was resumed for some employees, it is deemed to have occurred for the entire day at the beginning of the day, 12:01 AM, Sunday, November 24, 1967. Consequently, the instant claimants who were not rehired and who filed claims between November 24 and November 30 were eligible to serve a waiting period or to be paid benefits for the week which ended on November 30, 1968. At the very beginning of Sunday, November 24, 1968, the active progress of the dispute ceased.

DECISION: Claimants held not disqualified on grounds a labor dispute was not in active progress during week ending November 30, 1968.

C.O. # 8256 NONPRECEDENT

2422 STRIKE VERSUS LOCKOUT; UNCONDITIONAL RETURN TO WORK.

ISSUE: Whether striking claimants are disqualified when they are not permitted to return to work after abandoning the strike and agreeing unconditionally to return to work.

FACTS:
1. The company manufactures potato chips.
2. Claimants are members of the Teamster's union.
3. Contract expired March 29, 1966.
4. Contract negotiations failed and claimants went on strike April 17, 1966.
5. On May 20, 1966, claimants abandoned the strike and offered themselves for work, UNCONDITIONALLY.
6. Because of the perishable nature of its product, the company would not permit claimants to return to work unless they agreed not to strike again.
7. Union officials offered a "no strike" guarantee but could not be responsible for the unsanctioned actions of its members.
8. Company refused to permit claimants to return to work.

9. Two years earlier, under similar circumstances, the union had agreed not to strike and had abided by that agreement through the life of the contract then in existence.

REASONS: The issue to be resolved in this case is what effect follows from the company's insistence upon a "no strike" guarantee. The effect must be measured in terms of whether it constituted a lockout. In BARNES V. HALL (see Entry 2000) lockout is defined as a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms.

In the instant case, claimants originated their unemployment by calling a strike. However, they later abandoned the strike and offered themselves, UNCONDITIONALLY, for work. That the union could not be responsible for the unsanctioned actions of its members does not lessen the effect of its acquiescence to the company's demand for a "no strike" guarantee, because the union had made and abided by a similar agreement not to strike two years earlier. Therefore, company's refusal to permit the claimants to return to work constitutes a lockout because it sought a guarantee from the union that its individual members would not engage in an UNSANCTIONED strike, which was a term more desirable than it had previously enjoyed.

DECISION: Claimants held not disqualified following May 20, 1966, on grounds they were unemployed because of a lockout.

C.O. # 7006 NONPRECEDENT

NOTE: See Precedent Entry 2431 for similar ruling.

2423 BELATED CONTRACT ACCEPTANCE; EFFECT OF.

ISSUE: Whether striking claimants who belatedly accept an expired contract offer remain disqualified until either a new offer is made and accepted, or the strike is totally abandoned.

FACTS:
1. Contract expired November 2, 1982.
2. Claimants continued working.
3. A tentative agreement was reached December 6, 1982, which was to be available for union ratification ONLY until December 13, 1982.
4. After which date a substitute work force would have to be hired (a fact of which the claimants were aware) to work on two projects which had to be completed by a certain date.
5. On December 8, 1982, the contract was rejected, and the strike began December 9, 1982.
6. On December 17, 1982, claimants voted to return to work under the conditions of the December 6, 1982 proposal.
7. Claimants appeared ready to work December 20, 1982 and December 22, 1982.
8. But were not permitted to do so because they had been replaced.
9. New negotiations between claimants' union and company commenced January 26, 1983.

REASONS: Under traditional contract rules, an offer must be made and accepted according to its terms for a contract to come into existence. In PEPSI COLA BOTTLING COMPANY, ETC. V. NLRB, 108 LRRM 2454, 659F. 2d 87th (8th Cir. 1981), the Court found that:

"A contract offer is not automatically terminated by the other party's rejection or counter proposal but may be accepted within a reasonable time UNLESS IT WAS EXPRESSLY MADE CONTINGENT UPON SOME CONDITION SUBSEQUENT, OR WAS SUBJECT TO INTERVENING CIRCUMSTANCE WHICH MADE IT UNFAIR TO HOLD THE OFFEROR TO HIS BARGAIN, Id. Ed. 89-90." (Emphasis added.)

The record in this case reveals that the union knew unmistakably that the December 6, 1982 offer expired December 13, 1982. The union quite simply had no contract proposal to accept on the

date it purported to do so, and the plaintiff had changed its position as it had advised the union that it must, and no offer was then available to be accepted based on the December 6, 1982 proposal. Thus, negotiations resumed and the labor dispute was in active progress until either a new agreement was executed, or THE STRIKE WAS TOTALLY ABANDONED.

DECISION: Claimants held disqualified on grounds they were unemployed due to a labor dispute in active progress.

Franklin Circuit Court, JACKSON PURCHASE ELECTRIC COOPERATIVE CORPORATION V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND 816 OF THE IBEW, 83-CI-0927. Not to be cited to quoted. For guidance only.

2430 COMPANY SHUTS DOWN; LABOR DISPUTE ENDS.

ISSUE: Whether claimants are disqualified when the employer, while a labor dispute is in progress, completely closes its operation with no intention of reopening.

FACTS:
1. Claimants are members of the UMWA.
2. On October 1, 1962, company advised the union that the existing contract would be terminated in 60 days (such action being allowed by the contract).
3. Prior to expiration of the 60 days, the company made overtures to the union to meet and negotiate a new contract.
4. These overtures were not responded to by the union.
5. The contract terminated and the claimants ceased working.
6. Pickets were in place from November 29, 1962 through January 7, 1963.
7. Commencing in December and until January 7, 1963, the company sold and transferred all of its equipment to another corporation, surrendered its lease to the coal rights, and completely closed its operation.
8. Evidence indicates there is no future intention of reopening the mine.

REASONS: While it is possible that the terms and conditions of the new contract, which the company made overtures to negotiate, might have been so onerous as to render the labor dispute a lockout, this Commission will not conjecture in this regard. The evidence of record will only support that a labor dispute was in active progress from November 29, 1962 through January 7, 1963.

However, the Supreme Court of the United States has handed down a precedent which governs the issue in this case for the period subsequent to January 6, 1963. In UNEMPLOYMENT COMPENSATION OF ALASKA V. OREGON, 329. U.S. 143, the Court wrote:

"On the other hand, if, during a labor dispute pending negotiations the employer decides he is not going to operate anyway, whether an agreement is reached or not, withdraws from negotiations and ceases business operations, the labor dispute is ended and thereafter is not in active progress.

The evidence of the case, herein under appeal, conclusively shows that the appellant, as of January 7, 1963, effectively abandoned operation of its mine and had no intention of ever resuming operation under any conditions. Consequently, the provisions of KRS 341.360, are not controlling for the period subsequent to the latter date, and the referee properly held that if the appellees were otherwise eligible, benefits could be paid for weeks of unemployment served.

DECISION: Claimants held disqualified from November 29, 1962, through January 6, 1963, on grounds they were unemployed due to a labor dispute in active progress in the establishment where they were employed. However, claimants held not disqualified and entitled to receive benefits for which they were otherwise eligible subsequent to January 7, 1963, on grounds the labor dispute was no longer in active progress.

C.O. # 4770 NONPRECEDENT

2431 STRIKE VERSUS LOCKOUT; UNCONDITIONAL RETURN TO WORK.

ISSUE: Whether claimants are disqualified when they abandon their strike and agree to return to work unconditionally but are not allowed to do so.

FACTS:
1. A dispute arose between the company and the union regarding the interpretation and application of a provision of the contract regarding seniority rights.
2. Grievance was not settled and the claimants went on strike June 19.
3. On June 30, union notified the company that the grievance was being withdrawn, the strike terminated, and they were willing to return to work unconditionally.
4. Company refused to resume operations, insisting that claimants should accept in writing the company's interpretation of the grieved seniority provision of the contract.
5. Union would not accept this condition.
6. The matter was finally settled July 14, and the claimants then were called back to work.

REASONS: The question is whether or not the company's refusal to furnish work to the claimants from July 1 to July 14 constitutes a lockout. A lockout is the INDEPENDENT action of the employer in refusing to furnish work for the coercive purpose of compelling the employee to accept terms or make concessions favorable to the employer. That is what we have in this case. The company's refusal to furnish the claimants work, after they unconditionally agreed to return to work, constituted a lockout.

DECISION: Claimants held qualified from July 1 to July 14, on grounds their unemployment resulted from a lockout.

Kentucky Court of Appeals, DETROIT HARVESTER V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., 343 SW 2d 365. PRECEDENT

NOTE: See Entry 2422 for similar ruling.

2440 STRIKING CLAIMANTS; PERMANENTLY REPLACED (RESERVE ACCOUNT CHARGEABILITY).

ISSUE: Whether striking claimants qualify for benefits at the moment they are permanently replaced, or when the strike ends.

FACTS:
1. On January 14, 1960, the Louisville District Council of Woodworkers was certified as the bargaining agent for the claimants.
2. On April 11, 1960, claimants went on strike seeking more favorable working conditions.
3. In June, 1960, claimants failed to respond to a letter from the company advising they would be permanently replaced if they did not return to work.
4. Claimants were permanently replaced in June, 1960.
5. Strike continued through December 21, 1960.
6. Company never ceased its operations.
7. On December 21, 1960, the union dropped its demands and notified the company that the strike was over.

REASONS: We have carefully reviewed all of the voluminous proof and briefs filed in connection with this case and from the proven facts we are constrained to conclude that a strike existed in the establishment of the appellant, commencing April 21, 1960, and ending December 21, 1960; that the unemployment of the appellees during that period was a result of the strike, and that benefits may not be paid to the appellees during that period. We cannot subscribe to the theory that since

December 21 a labor dispute has existed in the plant of the appellant which caused the appellees to leave or lose their employment. It is obvious that the strike was not successful, and that the union has recognized the futility of further attempts to unionize the appellant's establishment. Under these conditions we conclude that the unemployment of the appellees after December 21 was not caused by a labor dispute in active progress.

The "permanent replacement" of the claimants or the "forfeiture of right to reinstatement" is, in our opinion, under the Unemployment Insurance Law of Kentucky nothing more than a discharge. In order for an employer's reserve account to be relieved of charges for benefits paid to a claimant who has been discharged from his most recent work, there must be a showing that the discharge was for misconduct connected with the work. The workers were discharged because of their attempt to unionize the plant of the appellant. They were discharged for union activity which was legal and legitimate in all respects. The Kentucky Unemployment Insurance Law specifically sets out in KRS 341.370 that, "legitimate activity in connection with labor organizations ... shall not be construed as misconduct." Under such conditions, relief of charges for benefits paid to the claimants cannot be granted.

DECISION: The claimants were unemployed from April 11 to December 21, 1960, because of a strike in active progress in the establishment of the appellant and for that reason they were not eligible for benefits during that period. However, a "labor dispute" has not been in active progress in the appellant's establishment since December 21, 1960, and the discharge of the workers in June of 1960 was for reasons other than misconduct connected with their work.

C.O. # 3833 NONPRECEDENT

NOTE: See Entry 2442 for further support that claimants are disqualified for the entirety of the strike regardless of when they were discharged.

2441 UNAUTHORIZED STRIKE; FAILURE TO UTILIZE ARBITRATION (STRIKE, LOCKOUT OR DISCHARGE).

ISSUE: Whether laid off claimants are disqualified when they strike in violation of the contract, rather than submit their grievances to arbitration as required by the contract; and whether remaining claimants, who were not laid off, are disqualified when they refuse to work in sympathy with the striking claimants.

FACTS:
1. Claimants herein are members of the Laborers International Union of North America.
2. Ten were laid off because of a loss of business.
3. Against the advice of the company and the union, they began picketing, contending that the seniority provisions of the contract had been violated in selecting them for lay off.
4. The remaining ten employees honored the pickets and refused to work.
5. The contract contains a "No Strike - No Lockout" provision and requires grievances to be submitted for arbitration.
6. All twenty were discharged for violating the "No Strike" provisions of the contract.
7. None resorted to the grievance procedures provided for in the contract.

REASONS: In an UNPUBLISHED decision, the Kentucky Court of Appeals held that the claimants' unemployment did not result from a strike or other bona fide labor dispute. Rather, they were discharged for violating the "No Strike" provision of the employment contract. The Court refused to consider claimants' argument that they were engaged in constitutionally protected rights of free speech and assembly, noting that they were discharged solely for violating the contract. Finally, the Court held that there was no question that the claimants were guilty of misconduct. KRS 341.370, therefore, is the statute under which this case must be decided.

DECISION: Claimants were held disqualified on grounds they were discharged for work related misconduct.

Kentucky Court of Appeals, BERTRAM ET.AL V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 83-CA-509 MR. Unpublished. Not to be cited or quoted. For guidance only.

2442 STRIKING CLAIMANTS, PERMANENTLY REPLACED.

ISSUE: Whether striking claimants are qualified for benefits after they agree to return to work unconditionally, only to discover that they had been permanently replaced.

FACTS:
1. Claimants are members of International Ladies' Garment Workers Union.
2. In March, 1982, claimants went on strike.
3. Notified by company in March and April their jobs were open, but none returned to work.
4. On October 28, 1982, union officials notified the company that the claimants were "unconditionally offering" to return to work.
5. Company replied that it had already permanently filled all positions opened by the strike.

REASONS: In an unpublished decision, the Kentucky Court of Appeals reasoned:

"In the present case, a strike caused the initial loss of employment. However, the dispute instigated by the strike ended when the striking workers unconditionally offered to return to work and were advised that their positions had been filled. The employer's actions in dismissing and replacing the striking employees became the direct cause of the unemployment and the former dispute was no longer in active progress. See IN THE MATTER OF MICHAEL W. SARVIS, 296, NC 475, 251 SE 2d 434 (1979); SPECIAL PRODUCTS COMPANY OF TENNESSEE V. JENNINGS, 353 SW 2d 561 (1961); and RUBEROID COMPANY V. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, 59 Cal. 2d 73, 378 P. 2d 102 (1963). Since the identical labor dispute that caused the unemployment, i.e., the strike, ceased to exist and the employer foreclosed the voluntariness of employment by refusing to rehire the strikers, the labor dispute disqualification provisions of KRS 341.360 (1) has become inapplicable. The Larand employees are entitled to unemployment benefits for THE PERIOD FOLLOWING THE STRIKE." (emphasis added).

DECISION: Claimants held qualified to receive benefits only after the cessation of the strike on October 28, 1982, even though they had been replaced (i.e., discharged) at an earlier date.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. LARAND LEISURELIES, 84 CA 2454 MR Unpublished. Not to be cited or quoted. For guidance only. (See Entry 2440 for similar ruling).

2550 LAID OFF WORKERS; REFUSE RECALL AFTER STRIKE COMMENCES.

ISSUE: Whether claimants on indefinite layoff are disqualified by refusing recall to positions vacated by striking employees.

FACTS:
1. Claimants laid off indefinitely for lack of work on March 1, 1981.
2. When production resumed a short time later, they were not recalled to work.
3. When an impasse was reached in contract negotiations, the union began a strike on May 8, 1981.
4. By letter dated May 9, 1981, the company recalled all striking and laid off employees.
5. Claimants refused recall.

REASONS: In affirming the Commission, the Kentucky Supreme Court held that the company's recall of the claimants was an offer of "new work" on grounds a layoff of indefinite duration, notwithstanding

seniority-based recall rights, is "equivalent" to a discharge. The Court further held that the "new work" offered was unsuitable because the positions offered were vacant due to a strike or labor dispute (see KRS 341.100). The intervening strike and recall has no bearing on the laid-off claimants' entitlement to benefits.

DECISION: Claimants held unemployed due to a lack of work and to have refused an offer of unsuitable work with good cause. Qualified to receive benefits.

Kentucky Court of Appeals, KOSMOS CEMENT V. HANEY ET AL AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 698 SW 2d 819.

PRECEDENT

2551 STRIKE AND LAYOFF; SAME WEEK.

ISSUE: Whether claimants are eligible to receive benefits for a week of unemployment during which a strike commenced and was resolved, then later notified no work was available the rest of the week due to equipment breakdown.

FACTS:

1. Claimants were hourly employees and union members.
2. Claimants worked various shifts. (7:00 a.m. - 3:00 p.m., 3:00 p.m. - 11:00 p.m., and 11:00 p.m. - 7:00 a.m.)
3. On Friday, June 16, 1989, claimants went out on strike.
4. The dispute ended at 3:00 p.m. on the following Monday, June 19, 1989.
5. All claimants missed one shift of work.
6. The third shift (11:00 p.m. - 7:00 a.m.) worked its normal shift Monday night. The first shift (7:00 a.m. - 3:00 p.m.) worked Tuesday morning. The second shift (3:00 p.m. - 11:00 p.m.) worked for about five hours at which time those claimants were notified, as were the others, that there would be no work available the rest of the week due to equipment breakdown.
7. The referee and the Kentucky Unemployment Insurance Commission denied benefits based on their interpretation of KRS 341.360 (1) and the commission's regulation defining "week of unemployment".
8. Franklin Circuit Court affirmed the decision made by the commission.
9. The Kentucky Court of Appeals reversed.

REASONS: At issue is KRS 341.360 (1) which provides in part:

> No worker may be paid benefits for any week of unemployment: (1) With respect to which a strike or other bona fide labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed. . .

In a published decision, the Kentucky Court of Appeals held:

> Although the "cause" of appellants' loss of work was not the strike (which had been settled), and even though there was no "labor dispute. . . in active progress" at the time the appellants were laid-off, the commission declined benefits because it interpreted the statute to require disqualification whenever a claimant loses any time from work for strike-related reasons during a week, as defined by 903 KAR 5:110. Under this regulation a "week of employment" is defined as . . .
>
> > a calendar week of seven (7) consecutive calendar days, beginning 12:01 a.m. Sunday and ending 12 midnight the following Saturday.
>
> This interpretation is erroneous as a matter of law for a number of reasons.

The Unemployment statutes are designed to protect workers who, through no fault of their own, find themselves without work. It is agreed by all that these appellants lost several days of work for reasons totally beyond their control. The commission's application of the disqualification statute thus works a forfeiture of benefits inconsistent with the policy and purposes of the act.

Next,the plain words of the statute dictate against its application in situations where, as here, the cause of the loss of employment is not due to a labor dispute. The disqualification applies only where (1) there "is" (not "was") a labor dispute "in active progress" which "caused" the claimant "to leave or lose his employment." Obviously this statute is meant to disqualify employees who have lost work due to a strike, from receiving benefits. By use of the present tense verb "is," the statute has no application to work lost to other causes in a week where coincidentally there "was" a labor dispute. Stated differently, if the labor dispute is not the cause of the loss of employment, that there was a strike at some other point in the week is irrelevant. if the legislature wanted to penalize workers who strike and provide for no benefits for ANY reason during any week a strike occurs regardless of its duration, it could easily have drafted such a statute. KRS 341.360(1), however, does not, as the appellees insist, so provide.

As stated before, it is undisputed that the labor dispute in the instant case had ended before another unrelated cause arose to deprive appellants of work. Regardless of how the statute or regulations define "week of employment," KRS 341.360 (1) has no application to the facts of this dispute.

DECISION: Reversed. Benefits allowed.

VANCE V. KUIC, Ky. App., 814 S.W. 2d 284.

PRECEDENT

CHAPTER 3000

MISCELLANEOUS

.

CONTENTS BY ISSUE

Additions made to Entry #3580 - April, 1993.

3000 CLOSELY HELD CORPORATIONS; OFF SEASON UNEMPLOYMENT.

ISSUE: Whether a corporate officer or hourly rate worker is disqualified when he is laid off for lack of work and receives no wages, notwithstanding the ongoing existence of the corporation.

FACTS:

1. Claimant is vice-president, minority share holder, and an hourly rated employee of a closely-held construction corporation.
2. In addition to being the on-site supervisor, he makes job estimates and formulates bids on new work.
3. Last worked on December 9, 1983, when last job completed.
4. Receives no pay when the company is not actually performing construction work.
5. Has been searching for work both for the company and for himself.

REASONS: Heretofore, the Commission held, in Precedent Order Number 27366, that owners of closely-held and family corporations were not eligible for benefits during periods of layoff caused by inactivity of the corporation, so long as the corporation was not defunct or dissolved. However, the Letcher County Circuit Court, in a similar case styled EVERIDGE V. EVERIDGE AND NEACE COAL COMPANY, 82-CI-332, held the above-cited precedent to be unconstitutional, in that it represented unequal application of the law, by creating two classes of individuals with one standard of eligibility that is automatically applied to employees who own an interest in a closely-held corporation, while another is applied to everyone else.

The Commission determined that the Circuit Court's opinion in EVERIDGE (supra) was reasonable and well supported and that the reversal of precedent order 27366 was proper, insofar as it dealt with BLANKET DENIAL of benefits to claimants who are corporate owners and officers. Such individuals must be judged under the same criteria utilized to determine eligibility for all other members of the work force. In cases of this nature, adjudicators should closely examine the individual's attachment to the labor force, giving special attention to the amount of time devoted to the affairs of the corporation. Determination of eligibility should be based on a careful evaluation of both factors.

In this particular case, the claimant had sought work for both the corporation and himself during weeks in which benefits were claimed. Since no question was raised regarding work search adequacy, it was accepted as meeting the requirements and the Commission held the claimant to be unemployed through no fault of his own.

DECISION: Claimant held eligible to receive benefits.

C.O. # 38929 PRECEDENT

3001 SALE OF STOCK; RESULTING IN LOSS OF EMPLOYMENT.

ISSUE: Whether a corporate officer should be held responsible for his activities when he knows voluntary sale of stock will result in loss of employment.

FACTS:

1. Claimant and Mr. Yeary each held fifty percent of the stock of the incorporated restaurant.
2. Claimant's brother managed the restaurant.
3. Mr. Yeary and claimant's brother became involved in an argument, and Mr. Yeary no longer wanted claimant's brother to manage the restaurant.
4. Claimant refused to place restaurant under anyone else's management.
5. Relations between claimant and Mr. Yeary deteriorated.
6. Claimant assumed position of general manager while the two negotiated transfer of corporate stock.
7. Differences not being resolved, Mr. Yeary's purchase of claimant's stock was complete on May 6, 1981.
8. Claimant knew he would not be offered continued employment by Mr. Yeary.
9. Corporation reported sufficient covered wages for claimant to establish a monetarily valid claim.

REASONS: Although we readily accept that, for certain legal purposes, a corporation is a separate entity apart from its individual shareholders and officers, we now hold that the individual claimant should be held responsible for his actions as a shareholder and corporate officer when his separation from employment results from those actions. To render such an individual impregnable under KRS 341.370 is totally inconsistent with the intent of the statute.

In the original enactment of the Kentucky Unemployment Insurance Law the Legislature saw fit to embody a "Declaration of State Public Policy" and announced it should be used as a guide to the interpretation and application of the act. We believe that the portions of the statement of public policy which are pertinent to this case are as follows:

"Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. INVOLUNTARY unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed workers and his family... The General Assembly, therefore, declares that in its considered judgement the public good, and general welfare of the citizens of this State require the enactment of the measure, under the police powers and other reserve powers of this State, for the compulsory setting aside of unemployment reserves to be used for the benefits of PERSONS UNEMPLOYED THROUGH NO FAULT OF THEIR OWN."

Therefore, we hold that the claimant, although acting as a shareholder, must be held accountable for his actions, and that he voluntarily quit his employment when he agreed to sell his interest in the corporation and leave the corporation as an employee.

Good cause for quitting employment exists only when the worker is faced with such compelling circumstances that he had no reasonable alternative to doing so (KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY, 539 SW 2d 293). In this case the claimant had the reasonable alternatives of remaining employed and working out his differences with Mr. Yeary, or he could have purchased Mr. Yeary's interest in the corporation and remained employed.

DECISION: Claimant held to have voluntarily quit his employment without good cause and disqualified from benefits.

C.O. # 28064 PRECEDENT

3002 VOCATIONAL SCHOOL INSTRUCTOR; REASONABLE ASSURANCE.

ISSUE: Whether vocational school instructor is eligible for benefits between terms when he has reasonable assurance of continued employment.

FACTS:
1. An instructor for eight years.
2. Until 1981, employed a full twelve months during each year of service.
3. Because of legislation enacted in 1980, vocational school instructors were to be paid a salary based on a 185 day school term.
4. Any additional employment had to be requested and approved.
5. Notwithstanding request for additional work, was not allowed to work from June 30, 1982 through August 1, 1982.
6. Had reasonable assurance of continued employment for the fall term of 1982.

REASONS: KRS 341.067 (4)(a) provides that the term "educational institution" including an institution of higher education as defined in subsection (2) of this section means:

1. A school in which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor(s) or teacher(s); 2. It is approved, licensed or issued a permit to operate as a school by the state department of education or other government agency that is authorized within the state to approve, license or issue a permit for the operation of a school; and 3. The courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation.

(b) In any particular case, the question of whether or not an institution is an educational institution within the meaning of the criteria described above will depend on what that particular institution actually does.

State operated vocational schools clearly fall within the definition of an "educational institution" in the context of the above-cited statutes. Thus, a mandatory disqualification must be imposed for workers who provide service to vocational schools and who are between semesters or terms with reasonable assurance of continued employment at the start of the next term or semester. In this case, there was reasonable assurance of continued employment. By the specific language of KRS 341.067 and KRS 341.360, the disqualification is inescapable.

DECISION: Claimant held ineligible to receive benefits on grounds he had reasonable assurance of reemployment for the fall term.

C.O. # 33124 PRECEDENT

3003 REASONABLE ASSURANCE; BONA FIDE.

ISSUE: By whom must reasonable assurance be extended, and what form must it take, before it may be considered "bona fide."

FACTS:
1. Nontenured teacher informed by the chairman of the board of education that her contract would not be renewed.
2. Later, on June 8, a certified letter from an assistant superintendent was mailed to the claimant announcing that a position would be available at another school in the system.
3. Received letter on June 15 and responded that she would accept the position.
4. On June 23, the board voted to employ claimant.
5. The board has final hiring and firing authority.

REASONS: KRS 341.360 provides that a claimant may not receive benefits between two academic terms if she has reasonable assurance of reemployment for the second of such academic terms.

When a worker does not have reasonable assurance at initial separation, and benefits are allowed, but receives such assurance during the between-terms period, benefit payments should be terminated. If reasonable assurance is extended and later rescinded or does not materialize, the worker is eligible for benefits for all weeks for which otherwise eligible during the period since separation. Reasonable assurance must be bona fide and may be considered as such only when offered by the board of education, or its authorized representative. Reasonable assurance, to be bona fide, should also be in writing. The first OFFICIAL information she had was on June 23. The letter of June 8 did not recite that the offer was authorized, or that the letter was official. The Campbell Circuit Court held claimant was entitled to benefits until she had reasonable assurance of reemployment, which was on June 23.

DECISION: Claimant held eligible to receive benefits through June 23, when she received bona fide reasonable assurance of reemployment for the second academic term.

Campbell Circuit Court, BLACK V. CAMPBELL COUNTY BOARD OF EDUCATION, 81-CI-904. Not to be cited or quoted. For guidance only.

3004 NO REASONABLE ASSURANCE; UNEMPLOYED UPON COMPLETION OF SERVICE.

ISSUE Whether a school teacher who does not have reasonable assurance is eligible for benefits upon completion of service or upon expiration of the contract.

FACTS:
1. Employed four years as an elementary school teacher.
2. Contract for the 1979-80 school year was for a total of 185 days (175 of which were teaching days).
3. The 185 days were to end no later than June 30, 1980.
4. Salary received in twelve equal monthly installments.
5. Contract not renewed for 1980-81 school year.
6. Last worked May 22, 1980, the end of the 185-day school year.

REASONS: The school board contends that the claimant was not unemployed prior to June 30, 1980, because the contract had not expired, and she continued to receive her salary. KRS 341.080 (3) defines "week of unemployment" as a week during which a worker performed less than full-time work and earned less than one and one-fourth times her weekly benefit rate.

The claimant certainly worked less than full time following May 22, 1980. It remains to determine if the claimant's salary which she continued to receive after May 22, 1980, is sufficient to render her ineligible for benefits. Having worked the 185 days required by the contract, it is concluded that the employer-employee relationship ended on May 22, 1980, and that no wages were earned beyond that date. For unemployment insurance purposes, wages paid following separation cannot have been earned during weeks claimed since the employment relationship had previously been severed. Relying on the United States Supreme Court ruling in SOCIAL SECURITY BOARD V. NIEROTKO, 327 U.S. 358, 162 A.L.R. 1445, the Commission held that wages paid the claimant following separation on May 22, 1980, must be allocated to the period in which they were actually earned, prior to May 22, 1980. Having performed no work and having earned no wages following May 22, 1980, claimant satisfied the dual requirements of the above-cited statute.

DECISION: Claimant held unemployed through no fault of her own and eligible to receive benefits.

C.O. # 24283 PRECEDENT

3005 NO REASONABLE ASSURANCE; VOCATIONAL REHABILITATION INSTRUCTOR IN YEAR. ROUND POSITION.

ISSUE: Whether a vocational rehabilitation instructor, who is temporarily laid off for lack of work from his year round teaching position, is ineligible on grounds he has "reasonable assurance" of returning to work.

FACTS:
1. The facility operates on a twelve month schedule, and the claimant teaches year round.
2. Because of a budget shortfall and a decline in enrollment, the claimant was laid off for two weeks in July.

REASONS: The employer appealed the awarding of benefits, citing KRS 341.360 (3) which prohibits an employee of an educational institution from receiving benefits when such employee has reasonable assurance of reemployment upon the conclusion of a period of unemployment that occurs between two successive academic years.

The Commission held that the cited statute is inapplicable to the facts in this case because the school operated on a year round basis, and the employee lost work due to lack of funds and through no fault of his own.

DECISION: Claimant held eligible to receive benefits on grounds he was unemployed through no fault of his own. Further held that the disqualifying provisions of KRS 341.360 pertaining to reasonable assurance were inapplicable.

Affirmed by Green Circuit Court, DEPARTMENT OF EDUCATION VOCATIONAL REHAB. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND BRADSHAW, 83-CI-113. Not to be cited or quoted. For guidance only.

3007 LAYOFF; IN LIEU OF BUMPING.

ISSUE: Whether a claimant is voluntarily unemployed (and disqualified) when he accepts layoff rather than exercise contractual right to bump another employee.

FACTS:
1. Claimants were laid off due to a reduction in force.
2. Union contract neither mandated nor contemplated such a reduction in force.
3. Claimants refused to exercise contractual right to BUMP other employees.

REASONS: These workers initially lost their positions due to simple lack of work layoff and may not be considered to have done so at their own volition.

The final question in these cases is whether the refusal by the claimants to exercise a contractually guaranteed privilege to "bump" another worker, thus retaining some sort of position with the company, constitutes either a refusal of suitable work without good cause or renders them voluntarily unemployed because of the exercise of contractually guaranteed option to accept voluntary layoff in lieu thereof.

The Commission has, over the years, consistently held that employees who exercise the option described above are not voluntarily unemployed and are thus not subject to disqualification from benefits. The reasoning advanced by previous commissions for this holding was that the option to bump was a contractually guaranteed privilege and therefore imposed no "duty" upon the worker to exercise it. We believe this reasoning remains valid.

The "bump" situation cannot be likened to an offer of work. In enacting the unemployment insurance statutes, the legislature was guided to some great degree by the federal enactment. The statutes, at both the federal and state level, have been designed to foster a return to gainful employment, as soon as practicable, of those who share in its benefits. To hold that a worker MUST displace another, not withstanding the clear language of the working agreement to the contrary, would not comport with this legislative design.

Finally, can it be said, under the provisions of the statute, that work is suitable when its acceptance would entail displacing another worker, who would not otherwise lose his employment? We think not. We think the framers of the statute, in choosing the wording for Section 341.370 (1)(a), envisioned work in a position that was vacant, or soon would be, as constituting that type of work the refusal of which would invoke a period of disqualification from benefits.

The bottom line of this reasoning is that, in situations like the instant one, there will ultimately be a recipient of benefits as a result of the company's decision to reduce its working force. Whether it be the worker who refused to bump or the individual who is ultimately bumped, we believe to be of little consequence in the final analysis.

DECISION: Claimants held qualified to receive benefits on grounds they were involuntarily unemployed for lack of work. Failure to exercise the bumping privilege does not result in a voluntary quit or a work refusal.

C.O. # 21736 NONPRECEDENT

3009 MINORITY STOCKHOLDER; UNEMPLOYED BECAUSE OF SALE OF ASSETS BY MAJORITY STOCKHOLDER.

ISSUE: Does a minority stockholder, by sale of stock or vote to sell assets, voluntarily participate in the termination of his employment so as to deprive himself of unemployment benefits.

FACTS:
1. Claimant and his brother were employees and minority stockholders in a family business in which their father was majority stockholder.
2. On May 1, 1985, the assets of the business were sold to another company, and after three weeks of assisting the new owner in the transaction phase, claimants became unemployed.
3. Claimants contend that the termination of their employment was not voluntary.
4. The decision to sell the assets was made by the father, who felt that, for his own economic security, it would be better for him to retire.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Jefferson Circuit Court reasoned:

The evidence in our case at worst for the claimants, is that they acceded to the patriarch's decision to sell the business and retire. Perhaps their evidence would have been better by corporate minutes reflecting their "nay" votes. The minutes of the "stockholder meetings" around the dinner table likely would not reveal more than the sons' compliance with the father's decision. By such accession they knew that their employment with the new owner was tenuous at best.

One can only speculate what benefits the claimants received, as minority stockholders, by the father's decision to sell the corporate assets and end the business. It is this speculation about this case that chafes any reader's interpretation of the "Declaration of State of Policy" stating the Acts' purpose to be, inter alia, to lighten the burden "...which now so often falls with crushing force upon the unemployed workers..."

However, and even with a large hole through the corporate veil, the undisputed evidence of record shows that the brothers had no controlling interest in the corporation, that they desired to continue employment in this business, albeit termination was inevitable, and that they were bona fide and active employees in the business. What lurked in the minds of father and sons at the dinner table can only be known by those present at those meetings. The evidence of record is that the brothers had no "reasonable alternative" but to cooperate in the demise of the family business.

The Court concluded that such an alternative was not voluntary.

DECISION: Claimants were not disqualified on grounds they were involuntarily separated through no fault of their own.

Jefferson Circuit Court, ROBERT JAFFE AND IRWIN LEWIS JAFFE V. DISPENSERS OPTICAL SERVICE CORP. AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 85-CI-07796 (4-4-86). Not to be cited or quoted. For guidance only.

3010 TEMPORARY WORK; NOT MOST RECENT.

ISSUE: Whether claimant on indefinite layoff is disqualified when she returns to her former employment to fill in temporarily for an ill employee but voluntarily quits prior to the ill employee's return to work.

FACTS:
1. Claimant and her husband worked for Eastern Parts Warehouse in Stanford, Kentucky, prior to August 5, 1968.
2. Both transferred to company's business in Danville, Kentucky.
3. After husband's salary was reduced $150.00 per month, claimant was laid off for lack of work, to be recalled only if and when work became available.
4. Within a few days asked to work in place of another employee who was off due to illness.
5. Was to work only until the ill employee returned to work.
6. Prior to the ill employee's return to work, claimant quit to follow her husband to another town where he hoped to find other employment.

REASONS: KRS 341.370 provides for the disqualification of a claimant for leaving her most recent suitable work voluntarily without good cause. However, the above-cited statute defines most recent work as follows:

As used in this section "most recent" work shall be construed as that work which occurred after the first day of the worker's base period and which last preceded the week of unemployment with respect to which benefits are claimed; except that, if the work last preceding such week of unemployment was intermittent or temporary in nature, most recent work may be construed as that work last preceding such intermittent or temporary work.

Since the claimant returned on only a TEMPORARY basis to work in place of an absent employee, her last period of work from which she voluntarily quit is not considered her most recent work. Thus, claimant's most recent work, as statutorily defined, was that from which she was placed on indefinite layoff.

DECISION: Claimant not disqualified on grounds she was involuntarily separated from her most recent employment by layoff.

C.O. # 8163 NONPRECEDENT

3011 SELF-EMPLOYMENT; DISREGARDED AS MOST RECENT WORK.

ISSUE: Whether a period of self-employment is to be disregarded in determining a worker's most recent work.

FACTS:
1. The record is cloudy regarding claimant's recent work history.
2. However, it is clear she last performed services for the University of Louisville under contract, as an independent contractor, or in self-employment.
3. Prior to completing the contract, claimant quit for lack of transportation and filed for benefits.
4. Disqualified by a determination dated September 7, 1979, on grounds she quit her most recent work without good cause.
5. Later returned and completed the contract and then reopened her claim.
6. Prior to her work with U of L, she last worked for the Bureau of Census and left that employment in May of 1979, for lack of work.

REASONS: Section 341.370 (2)(c) of the Kentucky Revised Statutes provides for the imposition of a duration benefit disqualification when the worker leaves her MOST RECENT WORK voluntarily, without good cause. (Underscoring ours). Subsection 5 of 341.370 provides that most recent work shall

be that work...last preceding the week of unemployment. By definition such work must have been as an employee.

In this case, claimant's most recent work was held to have been that performed for the University of Louisville. Proof shows, however, that this was self employment and should have been disregarded. She last worked in covered employment as an enumerator for the Bureau of Census. She separated from that work as the result of lack of work, therefore, she may not be disqualified from benefits as a result of her separation from the Bureau of Census.

DECISION: Self employment disregarded as most recent work.

C.O. # 22065 NONPRECEDENT

3012 CONSTRUCTION WORK; NOT TEMPORARY.

ISSUE: Whether construction work may be excluded as most recent work on grounds it is seasonal, temporary, or intermittent in nature.

FACTS:
1. Claimant's normal line of work for the past twenty years has been as a bricklayer.
2. At the end of the 1978 construction season, he accepted work of a more permanent nature with a different employer as a laborer, at $3.85 per hour.
3. After working eight months, he left the laborer's job to return to bricklaying which paid more than $8.00 per hour.
4. Laid off a short time later.

REASONS: KRS 341.370 provides that temporary work may be excluded from being "most recent work." Referee intimated that all construction work was temporary or intermittent in nature, and based her decision to disregard the last bricklaying job, as claimant's "most recent work," on this concept. Thus, claimant was disqualified for leaving the laborers job (which the referee found to be the "most recent work") to accept temporary work. The Commission disagrees. While it is true the construction trades do experience annual layoffs on a fairly regular basis, such work has never, for the purpose of unemployment insurance entitlement, been considered as seasonal, temporary, or intermittent in nature. There is no particular season during which construction goes on, nor are the jobs temporary. Some work goes on year round on a continuing basis, and during mild winters construction flourishes. Many jobs last for years. Each position, then, must be decided upon the conditions under which it is offered and accepted.

DECISION: Construction work is not seasonal, temporary, or intermittent in nature, unless the conditions under which it was offered and accepted shows it to have been such.

C.O. # 21822 NONPRECEDENT

NOTE: The statutory provision requiring next most recent employment be considered had not yet been enacted when this decision was issued.

3013 ADULT EDUCATION INSTRUCTION; REASONABLE ASSURANCE.

ISSUE: Whether an adult education instructor is eligible for benefits between terms when she has reasonable assurance of continued employment.

FACTS:
1. Worked for the Fayette County Schools thirteen years as a nontenured teacher in the adult education department.
2. Classes do not follow the typical semester calendar.

3. Rather, the board chooses the classes to be taught and advertises them for a specific number of weeks.
4. If the classes receive ten or more enrollees they are held; if not the classes are cancelled.
5. Historically, about 84 percent of the classes advertised are held.
6. On June 6, 1985, claimant's classes ended.
7. Being a satisfactory employee, she was eligible for rehire.
8. The board worked with her in planning and scheduling four business and two craft classes to be advertised in mid August.
9. If there is satisfactory enrollment, she will teach those classes in the fall.

REASONS: KRS 341.360 in pertinent part, states that no worker shall be paid benefits for any week of unemployment which, when based on service in an institution of higher education or an educational institution, begins during a period between two successive academic years or terms, if the worker performs such services in the first of such academic years or terms, and there is a reasonable assurance that the worker will perform such services in the second of such academic years or terms.

The Kentucky General Assembly said in KRS 341.360 that an employee of an educational institution need only have reasonable assurance to disqualify him from receiving benefits. The statute does not require concrete or absolute assurance, such as a written contract; it merely requires "reasonable" assurance. In this case, claimant has held the same position for thirteen years. The classes taught by her are those in great demand and which have been advertised listing her as the teacher. Further, claimant has met with the school coordinator and planned for the fall semester, thus working under the assumption that she will be returning for the fall term. Therefore, in view of the fact that claimant has taught for thirteen successive years, under exactly the same set of circumstances with continued employment year after year, it would be ludicrous to now assume that claimant did not have "reasonable" assurance that such employment would again be available for her.

DECISION: Claimant held ineligible to receive benefits on grounds she had reasonable assurance of reemployment for the fall term.

C.O. # 43481 NONPRECEDENT

3014 NONSCHOOL BASE PERIOD WAGES; REASONABLE ASSURANCE.

ISSUE: Whether a claimant who has sufficient nonschool base period wages for a valid claim is eligible for benefits between terms, notwithstanding reasonable assurance of continued employment.

FACTS:
1. Worked as a part-time school bus driver seven years.
2. In May, 1985, given reasonable assurance of reemployment for the 1985-86 school year.
3. Last worked for the board on June 1, 1985.
4. Concurrently worked about seven years for a supermarket, five days a week, year round, until laid off on July 12, 1985.
5. Had sufficient nonschool base period wages to establish a valid claim.

REASONS: KRS 341.360 (3)(b) provides that no worker may be paid benefits for any week of unemployment which, WHEN BASED ON SERVICE IN AN EDUCATIONAL INSTITUTION, begins during the period between two successive academic years or terms, if the worker performs services in the first of such academic years or terms, and there is a reasonable assurance that the worker will perform such service in the second of such academic terms.

There is no question that the claimant did in fact perform service in one term and had reasonable assurance of continued employment in the same position during the following term. Therefore, no benefits may be paid BASED ON SERVICE IN THE EDUCATIONAL INSTITUTION.

However, the majority of the claimant's earnings in the base period are from work at the supermarket, such work having ended through no apparent fault of the claimant. In 1976, Public Law 94-566 set forth provisions for between terms denial of benefits for individuals who work in educational institutions. A number of subsequent federal government documents clarified those provisions. One such document was a November 13, 1978 memorandum from the U.S. Department of Labor to State Agency Administration concerning "supplement #5 - Questions and Answers, Supplementary Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566." In that document, a situation such as that in the case at bar was discussed. In essence, the document states that when there is sufficient nonschool employment and earnings to qualify for benefits, then these benefits would be payable during the between terms denial period if the claimant were otherwise eligible. This is to be accomplished by recomputing the individual's benefit rights based solely on nonschool employment.

In this case, the claimant's nonschool earnings distributed throughout the four quarters of the base period are sufficient to establish a monetarily valid claim with a weekly benefit rate slightly less than the maximum (since school earnings may not be used in the computation). If otherwise eligible and qualified, the claimant may receive such benefits regardless of reasonable assurance from the educational institution of continued employment during the next school term. The benefits would be charged to the reserve account of the supermarket, not the school system.

DECISION: Claimant held entitled to receive benefits, for which he was otherwise eligible and qualified, based on nonschool employment. Benefits were charged to the reserve account of the nonschool employer.

C.O. # 43676 PRECEDENT

3015 EVIDENCE, RESIDUUM RULE (PROPER FOUNDATION FOR ADMISSION).

ISSUE: Whether partial reliance on incompetent evidence necessarily requires reversal of administrative agency's ruling.

FACTS:
1. Co-worker complained that she smelled alcohol on claimant's breath.
2. Claimant agreed to submit to a blood alcohol test.
3. Discharged as a result of a positive test.
4. Results of test introduced at referee hearing by personnel officer who was not present when the test was performed, and had little if any knowledge of proper testing procedures or the meaning of the results.
5. No other evidence introduced at the referee hearing to support the allegation that the claimant was under the influence of alcohol while at work.

REASONS: The Kentucky Court of Appeals held that:

It is beyond argument that results of such a test are incompetent when there is no foundation for its admission, no opportunity for cross-examination and no showing of the chain of custody of the blood sample. See McCormick, Evidence S 209 (2d ed 1972).

"The issue before this court is whether the trial court properly applied the 'residuum' rule. We find that it did not. This rule is that 'findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent evidence which by itself would have been legally sufficient to support the findings.'" BIG SANDY COMMUNITY ACTION PROGRAM V. CHAFFINS, Ky., 502 SW 526 (1973) at 530.

"Without the results of the test, the evidence that Mr. Haste was under influence of alcohol is insufficient to support a finding of misconduct. No one who testified before the board expressed the opinion that Mr. Haste had been using alcohol.

The testimony included opinions concerning facts that might lead one to the inference that Mr. Haste was under the influence. The witnesses' lack of positive expression makes it apparent that the employer was relying on the results of the blood test. As those results are incompetent, it failed in meeting its burden of proof.

DECISION: There did not exist, absent the incompetent test results, a residuum of competent evidence showing that the claimant was under the influence of alcohol while at work.

Kentucky Court of Appeals, HASTE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND OAKWOOD, 673 SW 2d 740. PRECEDENT

3020 RESERVE ACCOUNT CHARGEABILITY; PART-TIME EMPLOYER.

ISSUE: Whether a part-time employer, which comprises the entire base period employment for the claimant, may have its reserve account relieved when it continues to employ the claimant part-time.

FACTS:
1. Filed claim on August 19, 1982, with a base period of the second, third, and fourth quarters of 1981 and the first quarter of 1982.
2. Wages upon which the claim was based consisted entirely of earnings from the captioned employer.
3. Claimant continues in the part-time service of the captioned employer, working all available hours.

REASONS: Under KRS 341.530 (3), employers who provide less than full-time work during the base period, and who continue to provide such work during the claiming period may, under certain conditions, be relieved from benefit charges. We do not believe that when, as here, the part-time employer comprises the entire base period employment, and benefits are actually paid on the claim, such conditions have been met.

In separate subsections, the statute provides for computation of the weekly benefit amount and deduction of wages earned during the week of unemployment from the weekly benefit amount.

KRS 341.390 (1) provides that there shall be deducted from the benefit rate determined for a worker in accordance with subsection (2) of KRS 341.380.

(1) Eighty percent, adjusted to the nearest multiple of one dollar, of the amount of wages earned by such worker during the week of unemployment with respect to which he claims benefits.

Taken in conjunction, these two subsections of the statute preclude a claimant from receiving benefits based entirely upon wages paid by a part-time employer, so long as the employer continues to provide employment and wages to the same extent as during the base period. Where, as here, benefits are actually payable on the claim, it is reasonable to conclude that work and wages were NOT furnished during the week of unemployment to the same extent as during the base period.

In the final analysis, two conditions must be met before reserve account relief may be granted to the employer. He (the employer) must be WITHOUT FAULT in causing the unemployment, and he must enter a timely protest to chargeability. The part-time employer who meets the standard established by KRS 341.530 (3) and also protests charges to his account in a timely manner, shall

qualify for reserve account relief. This order shall constitute precedent for future cases of this nature.

DECISION: Claimant is eligible to receive benefits and the employer is denied reserve account relief.

C.O. # 33937 PRECEDENT

NOTE: See Entry 3486

3021 CONSECUTIVE CLAIMS; NO INTERVENING EMPLOYMENT.

ISSUE: Whether a claimant may have two successive valid claims without any intervening employment or, stated differently, may a claimant receive two series of benefit payments based on a single job separation.

FACTS:
1. Last worked May 2, 1981, when laid off indefinitely.
2. Filed, established, and received benefits from initial regular unemployment insurance claim.
3. Effective June 6, 1982, filed for extended benefits.
4. Was then required to file an application for regular benefits.
5. A valid, regular unemployment insurance claim was established based on wages and VACATION PAY, even though he had not worked since May 2, 1981.

REASONS: In most instances the formula for validating claims (KRS 341.350) effectively prevents consecutive claims without intervening employment. It is only in cases like the instant one, where there has occurred some form of taxable payment during the benefit year, without the claimant actually having performed service, where the formula fails. Thus we believe the intent of the legislators was clear.

The Kentucky Court of Appeals, writing in a similar case styled KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. ANACONDA ALUMINUM COMPANY, 1433 SW 2d 119 (1968), reached the same conclusion. In that case the Court cited with approval the language of the referee, in a case styled SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY V. LILLIAN S. BROCK, subsequently upheld by Franklin Circuit Court. The referee held, "the plain and certain intent ... was to prevent two successive valid claims without any intervening employment or, stated differently, to prevent the claiming and securing of two series of benefit payments from a single loss of employment..." The Court ultimately adopted this reasoning in ANACONDA (supra). We believe the ANACONDA case is dispositive of the issue of consecutive claims.

DECISION: Claimant cannot receive benefits from a second regular unemployment insurance claim if he has had no intervening employment.

C.O. # 33228 PRECEDENT

3022 PENSION DEDUCTIBILITY; NO BASE PERIOD SERVICE FOR CONTRIBUTING EMPLOYER.

ISSUE: Whether a pension is deductible when the claimant performed no service during the base period for the employer which contributed to or maintained the pension plan.

FACTS:
1. Claimant retired on October 1, 1982, after twenty years service for the City of Hazard, Kentucky.
2. Began receiving monthly pension of $827.00.
3. Pension contributed to by claimant and city.

4. HAD NOT ACTUALLY WORKED FOR THE CITY FOR SEVERAL MONTHS PRIOR TO RETIRING.
5. But had received full pay based on accumulated vacation, sick, and comp days.
6. Was employed by River Processing Company from April 4, 1982 to December 30, 1983, when he was laid off for lack of work.
7. Filed a valid claim effective January 15, 1984.
8. Base period was the fourth quarter of 1982 and the first quarter of 1983, or the period from October 1, 1982 through September 30, 1983.
9. Paid wages totalling $677.20 by the City of Hazard during the fourth quarter of 1982, which is the first quarter of his base period.

REASONS: KRS 341.390 (3)(b) states no reduction of benefits shall be made under this section by reason of the receipt of a pension if the SERVICES PERFORMED BY THE WORKER DURING THE BASE PERIOD (OR REMUNERATION RECEIVED FOR SUCH SERVICES) for such employer did not affect the worker's eligibility for, or increase the amount of, such pension, retirement or retired pay annuity, or other similar periodic payment. (Emphasis ours).

Wages shown for the City of Hazard during the fourth quarter 1982 were actually earned in the third quarter 1982. Although considered as base period wages on claimant's monetary determination for unemployment insurance benefits, such wages cannot adversely affect his right to benefits under the pension deduction provisions of the statute since he actually PERFORMED NO SERVICES for the city hiring his "BASE PERIOD." It matters not that the compensation was paid to him during the base period and therefore, reported to the Division as base period wages as provided by the statute.

DECISION: Claimant's pension from the City of Hazard is not deductible on grounds he did not perform services for the City during the base period.

C.O. # 39447 PRECEDENT

3041 CLAIM ERRONEOUSLY DISALLOWED; LATER ALLOWED.

ISSUE: Whether the original claim, which was erroneously disallowed, is controlling when a second claim, with a different base period and greater benefits, is allowed prior to the original claim being allowed.

FACTS:
1. Because correct wage information had not been received from her federal employer, claim filed on September 20, 1973, was held monetarily invalid.
2. After the quarter change, claimant filed a new claim on October 10, 1973, which resulted in a monetarily valid claim.
3. Meanwhile correct wage information was received from the federal employer.
4. The original claim of September 20, 1973 was reconsidered and held monetarily valid, with a smaller benefit award than the October 10, 1973 claim.
5. Original claim of September 20, 1973 was held to be controlling in this case.

REASONS: The Commission adopted the referee's reasoning:

Since the claim in September 1973, was allowed, the claimant cannot establish another claim until she has exhausted the first. There was a delay in the claim being allowed; however, this was not the fault of the division but was due to a delay by the federal government. As this claim was allowed, the claimant is not given the choice of picking which claim she prefers but must take the first. Had the second claim been less, I am sure she would have been satisfied with the decision.

DECISION: The original claim was held to be controlling.

C.O. # 10914 NONPRECEDENT

3080 FUTILE DURATION DISQUALIFICATION; NEXT MOST RECENT EMPLOYMENT.

ISSUE: Whether it is necessary to impose a duration disqualification from next most recent employment when claimant has sufficient work and wages from most recent employment to remove the disqualification.

FACTS:
1. Voluntarily left Central State Managers to accept full-time work with Western Steer -- D.D. Roberts Construction.
2. Worked for Western Steer in each of ten weeks from October 21, 1983, through December 24, 1983, with a total income of $2100.00. Laid off for lack of work.
3. Local office and referee disqualified claimant based on job separation from Central State Managers.

REASONS: KRS 341.370 (7) defines "duration of any period of unemployment" as the period of time beginning with the worker's discharge, voluntary quitting, or failure to apply for or accept suitable work and running until such worker HAS WORKED IN EACH OF TEN (10) WEEKS, whether or not consecutive, and HAS EARNED TEN (10) TIMES HIS WEEKLY BENEFIT RATE in employment covered under the provisions of this Act or a similar law of another state or of the United States. (Emphasis ours).

Evidence of record establishes both the division's local office and the referee erred in ruling on claimant's separation from the captioned employer and imposing a duration disqualification. Claimant had met the requirements, as set forth above, for removing such disqualification and having been laid off from his most recent employment is entitled to receive benefits.

DECISION: It is futile to impose disqualification from next most recent employment when claimant has sufficient work and wages with most recent employment to remove the disqualification.

C.O. # 39305 NONPRECEDENT

3180 FAILURE TO ACCEPT FILING OF A CLAIM.

ISSUE: Whether the failure by division personnel to accept the filing of a claim, or any attempt by such personnel to discourage the filing of a claim justifies the granting of a backdating request.

FACTS:
1. Claimants are members of UAW.
2. Labor agreement allows company to schedule vacation shutdowns.
3. Company closed for vacation during parts of Christmas and New Year holidays.
4. Some employees attempted to file for benefits but were either not allowed to do so or were discouraged from doing so by local office personnel, who stated it would do them no good to apply because they would be denied.
5. Others filed and were ultimately allowed benefits by the Commission.
6. Thereafter, those employees who were not allowed to file, or who were discouraged from filing, reported and requested backdating.

REASONS: Pursuant to the authority of KRS 341.350 (1) and (2); KRS 341.380 (1); KRS 13.082, KRS 194.050; and KRS 341.115; 903 KAR 5:100 (2) (1) and (2) states, respectively:

In order for a worker to file an initial or reopened claim for benefits he shall report in person to a public employment office and complete such forms and conform to such procedures as are approved by the Secretary.

In areas serviced by a full-time public employment office, such initial or reopened claim shall be dated as of the first day of the week in which such worker first reports to such public employment office for the purpose of filing a claim.

903 KAR 5:100 Section 7 declares that, if the Secretary finds that failure of any worker to file a claim for benefits was the result of failure by the division's personnel to discharge necessary responsibilities, then the worker shall have fourteen (14) days after he has received appropriate notice of such findings of the Secretary within which to file such claim, provided that no claim shall be allowed which is filed later than thirteen (13) weeks subsequent to the end of the actual or potential benefit year involved.

The evidence of record reveals that, at best, the division's personnel discouraged claims filing by declaring potential nonentitlement to benefits; at worst, the division's personnel actually refused to accept a claims filing.

It must be stated that the primary responsibility of the local office worker is to accept the filing of a claim; all other functions and decisions of the division derive from this first act. It must further be stated that a worker has the right to file a claim for unemployment insurance benefits and that this right is in no way diminished by the potential validity or merit of the claim itself. A refusal by the division to accept the filing of a claim or any attempt to discourage claims filing is an intolerable violation of this right and constitutes failure to discharge necessary responsibilities as contemplated in 903 KAR 5:100 Section 7.

DECISION: The claimants' failure to file a timely claim for benefits for the week of December 23, 1979, was occasioned by the division's failure to discharge its necessary responsibilities. The claimants are, therefore, within the restrictions set forth in the above cited Kentucky Administrative Regulation, entitled to claim benefits for the week in question.

C.O. # 28091 PRECEDENT

3181 REPORTING PROCEDURES; GENUINE EFFORT TO CONFORM TO.

ISSUE: Whether a claimant who is making a genuine effort to conform to reporting procedures but is prevented from doing so by compelling personal circumstances should be penalized.

FACTS:
1. While employed by Ford Motor Company claimant became subject to temporary layoffs.
2. Worked two weeks, off ONE week.
3. Issued payorder claim cards for off weeks and instructed to mail them in at the end of the off week.
4. Was then laid off for TWO weeks and submitted claim card at end of first week.
5. On the following weekend discovered she did not have claim card for the second week, and the local office was closed.
6. Reported on following Monday to claim previous week.
7. During week in question, experienced much personal stress due to illness of mother, problems with her children and two other family members being in nursing homes.
8. Returned to work on that same Monday.

REASONS: 903 KAR 5:100 (3) (1) and (3), pursuant to authority granted by statute, requires that in order for a worker in continued claim status to file a continued claim for benefits, she must report to the division and conform to established procedures for claiming benefits. However, upon a presentation of good cause for failing to properly report, a claim may be backdated to a previous period.

The above-cited portions of the regulations are designed to ensure that the benefit claimant periodically report to the division so that her continuing eligibility for benefits may be verified by

the division. It was not intended to penalize a benefit claimant who is making a genuine attempt to conform to reporting procedures and is prevented from doing so by reasons beyond her control. In the instant case, and in consideration of the claimant's personal circumstances, we feel she acted reasonably in attempting to claim benefits for the period in question, and she is not to be penalized.

DECISION: Claimant's request for backdating allowed on grounds she had good cause for failing to report at an earlier date to claim the week under appeal.

C.O. # 22147 NONPRECEDENT

3183 WORK SEARCH; ALLEGED MISADVICE BY DIVISION PERSONNEL.

ISSUE: Whether claimant is relieved of satisfying work search requirements on grounds the claimstaker instructed him to report monthly to Manpower Services.

FACTS:
1. Claimant is thoroughly experienced in the requirements of claiming benefits.
2. Told by the claimstaker, "All I want you to do now is to report to the Manpower Office once a month."
3. Made no other effort to secure work, even though he had also been instructed to make an independent and active search for work.

REASONS: KRS 341.350 (4) provides that a claimant for unemployment insurance benefits must make an active search for work. Case law abounds which interprets and defines this requirement and upholds its validity as having derived directly from the initial legislative intent of the statute.

The requirement that a claimant report on a regular basis to a Manpower Service office is a condition precedent to receipt of benefits and totally separate and apart from the requirement for an active independent search for work.

Claimants are instructed in this area early on in their claiming period and continue to receive reinforcement throughout. Despite all this, counsel would have us believe that a thoroughly experienced unemployment insurance claimant was led to believe he had been relieved of the requirement that he actively seek employment because of what was, at most, a poor selection of words on the part of an examiner.

We are not convinced that this claimant was so misled, nor should any claimant have been under like circumstances, considering the effort expended by these local office people in explaining rights and responsibilities to claimants. To manacle these examiners and claimstakers to a standard of verbal exactness such as that suggested by counsel would be to permanently impair the effectiveness of Section 350 of the statute. We are not prepared to embark on such a course.

DECISION: Claimant held ineligible on grounds he failed to make an active search for work.

C.O. # 21080 NONPRECEDENT

3185 REPORTING PROCEDURES; ALLEGED MISADVICE BY DIVISION PERSONNEL.

ISSUE: What quality of proof of misadvice by division personnel must be shown before reporting requirements can be waived?

FACTS:
1. Filed initial claim on July 9, 1962.
2. Reported again on July 23, 1962, at which time he was advised to report again in two weeks.

3. On August 3, 1962, adjusted determination issued, disqualifying claimant.
4. He did not report again to the local office to claim benefits.
5. Ultimately held qualified; however, then held ineligible for those weeks he failed to report and claim benefits.

REASONS: The Commission adopted the referee's reasoning:

The law, regulations, and manual of procedures provide for the filing of claims for benefits for weeks of unemployment as they occur. Claimants for benefits, as in this case, are notified of the requirements in a benefit rights interview. Then too, the exercise of ordinary common sense would suggest that regular reporting is necessary to prove continuing unemployed status, availability status, earnings, and all other conditions of continuing eligibility. Substantial proof, therefore, is required to show that employees of the division have not performed their duties in this regard or have, through deliberation or negligence, coerced or misled or otherwise prevented claimants from complying with the elementary requirements of the law. Such proof is not present herein.

DECISION: Claimant held ineligible for those weeks under appeal on grounds he failed without good cause to report at an earlier date to claim benefits.

C.O. # 4868 NONPRECEDENT

3186 REPORTING PROCEDURES; FAILURE TO CONFORM TO DURING APPEALS PROCESS.

ISSUE: Whether a claimant who on her own initiative discontinues reporting to claim benefits during the appeals process is entitled to have her claim backdated.

FACTS:
1. Filed a valid claim August 23, 1970.
2. Instructed to report every second Tuesday to claim benefits.
3. Was never told to discontinue reporting.
4. Adjusted determination of November 23, 1970, held her unavailable and ineligible, indefinitely.
5. Reported and claimed weeks ended December 5 and 12.
6. Referee decision of December 18, extended unavailability to December 18, date of hearing.
7. Did not report and claim benefits following issuance of referee decision.
8. Commission reversed the referee and held claimant available.
9. However, claimant held ineligible for benefits for all weeks she failed to report and claim benefits.

REASONS: KRS 341.350 requires a claim to be made with respect to each week for which benefits are paid. KRS 341.380 (1) provides that, "All benefits shall be paid through employment offices... Claims for all benefits shall be made in accordance with regulations of the Commission." The Commission, accordingly, subscribed in 903 KAR 5:100 (2)(1) that a worker must report to the employment office in person and complete such forms and conform to such procedures as are adopted by the Commissioner.

An exception to reporting to the employment office in person is that a person who has returned to work may mail in a supplied form for the two weeks prior to returning to work if he has not abandoned the claim by failing to report for the previous weeks. Another exception is found in the regulation which allows backdating for good cause or misdirection by the division's employees.

Claimant lacked good cause for failing to report to the employment office to sign the required forms with respect to the weeks at issue, and she did not otherwise comply with the claim requirements.

DECISION: Claimant held ineligible to receive benefits for weeks under appeal on grounds she failed without good cause to report at an earlier date.

C.O. # 9174 NONPRECEDENT

3187 MUST BE UNEMPLOYED TO FILE A CLAIM.

ISSUE: Whether a fully-employed claimant may file a valid claim.

FACTS:
1. Laid off for two weeks.
2. After returning to full-time employment on Monday, January 6, 1986, reported and requested backdating.
3. Backdating denied. However, referee instructed local office to establish a valid claim with an effective date on January 5, 1986.
4. Commission took the case on its own motion to address the issue listed above.

REASONS: The Commission held that allowing a fully-employed worker to file a valid claim runs contrary to the underlying intent of both the federal and state statutes, that a worker may receive no more than a single series of benefits, not to exceed 26 times her weekly benefit rate, following a single job separation.

Ruling in a similar case, wherein the division had allowed claims by workers not unemployed, Franklin Circuit Court said:

The effect of treating claims filed while the claimant is still regularly and continuously employed as valid claims and using them to establish a benefit year would be to freeze claimant's benefit year, and thus permit them thereafter to use wages, including any vacation pay or termination pay, earned by them following the filing of their claims but before they became unemployed, as base period wages for a second benefit year following but a single separation from employment. This would result in the claimants receiving unemployment insurance benefits up to an amount equal to fifty-two times their weekly benefit rate instead of twenty-six times their weekly benefit rate, as provided by KRS 341.380 (4).

In order to file a valid claim for unemployment insurance benefits it is necessary that the claimant be unemployed. KRS 341.090 (2) and KRS 341.350.

The defendants do not have authority to accept claims from claimants whom they know to be not unemployed, and said claims if filed are void, ab initio, and ineffective for any purpose.

The defendants in knowingly accepting such claims and using them to establish a benefit year are acting beyond the scope of the authority given them by KRS 341, and said action results in an unauthorized, unjustified, and preferential award of unemployment insurance benefits to those claimants who are able to anticipate a sufficient time in advance when their employment will come to an end. HARTSVILLE COTTON MILL V. SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, 79 SE 2d 381; KAELIN V. OLIVER MINING COMPANY, 37 NW 2d 365; in Re Jullin, 158 P 2d 391; and BROWN-BROCKMEYER COMPANY V. HERSCHBERGER, 67 NE 2d 820.

We adopt the conclusions of Franklin Circuit Court insofar as cases of this nature are concerned. We note that the Kentucky Court of Appeals, in KENTUCKY UNEMPLOYMENT INSURANCE

COMMISSION V. ANACONDA ALUMINUM COMPANY, 433 SW 2d 119, in determining whether a claim was valid, listed as a first condition that the claimant be unemployed.

DECISION: The claim with an effective date of January 5, 1986 was invalidated.

C.O. # 45171 PRECEDENT

3188 DELETED. Refer to KRS 341.090(4) as amended by the 1990 General Assembly.

3200 LAW CHANGES; RETROACTIVELY APPLIED (ERRONEOUSLY PAID CONTRIBUTIONS).

ISSUE: Whether the legislature may impair both public (i.e., state's) and private rights by enacting retroactive laws.

FACTS:
1. The 1938 unemployment insurance law provided for the refund of erroneously paid contributions up to one year prior to application for said refund.
2. An amendment, enacted April 1, 1940, allowed for refunds up to two years prior to application for same.
3. On April 25, 1940, the company applied for refund of erroneously paid contributions made during the previous two years.
4. Commission allowed refund back to April 1, 1939, but no further, on grounds the April 1, 1940 amendment could not operate to revive rights which were lost under the 1938 law.

REASONS: The appellee company, in filing its claim with the Commission for a refund of erroneously paid contributions on April 25, 1940, contended that the two year limitation period provided by the amendatory act, effective April 1, 1940, had immediate effect, with the resulting right given it to a refund of all amounts paid within two years of the date of the application for refund, even though its effect would be to restore rights which had already been lost under the one year provision.

The Kentucky Court of Appeals agreed with the company citing as authority 16 C.J.S., Constitutional Law § 417:

The state may constitutionally pass retrospective laws waiving or impairing its own rights or those of its instrumental subdivisions; and it may impose upon itself or its subdivisions new liabilities with respect to transactions already past, despite a constitutional prohibition against the retroactive imposition upon the people of counties or municipal subdivisions of new liabilities with respect to past transactions. Thus, statutes are valid which provide for the enforcement of existing moral obligations of the state or its subdivisions which were theretofore unenforceable.

DECISION: Appellee company was awarded appropriate refunds for the two years allowed by the 1940 amendment.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. CONSOLIDATED COAL COMPANY, 152 SW 2d 971. PRECEDENT

3260 NOTICE OF DISCHARGE NOT PROVIDED CLAIMANT.

ISSUE: Whether a disqualified claimant is entitled to benefits because the employer failed to give her written notice of discharge.

FACTS: 1. Employer did not give claimant written notice of discharge.

2. Claimant disqualified from receiving benefits under KRS 341.370 (1)(b).

REASONS: Claimant's counsel argues that the claimant cannot be disqualified because her employer failed to give written notice that she had been discharged. Counsel bases his argument on KRS 341.370 (3) which provides:

No worker shall be disqualified under paragraph (b) or (c) of subsection (1) of this section unless the employer, within a reasonable time as prescribed by secretary's regulation, notifies the Department for Human Resources and the worker in writing of the alleged voluntary quitting or the discharge for misconduct.

However, the Court of Appeals addressed the same issue of the employer's failure to give notice where the claimants were disqualified under the provisions of KRS 341.360 because they were unemployed due to a labor dispute. The Kentucky Court of Appeals held that to argue that benefits should be paid to employees who would otherwise be disqualified simply because their employer failed to notify the Division of the separation would ignore the legislature's dominant intent: namely, that persons unemployed by a disqualified offense should be denied benefits.

Although the case before the court was an interpretation of KRS 341.360 (1) where the language is permissive, the Commission believes the reasoning of the court is sound and such reasoning should be applied to KRS 341.370 (3) where the language is peremptory. The Commission, therefore, finds as fact that the claimant was properly disqualified under the provisions of KRS 341.370 (1)(b), and that decision should not be reversed simply because the employer failed to give written notice to the claimant and the Division of her discharge for misconduct.

DECISION: No claimant shall be entitled to receive benefits, if otherwise disqualified, on grounds the employer failed to give written notice to the claimant of the separation.

C.O. # 26998 PRECEDENT

3261 BENEFITS TO BE PAID; "WHEN DUE" (CALIFORNIA CASE DECIDED BY U.S. SUPREME COURT).

ISSUE: Whether benefits may be suspended when an employer appeals from initial determination holding claimant eligible.

FACTS:
1. Claimant, after being discharged, filed a claim for benefits.
2. An eligibility interview was scheduled, with notice of same given to both the claimant and employer.
3. Even though permitted to attend the interview, the employer failed to do so.
4. Claimant appeared and was held eligible; benefits began immediately.
5. Employer appealed, and in accordance with California statutes, benefits were suspended, pending the appeal.
6. Claimant filed a class action suit in U.S. District Court contending the pertinent California statute, allowing for suspension of benefits on appeal, was both unconstitutional and inconsistent with the requirements of section 303 (a)(1) of the Social Security Act.

REASONS: Section 303 (a)(1) of the Social Security Act requires a method of administration "reasonably calculated to insure full payment of unemployment compensation when due." In light of the intent of Congress to make payments available at the earliest stage of unemployment as is administratively feasible in order to provide a substitute for wages, the language "when due" must be construed to mean when benefits are allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions. Since California's initial interview provides such a hearing, enforcement of the California Unemployment Insurance Code providing for the withholding of insurance benefits upon an employer's appeal from the initial eligibility

determination must be enjoined because it conflicts with the requirement of §303 (a)(1) of the Social Security Act.

DECISION: Benefits must be paid "when due."

U.S. Supreme Court, CALIFORNIA DEPARTMENT OF HUMAN RESOURCES V. JAVA, 91 S Ct. 1347.

PRECEDENT

3420 FRAUD; FIVE ESSENTIAL ELEMENTS OF.

ISSUE: Whether a claimant is guilty of fraud when her statements, even if accepted as misrepresenting the facts, are immaterial to her entitlement to benefits.

FACTS:

1. At hire claimant notified employer that she could not lift in excess of twenty pounds without jeopardizing her health.
2. There is competent medical evidence of record substantiating physical limitation.
3. Transferred to a position that might require her to lift in excess of twenty pounds.
4. Reminded employer of her inability to lift in excess of twenty pounds.
5. Informed no other work available.
6. Whereupon, she left, and was removed from payroll as a voluntary quit.
7. Apparently claimant notified local office that she was laid off for lack of work.
8. However, employer's protest, received prior to payment of benefits, set forth the circumstances of the claimant's job separation as a voluntary quit.

REASONS: KRS 341.370 (2) provides that the claimant be disqualified from benefits for any week with respect to which she knowingly made a false statement in order to establish her right to or the amount of such benefits and for such additional weeks immediately following the date of discovery, not to exceed a total of fifty-two as may be determined by the Commissioner.

Five essential elements must be proven before disqualification pursuant to KRS 341.370 (2) (supra) may be imposed. These are:

1. a representation or statement;
2. its materiality;
3. its falsity;
4. the speaker's knowledge of its falsity;
5. the speaker's intuition that his representation shall be relied upon by the person to whom it is made.

In this case proof of these essential elements is nebulous at best. It is obvious from the recitation of facts in this case that, regardless of what claimant told the local office, she would have been qualified for benefits. If she quit, it was with good cause, therefore the MATERIALITY of any statement to the contrary is questionable.

Prior to payment of benefits, the Division of Unemployment Insurance had been informed by the employer that it viewed claimant's separation as a voluntary quit.

There was no reason for it to rely on claimant's statement alone. When the representation of both parties to a separation are before the Division, award or denial of benefits becomes largely a judgmental decision, and assignment of fraudulent intent to either party is difficult if not impossible.

DECISION: Claimant held not to have made false statements and, further, that she was separated under nondisqualifying conditions.

C.O. # 19126 NONPRECEDENT

3460 TAX REFUND INTERCEPT, BENEFIT OVERPAYMENT.

ISSUE: Whether a claimant's state income tax refund may be intercepted and used to defray benefit overpayment.

FACTS:
1. Filed claim effective August 12, 1984.
2. Paid benefits of $378.00 for weeks ended October 20, October 27, and November 3, 1984.
3. Subsequent adjusted determination, which was not appealed, held claimant ineligible for such benefits, and that he must repay them.
4. Neither repaid any portion nor made agreement with the Division to do so.
5. Filed individual state income tax return for 1984, claiming a refund.
6. State income tax refund was intercepted to offset overpayment.

REASONS: KRS 131.560 obligates the Kentucky Revenue Cabinet to withhold the Kentucky Individual Income Tax refund, otherwise due a taxpayer, for satisfaction of his indebtedness to another state agency. Precisely is the case at hand.

DECISION: Claimant's individual state income tax refund was properly intercepted to satisfy his indebtedness to the Division.

C.O. # 43043 PRECEDENT

3480 SCHOOL TEACHERS; OFF WORK DUE TO SNOW.

ISSUE: Whether school teachers idled by inclement weather are unemployed and entitled to benefits.

FACTS:
1. Claimants are teachers with varying lengths of service, some are tenured, while others are not.
2. Required to work 185 days from early August through June 30 of the following year.
3. School calendars, set at the beginning of the school year, may be revised to make up lost days.
4. Paid in equal installments throughout the school year.
5. Inclement weather forced closing of schools at various times in January, February, and March, sometimes in excess of seven days.
6. Filed claims for those days.

REASONS: The Commission held and the Court of Appeals agreed that modification of the school calendar did not alter the terms or contract of employment in that appellants were able, as per their contracts, to work 185 days within the prescribed school year, and their incomes remained intact. Consequently, they were not unemployed.

DECISION: Claimants held ineligible to receive benefits on grounds they were not unemployed.

Kentucky Court of Appeals, TACKETT V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky. App, 630 SW 2d 76. PRECEDENT

3481 VACATION PAY; AT OR AFTER SEPARATION.

ISSUE: Whether vacation pay received at separation is properly assignable to weeks immediately following separation.

FACTS:
1. Worked twenty-eight years for Department for Human Resources.
2. Laid off May 16, 1980; filed claim May 22, 1980.
3. Received lump sum in mid-June for fifty-seven and one-half days of accumulated annual leave.
4. Held ineligible during the twelve weeks for which she received vacation pay.

REASONS: KRS 341.350 provides that unemployment benefits be paid with respect to "weeks of unemployment." KRS 341.080 defines the term "week of unemployment" so as to exclude any week with respect to which the claimant earns wages in excess of one and one-fourth times weekly benefit rate. KRS 341.390 provides that there shall be deducted from the benefit rate of the claimant, eighty percent, adjusted to the nearest multiple of $1.00, of the amount of wages earned by such worker during the week of unemployment with respect to which she claims benefits.

Both the Division and the referee followed what for many years had been established policy with regard to the effect vacation payments received after separation have on the entitlement to benefits of a claimant for unemployment insurance. The Commission, early on, established these precedents (see Commission Order Number 7876) holding vacation payments to be wages, properly assignable to weeks immediately following separation. Vacation payments were, in fact, treated in the same manner as dismissal payments.

In its Order Number 20305, issued June 4, 1979, then modified by Order 21256, this Commission reversed the policy established by previous Commissions, and held severance or dismissal payments not to be disqualifying or deductible under the provisions of KRS 341.390, since such payments represented remuneration for services performed during a previous period in time. We do not find vacation payments, paid to a worker AT SEPARATION, to be significantly different from dismissal payments.

Vacation payments normally accrue on an annual basis and are designed to provide the worker with income during a period when he or she is enjoying a respite from work, purposed for rest, relaxation, and personal pursuits. An almost invariable corollary to vacation is a return to work at the end of the period. The payments received by claimant bear no relation whatsoever to the almost universal concept of vacations and vacation pay described above.

The claimant could not look forward to a return to work nor was she simply enjoying a respite from her employment. She had been separated therefrom and conceivably had but one recourse, that to seek other work. Her very entitlement to the payment received was predicated upon separation.

We perceive vacation payments thus conveyed and received, after the employer-employee relationship has been severed, as no more than dismissal payments. They should be accorded the same treatment under the provisions of KRS 341.390.

DECISION: Vacation pay at separation held to be payment for services performed during a period prior to separation and are not disqualifying.

C.O. # 23941 PRECEDENT

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~~NOTE: Please read in conjunction with Entry 3482.~~

~~3482 VACATION PAY; ONGOING EMPLOYMENT RELATIONSHIP.~~

ISSUE: Whether vacation payments are deductible wages, allocable to the designated vacation period, when there has been no job separation.

FACTS:
1. Claimants are members of UAW Union.
2. Placed on indefinite layoff May 29, 1980.
3. Remained on layoff through regularly scheduled vacation shutdown, which encompassed July 28 through August 8.
4. Received vacation pay to cover one week of the vacation shutdown.
5. Recalled on September 8, 1980, in accordance with legally enforceable, contractual right to recall.

REASONS: In our precedent Order Number 23941, this Commission held that vacation payments received AT OR AFTER separation were not to be considered as deductible wages for purposes of determining the benefit rate of an individual claimant. In that case we were dealing with workers whose employment connection had actually been severed, and who could only return to their employment through rehire. Claimants in the instant case were not permanently separated from their employment but retained a legally enforceable, contractual right to recall. (See KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL, 331 SW 2d 903). Since these workers retain employment status with the firm, vacation payments should be treated in the same manner as those received by individuals actively performing service for the firm. Although not at issue here, it is appropriate that we discuss also the status of the worker who is placed on indefinite layoff, and who has no contractually based right to recall. We believe the question of whether or not there has been a SEVERANCE of the employment connection turns upon two points: the existence of, or lack of a legally enforceable right to recall, and whether the layoff is for an indefinite time or requires return to work within a measurable period. In the first two instances, there is no question of a continuing employment relationship. However, in the final instance, where there is neither contractual right to recall nor a definite period of layoff, the employment connection has been severed. Future interpretations of Order Number 23941 should be consistent with the above to the extent that vacation payments will constitute deductible or disqualifying wages allocable to the designated vacation period, EXCEPT in instances where there has been a SEVERANCE of the employment connection, and vacation payments are received at or after such severance.

DECISION: Vacation payments are deductible wages if there has been no severance of the job connection.

C.O. # 24736 PRECEDENT

NOTE: Insofar as it deals with both the interpretation of precedent Order Number 23941, see Entry 3481, AND the question of severance from employment, this order shall serve as precedent.

3483 VACATION PAY; PERMANENT LAY OFF WITH CONTRACTUAL RECALL RIGHTS.

ISSUE: Whether vacation pay received following permanent lay off is deductible from benefits, notwithstanding contractual right to recall.

FACTS:
1. Last worked March 7, 1983, when placed on medical leave of absence.
2. On May 22, 1983, attempted to return to work after being released by doctor.
3. Permanently laid off due to "reduction in force."
4. No realistic chance of recall, although he retained such rights under the contract.
5. Filed initial claim; later received vacation pay.

REASONS: KRS 341.390 (1) provides that there shall be deducted from the claimant's benefit rate, eighty percent of the amount of wages EARNED during the week of unemployment for which he claims benefits.

In this case claimant had no wages "earned" during the weeks in question since he had not worked since March 7, 1983. What he received for those weeks was apparently two weeks of vacation pay. The only issue now is whether or not his vacation pay was deductible.

In precedent Order Number 24736, the Commission reasoned:

In our precedent Order Number 23941, this Commission held that vacation payments received AT OR AFTER SEPARATION were not to be considered as deductible wages for purposes of determining the benefit rate of an individual claimant. In that case we were dealing with workers whose employment connection had actually been severed, and who could only return to their employment through rehire. Claimants in the instant case were not permanently separated from their employment but retained a legally enforceable, contractual right to recall. (See KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MILLARD DAY, 451 SW 2d 656 and KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL,331 SW 2d 903). Since these workers retain employment status with the firm, vacation payments should be treated in the same manner as those received by individuals actively performing service for the firm. Although not at issue here, it is appropriate that we discuss also the status of the worker who is placed on indefinite layoff, and who has no contractually based right to recall. We believe the question of whether or not there has been a SEVERANCE of the employment connection turns upon two points: the existence of, or lack of a legally enforceable right to recall, and whether the layoff is for an indefinite time, or requires return to work within a measurable period. In the first two instances, there is no question of a continuing employment relationship. However, in the final instance, where there is neither contractual right to recall nor a definite period of layoff, the employment connection has been severed. Future interpretations of Order Number 23941 should be consistent with the above to the extent that vacation payments will constitute deductible or disqualifying wages, allocable to the designated vacation period, EXCEPT in instances where there has been a SEVERANCE of the employment connection, and vacation payments are received at or after such severance.

DECISION: Claimant received nondeductible vacation pay following severance of the employment relationship.

C.O. # 39074 A PRECEDENT

NOTE: Please read in conjunction with Entry 3481 and Entry 3482. Doctrine encompassed by the three subject cases above upheld by Kentucky Court of Appeals, SOUTH CENTRAL BELL V. EVANS AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 681 SW 2d 433. (See Entry 3484).

3484 SEVERANCE AND VACATION PAY; "WEEK OF UNEMPLOYMENT".

ISSUE: Whether a claimant may serve a "week of unemployment" when she is receiving severance or vacation pay, following loss of employment by technological displacement.

FACTS:
1. Two claimants were covered under the terms of a collective bargaining agreement, which provided for severance and vacation pay following separation.
2. A third claimant was a management employee and was entitled to sixty percent of her annual salary at separation.
3. All three were technologically displaced and received the aforementioned benefits while receiving unemployment insurance benefits.

REASONS: The Kentucky Court of Appeals held:

> Most simply put, it is our task to determine whether the weeks for which these employees received termination pay are "weeks of unemployment" for which they were eligible for

unemployment benefits. Our interpretation of KRS 341.080 (3) leads us to conclude that the weeks in which these employees received termination pay were weeks of unemployment within the meaning of the statute. The legislature defines "week of unemployment" as any period of seven consecutive days during which a worker performed less than full-time work AND earned less than one and one-fourth times his benefit rate. The employees at issue here performed no work after their dismissal to entitle them to their severance pay nor did they "earn" the severance pay by being fired. The severance pay received by the discharged workers was a bargained for agreement directly relating to their employment. The right to these payments was earned by virtue of the employee's work despite the fact that the triggering event was discharge from employment. It is clear to us that these employees did not "earn" anything from appellant after their discharge but simply reaped the benefit of previously vested collective bargaining rights.

The Court further held that vacation pay received after separation was nothing more than another form of termination or severance pay and, as such, was not earned following separation.

DECISION: Neither vacation pay nor severance nor termination pay received after separation are deductible from benefits; or put differently, such payments do not prevent the claimant from serving a "week of unemployment."

Kentucky Court of Appeals, SOUTH CENTRAL BELL TELEPHONE COMPANY V. EVANS, 681 SW 2d 433. PRECEDENT

NOTE: See Entries 3481, ~~3482~~, and 3484.

3485 VACATION PAY; RETROACTIVELY ALLOCATED, "WEEK OF UNEMPLOYMENT".

ISSUE: Whether vacation pay, received after vacation shutdown and upon completion of required service should be retroactively allocated to the vacation shutdown and deducted from benefits received for that same period.

FACTS:
1. Contract provided that up to two weeks of vacation during a calendar year would run concurrently with a shutdown if a shutdown of at least two weeks duration occurred.
2. Employees with sufficient service at the time of the shutdown were paid vacation pay prior to the shutdown.
3. While those without sufficient service received vacation pay only if and when they attained sufficient service during the calendar year to qualify for said pay.
4. Claimants became eligible for and received vacation pay after the shutdown.
5. They had already received unemployment insurance benefits for the vacation shutdown.

REASONS: Kentucky Court of Appeals held that the case turns on whether the weeks for which the claimants received vacation pay were "weeks of unemployment" within the meaning of KRS 341.080 (3), one of the prerequisites of which is that "the worker earned less than the benefit rate determined for him" (current law specifies earnings less than one and one-fourth times the benefit rate). The Court concluded that vacation pay received after the shutdown was wages earned, allocable to the shutdown, and deductible from benefits.

DECISION: Vacation pay is retroactively allocable to the shutdown and deductible from benefits. Employer's reserve to be credited with improperly paid benefits.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. GENERAL ELECTRIC AND GENERAL ELECTRIC V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 473 SW 2d 808. PRECEDENT

3486 PART-TIME EMPLOYMENT; "WEEK OF UNEMPLOYMENT".

ISSUE: Whether a worker hired initially on a part-time basis, who continues in some aspect of part-time employment, can ever qualify for benefits.

FACTS:
1. Claimant hired for part-time employment.
2. During base period averaged seventeen hours per week.
3. During benefit year averaged thirteen hours per week.
4. Established a monetarily valid claim.

REASONS: In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

> At the adjusted determination stage, it was ruled in the employee's favor that she could file for benefits. At the next stage, the referee affirmed that conclusion but of course pointed out that any actual earnings she did have would be set off against any benefits she was to receive. The Unemployment Insurance Commission affirmed the referee's decision, and the circuit court affirmed the ruling of the Commission.

KRS 341.080 (3) is the key to this question. It defines "week of unemployment" as seven consecutive days of less than full-time work and earnings less than an amount equal to one and one-fourth times the appropriate benefit rate for the particular claimant. If the earnings fall below the benefit rate and the hours worked are part-time, then this statute provides for recovery.

KRS 341.050 (1)(a) indicates that covered employment applies to an individual who under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee. This part-time claimant is covered. KRS 341.050 provides for any statutory exclusions, and part-time workers are not listed there; therefore, part-timers are not specifically excluded.

Finally, KRS 341.350 (5) provides conditions of qualifications for benefits by setting up a statutory scheme of base period earnings of certain minimum amounts as compared to benefits that could be earned. The claimant meets that criterion.

In no respect has it been demonstrated that the legislature intended to exclude unemployment insurance benefits for persons who only work part-time. To hold as a matter of law that employees who start off on a part-time basis are not entitled to unemployment insurance benefits would not only appear contrary to the statutory dictates but could lead to abusive employment practices. For instance, if an employer hired someone specifically to work on a part-time basis of thirty-six hours per week and then cut him back to one hour per week, he would be precluded from receiving any unemployment insurance benefits under the appellant's theory of this case.

The claimant's actual benefit here appears to be nominal and in fact may not materialize at all since twelve hours per week at her minimum wage pay scale would preclude her from receiving any unemployment insurance benefits based on her seventeen hours per week earnings.

DECISION: Whether or not benefits materialize, the claimant had the right to file a claim for receipt of benefits on grounds all statutory requirements were satisfied and their is no statutory provision excluding part-time employees from receiving benefits.

Published. Kentucky Court of Appeals, CORBIN TIME-TRIBUNE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND FRICHE, 686 SW 2d 821. PRECEDENT

NOTE: See Entry 3020.

3501 INSURANCE AGENTS; NONCOVERED EMPLOYMENT.

ISSUE: Whether insurance agents, who receive a guaranteed minimum commission per week, are engaged in covered employment.

FACTS:
1. Agents received weekly commissions on both "Weekly Premium" and "Monthly Debit" accounts which they serviced and collected.
2. Section V.-G. of the employment contract states:

"If the combined Weekly Premium and Monthly Debit Ordinary Collection and Service Commissions payable under Paragraph C-1 and D-1 of this Section are less than $40 a week, such combined commissions shall be $40 a week."

REASONS: Kentucky Court of Appeals rejected the Commission's argument that the $40.00 represented remuneration other than commission, thereby making the agent's employment "covered" under KRS 341.050 (i.e., not excluded from "covered employment" under KRS 341.055 (10)). Rather, the Court held the $40.00 to be simply an increase in the rate of commission when the specified commissions for servicing and collecting the two accounts did not produce $40.00. Noting that Section V.-G of the contract specifically identified the $40.00 as a COMMISSION, the Court concluded that the parties to the contract understood that the $40.00 was a COMMISSION rather than a salary or specified wage.

DECISION: Claimant's employment was noncovered on grounds the guaranteed commission was not a salary or wage.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, 357 SW 2d 850. PRECEDENT

3520 SEVERANCE PAY; RELATED TO PAST SERVICE.

ISSUE: Whether severance payments are deductible or disqualifying wages, allocable to weeks following separation.

FACTS:
1. Company announced it was closing its Louisville plant.
2. Company and claimant's union began negotiations on terms and conditions of plant closing as they affected claimants.
3. It was agreed that claimants would receive severance pay, based on length of service, either in monthly installments or a lump sum award.
4. Referee held severance payments to be disqualifying wages for the WEEK OR WEEKS WHEN RECEIVED.

REASONS: For many years it was the policy of the Kentucky Unemployment Insurance Commission to consider separation payments as constituting deductible or disqualifying wages with respect to entitlement to unemployment insurance benefits for the weeks immediately following separation, according to the number of weeks of separation pay received. In late 1978, Judge James E. Keller of the Fayette Circuit Court set aside an order of the Commission in a similar case, leading to a reexamination of our policy. In a case styled JOSEPH E. BLAND ET AL V. NATIONAL DISTILLERS, we set forth what was believed at the time to be the appropriate formula for the handling of severance pay, in view of Judge Keller's opinion. It was this formula that the referee utilized in reaching his conclusions in the instant case.

In arriving at their decision in BLAND, the Commission, faced with a split of authority from other jurisdictions and total absence of judicial precedent in Kentucky, adopted a "middle of the road" position in holding severance payments deductible from the benefit rate of a claimant for the week or weeks WHEN PAID only. We are now required to examine our position retrospectively and determine whether it rests upon a sound base, from the standpoint of reasoning or whether it is vulnerable to attack. We are convinced that the latter applies.

In deciding BLAND, the Commission, as pointed out by counsel, relied heavily upon BALDING V. TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, Tenn., 370 SW 2d 546 (1963). The cases are almost identical in their factual matrix, and the governing statutes are equally similar. The Tennessee Court, however, held that severance payments did not constitute EARNINGS (emphasis ours) for ANY week subsequent to separation and therefore could not be disqualifying for any week of unemployment.

We find that other jurisdictions which do not disqualify on the basis of receipt of severance payments support their policy with similar arguments. (See SOUTHWESTERN BELL TELEPHONE COMPANY V. EMPLOYMENT SECURITY BOARD, 189 KAR 600, 371 P2d 134, 93 ALR 2d 1312 (1962)).

From the split of authority, it is apparent that this question is one of the more bothersome ones insofar as application of the various unemployment insurance statutes is concerned. We are convinced, however, as stated in BLAND, that severance payments are directly related to the worker's past service with the company and cannot properly be related to weeks after separation. Given the additional argument, advanced by counsel for appellants, that need is not one of the criteria for determining qualification for unemployment insurance benefits, we cannot escape the conclusion that severance payments are neither disqualifying nor deductible from the benefit rate of claimants REGARDLESS OF WHEN PAID.

Commission Order Number 20305, which was held precedential with regard to cases of this nature, is hereby modified to the extent that severance payments, REGARDLESS OF WHEN PAID, OR MANNER OF PAYMENT ARE NOT DEDUCTIBLE OR DISQUALIFYING WAGES. The order, with the above modification, shall continue to constitute precedent.

DECISION: Severance payments are neither deductible nor disqualifying wages for weeks following separation.

C.O. # 21256 PRECEDENT

NOTE: See Entries 3481, ~~3482~~, ~~3483~~, and 3484.

3580 RETIREMENT BENEFITS; LUMP SUM PAYMENT.

ISSUE: Whether retirement benefits received in a lump sum are deductible for a single week or for the remainder of the claimant's life, when he had the choice of receiving the benefits monthly for the remainder of his life.

FACTS:

1. Separated by forced retirement on November 30, 1983.
2. Received regular pay until July 1, 1984.
3. OPTED to receive pension in a single lump sun payment of $93,455.80, rather than the actuarially determined monthly amount of $809.00.
4. This claimant attained retirement age under the plan as of July 1, 1984, at which time he had the OPTION of receiving his pension either in monthly payments or a single lump sum payment.

REASONS: This case presents squarely the question whether provisions of KRS 341.390 serve to bar claimant from receiving benefits by reason that he OPTED to receive a lump sum rather than a monthly pension payment. While this is a case of first impression in Kentucky, the Courts in other state(s) have addressed this issue.

All state laws are subject to federal law. Public Law 94-566 provided for the deduction of all pensions, including social security and railroad retirement, regardless of whether the claimant had base period employment with an employer who contributed to his pension. Public Law 96-364, effective for weeks claimed after September 28, 1980, provided that pensions received under the social security and railroad retirement acts were still to be deducted if the base period employers were contributors to social security but other pensions would not be deducted unless a base period employer contributed to the pension. In the case of MARGARET C. TUCKER V. DEPARTMENT OF EMPLOYMENT SECURITY, 453 A. 2d 1247 (N.H. 982), the Supreme Court of New Hampshire, stated in part:

> "... the purpose of the federal and complimentary state statues is to prevent so-called 'double dipping' by persons who are retired ... we do not believe that the wording of the statute can so easily be divorced from its purpose..."

The lump sum is a prepayment of monthly benefits due an employee for the rest of his life. See TENNESSEE GAS PIPELINE COMPANY V. ADMINISTRATOR, DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF LOUISIANA, LA, 364 2d 990. In the case of MEREDITH CORPORATION V. IOWA DEPARTMENT OF JOB SERVICE, Iowa 320 NW 2d 596, the Iowa Supreme Court held that where lump sum payments of private retirement benefits to an employee was the actuarial equivalent of $122.54 per month, the lump sum pension constituted remuneration which the employee received for each month following its receipt, and thus unemployment paid the employee had to be reduced as though the pension were received monthly.

The lump sum settlement of retirement benefits to which the employer made contributions represented a prepayment of benefits due the claimant under the retirement plan for the rest of his life and not just for a single week in which he received a lump sum payment. It therefore must be allocated for weeks of unemployment following his separation based on the monthly pension ($890.00 a month) he would have received if he had not OPTED to take a lump sum payment. When the monthly figure is multiplied by twelve, divided by fifty-two and rounded to the nearest multiple of one dollar, the pension amounts to $187.00 a week. This exceeds his weekly benefit rate by $47.00 and as his pension is to be deducted from his weekly benefit rate on a dollar for dollar basis, he cannot be paid unemployment insurance benefits.

NOTE: Those workers who have not attained retirement age under the plan, and who were involuntarily separated from their employment at the convenience of the employer, and who have not removed themselves from the labor market, shall not have deducted from their benefit rates monies received at separation from a retirement fund, on grounds such money is not, in fact, retirement pay. It matters not whether they had the option of receiving such money monthly or by lump sum (see Entry 3609).

DECISION: Lump sum retirement benefits shall be deducted based on the monthly pension claimant could have received.

C.O. # 41671 A PRECEDENT

3581 RETIREMENT; VOLUNTARY OR INVOLUNTARY QUITTING (THREEFOLD TEST DEFINED; KROEHLER, REYNOLDS METALS AND YOUNG CASES DISCUSSED).

ISSUE: Whether a claimant who accepts as a condition of employment that he retire at age 70 is entitled to benefits.

FACTS:
1. First employed by the Postal Service in 1958 as a substitute worker.
2. Thereafter became a full-time career employee.
3. Was aware at hire that he would be mandatorily retired upon reaching age 70.
4. On February 20, 1974, celebrated 70th birthday and his employment was terminated.
5. Received a federal pension of $580.00 per month based on twenty years in the Army and fifteen years service with the Postal Service.
6. In addition, received $150.00 per month in social security benefits.

REASONS: The Commission established a threefold test for determining whether an employee voluntarily quits when terminated because he has reached a specific age:

First, the mandatory retirement must have been pursuant to a general plan. Second, the plan must provide benefits to the employee who is terminated upon reaching the mandatory retirement age. Third, there must be some act of volition on the part of the employee. In other words, there must be some tangible act on the part of the employee which denotes his acceptance of the terms of the plan including the provisions for mandatory retirement. The Commission concluded that McFadden voluntarily accepted all of the terms and conditions of employment in effect at the time he first went to work for the Postal Service, including mandatory retirement at age 70.

In making its decision, the Kentucky Court of Appeals discussed several cases:

> In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KROEHLER MANUFACTURING COMPANY, Ky., 352 SW 2d 212 (1961), the Court considered a voluntary retirement plan which contained a provision for retirement at age 65. An employee's initial participation in the retirement plan was entirely voluntary. The employee was permitted to withdraw from the plan anytime prior to retirement, and the employee was entitled to make a special request to continue in employment upon reaching the age of 65 years. Because the employee's decision to participate in the retirement plan was voluntary, the Court concluded that the employee's subsequent retirement under the terms of the plan constituted a voluntary quitting of his employment.

In the present case, McFadden had no choice respecting his participation in the retirement plan of the Postal Service after he had made his initial voluntary decision to accept employment with the Postal Service. However, it must also be noted that the decision in the Kroehler case rejected one of the cases relied upon by McFadden in his brief on this appeal, WARNER COMPANY V. UNEMPLOYMENT INSURANCE COMPENSATION BOARD OF REVIEW, 396 Pa. 545, 153 A.2d 906 (1959).

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. REYNOLDS METALS COMPANY, Ky., 360 SW 2d 746 (1962), the Court extended the decision in the Kroehler case to employees participating in a retirement plan pursuant to a collective bargaining agreement negotiated for them by their labor union and ratified by their vote. The court held that an employee's retirement pursuant to the plan constituted a voluntary termination of his employment because he voluntarily accepted the retirement plan which provided for termination of his employment. Consequently, the court concluded that he was not entitled to unemployment insurance benefits.

On this appeal, McFadden relies principally upon the decision in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG, Ky., 389 SW 2d 451 (1965). In that case, Young had been employed by the Whayne Supply Company for eighteen years when the company adopted a policy that all employees must retire upon reaching the age of 65 years. The new policy left Young with only two years to work before his employment was terminated. The new retirement policy adopted by Whayne Supply Company did not offer a pension plan

affording any benefits to Young. The court held that Young did not voluntarily quit his employment.

In this case, the pension provides substantial retirement benefits to McFadden, and it was in effect at the time he first accepted employment. McFadden accepted employment with knowledge of plan providing for mandatory retirement and substantial retirement benefits. Kentucky Unemployment Insurance Commission DID NOT ERR in holding that McFadden voluntarily left his employment with the Postal Service without good cause. (KRS 341.370).

DECISION: Claimant disqualified from benefits on grounds he voluntarily left the Postal Service without good cause.

Kentucky Court of Appeals, MCFADDEN V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND POSTAL DATE CTR., 588 SW 2d 711. PRECEDENT

NOTE: See Entry 3582.

3582 RETIREMENT; MANDATORY (NO PENSION).

ISSUE: Whether a claimant who does not freely give his consent to a company retirement plan is eligible for benefits when he is mandatorily retired under said plan.

FACTS:
1. Began work for the company August 31, 1942.
2. No union, but workers elected committee to confer with company on matters of mutual concern.
3. With acquiescence of the committee, the company enacted a policy in 1960, providing for the mandatory retirement of all employees upon reaching age 65.
4. Retirement policy did not carry with it a pension plan.
5. Claimant was mandatorily retired when he attained the age of 65 on February 5, 1963.

REASONS: In holding that the claimant voluntarily left his employment without good cause the Commission relied on KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. REYNOLDS METAL COMPANY, Ky., 360 SW 2d 746 and KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KROEHLER MANUFACTURING COMPANY, Ky., 352 SW 2d 212.

However, in affirming the circuit court's REVERSAL of the Commission awarding benefits to the claimant, the Kentucky Court of Appeals held that:

> ...The termination of Young's employment at the age of 65 was an event over which Young had little free choice. Young had been employed for some eighteen years. With the approval of the workers' committee, the company adopted a compulsory retirement plan at the age of 65. This was something to which Young did not voluntarily assent or agree. Even if he approved the retirement plan, it was not by virtue of his individual consent or choice. In other words, it was not something that he did voluntarily. In the KROEHLER case it was noted that the employee had the privilege of avoiding retirement by applying to the company for permission to continue to work.
>
> Perhaps this case should be further distinguished from the Reynolds case. In REYNOLDS, all employees were represented by a union under collective bargaining. Not so in the present case, although the employees elected committeemen to "confer with management" with respect to matters of mutual concern. In REYNOLDS, a pension plan was provided. Not so in the present case. In this case Young worked for the employer eighteen years before 1960, when the retirement plan was put into effect "by the company," with the acquiescence of the committee. Young then had only about two years

to work before reaching 65. This retirement plan provided little, if any, benefits for Young.

It is a case where "Young" was too old. We deem it unnecessary in this particular case to decide whether the "committee," elected by the employees, had a right to bind all the employees of Whayne. The important and controlling question to Young and to this Court, is "WAS HIS EMPLOYMENT DISCONTINUED VOLUNTARILY by Young or by his authorized agent? We conclude it was not. This Court said in REYNOLDS:

> The purpose of the General Assembly in the enactment of such legislation was to provide benefits for only those employees who have been forced to leave their employment because of forces beyond their control and not because of any voluntary act of their own.

It seems to us the action of the employer two years before Young's retirement age was an act beyond his control without benefit to him and against his interest within the meaning of the law. We can discover no act or conduct of Young from which it can be said he voluntarily discontinued his employment.

As we read the record in this case, Young did not have a choice. We think the word "voluntary" must certainly be defined as meaning "freely given" and "preceding from one's own choice of full consent."

DECISION: Claimant did not voluntarily quit his employment.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG AND WHAYNE SUPPLY, 389 SW 2d 451. PRECEDENT

NOTE: See Entry 3581.

3583 REASONABLE ASSURANCE; ALTERED CONDITION OF EMPLOYMENT.

ISSUE: Whether reasonable assurance exists when the economic terms and conditions of the job offered are substantially less than those of the job last worked.

FACTS:
1. Claimant worked as custodian and school bus driver.
2. Lived at the school during the week since his home was eighty miles away.
3. On June 14, 1989, claimant was not rehired as custodian because of declining funds.
4. Claimant was rehired as a bus driver but was given the shortest route available even though he was the most senior driver.
5. Bus drivers wages are based on the length of the route.
6. Claimant would no longer be allowed to live in the school; but would have to commute 160 miles daily.

REASONS: KRS 341.360 provides that no worker may be paid benefits for any week of unemployment which, when based on service in an educational institution, begins during the period between two successive academic years or terms, and there is a reasonable assurance that the worker will perform such service in the second of such academic terms.

Reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State Law) than the terms and conditions for the job in the first period (see Unemployment Insurance Program Letter 4-87, dated December 24, 1986). The evidence in this case establishes that claimant was offered some work for the 1989-90 school year; however, the economic terms and conditions of said work were substantially less than that which he had been hired to perform during the previous three years.

Claimant was assigned to the shortest route available for a bus driver which meant a drastic reduction in his earning capacity especially considering that he no longer would receive wages as a custodian. Further, not being custodian, claimant could no longer live at the school during the week days thus requiring that he travel some 160 miles per day to drive the bus. Under all of these circumstances, we conclude that there was a substantial reduction in the economic terms and conditions of the work offered claimant from the 1988-89 term to the 1989-90 term. Thus, claimant did not receive "reasonable assurance" and the provisions of KRS 341.360 do not apply.

DECISION: Claimant did not have reasonable assurance and is not ineligible on that ground.

C.O. # 53742 PRECEDENT

3584 SCHOOL BUS DRIVERS; PRIVATE EMPLOYER.

ISSUE: Whether school bus drivers employed by a private for profit business are subject to a benefit disqualification between school terms if they have reasonable assurance of re-employment.

FACTS: Claimant neither works FOR, NOR IN, an educational institution; however, she does provide services TO OR ON BEHALF of an educational institution as a school bus driver in the employ of a private company.

REASONS: KRS 341.360 provides that no worker may be paid benefits for any week of unemployment:

(3) (a) Which, when based on service in an instructional, research, or principal administrative capacity in an institution of higher education as defined in subsection (2) of KRS 341.067 or in an educational institution as defined in subsection (4) of KRS 341.067, begins during the period between two (2) successive academic years, or during a similar period between two (2) regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the worker performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that the worker will perform such service in any such capacity for any institution or institutions of higher education or an educational institution in the second of such academic years or such terms; or

(b) Which, when based on service other than as defined in paragraph (a) of this subsection, in an institution of higher education or an educational institution, as defined in subsection (2) or (4) of KRS 341.067, begins during the period between two (2) successive academic years or terms, if the worker performs such services in the first of such academic years or terms and there is a reasonable assurance that the worker will perform such services in the second of such academic years or terms; except that if benefits are denied to any worker under this paragraph and such worker was not offered an opportunity to perform such services for such institution of higher education or such educational institution for the second of such academic years or terms, such worker shall be entitled to a retroactive payment of benefits for each week for which the worker filed a timely claim for benefits and for which benefits were denied solely by reason of this paragraph; or

(c) Which, when based on service in any capacity defined in paragraphs (a) and (b) of this subsection, begins during an established and customary vacation period or holiday recess if the worker performs any such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such worker will perform any such services in the period immediately following such vacation period or holiday recess; or

(d) Based on service in any capacity defined in paragraph (a) or (b) of this subsection when such service is performed by the worker in an institution of higher education or an educational institution, as defined in subsection (2) or (4) of KRS 341.067, while the worker is in the employ of an educational service agency, and such unemployment begins during the periods and pursuant

to the conditions specified in paragraphs (a), (b), and (c) of this subsection. For purposes of this paragraph the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one (1) or more institutions of higher education or educational institutions.

KRS 341.360 (3) (a)(b)(c) and (d) must be in conformity with clauses I, II, III and IV of 26 USC Section 3304 (a)(6)(A), as amended by Public Law 98-21. Clauses I through IV of Section 3304 (a)(6)(A) apply to those governmental entities and educational institutions to which section 3309 (a)(1) is applicable. Section 3309 (a)(1), for purposes of Section 3304 (a)(6)(A), applies to those governmental entities and their instrumentalities which are immune from the tax imposed by Section 3301, and to those education institutions and other organizations described in Section 501 (c)(3) which are exempt from income tax under section 501 (a) (see section 3306 (c) (7) and (8) respectively).

For an instrumentality of a governmental entity to meet the statutory test of Section 3306 (c)(7), and thereby subject its employees to the denial of benefits required by Section 3304 (a)(6)(A) (IV), it must be immune from the federal unemployment tax imposed by Section 3301. It does not appear that the captioned employer satisfies this requirement. For an educational institution, or OTHER ORGANIZATION described in Section 501 (c)(3) to satisfy the statutory requirement of Section 3306 (c)(8), and thereby subject its employees to the denial of benefits required by clauses I, II, and III of Section 3304 (a)(6)(A), it must be exempt from income tax under Section 501 (a). The captioned employer does not appear to satisfy this requirement either. The record supports that the captioned employer is a for profit corporation to which sections 3309 (a)(1) and 3306 (c)(7) and (8) do not apply. Further, it would seem reasonable that an instrumentality of a governmental entity would be created by the parent governmental entity. Evidence of record supports that the captioned employer is a privately formed corporation.

Even if it were accepted that the captioned employer is either an instrumentality of a governmental entity, as described in Section 3306 (c)(7), or a non-profit organization described in Section 3306 (c)(8), it would not qualify for the denial of benefits required by clauses I through IV of Section 3304 (a)(6)(A) because its employees neither work FOR, NOR IN, the educational institution. That is, clauses I, II, and III require states, under certain conditions, to deny benefits between school years or terms, and during vacation and holiday recess to individuals IN THE EMPLOY OF an educational institution. The ONLY exception to this employer-employee relationship requirement, prior to Public Law 98-21, was found in clause IV which requires the denial of benefits between school years or terms, and during vacation and holiday recess to individuals performing services in an educational institution, while IN THE EMPLOY OF an Educational Service Agency (i.e., ESA). An ESA is a governmental entity which is established and operated exclusively for the purpose of providing service to one or more educational institutions (see Section 3304 (a)(6)(A) (IV) and KRS 341.360 (d)). KRS 341.069 (5) defines governmental entity as a public school district and its instrumentalities. Even though the captioned employer provides services exclusively to the Jefferson County Board of Education (and thereby to its educational institutions), we do not believe it is an ESA because it neither satisfies the tax immunity requirement of Section 3306 (c)(7), nor the tax exemption requirement of Section 3306 (c)(8). AGAIN it must be stated that even if the captioned employer were an ESA, it remains that clause IV of Section 3304 (a)(6)(A) and subsection (d) of KRS 341.360 require that employees of ESAs must perform services IN the educational institution before they shall be subject to a denial of benefits between school years or terms, and during vacation, and holiday recess. The captioned employer's employees, including the claimant, do not perform services IN an educational institution.

Public Law 98-21 added an OPTIONAL clause V to Section 3304 (a)(6)(A) which, IF ADOPTED by a state, requires the denial of benefits between school years or terms, and during vacation, and holiday recess to employees of ESAs, if their services were PROVIDED TO or ON BEHALF OF an educational institution. Under the OPTIONAL clause V the services of ESA employees would not have to be performed IN the educational institution (as required by clause IV) for the between

school years or terms, and during vacation and holiday recess disqualifying provisions to be applicable. To date, Kentucky has not adopted OPTIONAL clause V. Therefore, the MANDATORY provisions of clause IV are controlling in this case. See Unemployment Insurance program letter No. 41-83, Attachments I and III, for an explanation and interpretation of amendments made by Public Law 98-21, and for draft language to be used in implementing the amendments.

DECISION: Claimant not subject to a benefit disqualification between school terms.

C.O. # 53729 NONPRECEDENT

3585 WHICH PARTY MUST TESTIFY FIRST; BURDEN OF PROOF.

ISSUE: Which party must bear the burden of proof and testify FIRST in a discharge case.

FACTS:
1. Claimant worked as a maid for the captioned hotel.
2. There was a rule prohibiting employees from fraternizing with hotel guests.
3. Claimant's supervisor observed claimant engaged in, what the supervisor considered improper conduct with a guest.
4. At the referee hearing, the employer was required to testify first regarding discharge, which was the only issue under appeal.
5. The only evidence submitted by the employer's attorney was an affidavit from the former supervisor, who was no longer an employee of the hotel, to the effect that the claimant was a willing participant in improper conduct with the guest.
6. Claimant testified, and it was found as fact, that she was resisting the unwanted advances of the guest.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held that the claimant bears the burden of proving eligibility for benefits under KRS 341.350, and that if eligibility is the issue, or one of several issues, at a referee hearing, then claimant must introduce testimony FIRST to establish eligibility for benefits. However, if eligibility (under KRS 341.350) is not at issue in the referee hearing; but rather disqualification from benefits under KRS 341.370 (1)(b) is the issue, then the burden of proving disqualification rests upon the employer, and the employer must introduce testimony FIRST to show misconduct connected with the work.

The Court held that when the facts in a case are in dispute, and the Commission's facts are supported by substantial evidence, and the Commission has applied the correct rule of law to the facts, then the Commission's order must be affirmed. The Court held that the claimant's direct sworn testimony constitutes substantial evidence, and that the Commission applied the correct rule of law to the facts which were based on that testimony.

DECISION: Claimant held qualified to receive benefits on grounds she was discharged for reasons other than work connected misconduct.

Kentucky Court of Appeals, BROWN HOTEL V. EDWARDS, 365 SW 2d 299. PRECEDENT

NOTE: Read in conjunction with Entry 3017.

3586 BURDEN OF PROOF IN A VOLUNTARY QUIT CASE.

ISSUE: Which party must bear the burden of proof and testify first in a voluntary quit case.

FACTS: (See "Issue" Above).

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit their most recent suitable work without good cause attributable to the employment.

In a published decision, the Kentucky Court of Appeals held that:

The burden was on {claimant} to establish her claim by proving eligibility under KRS 341.350. BROWN HOTEL COMPANY V. EDWARDS, Ky., 365 S.W. 2d 299 (decided this day). Further, it was a necessary part of establishing her claim to carry the burden of proving that she did not quit voluntarily without good cause attributable to her employment...

DECISION: Claimant must bear burden of proving good cause for voluntarily quitting employment, and should introduce testimony first unless there is good cause for reversing the order of proof.

Kentucky Court of Appeals, BROADWAY AND FOURTH AVENUE REALTY COMPANY V. ALLEN, 365 SW 2d 302. PRECEDENT

NOTE: Read in conjunction with Entry 3016.

3587 VOIDING A CLAIM; NO PROVISIONS FOR.

ISSUE: Whether a claimant can void an existing claim for the purpose of establishing another claim with a higher weekly benefit rate.

FACTS: (See "Issue" Above).

REASONS: KRS 341.380 (2) provides that "the weekly benefit rate payable to an eligible worker for weeks of unemployment shall, except as provided in KRS 341.390, be an amount equal to one and one hundred eighty-five one-thousandths of one percent (1.185%) of his total base period wages, except that no worker's weekly benefit amount shall be less than twenty-two dollars ($22.00), nor more than the maximum rate as determined in accordance with subsection (3) of this section."

KRS 341.090 defines "Base Period," "Benefit Year," and "Base Period Wages" as:

1. "Base period" means the first four (4) of the last five (5) complete calendar quarters immediately preceding the first day of a worker's benefit year.

2. "Benefit year" for any worker means the fifty-two (52) week period beginning with the first day of the week with respect to which he first requests a determination which establishes his status as a fully insured worker after the termination of his last preceding benefit year, if any, except that the last preceding benefit year shall be a fifty-three (53) week period if fifty-two (52) weeks would result in the overlapping of any calendar quarter of the base period of the new benefit year with the same calendar quarter of the base period of the previous benefit year. As used in this subsection, a worker shall be considered as having insured status, without regard to any other provisions of this chapter, if at the time of his request he has satisfied the conditions required under subsection (5) of KRS 341.350.

3. "Base period wages" means the wages paid to a worker during his base period by subject employers for covered employment. The secretary shall, upon request of employee, with respect to this subsection, consider wage payable to mean wage paid, if necessary to make

the employee meet the earning requirement in KRS 341.350 in order to prevent inequities in particular cases.

As clearly defined in the cited statutes, the benefit year begins with the FIRST DAY OF THE WEEK with respect to which a worker requests a determination. Appellant filed her claim on January 2, 1986. Since the first day of that week was December 29, 1985, the appellant's base period consists of the third and fourth quarters of 1984 and the first and second quarters of 1985. There are no statutory or regulatory provisions for voiding a claim and permitting a worker to then file a new one. We find such a practice would create an unreasonable administrative burden and would not be consistent with the basic intent of unemployment insurance law. That intent, we believe, is to compensate individuals as promptly as possible, in the amount they are due based on statutory formula, when they become unemployed through no fault of their own. It is not the intent of the law to provide mechanisms whereby unemployed workers may manipulate the filing of claims to maximize the amount of benefits they may secure. While this will undoubtedly occur, there is no basis in law or regulations to encourage it. We find the referee's decision to be correct.

DECISION: An existing claim cannot be voided for the purpose of increasing the weekly benefit rate.

C.O. # 45213 PRECEDENT

Note: KRS 341.380(4) sets the maximum amount of benefits payable within a benefit year to be twenty-six (26) times his weekly benefit rate. By allowing the voiding of a claim, and the establishing of a second claim, the claimant would have payable to him more than the twenty-six (26) weeks allowed by the statute.

3588 REMOVAL OF DISQUALIFICATION; BONA FIDE WORK.

ISSUE: Whether seasonal, temporary or intermittent work is bona fide and sufficient to remove a duration disqualification.

FACTS:
1. Discharged from permanent, full-time work December 8, 1980.
2. An unappealed adjusted determination of January 5, 1981 ruled the discharge to have been for misconduct.
3. Claimant's employment since December 8, 1980, was with two thoroughbred racetracks where he was a maintenance worker.
4. From mid-January 1981 through October 10, 1981, claimant worked virtually without interruption at one or the other of the two racetracks.
5. On October 18, 1981, claimant established a new claim and benefit year.

REASONS: KRS 341.370 provides for the imposition of a DURATION disqualification from receiving benefits when a claimant has been discharged from his most recent employment for reasons of misconduct connected with the work.

904 KAR 5:120 E (1) defines DURATION (of any period of unemployment) as beginning with the worker's separation from employment, or refusal of suitable work, "and running until such worker has worked four (4) weeks and has earned four (4) times his weekly benefit rate in bona fide full-time employment covered under the provisions of KRS Chapter 341," or a similar state or federal law. This regulation contains no language concerning the "type" of bona fide full-time employment necessary to qualify, and, therefore, it does not serve to exclude employment which may be seasonal, temporary, intermittent or otherwise less than permanent in nature.

The referee reasoned that "full-time" employment, denotes work providing around forty hours of duty each week for as long as it lasts... We are in full agreement on that point. However, the referee further reasoned that "bona fide" employment "is definable as employment contemplated as lasting indefinitely with a single employer. Employment entered into with the knowledge that

it will end on or by a date certain in the near future is not 'bona fide' employment." It is with this reasoning that we disagree. The regulation does not define the term "bona fide" and, therefore, the usual and commonly accepted definition must be applied:

> In or with good faith; honestly openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned. (BLACK'S LAW DICTIONARY)

> To be "bona fide" employment does not have to be permanent and indefinite in nature, but needs only to be genuine and real without deceit or fraud and, therefore, may include seasonal, temporary, and intermittent employment. The claimant need only work four weeks and earn four times his weekly benefit rate in any type of bona fide full-time employment to again qualify. This applies to cases adjudicated before July 1, 1982; thereafter statutory changes require employment in ten weeks and earning of ten times the weekly benefit amount.

DECISION: Claimant's employment with the race track was sufficient to remove the disqualification.

C.O. # 29958 PRECEDENT

3589 MOST RECENT - NEXT MOST RECENT; SAME EMPLOYER BUT DIFFERENT DUTIES AND CONDITIONS OF WORK.

ISSUE: Whether claimant, who was separated under nondisqualifying conditions from his most recent employment of more than ten weeks, should be disqualified because of what would have been a disqualifying separation from next most recent employment with the same employer when the duties and conditions of work for the two periods of employment were markedly different.

FACTS:
1. Discharged by the captioned employer in February 1987, for what the evidence supports was misconduct.
2. However, a claim for benefits was not filed, and claimant's discharge was converted to a two week suspension with pay.
3. Claimant allowed to return to a different job at a different location at his previous rate of pay.

REASONS: The problem posed by this case is whether or not claimant was discharged from his MOST RECENT employment for misconduct connected with the work. First of all the incident of misconduct occurred over six months prior to the August 1987 discharge, which obviously brings into question the causal connection between those two events; such causal connection being necessary to impose a disqualification. Secondly, under the law, KRS 341.370 (7), a misconduct disqualification is only effective from the worker's discharge for misconduct until he has worked in each of ten (10) weeks and earned ten (10) times his weekly benefit amount in covered employment. Here claimant's subsequent employment at Auto Wonder Wash was more than adequate to overcome any disqualification resulting from his discharge in February, 1987.

Unemployment Insurance Program Letter Number 984, issued by the United States Department of Labor on September 20, 1968, in interpreting Section 3304 (a)(5) of the Federal Unemployment Tax Act, stated, in pertinent part:

> ...All work is performed under a contract of employment between a worker and his employer. The contract describes the duties the parties have agreed the worker is to perform, and the terms and conditions under which the worker is to perform them. If the duties, terms or conditions of the work offered by an employer are covered by an existing contract between him and the worker, the offer is not of new work. On the other hand, if

the duties, terms or conditions of the work offered by an employer are not covered by an existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, new work.

Such is the case here. Claimant was discharged from his job as a truck driver in February, 1987. He was subsequently employed in NEW WORK at Auto Wonder Wash thereafter until being discharged from that, his MOST RECENT EMPLOYMENT, on August 31, 1987. The reason for his discharge at that time--having become vested in the company's pension, was not misconduct. Therefore, no disqualification may be invoked.

DECISION: Claimant's second period of employment, from which he was separated under nondisqualifying conditions, was NEW WORK lasting more than ten weeks in which he earned more than ten times his weekly benefit rate; therefore consideration of his next most recent work with the same employer is unnecessary.

C.O. # 49940 PRECEDENT

3590 RES JUDICATA; COURT OF COMPETENT JURISDICTION (MISREPRESENTATION OF MATERIAL FACT TO REFEREE).

ISSUE: Whether the Commission may rule on the issue of dishonesty when the matter of theft of company property has been settled in a court of competent jurisdiction.

FACTS:
1. At the initial hearing of this case, the employer was not present.
2. Based on claimant's testimony that charges of theft of company property, for which he was discharged, had been dismissed by the court, the referee ruled him qualified, holding the matter was RES JUDICATA.
3. However, at a second hearing of this case, at which both the claimant and employer were present, claimant admitted that he had pled guilty in court to a misdemeanor charge of theft related to the incident for which he was discharged.

REASONS: KRS 341.370 (1)(b) and 341.350 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of dishonesty connected with the work.

Dishonesty has many forms, the most common of which exists in the worker's unauthorized appropriation of company property for conversion to the worker's personal usage.

The claimant plead guilty in a court of competent jurisdiction to a misdemeanor charge of theft under $100 related to the incident for which he was discharged. Therefore, the matter is RES JUDICATA. That is, the Commission has no authority to rule on the issue of dishonesty since the criminal charge to which the claimant pled guilty, and the incident precipitating his job separation, were one and the same.

KRS 341.415 provides for the recovery of benefits from a recipient who makes a false statement for the purpose of receiving benefits to which he was not entitled. KRS 341.370 (2) provides for the disqualification of a worker from benefits for any week with respect to which he knowingly made a false statement to establish his right to benefits, and for up to fifty-two (52) additional weeks beginning with the Division's discovery of the false statement.

The claimant knowingly offered false testimony while under oath at the initial hearing when he both voluntarily and in response to direct questioning of the referee, stated that the criminal charges brought against him by the appellant employer had been dismissed by the court. This

false statement was the basis for the referee decision holding the claimant qualified to receive benefits.

DECISION: Claimant was discharged for work related misconduct and knowingly made false statements in order to receive benefits.

C.O. # 46706A PRECEDENT

3591 WORKING LESS THAN 40 HOURS A WEEK; EMPLOYED OR UNEMPLOYED.

ISSUE: Whether a claimant, who works less than forty hours a week, is unemployed for purposes of receiving benefits, when it is customary for full-time workers in that field of endeavor to work less than forty hours a week.

FACTS:
1. Laid off in June, 1985 from employment where she worked at least forty hours a week.
2. Received full benefits until hired by the captioned department store in September, 1985 as a part-time worker, working less than thirty hours a week.
3. Received partial benefits until October, 1985 when she became a full-time employee, working from thirty to forty hours a week.
4. Claimant was aware that company policy provided that those who work thirty hours or more a week are full-time.
5. In February, 1986 claimant reactivated her claim when her hours were somewhat reduced.
6. Received partial benefits through mid-March, 1986 even though she worked more than thirty hours in each week claimed.

REASONS: This case presents the issue of whether or not claimant was unemployed and eligible for benefits.

KRS 341.350 provides, in pertinent part, as conditions of qualification for benefits that, "an UNEMPLOYED worker shall ... be eligible for benefits with respect to any week of UNEMPLOYMENT..." (emphasis added). KRS 341.080 provides, in pertinent part, "as used in this chapter, unless the context clearly requires otherwise: (3) the term 'week of unemployment' means any period of seven (7) consecutive days, as prescribed by department for human resources regulations during which a worker performed LESS THAN FULL-TIME work and earned less than an amount equal to one and one-fourth times the benefit rate..." (emphasis added). KRS 341.390 (1) provides for deducting from the benefit rate eighty percent of the wages earned during the week of unemployment for which benefits are claimed.

No where in Kentucky law is there a definition of full-time or part-time employment. Also, there are apparently no appellate court decisions in this jurisdiction defining those terms for purposes of unemployment insurance. Thus, this case is apparently one of first impression.

In looking to other jurisdictions, we find a Pennsylvania Commonwealth court case which is persuasive, WATKINS V. COMMONWEALTH UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 491, A2d 935. In that case, claimant was laid off from a job where the NORMAL work week was at least forty hours. He later worked for an employer whose normal work week was 37.5 hours. The court, in ruling he was ineligible for benefits stated:

> Section 401 of the law establishes as the primary criterion of eligibility for benefits that a claimant be "unemployed". "Unemployed" is defined at Section 4 (u) in pertinent part as follows:
>
> An individual shall be deemed unemployed...(II) with respect to any week of less than his full-time work if the remuneration paid or payable to him with respect to such week is less than his weekly benefit rate plus his partial benefit credit...

> ...As noted, we must examine claimant's particular circumstances. He was laid off from a job where the normal work week is at least forty hours; he currently works for an employer whose normal work week is thirty-seven and one-half hours. We believe that claimant, in accepting an offer of employment from an employer whose full-time work week is thirty-seven and one-half hours, has consented to a reduction in hours in HIS work week for purposes of Section 4 (u) and is, therefore, no longer "unemployed." It is, after all, the practice of many employers to offer only thirty-seven and one-half hours per week to its full-time employees and the Unemployment Compensation System need not compensate individuals who manifest their tacit approval and the desirability of a shorter work week by accepting the employer's offer of employment...
>
> ...Departmental regulations lend support to our decision to affirm the Board. Section 63.35 of Title 34 of the Pennsylvania Code defines, inter alia, "part-time" to aid in administering Section 302 (a)(2) of the law, 43 P.S. Subsection 782 (a)(2) which provides that the account of an employer who employs an individual part-time not be charged provided the part-time employer files notice with the department. The regulation defines "part-time" as:
>
> Work other than normal full-time work of a claimant with a regular base year employer which is ordinarily performed for less than the total number of hours or days customarily worked in the business, occupation or industry.
>
> Claimant works the total number of hours customarily worked at the Jewish Home. He is not unemployed within the meaning of Section 4 (u) of the law, and, therefore, is ineligible to receive unemployment compensation pursuant to Section 401 of the law. Because claimant received benefits to which he was not entitled, he has been overpaid...

In the instant case, claimant was working 30 to 40 hours per week, which is the normal work week for this employer, and which is considered full-time work for this employer. Therefore, we find that she was not unemployed as required by the statute and was ineligible for benefits.

DECISION: Claimant was not unemployed and therefore, was ineligible to receive benefits.

C.O. # 45451 PRECEDENT

3592 SEVERANCE PAY VERSUS PAY IN LIEU OF NOTICE.

ISSUE: Whether monies doubling the severance pay allowed by company policy, which was awarded because of lack of notice of separation, should be considered severance pay or additional pay in lieu of notice.

FACTS:

1. Without prior notice, claimant and 275 others were terminated on September 25, 1990, because of company reorganization.
2. Company policy provides for a minimum of one months pay in lieu of notice for salaried employees including the claimant.
3. Policy also provides for one weeks severance pay for each year or fraction of a year of service to a maximum of 13 weeks.
4. Claimant had sufficient years of service to qualify for the maximum 13 weeks severance pay.
5. Because of the lack of notice to its employees, the company elected to award "a special package in lieu of notice" which doubled "the current severance payments."
6. Thus, claimant received the 13 weeks severance pay and one months pay in lieu of notice provided by company policy and the additional 13 weeks awarded by the special package.

REASONS: KRS 341.390 states there shall be deducted from the benefit rate determined for a worker in accordance with subsection (2) of KRS 341.380 the amount of remuneration which the worker has received or is receiving with respect to such week of unemployment adjusted to the nearest multiple of one dollar ($1.00), in the form of remuneration in lieu of notice.

In Order Number 21256, the Commission established the precedent that severance pay was directly related to the worker's past service and, therefore, could not properly be related to weeks after the separation. Thus, severance pay is not deductible wages for weeks of benefits claimed after the separation.

When determining whether pay received at separation is, for unemployment insurance purposes, pay in lieu of notice or severance pay, particular attention must be given to the basis, method, or formula used for calculating or determining the amount of money to be paid in each category.

Generally, in the workplace, members of management are given and are expected to give one months notice prior to termination or quitting, respectively. The captioned employer's policy comports with this general rule by providing eligible members of management with a minimum of one months pay when they are terminated without notice. It is also common practice in the workplace to calculate severance pay based on a formula tied to the length of service of the eligible workers. Again, the captioned employer's policy is consistent with this general practice in that it provides for one weeks severance pay for each year or fraction of a year of service, to a maximum of thirteen weeks.

It is vital to note that pay in lieu of notice is neither in general nor in the case of the captioned employer's policy based on length of service of the eligible workers. Rather, members of management, including the claimant, received the same fixed one months pay in lieu of notice regardless of their tenure with the company. Conversely, the amount of severance pay to be awarded is, both in general and in the case of the captioned employer, based on the length of service of the eligible workers. All eligible workers, including the claimant, received one week of severance pay for each year or fraction of a year of service. Claimant had sufficient service to receive the maximum thirteen weeks severance pay provided for by company policy.

However, the captioned employer elected to pay eligible workers, including the claimant, additional monies not provided for by company policy. It is with these monies that this appeal is concerned. The difficulty in determining the nature of these monies (i.e., whether it is pay in lieu of notice or severance pay, for unemployment insurance purposes) is underscored by the wording of claimant's exhibit #1, wherein the payment of the additional monies was announced to the workers with "those employees terminated or who resign...as a result of this restructuring will be eligible for a special package in lieu of notice which doubles the current severance payments." That is, the amount of additional money, not provided for by company policy, to be received by each eligible worker, including claimant, was calculated on the very same formula used to determine the amount of severance pay they were awarded under the provisions of the company policy. Unlike pay in lieu of notice which is a fixed amount of money paid each eligible member of management without regard to length of service, the additional monies paid were based on length of service, which fact, notwithstanding the captioned employer's motive for paying the additional monies and its laudable generosity toward its employees, constrains this Commission to construe the additional monies to be severance pay.

To allow monies paid at separation to apply as pay in lieu of notice toward weeks of unemployment for a period of time which, by any reasonable standard, far exceeds a customary notice period would be to effectively disqualify workers, who have been abruptly thrown onto the labor market, for a period of time longer than they would have worked had they been given reasonable notice of their pending termination. The Commission believes that the rule of reason should prevail, and that to assign monies paid at separation to weeks of unemployment is such a way as to create inordinately long periods of notice would be patently unreasonable and contrary to the intent of the unemployment insurance program.

DECISION: Additional monies were held to be severance pay and, therefore, not deductible from benefits.

C.O. # 56653 NONPRECEDENT

3593 VACATION PAY: ALLOCATION OF.

ISSUE: Whether vacation pay received for annual leave taken prior to regular vacation shutdown may be allocated to the shutdown period when it was permissible for employees to take leave without pay for the shutdown period if they were without sufficient annual leave to cover the shutdown period.

FACTS:
1. Vacation shutdown was from December 24, 1989 through January 2, 1990.
2. Claimant had already exhausted all earned vacation time by requesting and receiving supervisory approval to use it prior to vacation shutdown.
3. Claimant chose not to work the last day prior to shutdown; therefore, he did not receive holiday pay for December 26, 1989.
4. If claimant had conserved sufficient annual leave to cover the shutdown, his vacation pay would have been sufficient to reduce his weekly benefit rate to zero.
5. The Labor Management Handbook gave claimant the discretion of using either leave without pay or advanced annual leave for the shutdown period.
6. Claimant chose to use leave without pay.

REASONS: KRS 341.370 (5) provides: No worker shall be disqualified or held ineligible under the provisions of this section or KRS 341.350, who is separated from employment pursuant to a labor management contract or agreement, or pursuant to an established employer plan, program or policy, which permits the employer to close the plant or facility for purposes of vacation or maintenance.

KRS 341.390 (1) provides for the deduction from the worker's weekly benefit rate of: Eighty percent (80%), adjusted to the nearest multiple of one dollar ($1.00), of the amount of wages earned by such worker during the week of unemployment with respect to which he claims benefits.

Upon reviewing the record we find that neither the language of the prior collective bargaining agreements nor the successor Labor Management Handbook COMPELS the worker to use his annual leave during the Christmas shutdown period. Conversely, the Labor Management Handbook grants the worker discretion to choose advanced annual leave or leave without pay ("LWOP") to cover shutdown periods when he has no accrued annual leave. Therefore, the employer did not have the right to allocate, nor DID the employer allocate claimant's vacation pay to the Christmas shutdown. claimant, therefore, was not ineligible for benefits during the shutdown period on the basis of having deductible vacation pay.

DECISION: Claimant did not receive vacation pay for week ended December 31, 1988, and is not ineligible on those grounds.

C.O. # 52802 PRECEDENT

3594 EMPLOYED BY A COLLEGE WHILE A STUDENT (COVERED OR NONCOVERED EMPLOYMENT).

ISSUE: Whether full-time employment for a college is covered employment when the worker is also a part-time student.

FACTS:
1. Rehired by the University as a full-time laboratory technician; a staff position.

2. This employment was not connected with any course of study.
3. Attending school was not a consideration or requirement of the job.

REASONS: KRS 341.055 provides that certain types of employment are "noncovered" (unless the employing unit elects such services to be covered):

"(16) Service performed in the employ of a school, college, or university, if such service is performed:

(a) By a student who is enrolled and is regularly attending classes at such school, college or university..."

This portion of the statute, which is worded identically to the appropriate section of the controlling Federal Unemployment tax Act, FUTA, section 3306, does not differentiate between full-time and part-time concerning either employment or student status. Research further yields no appropriate case law in either this or foreign jurisdictions.

However, Federal Supplemental Number 5, 1976 Draft Legislation, dated November 13, 1978, does provide some clarification:

"...we are advised by officials of the Internal Revenue Service that the application of this requirement to doctoral candidates given in Ruling 78-17 published on page 18 of Internal Revenue Bulletin 1972-2, issued January 9, 1978, with respect to the identical exemption provided by section 3121 (b)(10)(B), FICA, is equally APPLICABLE TO SECTION 3306 (c)(10)(B), FUTA." (emphasis added).

Thus, exemptions from covered employment under FICA, the Federal Insurance Contributions Act, should be applied equally, and presumably in the same manner, to exemptions under FUTA.

Revenue Ruling 78-17 states in pertinent part:

"...An employee who performs services in the employ of a school, college or university as a result of and for the purpose of pursuing a course of study at such school, college or university has the status of a student in the performance of such services... ...In Situation 2, B is enrolled and is regularly attending classes. However, B is employed on a full-time basis and is taking only two courses worth six points of credit. Thus B's employment is not a result of and for the purpose of pursuing a course of study as required by the regulations. Accordingly, B's services are not excepted from employment under section 3121 (b)(10)(a) of the Act..."

Such is the case here. Claimant's employment would be considered "covered" under FICA and should likewise be "covered" under FUTA and under the Kentucky law.

DECISION: Claimant performed services in covered employment.

C.O. # 47138A PRECEDENT

3595 MAJOR POLICY MAKING OR ADVISORY POSITIONS; NONCOVERED EMPLOYMENT.

ISSUE: Whether the job title and nonclassified status of a claimant's position, or the actual job duties performed should be the primary considerations when determining whether a claimant held a major policy making or advisory position.

FACTS:
1. The last position held by the claimant was nonclassified pursuant to KRS 18A.115.
2. Claimant was dismissed without cause January 31, 1988.

3. Rather than summarily hold claimant disqualified under KRS 341.055 (4)(f) because of his job title and nonclassified status, the Commission chose to base its decision on the actual job duties performed.
4. Commission held that the bulk of claimant's job duties were administrative in nature rather than policy making or advisory.
5. Claimant's employment was held to be covered employment.

REASONS: KRS 341.055 provides that "covered employment" shall not include employment: (f) In a position which, under or pursuant to the state law is designated as a major nontenured policymaking or advisory position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight (8) hours per week or by reason of service on any appointed state or local board or commission.

In a published decision, the Kentucky Court of Appeals held:

> (1) The precise issue involved in this case is an issue of first impression in this Court. A review of Kentucky appellate case law yields no opinions squarely addressing this issue. This Court must now examine the method that the Commission and reviewing courts should utilize in determining whether a discharged employee who has held a nonclassified position pursuant to KRS 18A.115 should be entitled to receive unemployment compensation. Specifically, the Commission, pursuant to KRS 341.055 (4)(f) is required to determine whether the individual claiming unemployment compensation was employed in a position which under or pursuant to state law is designated as a major nontenured policymaking or advisory position. If the Commission finds that a claimant was employed in such a position, the Commission must deny the claimant's claim. Due to the differing nature and responsibilities of both classified and nonclassified positions in Kentucky, making this determination can often be difficult.

The Commission has come to rely on two primary sources to support its decision to analyze the duties of each claimant's position on an individual basis. The Franklin Circuit Court in HORN V. UNEMPLOYMENT INSURANCE COMMISSION AND DEPARTMENT OF TRANSPORTATION, No. 80-CI-0259, in deciding to remand the case back to the Commission, held that the Commission should scrutinize the actual duties and responsibilities of a claimant's job to determine whether he is entitled to unemployment compensation. The claimant's title or the fact that the claimant was employed in a noncovered merit position should not be controlling in this matter. The court stated that the policy or advisory nature of the actual job's duties must be controlling. The federal guidelines to 1976-PL-94-566, which stated that government employees are entitled to receive unemployment compensation, encouraged a case-by-case consideration to determine a claimant's eligibility. The Commission relied on both of these sources in analyzing each individual appellee's duties in the instant case before reaching its decision to grant the appellees compensation.

(2) Although the Franklin Circuit Court's decision in HORN is not controlling on this Court, we have reviewed this decision and find it to be a well reasoned opinion and find that the case-by-case approach that it favors is legally sound. The key consideration in such cases is whether the claimant's job duties were major policymaking or advisory. The title or nonclassified status of a claimant's position are not the primary considerations. The Commission correctly analyzed the appellee's positions in reaching its decision.

(7) The Franklin Circuit Court correctly found that the Commission's findings were supported by substantial evidence and that the Commission applied the correct rule of law. In this case the evidence showed that, although some of the appellees had minor advisory duties, the bulk of their duties was administrative. The Commission correctly considered the duties of each position on an individual basis in determining that none of the claimants were employed in major, nontenured policymaking or advisory positions as stated in KRS 341.055. As a result, the Commission correctly found that each of the appellees was entitled to receive unemployment compensation.

DECISION: In determining whether a claimant held a major policymaking or advisory position primary consideration must be given to actual job duties performed.

Kentucky Court of Appeals, KENTUCKY DEPARTMENT OF EDUCATION V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND GREGG, KENT, PLANICK, BUCHALAW AND MCCLAIN, 798 SW 2d 464. PRECEDENT

3596 APPROVED TRAINING VERSUS AVAILABILITY FOR AND ACCEPTANCE OF SUITABLE WORK.

ISSUE: Whether a claimant, who is in JTPA training approved by the Secretary, shall be denied benefits for either failing to search for or refusing an offer of work.

FACTS: (See "Issue" Above).

REASONS: KRS 341.350 (6) provides that an otherwise eligible worker shall not be denied benefits under subsection (4) of this section nor because of his failure to actively seek work, or disqualified under paragraph (a) of this subsection (1) of KRS 341.370 with respect to any week he is in training with the approval of the secretary. U.S. Department of Labor publication, UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 32-83, dated June 29, 1983 gives guidance concerning benefit claims involving participants of training programs under JTPA. That publication states "that an individual taking such training may not be found ineligible for benefits on grounds that he/she is not available for suitable work, is not making an active search for work, or has refused suitable work." The publication explains that such training must be with the approval of the State Employment Service Agency. We presume that the training referred to here was with such approval by virtue of the instructor's statements to the claimant that no work search was required while taking the training. We also find that the claimant's refusal to accept out-of-town assignments in a part-time job would not justify disqualification of benefits while participating in approved training. It is reasonable to presume that the claimant's acceptance of such work is indicative of his willingness to perform work and that his participation in the training program is indicative of his desire to improve his skills and qualifications so that he might return to full-time, suitable work. In the unique circumstances presented in this case, we find that the claimant did not quit his employment but refused particular work assignments which conflicted with participation in agency approved training under the Job Training Partnership Act.

DECISION: Claimant may not be disqualified for either refusing work or for failing to search for work if he is in training approved by the secretary.

C.O. # 42498 A PRECEDENT

3597 REIMBURSING EMPLOYER; WORKED LESS THAN TEN WEEKS FOR.

ISSUE: Whether a reimbursing employer, for whom claimant worked less than ten weeks, is liable for all or any portion of benefits paid.

FACTS: (See "Issue" Above).

REASONS: There is no question that section 2 of KRS 341.530 clearly applies to ALL employers, including Reimburser.

In pertinent part, the cited subsection provides:

(2) Except as provided in subsection (3) of this section, all regular benefits paid to an eligible worker in accordance with KRS 341.380 plus the extended benefits paid in accordance with KRS 341.700 to 341.740, subject to the provisions of paragraphs (a) and (b) below, shall be charged against the ACCOUNT of his most recent employer. No employer shall be deemed to be the most recent employer unless the eligible worker to whom benefits are payable shall have worked for such employer in each of ten (10) weeks whether or not consecutive.

(a) Subject employers, which are not governmental entities as defined in KRS 341.069, shall be charges one-half of the extended benefits paid in accordance with KRS 341.700 to 341.740; and

(b) Subject employers which are governmental entities, as defined in KRS 341.069, shall be charged for all extended benefits paid in accordance with KRS 341.700 to 341.740 for compensable weeks occurring on or after January 1, 1979, and for one-half of the extended benefits paid for compensable weeks occurring prior to such date. (emphasis added).

This particular subsection does not use the term RESERVE ACCOUNT in prescribing chargeability procedure, but refers simply to the charging of benefits to the ACCOUNT of a chargeable employer. The clear implication being that ALL employers, including reimbursers are subject to its provisions. The term RESERVE ACCOUNT is only used in subsection 3, where the provisions for NON-charging are enumerated, which provisions unquestionably apply only to contributing employers.

Prior to its amendment in 1982, KRS 341.530 did provide for the proportional charging of benefits on a particular claim to the accounts of ALL BASE-PERIOD EMPLOYERS, be they reimbursers or contributors, who were ultimately determined liable. The 1982 amendment changed criteria for potential chargeability from that of base-period employment to most recent 30 DAY employment. (This provision was expanded in 1984 to the most recent employer for whim the worker had worked in each of ten weeks).

It is clear that the legislature beginning in 1982, intended to eliminate base-period service as a criteria in determining potential chargeability. In its stead, they provided that the most recent employer for whom the worker had performed service for a specified period should be potentially chargeable, thus placing the responsibility for the payment of benefits upon the employer most closely associated with the particular period of unemployment. No distinction was made between chargeability provisions applying to reimbursers or contributors. In order that our precedent Order Number 46217, and the clarifications contained in Order Number 47270 not be again misconstrued, we restate our position that in all cases involving potential chargeability of employer accounts, save the single exception carved out in Order Number 46217, the provisions of KRS 341.530 shall be strictly construed. Benefits shall be potentially chargeable against the account of the most recent employer for whom the benefit claimant shall have worked in each of ten weeks whether or not successive, without regard to whether the employer is a contributor to the fund, or has elected the reimbursing method of financing benefits for its employees.

DECISION: Reimbursing employer, for whom claimant worked less than ten weeks, is not liable for any benefits paid.

C.O. # 49091 PRECEDENT

3598 REMOVED. Reference KRS 341.470(1) as amended by the 1992 session of the General Assembly.

3599 "ON" DUTY "OFF" DUTY PERIODS OF WORK; WHETHER UNEMPLOYED.

ISSUE: Whether claimant who works two weeks on followed by two weeks off is eligible for benefits during the off period.

FACTS:
1. Claimant is a river pilot.
2. Claimant accepted employment as a "trip" pilot.
3. Received assignments on a trip by trip basis and was not guaranteed subsequent trips at completion of a trip.
4. The practice of "off" periods is standard in the industry and are generally provided to full-time pilots since they must remain on their boat several days to several weeks at a time.
5. Some companies pay full-time pilots an "on" duty rate and an "off" duty rate.
6. The employer pays its full-time pilots $11.67 per hour twelve hours per day for each day on the boat plus provides medical, vacation and retirement benefits.
7. The employer pays "trip" pilots $12.08 per hour, twelve hours per day for each day on the boat but no medical, vacation or retirement benefits are provided.
8. Employer does not pay any wages to "full-time" or "trip" pilots when off duty but does attempt to provide all pilots "off" duty periods approximately the same length as "on" duty periods.
9. As evidenced by claimant's work schedule, employment was provided on a fairly constant two week on two week off basis.

REASONS: KRS 341.350 provides conditions of eligibility for benefits for an unemployed worker. In this case, we believe the primary issue is whether or not the claimant was unemployed for the weeks in question.

This case presents a set of rather unique circumstances. While such circumstances may potentially reoccur, we believe that cases similar to this must be scrutinized closely to arrive at an equitable decision. In this case, for the period of time in question, work was provided on a reasonably constant and consistent basis in keeping with standard industry practice and was compensated at a reasonable rate. As long as the employer continues to provide periods of employment of a duration comparable to corresponding "off" duty periods, we do not believe it reasonable to conclude that the claimant is unemployed for weeks "off" duty by virtue of his "trip" pilot status. Likewise, we believe it only reasonable to find the claimant, or a "trip" pilot, unemployed for weeks of no work in excess of the corresponding "on" duty periods.

DECISION: Claimant ineligible for benefits.

C.O.# 35868A NONPRECEDENT

3600 ADMINISTRATIVE REGULATION HAS FORCE OF LAW: TIMELINESS OF APPEAL.

ISSUE: Whether the Division has the authority to accept an appeal as timely filed when the appeal was postmarked and received after the established fifteen day time limit.

FACTS:
1. Claimant reopened her claim for benefits on October 31, 1984.
2. Claim was allowed and benefits were paid by adjusted determination issued November 15, 1984.
3. Employer filed an untimely appeal on December 3, 1984.
4. A hearing was scheduled for the purpose of determining whether there was legally sufficient reason for the appeal being untimely.
5. Notice of the scheduled hearing was mailed to the employer only and a hearing was conducted ex parte.

6. The referee accepted the appeal as timely on a finding that it had been delivered to the post office within the fifteen day appeal period, but for unknown reasons had not been postmarked until some three days later.
7. The letter bore the firm's postage meter date of November 30, 1984.
8. The referee's decision was mailed to the employer only.
9. A hearing was held on the merits of the case on February 2, 1985, with notices going to all interested parties.
10. At the hearing the issue was raised as to the lack of notice to the claimant for the first hearing.
11. Claimant first became aware the decision had been issued at the hearing.
12. Claimant filed an appeal on February 11, 1985, to the referee decision mailed January 18, 1985 ruling the appeal to be filed timely.

REASONS: KRS 341.420 (4) establishes fifteen days from the date of mailing of the referee decision as the time within which appeal to the Commission shall be initiated. In this case, the referee's decision was never mailed to claimant. His first notice of said decision was at the second referee hearing on February 5, 1985. Counsel for the claimant objected immediately, and entered an appeal to the decision, received by the division on February 11, 1985. Such appeal must be accepted as timely from first notice.

KRS 341.420 (2) provides that a party to a determination may file an appeal to a referee as to any matter therein within fifteen days after the date such determination was mailed to his last known address.

903 KAR 5:130 (1)(b) provides that an appeal to a referee shall be considered filed at the time it is delivered to a representative of the division or deposited in the mail as indicated by the postmark thereon.

The Kentucky Court of Appeals in UNION LIGHT, HEAT AND POWER CO. V. P.S.S., et. al, Kentucky, 271 S.W. 2d 361 held:

> Where a statute lays down general standards, the administrative agency may implement the statute by filling in the necessary details, but where the statute in itself prescribes the exact procedure, the administrative agency may not add to or subtract from the requirements thereof.

The administrative regulation establishing the postmark as the controlling factor in determining the timeliness of appeals filed by mail has the force and affect of law. The appeal in this case was not timely filed. Since we are bound to strict adherence to the statutes, as required by our courts, we have no authority to accept the appeal as timely filed.

DECISION: Employer's appeal from the adjusted determination was not timely filed. Both the referee and the Commission are without authority to consider the merits of the separation issue.

C.O. # 41802A PRECEDENT

3601 EXTENDED BASE PERIOD - TEMPORARY TOTAL DISABILITY VS. PERMANENT PARTIAL DISABILITY.

ISSUE: Whether an extended base period should be based on the period of injury compensated by worker's compensation during which the claimant was temporarily totally disabled or permanently partially disabled.

FACTS: 1. Claimant received an on-the-job injury.

2. Claimant received worker's compensation benefits of $288.96 per week from May 31, 1989, through February 14, 1990, for being temporarily totally disabled.
3. Claimant performed no work during that period of time.
4. April 10, 1990, claimant agreed to accept a worker's compensation lump-sum settlement of $27,977.28 plus $5,000.00 for future medical expenses and rehabilitation services as a final settlement for permanent partial disability.
5. The $27,977.28 amount was based on $76.97 per week for 363.483 commuted weeks.
6. Part of the settlement was paid in May 1990 and the balance in July 1990.
7. Claimant was released to return to work May 10, 1990.
8. Less than one week later claimant went to work for Jefferson Heating and Plumbing.
9. Claimant was laid off October, 1990, and went directly to work for Newburg Construction Company.
10. Claimant was laid off from Newburg December 21, 1990, and filed his claim for unemployment benefits on that date, establishing his base period as the last two calendar quarters of 1989 and the first two calendar quarters of 1990.
11. The claim was declared monetarily invalid.

REASONS: Effective July 13, 1990, KRS 341.090 (1) was amended to provide that:

> ...if an individual lacks sufficient base period wages because of a job-related injury, and he has received or was eligible to receive worker's compensation, upon written application by the claimant an extended base period will be substituted for the current base period on a quarter by quarter basis as needed to establish a valid claim or to increase the benefit rate of a claim if:
>
> (a) The individual did not earn wages because of a job-related injury for at least seven (7) weeks of each base period quarter to be substituted by an extended base period quarter;
> (b) No later than one (1) month prior to the expiration of worker's compensation benefits, the employer or carrier shall inform, orally and in writing, all recipients of their potential eligibility for unemployment insurance, and also provide a statement verifying the individual's eligibility for worker's compensation; and
> (c) A claim for unemployment insurance compensation is filed no later than the fourth week of unemployment after the end of the period of injury compensated or eligible to be compensated by worker's compensation.
>
> (2) "Extended base period" means the four (4) quarters prior to the claimant's base period. These four (4) quarters may be substituted for base period quarters on a quarter for quarter basis in order to establish a valid claim or increase the benefit rate of a valid claim regardless of whether the wages have been used to establish a prior claim, except wages earned as a member of the armed forces or wages reportable to another state and transferred under the combined wage agreement will be excluded if used in a prior claim. Benefits paid on the basis of an extended base period, which would not otherwise be payable, shall be charged to the pooled account.

For purposes of satisfying the requirements of subsection (1) (c) above, the Commission believes that the period of injury compensated or eligible to the compensated by worker's compensation is that period during which claimant was temporarily totally disabled (i.e., unable to work). In the case herein under appeal that period ended February 14, 1990. To rule that claimant's period of injury compensated or eligible to be compensated by worker's compensation extends through an additional 363 weeks, because of a monetary settlement for permanent partial disability, rehabilitation services, and future medical expenses would have the unreasonable effect of denying extended base periods to claimants even though they might be able and available for work and satisfy all other requirements for an extended base period. This section of the statute was intended to help insure that those claimants, who by virtue of being unable to work due to a work related injury, shall not be

disadvantaged thereby with regards to establishing a monetarily valid claim or increasing the benefit rate of a claim. Since claimant's period of injury has ended and he filed his claim for unemployment insurance benefits after the effective date of the above cited statute, he is entitled to an extended base period.

DECISION: Claimant is entitled to an extended base period.

C.O. # 57182 PRECEDENT

3602 PENSION PLAN MAINTAINED BY EMPLOYER; LIMITATION OF DEDUCTION.

ISSUE: Whether a pension should be deducted from benefits when the employer maintains the pension plan but claimant is the sole contributor.

FACTS:
1. Claimant was allowed to take early retirement.
2. Claimant contributed to the Civil Service Retirement System maintained by her employer throughout her twenty-five years of service.
3. Contributions were deducted from her pay checks.
4. Claimant's employer did not contribute to the retirement system.
5. Claimant is eligible for a monthly retirement annuity of $ 709.00.
6. Claimant has received supplemental annuity payments of $247.00 on December 31, 1990, $517.00 on January 1, 1991, and $614.00 on February l, 1991.

REASONS: KRS 341.390. Deductions from benefits.--There shall be deducted from the benefit rate determined for a worker in accordance with subsection (2) of KRS 341.380(3) (a) The amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan MAINTAINED or contributed to by a chargeable or base-period employer, shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week; except that the secretary may provide for limitations on the amount of any such deduction to take into account contributions made by the worker for the pension, retirement or retired pay, annuity, or other similar periodic payment. (emphasis added).

903 KAR 5:360. Limitation on pension deductions. Section 1. If the worker contributed to a pension, retirement or retired pay, annuity or other similar periodic payment plan deductible under KRS 341.390 (3) (a), the amount deducted from the worker's weekly benefit amount shall be limited to fifty percent (50%) of the amount of the payment received by the worker for that week.

The above cited statute provides for the deduction of an annuity from a worker's benefit rate when the base-period employer either MAINTAINS or contributes to the retirement plan. In this case, the base period employer MAINTAINED the retirement plan to which the claimant contributed; therefore, claimant's annuity is deductible from her benefit rate. The above cited regulation limits the amount of the annuity which may be deducted.

DECISION: Fifty percent (50%) of claimant's retirement annuity is deductible from her weekly benefit rate.

C.O. # 57303 NONPRECEDENT

3603 UNTIMELY PROTEST: DISQUALIFICATION AND OVERPAYMENT.

ISSUE: Whether a claimant, after being disqualified from receiving benefits, should be required to repay those benefits when the employer failed to file a timely protest and notify the Division of the alleged voluntary separation prior to benefits being paid.

FACTS:

1. Claimant filed for benefits and either indicated that she had been separated for lack of work or Division personnel determined from claimant's explanation that the separation was for lack of work.
2. Claimant was paid $82.00 for weeks ending April 13, 1991 and April 20, 1991.
3. Subsequently, an untimely protest was received from the employer informing the Division of an alleged voluntary quit.
4. A fact finding investigation followed wherein the claimant insisted she had not quit and the employer insisting that she had.
5. Claimant was disqualified from receiving benefits from December 30, 1990, through the duration of her unemployment, benefit overpayment in the amount of $82.00 was established and the employer's reserve account was denied relief of charges on the grounds of an untimely protest.
6. Claimant was not held to have made false statements in order to receive benefits. Rather, it was determined benefits were paid because of the untimely protest of the employer.

REASONS: The factual matrix of this case reveals three determinative points: 1) the claimant, in good faith, represented her job separation as a layoff; 2) the employer failed to file a timely protest; and 3) the Division had no knowledge of an alleged voluntary quitting prior to benefits being paid. It is the position of the Commission that when these three conditions are met, subsection (3) of KRS 341.370 creates an exception to the provisions of KRS 341.370 (7). That is, when this exception exists, the claimant may not be disqualified prior to the Division becoming aware of the alleged voluntary quitting, because it is apparent that the legislative intent of subsection (3) was to validate benefits actually paid so as to prevent inequitable restitution. Legislative intent is a persuasive principle as indicated by Commission Order Number 4245. Therefore, claimant may not be disqualified during the two weeks at issue.

Since the company filed no protest it thereby acquiesced in the notice (Form 412-A) received by it upon which the information appeared that the claimant had been separated because of "lack of work". Under the provisions of KRS 341.530 (3), it is proper that the company should be charged with such benefits as have been paid.

DECISION: The $82.00 overpayment is nullified. The employer's reserve account held chargeable for benefits paid on grounds it filed an untimely protest.

C.O. # 58137A PRECEDENT

3604 DELETED.
Refer to Entry #3595.

3605 REMOVED.
Reference KRS 341.470(1) as amended by the 1992 session of the General Assembly.

3606 STANDARD OF PROOF; CIRCUMSTANTIAL EVIDENCE.

ISSUE: Whether circumstantial evidence can satisfy the standard of proof that must be met, i.e., a preponderance of credible evidence.

FACTS:

1. Claimant worked for the employer as a salesperson in the industrial uniform division.
2. Claimant was responsible for handling problems and complaints from customers and for calling on prospective customers for the purpose of renting or selling uniforms and linens.
3. Claimant was paid a weekly salary plus commission.

4. On September 6, 1991, Ms. Willis, the bookkeeper, received a call from a customer stating claimant had made a delivery the day before but had failed to send a red tie with the order.
5. No record of the order could be found.
6. Ms. Willis contacted the customer for more information and was informed that claimant had delivered three pants, three shirts and three aprons on Thursday, September 5, 1991.
7. The receipt the customer had for the delivery was dated August 30, 1991, in the amount of $96.00, was marked paid and initialed by the claimant.
8. There was no explanation as to why the invoice was dated August 30, 1991, when the transaction took place on September 5, 1991.
9. Claimant was contacted by Ms. Willis concerning the call she had received regarding the red tie.
10. Claimant's response was "mmmmm". No explanation was given.
11. Ms. Willis contacted the customer again to obtain the invoice number and to determine how payment was made.
12. Ms. Willis was given the invoice number and told payment was made in cash to the claimant.
13. Ms. Willis decided not to question the claimant any further but to wait until Monday to give claimant a chance to bring in the money and the invoice.
14. When claimant reported for work on Monday, Ms. Willis asked if she had any invoices for her. Claimant's response was "no".
15. Ms. Willis told claimant about the call from the customer stating she had made a delivery and received payment in cash.
16. Claimant denied payment had been made and stated she would call the customer herself to straighten things out.
17. Claimant was told her call would not be necessary as Ms. Willis had talked to the customer three times on Friday and that the customer had an invoice marked paid with claimant's initials.
18. At that time, claimant recalled receiving the payment and said she had the envelope with the invoice and payment in her car.
19. Claimant explained she had confused the customer with another.
20. Following the conversation, claimant left the building to retrieve the envelope containing the invoice and payment and was absent for approximately forty-five minutes.
21. Vice-president of the company was informed of the problem and upon claimant's return confronted her is his office.
22. Claimant turned over the $96.00 cash and the invoice.
23. After examining the invoice it was discovered it was an invoice written by Ms. Willis for claimant to purchase used sheets for herself August 30, 1991.
24. Claimant stated she had used the same invoice for the delivery to her customer because when she arrived to deliver the purchase she had misplaced the invoice she had prepared.
25. During the meeting claimant was also questioned about emblems for the uniforms, which must be placed on all new merchandise.
26. Claimant stated she sewed the emblems on by hand because she received the order during lunch and there was no one in the uniform department on the sewing machines or the heat seal machine to help her.
27. Claimant stated she took the uniforms and delivered the order because she was going to be in the area of the business that afternoon and felt it would prevent her making an extra trip.
28. Upon investigation there was no evidence claimant had paid for the sheets listed on the invoice.
29. There was no evidence of the missing invoice, which should have been prepared when claimant took the initial order.
30. The emblems were not sewn on by claimant; rather, she used the heat seal machine to attach the emblems.
31. Claimant's explanation for leaving the building for forty-five minutes was to purchase panty hose.

32. After review of the incident by the personnel director and the absence of of what the personnel director considered a reasonable explanation of why the money and invoice had not been turned in promptly, claimant was terminated.

REASONS: Every employer has the right to expect its workers to conform to certain reasonable standards of behavior. Deviation from such standards is a disservice to the employer's interests. Although the issuance of a warning is usually required to sustain a finding of misconduct, some expected standards of behavior are so implicit in the employer-employee relationship that there breach is an obvious act in willful or wanton disregard of the employer's interests and requires no warning to constitute misconduct.

The standard of proof which must be met is that of a preponderance of credible evidence, or stated differently, a weight of credible evidence. Parties need not prove their cases by a showing of conclusive evidence. Conclusive evidence is evidence that not only proves a case beyond a reasonable doubt (the standard of proof required in criminal proceedings), but goes even further and puts an end to all doubt.

The preponderance of credible evidence of record establishes that the claimant was less than truthful on more than one occasion when responding to inquiries into the missing invoice and money. The chain of circumstantial evidence that claimant mishandled the employer's money with regard to the account is strong and unbroken. Claimant's explanations of the events are simply not credible.

DECISION: Claimant disqualified from receiving benefits.

C.O. # 59259 NONPRECEDENT

Not to cited or quoted. For guidance only.

3607 TERMINATION OF INELIGIBILITY UPON RECEIPT OF NEW EVIDENCE OF AVAILABILITY.
06/15/ 92

ISSUE: Whether department personnel may ignore new evidence of availability for work and not terminate the prior period of ineligibility, simply because claimant appealed the initial ruling that he was unavailable for work to the referee.

FACTS:
1. Claimant worked as a sheet metal worker.
2. Separated from his employment under non-disqualifying conditions, because of an on-the-job injury.
3. Filed for unemployment benefits March 8, 1992.
4. Held ineligible to receive benefits by an adjusted determination dated March 26, 1992, for weeks ending March 14 and March 21, 1992, and thereafter until conditions substantially change for failing to search for work.
5. Claimant submitted evidence (payorder cards) to the local office that conditions had substantially changed concerning his search for work; for weeks ending March 28, 1992 through May 16, 1992, he was making an active search for work.
6. Local office failed to issue an adjusted determination terminating claimant's ineligibility on grounds the claimant had appealed the first adjusted determination to the referee.
7. Without securing the payorder cards for relevant weeks, the referee extended claimant's ineligibility through week ending April 25, 1992, and thereafter until conditions substantially change.
8. Claimant sought relief from the Commission through a timely appeal of the referee decision.

REASONS: As a result of the actions of the local office and the referee, the claimant was denied timely payment of benefits to which the department had evidence he was entitled. In CALIFORNIA

DEPARTMENT OF HUMAN RESOURCES VS. JAVA, 91 S Ct. 1347, the U.S. Supreme Court held that benefits must be paid "when due." The department may not ignore evidence affecting a claimant's eligibility for benefits. A timely determination based on new evidence must be made to ensure that claimants receive benefits "when due."

In cases such as this where a second determination terminating the previously imposed indefinite period of ineligibility is required, the referee hearing the appeal from the first determination may not rule beyond the termination date of the second determination. The referee was obligated to secure and either make a part of the record, or take official notice of, relevant pay order cards which were in the possession of Department personnel.

DECISION: That portion of the referee decision which held the claimant ineligible to receive benefits for weeks ending March 14, 1992 and March 2l, 1992, was affirmed; however, in all other respects, the referee decision was set aside. Claimant held available for work and eligible to receive benefits from March 22, 1992 through May 16, 1992, and thereafter until conditions substantially change.

CO# 60630 PRECEDENT

3608 RES JUDICATA; ARBITRATOR'S RULING. 06/15/ 92

ISSUE: Whether arbitrator's ruling is res judicata on unemployment insurance ruling on worker's entitlement to benefits.

FACTS:
1. Labor agreement required "just cause" for discharge.
2. Claimant grieved her discharge and arbitrator ruled "just cause" did not exist.
3. Claimant seeks to have arbitrator's ruling given the effect of res judicata or collateral estoppel on unemployment insurance ruling.
4. Circuit court held that the unemployment insurance commission is a creature of statute bound only by the legislative enactments, not by the independent contracts between parties.
5. Court of appeals agreed and held that the claimant's argument would in effect usurp the function of the legislature by incorporating the provisions, terms and interpretations of the labor agreement into the Unemployment Insurance Statute.
6. Court of appeals refused to condone such action.

REASONS: See "FACTS" above.

DECISION: Arbitrator's ruling has neither the effect of res judicata nor collateral estoppel on unemployment insurance ruling on claimants' entitlement to benefits.

Kentucky Court of Appeals, BOWLING V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND FLAV O RICH, INC., NO. 91-CA-953-S Unpublished. Not to be cited or quoted. For guidance only.

3609 RETIREMENT PAY VS. NONDEDUCTIBLE BENEFITS.

ISSUE: Whether money received by the claimant from a profit sharing retirement plan at early separation is deductible from his weekly benefit rate.

FACTS:
1. Claimant worked for the employer 11 years.
2. During claimant's employment, the employer paid into a Profit Sharing Retirement Plan for its employees.

3. The employer decided to discontinue the plan and no contributions were made into the retirement plan after March 31, 1990.
4. November 26, 1991, claimant was laid off from his employer and received a lump sum settlement of $16,046.13 in March, 1992, from the discontinued retirement plan.
5. Claimant had options of receiving a monthly payment of $109.00 beginning March 1992, and continuing thereafter for the remainder of his life, or leaving the money in a retirement plan until age 62 when he would receive $221.00 per month for life.

REASONS: KRS 341.390. Deduction from benefits. --There shall be deducted from the benefit rate determined for a worker in accordance with subsection (2) of KRS 341.380:

(3)(a) The amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan maintained or contributed to by a chargeable amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week; except that the secretary may provide for limitations on the amount of any such deduction to take into account contributions made by the worker for the pension, retirement or retired pay, annuity, or other similar periodic payment.

It is the position of the Commission that federal statute, 26 U.S.C.A. § 3304 (a) (Supp. 1985), with which KRS 341.390 (3) (a) is in compliance, was intended to prevent retired people who have actually withdrawn from the labor force from receiving unemployment in addition to their retirement pensions. Parmelee v. New Hampshire Department of Employment Security, 508 A. 2d. 1041 (N.H. 1986) and Tucker v. Department of Employment Security et al., 453 A. 2d 1247 (N.H. 1982) are support for this interpretation of federal legislative intent.
Claimant had neither attained the required retirement age under the plan of 62 years (i.e., he was not eligible under the plan for retirement benefits); nor did he retire from the active labor market upon his involuntary separation from the captioned employer. Therefore, the money received by the claimant at separation cannot fairly be considered retirement pay; but rather, it was simply a monetary benefit which flowed to the claimant as a result of the employer-employee relationship being prematurely terminated by the employer.

DECISION: Monies received held not deductible from claimant's benefit rate.

CO# 60979 PRECEDENT

NOTE: This ruling does not affect Entry #3580 wherein the claimant had attained the required retirement age under the plan at the time he received the lump sum retirement benefit. Under this circumstance, the lump sum payment was a retirement benefit, and under the provisions of KRS 341.390 (3)(a), remains deductible from the weekly benefit rate based on the actuarially determined monthly payment, since the retirement benefit could have been received in monthly payments.

3610 MISREPRESENTATION; NONDISQUALIFYING JOB SEPARATION.

ISSUE: Whether a referee's retroactive ruling that claimant's job separation was nondisqualifying precludes a ruling that claimant knowingly made false statements to establish her right to benefits when initially filing her claim.

FACTS:
1. Claimant was laid off because of lack of work on September 12, 1992.
2. Claimant established an initial claim and was given a document which explained her rights and responsibilities pertaining to the unemployment insurance program.

3. Claimant returned to work for the same employer on October 1, 1992 and remained employed through October 8, 1992.
4. Because of problems between claimant and a co-worker, and between claimant and the store manager, claimant quit on October 8, 1992.
5. Claimant reopened the initial claim previously established.
6. Claimant reported the separation was due to lack of work.
7. Claimant misrepresented the separation because the area supervisor told her that she would not be able to receive benefits if she quit.
8. Claimant was advised by the area supervisor that the claim would not be protested and that she should inform Division personnel that the reason for her job separation was because her hours had been cut.

REASONS: KRS 341.370 (2) provides that a worker shall be disqualified from receiving benefits for any week with respect to which he knowingly made a false statement to establish his right to or the amount of his benefits, and, within the succeeding twenty-four (24) months, for the additional weeks immediately following the date of discovery, not to exceed a total of fifty-two (52), as may be determined by the secretary.

It is the position of the Commission that if a claimant intentionally withholds a fact that is relevant to the determination of her entitlement to benefits or knowingly misrepresents said fact, then she has violated KRS 341.370 (2) whether or not said fact would have adversely affected her entitlement to benefits. The materiality of a fact depends not on whether it would have adversely affected the claimant's entitlement to benefits; but rather, materiality of a fact depends solely on whether the fact is relevant to the determination of a claimant's entitlement to benefits.

Further, to allow claimants to either knowingly withhold material facts, or knowingly misrepresent material facts, even if disclosure of such material facts would ultimately have no adverse affect on their entitlement to benefits, would have the chaotic result of allowing claimants to, in effect, make their own initial determinations of eligibility for benefits. The right to make such determinations rests solely with the secretary (see KRS 341.350(1) and 903 KAR 5:100, Section 2), and rightfully so because, "The impact of a particular fact upon a claimant's eligibility may present difficult questions of law" (see MEYER V. SKYLINE MOBILE HOMES 589 P. 2d 89 and SMITH V. STATE DEPARTMENT OF EMPLOYMENT, 691 P. 2d 1240 (Idaho 1984)); and, the secretary, not the claimant, is charged with the responsibility of making determinations of relevancy and materiality, and of deciding questions of law bearing on a claimant's eligibility for benefits.

The claimant, by her own admission, knowingly misrepresented the facts surrounding her job separation because she believed she would not be entitled to receive benefits if she informed Division personnel that she had, in reality, quit her job. Based on the false information provided by the claimant, which was relevant and material to the issue of eligibility, Division personnel (acting as an agent of the secretary) determined the claimant to be entitled to received benefits. Without question, claimant's actions fall squarely under the purview of KRS 341.370 (2).

DECISION: Claimant disqualified from receiving benefits from September 27, 1992, through the duration of her unemployment and for twenty-six additional weeks beginning November 8, 1992, and ending May 8, 1993, on grounds she knowingly made false statements to establish her right to benefits.

Benefits paid as a result of a false statement, misrepresentation, or concealment of material information shall be repaid to the Division as provided by KRS 341.415.

CO# 62542 PRECEDENT

3611 SCHOOL BUS DRIVER: OFF WORK DUE TO NON-SCHEDULED SHUTDOWN. (E.G. INCLEMENT WEATHER, ETC.)

ISSUE: Whether a school bus driver (a non-salaried employee of the school) is unemployed and entitled to benefits when school is closed for inclement weather.

FACTS:

1. Claimant worked for the employer as a bus driver for thirteen years.
2. Required to work 175 days of the school year.
3. School calendar may be adjusted to make up days lost during the school year due to unscheduled closings.
4. School was forced to close due to inclement weather at various times during January and February.
5. Claimant was unable to work those days and received no pay.
6. Claimant filed a claim for benefits for those days.

REASONS: KRS 341.360 in pertinent part provides that no worker may be paid benefits for any week of unemployment with respect to which the worker is unemployed between two successive academic terms or years and there is a contract or a reasonable assurance that a worker will perform such service and in such capacity at the commencement of the following school term. In this case, the claimant's unemployment did not occur during a break between successive academic terms or years. Claimant's unemployment was due to bad weather when the schools were closed.

KRS 341.350 provides as the first condition of eligibility for benefits that the worker be unemployed.

KRS 341.080 (3) defines "week of unemployment" as any week in which the worker performs less than full-time work, and earns less than one and one-fourth (1 1/4) times her weekly benefit amount. KRS 341.390 (1) provides that eighty percent (80%) of the amount of wages earned by a worker during a week of unemployment shall be deducted from the worker's weekly benefit rate.

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION v. GENERAL ELECTRIC COMPANY, KY., 473 S.W. 2d 808, the Court of Appeals held that employees who were unemployed because of an annual vacation shutdown, and who did not have sufficient service with the company to qualify for a week of vacation pay, were ineligible to receive unemployment insurance benefits when they later in the same year qualified for and received vacation pay for the week of vacation taken earlier in the year. That is, the court ordered vacation pay to be retroactively allocated to the actual week of vacation; thereby preventing the claimants from receiving unemployment insurance benefits and vacation pay for the same week. The result of retroactively allocating the vacation pay was that the claimants no longer satisfied the aforementioned requirement of having earned less than one and one-fourth (1 1/4) times their weekly benefit rates during the week of vacation. Therefore, they were ineligible to receive unemployment insurance benefits for the week of vacation.

In the case herein under appeal, the claimant was neither on vacation during the days she was off work; nor did she receive vacation pay for those days of work missed. Rather, claimant worked less than full time during the weeks under appeal because of inclement weather; therefore, claimant has served a week of unemployment during any such week in which she earned less than one and one-fourth (1 1/4) times her weekly benefit amount. During these weeks, claimant is entitled to receive partial or full benefits, based on the amount of her earnings, or lack thereof.

The captioned employer argues that the claimant should not be entitled to receive unemployment insurance benefits during these weeks because she will work and be paid for all of the one-hundred and seventy-five days of the school year, if she remains an employee through the end of the school year, because the days missed must be made up as required by state law. The captioned employer argues further that if claimant is allowed to receive unemployment insurance benefits and works through the end of the school year than she will be "compensated" for more than the one-hundred and seventy-five days of the school year. Apparently, the captioned employer would have the commission withhold unemployment insurance benefits until it is

determined whether the claimant actually works and receives wages for the full one-hundred and seventy-five days, and then award her benefits only if she does not work the full one-hundred and seventy-five days. The result of such action would be to deprive claimant of benefits when due based on the possibility of her working the full one-hundred and seventy-five days. In CALIFORNIA DEPARTMENT OF HUMAN RESOURCES v. JAVA, 915 CT. 1347, the U.S. Supreme Court mandated that benefits be paid when due.

Even if claimant were to work the full one-hundred and seventy-five days, she would not be doubly enriched for the same period of time (as in GENERAL ELECTRIC, supra) by receiving unemployment insurance benefits when due for weeks of unemployment served, and later receiving wages for work performed after the weeks of unemployment. That is, for purposes of claiming unemployment insurance benefits, wages are allocated to the week in which they were earned; not retroactively to weeks when they were not earned.

The determinative point in this case is that claimant has served weeks of unemployment during the school year for which she is entitled to receive unemployment insurance benefits, when due. Simply put, claimant should receive unemployment insurance benefits when she is unemployed. Those wages she receives for work performed at a later time cannot operate retroactively to bar her from or reduce the amount of unemployment insurance benefits due her at the time she was unemployed.

DECISION: Claimant qualified and eligible to receive benefits.

CO# 65874 NONPRECEDENT

NOTE: Apply to any unscheduled shutdown.

3612 "FINALITY OF FEDERAL FINDINGS"; UCFE CLAIMS (UCX CLAIMS).

ISSUE: Whether the division is compelled by federal law to abide by "federal findings" of a federal agency in a UCFE claim.

FACTS:

1. Claimant worked for the Internal Revenue Service, became separated from his employment and filed for benefits.
2. A request for Information or Reconsideration of Federal Findings - UCFE was submitted to IRS Claims Analyst, The Frick Company, concerning wages reported for the first and second quarter of 1993.
3. Report received concurred with previously reported wages.
4. Claimant found ineligible for benefits due to the fact that his base period wages were not one and one-half times the high quarter.
5. Pay period for the Internal Revenue Service ran from Sunday through Saturday.
6. Employees paid biweekly, with the official payday being Thursday.
7. Salary for the period ending March 20, 1993, was made available to claimant on March 29, 1993.
8. Those earnings were reported in the second quarter of 1993 because the official payday was April 1, 1993.
9. It is the practice of James E. Frick, Inc., to report wages earned in the quarter when the official payday falls, regardless of when the employees actually receive the money.

REASONS: KRS 341.090 (1) defines "Base Period" as the first four (4) of the last five (5) completed calendar quarters immediately proceeding the first day of a worker's benefit year.

KRS 341.090 (4) defines "Base-Period Wages" as the wages paid to a worker during his base period by subject employers for covered employment.

KRS 341.080 (b) defines "Calendar Quarter" as three (3) consecutive months beginning on January 1, April 1, July 1, or October 1.

KRS 341.350 sets forth the conditions of qualification for benefits. Section (5) provides that a claimant's base-period wages in that calendar quarter of his base period in which such wages were highest are equal to at least seven hundred and fifty dollars ($750), and his total base-period wages are not less than one and one-half (1 1/2) times the base-period wages paid to him in such quarter and he was paid base-period wages in the last six (6) months of his base period equal to at least eight (8) times his weekly benefit rate with a minimum of seven hundred and fifty dollars ($750) earned outside the high quarter.

Obviously, the statute envisions that wages be applied to appropriate quarters and that such wages be attributed to the quarters in which they were paid. The evidence in this case clearly shows that the claimant was paid wages in the first quarter of 1993 which were erroneously reported by The Frick Company as having been paid in the second quarter of 1993.

In precedent Commission Order 53574, the commission held that the division was compelled by federal law to abide by the "federal findings" of a federal agency (in the case herein under appeal the Frick Company's reporting of claimant's wages) in a UCFE claim. The instant case presented a situation which has caused extensive review of the precedent order and the federal law upon which it was predicated. As a result, we are convinced that Commission Order Number 53574 misconstrued federal law in effect at that time, (1989) and conflicts with federal law currently in effect. UIPL 12-77, dated December 30, 1976, specifically stated that the finality provisions in federal law no longer applied to "federal findings" in UCFE claims. Indeed, review of federal law reveals the existence of a "finality of federal findings" provision for UCFE claims prior to 1976 which no longer existed after 1976. Thus, the division may make determinations which conflict with "federal findings" in UCFE claims.

We note that federal law, 20 CFR, chapter V, part 614.23, does provide that findings of a federal military agency shall be final and conclusive on the division. Thus, for UCX claims, the division must make determinations consistent with the findings of the military agency, although the same is not true of UCFE claims.

DECISION: Claimant's wages for the first and second quarter of 1993 to be changed to reflect the total wages PAID in those quarters. Division to re-evaluate the claimant's eligibility for benefits based upon the changes.

CO# 66272 PRECEDENT

3613 INVESTIGATION OF SEPARATION FROM NEXT MOST RECENT WORK PRIOR TO LAYOFF FOR PLANT SHUTDOWN.

ISSUE: Whether a claimant can be disqualified on the basis of a separation issue when unemployed and without pay during a plant shutdown.

FACTS:

1. Claimant voluntarily leaves otherwise suitable employment with her next-most recent employer for reasons which are later found to be without good cause attributable to the employment, but files no claim for benefits immediately.
2. Claimant later begins work with another employer, she works less than ten weeks and is laid off for lack of work due to a plant shutdown.
3. Claimant then files a claim and is paid benefits on grounds that 341.370(5) provides that no worker shall be disqualified or ineligible under 341.370 or 341.350 when the employer is permitted by contract or agreement to close its doors for vacation or maintenance purposes.

4. The Department policy, as applied in this case imposed no disqualification on the next-most recent separation because claimant did not file her claim until AFTER her separation by plant shutdown with her most recent employer. Conversely this same policy would have provided for a disqualification under identical employment circumstances if the worker had filed a claim BETWEEN the next-most recent and most recent employers.

REASONS: 341.370(5) was enacted to ensure that workers who were annually unemployed and without earnings could not be disqualified or held ineligible under the theory that they were voluntarily unemployed by having agreed, through a contract or bargaining agreement, to permit the employer to close its doors for vacation or maintenance purposes.

See: The MURRAY OPERATION OF THE TAPPAN COMPANY VS. KUIC, 583 SW 2d 100

The Department failed to take into consideration the legislative intent when adopting its policy. Further, the policy provided two different potential outcomes for similarly situated claimants who filed claims at different times. Whether a worker files a claim between the next-most recent and most recent periods of employment is not the determinative factor in deciding when to impose a disqualification. If the most recent employer is less than ten weeks, the next-most recent separation should be investigated irrespective of whether the worker is idled by a plant shutdown.

DECISION: The claimant voluntarily left her next-most recent work without good cause attributable to the employment and is disqualified from receiving benefits. The claimant's overpayment is subject to recoupment only by offset from future benefits as a result of it being due to Departmental error.

CO# 68500A PRECEDENT

3614 REASONABLE ASSURANCE; TEACHER FOR LICENSED DAY CARE CENTER

ISSUE: Whether the between academic years benefits denial imposed by the statute applies to individuals working in a Head Start program provided by a licensed day care center.

FACTS:

1. Claimant, a teacher, worked for the employer for five years.

2. The employer was a community action agency funded by federal and state governments.

3. The employer provided a Head Start program.

4. Head Start was a licensed day care center and not part of the school system.

5. Claimant received written notice that her employment was terminated for the summer.

6. The Division did not receive written notice that claimant had reasonable assurance of employment for the next school year.

7. In prior years, claimant and other workers were on annual contracts and were paid all year even though they did not work during the summer.

8. Beginning in early 1996 employees were given the option to continue on with such contracts or to be paid for their actual hours of work and only during the months in which they actually performed services.

9. Claimant opted for the latter terms of employment.

10. Claimant last worked on June 3, 1996, the end of the school year.

11. Claimant did not have a contract from the employer to show that she would be rehired, although she expected to be recalled the beginning of the new school year.

KRS 341.360 provides that no worker may be paid benefits for any week of unemployment: ...(3)(a) which, when based on service in an instructional, research, or principal administrative capacity in an institution of higher education as defined in subsection (2) of KRS 341.067 or in an educational institution as defined in subsection (4) of KRS 341.067, begins during the period between two (2) successive academic years, or during a similar period between two (2) regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the worker performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that the worker will perform such service in any such capacity for any institution or institutions of higher education or an educational institution in the second of such academic years or such terms; or ... (d) based on service in any capacity defined in paragraph (a) or (b) of this subsection when such service is performed by the worker in an institution of higher education or an educational institution, as defined in subsection (2) or (4) of KRS 341.067, while the worker is in the employ of an educational service agency, and such unemployment begins during the periods and pursuant to the conditions specified in paragraphs (a), (b), and (c) of this subsection. For purposes of this paragraph the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one (1) or more institutions of higher education or educational institutions.

KRS 341.067 (4)(a) provides that an "educational institution" including an institution of higher education as defined in subsection (2) of this section, means:

1. A school in which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor(s) or teacher(s);
2. It is approved, licensed or issued a permit to operate as a school by the state department of education or other government agency that is authorized within the state to approve, license or issue a permit for the operation of a school; and,
3. The courses or study or training which it offers may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

The basis for the between academic years denial of benefits lies within the Federal Unemployment Tax Act, Section 3304 (a)(6)(A), to which the state law must conform. In Unemployment Insurance Program Letter No. 4-87, the United States Department of Labor interpreted the federal statute to mean that, "For a reasonable assurance to exist, the educational institution must provide a written statement to the State agency stating that the employee has been given a bona fide offer of a specified job (e.g., a teaching job) in the second academic period." The Division of Unemployment Insurance has enforced that policy for many years.

Before the between academic years benefits denial is imposed the statute requires that certain criteria must be met: claimant must be employed by an educational institution, an institution of higher education, or an educational service agency as defined. Further, she must have "reasonable assurance" of such employment in the second of such academic years or terms. Also, the employer must provide the state agency with a written statement that the worker has been given a bona fide offer of such employment in the second academic year.

Claimant was employed as a teacher in the Head Start program, she was not employed in an educational institution or an educational service agency as defined by law. This Head Start program is a licensed day care center and neither an educational institution nor an educational service agency. Therefore, the between academic years benefits denial may not be imposed.

Additionally, whether claimant was a "contract" employee -- having signed a contract to be paid for twelve months instead of the nine months she actually worked, is also not dispositive of the issue because she was unemployed when the school year and the need for her services ended after June 3, 1996. Spreading her pay over a twelve month period

would not mean that she was "employed" for twelve months since she was not providing any services to the employer during the summer months.

DECISION Claimant is not disqualified from receiving benefits during the period between academic years as she was not an employee of an educational institution or an education service agency and she did not have reasonable assurance of such employment in the second of such academic years.

C.O. # 72073 PRECEDENT

CHAPTER 4000

MISCONDUCT

CONTENTS BY ISSUE

4000 MISCONDUCT.

4001 TARDINESS AFTER WARNING; DUE CARE TO AVOID NOT EXERCISED.

ISSUE: Whether a claimant who establishes a pattern of tardiness with warnings is guilty of misconduct when he fails to exercise due care to ensure his timely arrival at work.

FACTS:

1. Worked from February 7, 1978, until July 3, 1981, during which time he was frequently late for work.
2. Warned of need for improvement.
3. Tardiness for less than compelling reasons continued.
4. And on June 11, 1981, again warned that attendance would have to improve.
5. On June 12, 1981, was scheduled to open the business but failed to report because he overslept.
6. Given final warning that late appearance would not be tolerated.
7. On July 1, 1981, overslept alleging a power failure at his home caused his electrical alarm clock not to go off in time for him to report for work as scheduled.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Every employer has a legitimate interest in the efficient operation of its business. All worker tardiness disserves that interest. Tardiness for less than compelling reasons or which is improperly reported is a wanton disservice and constitutes misconduct, particularly so when there is a pattern of tardiness for which the worker has been warned. Such is the case here.

Although the claimant's last tardiness was ostensibly caused indirectly by a household power failure beyond his control, he placed his employment in certain jeopardy by his previous pattern of frequent tardiness, for which he had been warned several times. Having been warned, he should have made a greater effort to assure his prompt arrival to work (possibly by using a non-electrical alarm). Essentially, his last tardiness was the result of again oversleeping. It was not an isolated occurrence. Because it was but one instance in a pattern of tardiness we find the reason for claimant's last tardiness to be less than compelling, and part of a pattern of wanton disservice to his employer, constituting misconduct.

The referee cited Order Number 22156 as authority for holding that the claimant's last instance of tardiness would not allow for a finding of misconduct. The pertinent part of that Order is correctly quoted as:

... We must, however, utilize stricter standards in determining a disqualification for misconduct under the provisions of the statute.

One of those standards is that there must be a showing that the final act, which led to termination, must have been one which qualifies as misconduct under the appropriate definition. (See BOYNTON CAB COMPANY V. NEUBECK.) We do not believe that standard has been met here.

Claimant's final absence was the result of bona fide medical necessity, and was properly supported by statements from his physician. The record will not support that he failed at any duty for reporting the absence. He was, therefore, discharged for reasons other than misconduct...

In that case the final incident, which precipitated the worker's discharge, was an absence compelled by illness (verified by doctor's statements) and which was properly reported to the employer.

When a discharge results from a series or pattern of similar acts of worker disservice which have resulted in warnings (such as, but not limited to, tardiness or absence), the worker becomes culpable and should be held to a higher standard of accountability to show that his actions are justified, and that they do not contain the elements of misconduct. As the worker continues on the same course of repeated acts of disservice, misconduct may be found more easily in similar succeeding acts. This does not modify the basic concept expressed in Order Number 22156, but shall serve to temper its application in cases similar to this.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 28862 PRECEDENT

4002 SPOUSE'S QUITTING; OF NO EFFECT ON CLAIMANT'S DISCHARGE.

ISSUE: Whether claimant is disqualified when she is discharged solely because her husband quit the employer.

FACTS:
1. Claimant and her husband were hired as a team to train for and then to become managers of a motel.
2. An argument arose between claimant's husband and the employer.
3. Claimant's husband quit.
4. Claimant was not involved in the dispute and would have continued working.
5. Claimant discharged without explanation.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The referee found and reasoned as follows:

The uncontradicted evidence in this case shows that the claimant was discharged rather than having voluntarily quit. It is apparent that the discharge resulted from the arguments which had occurred between her husband and the employer and not as a result of any action on her part. Although she and her husband were hired as a team, I cannot conclude that, because of their relationship, her husband constituted her agent either for the purpose of constructively quitting or for the commission of an act of misconduct.

The Commission concluded:

We agree with the result reached by the referee. The fact that the "team" was husband and wife had no legal significance herein. The situation is the same as if there had been no personal relationship between them. They were not paid as a team, but separately. If the employer did not treat them as a unit for pay purposes, we cannot treat them as a unit for unemployment insurance purposes. It is no doubt true the employer would have hired neither if he had not been assured of the services of both. But the wife here cannot be penalized for the actions of the husband. And as a matter of fact, we do not know that the husband was not justified in quitting.

DECISION: Claimant discharged for reasons other than misconduct connected with the work.

C.O. # 5749 NONPRECEDENT

4003 REFUSAL TO WORK SUNDAYS; NO REASONABLE ACCOMMODATIONS MADE.

ISSUE: Whether a claimant is guilty of misconduct when he refuses to work Sundays on religious grounds, and the employer makes no effort to accommodate him.

FACTS:

1. As a production worker, claimant worked Sundays for two and one-half years. Off days were Tuesdays and Saturdays.
2. In January, 1979, he started attending church and was later "saved," baptized, and accepted into membership.
3. One of the tenets of the church is that Sunday is the Sabbath, and members must refrain from working on Sunday.
4. In May, 1979, he made his employer aware of his religious belief against working on Sundays and sought accommodation by way of transfer to a non-Sunday job or by being excused from Sunday work.
5. Employer made no effort to accommodate claimant, and when he failed to report to work for three Sundays, he was fired.
6. Employer could have easily accommodated claimant without undue hardship to its business by either transferring him to a non-Sunday job or simply excusing him from Sunday work.
7. Claimant filed a complaint with the Kentucky Commission on Human Rights alleging the employer had violated KRS 344.040 by refusing to accommodate his religious belief and by discharging him.
8. Specifically, the Commission on Human Rights held the employer had failed the statutorily required duty of attempting to reasonably accommodate religious beliefs. The Commission ordered the employer to reinstate claimant with back pay.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

Chapter 344 of the Kentucky Revised Statutes is the Kentucky Civil Rights Act. KRS 344.030 (5) is a definition section, known as the accommodation provision, which states:

(5) "Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

This definition of "religion" must be read in conjunction with KRS 341.040 (1) which provides:

It is an unlawful practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, national origin, sex or age...

These pertinent sections of the Act are virtually identical to Title VII of the Federal Civil Rights Act of 1964, as amended in 1972, Sec. 701 (j), Title VII, 42 USC Sec. 2000e. These sections clearly prohibit employers from discriminating against employees on the basis of religion, including discrimination against Sabbath observances by employees.

DECISION: The ruling of the Commission on Human Rights, ordering the employer to reinstate claimant with back pay, was affirmed by the Kentucky Court of Appeals.

Kentucky Court of Appeals, COMMISSION ON HUMAN RIGHTS AND GOINS V. KERNS BAKERY, 644 SW 2d 350.

PRECEDENT

4011 INCARCERATION; ABSENT WITHOUT NOTICE.

ISSUE: Whether a claimant who is absent without notice for nine days because of incarceration for failure to pay child support is guilty of misconduct.

FACTS:
1. A used car salesman, living and working in Louisville.
2. Received a call from his ex-wife, who lived in Indianapolis, that his child had been struck by a car.
3. Upon arriving at this ex-wife's home, he was arrested for failure to pay child support. His child had not been injured.
4. In his haste to get to his allegedly injured child, claimant left Louisville, with a set of "dealer tags" and a $200 customer check.
5. While incarcerated for nine days, he attempted without success to contact his employer when placing a collect call.
6. Discharged upon his return to work for unreported absence and for retaining the "dealer tags" and customer check.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Unemployment compensation law provides for benefits for persons unemployed through no fault of their own. It is reasonable to conclude that failure to pay court ordered child support (which led to incarceration) was a voluntary act, particularly when the failure to pay accrued over a protracted period of time, and claimant took no legal steps to reduce, modify, or stay such payments. When the claimant's unexplained absence is considered in conjunction with claimant's failure to notify his employer for nine days as to the retention of the check and the tags, the Commission determined that such behavior constituted misconduct connected with the work and rendered claimant ineligible for unemployment insurance benefits.

DECISION: Claimant discharged for work related misconduct.

Kentucky Court of Appeals, MORRIS V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND V.V. COOKE, 82-CA 1317-MR. UNPUBLISHED. Not to be cited or quoted. For guidance only.

4012 ABSENTEEISM; PROGRESSIVE DISCIPLINARY PLAN.

ISSUE: Whether a claimant who progresses through a disciplinary plan may be held to a strict compliance with attendance policies.

FACTS:
1. Captioned employer has a progressive disciplinary plan for unsatisfactory attendance.
2. Consisting of verbal warning, written warning, layoff, and discharge.
3. All absences not supported by a physician's statement or properly explained are unexcused.
4. Claimant progressed through this plan and offered NO EXPLANATION for his continual unexcused absences.
5. Final absence occurred on or near January 13, 1979, when he had a friend notify the employer that he was ill.
6. Claimant did not produce a physician's statement to support the necessity of his absence.
7. Discharged January 19, 1979, for continued unsatisfactory attendance.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Employee absence unquestionably disserves the interest of the employer. When improperly reported or for less than compelling reasons, it does so wantonly and constitutes misconduct as that term is used in the law. In this case, claimant was warned repeatedly that his attendance was not satisfactory. The disciplinary procedure itself was designed to promote awareness of the necessity to improve. He does not question the propriety of the disciplinary action imposed upon him, with the exception of the final absence which resulted in discharge. He contends that this absence was occasioned by illness. He did not, however, consult a physician and did not provide the employer with medical documentation.

It is upon this single point that proper disposition of this case turns. Was the employer within his right to require that those involved in the disciplinary process support their absences with medical documentation? We believe he was. The right to require employees to justify periods of absence is a well recognized employer prerogative, which becomes even more pronounced when discipline has gone before. Claimant herein involved was properly under a stricter standard insofar as compliance with attendance policies was concerned. When he failed to meet that standard, he was guilty of misconduct.

DECISION: Claimant disqualified on grounds he was discharged for misconduct.

C.O. # 20314 NONPRECEDENT

4020 LEAVE OF ABSENCE; FAILURE TO PROPERLY REQUEST LEAVE OF ABSENCE.

ISSUE: Whether a claimant, whose absences may have been for compelling reasons, is disqualified when he fails to properly request a medical leave of absence.

FACTS:

1. During his one and one-half years with the captioned employer, claimant compiled a less than satisfactory attendance record.
2. Warned in February 1982, but continued to miss work for various reasons.
3. Starting July 12, 1982, off work for two and one-half months for personal illness; however, illness not medically documented, and leave of absence not requested.
4. Notified that attendance policy, required WRITTEN LEAVE OF ABSENCE if an employee is absent for more than five consecutive days.
5. If absent for medical reasons, than request for leave must be accompanied by a doctor's statement justifying the leave.
6. Placed on sixty days probation on December 10, 1982, for an unreported absence.
7. Final occurrence of absences began February 15, 1983, which were reported almost daily for about three weeks, but NO LEAVE OF ABSENCE WAS REQUESTED.
8. Finally, in early March, wife obtained medical leave papers, and leave was granted through March 10, 1983, the expected date of claimant's return to work.
9. Leave form signed by claimant warns that failure to return from OR request extension of the leave (on or before March 10, 1983) would be grounds for termination.
10. No contact from claimant from March 11, 1983, through March 24, 1983.
11. On March 25, 1983, he notified employer that he had a doctor's appointment.
12. On March 25, 1983, claimant provided company a doctor's statement releasing him to work March 24, 1983.
13. From March 28, 1983, through April 11, 1983, no contact from claimant; no new leave or extension of earlier leave requested, and no additional doctor's statement provided.
14. Discharged April 14, 1983, for failure to file appropriate leave forms with justifying medical documentation.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The employer argues that the claimant was excessively absent, and that he did not obtain or substantiate the necessity for the leaves. Medical documentation of the illness is sketchy, but it appears the absences were generally for family or personal illness. Consequently, the number of days or percentage of lost time will not sustain a finding of misconduct in this case.

In the case of BROADWAY AND FOURTH AVENUE REALTY COMPANY V. CRABTREE, 365 SW 2d 313, the Kentucky Court of Appeals considered a similar situation and ruled that when a worker, after repeated warnings, is again absent because of claimed illness but fails to provide competent medical evidence to substantiate such illness, the resulting discharge was for misconduct. In such instances the burden of proof is upon the worker to show that the absence was justified.

The principle that it is the employee's responsibility in cases such as this one is expressed in 76 Am Jur 2d §60 as follows:

"...When it is necessary for an employee to temporarily absent himself from his employment, it becomes his duty to give the employer timely notice of the fact and to seek a leave of absence or otherwise manifest his intention not to abandon the labor force, the burden being on the employee to keep alive the employer-employee relationship after the expiration of a reasonable time for the temporary absence."

The record reflects that claimant did not meet this burden of proof. He had been warned about the absences without leave, and was placed on clear notice that he must follow company procedure in obtaining leaves. The procedure is reasonable and set forth in writing. If he did not understand the requirements, as alleged, there were others that could have assisted him. It was through his own neglect that the absences were not accounted for. His failure to adhere to the rules and procedures, without strong justification, constitutes misconduct.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 36360 A NONPRECEDENT

4030 ABSENTEEISM FOR PERSONAL ILLNESS; NOT PROPERLY REPORTED.

ISSUE: Whether claimant is guilty of misconduct when she is excessively absent for personal illness without giving required notice.

FACTS:
1. A cleaning woman at a hotel for seven years.
2. Absent from February 20 through March 15; and from April 2 through April 11 due to personal illness.
3. Last worked on May 9, notifying her employer on May 16, that she was again sick.
4. She contacted the employer on May 31 to report that she was still sick.
5. Last contacted the employer on June 20 to report she was able to work.
6. Notified at that time that she had been discharged June 13, for failure to give required weekly notice of continuing absence.
7. Claimant was aware that weekly notice was required.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> The decisions of the referee, Commission, and trial court were based on the theory that absence from work because of personal illness was involuntary and was not an act of misconduct justifying a denial of benefits. This conclusion is in error because it is the

excessive absenteeism, coupled with the failure to give notice thereof to the employer, that constitutes the misconduct for which the employee was discharged. KRS 341.530(3) provides that benefits paid to an eligible worker are not chargeable to the employer's reserve account "if such worker was discharged by such employer for misconduct connected with his most recent work for such employer."

DECISION: Claimant discharged for work related misconduct.

Kentucky Court of Appeals, BROWN HOTEL COMPANY V. WHITE, 365 SW 2d 306. PRECEDENT

4032 UNREPORTED ABSENCES; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether the claimant's failure to give notice of his absences for three days is tantamount to a voluntary quit when the employer was aware that he had suffered a work related injury which caused his absences.

FACTS: (See "Issue" above).

REASONS: In a long line of cases this Commission has held that if a worker remains away from work without notice to his employer such is tantamount to a voluntarily quitting without good cause. However, in those cases the reason for remaining away from work was not the result of a traumatic injury sustained on the job. Herein we have a worker who was required to use his hands in performing the duties of his job, that of laborer. The injury he received undoubtedly would have been affected if he had returned to work following his visit to the doctor. When he notified his employer he was injured, the employer was in a position to see the bandage on his hand, and we believe that sufficient notice was given to the employer that the claimant would be absent from work for at least a few days. We do not intend this case to overrule previous holdings by this Commission where failure to notify because of illness or some other reason caused a worker to be absent from work, but, in our opinion, under the particular circumstances of this case, the employer had sufficient notice of the reason the claimant did not report for work, and for that reason we must reverse the referee decision.

DECISION: Claimant did not voluntarily quit the employment; rather, he was involuntarily separated under nondisqualifying conditions.

C.O. # 4911 NONPRECEDENT

4040 ABSENTEEISM; PRODUCT OF MISUNDERSTANDING.

ISSUE: Whether claimant is guilty of misconduct when he is discharged for absenting himself with what he believed to be his supervisor's permission.

FACTS:

1. Worked fifteen months as a truck driver.
2. Willingly worked long hours of overtime when asked to do so.
3. Never warned about work performance or attendance.
4. Both company owner and his son supervised employees.
5. Prior to deer hunting season, which was to last Saturday through Monday, claimant requested permission from the son to leave work early on Friday for the purpose of embarking on a hunting trip.
6. After apparently consulting with his father, the SON granted claimant permission to leave early Friday.
7. While no specific mention was made of the actual days claimant was to be off, he believed his request to go deer hunting was to include the entire season.

8. Reported for work Tuesday and was discharged by the OWNER, who believed the only time claimant had been given off was Friday (partial shift).

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct must consist of acts or omissions by a worker which manifest a WILLFUL or WANTON disregard for the legitimate business interests of the employer.

In this case, at worst, there was a misunderstanding between claimant and his employer. The evidence adduced at the referee hearing will not support a finding that claimant's absence on Monday was in intentional disregard of this employer's interests. There was no pattern of such absences shown during claimant's tenure with the firm. Quite to the contrary, he had willingly worked long hours when asked to do so. Even granting that the misunderstanding was the fault of claimant, an isolated instance of inadvertence or failure at good judgment does not constitute misconduct.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 18593 NONPRECEDENT

4050 OVERTIME; ON CALL FOR.

ISSUE: Whether a claimant is guilty of misconduct when he fails to work overtime of which he was not notified.

FACTS:
1. Worked nearly two years as a fuel truck driver.
2. Received warnings for unacceptable attitude and unsatisfactory work performance.
3. Generally, claimant did not work Fridays or Saturdays.
4. On those occasions when needed to work on Friday or Saturday, he would be contacted by telephone prior to 1:00 p.m. on the day to be worked.
5. On Friday, February 20, 1981, the company telephoned claimant three times to call him to work.
6. However, all three calls were placed after 2:00 p.m. and claimant could not be reached.
7. Claimant was discharged for failing to work overtime.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals reasoned, in affirming the Commission, that:

> It is agreed that if he were to have been called on Friday, he would have to have been called before one o'clock. Ford's records show that he was called three times with no response, but the calls were placed after two o'clock. Therefore it was reasonable for the Commission to determine that Hardwick was not notified that he was supposed to work and that, as a result, no misconduct had been committed disqualifying Hardwick from receiving benefits. KRS 341.370 (1)(b). The findings are supported by substantial evidence and will not be disturbed by us on appeal. BROWN HOTEL COMPANY V. EDWARDS, Ky., 365 SW 2d 299 (1962).

DECISION: Claimant was discharged for reasons other than work related misconduct.

Kentucky Court of Appeals, FORD BULK INC. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND HARDWICK, Ky. App. 642 SW 2d 96. PRECEDENT

4080 COMPETITION WITH THE EMPLOYER; NO RULE AGAINST.

ISSUE: Whether a claimant, who purchases the assets of a competing business, is guilty of misconduct when there is no rule prohibiting same.

FACTS:
1. Claimant purchased the assets of a business which was in competition with the captioned employer.
2. There was no specific rule prohibiting such activity.
3. After the fact, captioned employer sought to have claimant sign a non-competition agreement.
4. Claimant wanted time to have the agreement reviewed by his attorney.
5. Claimant was discharged without being provided the requested time.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In an unpublished decision, the Kentucky Court of Appeals held:

> It was the opinion of the Commission that in entering into a competing business, the claimant in this case was disserving his employer's interest. However, it was their opinion that the disservice could not be considered "willful" in the absence of a known rule against competing, and that it was reasonable for the employee to request time to obtain a legal opinion before signing a proposed agreement not to compete. (It has been held that in order for violation of an employer's requirement to be held misconduct, the requirement must be a reasonable one. 76 AM Jur. 2d UNEMPLOYMENT COMPENSATION §53). We have no doubt that it is reasonable for any employee requested to sign a legal document by his employer to ask for time in which to obtain a legal opinion. However, in our opinion, the misconduct in this case occurred PRIOR to Bandy's request that Roberts sign the agreement not to compete.
>
> It is a matter of common knowledge that businesses may be harmed by losing customers to other competing businesses who perform similar functions. In BROWN HOTEL COMPANY V. WHITE, SUPRA, it is stated that among the obligations owed by an employee to the business for which he works is loyalty. Although some Kentucky cases on misconduct involve violation of a work rule, BROWN HOTEL COMPANY SUPRA or persistence in a course of conduct after warnings, BROWN HOTEL COMPANY V. ROBERTS, Ky., 365 SW 2d 309 (1962) and BROADWAY AND FOURTH AVENUE REALTY COMPANY V. CRABTREE, Ky., 365 SW 2d 313 (1962), we are aware of no statement requiring that, in order for acts to be misconduct, they must be preceded by the announcement of a rule prohibiting such acts.

To so hold would provide benefits for the employee who punches his employer, but pleads lack of a rule against physical assaults. While the existence of a known work rule will always be relevant to the question of whether willful misconduct occurred, we do not believe that under the specific facts of this case, the finding that such a rule did not exist detracts from the fact that there was misconduct consisting of a willful disservice to the interests of the employer. It is our opinion that the finding of the Commission, as affirmed by the Circuit Court, that there was no willful disservice, was clearly erroneous, and that the Circuit Court erred in failing to hold that there was a disqualification of the claimant pursuant to KRS 341.370.

DECISION: Claimant held disqualified on grounds he was discharged for work related misconduct.

Kentucky Court of Appeals, BANDY V. ROBERTS, 82-CA-597-MR. UNPUBLISHED. Not to be cited or quoted. For guidance only.

4081 COMPETITION; REFUSED TO REFRAIN FROM (PERSONAL BUSINESS ON COMPANY TIME).

ISSUE: Whether a claimant is guilty of misconduct when he conducts personal business, aimed at entering into competition with employer, on company time, and refused to sign non-competition agreement.

FACTS:
1. Employer engaged in production, sales and installation of retrogravure printing cylinders.
2. Claimant worked eight years as plant manager.
3. Near the end of his tenure, he began efforts to establish himself in the machine shop business.
4. Made a five minute call from the employer's plant in this regard, which the employer's president overheard.
5. President demanded claimant sign a covenant not to compete.
6. Claimant refused, and president discharged him as a result.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct has been construed to mean any act or omission by a worker which demonstrates a willful or wanton disregard for the legitimate business interests of the employer. Entering into competition with one's employer is considered to be misconduct. Also, conducting personal business during scheduled work time is misconduct, particularly when, as here, claimant was attempting to establish his own business which might conceivably have competed with his employer. We find that the employer acted reasonably in requiring claimant to enter into a contractual arrangement to prohibit such activity, and claimant's refusal to do so constituted misconduct.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 40094 NONPRECEDENT

4090 DISSATISFACTION WITH EMPLOYER; AIRED PUBLICLY.

ISSUE: Whether a claimant is guilty of misconduct when he publicly airs employer's violation of temporary zoning variance.

FACTS:
1. Employed by the Department for Human Resources as a security guard at a youth development center in Ashland, Kentucky.
2. Complained to employer that the youth center had not lived up to its commitments made to the local zoning commission.
3. Specifically, twenty-four-hour a day, seven-day a week security was not being provided as required by the temporary zoning variance allowing for operation of the center.
4. Was advised by his employer (by letter dated 10-31) that he was not to attend zoning commission meetings in the capacity of representing the Department.
5. He did not attend the zoning commission meeting; rather, he wrote the commission a letter disclosing the lack of security at the center. His title and place of employment followed his signature on the letter.
6. The commission was considering making the temporary variance permanent.
7. Claimant was discharged for writing this letter.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In an unpublished decision, the Kentucky Court of Appeals held:

> Appellant then sought and was denied unemployment compensation benefits on the grounds that he was discharged for misconduct. The basis of the misconduct was that appellant intentionally disregarded the interest of his employer and violated specific instructions of the employer to refrain from interfering with the zoning application.
>
> In the first place the letter written by appellant does not violate any specific instruction of a superior that appears in this record. The October 31 letter simply informed appellant that he had no purpose in attending zoning board meetings as an employee of the Bureau and implied serious consequences should he do so.
>
> Thereafter he did not attend a meeting of the zoning board. The letter he wrote did not suggest that he was acting in behalf of the Bureau. More to the point, however, is the fact that appellant had a right to express his views to the zoning board. The granting of a variance is a matter of public concern. The fact that the department had violated the security restrictions placed upon it when it obtained a temporary variance was certainly a relevant matter to a board which was considering making the variance permanent.

We cannot see that the Bureau had any legitimate interest in trying to prevent appellant from disclosing the security breaches. PICKERING V. BOARD OF EDUCATION, 391 U.S. 563, 20 L.ed. 2d 811, 88 S. Ct., 1731 is dispositive and we hold that the action of appellant was not misconduct within the meaning of KRS 341.370 (1)(b).

DECISION: Claimant held qualified on grounds he was discharged for reasons other than work related misconduct.

The Kentucky Court of Appeals, GANT V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 82-CA-952-MR. UNPUBLISHED. Not to be cited or quoted. For guidance only.

4091 NEGATIVE ATTITUDE; BY MEMBER OF MANAGEMENT.

ISSUE: Whether claimant, a member of management, is guilty of misconduct by displaying a negative attitude toward the employer, notwithstanding an otherwise satisfactory work record.

FACTS:

1. Worked three years part-time; then became a regular full-time employee of the captioned grocery chain.
2. Placed in management training, where he performed adequately.
3. Became disillusioned when a co-worker was promoted to a managerial position, which he felt should have been offered to him.
4. However, made no complaint about this over the ensuing two years, until approximately three weeks prior to discharge.
5. When in an interview with supervising trainer and area manager, claimant expressed his displeasure with the co-worker's promotion by stating "to hell" with the company.
6. Claimant was asked to reassess his feelings toward the company.
7. One week later management again met with claimant, and he again displayed extreme dislike of the company, and repeated the statement, "to hell" with the company.
8. Claimant was then discharged.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

This case presents a single question: Can the attitude of an employee, despite otherwise unblemished work record, constitute a sufficient disregard for the employer's interest to warrant a finding of misconduct? We think it can.

In this case we have an employee whom management had seen fit to place in its training program for managers. He had progressed to the top salary level for nonmanagerial employees and would have shortly been considered for promotion into the managerial field. At a minimum, the employer could expect that such workers display a positive attitude towards their positions and the company. The very essence of the success of a business concern such as this lies in the attitude of its managerial staff. Where, as in this case, the attitude is admittedly anti-management or anti-company, the success of the business is jeopardized. In such a case there need not be evidence that the work performance of the claimant had deteriorated, the disservice to the employer's interest lies in the negative attitude.

We do not feel compelled to discuss any real or imagined reason for the deterioration in attitude. The record is replete with just such discussions, none of which can be said to mitigate claimant's actions. The employer justifiably discharged claimant for reasons which constitute misconduct.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 19517 PRECEDENT

4100 DAMAGE TO COMPANY PROPERTY; GROSS NEGLIGENCE.

ISSUE: Whether claimant's failure to perform routine maintenance on company vehicle, resulting in severe damage to vehicle, is sufficient to sustain a finding of misconduct.

FACTS:

1. A route serviceman for one and one-half years was assigned a truck that he was responsible for fueling at the employer's gasoline pump and supplying with oil and coolant, as needed from employer stock.
2. Was to periodically check oil level in crankcase.
3. In October, 1983, added, at one time, two quarts of oil to the truck's five quart capacity crankcase.
4. On December 15, 1983, the truck began a loud knocking and claimant stopped and parked the truck.
5. Truck was found to contain but two quarts of oil in its crankcase.
6. No evidence anywhere of an oil leak.
7. Engine replaced at a cost of $1,600.00.
8. Claimant discharged for abuse of and damage to the truck.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct connected with the work is generally defined as those acts or omissions by which a worker willfully or wantonly disserves the legitimate business interest of his employer. Actual damage to those interest need not be proven; disservice to them is sufficient, so long as it results from willfulness or wantonness.

The truck assigned to claimant was the property of his employer. Claimant was responsible for checking its oil level frequently enough to assure that it matched the five quart capacity of its crankcase. The adding of two quarts of oil at one time in October, 1983 sufficiently evidences a failure of ordinary care. Had he checked the crankcase dipstick at frequent enough intervals, he should have had to add only one quart at a time, not more.

All evidence of record points to his letting the supply of oil in the crankcase dwindle to only two quarts on December 15. If a shortage of two quarts two months earlier was failure of ordinary care, the shortage of three quarts on December 15 was a failure of slight care. It amounted to gross negligence. And the result of that gross negligence was damage to the employer's truck in the amount of $1,600.00.

Since actual damage thus resulted, it is unnecessary to ascertain whether claimant's failure was wantonness as well. In either case, it amounted to misconduct connected with the work. Therefore, within the meaning of the law, his discharge was for misconduct connected with the work.

DECISION: Claimant discharged for work related misconduct.

C.O. # 38980 NONPRECEDENT

4110 PREVAILING COURSE OF CONDUCT; NO WARNING AGAINST.

ISSUE: Whether a claimant who engages in a course of conduct for which he is not warned, is guilty of misconduct when he is discharged for doing so.

FACTS:
1. Hopelessly conflicting or inconclusive testimony on each alleged act of misconduct.
2. However, the record clearly shows that the claimant was never told that his work was unsatisfactory, or that his job was in jeopardy.
3. Claimant discharged one day prior to the end of his one year probationary period; thus preventing him from attaining merit status as a state employee.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

> The time honored definition of industrial misconduct, particularly appropriate to cases of this nature, is found in a Wisconsin case, BOYNTON CAB COMPANY V. NEUBECK, 237 WIS 249, 296 N.W. 636 (1941):
>
> > ". . . the term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgement or discretion are not deemed 'misconduct' within the meaning of the statute."

Also, appropriate to cases of this nature is the general rule that when misconduct is allegedly based upon a course of conduct which has prevailed over a long period of time, it should be made clear to the worker that his job is in jeopardy before dismissing him without a chance to conform to the employer's requirements. In this case the claimant was never warned, counseled, or otherwise put on notice by the employer that his conduct was jeopardizing his job. Based upon that fact and the conflicting and inconclusive testimony presented, we find, after careful review of the record, that the evidence in this case is insufficient to sustain a finding of misconduct.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 26640 NONPRECEDENT

4130 POLYGRAPH TEST; REFUSAL TO SUBMIT TO (EVIDENCE UNRELIABLE).

ISSUE: Whether a claimant who either refuses to take a polygraph test or who is discharged based on evidence from the test is guilty of misconduct.

FACTS:
1. Following an inventory shortage at the captioned convenience type food store, claimant and other employees were scheduled to take a polygraph test.
2. Claimant, store manager, requested the inventory be taken again since it had been completed in record time. Request denied.
3. Claimant requested the inventory crew be examined also. Request denied.
4. Claimant refused to submit to the polygraph test and was summarily discharged.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> An employer's requirement that employees submit to polygraph examination is an unreasonable rule. Polygraph examinations are unreliable. CONLEY V. COMMONWEALTH, Ky., 382 SW 865 (1964); SWOPE v. FLORIDA INDUSTRIAL COMMISSION UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 159 S. 2d 653 (Fla. App. 1963). It is unreasonable that an innocent employee would be forced to risk loss of his reputation and future employment because of his employer's requirement that he submit to polygraph examination.
>
> Had the appellant taken the test and the results indicated that she was responsible for the shortages, and had she been discharged for that reason, unemployment compensation benefits would have had to be granted. The Unemployment Insurance Commission must rely on evidence that complies with the rules of evidence. PIPER V. THE SINGER COMPANY, INC., Ky. App., 663 SW 2d 761 (1984). Results of polygraph examinations are inadmissible to both civil and criminal actions. CONLEY supra; PERRY V. COMMONWEALTH, EX REL KESSINGER, Ky., 652 SW 2d 655 (1983). In as much as the results of the tests cannot be used to show misconduct, refusal to submit to those tests cannot be used to show misconduct.

We hold that it is unreasonable for an employer to require its employees to submit to such an unreliable test for purposes of unemployment compensation benefits.

DECISION: Claimant held qualified on grounds he was discharged for reasons other than proved misconduct in connection with his work.

Kentucky Court of Appeals, DOUTHITT V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND MINIT MART FOOD STORE, 676 SW 2d 472. PRECEDENT

4140 BANKRUPTCY; VIOLATION OF COMPANY RULE.

ISSUE: Whether a claimant who files bankruptcy following two garnishments is guilty of misconduct.

FACTS:
1. Company policy provides for discharge upon receipt of three garnishments or two garnishments and a declaration of bankruptcy.
2. After working eleven years, wages were garnished on April 26, 1962, and October 24, 1962, for debts incurred for the purchase of automobile tires and glass, respectively.

3. Warned upon receipt of first garnishment that he would be discharged if he received two more.
4. Nothing was said regarding the effect on his employment of a declaration of bankruptcy.
5. On December 17, 1962, company received notice that claimant had declared bankruptcy.
6. Claimant was discharged.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Garnishments resulting from debts incurred for luxury items are considered acts of misconduct. Therefore, claimant's two garnishments could not be considered acts of misconduct. However, the precipitating cause of discharge was the declaration of voluntary bankruptcy. Voluntary bankruptcy is a legal means of relief to a debtor who can no longer meet his financial obligations. To the extent that he is granted relief from his creditors under the bankruptcy laws, he lessens the likelihood of further attachments on wages. In this sense, a declaration of bankruptcy works to the benefit, rather than the detriment of the bankrupt's employer. Though claimant's conduct fell squarely within the prohibition of a company rule, company rules are not conclusive upon the issue of misconduct.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 4969 NONPRECEDENT

4150 MISCONDUCT CONNECTED WITH THE WORK; ALLEGED OFF DUTY CRIMINAL ACTIVITY.

ISSUE: Whether a claimant who allegedly commits a criminal act off duty and away from work is guilty of misconduct connected with the work.

FACTS:
1. Claimant worked as a stock clerk for the captioned grocery chain.
2. On Sunday, August 12, 1962, while off duty and away from work, he was arrested and charged with illegal sale of alcoholic beverages.
3. Returned to work Monday, August 13, 1962, and continued in his employment until October 1, 1962, when he was suspended and later discharged because of the August 12, 1962, incident.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

It is obvious from the above language of the law that there must be a direct connection between the act of misconduct committed by a worker and his job. The act herein complained of was on a Sunday when the appellant's store was closed and in no way interfered with the ability of the claimant to continue his employment. Coupling that with the fact that for a period of more than six weeks the appellant took no action whatsoever, we must conclude that this claimant was discharged for reasons other than misconduct in connection with his work.

DECISION: Claimant discharged for reasons other than misconduct connected with the work.

C.O. # 4722 NONPRECEDENT

4160 GARNISHMENTS; FOR NECESSITIES.

ISSUE: Whether claimant is guilty of misconduct when he incurs three garnishments for necessaries purchased prior to employment.

FACTS:

1. Union contract allows for discharge upon receipt of three garnishments in two years.
2. Prior to beginning his twenty-one months employment with the captioned employer, claimant purchased on credit, twin beds for his four preschool children and a washing machine for his wife.
3. Made installment payments until November 1968, when a fire in his house destroyed some of the purchases and took the lives of three of his children.
4. Still owes $700.00 funeral expenses.
5. Absent from July 1969 to October 3, 1969, while undergoing surgery.
6. Received $77.00 per week worker's compensation.
7. Tried to negotiate a payment schedule with aforementioned creditors, but to no avail.
8. On October 22, 1969, received a chargeable garnishment from this creditor.
9. Off work from January 3, 1970, through February 16, 1970, for further surgery.
10. Received two more garnishments from the same creditor on February 25 and March 25.
11. Claimant was discharged for receiving three garnishments within two years.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Historically, the Commission held that under any set of circumstances a discharge for garnishments was not for reasons connected with the work, but a decision of the Jefferson Circuit Court held that receipt of garnishments is misconduct connected with the work if the indebtedness is for luxuries, and the worker makes no attempt to avoid them and does not appear at the referee hearing to explain that the garnishments were unavoidable (Jefferson Circuit Court Civil Action Number 11429).

The Commission finds that the referee capsuled the present case when he said, "...the record contains adequate proof of an unbroken chain of causation between largely unavoidable expenses arising from injury or death and the garnishments which led to claimant's discharge..." It is added that a good portion of the indebtedness was for necessaries purchased prior to employment, and claimant used reasonable means to avoid such garnishments.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 8742 NONPRECEDENT

4175 PHYSICAL INABILITY TO FULFILL CONTRACT OF HIRE.

ISSUE: Whether a claimant who is physically unable through no fault of his own, to fulfill contract of hire is guilty of misconduct.

FACTS:

1. Hired by the City as a police recruit, with requirement that he complete ten weeks of approved training before becoming a permanent member of the force.
2. At the end of the third week of training, injured his back when slipping and falling while taking a shower.
3. Injury prevented him from completing the physical activities part of the training.
4. Persuaded that claimant was physically unable, now or ever, to complete the training, City discharged claimant rather than jeopardize state salary supplements which were contingent upon each member of the force completing the required training.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The employer argued that the contract of hire had been violated when the claimant was injured and unable to complete training, and therefore the claimant should be denied benefits under the discharge for misconduct provision of the unemployment insurance law. The claimant responded

that the injury was received involuntarily through no fault of his own, and therefore his discharge was for reasons other than misconduct.

Under unemployment insurance law, the concept of fault is applied in determining if benefits are to be paid or denied to a worker whose contractual relationship of employment has ended; benefits are denied where the relationship has ended through worker fault and allowed where it has ended without worker fault.

In this case, the claimant received an injury, through no fault of his own, which prevented him from completing the terms of hire. The claimant's discharge was due to circumstances beyond his control. His discharge cannot be attributed to misconduct under these circumstances.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 47074 PRECEDENT

4176 PHYSICAL INABILITY TO WORK; LEAVE OF ABSENCE DENIED (VOLUNTARY QUIT OR DISCHARGE).

ISSUE: Whether a claimant voluntarily quits or is discharged, when she is physically unable to work and is denied a medical leave of absence.

FACTS:
1. A production laborer, claimant last worked April 25, 1988, at which time she was in the fourth month of her pregnancy.
2. Because of complications with her pregnancy, she was advised by her doctor to go on medical leave.
3. While it was uncertain for how long the leave would be needed, there was the definite possibility that she would not be able to return until after the anticipated date of delivery.
4. Employer had no policy for granting medical leaves.
5. On May 3, 1988, request for medical leave was denied, and the claimant was replaced without guarantee of reemployment.
6. Her pregnancy ended in miscarriage on May 28, 1988.
7. On June 21, 1988, claimant contacted the employer seeking reemployment; however, there were no openings available.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In the Declaration of Public Policy, which prefaces the State's original unemployment insurance law, the persons the Act was designed to protect were identified as those unemployed through no fault of their own.

In the case under appeal, the claimant was unable to work because of a physical disability beyond her control. She was not at fault in causing her inability to work. It was precisely the claimant's inability to work which led the captioned employer to sever the employment relationship by denying the claimant a leave of absence, and replacing her, forthwith. The requested leave of absence, which was open ended only in that it would have possibly lasted for the duration of a full-term pregnancy, would have maintained the employer-employee relationship. It was not granted, and the claimant was involuntarily separated through no fault of her own.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 51695 NONPRECEDENT

4180 MINORITY STOCKHOLDERS; UNEMPLOYED BECAUSE OF SALE OF ASSETS BY MAJORITY STOCKHOLDER.

ISSUE: Does a minority stockholder, by sale of stock or vote to sell assets, voluntarily participate in the termination of his employment so as to deprive himself of unemployment benefits.

FACTS:
1. Claimant and his brother were employees and minority stockholders in a family business in which their father was majority stockholder.
2. On May 1, 1985, the assets of the business were sold to another company, and after three weeks of assisting the new owner in the transition phase, claimants became unemployed.
3. Claimants contend that the termination of their employment was not voluntary.
4. The decision to sell the assets was made by the father, who felt that, for his own economic security, it would be better for him to retire.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Jefferson Circuit Court reasoned:

> The evidence in our case at worst for the claimants, is that they acceded to the patriarch's decision to sell the business and retire. Perhaps their evidence would have been better by corporate minutes reflecting their "nay" votes. The minutes of the "stockholder meetings" around the dinner table likely would not reveal more than the sons' compliance with the father's decision. By such accession they knew that their employment with the new owner was tenuous at best.
>
> One can only speculate what benefits the claimants received, as minority stockholders, by the father's decision to sell the corporate assets and end the business. It is this speculation about this case that chafes any reader's interpretation of the "Declaration of State of Policy" stating the Acts' purpose to be, inter alia, to lighten the burden "...which now so often falls with crushing force upon the unemployed workers..."

However, and even with a large hole through the corporate veil, the undisputed evidence of record shows that the brothers had no controlling interest in the corporation, that they desired to continue employment in this business, albeit termination was inevitable, and that they were bona fide and active employees in the business. What lurked in the minds of father and sons at the dinner table can only be known by those present at those meetings. The evidence of record is that the brothers had no "reasonable alternative" but to cooperate in the demise of the family business.

The Court concluded that such an alternative was not voluntary.

DECISION: Claimants were not disqualified on grounds they were involuntarily separated through no fault of their own.

> Jefferson Circuit Court, ROBERT JAFFE AND IRWIN LEWIS JAFFE V. DISPENSERS OPTICAL SERVICE CORP. AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 85-CI-07796 (4-4-86). Not to be cited or quoted. For guidance only.

4181 DISCHARGE OR JOB ABANDONMENT DUE TO ALCOHOLISM.

ISSUE: Whether a claimant is discharged or voluntarily quits her job when loss of employment results from continued absence caused by alcoholism.

FACTS:
1. Worked nine months as a supervisor in charge of the captioned employer's dining room.
2. Missed a great deal of work because of her alcohol problem.

3. Permitted to return to work following absences related to alcohol problem.
4. Appeared at work June 24, 1981, intoxicated and unable to work. Had to be taken home by other employees since she was unable to walk on her own.
5. Claimant notified her employer that she would be of no use to the business in her present condition.
6. Removed from the payroll July 7, 1981, after failing to report for work following June 24, 1981.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit work without good cause attributable to the employment.

The Kentucky Court of Appeals held:

> That Ms. Egnew was frequently absent from work and, during her last absence, told her employer that she was of no use to the restaurant in her condition. We agree that the Commission's finding that her actions initiated the separation from employment were supported by the evidence.
>
> These findings of fact may not be disturbed unless the evidence is so persuasive that one would have no choice but to find for the claimant. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY, Ky., 539 SW 2d 293 (1976). Both Covington Haus's owner and Ms. Egnew testified that her separation from employment came only after she had failed to appear at work for a considerable length of time. We believe the Commission correctly found that Ms. Egnew's continued absence from her work without the employer's consent constituted a voluntary abandonment of employment.
>
> Further, we do not believe that alcoholism precludes a finding of misconduct or of voluntarily quitting one's employment. Appellant, in arguing that Ms. Egnew's disease of alcoholism necessitates a reversal of the Commission's findings, cites the case of MOELLER V. MINNESOTA DEPARTMENT OF TRANSPORTATION, 281 NW 2d 879 (Minn. 1979), for the proposition that an alcoholic should not be held strictly accountable for his actions.

This blanket statement does not accurately reflect the holding in MOELLER. The Minnesota Court, in holding that MOELLER was entitled to unemployment benefits, was construing a statute which required a claimant to have made "reasonable efforts" to retain his employment. This case is therefore distinguishable to the situation currently at bar.

Our Kentucky statute is more similar to the Florida one cited in OKALOOSA GUIDANCE CLINIC, INC. V. DAVIS, 384 So. 2d 1336 (Fla. App. 1980), in which it was stated:

Davis was terminated for misconduct, which included failure to report to work as ordered, removal of himself from an employer - provided opportunity to be treated coming onto the employer's premises in an intoxicated condition, and absence from his duties, all of which placed a burden on the employer to perform its function with a reduced staff. Davis' actions constituted a misconduct as defined by 443.06(9)(a)..ID. at 1336.

The Kentucky General Assembly has also pointed out in KRS 341.370 (6), that:

> "Discharge for misconduct" as used in this section shall include but not be limited to separation initiated by the employer for ... reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during work hours...

Thus, we cannot say that the fact that an employee is an alcoholic precludes either the finding of a voluntary quitting or of misconduct. On the contrary, the use of alcohol affecting one's ability to work, such as appearing at work inebriated, would seem to disqualify the claimant from unemployment benefits.

DECISION: Claimant disqualified on grounds she voluntarily left her employment without good cause.

Kentucky Court of Appeals, EGNEW V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND COVINGTON HAUS, 687 SW 2d 866. PRECEDENT

4182 DISCHARGE VERSUS VOLUNTARY QUIT (FOLLOWING ANGRY OUTBURST).

ISSUE: Whether claimant, who, in an angry outburst, requests her employment be terminated, has been discharged or voluntarily quits the employer.

FACTS:

1. Worked four years as a part-time bookkeeper.
2. Liked her job and had a good working relationship with the owner until the last two weeks of her employment.
3. Claimant alleges, without substantiating evidence, that the owner made unwanted amorous advances toward her while on a business trip.
4. Thereafter, informed co-workers she would soon quit.
5. Shortly thereafter she was notified by the manager that she and the other bookkeeper were going to have their hours reduced because business was slow.
6. Owner attempted to discuss schedule change with claimant, but she would not discuss it.
7. When owner AGAIN tried to discuss the schedule change, she lost her temper, created a disruptive scene, and URGED the owner to terminate her employment. He did just that.

REASONS: KRS 341.370 provides for the imposition of a duration disqualification when a worker has been discharged for reasons of work connected misconduct, or if she has voluntarily quit her employment without good cause. If a separation from employment occurs and the employer initiated it, the separation is a discharge. If the worker does so, it is a quitting. In this case the employer had no intention of discharging claimant, and he terminated her employment only after she refused to discuss the change in her schedule and requested, in an angry outburst, that her employment be terminated. She had previously told co-workers of her intention to quit. In this case we find that claimant did quit her employment. A resignation need not be announced for a worker to voluntarily quit. She need only embark on a course of conduct certain to result in termination from employment, as is found in this case.

It must now be determined whether or not claimant's quitting was with good cause. Good cause is measured by the rule of reason. It is reasonable for a worker to leave employment that becomes unsuitable, or when circumstances are such as to prohibit the pursuit of reasonable alternatives to quitting. The evidence presented in this case fails to show either situation existed when claimant quit her job. Claimant contends the work became unsuitable because of alleged amorous advances by her employer, and because a reduction in hours made the work economically undesirable. As to the first, there is no supportive evidence of claimant's allegations, aside from her own self-serving testimony; and after returning to work, there is no evidence of anything other than a business relationship with her employer. As to the second, since she did not ascertain what the actual reduction in her hours would be, that reduction cannot be used to render the work unsuitable. Finally, before embarking on the course of action which led to her separation from employment, claimant could have reasonably attempted to discuss the reduction in hours with her employer, as he attempted to do, twice.

DECISION: Claimant voluntarily left the captioned employer without good cause attributable to the employment.

C.O. # 20649 NONPRECEDENT

4190 WORKING CONDITIONS; RADICAL CHANGE IN.

ISSUE: Whether a radical change in working conditions, unilaterally imposed by the employer for nondisciplinary reasons, is in effect a discharge for reasons other than misconduct with resultant lack of reserve account relief for the employer.

FACTS:
1. Worked as a waitress for two years.
2. First worked the regular 11:00 AM to 7:00 PM shift for six months, following which she was assigned to the regular 5:00 AM to 1:00 PM shift.
3. In December, 1973, absent about two weeks because of personal illness.
4. When she returned, she was assigned to a swing shift, working various hours each day between 5:00 AM and 10:00 PM.
5. Refused to work irregular hours; offered to work any regular shift, but was not permitted to do so.
6. There is neither allegation nor evidence that the change in work schedule was caused by misconduct on claimant's part.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Claimant's termination from her employment was in effect a constructive discharge. Claimant had worked regularly scheduled hours for some time. When she returned from a brief absence her regular schedule had been changed to an irregular schedule whereby claimant worked different hours each day at the convenience of the employer. A radical change in the terms of employment, as here, can operate as a termination of employment and in effect is a constructive discharge. There is no evidence of misconduct as the reason for the change in work schedule.

DECISION: Claimant discharged for reasons other than misconduct. However, claimant disqualified on grounds she refused an offer of suitable work without good cause.

C.O. # 11102 NONPRECEDENT

4203 PREGNANCY RELATED LOSS OF EMPLOYMENT.

ISSUE: Whether a claimant voluntarily quits when she leaves employment because of pregnancy or termination of pregnancy.

FACTS:
1. Hired without reservation well into her second trimester of pregnancy.
2. Four weeks prior to her delivery date, she informed her employer that her doctor had advised her to remain in non-work status until release after the birth of her child.
3. Employer had no maternity leave policy and informed claimant she would be returned to work IF work were available.
4. Upon release by her doctor, she was told no work was available.
5. At this time she filed a claim for benefits, and the employer protested, asserting claimant quit for personal reasons.

REASONS: KRS 341.370 (1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Counsel for the claimant argues that denial of unemployment insurance benefits to his client is violative of 26 USC section 3304 (a)(12), which provides, in pertinent part, that "no person shall

be denied compensation under such state law solely on the basis of pregnancy or the termination of pregnancy." He cites in support of his contention BROWN V. PROCHER, 502 F. Sup. 946 (1980). In that case the United States Federal District Court South Carolina District, in considering a case similar to the instant one said:

> "In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women (26 USC Supra). These plain words must necessarily be construed to convey their ordinary meaning. (Citations omitted). If Congress intended a more limited prohibition or carved out exceptions, it would not have imposed a 'fundamental standard' using such broad and sweeping language ... The language it did use, however, obviously left no room for exceptions. It does not permit denial of benefits, as in South Carolina, solely because (1) a woman, for pregnancy related medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job either before or after her maternity leave was scheduled to expire. The plain and unambiguous words of the enactment do not contemplate consideration of such irrelevant factors."

In view of the clear mandate of 26 USC 3304 (a)(12), claimant may not be denied benefits when her separation was clearly caused by pregnancy. We intend no weakening of the "attributable to the employment" clause contained in KRS 341.370 (1)(c), but hold simply that, in this particular class of case, the statute's limitations are preempted by federal law. Where as here, the federal statute preempts our own and mandates payment of benefits in cases such as the instant one, and where state statute prohibits payments of benefits unless the separation is attributable to the employment, clearly the federal mandate requires that the separation be found to be attributable to the employment.

This order will constitute precedent for all future cases where the loss of employment can be directly attributed to pregnancy, or termination of pregnancy. This precedent does not apply to those workers who seek and are granted maternity leave, during the time of their leave, or those who elect to totally sever the employment connection when leave of absence is available. For those employees in the former category, employment has not been lost, for those in the latter, pregnancy or termination thereof was not the cause of loss of employment.

DECISION: Claimant did not voluntarily leave her employment and she is qualified to receive benefits for which she is otherwise eligible.

C.O. # 25886 PRECEDENT

4204 INDEFINITE LEAVE OF ABSENCE; REFUSAL BY CLAIMANT TO RETURN FROM AND SUBSEQUENT FAILURE BY EMPLOYER TO RETURN TO WORK.

ISSUE: Whether a claimant, who is granted a maternity leave of unspecified length, has quit work when she refuses recall because of parenting complications.

FACTS:

1. Worked six and one-half years when, during her eighth month of pregnancy, she was verbally granted a maternity leave of unspecified length, to begin around July 1, 1967.
2. Her baby was born August 8, 1967, and claimant was physically able to work a couple months later.
3. However, because of the baby's allergic reaction to cow's milk, claimant was advised by her doctor to breast feed the baby until the baby was six months old.
4. In November, the employer contacted the claimant and asked her to return to work.
5. Claimant declined because of the aforementioned complication with feeding her baby.

6. The company plant was severely damaged by fire in February, 1968, and had to be moved to a new location.
7. In March, 1968, claimant informed the employer she was ready to return to work.
8. Claimant was informed that she could not be rehired until the plant was moved and a suitable vacancy occurred.
9. Claimant then filed her claim for benefits.

REASONS: KRS 341.370 provides for the disqualification from benefits for the duration of unemployment which results from a voluntary quitting without good cause; a discharge for misconduct; or a refusal of suitable work without good cause. Further, under the provisions of KRS 341.350, a worker who is on voluntary leave of absence is unavailable for work for the duration of that leave.

The claimant was granted a maternity leave which was for an unspecified period of time. This leave, informal as it was, was intended to end when claimant was able to return to work. When the company called her to return in November, she was unable to do so because of complications which had arisen, namely her infant, whom she had been breast feeding, was allergic to cow's milk and her doctor advised her to continue the breast feeding until the baby was six months old. We feel that because of these circumstances the maternity leave was not terminated at this time, but continued until the circumstances permitted her to return. The claimant, therefore, was immune to the work offer made in November and cannot be held to have voluntarily left her employment at this or any other time.

DECISION: Claimant was involuntarily separated from her work in March, 1968, due to a lack of work, and she is not disqualified.

C.O. # 7873 NONPRECEDENT

4210 MILITARY SPOUSE LOSES JOB WHEN HUSBAND TRANSFERRED TO THE CONTINENTAL UNITED STATES.

ISSUE: Whether a claimant is voluntarily or involuntarily unemployed when she loses her job in West Germany because her husband is transferred by the U.S. Army to the Continental United States.

FACTS:
1. Claimant, a military spouse, accompanied her husband to a U.S. Army Post in West Germany.
2. Under an agreement between the U.S. Armed Services and the government of West Germany, claimant sought and secured employment as a secretary with the Department of the Army.
3. As a condition of that agreement, claimant could not stay in West Germany beyond the time when her husband left West Germany.
4. Claimant worked until terminated by the Department of the Army at the date of her husband's return to the continental United States.

REASONS: The referee held claimant disqualified under the provisions of KRS 341.370 (1)(c), on grounds she had left her most recent work voluntarily without good cause attributable to the employment. Such has been the general holding in this jurisdiction since the term "attributable to the employment" was added to the statute in 1980, and must continue to be the case so long as this type of separation is viewed as voluntary. We are convinced by our research in the area, however, that this claimant did not leave her employment of her own volition.

We are unable to locate any case from this jurisdiction directly on point, however, it appears to us that KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. AMERICAN NATIONAL BANK AND TRUST COMPANY, Ky., 367 SW 2d 260 (1963) is dispositive. In that case, the Court of Appeals, then Kentucky's highest, considered the case of a worker who

accepted temporary work as a watchman at a bank while renovation and repair was underway; said work was to terminate at the completion of the renovation. The work ended several months later, and the worker filed his claim for unemployment insurance benefits. He was initially disqualified on grounds he had voluntarily quit. The Court of Appeals reversed, holding the claimant had not quit his employment but had been terminated when the job ceased to exist. We believe that case is analogous to the instant one.

Claimant accepted employment which she knew would terminate when her husband's tour of duty ended. This was a precondition of her contract of hire. She had no control over the termination of her work and could have avoided that occurrence only by failing to accept the position initially. We conclude that where an employee is required to leave his employment because he has become ineligible for that employment under the terms of his employment, such employee has not voluntarily quit his employment and cannot be disqualified. Claimant herein falls within this category of employee and thus may not be denied unemployment insurance benefits.

This position is clearly the majority view. See STATE DEPARTMENT OF INDUSTRIAL RELATIONS V. MONTGOMERY BAPTIST HOSPITAL, INC., 359 S. 2d 410 (Ala. Civ. App. 1978); CERVANTES V. ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT., 177 Conn. 132, 411 A.2d 921 (1979); WALKER MFG. CO. V. POGREBA, 210 Neb. 619, 316 NW 2d 315, 30 A.L.R. 4th 1197 (1982); CAMPBELL SOUP COMPANY V. BOARD OF REVIEW, 13 NJ 431, 100 A.2d 287 (1953); Annot., 30 A.L.R. 4th 1201 (1984).

DECISION: The Commission, having reviewed the record and being advised, sets aside the decision of the referee and holds claimant did not voluntarily quit her most recent work, but was simply separated under nondisqualifying circumstances. She is qualified to receive benefits for all weeks for which otherwise eligible.

C.O. # 51976 PRECEDENT

Read in conjunction with entries 4211 and 4212.

4211 TEMPORARY WORK ENDS; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits when temporary work ends.

FACTS:
1. Hired as a bank guard to protect employer's temporary place of business while permanent premises were being renovated.
2. Aware that employment would end at the conclusion of the one-year renovation project.
3. Claimant filed for benefits when his job ended, and the employer protested, asserting claimant voluntarily quit.

REASONS: KRS 341.370 (1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

IN AN AFFIRMANCE OF THE COMMISSION, the Kentucky Court of Appeals ruled that the claimant accepted employment which he knew was temporary, but he did not agree to leave the work. When the need to have the work done ceased to exist, he became unemployed. Had the need for the work continued, he would have continued to work. Therefore, in the opinion of the Court, a correct interpretation of the statute is that, an employee who accepts a job which he knows in advance to be temporary does NOT voluntarily leave when the job ceases to exist.

DECISION: Claimant did not voluntarily quit; but rather, he was involuntarily separated under nondisqualifying conditions.

Kentucky Court of Appeals in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND KING V. AMERICAN NATIONAL BANK 367, SW 2d 260 PRECEDENT

NOTE: Read in conjunction with entries 4210 and 4212.

4212 PARI-MUTUEL CLERKS.

ISSUE: Whether pari-mutuel clerks are voluntarily or involuntarily unemployed at the conclusion of the race meeting.

FACTS: See "Issue" above.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> The significance of the element of the existence of a choice is illustrated by KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG, Ky., 389 SW 2d 451. There the employer unilaterally adopted a policy that all workers must retire at age 65. There was no bargaining or exercise of any choice by the workers. This court held that a worker in that case whose employment was terminated when he reached 65 had not voluntarily left his work. The court said:
>
> "As we read the record in this case Young did not have a choice. We think the word 'voluntarily' must certainly be defined as meaning 'freely given' and 'proceeding from one's own choice or full consent.'"

So we think that any agreement that could be considered to have been made by the pari-mutuel workers in the instant case, whether or not made through their union as "agent," to leave work at the close of a meet, was in no sense the exercise of a choice of alternatives so as to be classifiable as a voluntary election to leave the work.

With the "agency theory" properly out of the way, it becomes apparent that the instant case involves the same principle that governed in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. AMERICAN NATIONAL BANK AND TRUST COMPANY, Ky., 367 SW 2d 260. There the employer bank took temporary quarters during renovation of its permanent building and engaged the employee as a guard at the temporary location. It was contended by the bank that the employee had voluntarily quit when the renovation work was completed and the need for a guard at the temporary quarters ceased, because he had known from the outset that the work would so cease. We rejected that contention, saying in part (367 SW 2d at p. 262):

"Thus it is our opinion that a correct interpretation of the statute is that an employee who accepts a job which he knows in advance to be temporary does not voluntarily leave when the job ceases to exist."

The appellant in the instant case suggests that a different rule should apply here because the state law as administered by the State Racing Commission fixes the periods during which racing meets may be held at each track, and therefore, the employer track has no choice to continue the work beyond the fixed closing date - the employer has no power under the law to continue the employment. We find no basis for this argument in the terms of the unemployment compensation statute. Where unemployment results from the discontinuance of operations by the employer, the reason for the discontinuance has no bearing at all on the right of the workman to draw benefits (except where discontinuance is due to a strike). It makes no difference whether the discontinuance is caused by a public law, as in the instant case, or is caused by the natural law of

economics, as in the American Bank case, because the reason why the employer discontinued furnishing the work is irrelevant.

Actually, the most plain and simple reason why the workmen in the instant case cannot be considered to have left their most recent work is that the work left them; the work simply ceased to exist; the employer discontinued the furnishing of work to be done. To "leave" something contemplates that the thing is left behind; here no jobs were left behind.

DECISION: Claimants held to be involuntarily unemployed and not disqualified.

Kentucky Court of Appeals, CHURCHILL DOWNS INC. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 454 SW 2d 347. PRECEDENT

NOTE: Read in conjunction with entries 4210 and 4211.

4280 FINAL ACT "ORDINARY" NEGLIGENCE; MISCONDUCT; IN LIGHT OF PRIOR WARNINGS.

ISSUE: Whether a claimant who has a long history of misconduct for which she has been warned should be disqualified when the final instance of negligence, standing alone, might otherwise not be misconduct.

FACTS:
1. Production worker paid on a piece work basis (hourly rate plus incentive bonus).
2. During her twenty-two months with the company she received warnings for:
   a. falsifying production reports (from which pay was computed);
   b. leaving assigned work area and quitting work early;
   c. excessive absenteeism and tardiness;
   d. having intoxicants on company property (suspended one week);
   e. taking extended lunch breaks and quitting work early; and
   f. failure to follow supervisor's instructions (suspended one week).
3. Put on notice that if she received a warning within the next twelve months, she would be discharged.
4. Within that twelve month period, the final incident for which she was warned and discharged occurred when she erroneously reported her production to be significantly higher than indicated on the company's random audit.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The time-honored definition of industrial misconduct, particularly appropriate to cases of this nature, is found in a Wisconsin case, BOYNTON CAB COMPANY V. NEUBECK, 237 WIS 249, 296 N.W. 636 (1941):

> ". . . the term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgement or discretion are not deemed 'misconduct' within the meaning of the statute."

In this case claimant received numerous warnings from her employer and established a long-term history of incidents which demonstrated a disregard of her employer's interests.

The last incident, resulting from her own negligence or carelessness, would not in itself ordinarily be sufficient to sustain a finding of misconduct. However, in consideration of her previous record, especially a previous warning regarding incorrect production vouchers, the last incident culminating in her discharge contains elements of carelessness and negligence of such a degree and recurring nature as to demonstrate a reckless disregard of her employer's interests.

DECISION: Claimant disqualified on grounds she was discharged for work related misconduct.

C.O. # 20711 NONPRECEDENT

4281 FALSIFICATION OF COMPANY RECORDS; DOCTOR'S STATEMENT.

ISSUE: Whether a claimant is guilty of misconduct when he adds, in his own handwriting, to a doctor's statement that he was able to return to work.

FACTS:

1. Worked thirteen years as a mechanic, without warning or reprimand.
2. Injured his hand and was granted a thirty-day medical leave of absence.
3. Leave could be renewed at each subsequent thirty-day period.
4. Leave was extended for a second thirty day period upon presentation of a medical statement indicating he was still unable to work.
5. Shortly after the leave was extended, claimant's doctor told him he could return to work and gave him a statement indicating same.
6. Claimant sought a second opinion and secured a statement from another doctor suggesting that he stay off work until the end of the extension.
7. Having misplaced the doctor's statement releasing him to work, claimant added to another doctor's statement, which simply stated he had been seen by the doctor, that he was able to return to work.
8. Employer recognized the difference in handwriting on the doctor's statement, and claimant admitted to altering the document.
9. Employer had a published rule against falsification of company records, for which disciplinary action-including discharge-was the penalty.
10. Claimant was discharged for falsifying the doctor's statement.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Commission held that falsification of a statement that was used to justify a worker's absence has always been considered falsifying an employer's record. Since the claimant admitted the offense, he is guilty of misconduct. In its affirmation, the Nicholas Circuit Court held that the altered statement tendered to the company to become a part of the company's personnel records, became a company record upon tender of same.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 38101 PRECEDENT

4290 FALSIFICATION OF EMPLOYMENT APPLICATION (NOW COVERED UNDER 341.370 (6)).

ISSUE: Whether a claimant is guilty of misconduct when she intentionally fails to disclose a physical disability on the employment application.

FACTS:

1. Has fifty percent loss of use of her left thumb.

2. Left unchecked the space on the application to show any defect to hands, because she feared it would prevent her from securing the job.
3. The job for which she was hired required constant use of both hands.
4. Discharged when it was discovered she could not perform the work because of a preexisting disability.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The condition of a worker's health or any disability is of the utmost importance to an employer from both a standpoint of the worker's ability to perform duties and for insurance purposes. The intentional failure to disclose her condition was a willful disregard of the employer's interest and, therefore, an act of misconduct connected with the work. The fact that the employment office suggested she apply for the work does not excuse her failure to show the defect when the application form required her to do so. (Now covered under KRS 341.370(6)).

DECISION: Claimant disqualified on grounds she was discharged for work related misconduct.

C.O. # 7629 PRECEDENT

4291 FALSIFICATION OF EMPLOYMENT APPLICATION (NOW COVERED UNDER KRS 341.370 (6)).

ISSUE: Whether a claimant is guilty of misconduct when he grossly misrepresented his skills on the employment application.

FACTS:
1. Claimant represented to the employer on his application that he was an experienced, qualified bookkeeper.
2. However, his work history is, at best, spotty, and the record will not support that he is a qualified, experienced bookkeeper.
3. Employer's books were out of balance shortly after claimant's hire and remained so throughout his twenty-three weeks of employment.
4. Claimant was discharged when employer's bank account was overdrawn because the books were out of balance.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Incompetency is not ordinarily misconduct. However, if a prospective employee misrepresents his skill so grossly as to mislead the employer to hire one whom he otherwise would not have hired, the employer is justified in discharging the worker when the incompetency comes to light. The incompetency described here, existed at the time of the misrepresentation of ability and constituted an act of misconduct, but should be distinguished from the natural tendency to embellish one's skills to enhance one's chance of being selected for a position. (Now covered under KRS 341.370(6)).

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 4668 PRECEDENT

4340 ABSENTEEISM FOR PERSONAL ILLNESS; CLAIMANT MUST PROVE NECESSITY OF.

ISSUE: Whether a claimant who was warned repeatedly for absenteeism due to alleged stomach ailment is guilty of misconduct when he fails to prove the necessity of his final absence.

FACTS:

1. A parking lot attendant, frequently reported off work due to alleged stomach ailment.
2. Repeatedly warned concerning his absenteeism.
3. On his final day, claimant reported for work at noon instead of at 7:00 AM because of alleged stomach ailment.
4. He presented no medical evidence in support of his need to report for work late on his final day.
5. Claimant was discharged.
6. The Court noted both that others had seen the claimant "on the street" after reporting off sick and; that the claimant went to work elsewhere shortly after his discharge.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> The rule is that persistent or chronic absenteeism without notice or excuse in the face of continued warnings from the employer constitutes such misconduct as requires a denial of benefits ... Unless Wesley's tardiness and absenteeism were excusable by reason of his claimed stomach ailment, his discharge was justified and he was disqualified from receiving any benefits chargeable to appellant's reserve account.
>
> The only testimony of a stomach ailment was given by Wesley. The burden of proof in this respect rested on him. BROWN HOTEL COMPANY V. EDWARDS, Ky., 365 SW 2d 299; BROADWAY AND FOURTH AVENUE REALTY COMPANY V. ALLEN, Ky., 365 SW 2d 299. Wesley attributed his delinquencies to the ailment and claimed to have had a Dr. Lake treat him on the afternoon of his discharge. The evidence that he was seen walking on the streets when he had claimed to be ill would indicate that he may have had a "walking" ailment. No one else testified to Wesley's having an ailment. His burden of proof could have been sustained by the introduction of testimony from Dr. Lake or other medical testimony. This failure and his statement that he went to work on another job indicate that there was little substance in the testimony of his claimed ailment and constitutes a failure to sustain the burden imposed upon him.

DECISION: Claimant disqualified on grounds he was guilty of work related misconduct.

Kentucky Court of Appeals, BROADWAY AND FOURTH AVENUE REALTY COMPANY V. CRABTREE, SW 2d 313. PRECEDENT

4343 BURDEN OF PROOF; HEARSAY EVIDENCE.

ISSUE: Whether a claimant, who has been discharged for alleged acts of misconduct must prove his innocence or simply overcome whatever proof is offered by the employer.

FACTS:

1. Employer did not appear for the referee hearing; submitted an unsigned written statement alleging acts of misconduct by the claimant.
2. Claimant appeared at the referee hearing and offered direct sworn testimony regarding the events leading to his discharge.
3. Based on claimant's testimony, he committed no act which could be remotely construed as misconduct.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The burden of proving worker misconduct rests with the employer. In this case, the nonappearing employer chose to support its allegations of misconduct with an unsigned written statement, which

is nothing more than the lowest form of hearsay evidence. The claimant, in a discharge case, does not bear the burden of proving his innocence; rather, claimant need only overcome whatever proof is offered by the employer. In this case, claimant's direct sworn testimony must be accorded greater weight than the hearsay evidence of the nonappearing employer. Therefore, claimant has certainly overcome the employer's proof and he must prevail.

DECISION: Claimant discharged for reasons other than proved misconduct in connection with his work.

C.O. # 20579 NONPRECEDENT

4350 WHICH PARTY MUST TESTIFY FIRST; BURDEN OF PROOF.

ISSUE: Which party must bear the burden of proof and testify first in a discharge case.

FACTS:
1. Claimant worked as a maid for the captioned hotel.
2. There was a rule prohibiting employees from fraternizing with hotel guests.
3. Claimant's supervisor observed claimant engaged in what the supervisor considered improper conduct with a guest.
4. At the referee hearing, the employer was required to testify first regarding discharge, which was the only issue under appeal.
5. The only evidence submitted by the employer's attorney was an affidavit from the former supervisor, who was no longer an employee of the hotel, to the effect that the claimant was a willing participant in improper conduct with the guest.
6. Claimant testified, and it was found as fact, that she was resisting the unwanted advances of the guest.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held that the claimant bears the burden of proving eligibility for benefits under KRS 341.350, and that if eligibility is the issue, or one of several issues, at a referee hearing, then claimant must introduce testimony FIRST to establish eligibility for benefits. However, if eligibility (under KRS 341.350) is not at issue in the referee hearing; but rather disqualification from benefits under KRS 341.370 (1)(b) is the issue, then the burden of proving disqualification rests upon the employer, and the employer must introduce testimony FIRST to show misconduct connected with the work.

The Court held that when the facts in a case are in dispute, and the Commission's facts are supported by substantial evidence, and the Commission has applied the correct rule of law to the facts, then the Commission's Order must be affirmed. The Court held that the claimant's direct sworn testimony constitutes substantial evidence, and that the Commission applied the correct rule of law to the facts which were based on that testimony.

DECISION: Claimant held qualified to receive benefits on grounds she was discharged for reasons other than work connected misconduct.

Kentucky Court of Appeals, BROWN HOTEL V. EDWARDS, 365 SW 2d 299. PRECEDENT

4351 RES JUDICATA; COURT OF COMPETENT JURISDICTION (MISREPRESENTATION OF MATERIAL FACT TO REFEREE).

ISSUE: Whether the Commission may rule on the issue of dishonesty when the matter of theft of company property has been settled in a court of competent jurisdiction.

FACTS:

1. At the initial hearing of this case, the employer was not present.
2. Based on claimant's testimony that charges of theft of company property, for which he was discharged, had been dismissed by the court, the referee ruled him qualified, holding the matter was RES JUDICATA.
3. However, at a second hearing of this case, at which both the claimant and employer were present, claimant admitted that he had pled guilty in court to a misdemeanor charge of theft related to the incident for which he was discharged.

REASONS: KRS 341.370(1)(b) and 341.530(3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of dishonesty connected with the work.

Dishonesty has many forms, the most common of which exits in the worker's unauthorized appropriation of company property for conversion to the worker's personal usage.

The claimant plead guilty in a court of competent jurisdiction to a misdemeanor charge of theft under $100.00 related to the incident for which he was discharged. Therefore, the matter is RES JUDICATA. That is, the Commission has no authority to rule on the issue of dishonesty since the criminal charge, to which the claimant pled guilty, and the incident precipitating his job separation, were one and the same.

KRS 341.415 provides for the recovery of benefits from a recipient who makes a false statement for the purpose of receiving benefits to which he was not entitled. KRS 341.370 (2) provides for the disqualification of a worker from benefits for any week with respect to which he knowingly made a false statement to establish his right to benefits, and for up to fifty-two additional weeks beginning with the Division's discovery of the false statement.

The claimant knowingly offered false testimony while under oath at the initial hearing when he both voluntarily and in response to direct questioning of the referee, stated that the criminal charges brought against him by the appellant employer had been dismissed by the court. This false statement was the basis for the referee decision holding the claimant qualified to receive benefits.

DECISION: Claimant was discharged for work related misconduct and knowingly made false statements in order to receive benefits.

C.O. # 46706 A PRECEDENT

4360 REFUSAL TO PERFORM A NEW ASSIGNMENT.

ISSUE: Whether claimant is guilty of misconduct when she refused both to perform a new assignment, which the employer felt her capable of performing, and refused to arrange for a replacement to perform the assignment.

FACTS:

1. Worked four years as a teacher of mentally retarded children for a Comprehensive Care Center.
2. Holds a Master's Degree in Special Education.
3. After first month of employment, notified she would be "on call" periodically to work in the emergency room of local hospital as a liaison person.
4. Performed the duty one time, but felt she was not qualified legally or otherwise to function in that capacity.
5. In order to retain her job, she paid another person $10.00 a night to perform her "on call" assignments.

6. She then refused to perform "on call" duty, and ALSO refused to pay and arrange for a replacement.
7. Discharged for insubordination.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

There is no evidence in the record, other than conjecture and extremely self-serving testimony by the claimant, to support the referee's findings that claimant was not sufficiently trained to do the "on call" work assigned, or that while there she would have been required to perform ANY illegal acts. Consequently, the referee's decision must be reversed. The Commission finds, on the entire record, that claimant's refusal to do the assigned work was, on her own testimony, due to her own feelings of inadequacy after trying only once to perform the assigned work. So long as her supervisors condoned her hiring paid replacements, her behavior could not be called misconduct. However, when the claimant refused either to do the assigned "on call" work OR to arrange for a replacement, her behavior constituted misconduct connected with her work, for which she was discharged.

DECISION: Claimant disqualified on grounds she was discharged for work related misconduct.

C.O. # 17143 NONPRECEDENT

4370 FAILURE TO FOLLOW DIRECT ORDER OF SUPERVISOR.

ISSUE: Whether a claimant is guilty of misconduct when he, after repeated warnings, fails to perform a simple task assigned by his supervisor.

FACTS:
1. Worked as an engineer for the captioned hotel three years and four months.
2. Received numerous complaints from kitchen personnel that he was not providing sufficient steam to operate steam table.
3. Warned several times by his supervisor to stop turning off the valve which controlled steam to the table.
4. Nevertheless, claimant again turned off the valve resulting in loss of steam to the table, for which action he was discharged.
5. Claimant alleged at the referee hearing that the valve was defective; however, he never made this alleged defect known to the employer.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> The evidence is uncontradicted that as soon as Roberts employment was terminated the trouble with insufficient steam ended. It is true that Roberts placed the blame on a defective valve but nowhere does he show that he had made known this claimed defect while he was working. Nor does he deny that the matter was properly remedied by a turn of the manually operated valve after complaint had been made. Roberts admits receiving the warnings in which his supervisor told him to leave the valve alone.

Under such circumstances, Roberts' continued failure or refusal to perform a simple task in obedience to explicit and direct orders of supervisor constitutes ... misconduct.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

Kentucky Court of Appeals, BROWN HOTEL COMPANY V. ROBERTS, 365 SW 2d 308. PRECEDENT

4371 REFUSAL TO WORK; HEALTH CONSIDERATIONS.

ISSUE: Whether a claimant, who refused a work assignment because he believes it would be harmful to his health, is guilty of misconduct.

FACTS:
1. Worked thirteen months for the captioned laundry and cleaners as a boiler fireman and maintenance man.
2. Became ill and was absent ten weeks due to an asthmatic condition.
3. During his absence, company converted from coal to gas.
4. As a result, fireman duties were minimal, and maintenance duties were greatly increased, including painting of the building.
5. Refused to use a paint spray gun because doctor warned him the fumes would be harmful to his health.
6. Offered to use a brush to paint, but company felt it would be too slow.
7. Discharged for refusing to use paint spray gun.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The employer has the burden of proving the misconduct inasmuch as it made the allegation. There is a wide differentiation between unsatisfactory work performance and actual misconduct. A careful analysis of the record fails to show that the refusal to use the spray gun was based on any consideration other than the claimant's belief that use of the spray gun would undermine his health. This belief was based on medical advice.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 3950 NONPRECEDENT

4372 REFUSAL TO OBEY DIRECT ORDERS OF IMMEDIATE SUPERVISOR.

ISSUE: Whether a claimant is guilty of misconduct when he decides to follow general directive of plant manager rather than a specific, direct order from his immediate supervisor.

FACTS:
1. Worked six years as a truck driver, delivering milk to customers.
2. His FIRST stop was Campbellsville, Kentucky.
3. All drivers had been instructed by plant manager that the seal on their delivery truck was not to be broken until they arrived at their FIRST destination.
4. However, on November 29, 1978, an emergency arose, and claimant was instructed by his immediate supervisor, from whom he normally received his orders, to make a special delivery to Somerset, Kentucky, prior to making his delivery to Campbellsville, Kentucky.
5. After leaving the plant, claimant decided to make the Campbellsville, Kentucky delivery first, resulting in the Somerset delivery being late.
6. Attempted to justify his actions on grounds of the plant manager's general directive not to break the seal on the delivery until arriving at the FIRST stop, which, for the claimant, was normally Campbellsville.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In this case claimant was instructed to deviate from his normal schedule by the supervisor from whom he normally received his orders. It was clearly in the interest of the employer that he comply with that order. His failure to do so, not withstanding previous general instructions that he not deviate from his regular schedule, was clearly an act of insubordination. Had he delivered the milk to Somerset as instructed and controversy arisen as a result, then his supervisor (not the claimant) would have been the responsible individual.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 20275 NONPRECEDENT

4375 NONRENEWAL OF TEACHER'S LIMITED CONTRACT.

ISSUE: Whether or not the job separation is a discharge when a teacher is allowed to finish the school year even though the decision not to renew her contract for alleged acts of misconduct was made one month earlier.

FACTS:
1. Rather than institute termination proceedings, the Board simply chose not to renew claimant's limited teaching contract because of alleged misconduct.
2. Claimant was notified of nonrenewal on April 22; however, she was allowed to finish the school year, May 21.
3. The only question addressed by the Kentucky Court of Appeals was whether or not the job separation was a discharge.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> ... a teacher's limited one year contract of employment does not automatically expire and terminate at the end of a given school year, but it instead automatically renews itself unless school officials take affirmative steps to prevent its renewal. It is our opinion that, once a school board elects to terminate a limited contract, it is in effect discharging that teacher from employment within the meaning of the word "discharge," as used in KRS 341.370 (1)(b), just as when it discharges an employee at will who is not protected by the Teacher Tenure Act. Hence, when a teacher's limited contract is not renewed due to the teacher's misconduct, there is as a matter of law, a "discharge" for purposes of the unemployment insurance statutes. Moreover, the fact that the board may opt to discharge the teacher by easier method of nonrenewal, rather than by instituting a termination proceeding pursuant to KRS 161.790, is of no significance.

DECISION: Case remanded to the Commission for a ruling on whether claimant was guilty of work related misconduct.

Kentucky Court of Appeals, EVANS V. MONTGOMERY BOARD OF EDUCATION AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 712 SW 2d 358. PRECEDENT

4425 REFUSAL TO WORK SPECIAL SHIFT; RELIGIOUS CONVICTIONS NOT ALLEGED.

ISSUE: Whether claimant is guilty of misconduct when she refuses her employer's request to work a special shift.

FACTS: 1. Claimant worked as a cashier five years for the captioned restaurant.

2. The restaurant, a small business, opens for business on only two Sundays a year, Easter and Mother's Day; and then only for four hours each day.
3. Claimant was scheduled to work Easter, but failed to appear for work, alleging she was unaware she was scheduled to work.
4. Claimant was notified the week prior to Mother's Day that she was scheduled to work from noon to 4:00 PM on Mother's Day.
5. Claimant initially objected; then agreed to work but ultimately refused to work for which she was discharged.
6. Claimant's reason for not working was that she wanted to be with her family. She DID NOT allege religious convictions as a reason for not working.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In an unpublished decision, the Kentucky Court of Appeals held:

> The facts of this case are simply that Ms. Graszus was directed by her employer to work four hours on a Sunday and she refused to do so. While in some situations this may not be construed as misconduct, under the facts of this case, it is clear that it is. The Conservatory is a restaurant, a relatively small business in which every employee plays a substantial part in the conduct of the business. Secondly, the restaurant is only open on Sundays twice a year, and requiring an employee to work four hours on those two days, is not an unreasonable condition of employment. Finally, permitting this one employee to take off on those two holidays may be construed as unfair to other employees who may not wish to work on those dates. Thus, Ms. Graszus wishes the employer to create a special condition just for her. We hold, under the circumstances, that the findings are supported by substantial evidence and will not be disturbed by us on appeal. BROWN HOTEL COMPANY V. EDWARDS, Ky., 365 SW 2d 299 (1962).

DECISION: Claimant disqualified on grounds she was discharged for work related misconduct.

Kentucky Court of Appeals, GRASZUS V. THE CONSERVATORY, 83-CA-245-MR Unpublished. Not to be cited or quoted. For guidance only.

4440 PROFANITY; A SINGLE OUTBURST OF (CAUTION - READ IN CONJUNCTION WITH ENTRY 4441).

ISSUE: Whether a claimant, with a lengthy satisfactory work record, is guilty of misconduct because of a single outburst of profanity uttered in the presence of a member of management, but not directed at the member of management, personally.

FACTS:
1. Worked five years without incident or warning; the last two of which he was a bailor.
2. As a bailor he removed large containers of waste paper from production areas.
3. Inadvertently damaged a machine when a container got hung up on it.
4. Plant manager gruffly asked what had happened.
5. Claimant responded by stating "I can't help it if it hung up;" which statement he prefaced by using the Lord's name in vain.
6. Whereupon he was immediately discharged by the plant manager.
7. Claimant attempted to reason with him, but to no avail.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In this case claimant was, at worst, guilty of the unfortunate use of an expletive on a single occasion while in the presence of his superior. There is no indication in the record of a course of conduct evincing an intentional disregard for his employer's interests, or a bent on the part of the

claimant toward consistent displays of a less than respectful attitude in the presence of his superiors. On the contrary, he had, from all indications, been an acceptable employee whom management had never felt the need to counsel. When taken in conjunction with his overall record, claimant's single outburst on the day of his discharge does not warrant a finding of misconduct. It is significant to note that claimant's outburst was not directed AT his superior.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 18401 NONPRECEDENT

NOTE: Read in conjunction with Precedent Entry 4441 where a single instance of profanity accompanied by an obscene hand gesture, WAS misconduct when directed AT the supervisor.

4441 VULGAR LANGUAGE AND HAND GESTURE; DIRECTED AT SUPERVISOR (CONSTITUTIONAL RIGHT OF FREE SPEECH IS DISCUSSED).

ISSUE: Whether a claimant is guilty of misconduct when, without provocation, he directs vulgar language and an obscene hand gesture at his supervisor.

FACTS:

1. Worked six years as a die setter; and was an official in the union representing factory workers.
2. Approached the assistant factory manager to discuss a problem between another employee and a person in management.
3. Would not give specific complaints, but only made general unfavorable remarks against the member of management.
4. The assistant factory manager told the claimant that if he had nothing specific, then he (the assistant factory manager) would drop the matter.
5. Claimant said he would file a grievance. The assistant factory manager told the claimant he should go ahead and file a grievance.
6. Claimant responded by motioning to the assistant factory manager with his middle finger and stating a three word vulgarity as to what he could do with the finger.

REASONS: The Kentucky Court of Appeals reasoned:

> KRS 341.370 (1)(b) provides that a worker will be disqualified from receiving unemployment benefits if "[h]e has been discharged for misconduct or dishonesty connected with his most recent work..." KRS 341.370 (6) lists some examples of misconduct for purposes of KRS 341.370 (1)(b), but does not address the question of offensive language or gestures. KRS 341.370 (6), by its terms, does not provide an exclusive list of the forms of misconduct. There are no cases in Kentucky dealing with this precise issue. However, we think that the discussion of "misconduct" in case law can provide some guidance.

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KING, Ky. App. 657 SW 2d 250 (1983), this Court cited, with approval, the discussion of misconduct in 76 Am. Jur. 2d Unemployment Compensation § 52 (1975). That section contains the following statement:

> Misconduct within the meaning of an unemployment act excluding from its benefits an employee discharge for misconduct must be an act of wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of his employee...

We think it is reasonable for an employer to expect his employees to refrain from making obscene gestures or using vulgar language in a belligerent manner when addressing him unless there is justifiable provocation.

In REYNOLDS V. DANIELS, 1 Ark. App. 262, 614 SW 2d 525 (1981), the Court held that a worker was properly denied unemployment benefits for misconduct when he used unprovoked profanity in an argument with his supervisor. The Court stated that the worker's actions were a willful disregard of the standards of behavior an employer has a right to expect. Similarly, in KOWAL V. COMMONWEALTH UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 77 Ps. Cmwlth. 378, 465 A. 2d 1322 (1983), it was held that, absent justifiable provocation, vulgar language addressed to an employer can constitute willful misconduct resulting in the denial of unemployment benefits.

Dye next contends that the characterization of his behavior as misconduct, resulting in denial of unemployment benefits, is an infringement of his right of free speech guaranteed under the First Amendment of the Federal Constitution. We disagree.

In CHAPLINSKY V. NEW HAMPSHIRE, 315 U.S. 568, 571-572, 62 S. Ct. 766, 769, 86 L.Ed. 1031-1035 (1941), the Court stated: It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

We believe that Dye's words are in this class and, thus, do not merit constitutional protection. See REYNOLDS, supra. Further, we are not persuaded, as urged by Dye, that COHEN V. CALIFORNIA, 403 U.S. 15, 91 S.Ct. 1708, 29 L.Ed. 2d 284 (1971), alters this holding.

In COHEN, supra, the defendant was convicted of disturbing the peace through offensive conduct because he wore a jacket with a profane slogan on the back referring to the draft. The Court in COHEN, supra, specifically distinguished CHAPLINSKY, supra, in part because the words on the jacket were not directed to or meant to provoke any one person as were those in CHAPLINSKY. Like CHAPLINSKY, supra, Dye's words were directed to a specific person.

In addition, the Court in COHEN, supra, was concerned with protecting speech which expresses ideas, particularly about public figures and public issues even though distasteful or profane words are used. Words, such as those used by Dye, have little to do with the expressions of any ideas. See CHAPLINSKY, supra. Thus, COHEN, supra, has little relevance to the instant case. This same conclusion was also reached in REYNOLDS, supra.

The standard of review of an appeal to the courts regarding unemployment compensation is whether the findings of fact are supported by substantial evidence of probative value and, if so, whether the correct rule of law was applied. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., 437 SW 2d 775 (1969).

The essential facts surrounding Dye's conduct are not in dispute and the Commission's findings are supported by substantial evidence. The Commission applied the correct rule of law as Dye's actions amount to misconduct under KRS 341.370 (1)(b). The court below then was without authority to reverse the Commission's ruling. Therefore, the judgement is reversed and remanded with directions to reinstate the ruling of the Kentucky Unemployment Insurance Commission.

DECISION: Claimant discharged for misconduct connected with the work.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. DYE, 731 SW 2d 826. PRECEDENT

4450 WORK STOPPAGE THREATENED; DEMAND FOR WAGE INCREASE.

ISSUE: Whether claimants are guilty of misconduct when they threaten work stoppage following denial by the employer of their demand for a wage and benefit increase.

FACTS:
1. Employer is an interstate transporter of beer, employing nine truck drivers.
2. Claimant and seven other truck drivers met unannounced with employer and demanded a wage and benefit increase.
3. Employer said he would grant an increase when he got one.
4. Claimants responded by announcing we are not "aiming to go anywhere until we get some satisfaction."
5. All of the drivers were scheduled to go out on deliveries on the evening of the day they made their demands.
6. They did not make their deliveries. Claimants deny quitting and employer denies discharging them.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The referee held that the abrupt confrontation of the employer by eight of his nine drivers, demanding wage and benefits concessions the same day they were due to go on scheduled runs, was industrial misconduct sufficient to require disqualification of claimant and his fellow drivers stating, "In confronting his employer with demands without prior notice and to refuse to work without some immediate settlement is a willful, wanton, and reckless disregard (by the claimant) of the employer's legitimate business interests."

DECISION: Claimants disqualified on grounds they were discharged for work related misconduct.

C.O. # 9951 NONPRECEDENT

4460 UNDER THE INFLUENCE OF ALCOHOL; ON COMPANY PREMISES WHILE OFF DUTY (ADMISSION AGAINST OWN INTERESTS).

ISSUE: Whether a claimant is guilty of misconduct when she returns to the place of business while off duty, and under the influence of alcohol.

FACTS:
1. Worked for captioned Sanitarium two and one-half years as a nurse's aid on the day shift.
2. Her daughter worked at the sanitarium on the evening shift.
3. At some undetermined time AFTER the end of the evening shift, claimant and her husband visited the sanitarium seeking their daughter.
4. Husband was denied admittance; claimant was admitted.
5. According to two employees who witnessed the claimant, she became loud, used profanity and appeared to be disheveled and drunk.
6. Claimant and her husband contend claimant was neither loud nor drunk. Claimant also contends she did not use profanity.
7. However, both claimant and her husband admit claimant had consumed a "few beers" prior to arriving at the sanitarium.
8. Claimant was discharged the following morning.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Based upon the testimony at the hearing, there was a direct conflict in the evidence regarding the claimant's condition and the incident. The referee accepted claimant's version because the party alleging misconduct has the burden of showing by a preponderance of the evidence that acts of misconduct were committed.

An even number of witnesses on each side does not necessarily mean that the burden has not been satisfied. Claimant's testimony could well be considered self-serving and that of her husband slanted for her. The testimony of the company's two witnesses might well be slanted in favor of the company, but claimant's admission of having indulged in the traditional "few beers" tips the scales in favor of the company.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 8085 NONPRECEDENT

4462 EVIDENCE, RESIDUUM RULE (PROPER FOUNDATION FOR ADMISSION).

ISSUE: Whether partial reliance on incompetent evidence necessarily requires reversal of administrative agency's ruling.

FACTS:
1. Co-worker complained that she smelled alcohol on claimant's breath.
2. Claimant agreed to submit to a blood alcohol test.
3. Discharged as a result of this test.
4. Results of test introduced at referee hearing by personnel officer who was not present when the test was performed, and had little if any knowledge of proper testing procedures or the meaning of the results.
5. No other evidence introduced at the referee hearing to support the allegation that the claimant was under the influence of alcohol while at work.

REASONS: The Kentucky Court of Appeals held that:

> It is beyond argument that results of such a test are incompetent when there is no foundation for its admission, no opportunity for cross examination and no showing of the chain of custody of the blood sample. See MCCORMICK, Evidence S 209 (2d ed. 1972).
>
> "The issue before this court is whether the trial court properly applied the 'residuum' rule. We find that it did not. This rule is that 'findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent evidence which by itself would have been legally sufficient to support the findings.' BIG SANDY COMMUNITY ACTION PROGRAM V. CHAFFINS, Ky., 502 SW 526 (1973) at 530.
>
> "Without the results of the test, the evidence that Mr. Haste was under influence of alcohol is insufficient to support a finding of misconduct. No one who testified before the board expressed the opinion that Mr. Haste had been using alcohol.
>
> The testimony included opinions concerning facts that might lead one to the inference that Mr. Haste was under the influence. The witnesses lack of positive expression makes it apparent that the employer was relying on the results of the blood test. As those results are incompetent, it failed in meeting its burden of proof."

DECISION: There did not exist, absent the incompetent test results, a residuum of competent evidence showing that the claimant was under the influence of alcohol while at work.

Kentucky Court of Appeals, HASTE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND OAKWOOD, 673 SW 2d 740. PRECEDENT

4470 CLOSING BUSINESS EARLY; IN VIOLATION OF EMPLOYER POLICY.

ISSUE: Whether a claimant is guilty of misconduct or just "poor judgment" when she closes employer's business early in direct violation of employer policy.

FACTS:
1. Closed the employer's restaurant early because business was slow during January's bad weather.
2. She knew this was a violation of an explicit written directive of her employer.
3. Customers were turned away.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Commission does not agree with the referee's ruling. The referee found that claimant was not guilty of misconduct when, as assistant manager, she closed the employer's restaurant because business was slow during January's bad weather. The evidence is clear that claimant knew this was a violation of an explicit written directive of her employer. Although only a few customers (latecomers) were turned away, the employer was entitled to establish strict opening and closing times if he chose to do so, as a matter of business policy. The Commission considers this wanton and willful misconduct within the meaning of KRS 341.370 (1)(b) and not just "poor judgement."

DECISION: Claimant disqualified on grounds she was discharged for work related misconduct.

C.O. # 15827 NONPRECEDENT

4510 INFERIOR WORK; NO ALLEGATION OF MISCONDUCT.

ISSUE: Whether a claimant, who has a history of inferior work, is guilty of misconduct when there is neither allegation nor proof of intent to produce inferior work.

FACTS:
1. Worked thirty-one years as a pressman, during which time he occasionally turned out inferior work.
2. Was passed over repeatedly for promotions and was once demoted from first pressman to second pressman, because of inferior work.
3. Employer does not allege any willful or malicious intent on claimant's part to produce inferior work.
4. Rather, the voluminous record supports that claimant was never one of the better pressmen, and the employer more or less endured carrying him on the payroll rather than dismissing him, earlier.
5. Discharged following two days of inferior work.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct connected with one's work has been defined as a willful or malicious act or omission on the part of an employee which is detrimental to his employer's interest. We recognize that the inferior work produced by this pressman was a detriment to the interest of his employer; but, nevertheless, it has not been charged nor has it been proven that such work resulted from a willful or malicious act. Therefore, we conclude that the referee properly applied the law to the facts when finding no misconduct.

DECISION: Claimant discharged for reasons other than misconduct.

C.O. # 4241 NONPRECEDENT

4520 UNSATISFACTORY WORK; NO PRIOR WARNINGS.

ISSUE: Whether a claimant, who has received no prior warnings, is guilty of misconduct when he is discharged abruptly for failing to do "a days work for a days pay."

FACTS:
1. Worked eight months at various jobs on the company's coal tipple without complaint from his foreman.
2. However, the foreman had made casual reports to the general manager that the claimant was the slowest worker in the three or four man crew.
3. Because of lack of work on the tipple, transferred to a pick and shovel job preparing for a new mine entrance.
4. Without warning or explanation, other than being told he was no longer needed, claimant was discharged by the general manager.
5. General manager testified that on one occasion, claimant did not complete in a day a pick and shovel task which should have been completed in thirty minutes.
6. Additionally, general manager alleged claimant did not do "a days work for a days pay."

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Mere unsatisfactory work is not misconduct. Such unsatisfactory work must be accompanied by willful acts or omissions.

Although claimant did not produce a sufficient amount of work on the particular day, the record does not show he willfully failed to produce sufficient work. In cases of this nature, it is the general rule that a worker should be admonished of his shortcomings before an abrupt dismissal. This is especially true when he worked without complaint for several months.

In the absence of warning in this case, an act of misconduct has not been proved as was correctly held by the referee.

DECISION: Claimant discharged for reasons other than proved misconduct in connection with the work.

C.O. # 8108 NONPRECEDENT

4521 UNSATISFACTORY WORK; IS NOT, IPSO FACTO, MISCONDUCT DESPITE PRIOR WARNING.

ISSUE: Whether a claimant, who receives a warning for decreased productivity, is guilty of misconduct when failure to produce is caused by increased duties in nonproduction activities.

FACTS:
1. Worked ten months as a collector prior to discharge on November 10, 1970.
2. Collections decreased when the claimant was expected to perform the additional duties of shiptracer; i.e., to ascertain, by various means, the whereabouts of debtors whose addresses had changed.
3. Claimant attempted to improve his performance, after being warned in August 1970, but to no avail.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct, as that term is used in the law, means actions by a worker which show a willful or reckless disregard of an employer's interest. Unsatisfactory work is no IPSO FACTO misconduct

connected with the work despite the fact that a worker has been admonished. Before unsatisfactory work is misconduct it must be clearly and convincingly shown that it was because of a willful or reckless indifference toward the work.

The evidence in the present record does not show such willful or reckless indifference by the claimant toward his job. On the contrary, the record shows an effort by claimant to improve his performance after admonishment.

DECISION: Claimant discharged for reasons other than proved misconduct in connection with the work.

C.O. # 8991 NONPRECEDENT

4531 NEGLECT OF DUTY; AWAY FROM WORK STATION (BURDEN OF PROOF).

ISSUE: Whether a claimant with an unblemished work record is guilty of misconduct when he is observed, over a three day period, "away from his work station several times."

FACTS:
1. Worked as a welder six months without warning or reprimand.
2. During the three days prior to discharge he was observed "away from his work station several times."
3. However, no attempt was made to ascertain why he was away and no warnings were issued.
4. Company felt his activities were causing his own productivity and that of co-workers to suffer.
5. Company presented no evidence in support of this contention.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct can be found only in conduct evincing a willful, wanton or reckless disregard for the legitimate business interests of the employer. In this case claimant has been shown guilty of no more than being away from his work area, and talking with fellow employees on occasion. Insofar as the record will show, he could have been engaged in conducting the employer's business.

Even granting that his absences from his work area were for other than work related reasons, the nature of the offense would be such that a warning by the employer is prerequisite to a finding that his activities constituted misconduct.

DECISION: Claimant discharged for reasons other than proved misconduct in connection with the work.

C.O. # 19143 NONPRECEDENT

4532 FAILURE TO REPORT WRONGDOING BY A CO-WORKER.

ISSUE: Whether a claimant, who is not directly responsible for an incident, but failed to at least notify the company of the situation, is guilty of misconduct.

FACTS:
1. A mechanic for the company three months, with no prior acts of misconduct alleged.
2. On November 14, 1977, claimant and a co-worker, who acted as a driver, were dispatched in a "tractor-trailer rig" to retrieve a piece of heavy equipment.
3. In route back to the company's shop, the driver stopped at an "Elks" club.
4. Claimant suggested that he be allowed to take the equipment on to the company's shop.
5. When the driver refused, claimant took no further action and entered the club, where he remained for at least one hour before the employer located the equipment.

6. Claimant was discharged for failing to notify the company of the whereabouts of its property.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Claimant has steadfastly denied that he was "drinking" on his final day of work, and the record contains insufficient evidence to refute this denial. The question remaining to be answered, then, is whether he was guilty of a neglect of duty reasonably owed to the employer. We think he was.

No amount of denial will alter the fact that both claimant and the driver were aware that their actions in stopping at the "Elks" club while driving a piece of equipment such as that described herein was contrary to the interests of the employer. Even if claimant were not able to persuade the driver to return to company premises, he owed a positive duty to the employer to at least inform his employer of the whereabouts of his property. His failure to do so, resulting in the employer's having to seek out the vehicles on his own, amounts to misconduct within the meaning and intent of the Kentucky Unemployment Insurance Law.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 18256 NONPRECEDENT

4570 SLEEPING ON THE JOB; ALLEGED MEDICAL REASONS.

ISSUE: Whether a claimant is guilty of misconduct when he is observed sleeping on the job, for the second time; notwithstanding alleged medical condition as the cause.

FACTS:
1. Worked as boilerman six months.
2. Duties included maintaining boilers at proper operating temperatures and pressures.
3. Boilers can explode if the pressure or temperature gets too high.
4. On May 8, 1983, claimant was found sleeping on the job, for which he was reprimanded and docked one days pay.
5. On August 23, 1983, claimant set down to rest his swollen feet and was again found sleeping on the job. He does not remember falling asleep.
6. Had problems sleeping for three days prior to August 23, 1983, because of stress.
7. No mention was made to supervisors of any medical problems prior to discharge.
8. Following discharge, claimant sought medical attention because of his disrupted sleeping patterns.
9. The claimant's doctor believes the correct diagnosis was obstructive sleep apnea which means he has an obstruction to the breathing mechanism which constantly awakens him.
10. There is little treatment for this disorder, but the doctor advised claimant that he would get some relief by losing weight and controlling his blood pressure.
11. Claimant now asserts that this disorder caused him to fall asleep on the job.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

There appears to be no cases from the higher level courts in Kentucky that address this issue - that of sleeping on the job. However, this Commission has relief on reasoning from BELL V. APPEAL BOARD OF MICHIGAN EMPLOYMENT SECURITY COMMISSION, 103 NW 2d 584. Following are the relevant facts excerpted from that case:

> This case involves a discharge for alleged misconduct. The claimant, appellant herein, applied to the McInerney Spring & Wire company (hereinafter termed the employer) on October 21, 1957, for employment. At the time he was questioned by both the personnel

director and the maintenance engineer respecting his physical condition. This was done because the position of fireman in the boiler room, for which he had applied and for which he was hired, was a position of unusual responsibility, carrying pay at a premium rate. The fact of the matter was that claimant had suffered "an acute heart attack" some years past. This he did not disclose and, in response to the specific question on the employment application, "have you any physical defects?" he answered, "No." Moreover, because of his physical condition he was under the care of a physician and had been "given medicine for relaxation." This medicine, he admitted, had the effect of making him sleepy. On October 22, 1957, claimant commenced work as a fireman. Shortly thereafter, on November 1, he was discharged for sleeping on the job.

Also, the main thrust of the claimant's argument in that case was that his sleeping on the job was not intentional and thus not misconduct. The court addressed the following definition of misconduct:

> "A breach of those standards of conduct reasonably applicable to the industrial task assigned, rather than of those standards of ethics and morals applicable to mankind in general."

The court examined the criteria in the following manner:

> Tested by either criterion, however, claimant's position is equally untenable. We may concede that no man in his right mind would "intend" to fall asleep while on duty in a boiler room. But also we must hold that a man intends the normal consequences of his acts. He cannot deliberately stop eating, as in the device of the so-called hunger strike, and assert that he did not intend to go hungry, nor can he take sleeping pills or other sedatives and urge that he did not intend to go to sleep. Moreover, tested by the "standards of conduct reasonably applicable to the industrial task assigned" claimant's position is no better. The job for which he was hired was one of great responsibility. The results of a boiler explosion, either to him, as he dozed nearby, or to his fellow workmen, or to the plant itself, we need not describe. Judged by any criterion his act was "misconduct connected with his work."

In the case at hand, we are not convinced that the sleeping disorder was the sole cause of claimant's falling asleep. Instead, the evidence supports a finding that claimant had not been sleeping well for other reasons for at least three days prior to discharge. Surely he had to have been aware of this situation, and should have exercised more caution in placing himself in a situation that was conducive to falling asleep. The job that the claimant had was too important to allow any neglect of duty, much less going to sleep and risking his and others safety and lives.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 37931 NONPRECEDENT

4590 SPOUSE'S MISCONDUCT; NOT PROOF OF CLAIMANT'S (BURDEN OF PROOF).

ISSUE: Whether a claimant is guilty of misconduct when there is no definite proof she was involved in the offenses committed by her husband.

FACTS:

1. Claimant's husband was in charge of the warehouse while claimant was a general office worker.
2. They were the sole employees at this particular warehouse.
3. Claimant's husband was discharged and later indicted for forging endorsements on company checks; making unreported and unauthorized sales of company property, for cash.

4. Claimant was discharged because the company believed she must have known about her husband's illegal activities and failed to report them to the company.
5. Claimant's unrefuted testimony was that in the performance of her general secretarial duties she had not become aware of her husband's illegal activities.
6. Company president gave claimant a letter of recommendation to the effect that she was merely a victim of some very bad circumstances.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The evidence in a case of this type must be such as to support a finding that the claimant was guilty of misconduct connected with the work. The burden of furnishing the proof rests upon the company, the party alleging the misconduct.

Proof is lacking in this instance. The company has merely shown that claimant was discharged because of her husband's conduct. The company has not shown that by reasonable exercise of claimant's duties she would have known about her husband's illegalities.

DECISION: Claimant discharged for reasons other than proved work related misconduct.

C.O. # 4270 NONPRECEDENT

4610 HORSEPLAY; RESULTING IN LOSS OF WORK TIME.

ISSUE: Whether a claimant, who commits two acts of "horseplay" is guilty of misconduct when one of them results in loss of work time.

FACTS:
1. Worked for the company eighteen months when he quit by failing to report to work.
2. Applied for reemployment and was hired.
3. After working twenty-seven days gave in to the urge to squirt a passerby with water from equipment he used in the performance of his duties.
4. Next, he knowingly misadvised a co-worker that he must now secure the foreman's permission before going to a nearby stockroom to secure supplies needed to perform his job.
5. Acting on claimant's advice, the co-worker left his job and wandered around the plant for a considerable period of time in search of the foreman, when such permission was not needed.
6. Claimant had no authority to instruct the co-worker in the manner that he did.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The time lost to production by reason of the "horseplay" was a detriment to the employer's interest. Considered separately, claimant's actions were a minor matter; however, when coupled with previous acts of this nature, they constituted acts for which claimant was justifiably discharged.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 4682 NONPRECEDENT

4611 CO-WORKERS MARRYING; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits or is discharged when she loses employment because she violates company policy by marrying a co-worker.

FACTS:
1. Captioned employer purchased business from claimant's former employer April 1, 1987, and distributed copies of its employee handbook.
2. One policy in the handbook was that husbands and wives could not be employed at the same time.
3. On April 30, 1987, claimant married co-worker Gary Embry.
4. Claimant worked in the office, performing clerical duties, on the day shift.
5. Mr. Embry was an "extrusion" leadman working varied shifts, as needed.
6. There was neither a direct nor indirect line of supervision between the claimant and Mr. Embry.
7. Claimant left her employment because of the aforementioned policy.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct includes a knowing violation of a reasonable and uniformly enforced rule of an employer (see KRS 341.370 (6)).

That the claimant's marriage to Mr. Embry was in violation of the captioned employer's rule prohibiting husbands and wives from being employed at the same time is undisputed. However, before a finding of misconduct can be sustained, it must be shown that the rule was reasonable. The nonappearing captioned employer has failed to show either the broad reasoning behind the rule or the specific harm it might have suffered by allowing a clerical worker, the claimant, and a production worker, Mr. Embry, to be employed at the same time, after their marriage. There being no supervisory relationship between Mr. Embry and the claimant, the Commission cannot conjecture as to what serious or vital interest (security or otherwise) of the captioned employer might have been compromised or adversely affected by the claimant and Mr. Embry continuing to work after their marriage. The nonappearing captioned employer has not proven that the rule at issue was reasonable. Therefore, claimant's violation of it does not, for unemployment insurance purposes, constitute work related misconduct.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 51203 NONPRECEDENT

NOTE: Read in conjunction with Entry 4612

4612 CO-WORKERS MARRYING; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits or is discharged when she loses employment because she marries a co-worker in violation of company policy.

FACTS:
1. Worked for the captioned employer for three years as a secretary.
2. Company policy prohibited a worker from remaining employed if that worker marries a co-worker.
3. This policy was developed after claimant's hire and was never published nor circulated among the employees.
4. On November 5, 1983, claimant married a co-worker.
5. On November 8, 1983, she was told that either she or her husband would have to leave the employment.
6. Claimant chose to leave and last worked on November 17, 1983.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The referee cited Commission Order Number 6793 in support of his decision that claimant quit without good cause. Insofar as that Order was considered precedential in cases of this nature, it is hereby rescinded. Future cases shall be considered on a case by case basis, however, at a minimum, to support a finding of quit without good cause, we would require that the policy (described, supra), be published and known by employees and in effect at the time of hire of a particular worker. None of these elements are present in this case.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 39051 NONPRECEDENT

NOTE: Read in conjunction with Entry 4611

4613 MARRIAGE TO A RELATIVE OF A CO-WORKER.

ISSUE: Whether a claimant is guilty of misconduct when she marries the relative of a co-worker in violation of rule prohibiting relatives working in the same store.

FACTS:
1. At hire claimant was simply asked if she had a relative working in the store. She did not.
2. It was neither explained verbally at hire nor via an employee handbook thereafter that relatives were not permitted to work in the same store.
3. It was not until claimant announced her engagement to a brother of a co-worker that she was advised of the policy.
4. Claimant was discharged upon becoming the sister-in-law of a co-worker.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct has been construed to mean any action or omission by a worker which demonstrates a willful or wanton disregard for the legitimate business interests of the employer.

The referee reasoned that the employer had established reasonable rules and policies, that claimant was compelled to abide by those policies and her failure to do so was a disservice to the employer. We disagree. In this case we are not convinced that claimant was fully aware her marriage to the relative of a co-worker would result in her termination. Claimant's unrebutted testimony was that such policy was not explained at the time of hire nor provided her in writing during her employment. In cases of this nature, we feel a worker is not bound by an unreasonable policy established by his/her employer. As in this case, the relative was so far removed as a sister-in-law. Certainly claimant's actions did not demonstrate a willful or wanton disregard for the employer's interests nor was there a disservice. Her resultant discharge was for reasons other than misconduct.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 40748 NONPRECEDENT

4620 UNBECOMING CONDUCT; NO WARNING AGAINST.

ISSUE: Whether a claimant is guilty of misconduct for making frequent jocular references to sex when she is not warned that such behavior was unacceptable.

FACTS:

1. Employed as an assembly worker for eight months.
2. During the final several weeks of her employment, management received several complaints from co-workers about claimant's alleged frequent jocular references to sex, and one complaint that she had, a month earlier, directed in anger, a vulgar epithet to them, describing them as something less than virtuous individuals.
3. Claimant acknowledges infrequent jocular references to sex, but insists that her co-workers made similar remarks, and that they never indicated to her that she was shocking their sensibilities.
4. At no time was she counseled or warned that her actions were a matter of concern to the employer.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The single act of which claimant stands accused which can be considered to constitute an act of misconduct is her alleged utterance of the derogatory statement to her co-workers some thirty days prior to her separation. There is not a weight of evidence that she ever made such a remark. Even granting that she did, we have difficulty understanding why those who were offended by the remarks waited such an extended period before registering a complaint.

Claimant's jocular references to sex occurred over an extended period, during which no warning was issued to her by management. Such a course of conduct can be considered to constitute justification for discharge, insofar as application of the disqualifying provisions of the statute are concerned, only when preceded by warning, or notice by the employer, that such conduct is unacceptable. When such notice is absent, as is the case here, no misconduct may be found.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 19786 NONPRECEDENT

4621 VULGAR LANGUAGE; INSUBORDINATION.

ISSUE: Whether a claimant, who directs a vulgar epithet at a supervisor, is guilty of misconduct.

FACTS:

1. Notified that he was being suspended for one week for the receipt of a third warning for infractions of company rules.
2. Wadded up the notice and threw it on the floor and announced that his supervisors and foreman were "SOB's."
3. Discharged for use of vulgar language which resulted in fourth and final warning.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In berating his supervisors for giving him a warning and suspension, claimant caused his discharge. Such attitude of claimant showed a wanton disregard of the employer's interests. Claimant knew of the availability of the grievance machinery but chose to use other means to retaliate. Such action by claimant was overt insubordination. Insubordination is against the interest of a company and therefore an act or misconduct connected with the work.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 9171 NONPRECEDENT

4640 FIGHTING ON THE JOB; REASONABLE ALTERNATIVES TO (VERBAL ASSAULT IS NOT ADEQUATE PROVOCATION FOR A BATTERY).

ISSUE: Whether a claimant, who is being verbally assaulted, is guilty of misconduct when he initiates physical contact in response thereto.

FACTS:
1. A laborer in a steel factory twenty-seven months.
2. While working with a less experienced co-worker, claimant became angry with the co-worker and yelled at him concerning the manner in which he was working.
3. When the task was completed, the co-worker approached claimant and warned him about the manner in which he had spoken to him, while at the same time sticking his finger in claimant's face.
4. Knowing that company policy provided for discharge for fighting, claimant, nevertheless, pushed the co-worker's finger away.
5. Co-worker retaliated by striking claimant several times.
6. Claimant then wrestled the co-worker to the ground.
7. Claimant had been warned twice before for arguing with and name calling of two other employees.
8. Claimant's discharge was converted, through arbitration, to a suspension without pay.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Fighting on the job constitutes misconduct and in the instant case is clearly against the company rules. The facts reveal that the claimant was the victim of an aggressive co-worker, but also that the claimant was not totally blameless. The claimant over reacted to the manner in which the co-worker was handling the assigned task. The claimant was not in a supervisory capacity at the captioned company and if the co-worker was not performing the task properly, the claimant should have taken the matter to the proper company authorities rather than delegate this task to himself.

The claimant stated in his request for appeal that he had been the victim of various derogatory remarks which we do not feel need to be repeated here. We realize this is quite disturbing to any worker, but words are never adequate provocation for a battery, whether it be knocking one's hand aside or hitting one with a board. It was incumbent upon the claimant, in spite of the nature of these words and the pointing of the finger by the co-worker, to remain calm, refrain from any contact and report the incident to the proper authorities. This is especially true where the claimant knew that fighting was against the company rules, and constituted grounds for discharge when considered with prior warnings for arguing with and name-calling of co-workers.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

C.O. # 9314 NONPRECEDENT

4650 DISRUPTIVE BEHAVIOR; RESISTANT TO SUPERVISION.

ISSUE: Whether a disgruntled employee is guilty of misconduct when he engages in loud arguments and resists supervisor, despite warnings.

FACTS:
1. Worked as a stock clerk in the company's warehouse.
2. During last four months he was disgruntled because a co-worker was picked to fill a higher rated job as a counterman in the stockroom.
3. Claimant threatened to quit; he was prevailed upon to remain and was given a pay raise.
4. However, he engaged in loud arguments with his eleven co-workers thirty or forty times during this four month period, and was warned on several occasions that this behavior must stop if he wanted to keep his job.

5. Further, claimant argued with the counterman about filling orders and was reluctant to relinquish one task to attend to a more urgent one.
6. Lastly, claimant was observed sitting down reading a newspaper when he should have been working.
7. Discharged for all of the aforementioned actions during the final four months of his employment.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct, as that term is used in the law, means actions on the part of a worker which show a willful or reckless disregard of the interests of an employer. Disruptive arguments resulting in admonishments from management and a reluctant attitude toward supervisory direction evince a willful or reckless disregard of the interests of the employer. It is found as fact that claimant's actions are so classified.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 9368 NONPRECEDENT

4700 TARDINESS REPEATED; AFTER WARNINGS.

ISSUE: Whether a claimant is guilty of misconduct when she is repeatedly tardy for less than compelling reasons and despite warnings.

FACTS:
1. Employed as a clerical worker in the office of the traffic manager for three years.
2. Received several warnings for habitual tardiness.
3. Refused an offer of other employment with the company which would have enabled her to report to work later.
4. Attempted to explain her tardiness on factors of a personal nature, but was unable to tie this outside pressure to her tardiness.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Unemployment Insurance Law provides for the imposition of a disqualification from receiving benefits if a worker is discharged from his employment for reasons of misconduct connected with the work. Generally speaking, misconduct is a course of conduct evincing a willful or negligent disregard for the employer's best interest.

Evidence of one or two isolated instances of tardiness will not support a finding of misconduct; however, when the tardiness is repeated and warnings and admonishments have little or no effect in changing the worker's habit, a different result follows.

The admitted instances of being late for work, in the absence of good and compelling reasons therefore, support the finding of misconduct.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 3969 NONPRECEDENT

4710 STRIKING CLAIMANTS; PERMANENTLY REPLACED (RESERVE ACCOUNT CHARGEABILITY).

ISSUE: Whether striking claimants qualify for benefits at the moment they are permanently replaced, or when the strike ends.

FACTS:
1. On January 14, 1960, the Louisville District Council of Woodworkers was certified as the bargaining agent for the claimants.
2. On April 11, 1960, claimants went on strike seeking more favorable working conditions.
3. In June, 1960, claimants failed to respond to a letter from the company advising they would be permanently replaced if they did not return to work.
4. Claimants were permanently replaced in June, 1960.
5. Strike continued through December 21, 1960.
6. Company never ceased its operations.
7. On December 21, 1960, the union dropped its demands and notified the company that the strike was over.

REASONS: We have carefully reviewed all of the voluminous proof and briefs filed in connection with this case and from the proven facts we are constrained to conclude that a strike existed in the establishment of the appellant, commencing April 21, 1960, and ending December 21, 1960; that the unemployment of the appellees during that period was a result of the strike and that benefits may not be paid to the appellees during that period. We cannot subscribe to the theory that since December 21, a labor dispute has existed in the plant of the appellant which caused the appellees to leave or lose their employment. It is obvious that the strike was not successful and that the union has recognized the futility of further attempts to unionize the appellant's establishment. Under these conditions we conclude that the unemployment of the appellees after December 21 was not caused by a labor dispute in active progress.

The "permanent replacement" of the claimants or their "forfeiture of right to reinstatement" is, in our opinion, under the Unemployment Insurance Law of Kentucky nothing more than a discharge. In order for an employer's reserve account to be relieved of charges for benefits paid to a claimant who has been discharged from his most recent work, there must be a showing that the discharge was for misconduct connected with the work. The workers were discharged because of their attempt to unionize the plant of the appellant. They were discharged for union activity which was legal and legitimate in all respects. The Kentucky Unemployment Insurance Law specifically sets out in KRS 341.370 (1)(b) that "legitimate activity in connection with labor organizations ... shall not be construed as misconduct." Under such conditions, relief of charges for benefits paid to the claimants cannot be granted.

DECISION: The claimants were unemployed from April 11 to December 21, 1960, because of a strike in active progress in the establishment of the appellant and for that reason they were not eligible for benefits during that period.

C.O. # 3833 NONPRECEDENT

NOTE: See Entry 2031 for further support that claimants are disqualified for the entirety of the strike regardless of when they are discharged.

4711 INFORMATIONAL PICKET; REFUSAL TO CROSS (STRIKE OR DISCHARGE).

ISSUE: Whether claimants are engaged in legitimate union activities when they refuse to cross an informational picket line.

FACTS:
1. Both the prime contractor and the captioned subcontractor are nonunion employers.
2. Claimant Long is not a union member.
3. Claimant Kidd is a member of Teamsters union local 505.
4. Both were concrete truck drivers.

5. At the gate of the construction cite, labor union UCLA, local 1445 posted an informational picket in protest of the job being nonunion.
6. Both Long and Kidd refused to cross the informational picket line and deliver concrete to the prime contractor.
7. There was no effort by the individual manning the picket to prevent them from crossing.
8. Both Long and Kidd were discharged.

REASONS: In an unpublished decision, the Kentucky Court of Appeals held that there was neither a strike nor bona fide labor dispute in active progress in the establishment where the claimants were employed. No employees of the prime contractor or employees of any subcontractor were in a labor dispute. The lone informational picket of Local 1445 was not in a labor dispute but was merely protesting the fact that the job was nonunion. His protest does not amount to a labor dispute that would fall under the purview of KRS 341.360 (1). Now we must examine KRS 341.370 (1)(b). The Circuit Court affirmed the Commission in its finding that the appellants were not qualified for compensation benefits because they were guilty of misconduct.

The Court concluded that the claimants were not protected by KRS 341.370 (1)(b), which excludes as misconduct legitimate activity in connection with a labor organization:

> Because there was no bona fide labor dispute in active progress at the time. The informational picket present at the entrance gate was not a strike picket. His presence there was for protest purposes, which we do not believe comes within the statutory exception of legitimate activity in connection with labor organizations. A "legitimate activity in connection with labor organizations" within the meaning of this statute requires that there be organization efforts or strikes in progress. There was no such activity present in this case.

Absent such legitimate activity the conduct of the appellants was in disregard of their duty owed to their employer.

DECISION: Claimants disqualified on grounds they were discharged for work related misconduct.

Kentucky Court of Appeals, LONG AND KIDD V. BIG SANDY READY MIX AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 80-CA-2038-MR. Unpublished. Do not cite or quote. For guidance only.

4730 "WILDCAT" STRIKE; MISCONDUCT.

ISSUE: Whether claimant is guilty of misconduct when he engages in a "wildcat" strike in violation of a contractual "no strike" clause.

FACTS:
1. Claimant's union and the company agreed the union would not go on strike and that the company would not impose a lockout.
2. Certain union members violated the no-strike agreement more than once.
3. Company notified union members that if they struck again they would be discharged.
4. Thereafter, forty-two workers, including claimant, went out on strike against the company, for which they were discharged.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Claimant was discharged for engaging in a work stoppage in violation of a union employer contract to which he was a party. We hold that participation in this "wildcat" strike was an act of misconduct and that the provision of KRS 341.370 (1)(b) applies.

DECISION: Claimant was discharged for misconduct connected with the work.

C.O. # 6626 NONPRECEDENT

4731 ILLEGITIMATE UNION ACTIVITY; CONNECTED WITH THE WORK (PREPONDERANCE OF EVIDENCE AND BURDEN OF PROOF).

ISSUE: Whether striking claimants are guilty of misconduct when they commit acts of violence against security guards in the employ of the employer being struck.

FACTS:

1. The two claimants herein dealt with, were among the 2,500 employees who struck the captioned gas and electric company.
2. Using newly hired employees, the company continued operations.
3. To provide security for the new employees, the company hired security guards.
4. The guards were transported between their motel and company premises in a fortified school bus belonging to Murray Guards, Inc.
5. It was around 1:00 AM on January 13, 1984, that the bus, enroute to Louisville, was fired upon by another vehicle.
6. A preponderance of credible evidence shows that one of the claimants fired two shotgun rounds into the bus, while the other drove the car. Both were indicted on two felony charges.
7. Claimants were discharged on February 4, 1984, contemporaneously with the end of the strike.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct connected with the work consists of acts or omissions by which a worker willfully or wantonly disserves the legitimate business interests of his employer. The claimants' argument is twofold: first, that there is not a weight of evidence showing that they are the persons who fired into the Murray Guards, Inc. bus on the morning of January 13, 1984; second, that even if they were, their actions do not represent misconduct connected with the work because those actions occurred off company premises and while the claimants were not performing work for the company.

Unlike crimes, which must be proven beyond reasonable doubt, acts or omissions of misconduct connected with the work for unemployment insurance purposes need to establish by only a preponderance of proof, a much less stringent standard. And while it is true that an indictment under criminal law, standing alone, is neither conclusive nor irrebuttable evidence of misconduct under the unemployment insurance law (see Commission Order Number 12322), the employer may still establish misconduct by a weight of independent evidence. The captioned company has done that in the present case.

Claimants were apprehended at a time and place consistent with their being the culprits in the shooting incident. The car they were then in was stopped because it matched the description of the offending vehicle given by first hand witnesses to the shooting. At the time of apprehension, there were inside the car firearms capable of having inflicted on the Murray Guards, Inc. bus the physical damage not theretofore evident. Those firearms belonged to the claimants. The spent shell casings belonged to one of the claimants. And the car was itself the property of the other claimant's girlfriend.

There is evidence more than adequate to establish a PRIMA FACIE case against the claimants in an administrative hearing and to shift to them the burden of rebutting the presumption. Their evidence consists of denials that they fired the shots into the bus and of assertions by claimant Hockman that he had fired the shotgun earlier in the day in a Brandenburg field in order to test it. There are admittedly no witnesses to this alleged test shooting. Claimants have not rebutted the presumption against them. Therefore, the weight of the evidence is that claimants did, in fact,

discharge a firearm or firearms into the Murray Guards, Inc. bus on January 13, 1984, and that the actual shooting was done by claimant Hockman from a car driven by claimant Roy.

The remaining argument is that claimants did not thereby commit misconduct connected with the work. The referee is unpersuaded by this contention. Misconduct connected with the work has never been so narrowly defined as claimants wish to define it. Acts or omissions by employees may palpably disserve legitimate business interests of their employer even when committed off the job and on their own times. It can scarcely be argued that a bank teller who, while on his own time off the job, picks the pocket of a stranger on the street has not thereby forfeited the trust that his employer requires of him and committed misconduct connected with the work. Moreover, there is precedent that a job applicant, who falsifies his employment application, is discharged for misconduct connected with the work when his deception is later discovered and he is terminated because of it, notwithstanding that he was not an employee when committing the wrongful act. The theory is that his wrongdoing is continuous and achieves consummation only when discovered by the employer, of whom he is by that time an employee.

As of January 13, 1984, claimants were still employees of the captioned company. They were not on the job only because they were on strike. The case law is clear that the conduct of a strike does not break the employer-employee relationship between the strikers and the struck employer. Moreover, claimants acknowledge that they fully intended returning to their jobs upon the cessation of the strike. Therefore, when they committed the wrongdoing, they were company employees.

The object of their wrongdoing was the property of the firm that was providing protection to the very persons having temporarily claimed the jobs of the strikers. The apparent motive for the attack was the intimidation of both the guard service workers and the nonstriking employees of the captioned company. The connection between this wanton wrongdoing and the work is, in these circumstances, readily apparent. Equally apparent is the legitimacy of an employer's business interest in the physical safety of the persons and property of those doing business with it, in this case, the captioned company's provider of security services.

KRS 341.370 (1)(b) explicitly exempts from misconduct connected with the work "legitimate activity in connection with labor organizations ..." The conduct of an economic strike is such a legitimate activity. The use of violence by strikers in the conduct of their strike is not. It was precisely such violence that led to the captioned claimants' discharge by the captioned company. Within the meaning of the law, their discharge was for misconduct connected with the work.

DECISION: Claimants discharged for misconduct connected with the work.

C.O. # 39302 NONPRECEDENT

4733 ILLEGITIMATE UNION ACTIVITY; WHILE ON STRIKE.

ISSUE: Whether striking claimants, who engage in illegal activities on the picket line, are guilty of misconduct.

FACTS:
1. On April 11, 1960, claimants and others struck the company and a picket line was formed.
2. Each of the claimants engaged in some illegal activity connected with disturbances on the picket line.
3. Each was discharged for illegitimate union activity.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The employer contends that by the illegal action on the picket line each of the appellees "forfeited his right to reinstatement with the company." It is contended that such is not a discharge. We

cannot agree. If a worker performs some act or omits performing an act which is detrimental to his employer's interest and is relieved of his employment because of that action, then, within the meaning of the Kentucky Unemployment Insurance Law, the worker is discharged for an act of misconduct connected with his work.

We find as a matter of fact that each of the claimants was discharged for an act of misconduct and that proper disqualification was given to each and the reserve account of the employer was relieved of charges.

DECISION: Claimants discharged for misconduct connected with the work.

C.O. # 3831 NONPRECEDENT

4750 LEGITIMATE UNION ACTIVITY; SELF-ORGANIZATION.

ISSUE: Whether a claimant is guilty of misconduct when he solicited union membership before work and away from the actual work place.

FACTS:
1. Company rule provides for immediate discharge for soliciting of any kind on company premises.
2. Claimant worked for the company ten years prior to being discharged on May 8, 1962, for alleged violation of the aforementioned rule.
3. On May 8, 1962, twenty minutes BEFORE the regular shift began, claimant distributed union literature to employees who were waiting in the "BREAK ROOM" for the start of their shift.
4. Claimant was discharged for solicitation of union membership.
5. Claimant was later reinstated with back pay following a ruling by the National Labor Relations Board that he had been illegally discharged.

REASONS: KRS 341.370 and KRS 341.530 (3) provide for a disqualification of a claimant and for relief of charges to the account of the company if the claimant is discharged for misconduct connected with the work. The statute specifically provides, however, that legitimate union activity will not be construed as an act of misconduct connected with the work. Since the claimant's conduct was in connection with union activity, it must be determined whether such conduct comes within the exception of the above statute.

Section 7 of the National Labor Relations Act as amended by the Taft-Hartley Act gives employees the right of self organization and imposes certain obligations. Under this section, employees cannot exercise rights in any manner that would impair their obligation to render full services in return for wages or would impair the employer's right to possession and efficient operation of his establishment. Section 8 of the above law prohibits any actions on the part of the employer which are for the sole purpose of preventing or impeding self organization by the employees. A careful review of the numerous cases that have arisen under this law shows that it is consistently held that the soliciting of membership and distribution of union literature on the premises of the company is a legitimate self organization activity if it is done before work time and away from the place of work and does not interfere with the employer's operation and possession of the plant. While there might have been evidence to the contrary, the record before the commission in this case is completely void of any evidence that the soliciting was made during working hours or at the place of work or that such soliciting interfered with the efficient operation and possession of the plant. So far as the evidence in this case is concerned, the claimant's activity came within that which is excepted from misconduct under the Kentucky Unemployment Insurance Law. The claimant is not subject to a disqualification and no relief is granted to the reserve account of the company.

DECISION: Claimant discharged for reasons other than work connected misconduct.

C.O. # 4499 NONPRECEDENT

4791 ERROR IN JUDGEMENT; WHERE DISCRETION IS ALLOWED.

ISSUE: Whether a claimant is guilty of misconduct when his violations of company rule resulted from good faith errors in judgement.

FACTS:
1. Worked over one year as a cashier/stockboy for the captioned food mart.
2. Policy required him to check I.D.'s on any customer purchasing beer who appeared intoxicated or under age twenty-five.
3. Employer CHECKED on compliance with this policy by having youthful employees from another store attempt to buy beer from the cashier being CHECKED.
4. Failure to pass such a check resulted in a seven day suspension on the first occurrence and discharge on the second.
5. In July, 1983, claimant was advised he had, in the recent past, failed such a CHECK. He was not confronted at the time of the alleged violation. Suspended seven days.
6. On October 5th of the same year, claimant was discharged for failing another check the day before. Again, he was not confronted at the time of the alleged violation.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The time honored definition of industrial misconduct, particularly appropriate to cases of this nature, is found in a Wisconsin case, BOYNTON CAB COMPANY V. NEUBECK, 237 WIS 249, 296 N.W. 636 (1941):

> ". . . the term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgement or discretion are not deemed 'misconduct' within the meaning of the statute."

The Commission held that while the employer has established rules to insure that its employees do not sell alcohol to minors, it has also given the employee discretion in applying such rules. The employee is to make judgement in individual situations. The evidence presented here does not establish that the claimant willfully or wantonly disregarded rules, only that the employer's judgement differed from the claimant's. While the employer may use such a basis to discharge the claimant, the claimant's actions have not been shown to be industrial misconduct. A benefit disqualification may not be invoked.

DECISION: Claimant discharged for reasons other than proved misconduct in connection with the work.

C.O. # 38420 C NONPRECEDENT

4792 DRESS CODE; MATERIAL CHANGE IN.

ISSUE: Whether a claimant, who refuses to obey new dress code, is guilty of misconduct when no special damage to company was shown.

FACTS:
1. After about five months as a route salesman, claimant counseled to adopt a shorter, neater hair style.

2. Heretofore, he had worn his hair in the back to collar length and his sideburns extended below the ear lobes.
3. Rather than cut his hair, claimant simply changed the style of combing his hair.
4. Four months later company adopted six rules of grooming for its route salesmen.
5. One rule forbade the hair from covering any portion of the ear; another rule required a space of at least one half inch between the hair on the base of the head and the collar.
6. As a matter of principle, claimant chose not to comply with the rules.
7. No evidence of special damage to the company by claimant so refusing was produced.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Misconduct, as that term is used in the law, means actions which show a willful or reckless disregard of the company's interest. Having hired claimant without requiring a change in his hair style; having allowed him to wear it long for five months without requiring a change; and having waited four months thereafter to adopt mandatory rules, it must be concluded that the claimant's conditions of work were materially changed and claimant had good cause for refusing to comply. Especially this is true when no special detriment to the company was shown.

Notwithstanding the forgoing, the claim should be scrutinized closely to determine whether claimant's grooming is an unreasonable restriction upon his employability so as to render him ineligible to receive benefits under KRS 341.350.

DECISION: Claimant discharged for reasons other than misconduct connected with the work.

C.O. # 8880 NONPRECEDENT

4793 ERROR IN JUDGEMENT; WHERE DISCRETION IS NOT ALLOWED.

ISSUE: Whether claimant, a registered nurse, is guilty of misconduct when she knowingly violates regulations controlling the administering of medication to patients.

FACTS:
1. Claimant, a registered nurse, was director of nursing services for the captioned skilled care nursing home.
2. State and federal regulations, known to the claimant, require that medication be administered only by trained, licensed personnel.
3. However, she felt it was a better way of handling patients who were difficult to medicate, to have unqualified personnel put the medication in their food and then have unlicensed aides feed the patients.
4. Claimant was discharged for her knowing violation of state and federal regulations.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The time honored definition of industrial misconduct, particularly appropriate to cases of this nature, is found in a Wisconsin case, BOYNTON CAB COMPANY V. NEUBECK, 237 WIS 249, 296 N.W. 636 (1941):

> ". . . the term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances,

> or good-faith errors in judgement or discretion are not deemed 'misconduct' within the meaning of the statute."

A good faith error in judgement presupposes that the worker is exercising her judgement in an area where she has the right or authority to make judgements. Such is not the case under appeal. Claimant had no right or authority to exercise her judgement in clear violation of state and federal regulations governing the administering of medication to her employer's patients.

DECISION: Claimant was discharged for work related misconduct.

Kentucky Court of Appeals, GARRARD CONVALESCENT HOME V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND CONNER, 80-CA-819-MR. Unpublished. Not to be cited or quoted. For guidance only.

4800 ABSENTEEISM FOR PERSONAL ILLNESS; FAILURE TO GIVE NOTICE OF.

ISSUE: Whether KRS 341.370 (6), which defines misconduct, in part, as "unsatisfactory attendance if the worker cannot show good cause for absence," relieves the employee of the responsibility of notifying the employer of his absences.

FACTS:

1. Worked for the employer thirteen years, when, on July 22, 1985, he reported to the office manager that he was sick and "would be off for a few days." No details were given.
2. Went to the doctor complaining of dizziness, chest pain and nervousness. Was advised to stay off work thirty days and be examined by another doctor.
3. Claimant made no effort to notify the employer of these facts.
4. On August 8, 1985, the company sent him a certified letter to the effect that suspension and discharge procedures were being initiated and that he had five days to respond.
5. Having heard nothing from the claimant, the company sent him a second letter on August 17, 1985, announcing that the five days had expired.
6. Only on August 23, 1985, over a month after claimant's last contact with the company, did claimant's daughter deliver a doctor's statement to the company.
7. The company declined to rescind claimant's discharge.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Supreme Court held:

> Gooslin argues that under KRS 341.370 "unsatisfactory attendance" is only a disqualification "if the worker cannot show good cause for absences." But this is only one of the illustrative circumstances in KRS 341.370 (6) justifying a finding of disqualification on grounds of discharge for misconduct. The fundamental question is whether the facts found by the Board "are supported by substantial evidence" [KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. SPRINGER, Ky., 437 SW 2d 501 (1969)], and, if so, whether the Commission "incorrectly applied the law to the facts" presented to it [KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. STIRRAT, Ky., App., 688 SW 2d 750 (1985)]."

The Stirrat case presented a fact pattern somewhat similar to the present one. Kentucky Unemployment Insurance Commission denied unemployment benefits where the claimant was incarcerated and unable to contact anyone outside of the county jail, and discharged because of his unexplained absence from work. The Court of Appeals held, "there was substantial evidence to justify a finding that the appellant had engaged in misconduct connected with his most recent work justifying his dismissal and a denial of unemployment benefits." It reversed the holding in circuit court that the Commission "failed to correctly interpret the law." Id. at 753.

There are two cases from our Court that bear on the issue.

In BROWN HOTEL CO. V. WHITE, Ky., 365 SW 2d 306 (1963), the Commission awarded benefits "based on the theory that absence from work because of personal illness was involuntary," and we reversed holding as a matter of law that "excessive absenteeism, coupled with the failure to give notice thereof to the employer," constituted "misconduct" requiring disqualification. Id. at 307.

CANTRELL V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., 450 SW 2d 235 (1970) would appear on casual inspection to have reached the opposite result. We held, as a matter of law, that a woman who took time off from work to nurse her extremely sick husband until he died did not leave her job voluntarily without good cause and when she was replaced she was entitled to unemployment benefits. However, the key to understanding the CANTRELL decision is that the employee took pains to notify her employer on a daily basis of the continuing difficulties that made her absence a reasonable necessity. We stated:

> When all else is said and done, common sense must not be a stranger in the house of the law... "Good cause usually is regarded as a reason sufficient in ordinary circumstances of an urgent and personal nature to justify leaving employment;..." In re Lauria's Claim, 18 A.D. 2d 848, 236 NYS 2d 168 (Sup. Ct. App. Div. 1963). 450 SW 2d at 237.

In the present case the evidence was in dispute as to whether the employee was at all times during his absence so disabled that he was unable to work. The Court of Appeals made a factual determination that he was, but the record does not compel this conclusion.

Notwithstanding, the real issue here is not whether the employee was unable to work, but whether the Commission properly interpreted failure to notify the employer of illness as misconduct justifying disqualification. The Court of Appeals took the position that "the statute does not impose upon the worker a duty to inform the employer of the good cause, only that the worker have good cause." We disagree when the evidence is such that the Kentucky Unemployment Insurance Commission could conclude the lack of notice was both extensive and unjustified.

The appellee relies upon SHAMROCK COAL CO., INC. V. TAYLOR, Ky. App., 697 SW 2d 952 (1985). The Court of Appeals held the employee's conduct in overturning his bulldozer, a negligent act, standing alone, did not constitute misconduct justifying denial of unemployment benefits. The distinction between SHAMROCK and this case is the distinction between conduct that is negligent or inadvertent, and conduct which is of the employee's own volition. Here the record before the Unemployment Commission was sufficient to support a finding of misconduct when Gooslin failed to notify the company of reasons for absence over a substantial period of time, even if absence was unavoidable.

The Commission concluded "the claimant was aware that he would have to be absent for a protracted period but failed to notify the employer" in the manner that the circumstances called for. Factually, there was substantial evidence to support this conclusion, and based on this finding the Commission correctly applied the law.

DECISION: Claimant disqualified for misconduct connected with the work.

Kentucky Supreme Court, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND KENTUCKY CARBON CORP. V. GOOSLIN, Ky., 756 SW 2d 464 PRECEDENT

4801 SICK LEAVE; CONFLICTING MEDICAL EVIDENCE.

ISSUE: Whether a claimant is guilty of misconduct when he relies on his personal physician's advice not to return to work; notwithstanding contrary advice from company doctor and a third party doctor.

FACTS:

1. Suffered from "ulcer syndrome" requiring a sick leave.
2. At the end of the leave, personal physician considered claimant still unable to work.
3. However, company doctor and a third party doctor, chosen by the claimant, certified claimant as able to work.
4. Claimant chose to follow the advice of his personal physician and remained off work.
5. Discharged for doing so.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Before a disqualification can be imposed upon a claimant and relief of benefit charges granted to the reserve account of the company under KRS 341.370 and KRS 341.530 (3) for a discharge, it must be clearly and convincingly shown that the discharge was for an act of misconduct connected with the work. Misconduct is defined as a willful or reckless disregard of an employer's interests.

After a careful consideration of the record and testimony, this case is found to be based on a simple set of facts. The claimant relied upon his private physician who reported he was unable to work. As a result of the opinion of the company doctor that he was not so disabled, claimant was directed to be examined by a third doctor. He had no choice but to be examined by a third doctor or lose his job. THE ONLY CHOICE AFFORDED CLAIMANT WAS WHO THE THIRD DOCTOR WOULD BE. THIS WAS ALMOST A "HOBSON'S CHOICE" SINCE THE CLAIMANT HAD ALREADY RELIED UPON HIS OWN DOCTOR TO STAY AWAY FROM WORK. To overlook these facts is to miss the entire point in the case.

The Commission concludes that the question in this case is whether claimant acted reasonably in relying upon the advice of his own doctor or whether such reliance was a willful or reckless disregard of the employer's interest when the company doctor and the third doctor disagreed with the opinion of claimant's doctor.

After carefully considering the whole record, it is concluded that claimant did not willfully or recklessly disregard the employer's interest by relying upon his doctor. To hold otherwise would be to say that a worker would take a sick leave of absence at his peril. This situation is distinguished from one where the consensus of opinion of three doctors is used to determine whether a sick leave of absence should be granted in the first place.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 9182 NONPRECEDENT

4802 ABSENTEEISM; PERSONAL ILLNESS PROPERLY REPORTED (NOTWITHSTANDING WARNINGS).

ISSUE: Whether a claimant is guilty of misconduct when her violation of attendance policy resulted from absences caused by personal illness which were properly reported.

FACTS:

1. Employed twenty-two months as a tronic inspector, which required the use of both hands.
2. Attendance policy held six absences in twelve months to be excessive.
3. On August 9, 1982, received a verbal notification that she had been absent five times from January, 1982 through July, 1982.
4. All absences were for personal illness, with the exception of one, and all were properly reported.
5. On October 19, 1982, given a written warning and put on probation for three months because she had accumulated eight absences. Advised discharge might follow next absence during probation.

6. All absences from July to October were for personal illness and properly reported.
7. Absent during week ending December 3, 1982, because of bronchial infection.
8. Not discharged because of nature of absence; received a memo reminding her that her next absence during the probation would result in discharge, unless unusual mitigating circumstances existed.
9. On January 10, 1983, claimant reported to work, but was unable to work because her arm was painful and swollen.
10. Diagnosed as suffering from tendonitis; arm put in a sling. Company official accompanied claimant to the doctor.
11. Returned to work in an attempt to avoid an absence, but unable to work.
12. Off work one week because of tendonitis. Prior notice given to the company.
13. Discharged upon her return to work.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Absenteeism which is for less than compelling reasons or which is not properly reported to the employer constitutes misconduct. Certainly the employer has the prerogative to discharge employees for excessive absenteeism or for failure to properly report absences. However, the evidence in this case establishes that the claimant's absence which led to her termination was for compelling reasons and was properly reported. All the claimant's absences, with the exception of one, had been for illness and the final incident which caused her termination, was caused by severe pain and swelling in her arm which rendered her unable to perform her duties. The employer was aware of this condition because her supervisor accompanied her to the doctor. The claimant returned to work in an effort to comply with the employer's policy and avoid another absence, but was unable to work because of the severe pain.

The Commission has consistently held that there must be a showing that the final act, which leads to termination, must have been one which qualifies as misconduct, which is not the case here. The absences of the claimant were caused by illness, without fault on her part, therefore, they were not intentional, deliberate or voluntary.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 35845 NONPRECEDENT

4803 TECHNICAL VIOLATION OF UNION AGREED TO ATTENDANCE POLICY.

ISSUE: Whether a claimant's technical violation of an attendance policy, agreed to by his union is, ipso facto, misconduct.

FACTS:
1. The company retained the right, under the contract in existence with claimant's union, to promulgate attendance polices.
2. Such policy mandates discharge for three unexcused absences in a running twelve-month period.
3. Unexcused absences include those for which the employee fails to give notice prior to the start of work shift.
4. Absences are removed when they no longer fall within the running twelve month period.
5. For reasons not determined at the referee hearing, claimant was absent without notice May 27, 1986 and May 28, 1986.
6. For the week of June 23, 1986, claimant was placed in the "labor pool" and the company expected him to report to work daily for possible work assignment.
7. Claimant believed "labor pool" status relieved him both of the responsibility of reporting to work, and of reporting off work (i.e., he felt he was in essence laid off and the company would contact him if needed).

8. Co-workers interviewed by the company also held this same misunderstanding regarding the "labor pool."
9. claimant failed to give notice of his absences on June 23, 1986 and June 24, 1986, because of this misunderstanding.
10. In December, 1986, claimant injured his left foot at work.
11. Pain was worse in the morning because of arthritic changes and bone spurs in the injured foot, according to the company doctor.
12. On the morning of January 15, 1987, claimant awakened around 6:00 a.m. experiencing considerable pain in his left foot.
13. Living alone and not having a telephone, he was unable to walk the one block to the public telephone until 7:06 a.m. which was sixteen minutes after the start of his work shift.
14. Claimant was discharged January 16, 1987, for three unexcused absences in a running twelve month period.

REASONS: KRS 341.370 (1)(b) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of misconduct connected with the work.

Misconduct has been construed to mean any act of omission by a worker which demonstrates a willful or wanton disregard for the legitimate business interests of the employer.

KRS 341.370 (6) defines misconduct, in part, as a knowing violation of a reasonable and uniformly enforced rule of an employer. Violation of an attendance policy, agreed to by a worker's union, is not, ipso facto, misconduct for unemployment insurance purposes. It must be shown that the attendance policy is reasonable before a finding of misconduct can be sustained. An attendance policy which mandates discharge of a worker for three unexcused absences in a running twelve month period, without regard for the reason(s) causing the unexcused absences, is unreasonable. While three unexcused absences in a twelve month period may constitute misconduct, it is also possible, depending on the circumstances surrounding the absences, that three unexcused absences in a running twelve month period might not constitute misconduct. Each case must be decided on its own merits.

In this case, the reasons for the absences of May 27, 1986 and May 28, 1986 and the claimant's failure to give notice was unclear and the claimant might be held accountable for these absences. However, the unreported absences of June 23, 1986 and June 24, 1986 resulted from an honest misunderstanding by the claimant for which he should not be held accountable. Lastly, the absence of January 15, 1987 was necessitated by pain the claimant was experiencing in his left foot resulting from a work related injury. His failure to give notice of this absence prior to the start of his shift was because the pain was worse in the morning (a fact of which the company doctor was aware) and he had to wait for the pain to subside before walking a block to a public telephone to report his absence. Notwithstanding the claimant's technical violation of the company's attendance policy, his actions do not manifest a pattern of willful or wanton disregard for the employer. Therefore, the claimant was discharged for reasons other than work related misconduct.

The evidence of record regarding claimant's injury and ongoing medical care brings into question the claimant's ability to work and eligibility for benefits under KRS 341.350 (3).

DECISION: Claimant was discharged from the employment for reasons other than misconduct and is not disqualified from benefits. However, the case was remanded to the local office for investigation of the claimant's ability to work and eligibility for benefits.

C.O. # 48030 NONPRECEDENT

4804 REFUSAL TO OBEY REASONABLE INSTRUCTIONS TO PERFORM ADDITIONAL WORK.

ISSUE: Whether claimants were guilty of misconduct when they repeatedly refused to perform additional work assignments which were within their abilities and which would not cause undue hardship.

FACTS:
1. The four claimants constitute the sanitation department of the captioned city.
2. Because of operating expense problems, the city laid off a 73 year old, part-time employee who had picked up refuse around the public square.
3. Claimants, who frequently completed their regular routes with one hour of working time remaining, were asked to take over this additional function which had usually taken the elderly part-time employee about one hour to complete.
4. Claimants repeatedly refused, contending that additional work would interfere with their regular duties, and that garbage trucks on the square would cause traffic problems and hinder potential customers of downtown stores.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> The central issue in the appeal before us is whether the circuit court erred in failing to find substantial evidence to support the finding that the appellees had been discharged for misconduct. An employee is obligated to render loyal, diligent, faithful and obedient service to his employer and failure to do so is a disregard of the standards of behavior which the employer can expect of his employee. BROWN HOTEL COMPANY V. WHITE, Ky., 365 SW 2d 306 (1963). There is no right to reject the tasks of employment on the basis that work methods have changed and the employee suspects (without trying it) that he will be unable to satisfactorily do the new assignment. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. DAY, Ky., 451 SW 2d 656 (1979). Where an employee manifests an intent to disobey the reasonable instructions of his employer, the denial of unemployment compensation benefits on the basis of misconduct is proper. BROWN HOTEL COMPANY, supra; 76 Am. Jur. 2d Unemployment Compensation § 55. There was substantial evidence in the record which indicates that the order to clean the public square in this case was within the appellee's ability to perform and would not result in any undue hardship and was, in essence, a reasonable request. It is undisputed that when the subject was first brought up, they refused to do so, and they have continued in the refusal.
>
> We hold that there was substantial evidence in the record to support the action of the Unemployment Insurance Commission in holding that the appellees were disqualified under the provisions of KRS 341.370 on the grounds of discharge for misconduct.

DECISION: Claimants were discharged for work related misconduct.

Kentucky Court of Appeals, CITY OF LANCASTER V. TRUMBO ET.AL AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 660 SW 2d 954 PRECEDENT

4805 A SINGLE KNOWING AND WILLFUL DISREGARD OF A REASONABLE RULE ISSUE.

ISSUE: Whether a claimant is guilty of misconduct for a single violation of a reasonable rule.

FACTS:
1. Claimant worked as a cashier for the captioned department store.
2. At hire work rules were reviewed with claimant by the personnel manager.
3. Claimant signed a form indicating that work rules and procedures had been explained to her.
4. One rule prohibited cashiers from handling purchases made by friends and relatives.

5. Nevertheless, she was observed on one occasion checking out purchases for her mother and sister and was discharged.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> It is said at 76 AM Jr. 2d Unemployment Compensation § 52 that "the basic principle at the root of an unemployment compensation statute...is...the benefits of persons unemployed through no fault of their own." The section continues by noting that "an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rule would support exclusion from benefits whereas "mere mistakes, inefficiency, [or] unsatisfactory conduct" would not.

The referee and the Kentucky Unemployment Insurance Commission held:

> The Courts have defined misconduct as being a willful or wanton disregard of the legitimate business of the employer. In this case, whether or not the claimant was guilty of any legal wrongdoing is not relevant. She was aware of the company's policy regarding checking out purchases of close family members. The mother was also aware of this policy, and both parties disregarded such. The policy of the company was not an unreasonable one and, when the claimant willfully disregarded such, her actions constituted misconduct connected with the work, and her employment separation is disqualifying.

DECISION: Claimant disqualified on grounds she was discharged for misconduct connected with the work.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KING AND K-MART, 657 SW 2d 250. PRECEDENT

4806 RULE PROHIBITING HORSEPLAY; NOT UNIFORMLY ENFORCED.

ISSUE: Whether a claimant is guilty of misconduct when he engages in horseplay in violation of a rule which his foreman did not uniformly enforce.

FACTS:
1. Claimant, as a prank, placed epsom salts in a co-worker's milk thermos.
2. Foreman, who had himself in the past engaged in horseplay, discharged claimant for violating a company rule prohibiting horseplay.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

KRS 341.370 (6) states:

> "Discharge for misconduct" as used in this section shall include but not be limited to separation 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.

The referee reasoned the claimant deviated from reasonable behavior, which the employer had a right to expect, and that the behavior did not require any warnings prior to discharge. We disagree.

The key phrase in the above definition is "uniformly enforced rule." The evidence is clear such was not the situation in this case. An employer who has not enforced its rule uniformly may not show misconduct when he suddenly decides to do so, and invokes the ultimate disciplinary action of discharge. There must, at a minimum, be a warning that such rules will be so enforced, prior to the act which results in discharge.

DECISION: Claimant discharged for reasons other than work related misconduct.

C.O. # 40226 NONPRECEDENT

4807 MOTOR VEHICLE LAW VIOLATION; UNINSURABLE.

ISSUE: Whether a claimant is guilty of misconduct when he loses his drivers license or becomes uninsurable because of traffic violations either in his private vehicle or that of his employer.

FACTS:
1. Worked one and one-half years as a tractor-trailer truck driver.
2. At hire he was informed that he must keep a "clean" operator's license because of insurance requirements.
3. Had one traffic violation on his record at hire.
4. During his employment, co-workers were discharged for becoming uninsurable.
5. Claimant was charged with and admitted his guilt to four additional moving traffic violations after hire.
6. All but one of the violations, which were for speeding and failure to obey traffic controls, occurred while on duty.
7. Claimant was discharged when he became uninsurable by the company's insurance carrier.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The question raised in this case is whether or not misconduct exists when a worker can no longer fulfill his job duties because of loss of license, or becoming uninsurable.

Although, not binding outside of its jurisdiction, the Fayette Circuit Court in a recent case, 81-CI-3148, held that in circumstances such as this, the discharge was for misconduct. In that case, the worker's duties required him to drive a truck. A condition of qualifying for the position with the employer was that he was insurable under the company's liability insurance policy. That driver incurred violations in his personal vehicle (off the job) which ultimately led to his discharge after he became uninsurable.

The court reasoned that the employer's actions in discharging the worker were not unwarranted or unreasonable since one of the employment qualifications was driving a vehicle, and obviously a worker in that job must be insurable. The court found that it would not be reasonable to require an employer to pay the premium on a high risk insurance policy in order to retain the worker. When the worker's driving habits placed him in an uninsurable position with his employer's insurance carrier, the court held that his acts were connected with the work. Because of the obvious impact on the employer, the acts were contrary to its interests, and constitute misconduct within the meaning of the statute.

DECISION: Claimant discharged for misconduct connected with the work.

C.O. # 28870 PRECEDENT

4808 GROSS NEGLIGENCE; OR ISOLATED INSTANCE OF POOR JUDGEMENT.

ISSUE: Whether an experienced dozer operator is guilty of misconduct for the singular act of turning over his dozer.

FACTS:
1. Claimant has twenty-five years experience as a dozer operator; the last five or six years of which was with the captioned coal company.
2. Without first securing permission to do so, he proceeded to build a road which would expedite ingress and egress of the dozer into and out of the pit in which he worked.
3. In the process, he permitted the dozer to slip from a high wall and overturn into the pit.
4. While the dozer incurred little damage, it took a full day to retrieve the dozer with the aid of two other dozers and a highlift.
5. Claimant was discharged for this single act.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The time honored definition of industrial misconduct, particularly appropriate to cases of this nature, is found in a Wisconsin case, BOYNTON CAB COMPANY V. NEUBECK, 237 WIS 249, 296 N. W. 636 (1941):

> ". . . the term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgement or discretion are not deemed 'misconduct' within the meaning of the statute."

The Kentucky Court of Appeals held:

> We can only view Taylor's acts leading to the overturn of the dozer as constituting nothing more than an isolated case of poor judgement or minor and unintentional negligence. While such may well be a basis for terminating his employment, it falls far short of the type of conduct required under the statute in forfeiting benefits. 76 Am. Jur. 2d Unemployment Compensation § 52 (1975). There is a total absence of bad faith or any inference of culpability in the form of willful or wanton conduct. Certainly, Taylor, a man of twenty-five years experience in dozer operating and five or six years tenure for Shamrock, had some discretion in the definitive use of the dozer in accomplishing his employer's purpose. This would logically include not only the method of uncovering the coal and moving rock, but also the building of a road sufficient for ingress and egress. Further, we are compelled to recall that the actual damage to the machine was minor and although the upsetting of a dozer is not insignificant, it does not, on a single occasion, constitute such an unlikely occurrence as to manifest a willful or wanton use of the machine. To allow this single act or mishap to constitute "misconduct" within the meaning of the statute would certainly constitute the adoption of a rule barring a great mass of workers from benefits under a statute enacted for their protection. CF. BOYNTON CAB COMPANY V. NEUBECK, 237 Wis. 249, 296 NW 636 (1941). Certainly, no job

especially the rigorous task of mining coal can be performed free of misadventure. With this in mind, we must conclude that Shamrock failed in carrying its burden of proof, and further that the judgement of the circuit court was correct.

DECISION: Claimant discharged for reasons other than work related misconduct.

Kentucky Court of Appeals, SHAMROCK COAL COMPANY V. TAYLOR AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 697 SW 2d 952. PRECEDENT

4809 FAILURE OF STATE IMPOSED INSURANCE LICENSING TEST (DISCHARGE VERSUS VOLUNTARILY QUIT).

ISSUE: Whether a claimant, who fails to pass state imposed insurance licensing test, which is a condition of ongoing employment, quits or is discharged when his temporary license expires.

FACTS:
1. Hired as a sales agent by National Life Insurance Company.
2. Both parties understood that claimant must be licensed, a status achieved after passing a state examination.
3. Claimant worked under a temporary license which was valid for a period of ninety (90) days.
4. In December 1982, January 1983, and February 1983, claimant unsuccessfully attempted to pass the test.
5. Department of Insurance regulations required a reasonable waiting period before claimant could be retested.
6. Claimant's temporary license expired and he and the company parted ways on March 4, 1983.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In a published decision, the Kentucky Court of Appeals affirmed the Commission's ruling that claimant severed the employment relationship when he failed to meet the conditions of continued employment. This reasoning was predicated upon considering the employment relationship as a contractual one, thus creating the responsibility on the claimant to satisfy the threshold requirement of being licensed. By failing to do so, he initiated the job separation.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

Kentucky Court of Appeals, MURPHY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND NATIONAL LIFE INSURANCE COMPANY, 694 SW 2d 709. PRECEDENT

4810 MOST RECENT - NEXT MOST RECENT; SAME EMPLOYER BUT DIFFERENT DUTIES AND CONDITIONS OF WORK.

ISSUE: Whether claimant, who was separated under nondisqualifying conditions from his most recent employment of more than ten weeks, should be disqualified because of what would have been a disqualifying separation from next most recent employment with the same employer when the duties and conditions of work for the two periods of employment were markedly different.

FACTS:
1. Discharged by the captioned employer in February 1987, for what the evidence supports was misconduct.
2. However, a claim for benefits was not filed, and claimant's discharge was converted to a two week suspension with pay.

3. Claimant allowed to return to a different job at a different location at his previous rate of pay.

REASONS: The problem posed by this case is whether or not claimant was discharged from his MOST RECENT employment for misconduct connected with the work. First of all the incident of misconduct occurred over six months prior to the August 1987 discharge, which obviously brings into question the causal connection between those two events; such causal connection being necessary to impose a disqualification. Secondly, under the law, KRS 341.370 (7), a misconduct disqualification is only effective from the worker's discharge for misconduct until he has worked in each of ten (10) weeks and earned ten (10) times his weekly benefit amount in covered employment. Here claimant's subsequent employment at Auto Wonder Wash was more than adequate to overcome any disqualification resulting from his discharge in February, 1987.

Unemployment Insurance Program Letter Number 984, issued by the United States Department of Labor on September 20, 1968, in interpreting Section 3304 (a)(5) of the Federal Unemployment Tax Act, stated, in pertinent part:

> ...All work is performed under a contract of employment between a worker and his employer. The contract describes the duties the parties have agreed the worker is to perform, and the terms and conditions under which the worker is to perform them. If the duties, terms or conditions of the work offered by an employer are covered by an existing contract between him and the worker, the offer is not of new work. On the other hand, if the duties, terms or conditions of the work offered by an employer are not covered by an existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, new work.

Such is the case here. Claimant was discharged from his job as a truck driver in February, 1987. He was subsequently employed in NEW WORK at Auto Wonder Wash thereafter until being discharged from that, his MOST RECENT EMPLOYMENT, on August 31, 1987. The reason for his discharge at that time--having become vested in the company's pension, was not misconduct. Therefore, no disqualification may be invoked.

DECISION: Claimant's second period of employment, from which he was separated under nondisqualifying conditions, was NEW WORK lasting more than ten weeks in which he earned more than ten times his weekly benefit rate; therefore consideration of his next most recent work with the same employer is unnecessary.

C.O. # 49940 PRECEDENT

4811 REFUSAL TO SIGN MEDICAL RELEASE REGARDING JOB RELATED INJURY.

ISSUE: Whether refusal by a claimant to release medical information to his employer regarding its investigation of a job related injury is misconduct.

FACTS:
1. On January 20, 1989, claimant left work without indicating he had experienced any problem.
2. The next day he reported to an emergency room alleging he had injured his leg at work the previous day.
3. After seeing his family doctor, claimant was advised to remain off work until January 25, 1989.
4. On January 23, 1989, the employer sent claimant a letter and a medical release form, asking claimant to sign the medical release form granting the company access ONLY to information about the alleged injury of January 20, 1989.
5. Claimant refused to sign the medical release form.
6. Claimant was sent a second request by certified mail; again claimant refused.

7. The company had submitted a worker's compensation claim and simply wanted to verify the injury.
8. Claimant was sent a third medical release form and was informed if he did not sign it he would be subject to discharge.
9. Claimant, through his attorney, notified the company that the medical release form would not be signed.
10. Claimant was discharged for refusing to assist the company in its investigation of his alleged on the job injury of January 20, 1989.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In an unpublished decision, which is not to be cited to quoted, the Kentucky Court of Appeals held:

We agree with the commission that, as a matter of law, the refusal to sign medical releases under the circumstances proven here is misconduct. Such misconduct is based on the breach of the duty that Sharp owed his employer to cooperate with reasonable requests that are employment related.

DECISION: Claimant disqualified on grounds he was discharged for work related misconduct.

Kentucky Court of Appeals, BIG ELK CREEK COAL COMPANY V. SHARP AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, No. 90-CA-682-S. Unpublished. Not to be cited or quoted. For guidance only.

4812 TEACHER'S AIDES; HANDICAPPED STUDENTS (DISCHARGE VERSUS VOLUNTARY QUIT).

ISSUE: Whether it is the reasonable duty of an aide in a regular kindergarten class to change the diaper of a physically handicapped child.

FACTS:
1. A five year old boy suffering with spina bifida.
2. He is incontinent and ambulates with assistance of leg braces and walker.
3. Frequently has to use a wheelchair.
4. Because of lack of control over his bodily functions he wears a diaper.
5. He has normal mental faculties for a five year old.
6. Both state and federal laws requires that children be placed in the least restrictive environment possible.
7. Therefore, because the child has normal mental faculties for his age, he was placed in a regular (as opposed to a special) kindergarten class.
8. Claimant refused to change the child's diaper because it was not an original part of her job description, and because she feared a law suit against her if the child accused her of touching him while changing his diaper.
9. Claimant was discharged for refusing to change the child's diaper.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Because the Board was compelled by state and federal laws to place the child in a regular kindergarten class, it necessarily follows that the meeting of the child's special needs became the legitimate responsibility of those Board employees into whose care he was being placed. That the aide was assigned the duty of changing the child's diaper, rather than the teacher, comports with the normal division of duties between teachers and aides; namely, teachers perform instructional duties and aides perform noninstructional duties (eg., changing the child's diaper). Thus, the changing of the child's diaper was a reasonable job assignment for the claimant, and her refusal to perform it was misconduct.

DECISION: Claimant was discharged for misconduct connected with the work.

C.O. # 54112 PRECEDENT

NOTE: If the instant claimant had quit rather than change the child's diaper she would have done so without good cause attributable to the employment.

4813 VOLUNTARY QUIT PRIOR TO DISCHARGE (THE REVERSE DISCUSSED IN NOTE BELOW).

ISSUE: Whether a claimant, who voluntarily quits prior to her discharge on a date certain in the future, should be disqualified subsequent to the announced discharge date when there is no misconduct involved.

FACTS:

1. Claimant worked seven and one-half years, supervising mentally retarded individuals in their production work and training.
2. On April 19, 1988, claimant was notified that new insurance requirements provided that all employees must have a driver's license and a clean driving record for seven years.
3. Those employees who could not comply with these requirements would be terminated with two weeks notice.
4. Because claimant could not comply, she was given written notice that her employment would be terminated effective April 29, 1988.
5. Claimant quit April 20, 1988, instead of waiting until the 29th.

REASONS: Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In a published decision, the Kentucky Court of Appeals held:

The commission referee found that Mary had voluntarily quit without good cause attributable to her employment. The commission summarily affirmed. The trial court agreed with the referee's findings of fact, but reversed based on the decisions of other jurisdictions. This appeal followed.

{1} KRS 341.370 (1)(c) disqualifies a petitioner from receiving unemployment benefits if he has left his employment "voluntarily without good cause attributed to the employment." "Good cause" exits only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment. H & S HARDWARE V. CECIL, Ky. App. 655 S.W.2d 38 (1983). Both parties concede that the circumstances of this case create an issue of first impression.

{2} In JOHNSTON V. FLORIDA DEPARTMENT OF COMMERCE, 340 So.2d 1229 (Fla. App. 1976), the Florida court construed its unemployment statute to mean that where an employee has been notified that his employment is being terminated as of a certain date, the employee has not voluntarily left his employment without good cause attributable to his employment simply because he chose not to work all or part of the period between the notification and the date of termination. The employee, however, would not be entitled to benefits covering the period between his last day of work and the official date of his involuntary termination. In CARLSON V. JOB SERVICE NORTH DAKOTA, 391 N.W.2d 643 (N.D. 1986), the petitioner discovered a memo on the desk of one of her supervisors, directing the initiation of her removal from her secretarial position. Being upset, she chose to resign before her employment would have officially terminated. The North Dakota court held that she was entitled to benefits from the date she would have officially been discharged. It was insignificant that this official date had not yet been set.

Finally, in POTEAT V. EMPLOYMENT SEC. COM'N OF N.C., 319 N.C. 201, 353 S.E.2d 219 (1987), a truck driver was informed of his impending termination, and chose to quit prematurely and apply for benefits. The employee was nevertheless held to be qualified to receive benefits as of the date of his employer's designated date of discharge.

Here this Court, like the trial court, has no serious disagreement with the factual findings of the referee as affirmed by the commission. However, we cannot agree that the facts as presented constituted a voluntary termination. Mary's departure had already been decided--it was inevitable. Her act of leaving a few days early did not result in Barren River's decision to discharge her. CARLSTON, supra. However, her compensation begins from the date her employer terminated her, April 29th, and not from the date she quit, April 20th.

DECISION: Disqualified from date of voluntary quitting until date of discharge, following which claimant is qualified.

Kentucky Court of Appeals, BARREN RIVER MENTAL HEALTH MENTAL RETARDATION BOARD V. BAILEY, 783 SW 2d 886. PRECEDENT

NOTE: If the claimant had given notice of intent to quit at a date certain in the future, and no good cause attributable to the employment existed for doing so, and the employer discharged her prior to the chosen resignation date for reasons other than misconduct, then claimant would be qualified to receive benefits, for which she is otherwise entitled, for the period of time from the discharge to the chosen date of resignation.

4814 SINCERELY HELD RELIGIOUS BELIEFS; UNEMPLOYED BECAUSE OF.

ISSUE: Whether a claimant, who is not a member of a particular religious sect or church, should be disqualified for refusing an offer of work which would have required him to work on Sundays, when said refusal was based on a sincerely held religious conviction that as a Christian he should not work on Sundays.

FACTS: (See "Issue" Above).

REASONS: The United States Supreme Court held:

There is no doubt that "{o}nly beliefs rooted in religion are protected by the Free Exercise Clause," THOMAS supra, at 713. Purely secular views do not suffice. UNITED STATES V. SEEGER 380 U.S. 163 (1965); WISCONSIN V. YODER 406 U.S. 205, 215-216 (1972). Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it.

Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. THOMAS settled that much. Undoubtedly, membership in a organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious belief's, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

DECISION: Claimant may not be disqualified from benefits for refusing employment which would require him to violate a sincerely held religious conviction against working on Sundays.

The United States Supreme Court, FRAZEE V. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, 109 S.Ct. 1514 (1989). PRECEDENT

NOTE: This same principle would apply if a claimant quits work rather than work on his Sabbath, or is discharged for refusing to do so, if his refusal is grounded in a sincerely held religious conviction, whether or not he is a member of a religious sect or church.

4815 RELIGIOUS PRACTICES WHICH VIOLATE THE LAW.

ISSUE: Whether claimants, who, as members of the Native American Church, used peyote during religious ceremonies, should be disqualified when they were discharged from their positions as counselors by a private drug rehabilitation organization for using a controlled substance (i.e., peyote) in violation of state law.

FACTS: (See "Issue" Above).

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The United States Supreme Court held:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in MINERSVILLE SCHOOL DISTRICT BOARD OF EDUCATION V. GOBITIS, 310 U.S. 586, 594-595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in REYNOLDS V. UNITED STATES, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Id., at 166-167.

Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since REYNOLDS plainly controls.

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.

DECISION: Claimants held to be guilty of work related misconduct.

United States Supreme Court, EMPLOYMENT DIVISION DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH, 110 S.Ct. 1595 (1990). PRECEDENT

4816 "NO FAULT" ATTENDANCE POLICY.

ISSUE: Whether violation of a "no fault" attendance policy is, ipso facto, misconduct without considering reasons for absence and/or instances of tardiness or leaving work early.

FACTS:

1. Under the "no fault" attendance policy, employees are assessed points for each absence or tardiness without regard to the reason therefore.
2. Points are discarded after a year and are also removed at the rate of one per month for good behavior.
3. During the final year of her employment, claimant was tardy seven times, left work early three times, and was absent twelve times.
4. Claimant's final absence resulted from her excessive consumption of wine at a free dinner awarded her by her employer for being the employee of the month.
5. Virtually all of claimant's absences and tardiness, except for her last absence, were for good cause.
6. The Commission disqualified and the Circuit Court reversed. Employer appealed to the Court of Appeals.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

KRS 341.370 specifically states that in the case of unsatisfactory attendance, an employee is "discharged for misconduct" and thus denied benefits only "if the worker cannot show good cause for absences or tardiness." The trial court determined that the Hyatt's no-fault policy was a reasonable means of promoting employee work attendance and the trial court correctly determined that the finding was supported by the evidence in the record. The Commission's finding of misconduct based upon a violation of Hyatt's policy on absences does not, as the trial court determined, address a basic issue herein. The Unemployment Insurance statutes do not make the employer's standards its standards. The employee was fired for unsatisfactory attendance and this presents no problem; but, she was clearly able, without contradiction, to demonstrate excuses for good cause and notice of same and such absences do not evidence either a deliberate or wanton misbehavior. Virtually all of Ms. Dean's absences and tardiness, except for her last absence, were for good cause, including lack of transportation, nonappearance of baby-sitters and illness on her behalf and that of her family. Such conduct does not indicate bad faith or constitute willful or wanton misconduct.

DECISION: Claimant discharged for reasons other than work related misconduct.

Kentucky Court of Appeals, HYATT REGENCY LOUISVILLE V. DEAN AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, No. 88-CA-1864-S. Unpublished. Not to be cited or quoted. For guidance only.

4817 REASONABLE RULE AGAINST HORSEPLAY; NOT UNIFORMLY ENFORCED.

ISSUE: Whether a claimant is guilty of misconduct for violating a reasonable rule prohibiting horseplay when violators of the same rule had not been warned or punished in the past.

FACTS:

1. Many times during the course of claimant's seven years of employment workers had hung various items on the conveyor belt in jest.
2. No damage was caused in these instances and management neither investigated them nor admonished workers to refrain.
3. On June 3, 1987, claimant hung the purse of a co-worker on the conveyor belt in jest, intending no harm thereby.
4. The purse got hung in an overhead fan then a light fixture, the latter of which ripped lose and nearly hit a co-worker when it fell to the floor.
5. Production was shut down for twenty minutes, idolizing eighteen hourly employees.
6. During his seven years, claimant had a good work record.

REASONS: KRS 341.370 (1)(b) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of misconduct connected with the work.

Misconduct has been construed to mean any act or omission by a worker which demonstrates a willful or wanton disregard for the legitimate business interests of the employer.

Every employer has the right to expect its workers to conform to certain reasonable standards of behavior; and, may establish rules to govern the conduct of its workers. The worker owes a duty to abide by reasonable rules. Violation of such rules may constituted misconduct, especially after the worker has been warned, and provided there is uniform enforcement of such rules. A rule that is generally ignored, or the violation of which often goes unpunished, may not be selectively enforced to the worker's detriment to support a finding of misconduct.

Here the claimant imitated his co-workers by hanging something from the conveyor in jest and with no harm intended. However, his luck was bad and, what started as a joke, ended in near disaster. He engaged in conduct which was previously tacitly condoned by management's failure to punish or admonish workers for similar acts. Considering his otherwise good work record over a lengthy period of employment, we feel his actions did not rise to the level of disservice necessary to support a finding of misconduct.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 53753 NONPRECEDENT

NOTE: KRS 341.370 (c) now requires that the rule must be uniformly enforced before violation of same will be misconduct.

4818 SIMPLE NEGLIGENCE; REPEATED INSTANCES OF.

ISSUE: Whether repeated acts of simple negligence constitutes misconduct when discharge resulted from the collective effect thereof.

FACTS:

1. Claimant was a long distance over-the-road truck driver.
2. He was involved in three accidents in ten months.
3. One accident involved attempting to drive through an unmarked viaduct which ripped off a portion of the trailer top causing $1560.00 damage.
4. One accident involved hitting an overhang at a service station causing approximately $482.92 damage.
5. The other accident involved minor damages of $271.12 when, in backing out of a parking area, claimant struck the corner of another trailer.
6. Company policy was to discharge any driver who had three "preventable" accidents.
7. All three accidents were "preventable," and the Commission disqualified the claimant.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Edmonson Circuit Court held:

> The employee's conduct in this case in no one instant in the opinion of this Court amounted to gross negligence; or a willful or wanton disregard of the employer's interests, however, it manifestly appears that each accident did constitute simple negligence and, with a slightly higher degree of care, could have been avoided. It is true that the employee paid the damage to the building overhang himself and was also being assessed the sum of $25.00 per week to pay the $1,000.00 or the deductible portion of the employer's insurance policy for the damage caused by attempting to go through the viaduct that had insufficient clearance. However, as he was ultimately discharged as a result of two other accidents, it does not appear that he completed the required payment. A further consideration in this case is the fact that this employee was entrusted with a huge motor vehicle, which in the hands of a careless or negligent employee could have resulted in loss of life or lives of innocent persons or serious and substantial property damage, thereby exposing employer to great risk.

DECISION: Claimant discharged for misconduct connected with the work.

Edmonson Circuit Court, VINCENT V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND M.D. TRANSPORT SYSTEMS, No. 83-CI-116. Not to be cited or quoted. For guidance only.

4819 ABSENCES DURING PRETRIAL INCARCERATION.

ISSUE: Whether the claimant, who was discharged because of absences during pretrial incarceration, may be found guilty of misconduct when he is thereafter convicted of the offense(s) for which he had been incarcerated.

FACTS:
1. Claimant was absent from work due to pretrial incarceration.
2. Claimant gave ongoing notice of his absence to his employer.
3. Claimant was discharged prior to conviction for absences caused by pretrial incarceration.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged from the most recent employment for reasons of misconduct connected with the work.

KRS 341.370 (6) states:

"Discharge for misconduct" as used in this section shall include but not be limited to separation 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.

The employer's rule providing for the discharge of a worker for three or more consecutive days unexcused absence is unreasonable when applied to the facts of this case because claimant gave ongoing notice of his absence to the employer and he was compelled to be absent by virtue of

being involuntarily incarcerated. Further, at the time claimant was discharged he had not yet been convicted of either offense for which he was incarcerated. To hold claimant guilty of misconduct SOLELY because of pretrial incarceration, and absences resulting therefrom, would deny claimant his presumption of innocence (see HOLMES V. REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, 451 N.E. 2d 83 (Ind. App. 4 Dist. 1983)) We are not prepared to do that.

The question remains whether the claimant, who was discharged because of absences during pretrial incarceration, may be found guilty of misconduct when he is thereafter convicted of the offense(s) fro which he had been incarcerated. We think not. KRS 341.370 (6) provides for a finding of misconduct when a claimant is incarcerated "...in jail FOLLOWING CONVICTION of a misdemeanor or felony. . . which results in missing at least five (5) days work (emphasis added)". The clear unambiguous wording of this portion of subsection (6) of KRS 341.370 preserves, intact, the worker's presumption of innocence. This is precisely the Commission's intent with regards to the case herein under appeal. HOLMES, supra.

In further support of a strict interpretation of the relevant portion of subsection (6) of KRS 341.370, the Commission cites with favor ELLIS V. MICHIGAN EMPLOYMENT SECURITY COMMISSION, 155 N.W. 2d 433, wherein the Supreme Court of Michigan held a claimant entitled to receive benefits, when he reported for work two to three hours before the end of his shift on the tenth consecutive day of absence caused by incarceration following conviction of a traffic violation, because the relevant statute required an absence of AT LEAST ten consecutive days before a disqualification could be imposed.

While neither the Indiana nor Michigan cases cited above reach the intent of the Kentucky legislature when it enacted KRS 341.370 (6), it remains that these rulings lend support to the Commission's position that had the Kentucky legislature intended to include as "Discharge for misconduct" separations initiated prior to conviction for a worker's absence caused by pretrial incarceration, then the Kentucky legislature would have carved out such an exception to its requirement that the absences must follow conviction. Since it did not; we cannot.

As a word of caution, let it be known that by its strict interpretation of that portion of subsection (6) of KRS 341.370 which requires the five days absence to follow conviction before misconduct can be found, the Commission is not declaring that KRS 341.370 (6) is an all inclusive list of what constitutes misconduct. Rather, the Commission strongly affirms the clear intent of KRS 341.370 (6) that "Discharge for misconduct" SHALL NOT BE LIMITED to those examples of misconduct enumerated therein. We are simply excluding as misconduct, for reasons stated above, separations initiated prior to conviction for absences caused by pretrial incarceration.

DECISION: Claimant was discharged for reasons other than misconduct connected with the work.

C.O. # 55571A PRECEDENT

4820 POSITIVE DRUG TEST; EVIDENTIARY REQUIREMENTS FOR PROOF THEREOF.

ISSUE: Whether claimant is guilty of misconduct for violating agreement which required that he abstain from all controlled substances unless prescribed by his doctor.

FACTS:

1. Claimant employed by employer for five years as a machine operator.
2. Claimant entered into a two year re-entry agreement with the employer as a condition of returning to work following hospitalization for treatment of drug addiction.
3. Agreement required claimant to "completely abstain from any mood-altering drugs, alcohol, sedatives, narcotics, soporifics, over-the-counter drugs, etc., except on prescriptions from his family physician after consultation with his treatment facility" and provided for random suspicionless drug testing

4. Claimant was prescribed the anti-depressant medication sinequan by his doctor.
5. Claimant suffered a work related injury which resulted in him missing a day of work.
6. Claimant was asked to undergo a drug test as provided for by the re-entry agreement.
7. Claimant informed the plant nurse that he was taking sinequan.
8. The drug test was negative for all controlled substances including nordiazepam, the metabolite found in the tranquilizers valium and librium.
9. Claimant's attendance began to suffer.
10. Because of anonymous tips received by the personnel manager that claimant was back on drugs and/or alcohol, claimant was asked to under go another drug test.
11. Claimant consented and followed all instructions given to him by the plant nurse.
12. The plant nurse insured the sample was not tampered with and sealed it with security tape.
13. Claimant initialed the container to verify that it contained his urine sample.
14. Plant nurse completed the external chain of custody form and mailed the urine sample to Bayshore Clinical Laboratories in Milwaukee, WI.
15. Claimant forgot to inform the plant nurse that he was still taking sinequan when asked by her to list all medications he had taken during the preceding seventy-two hours.
16. Upon receipt by the laboratory of claimant's urine sample, the external chain of custody form was signed by an employee of the laboratory verifying the seal on the container holding claimant's urine was intact.
17. The internal chain of custody for the sample was supervised by the supervisor of toxicology who introduced employer exhibits and testified to their authenticity, accuracy, and that they were prepared in the normal course of business.
18. Claimant tested positive for nordiazepam, the metabolite found in the tranquilizers, valium and librium.
19. When confronted with the positive test results, claimant denied use of any controlled substance and suggested the positive finding could have resulted from him taking sinequan.
20. The supervisor of toxicology testified that he knows of no circumstances under which sinequan would show positive for nordiazepam.
21. Claimant was discharged for being in violation of the re-entry agreement.

REASONS: KRS 341.370 (1)(b) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of misconduct connected with the work.

It is the position of the Commission that the Kentucky Court of appeals described the evidentiary requirements to be met before test results for the presence of illegal drugs (and/or alcohol) in body fluids may be considered competent evidence in HASTE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND OAKWOOD, 673 S.W. 2d. 740. In that case the Court said the party introducing the test results must be able to lay the proper foundation for the admission of the test results, be subject to cross-examination, and show chain of custody of the body fluid sample, before the test results may be competent evidence. That is, the custodian of the document or other qualified witness introducing the document containing the test results must be able to authenticate the document and testify to the chain of custody of the body fluid sample before that document may be considered an exception to the hearsay rule. See CITY OF FORT LAUDERDALE V. FLORIDA UNEMPLOYMENT APPEALS COMMISSION AND VERNON L. MOODY, 536 So. 2d 1074, SOUTHERN BAKERIES, INC. V. FLORIDA UNEMPLOYMENT APPEALS COMMISSION AND WILBUR WHATLEY, JR., 545 So. 2d 898, BUCHLER V. COMMONWEALTH OF KENTUCKY, Kentucky, 541 S.W. 2d 935 (1976), and Rule 803 (6) of the Federal Rules of Evidence for additional support of this position.

Further, a denial by a claimant of using the illegal drug or drugs for which he tested positive will be considered a challenge to both the reliability of the test results and the maintenance of the chain of custody of the body fluid tested. Standing alone, in the face of such a challenge, test results which are incompetent evidence cannot sustain a finding of illegal drug use. However, a denial of

illegal drug use will not be an adequate defense against test results which are competent evidence and positive for the presence of an illegal drug or drugs in the body fluid tested. Further, an assertion by a claimant of passive inhalation of the illegal drug or drugs for which he tested positive, while insufficient in and of itself to show drug use, is no defense against test results which are competent evidence and positive for the presence of an illegal drug or drugs in the body fluid tested.

Considering the claimant had undergone treatment for drug addiction through an employee assistance program, the Commission finds that the requirement of the re-entry agreement that claimant abstain from all controlled substances unless prescribed by his doctor in consultation with his treating facility was reasonable.

In this case, the chain of custody of the claimant's urine sample was more than adequately maintained both by nurse Lang, who took the urine sample and testified in detail of the measures taken to insure the security of the sample, and by laboratory employees who handled and tested the sample, as testified to by Mr. Bretl, who oversaw the internal security of the sample, and authenticated the internal chain of custody documentation. Thus, both nurse Lang, and Mr. Bretl are competent witnesses with regards to establishing the chain of custody of the claimant's urine sample. further, the gas chromatography/mass spectrometry test used to confirm the presence of nordiazepam in the claimant's urine is accepted as the most accurate and reliable test in the industry, and Mr. Bretl was qualified to authenticate the test results. Therefore, considering that the chain of custody was maintained and testified to by two qualified and competent witnesses and considering the accuracy and reliability of the properly authenticated confirmatory test used, the positive test results are accepted as competent evidence against which claimant's denial of drug use cannot stand. Thus claimant violated the re-entry agreement and was, thereby, guilty of work related misconduct.

DECISION: Claimant discharged for misconduct.

C.O. # 56722B PRECEDENT

4821 NO-FAULT ATTENDANCE POLICIES.

ISSUE: Whether the claimant, having progressed through the employer's no-fault attendance policy, is guilty of misconduct.

FACTS:

1. Claimant worked for the employer from July, 1989, to November 30, 1990, at which time she was laid off due to lack of work.
2. On December 1, 1990, a message was left on claimant's telephone answering machine to report for work on December 3, 1990.
3. Claimant's telephone answering machine was functioning but she did not receive the message.
4. Claimant telephoned the company the afternoon of December 3, 1990, and learned she had been recalled to work.
5. Claimant received two points for the absence on December 3, 1990, bringing her total to eleven and one-half points which was sufficient under the employer's "no-fault" attendance policy to warrant termination.
6. Claimant was permitted to continue working and did so on December 4, 6, and 7, 1990.
7. December 8, 1990, due to a power outage, claimant overslept resulting in her reporting for work one hour late.
8. Claimant explained to her supervisor the reason for her tardiness.
9. Claimant was informed that it did not matter if she worked the remainder of her shift or not that she was going to be discharged.

10. Claimant elected not to work and received two points for December 8, 1990, which brought her total to thirteen and one-half.
11. If claimant had worked the remainder of her shift she would have only received one-half point, but she still would have been discharged.
12. Prior to December 3, 1990, claimant had accumulated nine and one-half points and had progressed through the employer's "no fault" attendance policy being made aware of her status therein after the sixth, seventh, eighth and ninth points were assessed.
13. Claimants attendance record suggests a vast majority resulted from either personal illness or work related injuries.

REASONS: KRS 341.370 (1) (b) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has been discharged from the most recent employment for reasons of misconduct connected with the work.

The employer trying to show a disqualification under KRS 341.370 must bear the burden to defeat recovery of the claim. BROWN HOTEL COMPANY V. EDWARDS, 365 SW 2d, 299.

Misconduct denotes acts or omissions by a worker which demonstrate a willful or wanton disregard for the legitimate business interests of the employer. Every employer has a legitimate interest in the efficient operation of its business. That interest is disserved by employee absenteeism. It is disserved wantonly, however, only when the absence is not properly reported, or when it is for less than compelling reasons. SIMPLE NUMBERS OF DAYS OR PERCENTAGES OF TIME LOST TO ABSENTEEISM CANNOT SERVE TO SHOW THAT A WORKER IS GUILTY OF MISCONDUCT.

An employer has the right to promulgate and apply a "no-fault" attendance policy; however, its provisions are not determinative on the question of whether or not a claimant committed misconduct connected with the work when violating the policy. That question must be answered by determining whether or not the claimant's absences, instances of tardiness and/or of leaving early were for compelling reasons and properly reported to the employer. That a claimant progresses through a "no-fault" attendance policy and receives warnings and/or disciplinary suspensions cannot support a finding of misconduct unless it is shown that a sufficient number of the absences, instances of tardiness and/or of leaving early were for less than compelling reasons and/or improperly reported to the employer so as to reflect a willful or wanton disregard by the claimant for the employer. It must be stated again that simple numbers of days absent or percentages of time lost to absenteeism cannot serve to show that a worker is guilty of misconduct whether or not he is warned and/or suspended for same.

In the case herein under appear, the employer has failed to meet its burden of proof. Claimant's absence of December 3, 1990, was through no fault of her own, and her tardiness of December 8, 1990, was caused by circumstances beyond her control. The vast majority of the remaining absences, instances of tardiness and/or of leaving early appear to have been for compelling reasons. Therefore, notwithstanding that claimant was warned as she progressed through the "no-fault" attendance policy, the evidence of record does not reflect a willful or wanton disregard by the claimant for the employer with regard to her attendance. Therefore, claimant's violation of the employer's "no-fault" attendance policy is not misconduct under the factual circumstances of this case.

DECISION: Claimant discharged for reasons other than misconduct.

C.O. # 57221 PRECEDENT

4822 CLAIMANT FRAUDULENTLY DRAWS BENEFITS FROM CURRENT EMPLOYER'S RESERVE ACCOUNT.

ISSUE: Whether a claimant is guilty of misconduct when she fails to report wages earned while working for the employer and fraudulently draws unemployment insurance benefits.

FACTS:
1. Claimant was employed with the company for eight years, last working as a receptionist.
2. Claimant failed to report wages she earned while working for the employer.
3. Claimant fraudulently drew unemployment insurance benefits for which the employer was liable.
4. Employer discharged the claimant when it learned of the claim because it was felt that the claimant's actions were a form of theft from the organization.
5. Claimant pled guilty in court to the misdemeanor charge of attempted unemployment insurance fraud over $100.00.

REASONS: KRS 341.370 (1) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged from the most recent employment for reasons of misconduct connected with the work.

In this case, claimant intentionally deceived the State so as to enable her to receive unemployment insurance benefits to which she was not entitled, requiring that the captioned employer reimburse the State fund for these benefits. Such action reveals wrongful intent and demonstrates an intentional and substantial disregard for the employer's interests. Further, claimant's actions totally ignored and blatantly abused the duties and obligations owed an employer by its employee, i.e. honesty and trust. Clearly, such deviant behavior is sufficient upon which to sustain a finding of misconduct connected with the work.

DECISION: Claimant disqualified on grounds she was discharged for misconduct connected with the work.

C.O. # 57909 A PRECEDENT

4823 REMOVED. Reference KRS 341.360(7) newly enacted by the 1992 session of the General Assembly.

4824 LAYOFF FOLLOWED BY OFFER OF WORK.

ISSUE: Whether claimants received a genuine offer of employment when new owners failed to personally extend said offer.

FACTS:
1. Claimants worked for Keith's Shop Rite Supermarket.
2. The store experienced financial difficulties which culminated in bankruptcy court and the store was purchased by the appellant, Westwood Supermarket.
3. Claimants received layoff notices from Keith's Shop Rite.
4. Appellant insists employment was offered to each claimant but in fact no personal offer was ever made.
5. Appellant relied on the former owner and other employees to pass the word that any employee wishing to stay should contact the new owners.

REASONS: If no actual offer of employment occurred, it is correct to conclude there could be no issue of work refusal and no violation of KRS 341.370 (1) (c), disqualifying an individual from unemployment benefits if he or she voluntarily quits without good cause. There is evidence supporting the factual determination that the employees were laid off.

DECISION: Claimants neither quit nor refused an offer of work; but rather, they were laid off under nondisqualifying conditions.

WESTWOOD SUPERMARKET, INC. VS. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND NINA J. JOHNSON, 90-CA-417-MR

Unpublished. Not to be cited or quoted. For guidance only.

4825 NOTICE OF INTENT TO QUIT; FAILURE TO GIVE SPECIFIC DATE.

ISSUE: Whether a claimant is discharged or voluntarily quits when she gives clear notice of intent to leave the employment in the near future but fails to or refuses to give a specific date, thereby placing the decision upon the employer as to date of claimant's separation from work.

FACTS:

1. Claimant worked for the employer fourteen months.
2. Claimant notified her employer she would be leaving to enter a Navy program March 1 or April 1, 1992.
3. On March 12, 1992, claimant and her employer discussed her anticipated acceptance by the Navy and the date she would leave her job.
4. Because of the hiring of a new employee and comments made by the claimant as to her acceptance into the Navy, the employer designated March 31, 1992, as claimant's last day of work.
5. During claimant's last week of work, she was notified that if she passed the Navy's physical examination, she would be accepted into the Navy program effective July 8, 1992.
6. Claimant was scheduled to work until 5:00 p.m. on March 31, 1992, but left at 3:00 p.m. believing there to be nothing for her to do.
7. Claimant failed her military examination and was not accepted into the Navy program.

REASONS: KRS 341.370, in pertinent part, provides that a claimant may be disqualified from receiving benefits if he quits or is discharged from his job under certain circumstances. Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In this case, the party initiating the job separation was the claimant. Claimant had advised the employer of her Navy application which was expected to result in her leaving her job. When claimant was unable to give a date when she would leave, the employer selected a date. The employer made this decision because of valid business interests, but only in response to claimant's clear notice that she would leave the work when accepted by the military; claimant intently pursuing such acceptance. It was claimant's decision to pursue other employment rather than continue employment with the captioned company. Claimant quit her job. The employer's insistence that a date of separation be established does not alter the nature of the separation as claimant had clearly stated her intent to leave, having given some tentative dates.

KRS 341.370 requires that, in order to qualify for benefits, the employee who voluntarily quits employment must not only have good cause but the reason for leaving must be attributable to the employment.

In this case, there is no evidence that the claimant had good cause to leave the work which is attributable to the employment.

DECISION: Claimant voluntarily quit her employment without good cause attributable to the employment, and is disqualified from receiving benefits.

CO# 60909 PRECEDENT

4826 REFUSING TO SIGN A WRITTEN WARNING.

ISSUE: Whether a refusal to sign a written warning thereby admitting quilt constitutes an act of misconduct.

FACTS:
1. Claimant was an apprentice tool maker/machinist.
2. Claimant received a written warning alleging numerous infractions.
3. Management insisted claimant sign the written warning as an admission of guilt.
4. An area was not designated on the written warning where claimant could sign his name acknowledging receipt of the warning and give a written response to the allegations.
5. Claimant disagreed with the allegations and refused to admit to guilt by signing the written warning.
6. Claimant was discharged for refusing to sign the written warning.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged from the most recent employment for reasons of misconduct connected with the work.

Claimant's refusal to sign the written warning admitting quilt of allegations that were not supported by the evidence of record was not unreasonable. Had the written warning been formatted in such a way that by signing it claimant would simply have been acknowledging receipt of the warning, and had the written warning afforded claimant space to provide a written response to the allegations, then refusal to sign the written warning would have been unreasonable and tantamount to misconduct. Such was not the case with regards to the written warning which management insisted claimant sign.

DECISION: Claimant was discharged from the employment for reasons other than misconduct and is not disqualified from benefits.

CO# 61582 PRECEDENT

4827 ADEQUATE NOTICE OF DRUG POLICY AND FALSIFICATION OF DRUG TESTING RELEASE FORM.

ISSUE: Whether a worker must be given a copy of specific rules or specific rules be posted by the employer for violation of the rules to be considered a knowing violation amounting to misconduct? Whether untruthful completion of a drug testing release form, required by an employer as part of its drug testing policy, is misconduct?

FACTS:
1. Claimants were employed by company since mid-1980's.
2. Company implemented drug policy in 1989. The policy was detailed and provided for mandatory drug testing under certain circumstances. The company displayed large posters in the plant about the drug policy but did not display the entire drug policy.
3. Claimants did not receive or read the detailed drug policy but did see the posters. They did sign a pledge card in 1989 to help keep the workplace drug-free.
4. On November 24, 1992, a supervisor observed claimants in the parking lot of the workplace engaged in dispute with other workers. One of claimants explained to the supervisor that he had been accused of selling drugs and wanted to settle the matter. During subsequent interviews, another worker asserted that the other claimant had smoked marijuana in a car on the workplace parking lot.
5. Claimants, according to the drug policy of employer, were sent for drug testing. Both signed statements prior to testing that they had not taken drugs, prescription or not, in the last two weeks.

6. Drug testing was positive for marijuana. Documentation of the testing and chain of custody was adequate.
7. Claimants subsequently admitted to using marijuana three days before the test.
8. Claimants were discharged because of drug use and falsifying statements related to drug testing.

REASONS: The referee, the Commission, the Circuit Court, and the Kentucky Court of Appeals held that disqualification from benefits was appropriate because misconduct was shown. Claimants had adequate notice of the employer's drug policy by the posters about the policy and by signing pledges to keep the workplace drug-free. Drug testing under the policy was justified and claimants' use of marijuana was a knowing violation of the policy which constituted a "willful disregard to the employer's interests." It was also held that falsification of the statement given prior to the testing was a separate act of misconduct which would require disqualification.

DECISION: Claimants disqualified for misconduct.

Kentucky Court of Appeals, Avalee Smith and Donna Smith v. Unemployment Insurance Commission, 94-CA-1364-MR. PRECEDENT

4828 INDEFINITE LAY OFF; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether claimant, who became self-employed following indefinite lay-off, voluntarily quit or was discharged, and whether claimant refused an offer of suitable work when he did not respond to the employer's recall to work but chose to remain seasonally self-employed.

FACTS:
1. Claimant began working for the employer on August 29, 1994, as a plating machine operator on the 3:00 p.m. to 11:00 p.m. shift earning $6.55 an hour.
2. Claimant last worked on May 14, 1995, at which time he was laid off for an indefinite duration with recall rights for one year.
3. In May 1995, claimant became self-employed as a shell harvester and earned substantially more than he did for the employer.
4. Claimant received notice that he was to return to work at 7:00 a.m. on June 11, 1995. Failure to comply with the notice would result in termination.
5. Claimant chose to remain self-employed and did not respond to recall to the company.

REASONS: KRS 341.370 (1) (b) and KRS 341.370 (1) (c) provide for the imposition of a duration disqualification from receiving benefits when a worker is discharged for work connected misconduct or voluntarily quits his/her most recent employment without good cause attributable to the employment.

KRS 341.370 (1) (a) provides for the disqualification of a worker from receiving benefits if he has failed without good cause either to apply for available, suitable work when so directed by the employment office or the secretary or to accept suitable work when offered him, or to return to his customary self-employment when so directed by the secretary. KRS 341.100 provides that prior work and earnings should be considered in determining whether work is suitable for a claimant.

Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

The Supreme Court of Kentucky, in a case styled KOSMOS CEMENT V. HANEY ET AL AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 698 SW 2d 819 ruled that a lay-off of indefinite duration, notwithstanding seniority-based recall rights, is "equivalent" to a discharge and the recall of a worker by the company is an offer of "new work". In KOSMOS, workers were on an indefinite lay-off then were recalled to positions which had been vacated by employees who were on strike. They refused recall. The Court held that the proximate cause of their unemployment was the fact that they were laid off due to lack of work. The intervening strike and the refusal of the company recall by the claimants did not disqualify them from receiving benefits. The case currently before the Commission differs only in that no strike exists.

The U.S. Department of Labor interpreted section 26 U.S.C. 3304(a)(5)(A) of the Federal Unemployment Tax Act to be identical with the ruling in Kosmos to the effect that "...work offered to a person on indefinite lay-off is new work..."further stating the existence of a seniority right to recall does not continue the contract of employment beyond the date of lay-off. Such a seniority right is the worker's right; it does not obligate the worker to accept the recall and does not require the employer to recall the worker. It only requires the employer to offer work to the holder of the right before offering it to individuals with less seniority. Appellate Courts of other states have adopted the same interpretation of "new work" and have ruled that workers on indefinite lay-off could refuse recall without loss of benefits since the position to which they are recalled constitutes a new contract of employment. (Ref.: ENGRACIA CAMPOS V. CALIFORNIA EMPLOYMENT DEVELOPMENT DEPT, 132 CAL. APP. 3d 961; TEXAS EMPLOYMENT COMMISSION V. E-SYSTEMS, Inc., 540 SW 2d 761 and ALLEN-BRADLEY V. DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, 58 Wis. 2d 1, 205 NW 2d 129).

Considering the rulings by the Courts, the evidence in this case is that claimant's employment ended by discharge (indefinite lay-off). The employer presented no allegations or proof of misconduct, thus, it must be held that claimant's separation was for reasons which are non-disqualifying. The subsequent recall constitutes an offer of "new work". Therefore, we must determine whether the new work offered was suitable for the claimant and whether he refused the work with good cause. It is undisputed that the work itself was suitable for the claimant. The wages and hours were very similar to those he held prior to being laid off and he had the knowledge and ability to perform the job duties to which he would have been assigned. Further, the work would have led to his return to his normal position. Claimant's sole reason for refusing the work offered was the fact that he had entered self-employment as a shell harvester. If, as the record demonstrates, claimant's self-employment was seasonal, such seasonal work is not justifiable cause for refusing an offer of bona-fide employment with his most recent employer. It, therefore, is held that claimant refused an offer of suitable work without good cause for which a disqualification is imposed.

Parenthetically, should claimant argue that the self-employment was full-time non-seasonal employment, he could refuse to return to his normal employer without disqualification; however, when filing a claim for unemployment benefits, claimant would be directed by the Division to return to his full-time self-employment and would, therefore, be ineligible to receive benefits.

While the Kentucky Unemployment Insurance Commission established KOSMPS as precedent several years ago, it has concurrently held as precedent a case styled KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL COMPANY, 331 SW 2d 903. In COCHRAN the Court held that separation from the employment occurred by a voluntary quit at the time the worker, on indefinite lay-off, refused recall to the employment stating that the lay-off itself did not terminate the employment. Obviously, as it relates to when a separation occurs, it is opposed to the concept espoused in KOSMOS. As KOSMOS was issued subsequent to COCHRAN and is supported by the federal interpretation, we believe that COCHRAN is no longer applicable.

DECISION: Claimant was discharged from the employment for reasons which are non-disqualifying. However, claimant refused an offer of suitable work without good cause. He is, therefore, disqualified from receiving benefits from May 7, 1995 through the duration of the period of unemployment.

CO# 70995 PRECEDENT

4829 REDUCTION IN WORKFORCE

ISSUE: Whether a worker who elects to participate in a workforce reduction plan quits or is discharged

FACTS: 1. Employer announces a reduction in workforce
2. Employer seeks volunteers to meet the targeted reduction
3. Employer offers monetary incentive to those who volunteer
4. Claimant volunteers for the reduction in workforce

KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged from the most recent employment for reasons of misconduct connected with the work.

KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit their most recent suitable work without good cause attributable to the employment.

In Precedent Order Number 60909, the Commission held that whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In the case herein under appeal, it was the captioned employer who approached the claimant, and his co-workers, announcing its intent to reduce the workforce in the Louisville area by one service technician position effective July 1, 2004. Further, it was the captioned employer who promulgated and offered to the claimant and his co-workers, an early retirement plan which offered a monetary inducement to the most senior employee who volunteered to retire effective July 1, 2004, thereby relieving the captioned employer of the necessity of discharging the least senior service technician. It is clear, that the captioned employer initiated the job separation by announcing the pending layoff and seeking a volunteer to be laid off. Therefore, claimant was discharged.

DECISION: Claimant was discharged for reasons other than work connected misconduct.

C. O. # 91867 PRECEDENT

Chapter 5000

PROCEDURES

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CONTENTS BY ISSUE

5000 BENEFIT CHARGES; NOTICE OF LIABILITY.

ISSUE: Whether benefit charges may be levied prior to notice of potential liability being given to employer.

FACTS:
1. On November 20, 1978, well after receiving notice of potential liability and protesting the claim, the employer's reserve account was charged with benefits paid for week ending June 17, 1978.
2. Employer questioned appropriateness of its reserve account being charged.

REASONS: Notice and hearing, the essence of due process, means an opportunity to object to adverse administrative action before it occurs. In 1949, the Kentucky Court of Appeals held unconstitutional that portion of the Kentucky Unemployment Insurance Law which provided that without prior notice and hearing charges could be made to the reserve account of certain base period employers. BABB V. BUILLITT, Ky., 220 SW 2d 394.

This statutory defect has long since been cured. Today, KRS 341.530 (3) and 903 KAR 5:080 together require that notice and hearing be given to any employer before its reserve account is charged with any payments made under a claim. Such was done in this case.

Due process does not prevent charging a reserve account with benefits paid for a week which preceded notice of potential liability. It only prevents the LEVYING of such a charge prior to such notice and hearing. After the opportunity to protest a claim has been given, charges for all weeks under the claim may be levied.

In this case, the employer's reserve account was not charged with benefits paid for the week ending June 17, 1978, until November 20, 1978, well after it was notified of its potential liability and protested the claim. Due process was satisfied.

DECISION: Due process had been provided, and benefits were properly charged to the employer's reserve account.

C.O. # 20011 NONPRECEDENT

5001 EMPLOYER - EMPLOYEE RELATIONSHIP.

ISSUE: What administrative bodies shall determine whether an employer-employee relationship exists, initially and on appeal.

FACTS:
1. Claimant was disqualified by a referee decision mailed March 11, 1982, which became final for lack of appeal.
2. Subsequently, claimant worked in employment insufficient to remove the disqualification, including a part-time job which the referee found to be "self-employment."
3. The employer considered it to be "contract labor."

REASONS: The determination of employer-employee relationship is a complex legal question. The accepted procedure when coverage is the issue is to refer the question to the Tax Branch for the auditor to investigate the nature of the employment and issue an administrative determination appealable to the Commission. The Commission held that the part-time employment was insufficient to remove the disqualification, and that evidence did not support the conclusion that claimant was self-employed or performing contract labor. Employee coverage issue referred to the Tax Branch for determination on whether or not an employer-employee relationship existed.

DECISION: That portion of the referee decision finding that the employment was self-employment or contract labor was voided. Case was remanded to the Tax Branch for a determination on the question of coverage (i.e., whether an employer-employee relationship existed).

C.O. # 32394 PRECEDENT

5002 UNTIMELY PROTEST; FIRST NOTICE NOT RECEIVED IN DUE COURSE OF POST.

ISSUE: Whether an employer may overcome the presumption that a properly addressed notice of claim was not received in due course of post.

FACTS:
1. First notice of claim (UI-412A) was mailed December 12, 1968, to the employer's correct address.
2. No response was made to this notice.
3. Employer filed a timely protest to the next notice, form UI-448, "Statement of Charges."
4. Incoming mail is received in a central mail room and distributed to the payroll clerks.
5. Employer's payroll clerk, Ms. Beasley, testified she did not receive the UI-412, and the other payroll clerk, Mrs. Hudson, told her she did not receive it either.

REASONS: The company contends the Division made no effort to show that the form UI-412 was properly mailed with the correct address, and that no presumption was created that it was received in the due course of mail. Numerous cases were cited setting forth the usual requirements for raising such presumption.

The statement of the referee that there is a presumption that properly addressed notices of claim are mailed by the Division on the date shown on the Division's record and are received by the addressee-employer in due course of mail is not supported by cited authority, but we are not conceding that such authority does not exist. Admittedly, no effort was made by the Division to prove that the particular piece of mail was properly mailed, or that the employees properly performed the duties of mailing notices generally.

These things are not determinative of the case because, under the facts of this particular case, the evidence is strong enough to rebut any presumption that the form UI-412 was properly mailed and received in the normal course of mail. There is a slight element of hearsay evidence involved, but

the Commission is convinced that Mrs. Hudson would testify, as stated by Mrs. Beasley, that she did not receive the form UI-412.

The Commission has heretofore remanded cases to permit the necessary parties to appear to give testimony. In this case the Commission is convinced that it would merely be a waste of time and effort to remand the case for Mrs. Hudson's testimony.

After carefully considering the facts in this case, the Commission is convinced that any omission in the present case regarding the receipt of mail was by those who may be considered mere messengers and were without knowledge of the contents of the mail they distributed.

Since the notice that claimant voluntarily resigned her last employment with the company on April 1, 1968, to accept a job with a previous employer was within ten days of the mailing date of form UI-448, it is concluded that the company's reserve account is relieved of charges under KRS 341.530 (3).

DECISION: Employer's protest from the "Statement of Charges" was accepted as timely filed, and its reserve account was relieved of charges.

C.O. # 8225 NONPRECEDENT

5003 SUBSTANTIAL EVIDENCE; REMAND FOR LOST TESTIMONY; STANDING OF NONCHARGEABLE EMPLOYER TO APPEAL.

ISSUE: Whether the Commission properly weighed the evidence, had authority to remand to recover lost testimony, and whether a nonchargeable employer is an "interested party" with standing to appeal award of benefits to former employee.

FACTS:
1. Claimant was discharged for being absent without notice, following a warning for tardiness without notice.
2. Referee disqualified the claimant and the Commission affirmed.
3. On appeal to Circuit Court, claimant asserted three errors: (1) the Commission's findings were not supported by substantial evidence; (2) due process was denied; and (3) the employer was not an interested party and had no standing to appeal.

REASONS: The Kenton Circuit Court ruled as follows:

While testimony from the parties was in conflict as to whether claimant inadvertently misread the work schedule or deliberately violated the employer's rule, the court was satisfied that the finding in favor of the employer was supported by substantial evidence of probative value contained in the record, and that the Kentucky Unemployment Insurance Commission applied the correct rule of law.

The second issue raised by the claimant was that she was denied due process of law when the Kentucky Unemployment Insurance Commission sent the matter back to the referee for a supplemental hearing and the taking of additional proof (at the first hearing, due to mechanical failure or human error, part of the testimony was not taped and the Commission referred the matter back to the hearing officer for the taking and transcription of the missing testimony).

The Court held the Commission committed no fundamental unfairness or deprived the claimant of any right by the procedure applied to this case. 903 KAR 5:130, Sec. 2 (2)(b) permits the Commission to "direct the taking of additional evidence before it, in order to determine the appeal." The claimant was not denied due process of law.

Lastly, claimant argues that since the employer in this appeal is not the "chargeable" employer, he has no standing to appeal the initial award of benefits, and no standing to initiate the review process.

The Court held that the employer of the claimant, whether a chargeable employer or not, is an "interested party" and may appeal an award of benefits to its employee by virtue of 903 KAR 5:130 Sec. 1 (1)(a).

DECISION: The Court ruled that the claimant's arguments were without merit, and the ruling of the Kentucky Unemployment Insurance Commission's disqualification of claimant was affirmed.

Affirmed by Kenton Circuit Court, SMITH V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 83-CI-141. Not to be cited or quoted. For guidance only.

5004 FAILURE TO GIVE NOTICE OF CHANGE OF ADDRESS.

ISSUE: Whether the appeals process should be extended or a new hearing granted on grounds claimant did not receive notice of hearing because he failed to notify the Division that his address had changed.

FACTS:
1. All forms, notices, and correspondence were mailed to the claimant's address of record.
2. Claimant changed his residence sometime after filing his claim but did not notify the Division until after issuance of the referee decision.

REASONS: It is the claimant's responsibility to notify the Division of any change of address. Failure by claimant to discharge that responsibility leaves the Commission little choice but to deny his application for reopening.

DECISION: Claimant's application for reopening was denied.

C.O. # 20504 NONPRECEDENT

5010 NONAPPEARANCE BECAUSE OF LOCAL OFFICE MISADVICE.

ISSUE: Whether an employer who fails to appear for a hearing because local office personnel advised him that he could submit a written statement in lieu of appearing should be granted another hearing.

FACTS:
1. Notice of Referee Hearing was mailed to the parties on April 23, 1974, giving notice of the hearing to be held on April 30, 1974.
2. Appellant employer failed to appear, and the referee dismissed the appeal for failure to prosecute.
3. Employer informed local office personnel that "he found it would be difficult to attend the hearing."
4. Local office personnel advised the employer that a written statement would be acceptable.

REASONS: Any party who fails to attend the scheduled hearing may, WITHIN SEVEN DAYS FROM THE DATE THEREOF, request a rehearing which may be granted upon a showing of good cause. (903 KAR 5:130 Section 3 (5)).

In view of the apparent misunderstanding, the Commission feels that the ends of justice will best be served by allowing the employer another opportunity to appear in person before a referee and present his appeal.

DECISION: Case was remanded to the Appeals Branch for another hearing.

C.O. # 11171 NONPRECEDENT

5013 LATE ARRIVAL FOR REFEREE HEARING (DUE PROCESS DISCUSSED).

ISSUE: Whether due process is served by failing to reopen a case when claimant arrived late for his referee hearing.

FACTS:
1. Claimant contends he arrived ten minutes late for his hearing because he had to take his mother to the hospital.
2. Referee docket sheet is simply marked "N/A" and is silent with regard to when the hearing was called.
3. Therefore, claimant's statement is accepted as fact.

REASONS: The fundamental requisite of due process of law is the opportunity to be heard. GRANNIS V. VORDEAN, 34 S. Ct. 779. We may not treat this basic right lightly. Those who fail to attend hearings must be allowed an opportunity to show cause for reopening, and the rules governing reopening must be liberal.

Louis F. Naftalison, a respected authority on administrative law and for many years a member of the New York State Unemployment Insurance Appeals Board, writing in a "manual for hearing officers in administrative adjudication," said:

> Experience has demonstrated that many parties fail to attend hearings for good cause, such as change of address, illness, absence from the jurisdiction, inability to be released from employment, serious domestic problems, etc. Following the practice in the courts, such persons should be enabled to apply to reopen their defaults. This is equitable and in keeping with the aim of providing a fair hearing on the merits of the case. In such instance, the party should be required to show good cause for the default. What is good cause is necessarily a judgmental matter. Some causes such as those enumerated above, are clearly good. Failure to receive the notice of hearing is obviously a good one, meriting reopening. The hearing officer should use discretion in passing upon the application to reopen. The practice in the courts is usually liberal in such situations. Even if there is some doubt as to the validity of the excuse, the application should be granted, nevertheless, and the case heard on the merits, to give the party his "day in court."

These standards seem to us to be fair and equitable and to best serve the purpose of the appeals process, which is to seek and secure the evidence necessary to issue a fair and equitable decision based on the merits of the case at hand.

Although there has been no Court of Appeals case in this jurisdiction in regard to parties failing to appear and prosecute their appeal, in a case styled WALTERS V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 84-CI-081, the Casey Circuit Court held the Division policy of denying a new hearing when a claimant failed to appear for the original scheduled hearing at the time scheduled and within an additional fifteen minutes is unreasonable and unfair to the plaintiff.

In future cases where the appellant appears on the scheduled date of the hearing, regardless if he appears more than fifteen minutes after the scheduled time of the hearing, and shows good cause for failing to appear at the scheduled hearing time, this Commission will order reopening. We adopt the guidelines set forth by Mr. Naftalison (supra) for all future cases involving reopening.

903 KAR 5:130 (2)(2)(c) provides that "the Commission, at its discretion, may return any case or issue to a referee for the taking of additional evidence as it desires." Therefore, the Commission

feels that the ends of justice will best be served by allowing the appellant another opportunity to present evidence concerning the circumstances of this case.

DECISION: Case remanded to the Appeals Branch with directions to schedule a new referee hearing and issue a new referee decision.

C.O. # 42528 PRECEDENT

5014 FAILURE TO VERIFY PETITION ON APPEAL TO CIRCUIT COURT.

ISSUE: Whether claimant's failure to verify (i.e., swear to the truthfulness of) his petition on appeal to Circuit Court is fatal to his appeal.

FACTS:
1. Appeal period expired without claimant verifying his petition to the Circuit Court.
2. Circuit Court dismissed claimant's appeal, and he then appealed that dismissal to the Court of Appeals.

REASONS: In an unpublished decision, the Kentucky Court of Appeals held:

> The statute setting out the appeal procedure is KRS 341.450 and same reads as follows:
>
> Judicial review. - (1) Except as provided in KRS 341.460, within twenty (20) days after the date of the decision of the Commission, any party aggrieved thereby may, after exhausting his remedies before the Commission, secure judicial review thereof by filing a complaint against the Commission in the circuit court of the county in which the claimant was last employed by a subject employer whose reserve account is affected by such claims. Any other party to the proceeding before the Commission shall be made a defendant in such action. The complaint shall state fully the grounds upon which review is sought, assign all errors relied on, and SHALL BE VERIFIED by the plaintiff or his attorney. (Emphasis added).

The sole question in this case is whether or not the verification requirement is mandatory or merely a ministerial act. Under the Civil Code of Practice all complaints were required to be verified, but a failure to do so was cured by an amended complaint and leave to file such amendments were freely granted by the courts. CITY OF DAYTON V. HIRTH, 121 Ky. 42, 87 SW 1136 (1905). Appellant argues that the principle enunciated in the above case and in numerous subsequent cases cited in appellant's brief should in some way guide us in reaching a decision in the case at bar. Since the requirement for verification is described in those cases as being merely ministerial and not mandatory, we cannot agree with this contention. The requirement for verification is mandated by the statute quoted above, and the failure to comply is fatal to appellant's appeal. In the case of ROBERTS V. WATTS, Ky., 258 SW 2d 513 (1953), the appellant failed to assign all errors relied upon in an appeal from the Department of Transportation to the Franklin Circuit Court. The Court of Appeals, in affirming the trial court's dismissal, stated as follows:

The right of appeal in administrative proceedings does not exist as a matter of right. When the right is conferred by statute, a strict compliance with its terms is required. It is the general rule that where the conditions for the exercise of the power of the court are wanting the judicial power is not, in fact, lawfully invoked. The appeal, not having been properly perfected, the Franklin Circuit Court was without jurisdiction and properly dismissed the appeal.

Also, appellant's reliance on the case of COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS V. PARKER, Ky., 394 SW 2d 899 (1965), is misplaced. A summons was issued after an appeal was filed from a decision of the then Workmen's Compensation Board. However, the appellant had the summons served upon the attorney general pursuant to CR 4.04 rather than upon the Executive Secretary of the Workmen's Compensation

Board as required by KRS 341.285 (1). The Court of Appeals held in favor of the appellant because the summons had been issued in good faith which is the requirement to commence an action under CR 3 and KRS 413.50. We fail to see how this holding has any application in this case.

It is our view that the failure of a party to strictly comply with the mandatory provisions of a statute authorizing an appeal from an administrative agency is jurisdictional. Therefore, any such failure is fatal to the appeal.

DECISION: The judgment of the Circuit Court dismissing the appeal for failure to verify was affirmed.

Kentucky Court of Appeals, PICKERT V. UNITED STATES POST OFFICE AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, Ky., App. 664 SW 2d 939. PRECEDENT

5020 HEARING CONTINUED BY REFEREE FOR ADDITIONAL EVIDENCE.

ISSUE: Whether referee erred by continuing hearing for taking of additional evidence from nonappearing employer witness.

FACTS:
1. Claimant, an installer of burglar and fire alarm systems, had "a couple of beers" before going to a job.
2. Customer complained and claimant was discharged.
3. Claimant's supervisor had personal contact with both claimant and customer on the day of the incident.
4. Supervisor out of town on company business on day of hearing.
5. Referee continued the hearing, over claimant's objection, to take supervisor's testimony.
6. Claimant was disqualified and the Commission affirmed.
7. Claimant appealed to Circuit Court contending the referee erred by continuing the hearing for additional proof.

REASONS: The Court held that the additional evidence that claimant's supervisor had to offer from his personal contact with the claimant and the customer on the day in question was relevant and vital. The referee has the authority to continue a hearing at his discretion in order to secure necessary evidence as stated in 903 KAR 5:130 (4)(e).

DECISION: The referee exercised his discretion properly by allowing the additional evidence, and the claimant was found to have been discharged for reasons of misconduct.

Kenton Circuit Court, COY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND MCDONALD DEFENSE, 83-CI-705. UNPUBLISHED. Not to be cited or quoted. For Guidance Only.

5040 ALTERING OF DOCUMENTARY EVIDENCE BY REFEREE.

ISSUE: Whether a referee should alter documentary evidence.

FACTS:
1. Claimant discharged for horseplay.
2. Employer exhibit number one contained information about discipline for conduct other than horseplay.
3. Counsel for claimant objected to the exhibit, and the referee altered it to exclude the information related to conduct other than horseplay.

REASONS: We find counsel's objection to be appropriate since evidence was not developed at the hearing to establish that "other reasons" contributed to the employer's decision to discharge claimant. However, the document should have been entered into the record unaltered and then weighed by

the referee. Only an original document or a true and accurate copy should be entered into the record. Under no circumstances should the referee alter a document.

DECISION: In this case, the Commission found sufficient evidence of record to make a ruling without considering employer's exhibit number one.

C.O. # 39291 PRECEDENT

5042 HEARSAY TESTIMONY VERSUS DIRECT SWORN TESTIMONY.

ISSUE: Whether direct sworn testimony which has not been discredited outweighs an unsworn written statement of a nonappearing party.

FACTS: (See "Issue" above).

REASONS: Subject to a few exceptions, testimony at a hearing should be given more weight than unsworn statements of parties not present for the hearing where their testimony cannot be cross examined. In all cases, the person against whom ex-parte statements are used should be confronted with the statement for an opportunity to refute it. Here the Commission held that the weight given to claimant's sworn testimony was sufficient to satisfy the burden of proving good cause attributable to the work for voluntary leaving.

DECISION: Claimant's direct sworn testimony was given greater weight than the unsworn, written statement of the nonappearing employer.

C.O. # 7984 NONPRECEDENT

5043 OUT OF HEARING EVIDENCE.

ISSUE: Whether evidence submitted on appeal to the Commission should be considered.

FACTS: (See "Issue" above).

REASONS: The Commission rejects as unacceptable affidavits submitted subsequent to the referee's decision because (1) at the time of the hearing, the employer failed to prove his case by witness or documents; and (2) at the hearing no groundwork or basis was laid for later introduction of documents or other testimony.

DECISION: Such evidence cannot be considered since it was not presented until AFTER the referee hearing and it is not, therefore, properly a part of the record.

C.O. # 15796 NONPRECEDENT

5046 EVIDENCE, RESIDUUM RULE (PROPER FOUNDATION FOR ADMISSION).

ISSUE: Whether partial reliance on incompetent evidence necessarily requires reversal of administrative agency's ruling.

FACTS:
1. Co-worker complained that she smelled alcohol on claimant's breath.
2. Claimant agreed to submit to a blood alcohol test.
3. Discharged as a result of testing positive for alcohol.
4. Results of test were introduced at referee hearing by personnel officer who was not present when the test was performed, and had little if any knowledge of proper testing procedures or the meaning of the results.

5. No other evidence introduced at the referee hearing to support the allegation that the claimant was under the influence of alcohol while at work.

REASONS: The Kentucky Court of Appeals held that:

> ... the results of the test were incompetent evidence. These results were introduced by the employer's personnel officer. He testified that he was not present when any part of the test was performed and had little, if any, knowledge of proper testing procedures, or the meaning of the results. It is beyond argument that results of such a test are incompetent when there is no foundation for its admission, no opportunity for cross examination and no showing of the chain of custody of the blood sample. See MCCORMICK, Evidence S 209 (2d ed 1972).
>
> The issue before this court is whether the trial court properly applied the "residuum" rule. We find that it did not. This rule is that "findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent evidence which by itself would have been legally sufficient to support the findings." BIG SANDY COMMUNITY ACTION PROGRAM V. CHAFFINS, Ky., 502 SW 526 (1973) at 530.
>
> Without the results of the test, the evidence that Mr. Haste was under influence of alcohol is insufficient to support a finding of misconduct. No one who testified before the board expressed the opinion that Mr. Haste had been using alcohol.
>
> The testimony included opinions concerning facts that might lead one to the inference that Mr. Haste was under the influence. The witnesses' lack of positive expression makes it apparent that the employer was relying on the results of the blood test. As those results are incompetent, it failed in meeting its burden of proof.

DECISION: There did not exist, absent the incompetent test results, a residuum of competent evidence showing that the claimant was under the influence of alcohol while at work.

Kentucky Court of Appeals, HASTE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND OAKWOOD, 673 SW 2d 740. PRECEDENT

5047 UNTIMELY APPEAL; FAILURE BY DIVISION TO EXERCISE ITS DUTIES.

ISSUE: Whether the Division's failure to mail the claimant the adjusted determination extends the claimant's appeal period.

FACTS: (See "Issue" above).

REASONS: The General Assembly did not see fit to give the Division for Unemployment Insurance or this Commission the right to recognize an exception to the time rule it laid down with respect to appeal; and in most cases, we are without authority to accept an appeal which clearly was not filed within the required time limit.

However, the Commission has consistently held that where an appeal was not timely filed because the Division's personnel failed to discharge its duties with regard to the proper mailing of its determinations, and, as a result, a party to such determination did not receive it within the appeal period, the time limit for appeal must commence at the point where the determination was in fact mailed or given to such party.

In the instant case, the Commission set aside the finding of the Appeals Branch that the claimant did not file a timely appeal on grounds that the claimant did not receive timely notice of the adjusted determination because the local office personnel erred in its administrative responsibilities, an error over which the claimant had no control and can in no way be held responsible. In fact, evidence of record shows that the determination was never mailed to the claimant, and that it was handed to him personally on June 13, 1980, at which time he lodged his appeal.

DECISION: Claimant's appeal accepted as timely filed.

C.O. # 23490 A NONPRECEDENT

5050 EFFECT OF REMAND ON FINAL ADMINISTRATIVE REMEDY; LABOR DISPUTE, PROPER VENUE.

ISSUE: Whether judicial appeal can be taken from a Commission Order remanding for a de novo hearing; and what is the proper venue for a labor dispute issue.

FACTS:
1. Adjusted determination held a labor dispute to be in active progress.
2. Employer did not appear for the referee hearing.
3. Referee held a lockout to be in existence.
4. Employer, on appeal to the Commission, requested a new hearing.
5. Commission remanded for a de novo (new) hearing.
6. Union appealed the remand order to Boyd Circuit Court.
7. Boyd Circuit Court dismissed the appeal on grounds of improper venue, and the union appealed to the Court of Appeals.
8. Commission cross appealed arguing both lack of venue AND lack of jurisdiction in that it had not issued its final decision.
9. Union also appealed to Franklin Circuit.
10. Franklin Circuit Court dismissed for lack of jurisdiction because the union had not exhausted all administrative remedies before the Commission.

REASONS: KRS 341.460 provides that appeals arising under KRS 341.360 (1), which deal with labor disputes, shall be made to Franklin Circuit Court. Further, KRS 341.450 (1) provides, as a prerequisite for judicial review, that all administrative remedies be exhausted.

The Kentucky Court of Appeals held that with few exceptions (e.g., when an agency acts in excess of its powers, when agency regulations are attacked as unconstitutional, or when further resort to administrative remedies would be futile), exhaustion of all administrative remedies before the Commission is a prerequisite for judicial review (i.e., appeal to Circuit Court). Further, Franklin Circuit Court was the proper venue.

DECISION: The effect of the Court of Appeals' decision is that a Commission Order remanding for a new hearing is not the final administrative action and therefore is not appealable to Circuit Court. Further, Franklin Circuit Court is the proper venue for labor dispute cases.

Kentucky Court of Appeals, ADKINS AND 338 OTHERS V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND SEMET SOLVEY, 614 SW 2d 950. PRECEDENT

5054 JURISDICTION OF UNAPPEALED ISSUES RES JUDICATA.

ISSUE: Whether the referee or the Commission has jurisdiction to rule on issues not under appeal.

FACTS:
1. By adjusted determination dated and mailed to the parties February 20, 1978, the claimant was held to have been discharged for reasons other than misconduct.

2. No benefit disqualification was imposed and the employer was held chargeable under the claim.
3. The determination further held claimant unavailable for work and ineligible to receive benefits.
4. Claimant appealed that portion of the determination adverse to him.
5. Employer did not appeal those portions adverse to its interests.
6. Referee addressed ONLY the issue of availability and held claimant available.

REASONS: A second question before the Commission in this case is whether or not the referee was correct in declining to rule upon the unappealed portion of the determination. If we find that he was, the Commission too is barred from considering that aspect of the case.

The right of appeal in respect to all matters determined by the Commission or the Division is a right granted by the legislature, and unless such rights are pursued in compliance with the provisions of the statute, neither the appeals referee nor the Commission acquires jurisdiction of the merits. Compliance with the provisions of the statute requires perfection of the appeal on the part of each party adversely affected. The claimant, who appealed only that portion of the determination which was adverse to his own interest, cannot perfect the employer's appeal, and thereby protect his, (the employer's) rights under the law. When the employer, whether by reliance upon the appeal entered by the opposing party or for other reasons not clear on the record, failed to go forward with his appeal, he relinquished all right to question the ruling of the adjusted determination with respect to separation and reserve account relief. These rulings became final after expiration of the fifteen day appeal period and were "res judicata" at the time of the referee hearing.

DECISION: Referee decision holding claimant available was affirmed. Commission neither assumed jurisdiction of, nor remanded the discharge and reserve account issues.

C.O. # 19366 NONPRECEDENT

5055 DISCHARGE OR JOB ABANDONMENT DUE TO ALCOHOLISM.

ISSUE: Whether a claimant is discharged or voluntarily quits her job when loss of employment results from continued absence caused by alcoholism.

FACTS:
1. Worked nine months as a supervisor in charge of the captioned employer's dining room.
2. Missed a great deal of work because of her alcohol problem.
3. Permitted to return to work following absences related to alcohol problem.
4. Appeared at work June 24, 1981, intoxicated and unable to work. Had to be taken home by other employees since she was unable to walk on her own.
5. Claimant notified her employer that she would be of no use to the business in her present condition.
6. Removed from the payroll July 7, 1981, after failing to report for work following June 24, 1981.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work. The Kentucky Court of Appeals held:

> That Ms. Egnew was frequently absent from work and during her last absence told her employer that she was of no use to the restaurant in her condition. We agree that the Commission's finding that her actions initiated the separation from employment were supported by the evidence. These findings of fact may not be disturbed unless the evidence is so persuasive that one would have no choice but to find for the claimant. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY, Ky., 539

SW 2d 293 (1976). Both Covington Haus' owner and Ms. Egnew testified that her separation from employment came only after she had failed to appear at work for a considerable length of time. We believe the Commission correctly found that Ms. Egnew's continued absence from her work without the employer's consent constituted a voluntary abandonment of employment.

Further, we do not believe that alcoholism precludes a finding of misconduct or of voluntarily quitting one's employment. Appellant, in arguing that Ms. Egnew's disease of alcoholism necessitates a reversal of the Commission's findings, cites the case of MOELLER V. MINNESOTA DEPARTMENT OF TRANSPORTATION, 281 SW 2d 879 (Minn. 1979), for the proposition that an alcoholic should not be held strictly accountable for his actions.

This blanket statement does not accurately reflect the holding in MOELLER. The Minnesota court, in holding that Moeller was entitled to unemployment benefits, was construing a statute which required a claimant to have made "reasonable efforts" to retain his employment. This case is therefore distinguishable to the situation currently at bar.

Our Kentucky statute is more similar to the Florida one cited in OKLAOOSA GUIDANCE CLINIC, INC. V. DAVIS, 384 So. 2d 1336 (Fla. App. 1980), in which it was stated:

"Discharge for misconduct" as used in this section shall include but not be limited to separation initiated by the employer for ... reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during work hours...

Thus, we cannot say that the fact that an employee is an alcoholic precludes either the finding of a voluntary quitting or of misconduct. On the contrary, the use of alcohol affecting one's ability to work, such as appearing at work inebriated, would seem to disqualify the claimant from unemployment benefits.

DECISION: Claimant disqualified on grounds she voluntarily left her employment without good cause.

Kentucky Court of Appeals, EGNEW V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND COVINGTON HAUS, 687 SW 2d 866. PRECEDENT

5056 COMMISSION'S POWER TO RECONSIDER; OUT OF HEARING EVIDENCE (DUE PROCESS DISCUSSED).

ISSUE: Whether the Commission has the power to reconsider its decisions; and whether due process is violated by the Commission relying on out of hearing evidence.

FACTS:
1. Commission reversed the referee and held claimant voluntarily quit the employer with good cause on grounds she was not receiving minimum wage.
2. Employer requested reconsideration upon presentation of a letter from the Department of Labor to the effect that it was not legally required to pay minimum wage.
3. Commission, without ordering a new hearing, reconsidered and reversed its earlier ruling and affirmed the referee's disqualification of the claimant.

REASONS: The Kentucky Court of Appeals concluded that the Commission does have the inherent power to reconsider its decisions. However, the Court went on to hold that the claimant's due process rights had been violated by not being given the opportunity to rebut the letter from the Department of Labor, even though it was highly improbable that she would have any evidence with which to rebut the letter.

DECISION: Commission has the power to reconsider. Case remanded for an additional hearing to give the claimant an opportunity to rebut the letter from the Department of Labor.

Kentucky Court of Appeals, CART V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND THE PLACE. Unpublished. Not to be cited or quoted. For guidance only.

5061 FAILURE TO PROCURE LEGAL COUNSEL; REQUEST FOR RECONSIDERATION AND REHEARING.

ISSUE: Whether claimant's failure to procure counsel until after a decision adverse to his interests is grounds for reconsideration and rehearing.

FACTS: (See "Issue" above).

REASONS: The claimant was advised of his right to representation by legal counsel and his right to utilize the subpoena power of the Division by the clear wording of the Notice of Referee Hearing mailed to his address. His election to delay seeking counsel until after a decision adverse to his interests cannot serve to warrant a rehearing.

DECISION: Motion for reconsideration and rehearing denied.

C.O. # 22115 A NONPRECEDENT

5064 PERSONNEL MANUAL OR UNION CONTRACT; AS EVIDENCE.

ISSUE: Whether a document, such as a personnel manual or union contract, must be made a part of the record of the referee hearing when the decision turns in part or in whole upon the contents of the document.

FACTS: (See "Issue" above).

REASONS: The referee decision was based, at least in part, on policies outlined in a PERSONNEL MANUAL supplied by the company to all its employees. This manual was never made a part of the record and is therefore not available for review by the Commission or any subsequent reviewing authority. We believe that when cases turn in part or in whole upon the language of a personnel policy or union contract (or any such document), then the document MUST be incorporated into the record.

DECISION: Case remanded for another hearing for the purpose of incorporating this relevant personnel manual into the record.

C.O. # 24261 PRECEDENT

5100 AUTHORITY OF REFEREE TO DETERMINE NATURE OF JOB SEPARATION.

ISSUE: Whether the referee is bound by the verbal representation and conclusions of witnesses regarding nature of job separation.

FACTS:
1. Notice of Referee Hearing listed "discharge" as the issue to be covered at the hearing.
2. Both claimant and employer characterized job separation as a "discharge."
3. Referee found the job separation to be a voluntary quit without good cause.
4. Counsel for claimant seeks reversal or remand for an additional hearing on grounds the referee went beyond the scope of the purpose of the hearing as identified in the Notice of Referee Hearing; misinterpreted the evidence since both parties characterized the

separation as a discharge; and that the broad scope of the hearing prevented claimant from having witnesses and evidence at the hearing.

REASONS: The Commission rejected all three arguments for the following reasons:

1. Although the hearing notice cited the issue as a discharge, it was claimant's separation, by whatever means, which was at issue.
2. The referee is not bound by the verbal representations or conclusions of witnesses and is responsible for interpreting the facts and applying the appropriate portion of the statute.
3. The Notice of Hearing advised the parties to be prepared to present their case, including witnesses at the time of the hearing.

DECISION: Referee decision was affirmed and request for rehearing denied.

C.O. # 22026 NONPRECEDENT

5121 ADDITIONAL WITNESSES AT SECOND SESSION OF HEARING.

ISSUE: Whether a party who has concluded his evidence at the first session of the hearing (which had to be continued for lack of time) should be allowed to bring additional witnesses and put on additional proof at the second session of the hearing.

FACTS: (See "Issue" above).

REASONS: The Hardin Circuit Court held:

> It was the referee's opinion that to permit witnesses to testify on the second day of the hearing, who were not present on the first day, would somehow transform the first day into a period of "discovery" instead of trial. Of course, it is not uncommon in a two day trial for a party surprised by testimony elicited on the first day to come armed on the second day with evidence previously thought not to have been needed. The propriety, not to mention consistency, of the referee's ruling in this regard are suspect. See e.q., REAMS V. STUTLER, Ky., 642 SW 2d 586 (1982).

DECISION: The Court held the referee's denial an error but not sufficient to reverse since the evidence clearly showed no misconduct.

Hardin Circuit Court, U.S. CALVARY STORE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND SHERWOOD, 83-CI-679. Not to be cited or quoted outside jurisdiction. For guidance only.

5130 A PATTERN OF LATE APPEALS.

ISSUE: Whether a claimant who has established a pattern of not actively pursuing her appeals should be given leave to appeal untimely to the Commission.

FACTS:

1. By an adjusted determination dated November 29, 1983, claimant was disqualified for voluntarily quitting her employment without good cause.
2. She appealed the determination January 19, 1984.
3. A referee hearing was scheduled for February 6, 1984, to afford claimant the opportunity to explain why her appeal was untimely.
4. Notice of the hearing was mailed to the claimant's address of record.
5. Claimant did not appear for the hearing, and the referee issued a decision on February 16, 1984, dismissing her untimely appeal from the adjusted determination.
6. The referee decision was mailed to the claimant's address of record.

7. Her appeal from the referee decision was dated April 9, 1984, in which she requested a rehearing.

REASONS: In this case, the claimant has established a pattern of not actively pursuing her appeals. Her appeal to the adjusted determination was not within the prescribed time, there is no indication that she notified the Division of an address change, she did not attend the scheduled hearing, and now her appeal from the referee's decision comes late. The claimant wishes to exert right without responsibility. We do not find legally sufficient cause for failure to appeal the referee's decision timely.

DECISION: Claimant's application for leave to appeal was denied. The referee decision was not disturbed.

C.O. # 39384 NONPRECEDENT

5150 FINALITY OF UNAPPEALED DETERMINATION; RES JUDICATA.

ISSUE: Whether the job separation addressed in an unappealed determination may again be adjudicated when a subsequent initial claim is filed involving reserve account chargeability based on the same job separation.

FACTS: (See "Issue" above).

REASONS: Simply stated, an issue once decided by a legal authority of competent jurisdiction may not be reopened or decided again if the first decision has become final for want of appeal.

DECISION: Employer's request to reopen the issue was denied under the legal doctrine of res judicata.

C.O. # 7723 NONPRECEDENT

5160 CONTRARY DECISIONS FOR SIMILARLY SITUATED CLAIMANTS.

ISSUE: Whether similarly situated claimants, who were initially held ineligible to receive benefits, were denied "equal protection under the law" when other similarly situated claimants, not party to this case, were initially held eligible to receive benefits.

FACTS: (See "Issue" above).

REASONS: Commission held that although contrary decisions were unfortunately made regarding these worker's eligibility for benefits by the Division, those other decisions were not appealed and, therefore, cannot be considered by the Commission at this time.

DECISION: (See "Reasons" above).

C.O. # 22702 NONPRECEDENT

NOTE: Read in conjunction with Entry 5170.

5161 RECONSIDERATION OF UNAPPEALED COMMISSION ORDER.

ISSUE: Whether an adversely affected party should be granted reconsideration of a Commission Order which it allowed to become final for want of appeal.

FACTS: 1. Employer does not question referee's findings of fact; rather he seeks reconsideration by questioning referee's conclusions of law drawn therefrom.

REASONS: Under the finality provision of the law, the Commission is without authority to reconsider a case once its initial ruling has become final for want of an appeal. We have not, however, felt that obvious inequities, such as those which might occur as a result of agency error, should be perpetuated by this provision. By the same token, we may not treat the provision lightly, for it is the vehicle through which entrance into the courts is gained. To allow reconsideration of the orders of the Kentucky Unemployment Insurance Commission for any reason other than those of an extremely compelling nature or to right an obvious wrong would lead to an endless trying of cases at the administrative level and would ultimately defeat the purpose of the finality provision contained in KRS 341.440 (3).

The employer's request does not set forth such compelling circumstances as to justify further reconsideration of this case.

DECISION: Employer's request for reconsideration was denied.

C.O. # 24233 A NONPRECEDENT

5170 FAILURE TO APPEAL REFEREE DECISIONS; BY SIMILARLY SITUATED CLAIMANTS.

ISSUE: Whether failure to appeal referee decision forecloses similarly situated claimants from being included with those co-workers who successfully appealed to the Commission.

FACTS:
1. Each adversely affected claimant was given written notice of his right to appeal the referee decision to the Commission (KRS 341.420).
2. Those who appealed won a reversal of a long standing policy of the Commission.
3. Claimants in this case did not appeal and were not included in the Commission order awarding benefits.
4. Claimants filed suit in Circuit Court, seeking inclusion with those who had pursued their appeals.
5. Circuit Court dismissed appeal for lack of subject matter jurisdiction, which resulted in an appeal to the Kentucky Court of Appeals.

REASONS: In an unpublished decision, the Court of Appeals ruled that KRS 341.450 (1) provides that a party may file suit only after exhausting administrative remedies before the Commission. Compliance with the administrative review procedures in the statute is a jurisdictional prerequisite to any relief. The appellants failed to timely use or exhaust their remedies before the Commission. Appellants were notified in writing of their right to appeal and failed to do so. Thirteen of their former co-workers processed an appeal through the proper administrative channels and obtained benefits. All of the employees were identically situated, but some chose a proper course of action under the law and were successful. Others did not heed the written notice advising them of their right to appeal and were unsuccessful in obtaining any benefits. The same opportunity was available to both groups. There is no manifest injustice of any kind in refusing to hear the appellants.

DECISION: Motion for inclusion denied.

Kentucky Court of Appeals, PEARSON ET AL V. NATIONAL DISTILLERS AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 81-CA-1657-MR. Unpublished. Not to be cited or quoted. For guidance only.

NOTE: Read in conjunction with Entry 5160.

5180 SPLIT HEARINGS BY DIFFERENT REFEREES.

ISSUE: Whether due process is violated when the same referee was not assigned to both portions of split hearing.

FACTS:
1. Referee hearing was conducted in two parts.
2. On June 4, 1980, referee Hatton took claimant's testimony in Covington, Kentucky.
3. On July 29, 1980, referee Nixon took the employer's testimony in Louisville, Kentucky.
4. Having heard the final testimony, referee Nixon prepared the written decision.
5. No indication that referee Hatton's services were unavailable on July 29, 1980.
6. Claimant's and employer's testimony was in conflict on several points.
7. Counsel for claimant argued claimant's right of due process was violated when both portions of the hearing were not assigned to the same referee.

REASONS: In GAMBLE-SKOGMO, INC. V. FEDERAL TRADE COMMISSION, 211 F 2d 106, the United States Court of Appeals, in interpreting the Federal Administrative Procedure Act, Section 5 (c), declared that an administrative agency has the right to refuse to strike evidence and to permit a substitute examiner to evaluate evidence heard by the original examiner only in cases where it may fairly be said that credibility evaluation from hearing and seeing witnesses testify is unnecessary. If such an evaluation is necessary, then a de novo proceeding is required. The Court recognized the problem of administrative convenience and dispatch but deemed such of little value unless they are also reasonably capable of producing fairness of result.

In VAN TESLAAR V. BENDER, 365 F. Supp. 1007, the United States District Court (Maryland) held the substitution of hearing examiners midway in the administrative evidentiary proceedings, without a recommencement of the proceedings de novo, deprived plaintiff of a fair hearing, where the case was one in which the resolution of conflicting testimony required determination of the credibility of witnesses, and where the plaintiff did not agree to proceed without a de novo administrative hearing.

It is apparent from the above-cited cases that credibility evaluation lies at the heart of the matter at hand. In legal concept, appearance and demeanor on the part of the orally testifying witnesses and permeating trial atmosphere to which these incidents may give rise are, in such situations, "assumed to be in evidence." Wigmore on Evidence, 3rd ed., 956. Such an evaluation of credibility, therefore, in relation to conflicting oral testimony, on material matters, necessarily is of the nature and stature of any rationalized conclusion constituting a part of judicial or quasi-judicial result.

This order shall serve as precedent for future matters involving similar circumstances. For intrastate hearings and interstate hearings conducted via teleconference, the substitution of referees without a de novo proceeding is permissible only where the original referee is unavailable (because of retirement, death, or prolonged absence) AND either (1) the case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses, or (2) if it is a case in which credibility is involved, the parties agree to proceed without a de novo administrative proceeding.

DECISION: Case remanded to the Appeals Branch with directions to conduct a de novo hearing.

C.O. # 23919 PRECEDENT

5182 PRETRIAL DISCOVERY AND SUPPLEMENTAL DEPOSITIONS.

ISSUE: Whether pretrial discovery should be allowed in unemployment insurance proceedings.

FACTS:

1. On November 16, 1979, counsel for the employer appealed a referee decision mailed on November 13, 1979.
2. On two occasions, counsel for the employer moved the Commission to remand, reconsider, and for permission to present oral and written arguments.
3. All but the request to submit written argument were denied.
4. Counsel for the employer now moves the Commission to enter an order compelling discovery and ordering the claimant to submit to deposition.
5. Counsel for the employer also moves for permission to supplement the record with depositions and for additional time to submit written argument.

REASONS: By its denial of an official reopening of the record, the Commission effectively foreclosed the option of considering evidence secured by depositions by either party. Even if that were not the case, neither the statute nor the regulations empower the Commission to compel discovery. Absent such specific authority, we may not do so. In STARR V. COMMISSIONER OF INTERNAL REVENUE, 226 F2d 721-722, (7th Cir. 1955) Cert. denied 350 US 998, 76 S. Ct. 542, 100 L.E.C. 859 (1955), the court established the concept that "there is no basic constitutional right to pretrial discovery in administrative proceedings."

It is the right of either party, however, to submit written argument in support of his position. Despite the lapse of time and the several requests for extensions, we will not deprive counsel of that right.

DECISION: Motion for order compelling discovery denied. Motion for extension of time for filing written arguments granted. Motion to supplement record with deposition denied.

C.O. # 21600 B NONPRECEDENT

5183 LACK OF SERVICE OF APPEAL; ALLEGED LACK OF NOTICE OF POTENTIAL OVERPAYMENT.

ISSUE: Whether letter of appeal must be served on opposing party; and whether notice of potential overpayment if reversed in appeals process must be given.

FACTS: (See "Issue" above).

REASONS: The Commission notes that early on in the claiming cycle, all claimants for unemployment insurance benefits are given a four page brochure entitled "Your Rights and Responsibilities While Claiming Benefits." On page two of that document are clear instructions to claimants that reversal of a determination by a higher authority may result in the establishment of a benefit overpayment. Regarding counsel's due process argument, the Commission finds that neither the statute nor the regulations of the Secretary require that either party be served with the actual appeal letter or document in order for an appeal to be perfected. The single requirement is that the notice of intent to appeal be delivered to a representative of the Commission or Division, either in person or by mail. The Commission does notify the parties that an appeal has been received and will provide them with the appeal document or other file material upon request. Given the informal nature of the administrative process, we do not believe that due process is substantially disserved by this practice.

DECISION: Due process was not violated by the letter of appeal not being served on the claimant. Further, notice of potential benefit overpayment if reversed in appeals process was given to the claimant.

C.O. # 29931 NONPRECEDENT

5211 UNTIMELY APPEAL; COMPELLING REASON FOR.

ISSUE: Whether a claimant, who is hospitalized for the entirety of the appeal period, should be given leave to appeal when his appeal is filed the day following his release from the hospital.

FACTS: 1. Claimant was too ill to file an appeal while hospitalized.

REASONS: Commission concluded that the ends of justice would best be served by giving the claimant a hearing.

DECISION: Claimant's appeal accepted and case remanded for hearing and decision.

C.O. # 8064 NONPRECEDENT

5213 UNTIMELY APPEAL DUE TO INCARCERATION.

ISSUE: Whether claimant's appeal period (to Circuit Court) should be extended because of his incarceration.

FACTS:
1. Initial claim filed March, 1981.
2. Commission denied claimant benefits August 24, 1981.
3. Claimant's appeal to Circuit Court was one day late because he was incarcerated.
4. Circuit Court dismissed claimant's appeal as untimely filed.
5. Claimant appealed to the Court of Appeals.

REASONS: The Kentucky Court of Appeals held:

> The issue presented here is simple: whether KRS 413.310 applies to appeals from administrative decisions. KRS 413.310 provides as follows: The time of confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action.
>
> Our question is whether an appeal from an administrative decision is the equivalent to any other civil action to be filed with a circuit court or whether such an appeal is to be treated simply as any appeal within the court system and therefore subject to strictly enforced procedural rules. If the former, then KRS 413.310 is applicable; if the latter, it is not. It is our opinion that an appeal cannot be considered "the commencement of an action." Pollitt's action or claim was begun or commenced when it was filed in March, prior to his incarceration. The appeal he seeks is simply a continuation of the same action; albeit in another forum with specific jurisdictional requirements. By failing to meet those requirements, the statutorily granted "grace to appeal" was lost. BOARD OF ADJUSTMENT OF CITY OF RICHMOND V. FLOOD, Ky., 581 SW 2d 1,2 (1978).

DECISION: Circuit Court's dismissal of claimant's appeal was affirmed.

Kentucky Court of Appeals, POLLITT V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND WALD MANUFACTURING COMPANY, 635 SW 2d 485. PRECEDENT

5214 NONRENEWAL OF TEACHER'S LIMITED CONTRACT.

ISSUE: Whether or not the job separation is a discharge when a teacher is allowed to finish the school year even though the decision not to renew her contract for alleged acts of misconduct was made one month earlier.

FACTS:

1. Rather than institute termination proceedings, the Board simply chose not to renew claimants limited teaching contract because of alleged misconduct.
2. Claimant was notified of nonrenewal on April 22nd; however, she was allowed to finish the school year, May 21st.
3. The only question addressed by the Kentucky Court of Appeals was whether or not the job separation was a discharge.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

...a teacher's limited one year contract of employment does not automatically expire and terminate at the end of a given school year, but it instead automatically renews itself unless school officials take affirmative steps to prevent its renewal. It is our opinion that, once a school board elects to terminate a limited contract, it is in effect discharging that teacher from employment within the meaning of the word "discharge," as used in KRS 341.370 (1)(b), just as when it discharges an employee at will who is not protected by the Teacher Tenure Act. Hence, when a teacher's limited contract is not renewed due to the teacher's misconduct, there is as a matter of law a "discharge" for purposes of the unemployment insurance statutes. Moreover, the fact that the board may opt to discharge the teacher by easier method of nonrenewal, rather than by instituting a termination proceeding pursuant to KRS 161.790, is of no significance.

DECISION: Case remanded to the Commission for a ruling on whether claimant was guilty of work related misconduct.

Kentucky Court of Appeals, EVANS V. MONTGOMERY BOARD OF EDUCATION AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 798 SW 2d 464.

5215 REMAND FOR ADDITIONAL HEARING; LIMITED SCOPE OF.

ISSUE: Whether the Appeals Branch has the authority to go beyond the Commission's stated limited purpose for remanding a case to the referee for an additional hearing.

FACTS:

1. Claimant had two opportunities before the referee to present her witnesses.
2. She was aware of the subpoena process for compelling witnesses to appear, as evidenced by her requesting a subpoena for one witness to appear at the second session of the referee hearing.
3. On appeal to the Commission, it was discovered that a portion of the testimony was not recorded.
4. The case was remanded to the referee for the sole purpose of recapturing the lost testimony.
5. Claimant then requested that fifteen additional witnesses be subpoenaed for the additional hearing.
6. Her request was initially allowed by the Appeals Branch, then denied by an order dated December 1, 1987.
7. Claimant's counsel then appealed to the Commission.

REASONS: The taking of additional new testimony or summoning of new witnesses in this case is strictly at the discretion of the Commission. The record in this case was closed by the referee, and was NOT reopened by the Commission's remand, except to the extent stipulated by the Order. In any case, 903 KAR 5:130 (2)(2)(c) provides that, "the Commission, at its discretion, may return any case or issue to a referee for the taking of such additional evidence as it desires." After reviewing the situation in this case we find that additional witnesses have not been shown to be justified since

the appellant has failed to show such witnesses were previously not available to testify. Therefore, the request for fifteen (15) new witnesses is denied at this time.

DECISION: Scope of additional hearing on remand is at the discretion of the Commission.

C.O. # 49559A NONPRECEDENT

5216 COMMISSION'S AUTHORITY TO REMAND FOR ADDITIONAL EVIDENCE.

ISSUE: Whether the Commission has the power to remand for the taking of additional evidence when the evidence on the determinative point was sketchy.

FACTS:
1. Claimant was discharged for allegedly reporting to the work place intoxicated.
2. Referee held the employer had not met its burden of proof, and ruled for the claimant.
3. The Commission determined that additional evidence was needed.
4. Remanded the case to the referee for the sole purpose of taking the testimony of two eye witnesses to claimant's behavior.
5. Both witnesses testified that claimant was intoxicated and became loud and boisterous while there.
6. Faced with the additional evidence, the Commission held claimant guilty of misconduct.
7. Claimant appealed to Circuit Court and the court reversed holding the Commission abused its discretion by remanding the case for additional evidence. Ruled for claimant.
8. The Commission appealed to the Kentucky Court of Appeals.

REASONS: In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

Our review of the relevant authorities indicates that the Commission is indeed vested with broad powers to order the remand of claims to an appeals referee for the taking of additional evidence and that this authority is limited only to the extent that the Commission's actions may not constitute an abuse of discretion. SEE, E.G. KRS 341.430 (1); 904 KAR 5:130 (2)(c); ADKINS V. COMMONWEALTH, Ky. App., 614 S.W. 2d 950 (1981). We have reviewed the record and simply cannot find such an abuse in the instant appeal. Here, an initial hearing before the appeals referee resulted in a recommendation favorable to the claimant. At that point, however, the record, while not totally devoid of evidence of her misconduct, was at best sketchy on that issue. Rather than making a final decision based upon this rather incomplete record, the Commission remanded the claim back to the referee for further testimony from the two individuals who had witnessed the events which culminated in the claimant's discharge. We simply cannot see an abuse of discretion in this action...

DECISION: Commission may remand for additional evidence if it does not abuse its discretion.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. NOBLETT AND AID ACRES INC., No. 84-CA-1043-MR. Unpublished. Not to be cited or quoted. For guidance only.

5217 AGGRIEVED PARTY MUST FILE APPEAL.

ISSUE: Whether claimant's appeal from an adjusted determination disqualifying him from benefits also brings before the referee the unappealed collateral ruling that the employer failed to file a timely protest.

FACTS: (See "Issue" Above).

REASONS: KRS 341.420 (2) provides that a party to a determination may file an appeal as to any matter therein within fifteen days.

KRS 341.430 (4) provides that a referee decision shall be deemed final unless within fifteen days further appeal is initiated under KRS 341.430.

KRS 341.430 (1) provides that the Commission may on its own motion affirm, modify or set aside any decision of a referee on the basis of evidence previously submitted in such cases, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The Commission may remove to itself or transfer to another referee the proceedings on any claims pending before a referee.

903 KAR 5:130, Section 2 (1)(c) provides that the Commission may grant or deny the application for leave to appeal without a hearing.

DECISION: Employer's untimely appeal dismissed on grounds claimant's appeal of job separation issue did not perfect employer's appeal of the reserve account chargeability issue.

C.O. # 56488 PRECEDENT

5218 COMPANION FEDERAL COURT CASE; NOT RES JUDICATA.

ISSUE: Whether a federal court verdict in favor of claimant in a companion suit (not an unemployment insurance claim) is controlling on Kentucky Court of Appeals when ruling on the same job separation regarding an unemployment insurance claim.

FACTS: (See "Issue" Above)

REASONS: In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

> Similarly, the referee found that the facts did not support the appellant's allegation that he was discharged for his involvement in the employees' organization. This finding was affirmed by the commission and circuit court. As there was substantial evidence to support this finding, we must not disturb it. ID. At oral argument it was brought to our attention that a verdict had been rendered in the appellant's favor in a companion suit in federal court. That decision does not change our treatment of the case because for better or for worse we must confine our decision to the record made in this case.

DECISION: Kentucky Court of Appeals limited its consideration to the record made by the referee and held claimant guilty of misconduct; notwithstanding a federal court verdict in favor of claimant on a companion case which was not an unemployment insurance claim.

Kentucky Court of Appeals, WYNN V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 80-CA-1155-MR Unpublished. Not to be cited or quoted. For guidance only.

5219 TELEPHONE CONFERENCE HEARINGS; DUE PROCESS.

ISSUE: Whether telephone conference hearings are fair and afford the parties due process.

FACTS:
1. Claimant appealed timely from a determination which disqualified him from benefits on a finding of misconduct.
2. Without objection from either party, the referee hearing was conducted by telephone.
3. Claimant's untimely appeal to the Commission was dismissed.

4. Claimant then appealed to Circuit Court and the case was remanded on the basis claimant was not afforded a fair hearing because it was conducted by telephone.
5. The Commission then appealed the remand order to the Court of Appeals.
6. The Court of Appeals held that the issue of whether parties are denied due process by conducting the hearing over the telephone was one of first impression in the Commonwealth.

REASONS: In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

> Unemployment hearings are conducted informally in such manner as to determine the substantial rights of the parties without regard to technical rules or procedures. 904 KAR 5:130 3 (4). Here, a conference call was arranged involving the referee, appellee and 2 employer witnesses. A review of the transcript reveals that the hearing so conducted was like any other unemployment compensation hearing, consisting primarily of questioning and answering, all of which was recorded and transcribed.
>
> Appellee complained below that conducting the hearing via telephone denied him the right to confront and cross-examine the witnesses who testified on behalf of the employer. While appellee could not observe the demeanor of the 2 employer witnesses, the transcript reveals that the referee afforded appellee adequate opportunities to question them. The referee's examination was adequate. Each party was given the opportunity to testify, cross-examine and make any further statement.
>
> Appellant directs us to 3 cases from other jurisdictions which found that conducting administrative hearings by telephone did not deprive any party of due process. See SLATTERY V. CALIFORNIA UNEMPLOYMENT INS. APP. BD., 131 Cal. Rptr. 422, 60 Cal. App. 3d 248 (1976); GREENBURG V. SIMMS MERCHANT POLICE SERVICE, Fla. App., 410 So.2d 566 (1982); STATE EXREL: HUMAN SERVICES DEPT. V. GOMEZ, N.M. 657 P2d 117 (1983).
>
> We are aware that the rules governing unemployment compensation appeals, KRS 341.420, 341.430, 341.450 and 904 KAR 5:130, contain no provisions for conducting hearings by telephone. However, these rules do not prohibit this method.
>
> Considering the noncomplex issues involved, the fair manner in which the referee conducted the hearing and the appellee's failure to allege any prejudice resulting from such a hearing, we conclude that appellee was not denied a fair hearing or due process.

DECISION: Telephone conference hearing was fair and did not deprive the parties of due process.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. TYNER AND E.W. JAMES AND SONS SUPERMARKET, No. 83-CA-2570-MR. Unpublished. Not to be cited or quoted. For guidance only.

NOTE: 903 KAR 5:130 Section 1 (4)(b) now allows for the conducting of telephone conference hearing under specific circumstances. It is the position of the Commission that if a party makes a timely request for an in-person hearing that one should be granted if at all feasible.

5220 TIMELINESS OF APPEAL; ADMINISTRATIVE REGULATION HAS FORCE OF LAW.

ISSUE: Whether the Division has the authority to accept an appeal as timely filed when the appeal was postmarked and received after the established fifteen day time limit.

FACTS:

1. Claimant reopened her claim for benefits on October 31, 1984.
2. Claim was allowed and benefits were paid by adjusted determination issued November 15, 1984.
3. Employer filed an untimely appeal on December 3, 1984.
4. A hearing was scheduled for the purpose of determining whether there was legally sufficient reason for the appeal being untimely.
5. Notice of the scheduled hearing was mailed to the employer only and a hearing was conducted ex parte.
6. The referee accepted the appeal as timely on a finding that it had been delivered to the post office within the fifteen day appeal period, but for unknown reasons had not been postmarked until some three days later.
7. The letter bore the firm's postage meter date of November 30, 1984.
8. The referee's decision was mailed to the employer only.
9. A hearing was held on the merits of the case on February 2, 1985, with notices going to all interested parties.
10. At the hearing the issue was raised as to the lack of notice to the claimant for the first hearing.
11. Claimant first became aware the decision had been issued at the hearing.
12. Claimant filed an appeal on February 11, 1985, to the referee decision mailed January 18, 1985 ruling the appeal to be filed timely.

REASONS: KRS 341.420 (4) establishes fifteen days from the date of mailing of the referee decision as the time within which appeal to the Commission shall be initiated. In this case, the referee's decision was never mailed to claimant. His first notice of said decision was at the second referee hearing on February 5, 1985. Counsel for the claimant objected immediately, and entered an appeal to the decision, received by the division on February 11, 1985. Such appeal must be accepted as timely from first notice.

KRS 341.420 (2) provides that a party to a determination may file an appeal to a referee as to any matter therein within fifteen days after the date such determination was mailed to his last known address.

903 KAR 5:130 (1)(b) provides that an appeal to a referee shall be considered filed at the time it is delivered to a representative of the division or deposited in the mail as indicated by the postmark thereon.

The Kentucky Court of Appeals in UNION LIGHT, HEAT AND POWER CO. V. P.S.S., ET. AL, Kentucky, 271 S.W. 2d 361 held:

> Where a statute lays down general standards, the administrative agency may implement the statute by filling in the necessary details, but where the statute in itself prescribes the exact procedure, the administrative agency may not add to or subtract from the requirements thereof.

The administrative regulation establishing the postmark as the controlling factor in determining the timeliness of appeals filed by mail has the force and affect of law. The appeal in this case was not timely filed. Since we are bound to strict adherence to the statutes, as required by our courts, we have no authority to accept the appeal as timely filed.

DECISION: Employer's appeal from the adjusted determination was not timely filed. Both the referee and the Commission are without authority to consider the merits of the separation issue.

C.O. # 41802A PRECEDENT

5221 TERMINATION OF INELIGIBILITY UPON RECEIPT OF NEW EVIDENCE OF AVAILABILITY. 06/15/ 92

ISSUE: Whether department personnel may ignore new evidence of availability for work and not terminate the prior period of ineligibility, simply because claimant appealed the initial ruling that he was unavailable for work to the referee.

FACTS:
1. Claimant worked as a sheet metal worker.
2. Separated from his employment under non-disqualifying conditions, because of an on-the-job injury.
3. Filed for unemployment benefits March 8, 1992.
4. Held ineligible to receive benefits by an adjusted determination dated March 26, 1992, for weeks ending March 14 and March 21, 1992, and thereafter until conditions substantially change for failing to search for work.
5. Claimant submitted evidence (payorder cards) to the local office that conditions had substantially changed concerning his search for work. For weeks ending March 28, 1992 through May 16, 1992, he was making an active search for work.
6. Local office failed to issue an adjusted determination terminating claimant's ineligibility on grounds the claimant had appealed the first adjusted determination to the referee.
7. Without securing the payorder cards for relevant weeks, the referee extended claimant's ineligibility through week ending April 25, 1992, and thereafter until conditions substantially change.
8. Claimant sought relief from the Commission through a timely appeal of the referee decision.

REASONS: As a result of the actions of the local office and the referee, the claimant was denied timely payment of benefits to which the department had evidence he was entitled. In CALIFORNIA DEPARTMENT OF HUMAN RESOURCES V. JAVA, 91 S Ct. 1347, the U.S. Supreme Court held that benefits must be paid "when due." The Department may not ignore evidence affecting a claimant's eligibility for benefits. A timely determination based on new evidence must be made to ensure that claimants receive benefits "when due."

In cases such as this where a second determination terminating the previously imposed indefinite period of ineligibility is required, the referee hearing the appeal from the first determination may not rule beyond the termination date of the second determination. The referee was obligated to secure and either make a part of the record, or take official notice of, relevant pay order cards which were in the possession of department personnel.

DECISION: That portion of the referee decision which held the claimant ineligible to receive benefits for weeks ending March 14, 1992, and March 2l, 1992, was affirmed; however, in all other respects, the referee decision was set aside. Claimant held available for work and eligible to receive benefits from March 22, 1992, through May 16, 1992, and thereafter until conditions substantially change.

CO# 60630 PRECEDENT

5222 RES JUDICATA; ARBITRATOR'S RULING. 06/15/ 92

ISSUE: Whether arbitrator's ruling is res judicata on unemployment insurance ruling on worker's entitlement to benefits.

FACTS:
1. Labor agreement required "just cause" for discharge.
2. Claimant grieved her discharge and arbitrator ruled "just cause" did not exist.
3. Claimant seeks to have arbitrator's ruling given the effect of res judicata or collateral estoppel on unemployment insurance ruling.

4. Circuit court held that the unemployment insurance commission is a creature of statute bound only by the legislative enactments, not by the independent contracts between parties.
5. Court of appeals agreed and held that the claimant's argument would in effect usurp the function of the legislature by incorporating the provisions, terms and interpretations of the labor agreement into the unemployment insurance statute.
6. Court of appeals refused to condone such action.

REASONS: See "FACTS" above.

DECISION: Arbitrator's ruling has neither the effect of res judicata nor collateral estoppel on unemployment insurance ruling on claimants' entitlement to benefits.

Kentucky Court of Appeals, BOWLING V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND FLAV O RICH, INC., NO. 91-CA-953-S Unpublished. Not to be cited or quoted. For guidance only.

5223 INVESTIGATION OF SEPARATION FROM NEXT MOST RECENT WORK PRIOR TO LAYOFF FOR PLANT SHUTDOWN.

ISSUE: Whether a claimant can be disqualified on the basis of a separation issue when unemployed and without pay during a plant shutdown.

FACTS:
1. Claimant voluntarily leaves otherwise suitable employment with her next-most recent employer for reasons which are later found to be without good cause attributable to the employment, but files no claim for benefits immediately.
2. Claimant later begins work with another employer, she works less than ten weeks and is laid off for lack of work due to a plant shutdown.
3. Claimant then files a claim and is paid benefits on grounds that 341.370(5) provides that no worker shall be disqualified or ineligible under 341.370 or 341.350 when the employer is permitted by contract or agreement to close its doors for vacation or maintenance purposes.
4. The Department policy, as applied in this case imposed no disqualification on the next-most recent separation because claimant did not file her claim until AFTER her separation by plant shutdown with her most recent employer. Conversely this same policy would have provided for a disqualification under identical employment circumstances if the worker had filed a claim BETWEEN the next-most recent and most recent employers.

REASONS: 341.370(5) was enacted to ensure that workers who were annually unemployed and without earnings could not be disqualified or held ineligible under the theory that they were voluntarily unemployed by having agreed, through a contract or bargaining agreement, to permit the employer to close its doors for vacation or maintenance purposes.

See: The MURRAY OPERATION OF THE TAPPAN COMPANY VS. KUIC, 583 SW 2d 100

The Department failed to take into consideration the legislative intent when adopting its policy. Further, the policy provided two different potential outcomes for similarly situated claimants who filed claims at different times. Whether a worker files a claim between the next-most recent and most recent periods of employment is not the determinative factor in deciding when to impose a disqualification. If the most recent employer is less than ten weeks, the next-most recent separation should be investigated irrespective of whether the worker is idled by a plant shutdown.

DECISION: The claimant voluntarily left her next-most recent work without good cause attributable to the employment and is disqualified from receiving benefits. The claimant's overpayment is subject to recoupment only by offset from future benefits as a result of it being due to Departmental error.

CO# 68500A PRECEDENT

5224 EVIDENCE, CONSTITUTIONALITY OF A STATUTE.

ISSUE: Whether the Commission should take evidence on the constitutionality of a statute.

FACTS:

1. During an Unemployment Insurance Tax Hearing, the appellant attempted to argue the constitutionality of KRS 341.285.

2. The Commission's referee refused to allow evidence relative to the issue of constitutionality of the statute.

REASONS: The Commission, as an administrative body, does not have the authority to rule on the constitutionality of a statute. That right is within the exclusive jurisdiction of the courts. Since we do not have the authority to rule on the constitutionality of a statute, there was no reason to take evidence on a question of constitutionality.

DECISION: The Commission does not have the authority to either take evidence or rule on the issue of constitutionality.

CO# 70798 PRECEDENT

5225 THE SCOPE OF A REFEREE HEARING

ISSUE: SEE ABOVE

FACTS: SEE BELOW

REASONS: The scope of a referee hearing shall not go beyond the issue(s) ruled upon by the local office and appealed to the referee. If an issue(s), not yet ruled upon by the local office, arises during the referee's conduct of the hearing on the issue under appeal, the referee shall not explore, investigate, or rule upon the new issue(s); but rather, the referee shall remand the case to the local office for its investigation and ruling, if deemed necessary by the local office.

The Commission notes that there may be instances when it might be appropriate for the referee to give the parties an opportunity to waive notice of an issue(s) ruled upon by the local office, but about which they were not given prior notice. For example, if the issue for which notice to the parties was given is whether the appeal to the referee was timely; and it becomes clear during the hearing that the appeal was timely, then the referee may ask the parties to waive notice of the issue ruled upon by the notice of determination. However, great care shall be taken by the referee to give the parties sufficient information regarding the issue(s); and the potential consequences of waiving notice; as to enable the parties to make an informed decision whether to waive notice or not.

DECISION: The scope of a referee hearing shall not go beyond the issue(s) ruled upon by the local office and appealed to the referee. The referee shall, without exploring, investigating, or ruling upon, remand to the local office any new issue raised at a hearing; which has not been ruled upon by the local office. The referee may give the parties the opportunity to give an informed waiver of notice of an issue ruled upon by the local office, but about which they were not given prior notice.

C.O. # 96788C **PRECEDENT**

Chapter 6000

SUITABLE WORK

CONTENTS BY ISSUE

ISSUE: Whether a claimant with twenty-nine years experience as a bookkeeper must accept a motel clerk's position with little bookkeeping responsibilities and a fifty percent reduction in pay, after nine weeks of unemployment.

FACTS: (See "Issue" above).

REASONS: The Daviess Circuit Court held that it would be unreasonable to require claimant to accept the position considering her prior experience and earnings and length of unemployment (see KRS 341.100).

DECISION: Claimant held to have refused an offer of unsuitable work with good cause.

Daviess Circuit Court, WARD V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND EXECUTIVE INN RIVERMONT, 83-CI-0059. Not to be cited or quoted. For guidance only.

6001 FAILURE TO RETURN TO WORK FOLLOWING LEAVE OF ABSENCE; WORK REFUSAL OR VOLUNTARY QUIT.

ISSUE: Whether a claimant who is off work on medical leave of absence has voluntarily quit or refused an offer of work when she fails to return to a position which, while not identical to the one she held for several months immediately prior to the leave, was no different from the work she had performed for this employer for several years.

FACTS:

1. Claimant worked most of her thirteen years with the captioned employer as a nurse's aide.
2. For several months prior to being granted a medical leave of absence, claimant worked as a medical supplies clerk at the same rate of pay previously received as a nurse's aid.
3. During the first few months of her tenure as a supplies clerk, she performed only those duties.
4. However, during the last four months she was required to work in the mornings as a nurse's aid.
5. As a supplies clerk she worked Monday through Friday.
6. Nurse's aids were scheduled so that aids positions were filled twenty-four hours a day, seven days a week.
7. When released by her physician as able to work on August 29, 1978, claimant found the supplies clerk position had been filled in her absence.
8. Claimant was offered a position as a nurse's aid which she refused because of weekend work and her husband's ill health.
9. Claimant was not promised that she would be returned to the supplies clerk position following her leave.

REASONS: A long line of precedent-setting court cases had established the premise that those individuals who are granted bona fide LEAVES OF ABSENCE have not been separated from their employment. We are in full agreement with this premise, therefore, claimant did not simply refuse an offer of work on or near August 29, 1978, but effectively set her separation from employment into motion.

Having so concluded, we must next proceed to the question of whether or not good cause for the quitting existed. We are convinced it did not.

KRS 341.370 (1)(c) and 341.350 (3) provide respectively that the worker be disqualified from benefits for the ensuing period of unemployment, and that the employer be awarded reserve account relief when the worker voluntarily leaves the employer without good cause.

Insofar as the record will show, claimant was not promised return to her position as Medical Supplies Clerk at the time her leave was granted. The work she was offered at her return, while not identical to the clerk position, was no different from that she had performed for this employer for a period of several years. Her refusal to return to her former work constituted a voluntary quitting, for which good cause has not been shown.

By the MUTUALITY of the agreement with regard to the leave of absence, this case is distinguished from those where the employers unilaterally alter the conditions of employment.

DECISION: Claimant held to have voluntarily quit without good cause attributable to the employment.

C.O. # 19620 NONPRECEDENT

6002 REFUSAL OF WORK AFTER BEING "BUMPED".

ISSUE: Whether a claimant who has been "bumped" should be disqualified for exercising his contractual right to take "voluntary time off" by refusing offers of three vacant positions which he had previously held, simply because they paid four percent less than his last job.

FACTS: (See "Issue" above).

REASONS: In an unpublished decision, the Kentucky Court of Appeals held that the offered work was suitable, and that the claimant had a clear and reasonable alternative to becoming unemployed: namely, he could have gone to work in any one of three suitable jobs.

It is significant to note that the Court did not feel that the language of the contract permitting the claimant to take "voluntary time off" rather than accept work in vacant positions, was controlling in this case. Further, this case is distinguishable from ENTRY 6375 where the claimant would have "bumped" another employee by accepting the position offered.

DECISION: In this case, the Court held that the claimant did not have good cause to either refuse the offered work or to quit his employment by failing to accept the work.

Kentucky Court of Appeals, FEGER AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. ALUMINUM CRUISERS, 80-CA-199-MR. Unpublished. Not to be cited or quoted. For guidance only.

6025 VOLUNTARY QUIT OR DISCHARGE; FOLLOWED BY WORK REFUSAL.

ISSUE: Whether a job separation is a voluntary quit or discharge when the employer extends an ultimatum of loss of employment or transfer to another region of the country, and claimant refuses the transfer.

FACTS:

1. Claimant began work in Lexington, Kentucky, June, 1975, at an annual salary of $17,000.00.
2. Immediately preceding the job separation, he had advanced to an annual salary of $20,000.00 plus a ten percent yearly bonus.
3. In late July, 1977, without warning, claimant was given the ultimatum of loss of employment or transferring to Dallas, Texas.
4. He was offered a "lesser" position without benefit of the aforementioned ten percent bonus and was given one week to decide.
5. The only reason offered by management for this change was that claimant and his supervisor did not always agree on matters pertaining to claimant's job duties.

6. Claimant was never warned that his job performance was unsatisfactory or that a transfer was possible.
7. Claimant elected not to take the transfer and left his employment on or near July 20, 1977.

REASONS: KRS 341.370 provides for the imposition of a disqualification from benefits where the worker voluntarily leaves SUITABLE work without good cause or is discharged for acts of work connected misconduct.

Proper disposition of this case turns upon two points. (1) Did claimant leave his employment of his own volition or was he discharged. If the latter proves to be true, we must then deal with the question of whether or not an offer of suitable work was extended subsequent to the termination.

From the outset it is clear that the employer was the moving party in provoking claimant's separation from his position in Lexington. Claimant obviously had no choice in the matter; he simply could not continue to work for the company in that location. Having thus concluded, we must now proceed to the question of whether or not such a move on the part of the employer constitutes a severance of the employment connection. All employment arises as the result of a contract between employer and employee, wherein the latter agrees to furnish services to the former at an agreed upon rate and, generally, at an agreed upon location. Any material change in the terms of the contract when unilaterally imposed by either party, represents a breach of the contract and renders it, for all practical purposes, null and void.

Such is the case here. There is no indication in the record that claimant ever agreed, either at hire or during his tenure with the firm, to relocate when so directed by the employer. When the employer delivered the ultimatum requiring that claimant relocate to Dallas, he effectively terminated the original contract of hire and thereby discharged claimant. Since no evidence of misconduct has been offered, no disqualification thus arises.

The single question remaining is whether or not the proffered position in Dallas, Texas, represented an offer of suitable work. In this regard, the provisions of KRS 341.100 are clear. Distance from the worker's domicile is of prime importance in determining the suitability of any work. In this case, the position offered was located some 900 miles from claimant's home. He was justified in refusing such an offer, and no benefit disqualification attaches as the result of such a refusal.

DECISION: Claimant was discharged for reasons other than work related misconduct and subsequently refused an offer of unsuitable work with good cause.

C.O. # 18194 NONPRECEDENT

NOTE: See Entry 6245

6035 REFUSAL OF REFERRAL; TRANSPORTATION PROBLEMS.

ISSUE: Whether a claimant has good cause to refuse a referral to a job nineteen miles from her home because of alleged transportation difficulties.

FACTS:
1. Claimant last worked in "bookkeeping" at a work site in eastern metropolitan Louisville about seven miles from her home.
2. Laid off on October 3, 1970, and filed a claim the same day.
3. Claimed and received benefits through February 5, 1971.
4. Refused a referral for a job in "bookkeeping" for a firm in southeast metropolitan Louisville, about nineteen miles from her home.
5. Refused the referral because of the distance from her home, and she did not think her car was in condition to drive the greater distance.

6. Starting rate of pay was not a consideration in the refusal.

REASONS: KRS 341.370 provides for the disqualification of a claimant from receiving benefits if he fails without good cause to apply for available, suitable work when so directed by the employment office.

In determining the suitability of work, a worker's prior experience, prior earnings, length of unemployment, and prospects of other work are considered. The distance of the work from claimant's residence is also considered. When all of these statutory factors are considered it must be held that the work to which claimant was referred was suitable. It is difficult to see why her car would not have been as dependable for the nineteen miles as it was for the seven miles. The distance involved in the metropolitan areas was not too great.

DECISION: Claimant refused without good cause to apply for suitable work.

C.O. # 9152 NONPRECEDENT

6090 REFUSAL OF REFERRAL TO BASE PERIOD EMPLOYMENT (ALLEGED PHYSICAL INABILITY).

ISSUE: Whether a claimant has good cause to refuse a referral to base period employment, without even inquiring into the specifics of the job, simply because he believes the work would be detrimental to his health.

FACTS:
1. Claimant worked for the University of Kentucky, a base period employer, eighteen months before leaving to work elsewhere.
2. After becoming unemployed from the subsequent employment, he refused a referral to a job opening as a custodian with the University of Kentucky.
3. Claimant did not even inquire about the job because he believed it would require heavy lifting which he preferred not to do.
4. He offered no medical evidence that the work to which he was referred would be injurious to his health, or that he was required to quit the University previously for medical reasons.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a claimant if he fails without good cause to apply for suitable work when so directed by the employment office. The Commission simply concluded that, in the absence of evidence to the contrary, base period employment is presumed to be suitable work.

DECISION: Claimant disqualified on grounds he refused a referral to suitable work without good cause.

C.O. # 11017 NONPRECEDENT

NOTE: See Entry 6240 for an exception to this general rule.

6215 UNION COMMITTEE RECEIVED OFFERS OF WORK FOR ITS MEMBERS.

ISSUE: Whether claimants who did not actually receive offers of work should be held to have refused work offered to them through their union committee.

FACTS:
1. Three claimants employed on motor crew in a coal mine.
2. Laid off June 15, 1951, for lack of work.
3. On June 18, 1951, their union mine committee approached the general manager on their behalf demanding reinstatement of one claimant to his previous position.

4. Management advised the committee that all three workers could return to work as coal loaders.
5. The offer was not made directly to the workers.
6. By terms of the contract, the company had the right to transfer workers to jobs of coal loading.
7. The wages of a loader are comparable to those of other jobs in the mine.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a claimant if he fails without good cause to accept suitable work.

An offer, to be valid, must be communicated to the worker. In this case the offer was not communicated to the workers unless it is considered that the offer to the mine committee constituted an offer to the men.

We are of the opinion the offer to the mine committee constituted a valid offer communicated to the claimants.

The mine committee is composed of members of the union who are employed in the same mine as claimants. Their duties under the agreement between the company and union is the adjustment of disputes. In the instant case the dispute grew out of the layoff of these three claimants and three others. The mine committee assumed jurisdiction over the grievances that arose out of this fact on the complaint of claimants. The committee's purpose in approaching the management of the mine was to secure reemployment of claimants. Specifically, they were seeking their reinstatement to their former jobs. As such, they were agents of the claimants to negotiate with the company the settlement of the grievance; the solution of which, according to the demand, was the reemployment of claimants. The company's reaction to the demand was an offer to the claimants, through the committee, of work as coal loaders.

As agents for the claimants in demanding reemployment for them, it necessarily follows the committee was their agent to report to them the results of its conference with the company which would have included the offer of work. The offer of the work, therefore, must be considered as communicated to the workers as of the time the offer was made to their agent, the mine committee.

DECISION: Claimants disqualified on grounds they refused offers of suitable work without good cause.

C.O. # 1390 NONPRECEDENT

6220 LAID OFF EMPLOYEE UNAVAILABLE FOR OFFER OF TEMPORARY WORK.

ISSUE: Whether a claimant who has been laid off indefinitely should be disqualified for not being at home when the employer, from whom he was laid off, telephoned to offer a single shift of work.

FACTS:
1. Laid off indefinitely May 4, 1970, and reopened claim effective May 8, 1970.
2. Instructed by local office to report back at 8:00 a.m. on May 22, 1970, for a benefit rights interview.
3. At around 7:00 or 7:30 a.m. on May 22, 1970, the employer telephoned claimant's residence to offer him a single shift of work.
4. Being in route to the local office for his interview, claimant was not home to receive the offer.
5. Claimant's roommate was advised to notify claimant to contact the employer within the hour for eight hours of work.
6. Claimant did not return home until after 8:30 a.m.
7. He did not contact the employer because it was too late to report for work.
8. On June 5, 1970, claimant received a call to return to regular work to which he responded.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a claimant from receiving unemployment insurance benefits if the worker refuses an offer of work without good cause.

The worker must have knowledge of the available work. There is a long standing rule which does not require a worker to "stand with his hand on the door knob or drop the plow lines in the field" to respond to an offer of temporary work or even a return to regular work. It is our opinion that claimant had a good and legitimate excuse for failing to get the message although it should not make any difference why he was away from home. The same result has been reached in labor dispute cases wherein it was held unreasonable to require workers to sit by a radio in order to report instantly for work when the dispute is ended, and the company calls workers back to work.

The Commission finds that neither the letter of the law nor the spirit of the law requires a disqualification in this case, because it is unreasonable to require such standby readiness under the facts of this case.

DECISION: It was held that an offer of work was not received by the claimant.

C.O. # 8890 NONPRECEDENT

6240 BASE PERIOD EMPLOYMENT OF SHORT DURATION.

ISSUE: Whether base period employment of brief duration and not in one's chosen field or endeavor is suitable work.

FACTS:

1. A journeyman carpenter with fifteen years experience left the trade for a brief period.
2. Engaged in farming and construction labor before reentering the carpentry trade in the fall of 1976.
3. Secured employment with a nonunion firm earning from $6.00 to $9.00 hourly.
4. During a temporary layoff in early winter of 1976, accepted work with the CAPTIONED employer as a welder earning $3.50 per hour.
5. He left the employment voluntarily after three weeks in early 1977.
6. Resumed membership in the carpenter's union and secured employment in the trade in March, 1977.
7. Continued in this employment through late August, 1977, earning a minimum of $9.85 per hour.
8. Laid off in late August, 1977, because of lack of work.
9. Established a valid claim.
10. On October 18, 1977, offered employment by the CAPTIONED employer as a welder fabricator at an hourly wage of $3.50.
11. Claimant refused the referral because of the wage differential, distance from his home, and because the work was not in his chosen field of endeavor.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a claimant if he fails without good cause to apply for suitable work when so directed by the employment office.

In this case the single question to be answered is, was the work to which claimant was offered referral suitable? The referee reasoned it was because of the length of his period of unemployment. We think not. Claimant had been unemployed less than a single month when the referral was offered him. He had filed his claim for benefits some two weeks prior to the referral and had received not a single benefit check. Although this was BASE PERIOD employment, the period of employment was abbreviated, and we must, therefore, look to other criteria in determining suitability. Claimant's many years as a carpenter firmly establishes that trade as his occupation. He should be allowed a reasonable period of time in which to secure like

employment. When the wide differential in hourly wage is added, we arrive at the inescapable conclusion: the work was unsuitable and, under the law, claimant was justified in refusing it.

DECISION: Claimant refused referral with good cause.

C.O. # 17994 A NONPRECEDENT

NOTE: See Entry 6090 which holds as a general rule that base period employment is suitable.

6241 REFUSAL OF REFERRAL; EARNINGS AND LENGTH OF UNEMPLOYMENT.

ISSUE: Whether a claimant unemployed for six months has good cause to refuse a referral because it pays twenty-five percent less than she was last paid.

FACTS:
1. Claimant was laid off in July from Allstate Truck Lines where she worked as an office worker for $80.00 per week (the largest salary she had ever been paid).
2. In January, she refused a referral to a clerk typist position paying $260.00 per month because she was unwilling to work for less than $75.00 per week.
3. Claimant had neither expectation of recall to Allstate nor a promise of other work at the time of the referral.

REASONS: KRS 341.370 (1)(a) provides for the imposition of a benefit disqualification following a failure without good cause to apply for available, suitable work when so directed by the Division of Employment Services.

KRS 341.100 requires that the Commission consider, in determining the suitability of a particular job offered to an individual, the matter of the claimant's experience and prior earnings. If a decision were to be rendered solely on the above factors the claimant would be entitled to a different result than that reached by the referee. However, in the instant case, the claimant was unemployed from July until January when she refused to consider the referral.

In numerous Commission Orders the Commission has consistently followed the reasoning set out in the case of HALLAHAN V. RILEY, 94 NH 48, 45 A. 2d 886, where the Court stated that, "While a claimant could be justified in refusing as unsuitable, work offered immediately after separation from another job, the situation could change after the lapse of time during which the claimant remained unemployed; that work which was unsuitable at the beginning of unemployment could become suitable when consideration was given to the length of unemployment and the prospects of securing accustomed work." We hold that six months constitutes "a considerable lapse of time."

DECISION: Claimant refused without good cause to apply for suitable work when so directed by Employment Services.

C.O. # 6816 NONPRECEDENT

6242 WORK REFUSAL OR UNAVAILABLE FOR TEMPORARY WORK.

ISSUE: Whether claimant who refuses a two day job assignment should be disqualified for the duration of her unemployment or held unavailable and ineligible for the week in question.

FACTS:
1. Captioned employer contracts workers to fill requests for nursing services.
2. Claimant, a nurse's aid, has been associated with the company for two years.
3. Initially, she agreed to accept hourly and live-in assignments.

4. Later, she informed the employer that she would not accept weekend, night, or live-in assignments because of personal considerations.

5. As was its custom with all employees, the employer complied with claimant's restrictions for over a year.
6. On September 13, 1984, employer requested claimant accept a live-in assignment for two days.
7. Claimant refused, and the Division held that claimant refused an offer of suitable work without good cause.
8. Simultaneously, the Division ruled claimant unavailable for work and ineligible for benefits the week of the refusal and thereafter until conditions substantially change.
9. This ruling was reversed on appeal to the referee, whose decision became final for lack of appeal or action.
10. Thus, the ruling of availability is not properly before the Commission.

REASONS: KRS 341.370 (1)(a) provides that a worker be disqualified for refusing to accept an offer of suitable work without good cause. The work offered in this case, in the strictest sense, is suitable for the claimant. Her reasons for refusing the offer would not generally be considered as providing good cause for refusal. However, we question the appropriateness of applying the cited statute to the situational matrix of this case. The claimant retains an association with the captioned firm. The claimant's self-imposed restrictions pertaining to work assignments had been accepted by the employer for a significant period of time, and such restrictions were not unusual for other workers associated with the firm. Her refusal was a refusal of a temporary assignment of short duration, not a blanket refusal of work that the employer may have. We believe that the invocation of a duration disqualification in such a situation is inequitable and, at the least, statutorily questionable. We find it inappropriate to apply the cited statute in a situation such as this.

We do not believe the legislature envisioned nor intended that a worker be disqualified for the duration of unemployment for refusing such a temporary period of employment but intended the disqualification to be imposed on a worker who refused a job which was expected to have some degree of permanence.

We do find that the Division appropriately investigated the claimant's attachment to the labor market. However, we cannot properly enter into that issue for the period encompassed by the referee decision which has become final. However, we believe it appropriate for the Division to initiate another investigation of the claimant's attachment to the labor market immediately following the week of the referee's ruling on that issue and thereafter.

DECISION: Claimant did not refuse an offer of suitable work.

C.O. # 41441 NONPRECEDENT

6245 SUBSTANTIAL CHANGE IN WORKING CONDITIONS; FOLLOWED BY WORK REFUSAL.

ISSUE: Whether a job separation is a voluntary quit or discharge when the employer substantially changes the conditions of employment, and claimant refuses to accept said changes.

FACTS:
1. Claimants worked from 7:30 a.m. to 3:00 p.m. Monday through Friday.
2. On August 19, 1974, employer announced that starting on August 24, 1974, claimants would have to work different shifts each week.
3. Seven night shift - off two days; seven evening shifts - off one day; seven day shifts - off five days.

4. Claimants discussed dissatisfaction with the sudden change in working hours with management pointing out the impossible tasks of obtaining baby-sitters and arranging transportation with a carpool.
5. Employer confirmed that the new shifts would stand and the claimants gave notice they were quitting.

REASONS: KRS 341.370 (1)(a)(b) and (c) provide for the disqualification from receiving benefits for the duration of any period of unemployment with respect to which a worker refuses suitable work without good cause, is discharged for misconduct, or voluntarily quits suitable work without good cause.

Claimants refused an offer of work with good cause. Changing a worker's hours from one day time shift, five days a week, to three rotating shifts (midnight, evening and day) for seven day periods, is a substantial change in working conditions and constitutes a termination of existing conditions and an offer of new work.

The work offered must be suitable and not unduly burdensome in the particular circumstances. In the instant case, the offer of work was unsuitable because the sudden change of hours imposed an unduly burdensome condition of obtaining baby-sitters or transportation on a rotating basis for seven day periods so as to enable claimants to retain their employment.

DECISION: Claimants held to have been laid off and refused an offer of unsuitable work with good cause.

C.O. # 11545 NONPRECEDENT

NOTE: See Entry 6025

6375 REFUSAL TO "BUMP"; WORK REFUSAL OR VOLUNTARY QUIT.

ISSUE: Whether a more senior employee should be disqualified for refusing to "bump" less senior employee.

FACTS:
1. Worked two years as a truck driver at an hourly rate of $3.23.
2. Laid off on July 10, 1970, and apprised of his contractual right to "bump" other employees in other departments with less seniority.
3. Claimant chose not to "bump" into a job as serviceman paying $3.05 per hour.
4. The "bumping" right was strictly voluntary, and by refusing to "bump" claimant did not lose his right to recall to his regular job.

REASONS: KRS 341.370 provides for a disqualification from benefits if a worker quits suitable work voluntarily without good cause or if he refuses an offer of suitable work without good cause.

In Commission Order 8621 it was held in a similar case that there was no duty upon the worker to exercise "bumping rights" and he cannot be disqualified for choosing not to do so. The Order cited two earlier orders 2126 and 2252, in which the test was whether the worker had an option to exercise "bumping rights."

It is the ruling of the Commission that claimant did not voluntarily quit by choosing to take the layoff when he was not required by the company to exercise "bumping rights." It is the further ruling that no specific offer of work was made. Claimant was left with the initiative, the lack of exercise of which is not within a specific statutory disqualification provision.

Ordinarily, as stated by the referee, someone, whether it be the "bumper" or "bumpee" would be entitled to unemployment insurance, and the company's account would be changeable anyway.

DECISION: Claimant did not voluntarily quit and did not refuse a specific offer of work.

C.O. # 8873 NONPRECEDENT

6400 REFUSAL OF REFERRAL TO NONUNION WORK.

ISSUE: Whether claimant, a union bricklayer for fourteen years, had good cause to refuse a referral to a nonunion job simply because he feared he would be suspended by his union when most construction jobs in the area were nonunion.

FACTS: (See "Issue" above).

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a worker for refusing without good cause to apply for suitable work when so directed by Employment Services.

KRS 341.100 provides that work is not suitable if, as a condition of being employed, the worker would be required to resign from a bona fide labor union. It is the established principle that this section is applicable only when the employer, instead of the union, places the condition upon which the acceptance of work would require the resignation from a union. See Commission Order Numbers 3636, 3613, 3728 and 5643, which are supported by court cases. The Courts of Pennsylvania, the jurisdiction reporting most of the cases in point, follow the rule in BARCLAY WHITE COMPANY V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 50 A. 2d 336, Cer. Den. 332 U.S. 761, 68 S.

Ct. 63. CHAMBERS V. OWENS-AMES-KIMBALL COMPANY, 146 Ohio, 559 67 N.E. 2d 439, 165 A.L.R. 1373, which held the EQUAL PROTECTION CLAUSE of both the state and federal constitutions would be violated by interpreting a statute similar to KRS 341.100 in such a manner that the refusal of nonunion work by a union worker would not subject the worker to a disqualification from receiving benefits.

If otherwise suitable, the refusal of work by the claimant requires a disqualification. KRS 341.100 provides further that new work is not suitable unless the conditions of work and wages compare favorably with those of similar work in the area.

The employment office interviewer and examiner qualified himself as an expert and testified that the bricklaying work in the Somerset area was predominantly nonunion, and that the wage for the offered work was that which is usually paid for such work in the area.

Since claimant testified positively that he did not accept the work because it was nonunion, he cannot be heard upon appeal to deny it. Moreover, the fact that no work was available when he finally contacted Hacker Brothers on or about January 2, 1970, does not mean no work was available when the referral was offered on December 22, 1969.

DECISION: Claimant refused a referral to suitable work without good cause.

C.O. # 8579 NONPRECEDENT

NOTE: See Entry 6402 for precedent on this issue.

6402 NONUNION WORK; UNION MEMBER.

ISSUE: Whether a claimant who is a union member is subject to a benefit disqualification for refusing nonunion work.

FACTS:

1. While on layoff from union work, claimant was offered nonunion work by the captioned employer, for whom he had worked previously.
2. Claimant, a twenty year member of the IBEW union, refused the offer because he would have faced a fine by and expulsion from his union.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a worker who refuses an offer of suitable work without good cause. KRS 341.100 provides that no work shall be suitable if, as a condition of employment, the worker would be required to resign from a bona fide labor organization.

In Commission Order Number 8579 it was stated: It is the established principle that this section is applicable only when the employer, instead of the union, places the condition upon which the acceptance of work would require the resignation from a union. See Commission Order Numbers 3636, 3613, 3728 and 5643, which are supported by court cases. The Courts of Pennsylvania, the jurisdiction reporting most of the cases in point, follow the rule in BARCLAY WHITE COMPANY V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 50 A. 2d 336, Cer. Den. 332 U.S. 761, 68 S. Ct. 63. The BARCLAY WHITE case relied upon the most widely cited case of CHAMBERS V. OWENS-AMES-KIMBALL COMPANY, 146 Ohio, 559, 67 N.E. 2d 439, 165 A.L.R. 1373, which held the EQUAL PROTECTION CLAUSE of both the state and federal constitutions would be violated by interpreting a statute similar to KRS 341.100 in such a manner that the refusal of nonunion work by a union worker would not subject the worker to a disqualification from receiving benefits.

DECISION: Claimant refused an offer of suitable work without good cause.

C.O. # 42955 PRECEDENT

6445 BENEFIT RATE COMPARABLE TO WAGE OFFERED.

ISSUE: Whether a claimant has good cause to refuse work on grounds his benefit rate was comparable to the wage offered.

FACTS:

1. Worked for International Harvester for two months prior to being laid off in April, 1969.
2. He was earning about $3.46 per hour.
3. While on layoff he worked as a mechanic's helper for the CAPTIONED employer.
4. He earned about $100.00 per week for a fifty-four hour week.
5. Recalled to International Harvester February, 1970.
6. Laid off again on July 10, 1970, for an announced period of about seven weeks.
7. On July 30, 1970, claimant refused an offer to work again for the CAPTIONED employer.
8. He was to receive a $16.00 increase for the same fifty-four hour week.
9. Claimant refused because his unemployment insurance benefits plus supplemental benefits from International Harvester would total but $8.00 or $9.00 less than the wage offered by the captioned employer.
10. No evidence that acceptance of work with the captioned employer would have interfered with his right to return to International Harvester.

REASONS: KRS 341.370 (1)(a) provides for the disqualification of a claimant from receiving benefits if the worker refuses an offer of suitable work without good cause. KRS 341.100 provides that prior work and earnings should be considered in determining whether work is suitable for a claimant.

The record shows that claimant earned 53.9 percent of his base period wages from the captioned company in the same type of work he refused, and that an additional 16.4 percent of his base period wages is indicated to have had a lower wage rate than that at International Harvester.

Since there is no indication that acceptance of the work would have interfered with his right to return to International Harvester when recalled, the work was suitable, and he did not have good cause to refuse it.

There is no statute which measures rights to unemployment insurance benefits by comparison of wages to amount of total benefits. So far as the statutes are concerned, the work was suitable, and claimant did not have good cause to refuse it.

DECISION: Claimant refused an offer of suitable work without good cause and was disqualified.

C.O. # 8842 NONPRECEDENT

6451 REFUSAL OF MENIAL LABOR BY SKILLED WORKER.

ISSUE: Whether a laid off claimant who is a skilled worker has good cause to refuse recall to menial labor.

FACTS:
1. Worked eighteen months for the captioned employer as a tool and die maker earning $2.86 per hour.
2. Given a temporary layoff on July 22, 1973.
3. In accordance with company policy, claimant was instructed to report for work August 2, 1963.
4. Upon arriving he was assigned work as a laborer at a rate of $1.41 per hour.
5. The work consisted of cleaning lights in the office.
6. Claimant refused and he was discharged.

REASONS: A referee held that the janitorial work offered claimant on August 2 was unsuitable in its nature for him, and that he was under no obligation to accept it. The company has appealed to the Commission indicating that in accordance with their policy and standards, the claimant was obligated to take the proffered work.

KRS 341.100 requires that the Commission consider, in determining the suitability of a particular job offered to an individual, the matter of the claimant's work experience and prior earnings. In this case we have a highly skilled employee being asked to accept menial work as a laborer at a labor pay rate. Under these circumstances we conclude that the work was unsuitable for this claimant, and that he was not discharged for an act of misconduct.

DECISION: Claimant refused an offer of unsuitable work with good cause.

C.O. # 5859 NONPRECEDENT

6470 BREACH OF CONTRACT; VOLUNTARY QUIT; WORK REFUSAL.

ISSUE: Whether a claimant has good cause to refuse work when she had good cause to voluntarily quit the same employer for breach of contract.

FACTS:
1. Employed as a salesperson by the captioned exclusive millinery shop.
2. When hired, was offered the choice of a straight salary of $45.00 per week or $30.00 per week plus commission.
3. Claimant chose the straight salary.
4. With the approach of summer, which is a slow season in the millinery business, the employer told claimant she would either have to accept $30.00 per week plus commission or be laid off.
5. Claimant refused the offer and was laid off on June 28, 1952.

6. On July 28, 1952, again refused the same offer from the captioned employer on grounds she couldn't live on $30.00 per week.

REASONS: KRS 341.370 provides that a worker shall be disqualified from receiving benefits if she has refused an offer of suitable work without good cause. The claimant and the appellant had agreed that the claimant would be paid a straight salary of $45.00 per week. The reduction from $45.00 per week to $30.00 plus commissions constituted a breach of the contract of employment which justified claimant's quitting her job for good cause attributable to the employment.

If, as we think, the claimant was legally within her rights to resign because of a reduction in pay, she likewise was within her legal rights to refuse the offer to return to the reduced wage.

DECISION: Claimant refused an offer of unsuitable work with good cause.

C.O. # 1634 NONPRECEDENT

6475 REFUSAL OF REFERRAL; WAGES LESS THAN PREVIOUSLY PAID.

ISSUE: Whether a claimant has good cause to refuse work solely because the wage was not equal to her last salary.

FACTS:
1. Last worked on May 23, 1973, for $601.00 per month.
2. On January 10, 1974, referred to similar work paying $500.00 per month.
3. Claimant refused referral on grounds she was unwilling to accept less than $550.00 monthly.
4. A few weeks later she accepted other work at the same rate as that which she had rejected on January 10, 1974.

REASONS: KRS 341.370 (1)(a) provides that the worker be disqualified from benefits if she fails, without good cause, to apply for suitable work at the direction of the employment office.

The referee correctly held that:

> "To be suitable, a pay rate need not be as great as that which the worker last received. The longer a worker is unemployed, the less she is expected to insist on equalling her prior level of income. As of January 10th, claimant had been unemployed for a prolonged period. A rate of $500.00 per month, which is within the range prevailing in Louisville for accounting clerk work, was suitable when consideration is given to the long period during which claimant had been unable to obtain work paying a higher rate. Moreover, her willingness within a few weeks following January 10th to accept a job paying the same rate as that which she rejected on that date, is further evidence that the rejection of January 10th was an imprudent act."

The referee decision is supported by the facts and law.

DECISION: Claimant refused without good cause to apply for suitable work when so directed by Employment Services.

C.O. # 11008 NONPRECEDENT

6476 DISCHARGE FOLLOWED BY OFFER OF LOWER PAYING JOB.

ISSUE: Whether a claimant who is discharged for excessive absenteeism has good cause to thereafter refuse a lesser paying job with the same employer.

FACTS:

1. Worked for the captioned coal mine seven months, starting at $18.00 per shift and working up to $22.00 per shift.
2. He was discharged December 2, 1966, for excessive absenteeism.
3. On December 19, 1966, company offered claimant work as a mucker, cleaning dirt and mud from around the tracts and work places for a wage of $16.00 per shift.
4. Previously he had worked at the higher rated jobs of driller and shooter which were directly connected to coal production and upon which other operations were dependent.
5. The mucking job was not directly related to coal production and usually paid a starting wage of $12.00 per shift.
6. Claimant refused because of the wage rate.

REASONS: KRS 341.370 (1)(a) provides for a disqualification from receiving benefits if a worker refuses an offer of suitable work without good cause.

KRS 341.100 provides that the Commission shall consider the worker's prior experience, earnings, length of unemployment and prospects of returning to his customary work. This same section provides that the new work must compare favorably with similar work from a standpoint of wages and conditions of work.

Although the claimant had worked up to a higher rated job before being discharged, he did not have any prospect of returning to his regular work because of his attendance record. The new work compared favorably with similar work in other mines in the area and must be considered suitable work under the above statute. The claimant did not have good cause for refusing the work.

DECISION: Claimant refused an offer of suitable work without good cause.

C.O. # 7302 NONPRECEDENT

6495 VOLUNTARY QUIT WITH GOOD CAUSE; SUBSEQUENT REFUSAL TO RETURN TO SAME WORK.

ISSUE: Whether a claimant, who had good cause attributable to the work to quit, also had good cause to refuse an offer of reemployment.

FACTS:

1. Worked for the captioned employer four and one-half years molding concrete flower pots for an hourly wage of $4.00.
2. Filed suit with Labor Relations regarding unpaid overtime.
3. Was told "if you accept the overtime pay, you are cutting your own throat."
4. A job separation followed which the Commission held to be a voluntary quit with good cause attributable to the employment.
5. Apparently a contributing factor to the job separation was claimant's inability to meet production standards.
6. Following the Commission's ruling on the job separation, the captioned employer offered claimant his old job at the previous wage rate with the same production standards.
7. Considering his prior experience with the captioned employer, claimant refused the offer.

REASONS: KRS 341.370 (1)(a) provides that a worker shall be disqualified if he has refused an offer of suitable work without good cause.

The Commission held that while the claimant's old job was suitable with regard to job duties and pay, claimant's previous experience with the employer gave him good cause to refuse the offered work. In determining suitability of offered work, consideration must be given to the type of work and the conditions under which it is performed with regard to the worker's past experience.

In this case, the job offered was the same job, with the same employer in which his earlier experience had shown he could not meet the expected production quotas. This fact rendered the work unsuitable and afforded the claimant good cause to refuse the offered work.

DECISION: Claimant refused an offer of suitable work with good cause.

C.O. # 38867 NONPRECEDENT

6496 DISCHARGE; SUBSEQUENT REFUSAL TO RETURN TO OTHER WORK.

ISSUE: Whether claimant who was discharged for nondisqualifying reasons had good cause to refuse offer of reemployment.

FACTS:
1. Worked as a cook and "salad lady" for one and one-half years before being replaced while on sick leave.
2. Upon attempting to return to work, was offered a position as a maid in the housekeeping department.
3. Claimant refused the offer.

REASONS: KRS 341.370 (1)(b) provides for the disqualification of a worker if she has refused without good cause to accept available suitable work when offered. The referee held:

> "Suitable work has been described as that work which provides wages and working conditions commensurate with the worker's past experience.
>
> "In the instant case, it is clear that the proffered work would not have provided working conditions commensurate with claimant's past experience. She had a single month of experience as a maid, with the remainder of her entire work history being as a cook and kitchen helper."

DECISION: Claimant refused an offer of unsuitable work with good cause.

C.O. # 11099 NONPRECEDENT

6515 REFUSAL OF A SINGLE SHIFT; WHILE ON LAYOFF.

ISSUE: Whether a laid off truck driver refused an offer of work or was unavailable for work when he refused a single shift, with his regular employer, as a dock worker.

FACTS:
1. Claimant, a member of the Teamster's union was an over-the-road truck driver.
2. He was paid twenty-three cents per mile (up to 326 miles) or $9.35 per hour (for over 326 miles and nondriving time).
3. On September 13, 1985, he was laid off for lack of work.
4. The contract provides that casual dock work must be offered to laid off drivers before it can be offered to other workers.
5. It pays $11.00 per hour and is on a day by day basis.
6. Contractually, drivers have the right to refuse such work.
7. On September 21, 1985, claimant was offered a single shift of casual dock work.
8. Claimant had performed casual dock work on July 7, 1985.
9. He refused the offer of September 21, 1985, because he did not like dock work.

REASONS: KRS 341.370 (1)(a) provides, in pertinent part, for the imposition of a DURATION disqualification from receiving benefits when a worker has refused suitable work without good

cause. KRS 341.350 (4) provides as a condition of eligibility to receive benefits that during any week of unemployment, a claimant be available for suitable work.

The language of KRS 341.370 (1)(a) refers to an offer of suitable work, leaving to interpretation whether it is to apply to a single shift of temporary reassignment by a current employer, as here, or whether it should apply only to offers of work of more permanent duration. We feel it was intended to be applied in the latter situation, where there is an offer of new work of a significant duration. All other refusals of work probably involved a separation from employment, under KRS 341.370 (1)(b) or (c), or the worker's weekly availability for suitable work under KRS 341.350 (4).

In this case claimant refused a single shift of work. Therefore, we find KRS 341.350 (4) to be applicable here. Based upon the facts herein, we find he held himself unavailable for suitable work during week ended September 21, 1985. He had previously performed such work (July, 1985); its wages were comparable if not higher than his regular earnings; and his refusal to accept the offer was based upon a personal preference rather than any compelling circumstances. Therefore, he was ineligible to receive benefits for that week.

The referee cited Commission Orders 8873 and 11480 which ruled, "a worker electing to take layoff rather than "bump" a co-worker did not refuse suitable work," as controlling in this case. We disagree and find this case to be distinguishable from those. In this case the job was vacant and claimant would not have BUMPED another worker out of the job by accepting the offer of work. In the other cases the job was not vacant and either the claimant or the other worker would have been unemployed due to an employment cut back.

DECISION: Claimant held unavailable for work and ineligible to receive benefits for week ended September 21, 1985.

C.O. # 44643 NONPRECEDENT

6545 TEMPORARY CONTRACT OF HIRE FULFILLED; REFUSAL OF ONGOING EMPLOYMENT ON RELIGIOUS GROUNDS.

ISSUE: Whether a claimant, after fulfilling temporary contract of hire, should be disqualified for refusing ongoing employment, the conditions of which violated the tenets of her faith.

FACTS:

1. Accepted temporary employment on or near March 6, 1978, which was to end on October 27, 1978.
2. Termination of the temporary contract took place as scheduled on October 27, 1978.
3. Employer contends claimant could have remained employed by bidding on the fifty-four jobs posted for bid during her employment.
4. She was not offered any of these positions.
5. However, claimant was offered part-time and full-time work both of which required Saturday work.
6. She refused both offers because she is a member of the Seventh Day Adventist faith, whose Sabbath falls on Saturdays, and whose members are prohibited, as a basic tenet of their faith, from working on the Sabbath.

REASONS: In this case, the claimant was hired for a specific period of time, with the contract of hire expiring, by its own terms, at completion of that period. The positions posted by the company during the tenure of her employment cannot be considered as offers of work, since no effort was ever made to actually offer any of the positions to her.

Finally, claimant rejected both the offer of part-time work and the final offer of full-time work with good cause. It is well established in unemployment insurance law, that work, the conditions

of which require violation of the basic tenets of a worker's faith, is unsuitable. Claimant's faith requires that its followers refrain from performing any work on the Sabbath. Both of the firm's final offers were positions which included, as a condition of acceptance, that work be performed on Saturday, the Sabbath for those of the Seventh Day Adventist persuasion. She rejected the offers with good cause and cannot be disqualified from benefits as a result thereof.

DECISION: Claimant refused both offers with good cause and was not disqualified.

C.O. # 20028 NONPRECEDENT

NOTE: A sincerely held religious conviction would be sufficient grounds for refusal of work.

6560 REFUSAL BECAUSE OF FEAR OR BODILY HARM IN TRANSIT HOME AFTER WORK.

ISSUE: Whether a claimant with two years experience as a night dishwasher had good cause to refuse the same work because she feared she might be molested on her way home after work.

FACTS:
1. Worked two years for the CAPTIONED employer as a night dishwasher.
2. Was allowed to leave an hour early, 11:00 p.m. to catch a bus to her home some thirty-five blocks away.
3. Voluntarily quit because of a growing fear that she might be molested on her way home after work.
4. There was no evidence of threat of harm or likelihood of harm or of any unusual circumstance creating an increased chance of harm.
5. Claimant secured intervening employment and became separated under nondisqualifying conditions.
6. After filing her initial claim, she refused reemployment offered by the CAPTIONED employer under the same terms and conditions as before, stating she was willing to work only the day shift.
7. Only grounds for refusal were that she had no private transportation and lived thirty-five blocks from the place of work.

REASONS: KRS 341.370 provides for the disqualification of a claimant if she refuses an offer of suitable work without good cause. KRS 341.100 requires the Commission, in determining whether work is suitable, to consider the risk involved to a worker's safety.

Except during very unusual occasions, not herein involved, the general crime rate of a city does not render work unsuitable on a particular shift or at a particular place. It must be presumed that sufficient police protection is afforded for the general conditions. It is concluded from the evidence of record that claimant has not proved any undue risk to her safety. The absence of incidents or threats while claimant was previously working under the same circumstances does not support a finding that the work was unsuitable or that claimant had good cause for refusing it.

DECISION: Claimant refused an offer of suitable work without good cause.

C.O. # 8401 NONPRECEDENT

6561 SINCERELY HELD RELIGIOUS BELIEFS; UNEMPLOYED BECAUSE OF.

ISSUE: Whether a claimant, who is not a member of a particular religious sect or church, should be disqualified for refusing an offer of work which would have required him to work on Sundays, when said refusal was based on a sincerely held religious conviction that as a Christian he should not work on Sundays.

FACTS: (See "Issue" Above).

REASONS: The United States Supreme Court held:

> There is no doubt that "{o}nly beliefs rooted in religion are protected by the Free Exercise Clause," THOMAS supra, at 713. Purely secular views do not suffice. UNITED STATES V. SEEGER 380 U.S. 163 (1965); WISCONSIN V. YODER 406 U.S. 205, 215-216 (1972). Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it.
>
> Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. THOMAS settled that much. Undoubtedly, membership in a organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious belief's, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

DECISION: Claimant may not be disqualified from benefits for refusing employment which would require him to violate a sincerely held religious conviction against working on Sundays.

The United States Supreme Court, FRAZEE V. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, 109 S.Ct. 1514 (1989). PRECEDENT

NOTE: This same principle would apply if a claimant quits work rather than work on his Sabbath, or is discharged for refusing to do so, if his refusal is grounded in a sincerely held religious conviction, whether or not he is a member of a religious sect or church.

6562 OFFER OF WORK; DISTANCE TO NEW LOCATION.

ISSUE: Whether claimants refused an offer of suitable work because of the commuting distance.

FACTS:
1. Work was no longer available to these employees at their present location.
2. Transfers offered to employees to positions located 31 miles away.
3. Offer declined for various reasons ranging from increased transportation costs and commuting time to domestic problems such as child care.
4. Cases remanded to local office for investigation into the availability of these claimants.

REASONS: KRS 341.370 (1)(a) provides for a disqualification from receiving benefits for the duration of any period of unemployment if, subsequent to his most recent work, claimant has refused, without good cause, to accept available suitable work when offered.

In these cases it is without question that the proffered work was suitable. In some instances actual duties to be performed were changed to some extent, however, such changes were not sufficiently detrimental to the claimants to warrant a finding of non-suitability.

The single question remaining to be answered, and the one upon which proper disposition of these cases turn, is whether the distance of the new work, approximately 31 miles from Hopkinsville, was sufficient to render it unsuitable.

In cases of this nature, distance alone, unless obviously beyond reasonable limits, cannot be the single deciding factor in whether or not a particular job site is within a commuting area. Of equal importance are road conditions, and available transportation. Here, the record does not address availability of public transportation, however the Commission does not find this omission determinative. It is clear that transportation was available to these claimants, in the form of carpooling, (some eighteen of South Central Bell's employees commute to Madisonville on a daily basis), or privately owned automobiles. Highways are more than adequate, with both a limited access "toll" road, and an excellent secondary connecting the two cities.

There is a paucity of case law in this jurisdiction dealing with the point at issue in these cases. In other jurisdictions, however the courts have consistently ruled that commuting distances no longer than that in the instant cases did not, standing alone, render work unsuitable. In a recent case almost identical in factual matrix with the cases at hand, SOUTH CENTRAL BELL V. MISSISSIPPI EMPLOYMENT SECURITY COMMISSION, et al, MISS., 357 SO. 2D 312, the Mississippi supreme court ruled that commuting distances of 43, 38, and 35 miles respectively, were not unreasonable. We are in accord with that ruling.

A final point worthy of note in these cases is that the employment offered by the company would have provided substantial earnings (in excess of $200.00 weekly) to these claimants. To us, it seems the income potential far outweighs the disadvantages brought about by the necessity to spend one hour per day commuting.

DECISION: Claimants refused an offer of suitable work without good cause. Benefits are denied.

C.O. # 18617 NON-PRECEDENT

6563 MOVING FROM AREA WHILE ON LAY OFF; WORK REFUSAL OR VOLUNTARY QUIT.

ISSUE: Whether claimant, working out of union hall and having no real job connection, has voluntarily quit or refused an offer of work, while during a period of layoff claimant moves to New York.

FACTS:

1. Claimant, hired from a union hall, worked as a journeyman carpenter for approximately five months when placed on layoff status due to lack of work.
2. While on layoff, claimant traveled to New York to seek work and arrange for her move to that state.
3. During her absence, the employer offered, by mail, to return her to work on another of its projects.
4. Upon claimant's return she declined the offer because of her plans to move from the area.
5. No evidence of a contractual, or seniority based, right to recall. No real continuing job connection existed.

REASONS: KRS 341.370 (1)(c) provides for the imposition of a disqualification from benefits, and relief from charges to the employer's reserve account only in those instances where the worker voluntarily leaves the employment without good cause.

In this case claimant initially left her employer as the result of a lack of work layoff. Testimony to the contrary notwithstanding, the evidence is clear that she was not offered continuing work, or other work with the firm, until some time after layoff. She had, by this time, finalized plans to move from the area, and had in fact visited New York and presumably secured living accommodations, etc. Since she initially separated due to layoff, and there is no evidence of a contractually based job connection, she cannot be held to have quit her employment when she refused recall. On the other hand, the proffered work was obviously suitable insofar as general conditions, etc., are concerned. The single factor which precludes a finding of suitability is claimant's move to New York. She had moved from the labor market area during a period of

layoff, and thus was justified in refusing the offer of work since distance from her domicile rendered it no longer suitable.

DECISION: Claimant unemployed due to lack of work, and refused an offer of work with good cause.

C.O. # 20571A NON-PRECEDENT

6564 REFUSAL OF WORK; CLAIMANT REQUIRED TO PAY FOR EMPLOYMENT PHYSICAL.

ISSUE: Whether claimant had good cause to refuse an offer of work from his former employer when he is requested to pay for a medical examination and drug and alcohol tests required by the employer as a condition of employment.

FACTS:
1. Claimant was one of the employer's sales people earning over $36,000.00 a year.
2. Claimant was separated from his employment under non-disqualifying reasons.
3. Employer offered claimant his former job, with the stipulation that he would have to take a physical examination, including drug and alcohol tests for which claimant would have to pay $125.00.
4. Employer also stipulated claimant's health insurance would not commence until he had been with the employer for 90 days.
5. Claimant was without insurance while unemployed and could not afford the expense of the examination and tests.
6. Claimant refused the offer, but would not have if the employer had paid for the exam and there had not been a 90 day waiting period for insurance to become effective.
7. Claimant asserted he was in good health and had no problems with drugs or alcohol.
8. Claimant was disqualified from receiving benefits on grounds he refused an offer of suitable work without good cause and an overpayment of $199.00 was established on the claim.

REASONS: KRS 341.370 (1)(a) provides for the duration disqualification of a worker who refuses an offer of suitable work without good cause.

KRS 336.220 (1) provides that it is ". . . unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination. . . required by the employer as a condition of employment.

The requirement that claimant pay for his own employment physical examination and drug test was unlawful, rendering the work unsuitable and giving claimant good cause to refuse the offer of employment. Even if this requirement were not unlawful, it would be unreasonable and onerous and claimant would still have had good cause to refuse the offer of work.

DECISION: Claimant refused an offer of unsuitable work with good cause. The overpayment was nullified.

C.O. # 58577 PRECEDENT

6565 OFFER OF WORK; BONA FIDE.

ISSUE: Whether claimants received a genuine offer of employment when new owners failed to personally extend said offer.

FACTS:
1. Claimants worked for Keith's Shop Rite Supermarket.
2. The store experienced financial difficulties which culminated in bankruptcy court and the store was purchased by the appellant, Westwood Supermarket.
3. Claimants received layoff notices from Keith's Shop Rite.

4. Appellant insists employment was offered to each claimant but in fact no personal offer was ever made.
5. Appellant relied on the former owner and other employees to pass the word that any employee wishing to stay should contact the new owners.

REASONS: If no actual offer of employment occurred, it is correct to conclude there could be no issue of work refusal and no violation of KRS 341.370 (1) (c), disqualifying an individual from unemployment benefits if he or she voluntarily quits without good cause. There is evidence supporting the factual determination that the employees were laid off.

DECISION: Claimants neither quit nor refused an offer of work; but rather, they were laid off under non-disqualifying conditions.

WESTWOOD SUPERMARKET, INC. VS. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND NINA J. JOHNSON, 90-CA-417-MR

Unpublished. Not to be cited or quoted. For guidance only.

6566 REFUSAL OF RECALL AFTER INDEFINITE LAYOFF; CLAIMANT ELECTS TO REMAIN SELF-EMPLOYED.

ISSUE: Whether claimant, who became self-employed following indefinite lay-off, voluntarily quit or was discharged, and whether claimant refused an offer of suitable work when he did not respond to the employer's recall to work but chose to remain seasonally self-employed.

FACTS:
1. Claimant began working for the employer on August 29, 1994, as a plating machine operator on the 3:00 p.m. to 11:00 p.m. shift earning $6.55 an hour.
2. Claimant last worked on May 14, 1995, at which time he was laid off for an indefinite duration with recall rights for one year.
3. In May 1995, claimant became self-employed as a shell harvester and earned substantially more than he did for the employer.
4. Claimant received notice that he was to return to work at 7:00 a.m. on June 11, 1995. Failure to comply with the notice would result in termination.
5. Claimant chose to remain self-employed and did not respond to recall to the company.

REASONS: KRS 341.370 (1) (b) and KRS 341.370 (1) (c) provide for the imposition of a duration disqualification from receiving benefits when a worker is discharged for work connected misconduct or voluntarily quits his/her most recent employment without good cause attributable to the employment.

KRS 341.370 (1) (a) provides for the disqualification of a worker from receiving benefits if he has failed without good cause either to apply for available, suitable work when so directed by the employment office or the secretary or to accept suitable work when offered him, or to return to his customary self-employment when so directed by the secretary. KRS 341.100 provides that prior work and earnings should be considered in determining whether work is suitable for a claimant.

Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

The Supreme Court of Kentucky, in a case styled KOSMOS CEMENT V. HANEY ET AL AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 698 SW 2d 819 ruled that a lay-off of indefinite duration, notwithstanding seniority-based recall rights, is "equivalent" to a discharge and the recall of a worker by the company is an offer of "new work". In KOSMOS, workers were on an indefinite lay-off then were recalled to positions which had been vacated by employees who were on strike. They refused recall. The Court held that the proximate cause of their unemployment was the fact that they were laid off due to lack of work. The intervening strike and the refusal of the company recall by the claimants did not disqualify them from receiving benefits. The case currently before the Commission differs only in that no strike exists.

The U.S. Department of Labor interpreted section 26 U.S.C. 3304(a)(5)(A) of the Federal Unemployment Tax Act to be identical with the ruling in Kosmos to the effect that "...work offered to a person on indefinite lay-off is new work..."further stating the existence of a seniority right to recall does not continue the contract of employment beyond the date of lay-off. Such a seniority right is the worker's right; it does not obligate the worker to accept the recall and does not require the employer to recall the worker. It only requires the employer to offer work to the holder of the right before offering it to individuals with less seniority. Appellate Courts of other states have adopted the same interpretation of "new work" and have ruled that workers on indefinite lay-off could refuse recall without loss of benefits since the position to which they are recalled constitutes a new contract of employment. (Ref.: ENGRACIA CAMPOS V. CALIFORNIA EMPLOYMENT DEVELOPMENT DEPT, 132 CAL. APP. 3d 961; TEXAS EMPLOYMENT COMMISSION V. E-SYSTEMS, Inc., 540 SW 2d 761 and ALLEN-BRADLEY V. DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, 58 Wis. 2d 1, 205 NW 2d 129).

Considering the rulings by the Courts, the evidence in this case is that claimant's employment ended by discharge (indefinite lay-off). The employer presented no allegations or proof of misconduct, thus, it must be held that claimant's separation was for reasons which are non-disqualifying. The subsequent recall constitutes an offer of "new work". Therefore, we must determine whether the new work offered was suitable for the claimant and whether he refused the work with good cause. It is undisputed that the work itself was suitable for the claimant. The wages and hours were very similar to those he held prior to being laid off and he had the knowledge and ability to perform the job duties to which he would have been assigned. Further, the work would have led to his return to his normal position. Claimant's sole reason for refusing the work offered was the fact that he had entered self-employment as a shell harvester. If, as the record demonstrates, claimant's self-employment was seasonal, such seasonal work is not justifiable cause for refusing an offer of bona-fide employment with his most recent employer. It, therefore, is held that claimant refused an offer of suitable work without good cause for which a disqualification is imposed.

Parenthetically, should claimant argue that the self-employment was full-time non-seasonal employment, he could refuse to return to his normal employer without disqualification; however, when filing a claim for unemployment benefits, claimant would be directed by the Division to return to his full-time self-employment and would, therefore, be ineligible to receive benefits.

While the Kentucky Unemployment Insurance Commission established KOSMOS as precedent several years ago, it has concurrently held as precedent a case styled KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL COMPANY, 331 SW 2d 903. In COCHRAN the Court held that separation from the employment occurred by a voluntary quit at the time the worker, on indefinite lay-off, refused recall to the employment stating that the lay-off itself did not terminate the employment. Obviously, as it relates to when a separation occurs, it is opposed to the concept espoused in KOSMOS. As KOSMOS was issued subsequent to COCHRAN and is supported by the federal interpretation, we believe that COCHRAN is no longer applicable.

DECISION: Claimant was discharged from the employment for reasons which are non-disqualifying. However, claimant refused an offer of suitable work without good cause. He is, therefore, disqualified from receiving benefits from May 7, 1995 through the duration of the period of unemployment.

CO# 70995 PRECEDENT

Chapter 7000

VOLUNTARY QUIT

CONTENTS BY ISSUE

7000 DRESS CODE; REFUSAL TO CONFORM TO.

ISSUE: Whether claimant had good cause to quit when the employer chose to enforce a long-standing dress code to which she had previously conformed.

FACTS:
1. Employed as a waitress four years, during which time her attire for work had been a dress, a uniform, or skirt and blouse.
2. On October 3, 1974, she reported for work wearing a "pants suit."

3. Instructed not to come back to work wearing a "pants suit."
4. She was not discharged.
5. Because it was at time cool in the restaurant and because her job caused her to stoop over from time to time, thereby possibly improperly exposing herself, claimant quit rather than conform to the dress code.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Kentucky Court of Appeals held:

The only supportive facts introduced by the claimant were that sometimes it was a little bit cool in the restaurant, and that her job caused her to stoop over from time to time, thereby possibly improperly exposing herself. On the contrary, the evidence of her refusal to return to work is conclusive. The requirement that she not wear a "pants suit" was the only barrier between employment and unemployment; the choice was solely hers.

It is clearly within an employer's rights to set standards of dress which become guidelines for his employees. GOOD CAUSE FOR VOLUNTARILY QUITTING WORK EXISTS ONLY WHEN THE WORKER IS FACED WITH CIRCUMSTANCES SO COMPELLING AS TO LEAVE NO REASONABLE ALTERNATIVE BUT LOSS OF EMPLOYMENT. However, the enforcement of a reasonable dress code is a well-recognized prerogative of an employer, particularly in restaurants and other institutions of similar nature and has none of the aspects of unreasonableness or arbitrariness.

The evidence conclusively demonstrates that the claimant was not discharged. The fact that she terminated her employment constitutes her leaving work voluntarily and without good cause, thereby disqualifying her upon a claim for unemployment compensation.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY KY., 539 SW 2d 293. PRECEDENT

7001 PAY RAISE AGREED TO BUT NOT GIVEN; FURTHER DEMANDS NOT MET.

ISSUE: Whether a claimant has good cause to quit when the employer fails to give an agreed to pay raise and later refuses claimant's demand for a greater pay raise.

FACTS:
1. Accepted full-time work for $5.50 per hour ($11,400 annually) with the understanding her annual earnings would be increased to $12,000 after six months.
2. Because of financial considerations, this pay increase was not forthcoming.
3. Claimant continued to work without protest under the same terms and for five additional months.
4. She then demanded a $1.50 per hour raise which would have made her annual income $14,560.
5. The employer countered by offering an immediate $.50 per hour raise (making an annual wage of $12,480.) with two additional $.50 raises at future dates.
6. Claimant quit, giving as her reason the employer's failure to give her the agreed to pay raise at the end of her initial six months as a full-time employee.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Kentucky Court of Appeals adopted the referee's reasons:

Work becomes unsuitable when the employer unilaterally alters the conditions of hire, or of ongoing employment to the significant detriment of the employee. A worker who quits unsuitable work does so with good cause. In the instant case, the condition of ongoing employment that was not met was that of the claimant receiving an unspecified raise in pay in November, 1980, sufficient to increase her annual income to $12,000. She accepted this change in condition of her ongoing employment without protest with the result being that the pay raise of November 1980 was no longer a condition of her ongoing employment. Thus, any subsequent raises in pay became negotiable with the appellee being under no contractual obligation to grant a specific request for a raise in pay. Absent a contractual obligation to the contrary, the appellee's refusal of the claimant's request for a $1.50 per hour raise in pay was within his right and did not render the work unsuitable for the claimant. Therefore, the claimant voluntarily quit suitable employment without good cause. The employer's reserve account is granted relief from charges under this claim.

DECISION: Claimant voluntarily quit suitable work without good cause.

Kentucky Court of Appeals, H & S HARDWARE V. CECIL, 655 SW 2d 38. PRECEDENT

7002 MEDICAL LEAVE; REFUSAL TO ACCEPT EXTENSION OF.

ISSUE: Whether a claimant had good cause to refuse an extension of her medical leave and thereby sever the employment relationship.

FACTS:
1. Worked for the captioned employer seventeen years.
2. On March 19, 1962, she was granted a one month leave of absence because of ill health.
3. No evidence that ill health was caused or aggravated by the work.
4. Leave was extended through July 18, 1962, at claimant's request.
5. On July 18, 1962, the company offered to extend the leave again.
6. However, claimant refused and resigned on July 18, 1962.
7. Filed a claim for benefits on August 14, 1962, asserting that she was able and available for work.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Absent proof that the claimant's ill health was either caused or aggravated by the work, it must be held that she voluntarily quit the employer without good cause attributable to the employment when she refused the offered extension of her medical leave and resigned.

DECISION: Claimant was disqualified on grounds she voluntarily quit her employment without good cause attributable to the employment.

C.O. # 4629 NONPRECEDENT

7005 VOLUNTARY QUIT EXCEPTION; RETURN TO USUAL EMPLOYER.

ISSUE: Whether a claimant should be disqualified for leaving stop-gap employment to return to his usual employer.

FACTS:

1. While on layoff from union carpentry work, claimant, on his own, found nonunion carpentry work at $8.00 per hour, to last fifteen weeks.
2. After eleven weeks accepted work secured by his union at $13.45 per hour, to last eight to twelve weeks.
3. In addition, pension and insurance benefits accompanied the union work.
4. Claimant testified that he received three "cold" checks from the nonunion employer, and had been looking for other work prior to the offer from his union.
5. The union customarily supplied claimant with jobs upon which to ply his trade.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The 1984 General Assembly modified the above statute by amending it with the following provision:

No otherwise eligible worker shall be disqualified from receiving benefits for leaving his next most recent suitable work to return to work with his usual employer or to avoid imminent layoff (of which he has been given notice by his employer) by accepting other work, or for leaving work which was concurrent with his most recent work, or for leaving part-time work which preceded his most recent suitable work to accept such most recent suitable work.

In this case, the claimant left stop-gap employment with a transient employer, whose pay practices were suspect, to return to his customary employer and gained three additional weeks of work in the transaction.

The Division of Unemployment Insurance has, since the effective date of the 1984 amendments, followed a policy that a worker who CUSTOMARILY receives his job assignments from his local union, meets the exception provided by KRS 341.370 (1)(c), insofar as it pertains to a worker leaving interim employment to return to his usual occupation, as was the case here. In addition to being returned to his customary pay scale, the claimant was also provided with pension payments and life and health insurance coverage as a part of the employment package.

DECISION: Claimant voluntarily left the captioned employer under non- disqualifying conditions.

C.O. # 40652 PRECEDENT

7006 LOSS OF PROFESSIONAL NURSING LICENSE; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant quits or is discharged when through her own neglect she loses a professional license which is a requirement of her remaining employed.

FACTS:

1. Worked three years for the captioned hospital as a licensed practical nurse.
2. Her license to practice as an LPN expired October 31, 1983, because she failed to properly submit necessary forms and fees to the nursing licensure board.
3. She was suspended and given until December 1, 1983, to secure renewal of her license.
4. She failed to do so and was discharged.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In an UNPUBLISHED decision, the Kentucky Court of Appeals held that the claimant had a reasonable alternative to losing her license to practice nursing; namely, she could have properly and timely submitted the required documents and fees to the nursing licensure board. That she

chose not to do so indicates she voluntarily chose to leave her employment by making it impossible for her employer to continue employing her as an LPN.

Thus, the loss of a professional license because of neglect to renew, which results in loss of employment, becomes a voluntary quitting without good cause.

DECISION: Claimant voluntarily quit without good cause.

Kentucky Court of Appeals, OGAN V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND PINEVILLE COMMUNITY HOSPITAL. Unpublished. Not to be cited or quoted. For guidance only.

7011 ACCEPTANCE OF PERMANENT EMPLOYMENT WHILE ON LAYOFF.

ISSUE: Whether a claimant, who retains recall rights while on layoff, has good cause to quit the employment to accept other permanent employment.

FACTS:
1. Laid off by Armco and placed in its "Labor Reserve Pool" on August 31, 1968.
2. After claiming only one week of benefits, secured permanent employment with Gould National Batteries in mid-September, 1968.
3. Refused recall to Armco on February 6, 1969, in favor of remaining with Gould.
4. Laid off by Gould July 13, 1969, and reopened his claim.
5. Based on the statute controlling at that time, Armco was charged with benefits under the claim.

REASONS: Even though KRS 341.530, in its present form, would charge Gould with benefits under this claim, it remains that the significance of this case rests in its standing for the propositions that the job separation occurred at the time the claimant accepted other PERMANENT work (not stop-gap employment), and that he had good cause attributable to Armco to quit because it was Armco who laid him off. This case is to be distinguished from KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL COMPANY, 331 SW 2d 903, wherein the Kentucky Court of Appeals held that a claimant who relocated to Texas while on layoff because her husband had transferred there voluntarily quit without good cause when she could not accept recall to work in Kentucky. The distinction lies in the reasons for the claimants not returning to their former employment.

DECISION: Claimant voluntarily left Armco with good cause attributable to the employment.

C.O. # 8570 NONPRECEDENT

7021 NOTICE OF QUIT; ATTEMPTED WITHDRAWAL OF.

ISSUE: Whether a claimant quits or is discharged when the employer refuses to allow him to withdraw his notice to quit.

FACTS:
1. On July 2, 1962, claimant gave a one week notice that she was quitting because her husband was being transferred
2. However, her husband's transfer was cancelled, and claimant attempted to rescind her resignation.
3. Employer chose to hold her to the agreed to resignation date because someone else had been hired to take her place.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

A worker who announces an intention to quit on a certain date and subsequently changes her mind prior to the effective date of the resignation, must be found to have quit if the employer chooses to hold her to the agreement. Claimant quit for personal reasons not fairly attributable to the employment.

DECISION: Claimant voluntarily quit without good cause attributable to the employment and was disqualified.

C.O. # 4484 NONPRECEDENT

7025 SICK LEAVE; FAILURE TO PROPERLY APPLY FOR EXTENSION OF.

ISSUE: Whether there existed a reasonable alternative to claimant's failure to apply for an extension of her sick leave which resulted in the employment separation.

FACTS:
1. On June 11, 1963, claimant was granted a thirty day sick leave, which could be extended for thirty days upon presentation of a doctor's statement in support thereof.
2. At the end of the thirty days and without presenting medical support therefore, she requested an indefinite extension of her leave.
3. Claimant was informed that such indefinite extensions were against company policy.
4. Claimant failed to supply the employer with a doctor's statement, and her employment ended.

REASONS: KRS 341.370 disqualifies from benefits any claimant who has voluntarily quit his employment without good cause. Good cause may be defined as the existence of a condition or conditions which afford to a prudent person no reasonable alternative to a severance of his job connection. Here, the claimant had a reasonable alternative to a severance of her job connection. She could have secured from her doctor a statement that an extension of her leave was necessary. As she did not pursue this reasonable alternative to a severance of her job connection, it must be held that the claimant voluntarily quit her employment without good cause.

DECISION: Claimant voluntarily quit without good cause and was disqualified from benefits.

C.O. # 5627 NONPRECEDENT

7026 DOCTOR'S STATEMENT; FAILURE TO SUBMIT TIMELY.

ISSUE: Whether there existed a reasonable alternative to the claimant's untimely submission of a doctor's statement releasing her to work, which act led to the employment separation.

FACTS:
1. Claimant was on sick leave from February 1, 1971, to March 13, 1971, for treatment of an emotional disorder.
2. Returned to work March 15, 1971, and remained there until March 31, 1971, when she fainted on the job.
3. Employer instructed claimant to secure a doctor's release before returning to work.
4. Claimant insisted she was able to work, and that a doctor she had seen, agreed.
5. However, claimant did not submit a doctor's statement until July 16, 1971, which stated she was able to work from March 15, 1971, and thereafter.
6. Since the employer had not received the requested doctor's statement, claimant had been replaced.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Considering claimant's prior illness and fainting spell at work, it was reasonable for the employer to require that she present medical verification of her ability to return to work without undue risk to her health. If the claimant had complied with this request, there is nothing to indicate that she would have been replaced by the employer.

Moreover, it is obvious that the physician's report was readily available as witnessed by its subsequent inclusion in the record. However, such inclusion does not excuse the failure to present such verification when requested by the manager. This is especially true due to the reasonable belief by the manager that the claimant was not physically able to work. The claimant had the choice of either producing this verification or failing to present it and thereby being replaced. The claimant chose the latter, and by so doing she voluntarily quit her most recent work.

DECISION: Claimant voluntarily quit without good cause and is disqualified.

C.O. # 9316 NONPRECEDENT

7030 UNREPORTED ABSENCES; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether the claimant's failure to give notice of his absences for three days is tantamount to a voluntary quit when the employer was aware that he had suffered a work related injury which caused his absences.

FACTS: (See "Issue" above).

REASONS: In a long line of cases this Commission has held that if a worker remains away from work without notice to his employer such is tantamount to a voluntarily quitting without good cause. However, in those cases the reason for remaining away from work was not the result of a traumatic injury sustained on the job. Herein we have a worker who was required to use his hands in performing the duties of his job, which was that of laborer. The injury he received undoubtedly would have been affected if he had returned to work following his visit to the doctor. When he notified his employer he was injured, the employer was in a position to see the bandage on his hand and we believe that sufficient notice was given to the employer that the claimant would be absent from work for at least a few days. We do not intend this case to overrule previous holdings by this Commission where failure to notify because of illness or some other reason caused a worker to be absent from work, but in our opinion, under the particular circumstances of this case, the employer had sufficient notice of the reason the claimant did not report for work, and for that reason we must reverse the referee decision.

DECISION: Claimant did not voluntarily quit the employment; rather, he was involuntarily separated under nondisqualifying conditions.

C.O. # 4911 NONPRECEDENT

7035 QUITTING IN ANTICIPATION OF BEING LAID OFF.

ISSUE: Whether a claimant has good cause to quit in anticipation of being laid off.

FACTS: 1. Worked as a general repairman and attendant for the captioned service station about one year when the owner informed him prior to December 24, 1965, that he would be laid off for lack of work December 31, 1965.

2. Quit the captioned service station December 24, 1965, and worked for his father the week of December 31, 1965, earning as much in half the time as he would have if he had returned to the captioned service station.
3. Claimant's father did not provide him any work beyond December 31, 1965.
4. Secured employment with another service station February 28, 1966.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Although the claimant has given testimony that he did not lose any wages by quitting one week early, loss of wages is not the reason for holding that an early quitting is without sufficient good cause. The rationale in holding that an early quitting is without good cause is that the conditions could change within a period of one week to such extent that the worker could be retained for an indefinite period of time. This is especially true in service station and mechanical work as substantial work frequently comes in unexpectedly. By leaving earlier, the claimant not only closed the door to the possibility of staying beyond the designated date of the layoff but also severed any recall relationship which would have existed between him and the employer.

DECISION: Claimant voluntarily quit without good cause.

C.O. # 6907 NONPRECEDENT

7050 DEMOTION WITHOUT REDUCTION IN PAY.

ISSUE:: Whether a claimant has good cause to voluntarily quit when he is demoted for unsatisfactory work performance but suffers no reduction in pay.

FACTS:
1. Claimant, a cafeteria manager, had several complaints lodged against him by members of his staff and by customers.
2. Instructed to take a two week vacation, upon the completion of which he would be assigned to another cafeteria.
3. He would retain the title of supervisor, and his pay would not be reduced.
4. He was to fill in for absent employees until another supervisory position became vacant, for which he would be considered.
5. While on vacation, he learned that a woman manager had replaced him at the cafeteria.
6. He felt discriminated against and quit rather than report to work upon completion of his vacation.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The substance of claimant's reason for leaving was that he believed that placing a female in his former position was discrimination. The Commission does not believe, that in the context of this case, this change rendered the work unsuitable. As to the change in duties, the employer had that prerogative and was justified in doing so in view of the complaints lodged against the claimant. This is especially true when the change had no adverse monetary effect.

DECISION: Claimant voluntarily quit suitable work without good cause.

Kentucky Court of Appeals, CASTLE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND SAGA FOODS, 83-CA-350-MR. Unpublished. Do not cite or quote. For guidance only.

7051 FAILURE TO RESPOND TO RECALL NOTICE.

ISSUE: Whether a laid off claimant who fails to accept recall to work has been discharged or quit her work.

FACTS:
1. While on layoff status, claimant's services became necessary to her employer.
2. Efforts to contact her personally by telephone for two days were unavailing.
3. On October 8, 1974, employer sent claimant a letter advising that she would be terminated if she did not report for work by October 14, 1974.
4. Union contract required five days notice of call back to work.
5. On October 9, 1974, before claimant received the letter, employer reached claimant by telephone and asked her to return immediately, if possible.
6. Without explanation, claimant failed to report to work on October 14, 1974, and was terminated.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The evidence clearly established that claimant, in failing to respond to recall, effectively quit and was not discharged or laid off as she contends. It was within her power to retain her job connection by reporting to duty as instructed. She was on both verbal and written notice of this requirement. She chose to ignore these instructions thereby causing the loss of her job.

DECISION: Claimant voluntarily quit without good cause.

C.O. # 11538 NONPRECEDENT

7052 FAILURE TO RETURN TO WORK FOLLOWING VACATION.

ISSUE: Whether a claimant who fails without notice to return to work following vacation because of child care problems has been discharged or quit her work when she is not permitted to return to work ten days thereafter.

FACTS:
1. While on vacation, lost her baby-sitter.
2. Failed, without notice, to return to work at end of vacation.
3. Did not request a leave of absence.
4. After finding a baby-sitter, ten days later, she attempted to return to work, but found that she had been replaced.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The central question in this case is: if the worker does not, for personal reasons, report back to work promptly upon the expiration of vacation, knowing such action will result in dismissal, and she is dismissed, has she voluntarily quit work or has she been discharged for cause?

By engaging in semantics, a good argument can be made for either view. However, it is the view of the Commission that when one embarks upon a course or deliberately does a thing or refrains from doing a thing, which he knows will terminate his employment, he has in effect quit his work, at least as of the date when the commission or omission results in the discharge. It, therefore, is the opinion of the Commission that when claimant failed to return to work she quit her job. Quitting work because of failure to obtain a baby-sitter has consistently been held to be a quitting

without good cause as contemplated by KRS 341.370 (1)(c). For reasons sufficient to herself she failed to return to her job.

DECISION: Claimant voluntarily quit without good cause.

C.O. # 4733 NONPRECEDENT

7056 DEMOTION AS REASON FOR LEAVING.

ISSUE: Whether a claimant who voluntarily quits because she was demoted had good cause for doing so.

FACTS:
1. Worked for the captioned department store eleven years in its executive offices.
2. She had served as both director of personnel and director of management.
3. In August 1982, she was given a newly created position of director of human resources, which she held for two years prior to separation.
4. This position was responsible for all personnel division functions.
5. Claimant contended with the responsibilities of this position, without benefit of a pay raise and without sufficient staffing until April 1984, when she was demoted to director of personnel following an average performance evaluation.
6. Most of claimant's supervisory duties were taken from her, and she was given a vague and uncertain job description for her new position.
7. Claimant quit May 31, 1984, contending the demotion was unfair.

REASONS: KRS 341.370 (1)(c) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits and granting of reserve account relief to the employer when a claimant has voluntarily quit his most recent suitable work without good cause attributable to the employment. To establish good cause for voluntary leaving of work, the facts must disclose real, substantial, or compelling reasons of such magnitude as would cause a reasonable and prudent person genuinely desirous of retaining gainful employment to take similar action.

In this case, we find that the claimant accepted a position of greater responsibility with no immediate guarantee of a pay increase. After remaining in the position for about twenty months, she was demoted although her performance was evaluated as average. We agree with the referee that a demotion must be considered to be a form of discipline. The evidence does not show any basis for discipline. While the employer has every right to make any changes in personnel it wishes, we do find that demotion without clear justification makes ones work unsuitable. The possibility for economic and professional gain is lost through such action, and demotion does impact on the worker's reputation. We therefore find that resignation is reasonable unless it is shown that the worker has been less than diligent in performing duties, has violated work rules, or has otherwise engaged in activities which clearly disserve the employer's interests. Such has not been shown here.

DECISION: Claimant voluntarily quit with good cause.

C.O. # 41126 A NONPRECEDENT

7060 TRANSFER REQUIRING COMPENSATED TRAVEL.

ISSUE: Whether claimant had good cause to quit when she was directed to work one or two days a week at a locale requiring additional travel, for which she was compensated.

FACTS:
1. A clerical worker for an agency of the federal government was hired to work at the Hazard, Kentucky office, with the understanding she would eventually be transferred to the Hyden, Kentucky office.

2. One year after being transferred to the Hyden office, due to federal budget cuts and layoffs, she was directed to work in the Hazard office one to two days a week.
3. Claimant was paid while traveling AND was paid milage for the use of her private vehicle.
4. Further, federal regulations provide that an employee cannot be forced to leave their duty station.
5. Claimant was aware of this regulation but never invoked its protection for fear of retributions by her superiors.
6. Rather, claimant quit because she felt the travel caused an undue hardship.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Commission held that the employer's requirement that claimant drive to the Hazard office one to two days per week was reasonable in light of the needs of the job, the economic reality after the budget cuts and hiring freeze, and the fact that the claimant was fairly compensated for such duty. In addition, the claimant had the real alternative of invoking the aforementioned regulation to avoid what she considered onerous duty. Rather, claimant chose to submit her resignation.

DECISION: Claimant voluntarily quit suitable work without good cause.

Affirmed by the Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. SIZEMORE, 83-CA-948-MR. Unpublished. Do not cite or quote. For guidance only.

7066 COMMUTING DISTANCE TO TRANSITORY WORK.

ISSUE: Whether a claimant has good cause to quit transitory work when the job situs moves a great distance from his residence.

FACTS:
1. Hired as a laborer in November 1968, when the job situs was near his home.
2. Company is engaged in the construction of towers for power lines and moves crews from one location to another as work is completed.
3. No evidence that claimant had ever worked and boarded away from home.
4. On or about April 1, 1969, claimant was transferred to Wayne, West Virginia.
5. While the record is not clear regarding the exact milage, the new job situs was a GREAT distance from claimant's home which would require him to board and room away from home while earning $3.33 an hour.
6. Claimant quit rather than accept transfer to Wayne, West Virginia.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment. KRS 341.100 provides that the Commission shall consider the distance of the work from the claimant's home in determining its suitability.

The fact that claimant accepted work while it was being performed in Kentucky cannot be held to have been an agreement to go with the job to distances beyond the range of commuting. The general rule, as established by precedent decisions, is that a worker has good cause for leaving work when the work progresses beyond commuting distance. There are exceptions to the general rule such as a pattern of the worker who boards away from home, or where the renumeration is exceptionally high. There could be other exceptions, but the evidence in this record does not establish an exception. It is also noted that a company engaged in this type of work usually relies upon local unskilled workers whose earnings are at the lower wage scale.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 8413 NONPRECEDENT

7071 CHANGE IN SHIFT; LACK OF TRANSPORTATION.

ISSUE: Whether a claimant has good cause to quit work when her shift is changed, and she lacks transportation to and from work.

FACTS:
1. Claimant lives nine and one-half miles from Hopkinsville, Kentucky, where she worked in a nursing home on the 3:00 p.m. to 11:00 p.m. shift.
2. Her husband also worked the same hours in Hopkinsville and transported her to work.
3. Claimant's duty was changed to day shift.
4. Having a transportation problem for those hours, she resigned.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The loss of a worker's means of transportation, in the absence of employer's duty to provide it, is a personal problem of the worker, and a resignation caused by loss of transportation amounts to a voluntary quitting without good cause. It has often been so held by this Commission.

Not only did claimant voluntarily quit without good cause, but she still restricts her employability to the evening shift. Claimant has thus restricted her chance of employment, and she does not have the attachment to the labor market which is a condition of eligibility under KRS 341.350.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 5679 NONPRECEDENT

7076 LACK OF CHILD CARE AS REASON FOR QUITTING.

ISSUE: Whether a claimant has good cause attributable to the employment to quit when she loses her baby-sitter.

FACTS:
1. Worked two years for the captioned employer when her baby-sitter moved her residence.
2. Hired a teenager who did not prove satisfactory as a sitter.
3. All other replacements demanded $20.00 per week.
4. Claimant's pay ran between $40.00 and $45.00 per week.
5. She quit because she did not feel she could afford to pay a baby-sitter $20.00 a week.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Numerous precedent decisions have held that it is the responsibility of the worker to arrange his affairs in such a manner as to be able to continue in full-time suitable work. As this claimant quit because of away-from-work difficulties, it must be concluded that she quit without good cause.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 4533 NONPRECEDENT

7085 RELOCATION TO ANOTHER STATE WHILE ON LAYOFF.

ISSUE: Whether a claimant who retains recall rights while on layoff has good cause to quit and refuse recall when he has relocated to another state to seek employment.

FACTS:
1. Worked for the captioned employer four months in Kentucky and was laid off June 6, 1963.
2. By union contract he had the right of recall.
3. While on layoff, relocated with his wife and five children to Cincinnati, Ohio, where he actively sought other permanent employment.
4. Filed for benefits January 23, 1964.
5. Recalled to work by the captioned employer February 3, 1964.
6. Refused recall because he did not have enough money to relocate back to Kentucky (about one hundred miles away).

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In this case claimant had been in layoff status eight months and had moved with his six dependents to another state about one hundred miles away. He was looking for other work, with some prospect of obtaining it. He applied for benefits, and then he was recalled. In effect, he terminated the connection before recall and with good cause. He was financially unable to make the transition and refused the work offered.

We believe he did not voluntarily quit without good cause, and we likewise believe the distance involved is a factor which we must consider in determining whether available work is suitable (KRS 341.100 (1)). The distance to the new job (the old connection was broken) under all the circumstances, made the job unsuitable.

DECISION: Claimant voluntarily quit with good cause and refused an offer of unsuitable work with good cause.

C.O. # 5686 NONPRECEDENT

7105 CO-WORKERS MARRYING; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits or is discharged when she loses employment because she marries a co-worker in violation of company policy.

FACTS:
1. Worked for the captioned employer for three years as a secretary.
2. Company policy prohibited a worker from remaining employed if that worker marries a co-worker.
3. This policy was developed after claimant's hire and was never published nor circulated among the employees.
4. On November 5, 1983, claimant married a co-worker.
5. On November 8, 1983, she was told that either she or her husband would have to leave the employment.
6. Claimant chose to leave and last worked on November 17, 1983.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The referee cited Commission Order Number 6793 in support of his decision that claimant quit without good cause. Insofar as that Order was considered precedential in cases of this nature, it is hereby rescinded. Future cases shall be considered on a case by case basis. At a minimum, to support a finding of quit without good cause, we would require that the policy (described supra) be published and known by employees and in effect at the time of hire of a particular worker. None of these elements are present in this case.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 39051 NONPRECEDENT

NOTE: Read in conjunction with Entry 7106

7106 CO-WORKERS MARRYING; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits or is discharged when she loses employment because she marries a co-worker in violation of company policy.

FACTS:
1. Captioned employer purchased business from claimant's former employer April 1, 1987, and distributed copies of its employee handbook.
2. One policy in the handbook was that husbands and wives could not be employed at the same time.
3. On April 30, 1987, claimant married co-worker Gary Embry.
4. Claimant worked in the office performing clerical duties on the day shift.
5. Mr. Embry was an "extrusion" leadman working varied shifts as needed.
6. There was neither a direct nor indirect line of supervision between the claimant and Mr. Embry.
7. Claimant left her employment because of the aforementioned policy.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work. Misconduct includes a knowing violation of a reasonable and uniformly enforced rule of an employer (see KRS 341.370 (6)).

That the claimant's marriage to Mr. Embry was in violation of the captioned employer's rule prohibiting husbands and wives from being employed at the same time is undisputed. However, before a finding of misconduct can be sustained, it must be shown that the rule was reasonable. The non-appearing captioned employer has failed to show either the broad reasoning behind the rule, or the specific harm it might have suffered by allowing a clerical worker, the claimant, and a production worker, Mr. Embry, to be employed at the same time after their marriage. There being no supervisory relationship between Mr. Embry and claimant, the Commission cannot conjecture as to what serious or vital interest (security or otherwise) of the captioned employer might have been compromised or adversely affected by the claimant and Mr. Embry continuing to work after their marriage. The non-appearing employer has not proven that the rule at issue was reasonable. Therefore, claimant's violation of it does not, for unemployment insurance purposes, constitute work related misconduct.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 51203 NONPRECEDENT

NOTE: Read in conjunction with Entry 7105.

7120 PHYSICAL IMPAIRMENT; MEDICAL DOCUMENTATION OF.

ISSUE: Whether a claimant must, as a general rule, present medical documentation of alleged work related physical impairment before good cause for quitting can be established.

FACTS:
1. Worked as a laborer one and one-half years before quitting without notice on April 1, 1963.
2. Alleges his lungs were being injured by the paint fumes in the work place.
3. He was not under the care of a doctor for a pulmonary condition at the time of separation.
4. Contends that a doctor told him in December 1962, that the conditions of work were impairing his health.
5. Did not inform his employer of the doctor's findings.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

This case is quite similar to the case of BROADWAY AND FOURTH AVENUE REALTY COMPANY V. CRABTREE, Ky., 365 SW 2d 313. In that case the employee had been absent from work, giving illness as his reason. The Court of Appeals held that the burden of proof in showing the illness lay upon the employee, and that he had failed to sustain the burden when he did not show a doctor's statement or other medical evidence of his illness.

In the present case, claimant has not shown by any other means that his own testimony that his physical condition required him to quit his work. The Commission believes that the CRABTREE case cited above requires the result reached by the referee.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 5020 NONPRECEDENT

NOTE: Read in conjunction with Entries 7121 and 7150.

7121 PHYSICAL IMPAIRMENT; MEDICAL DOCUMENTATION OF.

ISSUE: Whether there is an exception to the general rule that a claimant must present medical documentation of alleged work-related physical impairment before good cause for quitting can be established.

FACTS:
1. Worked as a laborer one year before being "bumped" by a more senior worker to a position which required frequent lifting of spools of wire weighing 125 pounds.
2. Immediately began to experience problems with menstrual cycle and a reoccurrence of hemorrhoids.
3. On a previous occasion had experienced similar problems while assigned to this position and had been advised by her doctor that the problems were work related.
4. Informed the foreman that she could not perform the duties.
5. He responded that no other work was available, and that her only alternative was to quit.
6. Without seeing her physician on this occasion, claimant elected to quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Good cause for a voluntary leaving of employment exists when the conditions of work are detrimental to the health of the worker. In this case there is little question that claimant's health was adversely affected by the requirement that she lift the heavy spools. Given the reactions produced and the previous advice of her physician, it was not necessary that she secure additional

medical advice before quitting. Since no other work was available to her, she quit with good cause.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 20306 NONPRECEDENT

NOTE: Read in conjunction with Entries 7120 and 7150.

7130 PERCEIVED LACK OF ABILITY TO PERFORM WORK AS REASON FOR QUITTING.

ISSUE: Whether a claimant has good cause to quit because he felt he did not have enough education to perform the job.

FACTS:
1. Worked as a mechanic on the captioned employer's strip mine operation one week.
2. Required to complete time sheets and forms that reflected work performed on equipment.
3. Quit because he felt he didn't have the education to complete the forms.
4. Employer was aware of claimant's limited education and offered him assistance in completing the forms.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Good cause under the statute should be what a prudent person preferring to remain employed would have done under similar circumstances. Claimant had the reasonable alternative of accepting the assistance in completing the necessary forms and retaining his employment. Claimant had not been threatened with discharge for failure to complete the forms.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 11022 NONPRECEDENT

7136 PREVIOUSLY EXISTING PHYSICAL IMPAIRMENT; AGGRAVATED.

ISSUE: Whether a claimant has good cause for quitting when the work aggravated (not caused) a previously existing physical impairment.

FACTS:
1. Worked one year as a bricklayer when he was assigned to work inside a building under construction.
2. Although the building may have had sufficient lighting for other workers, claimant suffered from glaucoma and had extreme difficulty in seeing to work in the building.
3. Complained to his foreman and the general contractor's electrician about his need for additional light.
4. After being told additional lighting would not be installed, claimant quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits and granting of reserve account relief to the employer when a claimant has voluntarily quit his most recent employment without good cause attributable to the employment. A worker is afforded good cause to quit employment when the conditions of employment become unsuitable. Work becomes unsuitable when it becomes detrimental to the worker's health. Such is the case here. Although the work environment did not cause claimant's previously existing condition, it aggravated it so as to render the work unsuitable.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 26058 NONPRECEDENT

7137 FAILURE TO EXPLORE REASONABLE ALTERNATIVE (FAILURE TO DISCLOSE DOCTOR'S RECOMMENDATION).

ISSUE: Whether a claimant quits with good cause when he fails to exhaust all reasonable alternatives to loss of employment.

FACTS:
1. Worked seven months repairing damaged vending machines.
2. The work was similar to that in an auto body shop with paint vapor and fiberglass dust in the air.
3. Ventilation of the work area was a problem during winter months.
4. Employer provided filter masks and installed a wall fan to help clean the air.
5. Nevertheless, claimant began to experience chest pains and a productive cough streaked with paint and fiberglass particles.
6. Advised by his doctor to wear a respirator at work.
7. Claimant did not inform the employer of the doctor's recommendation that he wear a respirator.
8. Rather, he simply requested more ventilation, which the employer refused to provide.
9. Claimant quit without discussing with the employer the possibility of his wearing a respirator at work.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Commission determinated that since the claimant withheld the information about the use of a respirator, he did not exhaust or avail himself of ALL reasonable alternatives to leaving his employment.

DECISION: Claimant voluntarily quit without good cause.

Affirmed by the Hardin Circuit Court, DOUGHERTY V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND HORN AUTOVEND, 83-CI-540. Not to be cited or quoted. For guidance only.

7150 PHYSICAL IMPAIRMENT; MEDICAL DOCUMENTATION OF.

ISSUE: What quality of proof is needed to establish that a physical impairment is either caused or aggravated by the work environment.

FACTS:
1. Worked three years, first as a production worker and then as a painter.
2. Began painting in November 1981 and developed allergies which were initially intermittently symptomatic but became consistently symptomatic after March 1983.
3. Symptoms included swelling, hives, and blisters.
4. Her physician initiated steriod treatment, which relieved the symptoms for short periods of time, but they always returned.
5. This medical problem necessitated numerous absences from work.
6. Allergy skin testing was done on a few samples of paint used by the claimant, which proved negative.
7. The tests were inconclusive because claimant used forty or fifty different paints and thinners in her work.

8. Continued to experience symptoms when working, but the symptoms improved when she was not at work.
9. Advised by her physician that steriod treatment could not continue indefinitely because of possible adverse side effects.
10. Returned to work September 1, 1983, after absence due to illness.
11. Experienced allergy symptoms again and was advised by her physician on September 20, 1983, that she would have to get the allergens out of her environment or quit work.
12. Claimant quit and has thereafter experienced no allergic reactions and has taken no steriod treatments.
13. Additional allergy tests to identify the specific allergens were not performed.
14. When tendering her resignation she neither requested nor did the employer offer transfer to other work.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Good cause has been defined as a condition which affords a worker no reasonable alternative to quitting the employment. Commission Order Number 5599 specified:

> "When a worker is confronted with a choice of continuing her employment to the detriment of her health, or of quitting her employment to preserve her health, she is confronted with a condition which affords a prudent person no reasonable alternative to a severance of her job connection. Thus, one who voluntarily quits under such a condition quits with good cause. However the burden is upon the worker to prove that her separation was because of such a condition..."

The Commission further specified that, for a finding of good cause to be sustained, there must be presented medical evidence to indicate the worker's quitting was necessary to preserve her health. Also, the statute requires that good cause for quitting employment must be ATTRIBUTABLE TO THE EMPLOYMENT.

In this case the evidence is convincing that the claimant's allergy symptoms were related to allergens in the work place. Her medical condition afforded good cause to be absent and good cause to quit her employment. The absence of a conclusive medical test identifying the specific allergen or combination of allergens causing her symptoms does not negate a finding that the claimant's medical difficulties were associated with her work.

We do not find the existence of a reasonable alternative in the possibility of job transfer. Instead we find merely a potential alternative. For job transfer to amount to a reasonable alternative in this case, there would need to be some indication that claimant's symptoms would not occur in another job in the plant, or the specific allergen would have to be identified, and then a specific job identified where that allergen was absent. We find it unreasonable for the claimant to continue to subject herself to continuing symptoms while experimenting with different jobs.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 38718 NONPRECEDENT

NOTE: Read in conjunction with Entries 7120 and 7121.

7160 PREGNANCY RELATED LOSS OF EMPLOYMENT.

ISSUE: Whether a claimant voluntarily quits when she leaves employment because of pregnancy or termination of pregnancy.

FACTS:

1. Hired without reservation well into her second trimester of pregnancy.
2. Four weeks prior to her delivery date she informed her employer that her doctor had advised her to remain in non-work status until release after the birth of her child.
3. Employer had no maternity leave policy and informed claimant she would be returned to work IF work were available.
4. Upon release by her doctor she was told no work was available.
5. At this time she filed a claim for benefits, and the employer protested, asserting claimant quit for personal reasons.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Counsel for the claimant argues that denial of unemployment insurance benefits to his client is violative of 26 USC section 3304 (a)(12), which provides, in pertinent part, that "no person shall be denied compensation under such state law solely on the basis of pregnancy or the termination of pregnancy." He cites in support of his contention BROWN V. PORCHER, 502 F. Sup. 946 (1980). In that case the United States Federal District Court, South Carolina District, in considering a case similar to the instant one said:

> "In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women (26 USC Supra). These plain words must necessarily be construed to convey their ordinary meaning. (Citations omitted). If Congress intended a more limited prohibition or carved out exceptions, it would not have imposed a 'fundamental standard' using such broad and sweeping language... The language it did use, however, obviously left no room for exceptions. It does not permit denial of benefits, as in South Carolina, solely because (1) a woman, for pregnancy-related-medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job either before or after her maternity leave was scheduled to expire. The plain and unambiguous words of the enactment do not contemplate consideration of such irrelevant factors."

In view of the clear mandate of 26 USC 3304 (a)(12), claimant may not be denied benefits when her separation was clearly caused by pregnancy. We intend no weakening of the "attributable to the employment" clause contained in KRS 341.370 (1)(c) but hold simply that, in this particular class of case, the statute's limitations are preempted by federal law. Where as here, the federal statute preempts our own and mandates payment of benefits in cases such as the instant one, and where state statute prohibits payment of benefits unless the separation is attributable to the employment, clearly the federal mandate requires that the separation be found to be attributable to the employment.

This order will constitute precedent for all future cases where the loss of employment can be directly attributed to pregnancy or termination of pregnancy. This precedent does not apply to those workers who seek and are granted maternity leave, during the time of their leave, or those who elect to totally sever the employment connection when leave of absence is available. For those employees in the former category, employment has not been lost, for those in the latter, pregnancy or termination thereof was not the cause of loss of employment.

DECISION: Claimant did not voluntarily leave her employment and she is qualified to receive benefits for which she is otherwise eligible.

C.O. # 25886 PRECEDENT

7220 PERSONAL REASONS; VOLUNTARILY QUIT BECAUSE OF PERSONAL REASONS.

ISSUE: Whether a claimant who quits without requesting a leave of absence to accompany parents to a retirement domicile in another state has good cause attributable to the employment to quit.

FACTS: (See "Issue" above).

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Reasons for quitting which are of a purely personal nature do not afford the claimant good cause ATTRIBUTABLE to the employment to quit.

DECISION: Claimant voluntarily quit without good cause ATTRIBUTABLE to the employment.

C.O. # 10984 NONPRECEDENT

7221 VACATION; REQUEST FOR DENIED.

ISSUE: Whether a claimant has good cause to voluntarily quit when the employer denies his request for vacation.

FACTS:
1. Claimant requested a vacation to be with his son who was in military service.
2. Request was denied because two other workers were off, and employer could not afford to lose claimant's services also.
3. There was no contractual obligation for the employer to grant claimant's request.
4. Claimant quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In the absence of a contract, the employer has the absolute right to designate vacation periods in a manner that best suits its business needs.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 7073 NONPRECEDENT

7230 QUITTING FULL-TIME WORK TO ACCEPT TEMPORARY SEASONAL WORK.

ISSUE: Whether a claimant has good cause to quit his regular job to take a temporary seasonal job.

FACTS:
1. Claimant most always worked forty hours a week, even though he may not have always worked five days a week.
2. He was a helper on a moving van during his seven months with the company.
3. He quit to accept what he knew to be temporary, seasonal work with a tobacco firm.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Commission simply held that the claimant did not have good cause to quit "gainful" (in this case, effectively full-time) employment to accept temporary work.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 7330 NONPRECEDENT

7231 QUITTING TO ACCEPT OTHER WORK (PHYSICAL INABILITY TO PERFORM REGULAR WORK).

ISSUE: Whether a claimant who quits to accept other work is necessarily disqualified from benefits.

FACTS:
1. Worked two years removing parts from wrecked automobiles, which required heavy lifting.
2. Injured his back on the job and had surgery.
3. Released to light work, which the employer provided for several months.
4. Then light work was no longer available and the only work remaining was removing parts from wrecked automobiles, (requiring heavy lifting).
5. Attempted to perform this work but reinjured his back.
6. Again advised by his doctor not to do heavy lifting.
7. Nevertheless, he continued working until he found other work.
8. He quit to accept other work driving a tow truck.
9. However, the would-be employer lost a building lease, and claimant didn't get the anticipated job.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

We find the evidence convincing that the claimant's quitting was because of his back condition. He attempted to do the work but found himself unable to do so without incurring symptoms, knowing that the work was not consistent with the restrictions advised by his physician. We do not find the claimant's decision to leave only when he had secured other employment to be dispositive in this case. Based on the evidence presented, the claimant did not have a reasonable alternative to leaving the work, and in fact his continued attempts to do the work despite symptoms were not reasonable, although they do reflect an intent to remain employed.

As a guideline in future cases of this nature we would point out that a worker who secures other employment or a promise of same prior to quitting does not always, as a result of the act, quit solely to accept other work. It may be that, as here, factors existing within the employment relationship initially caused him to seek other work. If such is the case no disqualification may be imposed. Clearly, the intent of the statute is to encourage workers to remain in gainful employment. Where they endeavor to do so and are thwarted by circumstance, disqualification would be contrary to this clear intent.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 42271 PRECEDENT

7260 TEMPORARY INCREASE IN WORKLOAD MADE PERMANENT; WITH NO INCREASE IN PAY.

ISSUE: Whether a claimant who accepts a temporary increase in his workload without additional compensation quits with good cause when the employer attempts to make the arrangement permanent.

FACTS:

1. Initially hired as a carpenter and general maintenance employee.
2. Agreed to work forty hours a week for a flat rate of $125.00.
3. Upon receipt of first paycheck, his pay had been unilaterally reduced by $25.00 per week.
4. Claimant complained but ultimately accepted the change in pay.
5. Because of the resignation of a co-worker, claimant agreed to temporarily assume that worker's duties as night watchman until a replacement could be hired.
6. In addition to his regular duties, claimant then became responsible for snow removal, attendance at the employer's skating rink in the evenings, and to generally be "on call" twenty-four hours a day, six days a week.
7. The "on call" provision required claimant to take up residence on the employer's premises.
8. Employer provided a heated one room structure with no running water, kitchen, or bathroom.
9. He was given a hot plate and a "pee can."
10. He received NO increase in pay, but was allowed free meals at the employer's restaurant which was open only two days per week.
11. During the ten months claimant worked under these conditions, he repeatedly reminded the employer of the temporary nature of the arrangement and repeatedly requested to be returned to his normal forty hour week for which he was hired.
12. Employer refused and claimant resigned.

REASONS: In reversing the Commission's ruling that the claimant had acquiesced in the changes in the terms and conditions of his employment as evidenced by his continuing to work under these circumstances and had thereby deprived himself of good cause to quit his employment, the Kentucky Court of Appeals found that the Commission's acceptance of such a theory placed the claimant on the horns of a dilemma. The principle is well established that a worker faced with changes in his employment does not have good cause to quit without making a reasonable attempt to adjust to the new circumstances of employment. Presumably, this same rationale would have been applied to the claimant had he quit his job immediately upon being requested to temporarily take on the additional duties of the night watchman until a replacement could be found.

Knowing that a refusal to attempt to work under proposed modifications in the circumstances of his employment would be construed as a voluntary quit, an employee would have no alternative but to accept the changes. Having done so, however, the employee would now be faced with the very real possibility that the Commission could argue that he had acquiesced in the changes and, therefore, could not quit with good cause when he later discovered his inability to function in the new work situation.

The unfairness of such a result is manifest and runs counter to the underlying philosophy of unemployment compensation, which is to encourage individuals to work. The claimant made an honest attempt to do just that and having subsequently discovered that the conditions of employment imposed by the employer were unreasonable, he should not be penalized by the denial of unemployment benefits.

The Commission has consistently granted benefits when a claimant was faced with an increased work load with no corresponding increase in compensation. Here, the claimant was expected to submit to a massive increase in his work hours to six full days per week, live in substandard housing, assume substantial new responsibilities, and not receive any additional compensation. The claimant was agreeable to these changes on a temporary basis and quit only when the employer attempted to impose them permanently. Clearly, such extensive modification of the original contract of hire, left the claimant with no alternative but to quit.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

Reversed by the Kentucky Court of Appeals, NICHOLS V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND SWEET HOLLOW, INC., 677 SW 317. PRECEDENT

7270 TEMPORARY WORK ENDS; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether a claimant voluntarily quits when temporary work ends.

FACTS:
1. Hired as a bank guard to protect employer's temporary place of business while permanent premises were being renovated.
2. Aware that employment would end at the conclusion of the one year renovation project.
3. Claimant filed for benefits when his job ended, and the employer protested asserting claimant voluntarily quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In affirming the Commission, the Kentucky Court of Appeals ruled that the claimant accepted employment which he knew was temporary, but he did not agree to leave the work. When the need to have the work done ceased to exist, he became unemployed. But had the need for the work continued, he would have continued to work. Therefore, in the opinion of the Court, a correct interpretation of the statute is that an employee who accepts a job which he knows in advance to be temporary does NOT voluntarily leave when the job ceases to exist.

DECISION: Claimant did not voluntarily quit, but rather he was involuntarily separated under nondisqualifying conditions.

Kentucky Court of Appeals in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND KING V. AMERICAN NATIONAL BANK, 367 SW 2d 260. PRECEDENT

NOTE: Read in conjunction with Entry 7271.

7271 PARI-MUTUEL CLERKS.

ISSUE: Whether pari-mutuel clerks are voluntarily or involuntarily unemployed at the conclusion of the race meeting.

FACTS: (See "Issue" above).

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The significance of the element of the existence of a choice is illustrated by KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG, Ky., 389 SW 2d 451. There the employer unilaterally adopted a policy that all workers must retire at age 65. There was no bargaining or exercise of any choice by the workers. This court held that a worker in that case whose employment was terminated when he reached 65 had not voluntarily left his work. The court said:

> "As we read the record in this case Young did not have a choice. We think the word 'voluntarily' must certainly be defined as meaning 'freely given' and 'proceeding from one's own choice or full consent.'"

So we think that any agreement that could be considered to have been made by the pari-mutuel workers in the instant case, whether or not made through their union as "agent," to leave work at the close of a meet, was in no sense the exercise of a choice of alternatives so as to be classifiable as a voluntary election to leave the work.

With the "agency theory" properly out of the way, it becomes apparent that the instant case involves the same principle that governed in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. AMERICAN NATIONAL BANK & TRUST COMPANY, Ky., 367 SW 2d 260. There the employer bank took temporary quarters during renovation of its permanent building and engaged the employee as a guard at the temporary location. It was contended by the bank that the employee had voluntarily quit when the renovation work was completed, and the need for a guard at the temporary quarters ceased, because he had known from the outset that the work would so cease. We rejected that contention, saying in part (367 SW 2d at p. 262):

> "Thus it is our opinion that a correct interpretation of the statute is that an employee who accepts a job which he knows in advance to be temporary does not voluntarily leave when the job ceases to exist."

The appellant in the instant case suggests that a different rule should apply here because the state law as administered by the State Racing Commission fixes the periods during which racing meets may be held at each track, and therefore the employer track has no choice to continue the work beyond the fixed closing date under the law. We find no basis for this argument in the terms of the unemployment compensation statute. Where unemployment results from the discontinuance of operations by the employer, the reason for the discontinuance has no bearing at all on the right of the worker to draw benefits (except where discontinuance is due to a strike). It makes no difference whether the discontinuance is caused by a public law, as in the instant case, or is caused by the natural law of economics, as in the American Bank case, because the reason why the employer discontinued furnishing the work is irrelevant.

Actually, the most plain and simple reason why the workers in the instant case cannot be considered to have left their most recent work is that the work left them; the work simply ceased to exist; the employer discontinued the furnishing of work to be done. To "leave" something contemplates that the thing is left behind; here no jobs were left behind.

DECISION: Claimants held to be involuntarily unemployed and not disqualified.

Kentucky Court of Appeals, CHURCHILL DOWNS INC. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 454 SW 2d 347. PRECEDENT

NOTE: Read in conjunction with Entry 7270.

7295 QUITTING PART-TIME WORK; NO PROSPECT OF OTHER EMPLOYMENT.

ISSUE: Whether a claimant has good cause to quit part-time work when he has no prospect of other employment.

FACTS:
1. Worked as a groundman for the captioned electrical construction contractor.
2. Worked six or seven hours a day, five days a week.
3. Working hours were limited because the work was on a highway, and safety policy did not permit work before 9:00 a.m. or after 3:30 p.m.
4. In a heated exchange, the foreman told claimant if he was not satisfied with working hours he could quit.
5. Claimant quit because the employer would not provide full-time work.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Commission has consistently held that quitting because of lack of full-time work, without prospect of other work, is done so without good cause. The reason for this is that the worker can use his spare time to seek more renumerative employment. In light of the fact that claimant quit without other prospects of employment, and that his job was not unsuitable or intolerable, the referee decision that claimant quit without good cause must stand.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 11456 NONPRECEDENT

7310 FAILURE BY EMPLOYER TO PROVIDE REQUIRED BREAK PERIODS.

ISSUE: Whether a claimant has good cause to quit when the employer fails to provide break periods required by statute.

FACTS:
1. Worked five years and four months as a fountain worker and grill cook.
2. Received regularly scheduled lunch breaks.
3. She complained of being overworked and not receiving break periods other than lunch breaks.
4. It was against company policy for employees to receive before and after lunch breaks.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

To the Commission, the most important point in the case is that claimant was denied regular break periods. Under KRS 337.365 an employer may not require a female employee to work for more than four (4) hours without rest periods for at least ten (10) minutes. Claimant was denied the break periods to which she was entitled by statute. When the public policies of the state with respect to rest periods for female employees has been so clearly stated, the Commission must hold that a female worker who quits her work because she does not get the break periods provided by law does so with good cause within the meaning of the Kentucky Unemployment Insurance law.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 5019 NONPRECEDENT

7320 QUITTING IN ANTICIPATION OF REDUCED HOURS AND/OR LAYOFFS.

ISSUE: Whether a claimant has good cause to quit in anticipation of reduced hours and/or layoffs which had not yet occurred.

FACTS:
1. Both claimants, residents of Booneville, Kentucky, worked for the captioned black topping contractor several years in Cincinnati, Ohio.
2. They were normally laid off in bad weather during the winter months.
3. On November 13, 1973, both worked six hours but anticipating shortened work days or layoffs to come, they left Cincinnati and returned home.
4. Continuing work was available, and both claimants had to be replaced by the employer.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Commission simply held that the claimants quit without good cause when they left the job in anticipation of shortened hours and work layoffs which had not yet materialized.

DECISION: Claimants voluntarily quit without good cause attributable to the employment.

C.O. # 10954 NONPRECEDENT

7325 INDEFINITE LEAVE OF ABSENCE; REFUSAL BY CLAIMANT TO RETURN FROM AND LATER FAILURE BY EMPLOYER TO RETURN CLAIMANT TO WORK.

ISSUE: Whether a claimant who is granted a maternity leave of unspecified length has quit work when she refuses recall because of parenting complications.

FACTS:
1. Worked six and one-half years when, during her eighth month of pregnancy, she was verbally granted a maternity leave of unspecified length, to begin around July 1, 1967.
2. Her baby was born August 8, 1967, and claimant was physically able to work a couple months later.
3. However, because of the baby's allergic reaction to cow's milk, claimant was advised by her doctor to breast feed the baby until the baby was six months old.
4. In November, the employer contacted the claimant and asked her to return to work.
5. Claimant declined because of the aforementioned complication with feeding her baby.
6. The company plant was severely damaged by fire in February 1968, and had to be moved to a new location.
7. In March 1968 claimant informed the employer she was ready to return to work.
8. Claimant was informed that she could not be rehired until the plant was moved and a suitable vacancy occurred.
9. Claimant then filed her claim for benefits.

REASONS: KRS 341.370 provides for the disqualification from benefits for the duration of unemployment which results from a voluntary quitting without good cause, a discharge for misconduct, or a refusal of suitable work without good cause. Further, under the provisions of KRS 341.350, a worker who is on voluntary leave of absence is unavailable for work for the duration of that leave.

The claimant was granted a maternity leave which was for an unspecified period of time. This leave, informal as it was, was intended to end when claimant was able to return to work. When the company called her to return in November, she was unable to do so because of complications which had arisen, namely her infant, whom she had been breast feeding, was allergic to cow's milk, and her doctor advised her to continue the breast feeding until the baby was six months old. We feel that because of these circumstances the maternity leave was not terminated at this time but continued until the circumstances permitted her to return. The claimant, therefore, was immune to the work offer made in November and cannot be held to have voluntarily left her employment at this or any other time.

DECISION: Claimant was involuntarily separated from her work in March 1968 due to a lack of work, and she is not disqualified.

C.O. # 7873 NONPRECEDENT

7357 VOLUNTARILY QUIT AT THE REQUEST OF SISTER UNION ISSUING TRAVEL CARD.

ISSUE: Whether claimants have good cause attributable to the employment to quit when they do so at the request of the union issuing the travel card under which they are working.

FACTS: 1. Claimants are members of an international trade union.

2. They are permanent members of local union 107.
3. Local union 522 belongs to the same international union.
4. Members of either local may work under the travel card of the other whenever the latter needs additional workers.
5. Neither local union is vested with hiring or firing authority.
6. Claimants secured employment with the captioned employer under the travel card agreement.
7. Worked three months and left their employment when requested to do so by the business agent of the other local union.
8. Work was still available with the captioned employer when they left their employment.
9. Failure to leave the employment would have resulted in certain loss of future job opportunities through the other union.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

There is no employer-employee relationship between the business agent of either local and the members of his local. The business agent pays no wages, he has no supervisory authority over the details of the work for the employer, and he has no authority to fire any union member from the employ of the appellee. Therefore, the business agent of a sister local is not the employer of the members of its sister's local. Thus, when the claimants left at the request of the business agent of the sister union they did so voluntarily. As stated by the referee, "a worker who quits one job connection in order to enhance his chances of securing another at some unknown future time with some unascertained employer, leaves his employment for other than compelling or necessitous reasons."

DECISION: Claimants voluntarily quit without good cause attributable to the employment.

C.O. # 5588 NONPRECEDENT

7390 NONUNION WORK; LOSS OF UNION BENEFITS.

ISSUE: Whether a claimant has good cause to quit nonunion work because he faces possible loss of union benefits if he continues therein.

FACTS:
1. Unaware that mine was nonunion at the time of hire.
2. Worked one week and quit when he learned the mine was nonunion, because he feared his union would withdraw his right to welfare and hospital cards.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

This leaving was admittedly voluntary. The matter of the loss or retention of a union welfare card rested between the claimant and his union, and the company had no duty to operate its mine under such conditions as would preserve it for him.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 4766 NONPRECEDENT

7420 REFUSAL OF TRANSFER; VOLUNTARY QUIT OR WORK REFUSAL.

ISSUE: Whether a claimant who refuses a transfer to a different job site with same duties and pay has voluntarily quit or refused an offer of work.

FACTS:
1. Worked for the captioned dry cleaning service one year as a counter clerk and sole employee of a branch store.
2. Notified in late May 1971 that the branch store would be closed permanently June 26, 1971.
3. Offered a transfer to the main plant in the same city effective June 29, 1971.
4. Job duties and rate of pay would be the same as before.
5. The work week was to be reduced from six to five days.
6. Claimant initially accepted the transfer, however, during the final week at the branch store she declined the transfer stating she wanted to visit relatives out of town.
7. She moved to Michigan in August and was residing there at the time of the hearing in February 1972.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Since claimant had the opportunity of remaining employed by accepting work in the main plant or refusing work and becoming unemployed, she had a chance to exercise her own free will of whether to remain employed or to become unemployed. Despite the two or three day period between the two jobs, it is apparent that claimant would have remained on the payroll of the company without any interruption had she accepted the reassignment. It is concluded, therefore, that claimant voluntarily quit her employment with the company. Such quitting was without good cause because the type of work and wage rate remained the same, and there was no issue made of the suitability of the work. If the conditions of the new assignment had been substantially different than those of her old job then there would have been a job separation with an offer of new work. Such was not the case herein.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 9065 NONPRECEDENT

7425 DISSATISFACTION WITH WAGES.

ISSUE: Whether a claimant has good cause to quit because of dissatisfaction with wages.

FACTS:
1. Worked four years as a nurse's aid.
2. In January 1974, claimant and others petitioned the employer for a pay increase.
3. This request was denied.
4. Worked until April and took a leave of absence through August.
5. Returned and worked one day following the leave and quit because she felt she was overworked and under paid.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Unless an employer violates a contract for hire, dissatisfaction with one's wages does not constitute good cause to quit. Furthermore, claimant has not proven her working conditions so intolerable or her salary so low as to afford her good cause to leave her job.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 11457 NONPRECEDENT

7426 DISSATISFACTION WITH YEAR END BONUS.

ISSUE: Whether a claimant has good cause to quit because of dis- satisfaction with year end bonus.

FACTS:
1. Claimant worked 25 years as manager of the grocery store.
2. She had no complaint about her job, and the employer was not dissatisfied with her work.
3. Heard, through employee gossip, that others in lesser jobs or managing smaller units had received larger year end bonuses than she.
4. Claimant quit in anger alleging that the bonus policy discriminated against her because of sex.
5. However, she admitted that some males received smaller and some larger bonuses than she.
6. No discriminatory pattern for awarding bonuses was established.
7. No evidence that the employer agreed to pay bonuses based on any objective standard.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Absent any direct evidence of grossly unfair or discriminatory treatment, it was the employer's prerogative to distribute bonuses in any manner it deemed proper. There was no evidence of any contract or other agreement to the effect that claimant had a right to any particular bonus amount or to any bonus at all.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 11486 NONPRECEDENT

7430 WAGES LESS THAN AGREED TO AT HIRE.

ISSUE: Whether a claimant has good cause to quit when wages promised at hire prove to be substantially less than actually paid.

FACTS:
1. At hire, the manager of the captioned clothing manufacturer led claimant to believe she would be able to earn from $6.00 to $7.00 per hour on a production job styled "inseaming."
2. However, after hire, she was placed on a operation styled "top stitching front pockets."
3. She did not object to this assignment until informed by her floor supervisor, quite emphatically, that she could expect to earn no more than $2.65 per hour on that job.
4. Claimant verified that estimate of potential earnings with co-workers.
5. Sought to discuss the matter with the manager who hired her, but he ignored her.
6. Therefore, claimant quit because she did not feel she could afford to drive 60 miles a day for $2.65 an hour.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The claimant was misled by management regarding the wage she would receive. The question remains whether the claimant had a reasonable alternative to quitting. We think not. The initial "breach of contract" by the employer was sufficient to justify a quitting. Claimant needed only to verify that her information regarding the lesser wage was correct in order to justify her leaving. This she did. If there was responsibility for discussing or rectifying the breach, it lay with the perpetrator, not the adversely affected employee.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 19874 NONPRECEDENT

7432 DEDUCTION OF CASH SHORTAGES FROM WAGES.

ISSUE: Whether a claimant has good cause to quit when the employer unilaterally deducts cash shortages from the agreed upon wage.

FACTS:
1. Worked ten months as a gas station attendant.
2. Notified VERBALLY at hire that cash shortages occurring on his shift would be deducted from his wages.
3. Complained that the cash shortages being deducted were excessive.
4. Employer disagreed and claimant quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

After a thorough review of the record, the Commission finds the employer in violation of KRS 337.060, which states:

(1) No employer shall withhold from any employee any part of the wage agreed upon. This section shall not make it unlawful for an employer to withhold or divert any portion of an employee's wage when the employer is authorized to do so by local, state, or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital and medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, nor shall it preclude deductions for union dues where such deductions are authorized by joint wage agreements or collective bargaining contracts negotiated between employers and employees or their representative.

(2) Notwithstanding the provisions of subsection (1) of this section, no employer shall deduct the following from the wages of employees:

(a) Fines;
(b) Cash shortages in a common money till, cash box, or register used by two or more persons;
(c) Breakage;
(d) Losses due to acceptance by an employee of checks which are subsequently dishonored if such employee is given discretion to accept or reject any check; or
(e) Losses due to defective or faulty workmanship, lost or stolen property, damage to property, default of customer credit or nonpayment for goods or services received by the customer if such losses are not attributable to employee's willful or intentional disregard of employer's interest. (1599c-19: amend. Acts 1978, ch. 74, § 1, effective June 17, 1978; 1978 ch. 141 § 2, effective June 17, 1978; 1984 ch. 223, § 1, effective July 13, 1984).

Although duly notified of the scheduled hearing, the employer chose not to appear to provide testimony and allow for cross examination. The Commission, therefore, must rely on the best evidence available, which in this case is the testimony of the claimant. Consequently, the Commission finds no evidence of record that the employer had WRITTEN authorization from the employee to deduct such shortages, therefore, such practices amount to a unilateral deduction from the wages agreed upon between the employer and the claimant.

IT SHOULD BE NOTED THAT WRITTEN AUTHORIZATION DOES NOT ALLOW FOR DEDUCTION OF CASH SHORTAGES IF TWO OR MORE EMPLOYEES USE THE CASH BOX DURING A GIVEN SHIFT.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 41771 NONPRECEDENT

7445 PERSISTENT SHORTAGES IN PAY.

ISSUE: Whether a claimant has good cause to quit when he is persistently shorted wages due.

FACTS:
1. Worked as a mechanic two months during which time he was "shorted" on his pay a total of 42 hours.
2. Complained to his foreman, and SOME of the shortages were corrected.
3. Employer admitted that its timekeeping system left something to be desired, and that shortages did occur.
4. Claimant quit when the shortages persisted after his complaints.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Shortages in pay requiring late adjustments which persist after being brought to the attention of the employer are good cause for quitting.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 11156 NONPRECEDENT

7446 WITHHOLDING OF WAGES AS PAYMENT OF JUST DEBT.

ISSUE: Whether a claimant has good cause to quit when the employer withholds the entirety of his paycheck as payment for a just debt.

FACTS:
1. During his eleven months of employment claimant became indebted to the employer in the amount of $300.00.
2. It was agreed that the employer would withhold his salary "for every other two week period."
3. However, the employer withheld the entirety of claimant's paycheck for three successive weeks.
4. Employer also planned on withholding claimant's paycheck for the following two weeks until the debt was paid in full.
5. Claimant quit when the employer withheld his third successive paycheck.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Although the record is not without conflict as to the nature of the transactions between the claimant and the owner, it cannot be found that the claimant intended to be without wages for five successive weeks. In view of the period of time within which the indebtedness accrued, it is reasonable to conclude that the decision to withhold the claimant's wages until the debt was paid was of recent origin.

Admittedly, it was a just debt, which the owner was entitled to recover, but the means used and the prospect of working without any income for the length of time made the work so onerous that it was no longer suitable. Even the much criticized garnishment laws of Kentucky would have left the claimant something with which to meet the required expense of getting to work. Likewise, it may be found that the quitting was attributable to the employment.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 6974 NONPRECEDENT

7450 REDUCTION IN PAY; FOLLOWING TRANSFER.

ISSUE: Whether claimants had good cause to quit when they were transferred to other jobs and experienced from 21 to 32 percent reduction in wages.

FACTS:
1. These claimants were production workers being paid $2.65 per hour plus a production bonus for a weekly income of about $195.00.
2. Transferred to another production line where their wages were $3.30 per hour but with no production bonus for a weekly income of $132.00.
3. To these claimants, who lost 32 percent of their wages, was added a third claimant who suffered a 21 percent loss of wages.
4. After learning the transfer was to be permanent, all three claimants quit rather than accept the pay reduction.
5. The employer failed to appear before the referee and justify the necessity of the transfers and reduction in wages.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In this case it is undisputed that the claimants voluntarily quit their jobs. Therefore, the question to be resolved is whether the income adjustment is so substantial as to compel an employee to quit a job and still have good cause to do so. The claimants lost from 21 percent to 32 percent, which was certainly a substantial portion of their wages, the necessity of which the employer declines to justify by his failure to appear before this Commission.

DECISION: Claimants voluntarily quit with good cause attributable to the employment.

Kentucky Court of Appeals, INTERNATIONAL SPIKE V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND TUBBS, Ky., App. 609 SW 2d 374. PRECEDENT

NOTE: Please read in conjunction with Entries 7451 and 7452.

7451 REDUCTION IN PAY; FOLLOWING TRANSFER.

ISSUE: Whether claimant had good cause to quit when he was transferred to another job and suffered a six percent reduction in wages.

FACTS:
1. A production worker being paid $3.96 per hour plus production bonus which averaged 33 and 1/3 percent of his hourly wage.
2. Transferred to another machine where he was paid the same hourly rate but his bonus decreased to about 26 percent.
3. After three weeks, quit because of the reduction in bonus.
4. No evidence that the reduction in bonus would be permanent.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The issue to be decided here is whether claimant's reduction in bonus is good cause for voluntarily leaving his employment. Good cause exists only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment.

In this case, the claimant suffered a five or six percent reduction in bonus. The Commission held this reduction to be insufficient to constitute good cause. Therefore, the Commission concluded that the claimant was not faced with circumstances so compelling as to leave no reasonable alternative but loss of employment, and that his claim for benefits should be denied.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

Kentucky Court of Appeals, RAINES V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND BELDEN CORP., Ky., App. 669 SW 2d 928. Discretionary review denied by the Supreme Court of Kentucky, May 4, 1984. PRECEDENT

NOTE: Please read in conjunction with Entries 7450 and 7452.

7452 REDUCTION IN WAGES.

ISSUE: Whether a claimant has good cause to quit when her wage is reduced 17½ percent, from $2.00 per hour to $1.65 per hour.

FACTS:
1. Worked four years as a sewing machine operator; the last two which she earned $2.00 per hour.
2. To meet competition, employer reduced claimant's pay from $2.00 per hour to $1.65 per hour.
3. Claimant quit rather than accept the reduction in pay.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The issue is whether a decrease in wages from $2.00 per hour to $1.65 per hour afforded claimant good cause to quit under the provisions of KRS 341.370 (1)(c).

The general rule is that a "substantial" decrease in wages afforded good cause to quit (C.O. # 6074). See also ROBERTSON V. BROWN, 100 A.L.R. 2d 1053, a Louisiana case, where the rule was stated, and where a reduction in wages from $60.00 to $37.69 per week afforded good cause.

No rule based on a mathematical formula is possible in determining whether a wage has been reduced to such an extent as to afford good cause to quit. Various circumstances must be considered. Among them are prevailing wage in the locality, contract or lack of it between the parties, benefit rate of the claimant, prospect of other work, whether others similarly situated are likewise affected by the reduction, and prior work history of the claimant.

Obviously a wage reduction at a time when living costs are rising is more likely to afford "good cause" to quit than when prices are falling. In the case at hand after receiving $2.00 per hour during a period of two years during which the price index moved steadily upward, claimant was cut back to the old wage.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 6837 NONPRECEDENT

NOTE: Please read in conjunction with Entries 7450 and 7451.

7485 DISSATISFACTION WITH AMOUNT OF PAY RAISE (PREVAILING WAGE).

ISSUE: Whether a claimant has good cause to quit because co-workers received larger pay increases than did he.

FACTS:
1. Worked fifteen years as a truck driver, paid on an hourly wage basis.
2. Quit when he received a five cent per hour raise, and his co-workers received twenty cent per hour raises.
3. The employer would not give the claimant an additional fifteen cent per hour raise.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

It is not the function of this Commission to regulate wages. The only requirement concerning wages as far as the unemployment insurance law is concerned is that a wage must not be substantially less than the prevailing wage in the community for that particular type of work. The wage paid by the company seems to have fallen within this requirement, so claimant's dissatisfaction with it did not afford him good cause to abandon his job.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 6855 NONPRECEDENT

7495 TECHNOLOGICAL DISPLACEMENT.

ISSUE: Whether technologically displaced claimant has good cause to quit and thereby ensure receipt of full severance pay rather than accept part-time work and risk loss of fifty percent of severance pay if separated from the part-time job at a later date.

FACTS:
1. Claimant, a supervisor for a telephone company, was technologically displaced and offered two alternatives, transfer to a similar position 108 miles from her home or take a job in sales for the same wage but for 20 hours a week, subject to change.
2. Declined both and quit while still a full-time employee so that she could receive 26 weeks severance pay at the 37.5 hour per week full-time rate rather than risk taking and later losing the part-time job and thereby receiving severance pay at a rate of 20 hours per week.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The Kentucky Court of Appeals held that the employer's proffered alternatives placed the claimant on the horns of a dilemma. It was patently unreasonable to expect her to sever family ties and move more than 100 miles to another town. The only real choice left to the claimant was between accepting part-time work in Pikeville and quitting. The part-time work was to be at the same wage and benefits which amounted to a 44.5 percent reduction in income IF her employer maintained her hours at 20 per week. The employer could not guarantee the 20 hours per week.

Such hours were changeable at the company's option, subject both to a reduction in number of hours, and to the hours being split into two shifts which could double claimant's travel expenses to and from the job site.

Claimant's severance pay amounted to 26 weeks at her gross salary. If she chose to quit while a full-time worker, her $8,886.00 severance pay was at least double the amount she would receive for terminating her employment as a 20 hour (or less in the future) per week worker. The Court believes she made the only prudent decision possible in these circumstances. We hold she had good cause for voluntarily terminating her employment within the provision of KRS 341.370 (1)(c).

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. CLEVENGER, 82-CA-2311 MR. Unpublished. Do not cite to quote. For guidance only.

7535 ILLEGAL ACTIVITIES; FORCED TO PERFORM.

ISSUE: Whether a claimant has good cause to quit when the employer requires him to engage in illegal activities.

FACTS:
1. Worked as a truck driver for two years.
2. Required to move heavy equipment without proper permits and sometimes without properly licensed trucks.
3. Also required to haul 85,000 to 90,000 pound loads on 44,000 pound tags.
4. Complained to employer but to no avail.
5. He then quit rather than perform these activities.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration
Work that is illegal is considered unsuitable. Claimant had good cause to quit his employment since he was required to work under illegal working conditions.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 11161 NONPRECEDENT

7536 DIRECT ACCUSATION OF WRONGDOING; DURING INVESTIGATION.

ISSUE: Whether a claimant has good cause to quit when the employer utilizes direct accusation of wrongdoing as a means of investigation.

FACTS:
1. Misappropriation of company funds was under investigation by the employer.
2. Claimant, who was later cleared of any wrongdoing, was subjected to intense interrogation consisting of direct accusations of wrongdoing.
3. Claimant quit her employer of six years because of these investigative techniques, which were permitted by company policy.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Cases are legion which hold that, despite the employer's clear prerogative to establish policy as he sees fit, those policies which infringe the bounds of propriety afford the worker good cause to quit. We believe the policy of direct accusation of wrongdoing as a means of investigation

represents such an infringement. Because of being subjected to these investigative techniques by her employer of some six years, claimant quit. She did so with good cause.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 19339 NONPRECEDENT

7550 REAPPORTIONMENT OF WORKLOAD; FOLLOWING REDUCTION IN FORCE.

ISSUE: Whether the claimant had good cause to quit when the employer reduced the work force by one and reapportioned the work load.

FACTS:
1. Claimant and four others worked as wrappers of finished garments.
2. They averaged working 35 hours a week and were paid $1.80 per hour.
3. One co-worker quit, and the employer informed the remaining four that a replacement would not be hired.
4. The work was to be divided among the four with a few additional hours of work each week required (but still within the customary 40 hour week).
5. Claimant objected strenuously and announced that she did not intend to do someone else's work.
6. Employer insisted on his right to schedule and arrange the work load.
7. Anticipating that the work load would be heavier, claimant quit in advance of the fifth worker's last day.
8. After the claimant and the fifth worker separated, the entire wrapping operation is being performed by three full-time workers and one part-time helper.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Quitting in anticipation of a problem is not the reaction of a prudent person wishing to remain employed. If claimant had tried to do the work to be assigned and had found it harmful to her health or otherwie unreasonably burdensome, she may have been justified in complaining and quitting if her objections were not reasonably dealt with.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 10411 NONPRECEDENT

7555 REASONABLE BREAK PRIVILEGES; REFUSAL TO CONFORM TO.

ISSUE: Whether a claimant has good cause to quit when the employer imposes a reasonable work rule regarding breaks.

FACTS:
1. Claimants were allowed one hour for lunch, one twelve minute rest break in the morning, and one in the afternoon, and extra "smoke breaks" in the morning and afternoon.
2. Break privileges were abused by workers smoking and eating at their work stations in addition to taking the aforementioned breaks.
3. Claimants were informed that smoking and eating would be limited to normal break periods and violations would result in discharge.
4. Claimants felt the rule was unfair and quit with no prospects of other employment.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Good cause must arise from circumstances so compelling as to deprive the worker of reasonable alternatives to the loss of her employment. The weight of evidence is that the new rule was reasonable and uniformly fair in its application to all workers. It was the employer's sole prerogative to establish such rules. These rules did not create an undue burden on these claimants. They had the most reasonable of alternatives to the loss of their employment. They could have continued working. Their choice to voluntarily sever their employment were acts lacking in good cause within the meaning of KRS 341.370 (1)(c).

DECISION: Claimants voluntarily quit without good cause attributable to the employment.

C.O. # 11230 NONPRECEDENT

7560 CLEANING RESTROOM; NOT A PART OF CONTRACT OF HIRE.

ISSUE: Whether a claimant has good cause to quit when required by her employer to clean restrooms, which duty was not a part of the contract of hire.

FACTS:
1. Worked as an assembly worker from April 12, 1967, until May 23, 1967.
2. Claimant and 14 other female workers on her shift were instructed to take turns cleaning the ladies' restroom because it was in "poor condition."
3. The work entailed cleaning the lavatory, sweeping the floor and picking up trash, including soiled tissue and napkins.
4. Claimant did not complain at the time the plan was announced but refused the assignment when her turn arrived.
5. She would have had to do the work every 15 days.
6. Janitorial work was not a part of the contract of hire.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In the first instance, it is clearly shown that the plan was inaugurated as a punitive or corrective measure because of carelessness on the part of some of the workers. In addition to the impropriety of requiring claimant to clean up after careless employees, it is not a customary practice to have assembly workers perform janitorial work unless it was a part of their contract of hire.

Although many assembly workers participate in good housekeeping practices in the working area, which includes a certain amount of "cleaning up," such practice is not extended to cleaning restrooms.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 7539 NONPRECEDENT

NOTE: Read in conjunction with Entry 7620.

7561 REFUSAL TO PERFORM UNCOMPENSATED "DEAD WORK," NECESSARY TO RESUME COMPENSATED PRODUCTION.

ISSUE: Whether claimants who are paid a tonnage rate for coal extracted had good cause to quit when they were required to perform uncompensated "dead work" before resuming mining operations.

FACTS:

1. Claimants worked under an arrangement known as the "gang work" system.
2. The group of employees making up the "gang" were paid $1.50 for each ton of coal mined.
3. The gang had to do all necessary dead work such as blasting, timbering, and the pumping of water from work areas, for which they were not compensated.
4. Following a two week vacation shutdown claimants found water in the work place.
5. Claimants quit rather than pump the water from the work places.
6. Replacement workers pumped the water out in four hours, and mining production began shortly thereafter.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

These workers did not have good cause for leaving their jobs, although there was some water in the working rooms at the time they quit. The arrangement under which they worked called for them to do those things necessary in order to be able to mine coal. Pumping water is recognized as one of the chores that must be done from time to time in most mines. Under these circumstances, we believe the referee properly applied the law to the facts.

DECISION: Claimants quit without good cause attributable to the employment.

C.O. # 4624 NONPRECEDENT

7565 PHYSICAL CHARACTERISTIC OF WORK STATION.

ISSUE: Whether physical characteristic of work station can render the work so burdensome as to justify quitting.

FACTS:

1. Worked in a truck repair shop as a mechanic from August 1978 to February 1979.
2. There were holes in the walls of the shop, and when it rained water would accumulate two to three inches deep in the concrete floor.
3. There was no furnace, and the water would freeze on the floor.
4. The only heat was from two portable heaters which were turned off at night.
5. Claimant complained, but promised improvements were not forthcoming. Claimant quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The referee reasoned that since the claimant had endured the intolerable working conditions through the winter of 78-79, and more pleasant weather was approaching when he quit on February 24, 1979, he had the reasonable alternative of remaining employed through the more pleasant summer months and quitting prior to the onset of severe weather in the fall if conditions did not improve. It is with this reasoning that we disagree.

Work which is burdensome and onerous is unsuitable, and a worker is justified in quitting such work. This is precisely the case we have here. The claimant endured intolerable working conditions throughout his employment. Although he complained frequently, conditions did not improve. When he left on or near February 24, 1979 (at a time when the weather had improved very little) he did so with good cause. He was under no obligation to remain with this employer "though the summer" in the hope (albeit faint) that conditions would improve before the next winter.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 20437 NONPRECEDENT

NOTE: Read in conjunction with Entry 7566.

7566 PHYSICAL CHARACTERISTICS OF WORK STATION.

ISSUE: Whether physical characteristics of work station can render work so burdensome as to justify quitting.

FACTS:
1. Worked out of her home as a bookkeeper 26 months when the employer moved her work station.
2. The new work station was one mile from her residence in a cottage with no running water and a well on the back porch.
3. The toilet was outside.
4. Claimant's home had running water and modern conveniences.
5. The employer was not asked to move the work station from claimant's home.
6. The record is not clear why the work station was moved.
7. Claimant quit rather than work under the conditions attendant to the new work station.

REASONS: KRS 341.370 provides for a disqualification from benefits if a worker voluntarily quits suitable work without good cause. It is clearly shown that the change in the working conditions had made the work unsuitable for a female office worker. Regardless of the reason for moving to the new quarters, the conditions of which claimant complained actually existed. The claimant acted as a prudent clerical worker in quitting work which had become unsuitable.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 7055 NONPRECEDENT

NOTE: Read in conjunction with Entry 7565.

7570 HARASSMENT BY CO-WORKERS; COMPLAINED TO EMPLOYER.

ISSUE: Whether work becomes unsuitable when the employer does nothing to stop harassment of claimant by co-workers.

FACTS:
1. Employed six weeks by the captioned manufacturing company.
2. During the last two weeks she was frequently harassed by co-workers, and many arguments ensued.
3. Her car was vandalized twice, and someone at work allegedly put lacquer thinner in her soft drink.
4. Complained four times to her supervisor, who instructed her to ignore the harassment.
5. The harassment continued and claimant quit.

REASONS: KRS 341.370 (1)(c) requires that we impose a disqualification from receiving benefits for the duration of any period of unemployment with respect to which a worker has voluntarily left his most recent work without good cause. "Good cause" exists when circumstances are so compelling as to afford the worker no reasonable alternative to quitting her employment. In the instant case, there is sufficient testimony to substantiate the worker's claim that she was being harassed by her co-workers. Furthermore, claimant made a "good faith" effort to correct this situation by complaining to her employer, but the employer apparently did nothing to remedy the situation.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 11482 NONPRECEDENT

7580 REPRIMAND PUNCTUATED WITH PROFANITY.

ISSUE: Whether a claimant has good cause to quit because the employer used profanity (not directed at her) when issuing reprimand.

FACTS:
1. Worked as produce manager eight and one-half years.
2. Her duties included ordering and displaying stock.
3. Claimant returned to work following an absence of several days due to illness.
4. The owner was displeased with the quality of tomatoes delivered and the general display of the produce.
5. Owner instructed claimant to get the department in better order and assigned a male employee to help her.
6. On two occasions the owner observed claimant talking to other employees and reminded her she had work to do.
7. When he next observed claimant talking with other employees, the owner told her the gossiping would have to stop.
8. During this discussion the owner used the words "damn" and "hell" several times but they were not directed at the claimant.
9. Claimant quit because of the owner's use of these curse words and because he allegedly cursed her in a foreign language, which she does not understand.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The referee found that the claimant left work and refused to return more because of the reprimand than the use of the "curse words." He also found that the words were used to punctuate the owner's statements and were not directed at claimant. The referee's findings are supported by probative evidence and are not disturbed. It is significant that claimant objected to statements in a language other than English although she admittedly did not understand them. It is also to be considered that claimant must have accepted the usage of such language during the many years she worked for the company.

All of these things support the referee's finding that the real reason for leaving is the reprimand. It cannot be found that such reprimand was unreasonable.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 9173 NONPRECEDENT

7581 SEXUAL ADVANCES; UNSOLICITED AND UNWANTED; UNDUE RISK TO MORALS.

ISSUE: Whether a claimant has good cause to quit when sexual advances persist despite complaint and employer efforts to halt them.

FACTS:
1. Claimant worked as a clerical worker for the captioned job corps center five and one-half months.
2. A corpsman instructor harassed her with requests for dates and kisses.
3. Claimant complained to her immediate supervisor who advised her to assume an indifferent attitude toward him.
4. When claimant threatened to quit because of continued harassment, she was transferred to another section of the center.

5. However, the instructor, albeit less frequently, continued to harass claimant at her new work station.
6. The final incident was when a corpsman "slapped her on the rear" on more than one occasion and attempted to place his hand up her skirt. This corpsman was disciplined.
7. Employer contends claimant should have presented detailed complaints to the program directors and her new supervisor.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The claimant has furnished an abundance of evidence to show there was an undue risk involved, at least to her safety and morals, and that her actions of leaving were those of a prudent person under similar circumstances. After complaining to her immediate supervisor it is reasonable to conclude that the program director was aware of claimant's grievance because claimant was transferred to another area. It would appear that persons higher in authority than the immediate supervisor had to authorize the transfer.

Although claimant did not complain to her new supervisor about the infrequent harassment by the instructor, she did complain about the incident causing her to leave when she did. The record supports a finding that corrective and disciplinary measures were taken upon the complaint, but it is concluded that claimant was not required to run the risk of further harassment by other corpsmen and the instructor.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 8321 NONPRECEDENT

7582 PROFANITY IN AN OFFICE SETTING.

ISSUE: Whether an office worker has good cause to quit when the employer continues to use profanity after being made aware it was objectionable to the office worker.

FACTS:
1. Claimant was the only full-time office employee.
2. Company president's office was eight feet from claimant's office.
3. A plant foreman who frequently reported to work drunk was frequently reprimanded in harsh tones punctuated with profanity by the president in his office.
4. Claimant could overhear these arguments, even though they usually took place behind closed doors.
5. However, on June 24, 1968, the foreman was berated in harsh tones with the door open.
6. Later in the day on June 24, claimant tendered her resignation to be effective July 5, 1968, stating she could not tolerate the confusion.
7. On June 27, claimant overheard the president talk to a telephone operator in harsh terms.
8. On June 28, the president notified claimant she could leave on Wednesday of the following week (prior to July 5, 1968).
9. Claimant became upset and left immediately.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Based on these facts, the established rule must be applied that it is reasonable for an office worker to leave work when a supervisor uses profane or coarse language and continues to do so after knowing it is objectionable to the employee. The claimant, therefore, acted as a reasonably prudent person in leaving and the conditions of work were the cause.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 7999 NONPRECEDENT

7590 STRESS AND PRESSURE OF UNREASONABLE WORKLOAD.

ISSUE: Whether a claimant has good cause to quit when excessive workload proves detrimental to her health, and the employer refuses to provide adequate staff.

FACTS:
1. Claimant was the supervisor of the invoice and order office with three employees under her direction.
2. She had been promised that a fifth employee would be hired to help because she found it necessary to work overtime to get the work done.
3. However, one of the three employees quit in January 1971 and was not replaced.
4. Further, additional work was assigned to claimant's department.
5. She was required to discontinue the overtime because she was an hourly rated employee and could later demand payment for overtime. Apparently claimant had not been receiving pay for overtime worked.
6. Thereafter she took work home with her and devoted as much as 20 hours a week to homework.
7. The company was aware of the extra work claimant was performing at home.
8. On April 2, 1971, claimant AGAIN asked for additional help but was told that she had to work harder because the budget would not permit hiring additional employees.
9. Claimant quit on that same day, because the pressure of work had made her extremely nervous.
10. She had undergone medical treatment for six months, had lost 20 pounds in weight, and her doctor had advised her to quit her job.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

Work which has become onerous or unduly burdensome is unsuitable. Especially this is so if the work is detrimental to the health of a worker. The record and testimony show that the work had become too burdensome and onerous without additional help. The company, with knowledge that claimant was devoting many hours a week to homework, had a corresponding duty to make some type of adjustment, which they refused to do.

Claimant, relying upon her doctor's advice, had good cause for quitting, and the onerous, burdensome conditions of work made her quitting attributable to the employment.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 9247 NONPRECEDENT

NOTE: Read in conjunction with Entry 7595.

7591 MUST GIVE A NEW JOB A FAIR TRIAL BEFORE QUITTING.

ISSUE: Whether a claimant has good cause to quit before completing the training period simply because she did not feel she could learn the work.

FACTS:
1. Claimant left her regular part-time work as a maid at a motel to accept full-time work as a sewing machine operator with the captioned garment factory.
2. After working two days she quit because she did not feel she could learn the job.

3. The employer allows eight weeks of training for new employees.
4. There were no threats of discharge and supervisors were assisting in the training of the claimant.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The work was definitely suitable to the claimant during the training period because no demands were made, and supervisory assistance was offered. It was incumbent upon the claimant to give the work a fair trial before leaving. The employer expected it to take time for her to learn the job operation.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 8450 NONPRECEDENT

7595 UNREASONABLE WORKLOAD; SUPERVISORY EMPLOYEE.

ISSUE: Whether a claimant has good cause to quit when the employer places her under an excessively burdensome work load and refuses to rectify the situation.

FACTS:
1. Hired to replace the retiring head bookkeeper with the understanding she would train her own assistant.
2. However, the retiring head bookkeeper trained claimant's assistant, but not in the new bookkeeping systems to be used by the claimant.
3. Claimant's assistant resigned when she was unable to perform work satisfactorily using the new bookkeeping system.
4. Claimant, with knowledge of management, began working 75 to 80 hours per week in order to complete the work.
5. Claimant offered to share some of her salary to gain a more qualified assistant.
6. Employer refused to hire a more qualified assistant, opting instead to hire an inexperienced replacement.
7. In addition to training the new assistant, the company added several duties heretofore not the responsibility of the bookkeepers.
8. Claimant's new assistant quit after one month because of the workload.
9. When the company again announced their intentions of hiring another inexperienced assistant, claimant quit.
10. Thereafter, company hired a new head bookkeeper and two assistants.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The claimant was an industrious worker who performed her duties for a management that had no understanding of bookkeeping and little appreciation for the problems involved with that skill. The officials of the company knew that the claimant was having to work excessive hours to complete the reports demanded of her, and her suggestions as to how this problem could be remedied fell on "deaf ears."

The Commission has generally held in cases concerning hourly wage earners that management has the right to see that the workers remain busy during the work shift; and if a worker complains that the work is too burdensome, he should do as much as he can and then await action by the management. But here we have an entirely different situation. The claimant, in her employment as head bookkeeper, is held to a higher standard than an hourly wage earner in regard to the work

of the company. By placing the claimant in this position of responsibility the company delegated to her several duties.

These duties included the responsibility of keeping the company's books current and the responsibility of attempting to meet all REASONABLE demands made upon her department by the management. A person in such a position will usually exhaust every means available to him rather than let the assigned tasks be completed later than demanded. We feel the claimant was such a person, her deep sense of professionalism compelled her to work the excessive hours on the books. When the workload was increased, she informed management that it had become too burdensome, but instead of letting part of it go uncompleted, she increased her already excessive hours until they became unreasonable. Her suggestions to management concerning this situation were given no weight.

Considering the extenuating circumstances surrounding this case, we feel that when the company made no "bona fide" effort to improve the situation that had for some time existed concerning the workload of the claimant, they, in effect, deprived her of all reasonable alternatives to leaving. We think that at the time of her resignation the claimant had already exhausted every reasonable alternative that is available to one in a position such as hers.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 7884 NONPRECEDENT

NOTE: Read in conjunction with Entry 7590.

7596 UNSAFE WORKING CONDITIONS; UNDERGROUND COAL MINE.

ISSUE: Whether a claimant has good cause to quit when the employer refuses to alleviate unsafe working conditions in the underground coal mine.

FACTS:
1. Worked two years as a scoop operator in the employer's underground coal mines.
2. Transferred to a mine where there was a 400 V power cable laying in eight to ten inches of water near his work station.
3. Complained to his supervisor and employer about the unsafe conditions, and they suggested he quit and draw unemployment insurance.
4. The employer did not appear at the referee hearing.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In this case the only probative evidence is that offered by the claimant who has sworn that dangerous working conditions existed, and that this was his only reason for leaving. The employer has not denied claimant's allegations. Allegations of unsafe conditions in underground mining must be carefully weighed since the occupation itself is inherently dangerous. However, when a claimant offers sworn testimony of specific unsafe practices or conditions which are not inherently incredible (and are not contradicted), and the employer does not offer any rebuttal or defense of the allegations, the Commission must rule for the claimant.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 11499 NONPRECEDENT

7605 SENIORITY NOT USED AS BASIS FOR ASSIGNING WORK.

ISSUE: Whether a claimant has good cause to quit when the employer makes work assignments without regard to seniority.

FACTS:
1. Worked as a stockroom worker for two years.
2. Notified that her 8:30 a.m. to 5:00 p.m. shift would be temporarily changed to 12:30 p.m. to 9:00 p.m. so she could train a new stockroom supervisor.
3. She had previously worked the 12:30 p.m. to 9:00 p.m. shift for two weeks during her employment.
4. Claimant refused to work these hours because they would prevent her from being home with her husband and children at night.
5. And because she believed there were two employees with less seniority than she, and that one of them should have been assigned the night work.
6. Claimant quit rather than work the temporary assignment.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The record shows that the night work would have been temporary. Claimant had worked this shift once before and should have at least given the hours a trial period. Concerning claimant's allegation that another employee should have been assigned the late shift, the question of seniority is not controlling. Absent a contract, an employer has the prerogative of assigning work tasks and hours to his employees as long as he exercises this prerogative in a reasonable manner. As the referee points out it is not uncommon in the Louisville area for a retail employee to work until 9:00 p.m.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 6365 NONPRECEDENT

7610 CRITICISM BY A SUPERVISOR; PERSISTENT AND UNWARRANTED.

ISSUE: Whether a claimant has good cause to quit when his supervisor persistently criticizes him and his work.

FACTS:
1. Worked 13 years as a chief engineer on a river vessel.
2. During the last two years his supervisor criticized him and his work persistently and repeatedly suggested that he find other work.
3. Claimant discussed the problem with his supervisor in an attempt to reconcile their differences but to no avail.
4. He performed his duties to the best of his ability and attempted to satisfy work instructions of his supervisor but was rebuffed every time.
5. Employer witness testified that he had received complaints from other engineers concerning this same supervisor and that the claimant was a satisfactory employee.
6. Claimant quit because he found the situation to be intolerable, and he could no longer effectively perform in the face of the harassment.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The referee held and the Commission agrees that: "work becomes unsuitable when conditions attendant with the job become such that the work becomes intolerable. It is not reasonable to expect a worker to keep working in a harassing (sic) situation when he has exhausted all available

remedies and the situation continues. The referee was persuaded by the evidence that such a situation existed in this case." We agree.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 11184 NONPRECEDENT

7620 GENERAL HOUSEKEEPING; INDUSTRIAL WORK SETTING.

ISSUE: Whether a claimant has good cause to quit because he is required to perform housekeeping duties in his work area.

FACTS:
1. Worked four years as a twister operator in the wire department.
2. Was not required to perform housekeeping duties in this work area.
3. Laid off January 7, 1969, recalled March 6, 1969, to the position of spooler at the same rate of pay.
4. Was to be returned to the wire department when work was available.
5. Union contract provides that spoolers perform general housekeeping, as assigned in the work area.
6. Even though he initially performed assigned housekeeping duties as a spooler, on April 8, 1969, claimant refused to do so and quit.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

It is the established rule that an industrial worker may be expected to participate in a housekeeping program whereby he is assigned to do cleaning in an area where his work is performed. The practice of housekeeping by production workers is almost universal. Considering the time entailed and the fact that the work was not foreign to that which is normally performed by production workers, the claimant did not have a semblance of good cause for leaving his employment to become totally unemployed.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

C.O. # 8269 NONPRECEDENT

NOTE: Read in conjunction with Entry 7560.

7621: SALE OF INTEREST IN BUSINESS RESULTS IN UNEMPLOYMENT.

ISSUE: Has a claimant who becomes unemployed as a result of voluntarily selling his interest in a business quit with good cause if his income from the business had become so diminished through no fault of his own that he was unable to meet his personal expenses?

FACTS:
1. The claimant purchased 50% of a gasoline service station on July 1, 1987.
2. The claimant and his partner each worked in the station and received a salary of $3,000 a month.
3. On July 1, 1988, the claimant agreed to sell one-third of the business to a third partner; each partner received an equal monthly salary.
4. During the ensuing recession, the income from the business diminished, with a severe reduction in the amount of income each partner received.

5. The claimant sold his share in the business to the other two partners, voluntarily, to seek more gainful employment as he could not meet his personal expenses with his income from the business.

REASONS: In commission order #28064, the commission held, as precedent, that a stockholder-employee whose unemployment results directly from the sale of his interest in the business will be held to have voluntarily quit that employment. The question in this case is whether the claimant had good cause to quit his employment. The commission reasons that the diminished income from the claimant's business was a result of the economy rather than any act of the claimant. The commission further reasoned that an owner-employee cannot be expected to continue working indefinitely for little or no wages for services performed.

DECISION: The commission held that the claimant quit with good cause associated with the employment.

C.O. # 58303 PRECEDENT

7622: UNTIMELY PROTEST: DISQUALIFICATION AND OVERPAYMENT.

ISSUE: Whether a claimant, after being disqualified from receiving benefits, should be required to repay those benefits when the employer failed to file a timely protest and notify the Division of the alleged voluntary separation prior to benefits being paid.

FACTS:
1. Claimant filed for benefits and either indicated that she had been separated for lack of work or Division personnel determined from claimant's explanation that the separation was for lack of work.
2. Claimant was paid $82.00 for weeks ending April 13, 1991 and April 20, 1991.
3. Subsequently, an untimely protest was received from the employer informing the Division of an alleged voluntary quit.
4. A fact finding investigation followed wherein the claimant insisted she had not quit and the employer insisting that she had.
5. Claimant was disqualified from receiving benefits from December 30, 1990, through the duration of her unemployment, benefit overpayment in the amount of $82.00 was established and the employer's reserve account was denied relief of charges on the grounds of an untimely protest.
6. Claimant was not held to have made false statements in order to receive benefits. Rather, it was determined benefits were paid because of the untimely protest of the employer.

REASONS: The factual matrix of this case reveals three determinative points: 1) the claimant, in good faith, represented her job separation as a layoff; 2) the employer failed to file a timely protest; and 3) the Division had no knowledge of an alleged voluntary quitting prior to benefits being paid. It is the position of the Commission that when these three conditions are met, subsection (3) of KRS 341.370 creates an exception to the provisions of KRS 341.370 (7). That is, when this exception exists, the claimant may not be disqualified prior to the Division becoming aware of the alleged voluntary quitting, because it is apparent that the legislative intent of subsection (3) was to validate benefits actually paid so as to prevent inequitable restitution. Legislative intent is a persuasive principle as indicated by Commission Order Number 4245. Therefore, claimant may not be disqualified during the two weeks at issue.

Since the company filed no protest it thereby acquiesced in the notice (Form 412-A) received by it upon which the information appeared that the claimant had been separated because of "lack of work". Under the provisions of KRS 341.530 (3), it is proper that the company should be charged with such benefits as have been paid

DECISION: The $82.00 overpayment is nullified. The employer's reserve account held chargeable for benefits paid on grounds it filed an untimely protest.

C.O. # 58137A PRECEDENT

7623 PHYSICAL INABILITY TO WORK; LEAVE OF ABSENCE DENIED (VOLUNTARY QUIT OR DISCHARGE).

ISSUE: Whether a claimant voluntarily quits or is discharged, when she is physically unable to work and is denied a medical leave of absence.

FACTS:
1. A production laborer, claimant last worked April 25, 1988, at which time she was in the fourth month of her pregnancy.
2. Because of complications with her pregnancy, she was advised by her doctor to go on medical leave.
3. While it was uncertain for how long the leave would be needed, there was the definite possibility that she would not be able to return until after the anticipated date of delivery.
4. Employer had no policy for granting medical leave.
5. On May 3, 1988, request for medical leave was denied, and the claimant was replaced without guarantee of reemployment.
6. Her pregnancy ended in miscarriage on May 28, 1988.
7. On June 21, 1988, claimant contacted the employer seeking reemployment; however, there were no openings available.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

In the Declaration of Public Policy, which prefaces the State's original unemployment insurance law, the persons the Act was designed to protect were identified as those unemployed through no fault of their own.
In the case under appeal, the claimant was unable to work because of a physical disability beyond her control. She was not at fault in causing her inability to work. It was precisely the claimant's inability to work which led the captioned employer to sever the employment relationship by denying the claimant a leave of absence, and replacing her, forthwith. The requested leave of absence, which was open ended only in that it could have possibly lasted for the duration of a full-term pregnancy, would have maintained the employer-employee relationship. It was not granted, and the claimant was involuntarily separated through no fault of her own.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 51695 NONPRECEDENT

7624 FAILURE OF STATE IMPOSED INSURANCE LICENSING TEST (DISCHARGE VERSUS VOLUNTARILY QUIT).

ISSUE: Whether a claimant, who fails to pass state imposed insurance licensing test, which is a condition of ongoing employment, quits or is discharged when his temporary license expires.

FACTS:
1. Hired as a sales agent by National Life Insurance Company.
2. Both parties understood that claimant must be licensed, a status achieved after passing a state examination.
3. Claimant worked under a temporary license which was valid for a period of ninety (90) days.
4. In December 1982, January 1983, and February 1983, claimant unsuccessfully attempted to pass the test.

5. Department of Insurance regulations required a reasonable waiting period before claimant could be retested.
6. Claimant's temporary license expired and he and the company parted ways on March 4, 1983.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In a published decision, the Kentucky Court of Appeals affirmed the Commission's ruling that claimant severed the employment relationship when he failed to meet the conditions of continued employment. This reasoning was predicated upon considering the employment relationship as a contractual one, thus creating the responsibility on the claimant to satisfy the threshold requirement of being licensed. By failing to do so, he initiated the job separation.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

Kentucky Court of Appeals, MURPHY v. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND NATIONAL LIFE INSURANCE COMPANY, 694 SW 2d 709. PRECEDENT

7625 VOLUNTARY QUIT PRIOR TO DISCHARGE (THE REVERSE DISCUSSED IN NOTE BELOW).

ISSUE: Whether a claimant, who voluntarily quits prior to her discharge on a date certain in the future, should be disqualified subsequent to the announced discharge date when there is no misconduct involved.

FACTS:
1. Claimant worked seven and one-half years, supervising mentally retarded individuals in their production work and training.
2. On April 19, 1988, claimant was notified that new insurance requirements provided that all employees must have a driver's license and a clean driving record for seven years.
3. Those employees who could not comply with these requirements would be terminated with two weeks notice.
4. Because claimant could not comply, she was given written notice that her employment would be terminated effective April 29, 1988.
5. Claimant quit April 20, 1988, instead of waiting until the 29th.

REASONS: Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In a published decision, the Kentucky Court of Appeals held:

> The commission referee found that Mary had voluntarily quit without good cause attributable to her employment. The commission summarily affirmed. The trial court agreed with the referee's findings of fact, but reversed based on the decisions of other jurisdictions. This appeal followed.
>
> {1} KRS 341.370 (1)(c) disqualifies a petitioner from receiving unemployment benefits if he has left his employment "voluntarily without good cause attributed to the employment." "Good cause" exits only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment. H & S HARDWARE V. CECIL, Ky. App. 655 S.W.2d 38 (1983). Both parties concede that the circumstances of this case create an issue of first impression.

{2} In JOHNSTON V. FLORIDA DEPARTMENT OF COMMERCE, 340 So.2d 1229 (Fla. App. 1976), the Florida court construed its unemployment statute to mean that where an employee has been notified that his employment is being terminated as of a certain date, the employee has not voluntarily left his employment without good cause attributable to his employment simply because he chose not to work all or part of the period between the notification and the date of termination. The employee, however, would not be entitled to benefits covering the period between his last day of work and the official date of his involuntary termination. In CARLSON V. JOB SERVICE NORTH DAKOTA, 391 N.W.2d 643 (N.D. 1986), the petitioner discovered a memo on the desk of one of her supervisors, directing the initiation of her removal from her secretarial position. Being upset, she chose to resign before her employment would have officially terminated. The North Dakota court held that she was entitled to benefits from the date she would have officially been discharged. It was insignificant that this official date had not yet been set.

Finally, in POTEAT V. EMPLOYMENT SEC. COM'N OF N.C., 319 N.C. 201, 353 S.E.2d 219 (1987), a truck driver was informed of his impending termination, and chose to quit prematurely and apply for benefits. The employee was nevertheless held to be qualified to receive benefits as of the date of his employer's designated date of discharge.

Here this Court, like the trial court, has no serious disagreement with the factual findings of the referee as affirmed by the commission. However, we cannot agree that the facts as presented constituted a voluntary termination. Mary's departure had already been decided--it was inevitable. Her act of leaving a few days early did not result in Barren River's decision to discharge her. CARLSTON, supra. However, her compensation begins from the date her employer terminated her, April 29th, and not from the date she quit, April 20th.

DECISION: Disqualified from date of voluntary quitting until date of discharge, following which claimant is qualified.

Kentucky Court of Appeals, BARREN RIVER MENTAL HEALTH MENTAL RETARDATION BOARD V. BAILEY, 783 SW 2d 886. PRECEDENT

NOTE: If the claimant had given notice of intent to quit at a date certain in the future, and no good cause attributable to the employment existed for doing so, and the employer discharged her prior to the chosen resignation date for reasons other than misconduct, then claimant would be qualified to receive benefits, for which she is otherwise entitled, for the period of time from the discharge to the chosen date of resignation.

7626 DISCHARGE OR JOB ABANDONMENT DUE TO ALCOHOLISM.

ISSUE: Whether a claimant is discharged or voluntarily quits her job when loss of employment results from continued absence caused by alcoholism.

FACTS:

1. Worked nine months as a supervisor in charge of the captioned employer's dining room.
2. Missed a great deal of work because of her alcohol problem.
3. Permitted to return to work following absences related to alcohol problem.
4. Appeared at work June 24, 1981, intoxicated and unable to work. Had to be taken home by other employees since she was unable to walk on her own.
5. Claimant notified her employer that she would be of no use to the business in her present condition.
6. Removed from the payroll July 7, 1981, after failing to report for work following June 24, 1981.

REASONS: KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

The Kentucky Court of Appeals held:

> That Ms. Egnew was frequently absent from work and, during her last absence, told her employer that she was of no use to the restaurant in her condition. We agree that the Commission's finding that her actions initiated the separation from employment were supported by the evidence. These findings of fact may not be disturbed unless the evidence is so persuasive that one would have no choice but to find for the claimant. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY, Ky., 539 S.W. 2d 293 (1976). Both Covington Haus' owner and Ms. Egnew testified that her separation from employment came only after she had failed to appear at work for a considerable length of time. We believe the Commission correctly found that Ms. Egnew's continued absence from her work without the employer's consent constituted a voluntary abandonment of employment.
>
> Further, we do not believe that alcoholism precludes a finding of misconduct or of voluntarily quitting one's employment. Appellant, in arguing that Ms. Egnew's disease of alcoholism necessitates a reversal of the Commission's findings, cites the case of MOELLER V. MINNESOTA DEPARTMENT OF TRANSPORTATION, 281 N.W. 2d 879 (Minn. 1979), for the proposition that an alcoholic should not be held strictly accountable for his actions.

This blanket statement does not accurately reflect the holding in MOELLER. The Minnesota court, in holding that Moeller was entitled to unemployment benefits, was construing a statute which required a claimant to have made "reasonable efforts" to retain his employment. This case is therefore distinguishable to the situation currently at bar.

Our Kentucky statute is more similar to the Florida one cited in OKALOSSA GUIDANCE CLINIC INC. V. DAVIS, 384 So.2d 384 (Fla. App. 1980), in which it was stated:

Davis was terminated for misconduct, which included failure to report to work as ordered, removal of himself from an employer-provided opportunity to be treated, coming onto the employer's premises in an intoxicated condition, and absence from his duties, all of which placed a burden on the employer to perform its function with a reduced staff. Davis' actions constituted a misconduct as defined by 443.06(9)(a)...ID at 1336.

The Kentucky General Assembly has also pointed out in KRS 341.370 (6), that :

"Discharge for misconduct" as used in this section shall include but not be limited to separation initiated by the employer for...reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during work hours...

Thus, we cannot say that the fact that an employee is an alcoholic precludes either the finding of a voluntary quitting or of misconduct. On the contrary, the use of alcohol affecting one's ability to work, such as appearing at work inebriated, would seem to disqualify the claimant from unemployment benefits.

DECISION: Claimant disqualified on grounds she voluntarily left her employment without good cause.

Kentucky Court of Appeals, EGNEW V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND COVINGTON HAUS, 687 S.W. 2d 866. PRECEDENT

7627 REFUSAL TO CONFORM TO CODE OF ETHICS.

ISSUE: Whether a claimant, who refuses to conform to a state imposed code of ethics, voluntarily quits or is discharged.

FACTS:
1. Employed as a deputy jailer for one and one-half years.
2. State imposed code of ethics prohibits jail employees from associating with known felons.
3. Began dating a woman known to be a felon.
4. Told to either stop associating with the woman or be fired.
5. Claimant then left his employment and filed for unemployment insurance benefits.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In an unpublished decision, the Kentucky Court of Appeals affirmed both the Commission's ruling that the claimant had voluntarily quit, and that he did so without good cause when he failed to explore the reasonable alternative of complying with the state code of ethics and thereby remain secure in his job.

DECISION: Claimant voluntarily quit without good cause attributable to the employment.

Kentucky Court of Appeals, JETT V. KENTUCKY UNEMPLOYMENT INSURANCE Commission AND KENTON COUNTY JAILER, No. 84-CA-812-MR. Unpublished. Do not cite or quote. For guidance only.

7628 QUIT TO FOLLOW SPOUSE, WHILE ON LAYOFF; REFUSAL OF UNION BASED RECALL RIGHT.

ISSUE: Whether a claimant has "good cause" when she quits while on layoff to follow her husband to a distant locale and thereafter refuses recall to which she had a contractual right.

FACTS:
1. Worked for the Cochran Foil Company under a union contract sixteen months.
2. Laid off March 17, 1952, because of a general reduction in force.
3. Continued in the laid off status for the balance of 1952, and did not apply for unemployment insurance benefits.
4. In January 1953, claimant's husband was transferred from Louisville, Kentucky to an office in Texas.
5. Claimant did not immediately follow her husband, it being her intention to stay in Louisville until the school year was over.
6. In February 1953, inquired of Cochran Foil as to the prospects of being recalled to work.
7. She was given no assurance of a return in the immediate future.
8. Shortly thereafter claimant moved to Texas to join her husband.
9. On March 20, 1953, the company notified the claimant, in accordance with the union contract, that she was being recalled to work.
10. Claimant refused and at that time filed her claim for unemployment insurance benefits.
11. She gave no notification to the employer that she was terminating her employment prior to being recalled on March 20, 1953.

REASONS: KRS 341.370 (1)(b) (the law in effect at that time provided for the disqualification of a worker for voluntarily quitting work without good cause).

In a published decision the Kentucky Court of Appeals held:

> Here, Mrs. Kistner did not seek unemployment benefits during the lay-off period. Nor did she quit her job during that period and seek other employment. On the contrary, she elected

to wait until after the offer to resume work was made, and then she rejected it and terminated her employment.

It is suggested in argument that Mrs. Kistner, in effect, quit her job when she moved to Texas, and that there was good cause for her to quit at that time because the company was holding out no prospect of work being available in the reasonable future. But the fact is that she gave no notification to the company of any intention to terminate her employment contract, nor did she perform any other act until after the offer to return to work had been made, to indicate that she was surrendering her rights under the employment contract. Surely, if the company had taken other employees back in violation of her seniority rights, it would have furnished a feeble defense, in a suit by her for breach of contract, for the company to assert that they assumed she had quit because they had heard a rumor that she had moved to Texas. Until Mrs. Kistner rejected the call back to work the company still considered her to be its employe, and it is clear that the lay-off itself did not terminate the employment. See North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 9 Cir. 109 f.2d 76; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 65 S.Ct. 1105, 90 L.Ed. 1230.

Even if it should be considered that Mrs. Kistner did quit her job when she moved to Texas, the fact remains that the avowed reason for her quitting was her desire to be with her husband, and not the absence of available work in her employment with the Cochran Foil Company. She had intended to quit in any event at the end of the school year, so at the most the lack of work in February merely accelerated her decision to move to Texas.

We think it is beyond question that the cause for Mrs. Kistner's termination of her employment, namely her having placed herself, for family reasons, at too great a distance from the place of employment, cannot be considered a cause "attributable to the employment."

DECISION: Claimant voluntarily quit without good cause.

Kentucky Court of Appeals, Kentucky Unemployment Insurance Commission v. Cochran Foil Company, 331 SW 2d 903. PRECEDENT

7629 TEMPORARY LAYOFF; REFUSAL OF RECALL FROM.

ISSUE: Whether a temporarily laid off claimant refuses work or voluntarily quits when he refuses to return to work at the end of the temporary layoff.

FACTS:
1. Claimant had training in the woodworking trade prior to his employment with the captioned furniture manufacturer.
2. Laid off temporarily on August 28, 1967 for production changeover and retooling.
3. Filed for unemployment insurance benefits shortly thereafter.
4. He was then recalled to work September 25, 1967.
5. Refused recall because the furniture assembly method had been changed and he didn't think he could do the work satisfactorily.
6. The other reason for refusing recall was that he preferred an "easier welfare type job."

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit their most recent suitable work without good cause.

The Kentucky Court of Appeals held:

Appellee has two reasons why he did not return to his former job. One was that the furniture assembly method had been changed and he did not think he could do the work

satisfactorily . The other reason was that he would rather be on the "Happy Pappy" program.

Appellant take the position that, even though appellee had been temporarily laid off, he was still considered an employee and when he refused to return to work he had left it "voluntarily without good cause."

It is evident the employer considered appellee as remaining in the employee class even though he had been temporarily laid off during a change-over in a production process. When he declined to return to his former job, he was in effect leaving "his most suitable work voluntarily without good cause." The reasons given by him, which constitute no more than a disinclination to work, would not be "good cause." The burden was on appellee to make such a showing. BROADWAY & FOURTH AVENUE REALTY COMPANY V. ALLEN, Ky., 365 S.W.2d 302 (1963). The Board was certainly justified in finding against him. See KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. SPRINGER, Ky., 437 S.W.2d 501 (1969).

DECISION: Claimant voluntarily quit without good cause.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. DAY, 451 S.W. 2d 656. PRECEDENT

7630 WORK RELATED STRESS; PIECE RATE WORK (BURDEN OF PROOF DISCUSSED).

ISSUE: Whether a claimant, who shows by medical evidence that continued piece rate work was detrimental to her health, must also show that no reasonable alternatives to loss of employment existed.

FACTS:

1. Claimant was an excellent employee, who generally exceeded production goals.
2. She took a leave of absence in February 1987, and subsequently quit her job because of stress associated with piece rate work.
3. claimant presented medical documentation in support of her need to quit her job because work related stress was harmful to her health.
4. There were no positions available, besides those involving piece work, for which claimant qualified.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

In an unpublished decision, which is not to be cited or quoted, the Kentucky Court of Appeals held:

The commission found that Bryant's ongoing employment "would have been detrimental to the claimant's mental health," and hence, concluded that she voluntarily left her employment with good cause.

Appellant asserts that other reasonable alternatives, such as participation in stress reduced counseling or a self-imposed reduction in her production rate, were available to Bryant. Since Bryant failed to utilize such reasonable alternatives, appellant argues that the evidence does not support a finding that she quit her job with good cause. We do not agree. Although it is true that the burden was on the claimant to prove that compelling circumstances required her to quit her employment, once she showed the existence of such circumstances by means of uncontradicted medical evidence which indicated that she was faced with a choice of continuing her employment to the detriment of her health or quitting her employment, the burden of going forward with the evidence and showing that other reasonable alternatives existed shifted to appellant. IN. BENNETT V. MACK'S

SUPERMARKETS INC., Ky. 602 SW 2d 143 (1979). However, appellant failed to adduce any probative evidence to show whether either of its proposed alternatives was likely to be effective in reducing Bryant's particular stress level. To the contrary, even appellant's personnel director indicated that Bryant's stress level might not be reduced by an attempt at reducing her production rate, as "{s}ome people go to their limit regardless. You can't get them to fall back." We conclude, therefore, that the commission's findings that Bryant voluntarily quit her employment with good cause is supported by substantial evidence.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

Kentucky Court of Appeals, CORBIN LTD. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, No. 87-CA-2691-MR. Unpublished. Not to be cited or quoted. For guidance only.

7631 RETIREMENT; VOLUNTARY OR INVOLUNTARY QUITTING, (THREE-FOLD TEST DEFINED; KROEHLER, REYNOLDS METAL AND YOUNG CASES DISCUSSED).

ISSUE: Whether a claimant, who accepts as a condition of employment that he retire at age 70, is entitled to benefits.

FACTS:
1. First employed by the Postal Service in 1958 as a substitute worker.
2. Thereafter became a full-time career employee.
3. Was aware at hire that he would be mandatorily retired upon reaching age 70.
4. On February 20, 1974, celebrated 70th birthday and his employment was terminated.
5. Received a federal pension of $580.00 per month based on 20 years in the Army and 15 years service with the Postal Service.
6. In addition, received $150.00 per month in social security benefits.

REASONS: The Commission established a three-fold test for determining whether an employee voluntarily quits when terminated because he has reached a specific age:

First, the mandatory retirement must have been pursuant to a general plan. Second, the plan must provide benefits to the employee who is terminated upon reaching the mandatory retirement age. Third, there must be some act on the part of the employee which denotes his acceptance of the terms of the plan including the provisions for mandatory retirement. The Commission concluded that McFadden voluntarily accepted all of the terms and conditions of employment in effect at the time he first went to work for the Postal Service, including mandatory retirement at age 70.

In making its decision, the Kentucky Court of Appeals discussed several cases:

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KROEHLER MANUFACTURING COMPANY, Ky., 352 SW 2d 212 (1961), the court considered a voluntary retirement plan which contained a provision for retirement at age 65. An employee's initial participation in the retirement plan was entirely voluntary. The employee was permitted to withdraw from the plan anytime prior to retirement, and the employee was entitled to make a special request to continue in employment upon reaching the age of 65 years.

Because the employee's decision to participate in the retirement plan was voluntary, the court concluded that the employee's subsequent retirement under the terms of the plan constituted a voluntary quitting of his employment.

In the present case, McFadden had no choice respecting his participation in the retirement plan of the Postal Service after he had made his initial voluntary decision to accept employment with the Postal Service. However, it must also be noted that the decision in the

Kroehler case rejected one of the cases relied upon by McFadden in his brief on this appeal, WARNER COMPANY V. UMEMPLOYMENT COMPENSATION BOARD OF REVIEW, 396 Pa. 545, 153 A.2d 906 (1959).

In KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. REYNOLDS METALS COMPANY, Ky., 360 S.W. 2d 746 (1962), the court extended the decision in the Kroehler case to employees participating in a retirement plan pursuant to a collective bargaining agreement negotiated for them by their labor union and ratified by their vote. The court held that an employee's retirement pursuant to the plan constituted a voluntary termination of his employment because he voluntarily accepted the retirement plan which provided for termination of his employment. Consequently, the court concluded that he was not entitled to unemployment insurance benefits.

On this appeal, McFadden relies principally upon the decision in KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG AND WHAYNE SUPPLY, Ky., 389 S.W. 2d 451 (1965). In that case, Young had been employed by the Whayne Supply Company for eighteen years when the company adopted a policy that all employees must retire upon reaching the age of 65 years. The new policy left Young with only two years to work before his employment was terminated. The new retirement policy adopted by Whayne Supply Company did not offer a pension plan affording any benefits to Young. The court held that Young did not voluntarily quit his employment.

In this case, the pension plan provides substantial retirement benefits to McFadden and it was in effect at the time he first accepted employment. McFadden accepted employment with knowledge of the plan providing for mandatory retirement and substantial retirement benefits. Kentucky Unemployment Insurance Commission DID NOT ERR in holding that McFadden voluntarily left his employment with the Postal Service without good cause. (KRS 341.370).

DECISION: Claimant disqualified from benefits on grounds he voluntarily left the Postal Service without good cause.

Kentucky Court of Appeals, MCFADDEN V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND POSTAL DATA CENTER, 588 S.W. 2d 711. PRECEDENT

7632 RETIREMENT; MANDATORY (NO PENSION).

ISSUE: Whether a claimant, who does not freely give his consent to a company retirement plan, is eligible for benefits when he is mandatorily retired under said plan.

FACTS:
1. Began work for the company August 31, 1942.
2. No union, but workers elected committee to confer with company on matters of mutual concern.
3. With acquiescence of the committee, the company enacted a policy in 1960, providing for the mandatory retirement of all employees upon reaching age 65.
4. Retirement policy did not carry with it a pension plan.
5. Claimant was mandatorily retired when he attained the age of 65 on February 5, 1963.

REASONS: In holding that the claimant voluntarily left his employment without good cause the Commission relied on KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. REYNOLDS METAL COMPANY, Ky., 360 S.W. 2d 746 and KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KROEHLER MFG. COMPANY, Ky., 352 S.W. 2d 212.

However, in affirming the circuit court REVERSAL of the Commission and awarding benefits to the claimant, the Kentucky Court of Appeals held that:

...The termination of Young's employment at the age of 65 was an event over which Young had little free choice. Young had been employed for some 18 years. With the approval of the workers' committee, the company adopted a compulsory retirement plan at the age of 65. This was something to which Young did not voluntarily assent or agree. Even if he approved the retirement plan, it was not by virtue of his individual consent or choice. In other words, it was not something that he did voluntarily. In the Kroehler case it was noted that the employee had the privilege of avoiding retirement by applying to the company for permission to continue to work.

Perhaps this case should be further distinguished from the Reynolds case. In Reynolds, all employees were represented by a union under collective bargaining. Not so in the present case, although the employees elected committeemen to "confer with management" with respect to matters of mutual concern. In Reynolds, a pension plan was provided. Not so in the present case. In this case Young worked for the employer 18 years before 1960, when the retirement plan was put into effect "by the company," with acquiescence of the committee. Young then had only about two years to work before reaching 65. This retirement plan provided little, if any, benefits for Young.

It is a case where "Young" was too old. We deem it unnecessary in this particular case to decide whether the "committee," elected by the employees, had a right to bind all the employees of Wayne. The important and controlling question to Young and to this Court is, WAS HIS EMPLOYMENT DISCONTINUED VOLUNTARILY by Young or by his authorized agent? We conclude it was not. This Court said in Reynolds:

The purpose of the General Assembly in the enactment of such legislation was to provide benefits for only those employees who have been forced to leave their employment because of forces beyond their control and not because of any voluntary act of their own.

It seems to us the action of the employer two years before Young's retirement age was an act beyond his control without benefit to him and against his interest within the meaning of the law. We can discover no act or conduct of Young from which it can be said he voluntarily discontinued his employment.

As we read the record in this case, Young did not have a choice. We think the word "voluntary" must certainly be defined as meaning "freely given" and "preceding from one's own choice or full consent."

DECISION: Claimant did not voluntarily quit his employment.

Kentucky Court of Appeals, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. YOUNG AND WHAYNE SUPPLY, 389 S.W. 2d 451. PRECEDENT

7633 SINCERELY HELD RELIGIOUS BELIEFS; UNEMPLOYED BECAUSE OF.

ISSUE: Whether a claimant, who is not a member of a particular religious sect or church, should be disqualified for refusing an offer of work which would have required him to work on Sundays, when said refusal was based on a sincerely held religious conviction that as a Christian he should not work on Sundays.

FACTS: (See "Issue" Above).

REASONS: The United States Supreme Court held:

There is no doubt that "{o}nly beliefs rooted in religion are protected by the Free Exercise Clause," THOMAS supra, at 713. Purely secular views do not suffice. UNITED STATES

V. SEEGER 380 U.S. 163 (1965); WISCONSIN V. YODER 406 U.S. 205, 215-216 (1972). Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it.

Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. THOMAS settled that much. Undoubtedly, membership in a organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious belief's, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

DECISION: Claimant may not be disqualified from benefits for refusing employment which would require him to violate a sincerely held religious conviction against working on Sundays.

The United States Supreme Court, FRAZEE V. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, 109 S.Ct. 1514 (1989). PRECEDENT

NOTE: This same principle would apply if a claimant quits work rather than work on his Sabbath, or is discharged for refusing to do so, if his refusal is grounded in a sincerely held religious conviction, whether or not he is a member of a religious sect or church.

7634 TEACHER'S AIDES; HANDICAPPED STUDENTS (DISCHARGE VERSUS VOLUNTARY QUIT).

ISSUE: Whether it is the reasonable duty of an aide in a regular kindergarten class to change the diaper of a physically handicapped child.

FACTS:
1. A five year old boy suffering with spina bifida.
2. He is incontinent and ambulates with assistance of leg braces and walker.
3. Frequently has to use a wheelchair.
4. Because of lack of control over his bodily functions he wears a diaper.
5. He has normal mental faculties for a five year old.
6. Both state and federal laws requires that children be placed in the least restrictive environment possible.
7. Therefore, because the child has normal mental faculties for his age, he was placed in a regular (as opposed to a special) kindergarten class.
8. Claimant refused to change the child's diaper because it was not an original part of her job description, and because she feared a law suit against her if the child accused her of touching him while changing his diaper.
9. Claimant was discharged for refusing to change the child's diaper.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Because the Board was compelled by state and federal laws to place the child in a regular kindergarten class, it necessarily follows that the meeting of the child's special needs became the legitimate responsibility of those Board employees into whose care he was being placed. That the

aide was assigned the duty of changing the child's diaper, rather than the teacher, comports with the normal division of duties between teachers and aides; namely, teachers perform instructional duties and aides perform non-instructional duties (eg., changing the child's diaper). Thus, the changing of the child's diaper was a reasonable job assignment for the claimant, and her refusal to perform it was misconduct.

DECISION: Claimant was discharged for misconduct connected with the work.

C.O. # 54112 PRECEDENT

NOTE: If the instant claimant had quit rather than change the child's diaper she would have done so without good cause attributable to the employment.

7635 FEAR OF BODILY HARM; UNSAFE WORKING CONDITIONS.

ISSUE: Whether an underground coal miner has good cause to quit when dangerous working conditions persist despite complaint to section foreman.

FACTS:
1. Worked five days as a roof bolter in an underground mine.
2. Periodically required to move electrical cables which supplied power to bolting machine.
3. Mine was wet and the cables smoked from areas involving splices and repairs.
4. Shocked twenty-five to thirty times while handling the cables during his short period of employment.
5. Complained to section foreman about working conditions.
6. Section foreman admitted the conditions were dangerous, but he did not notify his superior.
7. The conditions remained unchanged and the claimant quit.

REASONS: KRS 341.370 (1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit their most recent suitable work without good cause attributable to the employment. KRS 341.100 (a) requires that in determining the suitability of employment the degree of risk to a worker's health and safety must be considered (among other pertinent conditions). Federal courts and the Federal Mine Safety and Health Review Commission have interpreted the Federal Mine Safety and Health Act of 1977, subsection 2 et seq., 105 (c) (1), as amended, 30 U.S.C.A. subsection 810 et seq, 815 (c) (1), to mean that it protects a miner's right to refuse to work under conditions that the miner reasonably and in good faith believes to be hazardous. See SIMPSON V. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, 842 F. 2d 453 (s.c. Cir. 1988).

After carefully reviewing the evidence in this case we find that the claimant's leaving of employment, thereby refusing to perform that work, was protected under the above cited federal law. State law cannot be invoked to override federal law. Claimant left the work because of conditions he reasonably and in good faith believed to be hazardous. Therefore, KRS 341.370 cannot be invoked to his detriment.

Further, without considering the above cited law, we find under KRS 341.370 that claimant was afforded good cause to quit attributable to the employment when after being shocked many times and complaining to the section foreman, WHO AGREED THE CONDITIONSWAS DANGEROUS, the condition continued to exist.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 54006 PRECEDENT

7636 FEAR OF BODILY HARM; UNSAFE WORKING CONDITIONS.

ISSUE: Whether a salaried employee has good cause to quit when the employer cannot ensure his safety during a work stoppage by hourly workers.

FACTS:
1. Claimant worked for the captioned employer twenty-one years as a salaried mine foreman.
2. Hourly paid union employees initiated a work stoppage.
3. A hostile, volatile environment developed when threats of violence were made by hourly employees against salaried employees and when the company created an armed camp atmosphere.
4. Claimant quit rather than face bodily harm by reporting to work.
5. None of the threats were carried out.

REASONS: KRS 341.370(1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged for reasons of misconduct connected with the work.

Both the union and the company contributed to creating a pervasive atmosphere of violence which was real to the claimant. Therefore, he acted reasonably and with good cause when he refused to report to work.

DECISION: Claimant was discharged for reasons other than work related misconduct.

C.O. # 53891 NONPRECEDENT

7637 MILITARY SPOUSE LOSES JOB WHEN HUSBAND TRANSFERRED TO THE CONTINENTAL UNITED STATES.

ISSUE: Whether a claimant is voluntarily or involuntarily unemployed when she loses her job in West Germany because her husband is transferred by the U.S. Army to the Continental United States.

FACTS:
1. Claimant, a military spouse, accompanied her husband to a U.S. Army Post in West Germany.
2. Under an agreement between the U.S. Armed Services and the government of West Germany, claimant sought and secured employment as a secretary with the Department of the Army.
3. As a condition of that agreement, claimant could not stay in West Germany beyond the time when her husband left West Germany.
4. Claimant worked until terminated by the Department of the Army at the date of her husband's return to the continental United States.

REASONS: The referee held claimant disqualified under the provisions of KRS 341.370 (1)(c), on grounds she had left her most recent work voluntarily without good cause attributable to the employment. Such has been the general holding in this jurisdiction since the term "attributable to the employment" was added to the statute in 1980, and must continue to be the case so long as this type of separation is viewed as voluntary. We are convinced by our research in the area, however, that this claimant did not leave her employment of her own volition.

We are unable to locate any case from this jurisdiction directly on point, however, it appears to us that KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. AMERICAN NATIONAL BANK AND TRUST COMPANY, Ky., 367 SW 2d 260 (1963) is dispositive. In that case, the Court of Appeals, then Kentucky's highest, considered the case of a worker who accepted temporary work as a watchman at a bank while renovation and repair was underway; said work was to terminate at the completion of the renovation. The work ended several months later, and the worker filed his claim for unemployment insurance benefits. He was initially disqualified on grounds he had voluntarily quit. The Court of Appeals reversed, holding the

claimant had not quit his employment but had been terminated when the job ceased to exist. We believe that case is analogous to the instant one.

Claimant accepted employment which she knew would terminate when her husband's tour of duty ended. This was a precondition of her contract of hire. She had no control over the termination of her work and could have avoided that occurrence only by failing to accept the position initially. We conclude that where an employee is required to leave his employment because he has become ineligible for that employment under the terms of his employment, such employee has not voluntarily quit his employment and cannot be disqualified. Claimant herein falls within this category of employee and thus may not be denied unemployment insurance benefits.

This position is clearly the majority view. See STATE DEPARTMENT OF INDUSTRIAL RELATIONS V. MONTGOMERY BAPTIST HOSPITAL, INC., 359 S. 2d 410 (Ala. Civ. App. 1978); CERVANTES V. ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT., 177 Conn. 132, 411 A.2d 921 (1979); WALKER MFG. CO. V. POGREBA, 210 Neb. 619, 316 NW 2d 315, 30 A.L.R. 4th 1197 (1982); CAMPBELL SOUP COMPANY V. BOARD OF REVIEW, 13 NJ 431, 100 A.2d 287 (1953); Annot., 30 A.L.R. 4th 1201 (1984).

DECISION: The Commission, having reviewed the record and being advised, sets aside the decision of the referee and holds claimant did not voluntarily quit her most recent work, but was simply separated under non-disqualifying circumstances. She is qualified to receive benefits for all weeks for which otherwise eligible.

C.O. # 51976 PRECEDENT

Read in conjunction with entries 4211 and 4212.

7638 SALE OF STOCK; RESULTING IN LOSS OF EMPLOYMENT.

ISSUE: Whether a corporate officer should be held responsible for his activities when he knows voluntary sale of stock will result in loss of employment.

FACTS:
1. Claimant and Mr. Yeary each held fifty percent of the stock of the incorporated restaurant.
2. Claimant's brother managed the restaurant.
3. Mr. Yeary and claimant's brother became involved in an argument, and Mr. Yeary no longer wanted claimant's brother to manage the restaurant.
4. Claimant refused to place restaurant under anyone else's management.
5. Relations between claimant and Mr. Yeary deteriorated.
6. Claimant assumed position of general manager while the two negotiated transfer of corporate stock.
7. Differences not being resolved, Mr. Yeary's purchase of claimant's stock was complete on May 6, 1981.
8. Claimant knew he would not be offered continued employment by Mr. Yeary.
9. Corporation reported sufficient covered wages for claimant to establish a monetarily valid claim.

REASONS: Although we readily accept that, for certain legal purposes, a corporation is a separate entity apart from its individual shareholders and officers, we now hold that the individual claimant should be held responsible for his actions as a shareholder and corporate officer when his separation from employment results from those actions. To render such an individual impregnable under KRS 341.370 is totally inconsistent with the intent of the statute.

In the original enactment of the Kentucky Unemployment Insurance Law the Legislature saw fit to embody a "Declaration of State Public Policy" and announced it should be used as a guide to

the interpretation and application of the act. We believe that the portions of the statement of public policy which are pertinent to this case are as follows:

> "Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. INVOLUNTARY unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed workers and his family... The General Assembly, therefore, declares that in its considered judgement the public good, and general welfare of the citizens of this State require the enactment of the measure, under the police powers and other reserve powers of this State, for the compulsory setting aside of unemployment reserves to be used for the benefits of PERSONS UNEMPLOYED THROUGH NO FAULT OF THEIR OWN."

Therefore, we hold that the claimant, although acting as a shareholder, must be held accountable for his actions, and that he voluntarily quit his employment when he agreed to sell his interest in the corporation and leave the corporation as an employee.

Good cause for quitting employment exists only when the worker is faced with such compelling circumstances that he had no reasonable alternative to doing so (KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. MURPHY, 539 SW 2d 293). In this case the claimant had the reasonable alternatives of remaining employed and working out his differences with Mr. Yeary, or he could have purchased Mr. Yeary's interest in the corporation and remained employed.

DECISION: Claimant held to have voluntarily quit his employment without good cause and disqualified from benefits.

C.O. # 28064 PRECEDENT

7639 VOLUNTARY QUIT AFTER TRANSFER TO UNSUITABLE WORK.

ISSUE: Whether claimant, after transferring, had good cause to quit his employment when the work is later found to be unsuitable.

FACTS:

1. Claimant, a member of the Tobacco Workers International Union, employed with the company thirteen years and nine months.
2. On November 1, 1984, company announced plans to consolidate its Cigarette Manufacturing section of its Louisville plant with its plant located in Greensboro, North Carolina.
3. Claimant to be laid off at unknown time in the future.
4. Claimant transferred and was treated as a new employee with no transfer of seniority or job classification.
5. Claimant worked three days at the North Carolina plant.
6. Returned to Kentucky because he felt it would not be feasible to relocate to North Carolina.

REASONS: KRS 341.370 (1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit suitable work without good cause attributable to the employment.

The question herein presented may not be equitably and fairly resolved under the provisions of KRS 341.370 (1)(c) alone. It is many faceted, and requires consideration of the underlying intent of the statute. That intent is to assist and encourage individual workers to find and retain gainful employment. Here, claimant accepted a position which, under the provisions of KRS 341.100 (suitability of work) he could have initially rejected as unsuitable. The question is, can he later reject that work as unsuitable, and remain immune from disqualification under the provisions of

KRS 341.370 (1)(c) (supra). The law wisely recognizes that individuals should not be compelled to accept employment which is unsuitable (KRS 341.100). It is contrary to the spirit of the law to penalize persons who take such work, give it an honest try, then leave it because it is unsuitable.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 42665 NON-PRECEDENT

7640 TRANSFER DENIED; FAILURE TO HONOR AGREEMENTS OF PREDECESSOR.

ISSUE: Whether claimant had good cause to quit when his employer refused to honor agreements made by previous management.

FACTS:

1. Claimant was employed four and one-half months in the employer's London, Kentucky office.
2. Previously employed by the company's predecessor for three and one-half years when it was bought out December 31, 1986.
3. January 6, 1986, the predecessor asked the claimant to transfer from Owensboro, Kentucky, to London, Kentucky, to manage that operation.
4. A verbal agreement was made that in July of that year claimant would transfer to Louisville, Kentucky to head its consumer loan division.
5. Company was not solvent and transfers were not granted.
6. Claimant remained in London, living in a company owned home until the merger on December 31, 1986.
7. The new company placed all former employees of the predecessor on a 90 day probation.
8. Claimant was advised during this time that no agreements made by previous management would be honored unless they were written.
9. Claimant resigned April 15, 1987, because he was unhappy with living arrangements and also over the company's failure to transfer him to Louisville as promised by the predecessor.

REASONS: KRS 341.370 (1)(c) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has voluntarily quit their most recent suitable work without good cause attributable to the employment.

The referee reasoned, apparently, on the grounds the agreement to transfer the claimant to Louisville was oral and not in writing, that the company did not unilaterally change the conditions of hire. However, the agreement between the parties concerning the conditions of the employment need not be in writing to be binding on the parties. An oral agreement is also binding. In this case the employer did, in fact, unilaterally alter the terms of the employment when he refused to transfer the claimant to Louisville, Kentucky.

We also find the referee's reasoning that claimant having accepted the temporary position and it's terms for a period of time is precluded from later asserting that the terms were unsuitable. The Kentucky court of Appeals, in the case of NICHOLS VS. K.U.I.C. 677 SW 2d 317 addressed this issue. In that case the claimant had worked for one (1) year at a temporary assignment which was unsuitable. After attempts to rectify the situation by complaining to the employer failed, he quit. The Court held he had good cause to quit.

The Court went on to say that to rule otherwise would, in deed place a worker such as the appellant on the horns of a dilemma. Knowing that a refusal to attempt to work under proposed modifications in the circumstances of his employment would be construed as a voluntary quit, an employee would have no alternative but to accept the changes. Having done so, however, the employee would now be faced with the very real possibility that the Kentucky Unemployment Insurance Commission could argue that he had acquiesced in the changes and, therefore, could not

quit with good cause when he later discovered his inability to function in the new work situation. The unfairness of such a result is manifest and runs counter to the underlying philosophy of unemployment compensation which is to encourage individuals to work.

The only remaining question to be determined is whether the temporary assignment in London, Kentucky, was unsuitable on its face. Since there is no evidence that the claimant had any agreement with the company at the time of hire that he would consent to transfer from one location to another, or that he had a history of transferring from one location to another. While employed, the offer of temporary work approximately two (2) hundred miles away is unsuitable on its face. The claimant could have refused the transfer and quit in January, 1986, with immunity. NICHOLS VS. K.U.I.C. supra is controlling in this case.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 49005 NONPRECEDENT

7641 UNREASONABLE AMOUNT OF OVERTIME; NO COMPENSATION (SALARIED EMPLOYEE).

ISSUE: Whether a claimant has good cause to quit when he is required to work an excessive amount of overtime without compensation.

FACTS:
1. Claimant was employed for ten weeks as a maintenance foreman.
2. Weekly salary of $325.00 based on a forty hour work week.
3. At various times claimant supervised two to three employees.
4. These employees were frequently pulled from their maintenance duties to perform production work for absent employees.
5. Claimant was left to perform the maintenance work left undone by the transferred employees, resulting in as much as fifty-seven hours overtime a week.
6. Claimant received no overtime compensation.
7. Claimant complained to management about the employees being used to perform production work, but no changes were made.
8. Claimant quit.

REASONS: KRS 341.370 (1) and 341.530 (3) combine to provide for the imposition of a duration disqualification from receiving benefits, and granting of reserve account relief to the employer, when a claimant has voluntarily quit their most recent suitable work without good cause attributable to the employment.

The employer has the prerogative, within reasonable limits to move workers from one assignment to another to benefit its business, and to schedule a REASONABLE amount of overtime. However, in exercising the first right the employer's action caused claimant to work an UNREASONABLE amount of overtime, for which he was not compensated.

Faced with the certainty of having to perform excessive overtime because of the company's ongoing practice of using maintenance workers to perform production work, the work became onerous and burdensome and claimant was afforded good cause to quit.

The Commission notes that the designation of a position as SALARIED does not necessarily exempt it from the requirement that overtime wages be paid. 803 KAR 1:070 identifies those positions which are exempt from overtime pay. Section four of 803 KAR 1:070 exempts from overtime pay those "individuals employed in a bona fide supervisory capacity". Said term is defined as any employee who customarily and regularly directs the work of two or more employees; and who devotes either less than 20% (if he is paid more than $155.00 but less than $250.00 per week) or less than 50% (if he is paid more than $250.00 per week) of his hours of

work to activities of the same nature performed by employees under his supervision. While the record is not absolutely clear in this regard it appears that claimant worked in excess of 50% of his work hours performing work of the nature performed by employees under his supervision. However, it is not necessary to clarify this issue because the work was onerous and burdensome based SOLELY on the number of overtime hours claimant had to work.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. # 53384 NONPRECEDENT

7642 OVERTIME HOURS WORKED WITHOUT COMPENSATION.

ISSUE: Whether a claimant had good cause to quit when the employer required additional hours to be worked without compensation.

FACTS:

1. Claimant performed general office duties for Drs. Clark and Clark P.S.C. beginning April 3, 1989.
2. Claimant earned minimum wage for a probationary one month period.
3. Claimant was then placed on a full-time salary of $344.00 calculated on eighty hours and paid twice monthly.
4. Claimant rotated, with a co-worker, working forty hours one week and forty-five hours the second.
5. Claimant nor the co-worker was compensated for the additional five hours worked.
6. Claimant worked under this system from May, 1989, until September, 1990, she was placed on strictly forty hours per week.
7. In January, 1991, claimant's co-worker began a maternity leave of absence.
8. Claimant was required to work the additional hours vacated by her co-worker.
9. Claimant questioned her employer about additional wages for additional hours worked and was informed she would be compensated when her co-worker returned to work.
10. Compensation was to be in wages for the additional hours or an appropriated number of hours off with pay.
11. Claimant advised her employer she was in financial need of the monies immediately.
12. Claimant received her paycheck January 31, 1991, and computed her rate of pay as $2.90 per hour.
13. Claimant questioned her employer concerning additional wages for additional hours.
14. The employer became angry and stated "I don't have money to pay you and will not pay you..."
15. Claimant decided to leave her employment reasoning she could no longer work extended periods of time without rest or lunch breaks and receiving compensation for additional hours worked.

REASONS: KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a claimant has voluntarily quit their most recent suitable work without good cause attributable to the employment.

To establish good cause for voluntarily leaving of work, the facts must disclose real, substantial or compelling reasons of such magnitude as would cause a reasonable and prudent person genuinely desirous of retaining gainful employment to take similar action.

KRS 337.020 provides, in pertinent part, that "Every employer doing business in this state shall, as often as semimonthly, pay to each of its employees all wages or salary earned to a day not more than eighteen (18) days prior to the date of that payment. Any employee who is absent at the time fixed for payment, or who, for any other reason, is not paid at that time, shall be paid thereafter at any time upon six (6) days demand. No employer subject to this section shall, by any means,

secure exemption from it. Every such employee shall have a right of action against any such employer for the full amount of his wages due on each regular pay day."

When a worker is not being paid on a timely basis for hours worked, that worker is granted good cause to leave that employment. The claimant realized she was not going to be paid on a timely basis for the overtime hours worked and was, therefore, justified in leaving the employment.

DECISION: Claimant voluntarily quit with good cause attributable to the employment.

C.O. #57649A PRECEDENT

7643 NOTICE OF INTENT TO QUIT; FAILURE TO GIVE SPECIFIC DATE.

ISSUE: Whether a claimant is discharged or voluntarily quits when she gives clear notice of intent to leave the employment in the near future but fails to or refuses to give a specific date, thereby placing the decision upon the employer as to date of claimant's separation from work.

FACTS:
1. Claimant worked for the employer fourteen months.
2. Claimant notified her employer she would be leaving to enter a Navy program March 1 or April 1, 1992.
3. On March 12, 1992, claimant and her employer discussed her anticipated acceptance by the Navy and the date she would leave her job.
4. Because of the hiring of a new employee and comments made by the claimant as to her acceptance into the Navy, the employer designated March 31, 1992, as claimant's last day of work.
5. During claimant's last week of work, she was notified that if she passed the Navy's physical examination, she would be accepted into the Navy program effective July 8, 1992.
6. Claimant was scheduled to work until 5:00 p.m. on March 31, 1992, but left at 3:00 p.m. believing there to be nothing for her to do.
7. Claimant failed her military examination and was not accepted into the Navy program.

REASONS: KRS 341.370, in pertinent part, provides that a claimant may be disqualified from receiving benefits if he quits or is discharged from his job under certain circumstances. Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In this case, the party initiating the job separation was the claimant. Claimant had advised the employer of her Navy application which was expected to result in her leaving her job. When claimant was unable to give a date when she would leave, the employer selected a date. The employer made this decision because of valid business interests, but only in response to claimant's clear notice that she would leave the work when accepted by the military; claimant intently pursuing such acceptance. It was claimant's decision to pursue other employment rather than continue employment with the captioned company. Claimant quit her job. The employer's insistence that a date of separation be established does not alter the nature of the separation as claimant had clearly stated her intent to leave, having given some tentative dates.

KRS 341.370 requires that, in order to qualify for benefits, the employee who voluntarily quits employment must not only have good cause but the reason for leaving must be attributable to the employment.

In this case, there is no evidence that the claimant had good cause to leave the work which is attributable to the employment.

DECISION: Claimant voluntarily quit her employment without good cause attributable to the employment, and is disqualified from receiving benefits.

CO# 60909 PRECEDENT

7644 INDEFINITE LAY OFF; VOLUNTARY QUIT OR DISCHARGE.

ISSUE: Whether claimant, who became self-employed following indefinite lay-off, voluntarily quit or was discharged, and whether claimant refused an offer of suitable work when he did not respond to the employer's recall to work but chose to remain seasonally self-employed.

FACTS:

1. Claimant began working for the employer on August 29, 1994, as a plating machine operator on the 3:00 p.m. to 11:00 p.m. shift earning $6.55 an hour.

2. Claimant last worked on May 14, 1995, at which time he was laid off for an indefinite duration with recall rights for one year.

3. In May 1995, claimant became self-employed as a shell harvester and earned substantially more than he did for the employer.

4. Claimant received notice that he was to return to work at 7:00 a.m. on June 11, 1995. Failure to comply with the notice would result in termination.

5. Claimant chose to remain self-employed and did not respond to recall to the company.

REASONS: KRS 341.370 (1) (b) and KRS 341.370 (1) (c) provide for the imposition of a duration disqualification from receiving benefits when a worker is discharged for work connected misconduct or voluntarily quits his/her most recent employment without good cause attributable to the employment.

KRS 341.370 (1) (a) provides for the disqualification of a worker from receiving benefits if he has failed without good cause either to apply for available, suitable work when so directed by the employment office or the secretary or to accept suitable work when offered him, or to return to his customary self-employment when so directed by the secretary. KRS 341.100 provides that prior work and earnings should be considered in determining whether work is suitable for a claimant.

Whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

The Supreme Court of Kentucky, in a case styled KOSMOS CEMENT V. HANEY ET AL AND KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION, 698 SW 2d 819 ruled that a lay-off of indefinite duration, notwithstanding seniority-based recall rights, is "equivalent" to a discharge and the recall of a worker by the company is an offer of "new work". In KOSMOS, workers were on an indefinite lay-off then were recalled to positions which had been vacated by employees who were on strike. They refused recall. The Court held that the proximate cause of their unemployment was the fact that they were laid off due to lack of work. The intervening strike and the refusal of the company recall by the claimants did not disqualify them from receiving benefits. The case currently before the Commission differs only in that no strike exists.

The U.S. Department of Labor interpreted section 26 U.S.C. 3304(a)(5)(A) of the Federal Unemployment Tax Act to be identical with the ruling in Kosmos to the effect that "...work offered to a person on indefinite lay-off is new work..."further stating the existence of a seniority right to recall does not continue the contract of employment beyond the date of lay-off. Such a seniority right is the worker's right; it does not obligate the worker to accept the recall and does not require the employer to recall the worker. It only requires the employer to offer work to the holder of the right before offering it to individuals with less seniority. Appellate Courts of other

states have adopted the same interpretation of "new work" and have ruled that workers on indefinite lay-off could refuse recall without loss of benefits since the position to which they are recalled constitutes a new contract of employment. (Ref.: ENGRACIA CAMPOS V. CALIFORNIA EMPLOYMENT DEVELOPMENT DEPT, 132 CAL. APP. 3d 961; TEXAS EMPLOYMENT COMMISSION V. E-SYSTEMS, Inc., 540 SW 2d 761 and ALLEN-BRADLEY V. DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, 58 Wis. 2d 1, 205 NW 2d 129).

Considering the rulings by the Courts, the evidence in this case is that claimant's employment ended by discharge (indefinite lay-off). The employer presented no allegations or proof of misconduct, thus, it must be held that claimant's separation was for reasons which are non-disqualifying. The subsequent recall constitutes an offer of "new work". Therefore, we must determine whether the new work offered was suitable for the claimant and whether he refused the work with good cause. It is undisputed that the work itself was suitable for the claimant. The wages and hours were very similar to those he held prior to being laid off and he had the knowledge and ability to perform the job duties to which he would have been assigned. Further, the work would have led to his return to his normal position. Claimant's sole reason for refusing the work offered was the fact that he had entered self-employment as a shell harvester. If, as the record demonstrates, claimant's self-employment was seasonal, such seasonal work is not justifiable cause for refusing an offer of bona-fide employment with his most recent employer. It, therefore, is held that claimant refused an offer of suitable work without good cause for which a disqualification is imposed.

Parenthetically, should claimant argue that the self-employment was full-time non-seasonal employment, he could refuse to return to his normal employer without disqualification; however, when filing a claim for unemployment benefits, claimant would be directed by the Division to return to his full-time self-employment and would, therefore, be ineligible to receive benefits.

While the Kentucky Unemployment Insurance Commission established KOSMPS as precedent several years ago, it has concurrently held as precedent a case styled KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. COCHRAN FOIL COMPANY, 331 SW 2d 903. In COCHRAN the Court held that separation from the employment occurred by a voluntary quit at the time the worker, on indefinite lay-off, refused recall to the employment stating that the lay-off itself did not terminate the employment. Obviously, as it relates to when a separation occurs, it is opposed to the concept espoused in KOSMOS. As KOSMOS was issued subsequent to COCHRAN and is supported by the federal interpretation, we believe that COCHRAN is no longer applicable.

DECISION: Claimant was discharged from the employment for reasons which are non-disqualifying. However, claimant refused an offer of suitable work without good cause. He is, therefore, disqualified from receiving benefits from May 7, 1995 through the duration of the period of unemployment.

CO# 70995 PRECEDENT

7645 REDUCTION IN WORKFORCE

ISSUE: Whether a worker who elects to participate in a workforce reduction plan quits or is discharged

FACTS: 1. Employer announces a reduction in workforce
2. Employer seeks volunteers to meet the targeted reduction
3. Employer offers monetary incentive to those who volunteer
4. Claimant volunteers for the reduction in workforce

KRS 341.370 (1)(b) provides for the imposition of a duration disqualification from receiving benefits when a worker has been discharged from the most recent employment for reasons of misconduct connected with the work.

KRS 341.370(1)(c) provides for the imposition of a duration disqualification from receiving benefits when a worker has voluntarily quit their most recent suitable work without good cause attributable to the employment.

In Precedent Order Number 60909, the Commission held that whether a separation from employment is a discharge or quitting is determined by which party's actions initiate it. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting.

In the case herein under appeal, it was the captioned employer who approached the claimant, and his co-workers, announcing its intent to reduce the workforce in the Louisville area by one service technician position effective July 1, 2004. Further, it was the captioned employer who promulgated and offered to the claimant and his co-workers, an early retirement plan which offered a monetary inducement to the most senior employee who volunteered to retire effective July 1, 2004, thereby relieving the captioned employer of the necessity of discharging the least senior service technician. It is clear, that the captioned employer initiated the job separation by announcing the pending layoff and seeking a volunteer to be laid off. Therefore, claimant was discharged.

DECISION: Claimant was discharged for reasons other than work connected misconduct.

C. O. # 91867 PRECEDENT

Chapter 8000

SUBJECTIVITY AND CONTRIBUTIONS

CONTENTS BY ISSUE

8000 ACCOUNT REACTIVATION AND RATE ASSIGNMENT.

ISSUE: Does an employer who fails to request termination of an inactive reserve account and subsequently engages in the same business, receive a rate based on his prior experience when his account is reactivated?

FACTS:
1. The employer was sole proprietor of a single-family construction business from 1975 to 1978.
2. His reserve account was inactivated in 1979 because he was no longer doing business.
3. The employer did not request termination of his account.
4. It is division policy to terminate accounts of employers with POSITIVE reserve balances after a period of inactivity and transfer the reserve balance to the pooled account.
5. The division does not terminate the accounts of employers with NEGATIVE balances unless the employer requests the termination.
6. The employer resumed his business in 1986.
7. The employer did not report wages or pay taxes for 1986 through 1990 because other builders were not reporting their workers and the employer thought this was acceptable.
8. The employer's reserve account was reactivated and he was assessed contributions and assigned rates based on his negative reserve account balance.
9. The employer appealed the determination, stating that the division's failure to use its discretionary authority to terminate reserve accounts with negative balances while it does use its discretionary authority to terminate accounts with positive account balances, is unfair.

REASONS: Under KRS 341.250, an employer must request termination of coverage of his inactive account to assure that the account is closed. This does not prevent the division, however, from terminating an inactive account with proper notice to the employer. The division's policy has been to terminate inactive reserve accounts with POSITIVE account balances in order to transfer the account balance into the pooled account for use in the payment of benefits. Accounts with negative balances are not terminated at the discretion of the division because doing so would not benefit the pooled account and would bypass the experience rating provisions under which contribution rates are assigned. The commission reasons that the policy of the division is not unfair, because an employer with a negative account balance is not equal to an employer with a positive account balance. The policy is consistent with good management as the termination of accounts with positive account balances provides additional funds to carry out the purposes of the program, while not terminating the accounts with negative balances maintains the intent of the experience rating system.

DECISION: The commission affirmed the assignment of contribution rates based on the employer's past experience.

C.O. # 57259 PRECEDENT

8001 EMPLOYER - EMPLOYEE RELATIONSHIP.

ISSUE: What administrative bodies shall determine whether an employer- employee relationship exists, initially and on appeal.

FACTS:
1. Claimant was disqualified by a referee decision mailed March 11, 1982, which became final for lack of appeal.
2. Subsequently, claimant worked in employment insufficient to remove the disqualification, including a part-time job which the referee found to be "self-employment."
3. The employer considered it to be "contract labor."

REASONS: The determination of employer-employee relationship is a complex legal question. The accepted procedure when coverage is the issue is to refer the question to the Tax Branch for the auditor to investigate the nature of the employment and issue an administrative determination appealable to the Commission. The Commission held that the part-time employment was insufficient to remove the disqualification, and that evidence did not support the conclusion that claimant was self-employed or performing contract labor. Employee coverage issue referred to the Tax Branch for determination on whether or not an employer-employee relationship existed.

DECISION: That portion of the referee decision finding that the employment was self-employment or contract labor was voided. Case was remanded to the Tax Branch for a determination on the question of coverage (i.e., whether an employer-employee relationship existed).

C.O. # 32394 PRECEDENT

8002 JURISDICTION FOR APPEALS ON ISSUES OF COVERAGE WHICH ARISE IN A BENEFIT CLAIM.

ISSUE: What administrative body shall hear and decide issues of coverage which have been appealed from a benefit claim determination.

FACTS:
1. Claim filed but denied for lack of qualifying wage credits.
2. Claimant requests reconsideration listing work in base period for an individual who had not reported claimant's earnings as covered wages.
3. Auditor investigated and determined some earnings were uncovered agricultural wages while other earnings were covered but insufficient to cause employer to be subject employer. Thus, wages could not be used as base period wages.
4. Division issued determination to only claimant holding earnings from work at issue could not be added to the claim.
5. Claimant appealed.
6. Case assigned to division referee and hearing held.
7. Referee ruled some work at issue uncovered while other work covered and ordered division to add covered wages to claim.
8. Claimant appealed to the Commission.

REASONS: KRS 341.420 and KRS 341.430 provide different procedures for handling benefit appeals and appeals by employers from determinations affecting their liability, contribution rate or amount of contributions owed. Precedent commission order 32394 (1982) established procedure of referring to Commission for handling all appeals involving coverage issues rather than such appeals being considered by the division's Appeals Branch.

The appeal in this case should have been directed to the Commission for hearing and ruling. The referee was without jurisdiction to hear and decide the appeal.

DECISION: Referee decision set aside as Appeals Branch referee was without jurisdiction to hear and decide issue. Issue taken by Commission for scheduling of additional hearing and ruling.

C.O. # 57480 PRECEDENT

NOTE: This case made precedent to clarify that all issues of coverage which involve potential employer liability must be handled in keeping with precedent commission order number 32394, not just issues of whether or not a worker was an employee or independent contractor. This precedent also clarifies that wording in precedent commission order number 32394 did NOT mean that the Internal Revenue Code, regulations of the Internal Revenue Service, and case law relative to the code are controlling for Kentucky Unemployment Insurance cases relative to the evaluation of an employer-employee relationship.

8003 REFUND REQUESTS BY EMPLOYER.

ISSUE: Whether or not an employer's nonspecific request for a refund under KRS 341.330 requires an appealable determination.

FACTS:
1. Employer filed numerous appeals in past on issues affecting the employer's account.
2. Decisions issued on such appeals had become final or no longer were within division's jurisdiction.
3. The employer mailed letter to division which stated, "Pursuant to KRS 341.330 and any other related statute pertaining to tax refunds I hereby request a full and complete refund of all unemployment insurance taxes and penalties I have paid as an employing unit in the past five years, reserve account #351701-A8. Please forward the refund to me or make a written response to my request."
4. The division responded by letter that no credit or overpayment existed in the account.
5. Employer filed an appeal to the Commission.

REASONS: KRS 341.330 provides that an employer may make a request for refund or adjustment which shall be allowed if monies had been erroneously paid by the employer. Section (1) of 341.330 specifically provides that no application for adjustment or refund could be made relative to any payment made by the employer as the result of an administrative determination affecting the employer's liability, contribution rate, or amount of contributions where no request for review was filed or on review it was determined that no adjustment was due. Since the employer's application for refund or adjustment did not specify what amounts the employer deemed erroneously paid, for which periods of time those amounts related to, the identify of any workers for which the payments had been made, or the reason why the employer believed such payments were erroneously paid, the division could reject without a formal determination the application as invalid. A valid application would require the division to issue an appealable decision.

DECISION: Appeal to the Commission was stricken from the docket as employer failed to file a valid refund request.

C.O. # 56003 PRECEDENT

8004 NATIONAL AND STATE BANKS' RIGHT TO EXEMPTION FROM COVERAGE.

ISSUE: Whether national and/or state banks have a right to exemption from the provisions of the Unemployment Compensation Act.

FACTS:
1. The Federal Social Security Act of 1935, 42 U.S.C.A § .301 et seq., exempted from provisions any services performed in the employ of the United States government or any instrumentality of the United States government.
2. The federal act was amended in 1939 to become effective January 1, 1940. Amendment granted to several states authority to tax instrumentalities of the United States under the provisions of Unemployment Compensation laws.

3. The first Kentucky Unemployment Compensation Act passed by the General assembly of 1936 exempted instrumentalities of the United States from its provisions. Acts 1936, 4th Ex.Sess., C7.
4. The 1938 Act and the 1940 amendment omitted the exemption. Acts 1938, c.50; Acts 1940, c.193.
5. The Federal Social Security Board and the Unemployment Compensation Commission construed the federal act and the state law, enacted to conform thereto, to exempt from their provisions, because they were instrumentalities of the United States, national banks, federal building and loan associations, state banks holding membership in the Federal Reserve System, building and loan associations owning stock in the Home Owners Loan Corporation, and, financial institutions appointed as agencies of the board administering the provisions of the Federal Housing Act, 12 U.S.C.A § 1701 et seq.
6. They construed the act not to exempt from its provisions state banks which are not members of the Federal Reserve Bank, although their deposits are insured with the Federal Deposit Insurance Corporation.
7. After the 1939 amendment to the Social Security Act, acting under advice of the Attorney General, the Unemployment Compensation Commission reversed its former decisions and construed the Unemployment Compensation Acts of 1936 and 1938 to be applicable to the institutions without exception.
8. The Anderson National Bank of Lawrenceburg, sued for itself and all national banks of Kentucky, seeking a declaration of the rights of national banks to be exempt from the provisions of the 1936 and 1938 Acts.
9. The Farmers Bank and Capital Trust Company of Frankfort, representing state banks not members of the federal Reserve System, but whose deposits are insured with the federal Deposit Insurance corporation; the Peoples Liberty Bank and Trust Company of Covington, representing state banks claiming exemption by reason of membership in the Federal Reserve System; the Kentucky Title Trust Company, representing trust companies with membership in the Federal Reserve System; the Ideal Savings, Loan and Building Association of Newport, representing institutions holding membership in the Federal Home Loan Bank under the provisions of the Home Owners' Loan Act, 12 U.S.C.A. § 1461 et seq., and the Greater Louisville First Federal Savings and Loan Association, representing institutions appointed as agencies for the Federal Housing Administration, were permitted to intervene and assert their various contentions in respect to their claims of exemption from the provisions of the Acts.
10. Circuit Court entered judgment declaring: (1) All national banks and federalized building and loan associations to be exempt from the provisions of the acts, because they are instrumentalities of the United States; (2) state banks holding membership in the Federal Reserve System to be exempt from the provisions of the 1936 Unemployment compensation law but not to be exempt after the effective date of the 1938 amendment; and (3) neither state bank members of the Federal Reserve System, nor state chartered building and loan association members of the Federal Home Owners Bank, to be exempt because, they were not instrumentalities of the federal government.
11. All of the parties adversely affected appealed to the Kentucky Court of Appeals.

REASONS: The Unemployment Compensation Act was enacted in exercise of state's power to levy taxes, not under its "police power," so as to require determination of question of banks, trust companies and savings and loan associations, immunity from taxation thereunder in light of law respecting taxation.

National banks, being instrumentalities of the United States and hence not taxable by states without Congress' consent, are not "employers" covered by Unemployment Compensation Act, which was enacted to conform to federal Social Security Act.

Since the establishment of the Federal Reserve System, the member banks, to a greater extent than ever before, are engaged in the performance of governmental functions directed toward the vital public purpose of the government to stabilize economic and social conditions. The same policy

was the principle which motivated Congress in the establishment of the Home Owners Loan Corporation, the Federal Housing Corporation, and similar federal agencies.

The Unemployment Compensation Act is not unconstitutional as "discriminatory" in so far as it purports to tax state banks and exempt national banks from taxation thereunder, since national banks are exempt from taxation under federal constitution and acts of Congress.

DECISION: Judgment as to the Anderson National Bank, Farmers Bank and Capital Trust Company, and the Greater Louisville First Federal Savings and Loan Association is affirmed; but, as to the People-Liberty Bank and Trust Company, the Kentucky Title Trust Company, and the Ideal Savings, Loan and Building Association, it is reversed.

BARNES V. ANDERSON NAT. BANK 169 S.W. 2d 833 PRECEDENT

8006 COVERAGE OF ENTITY EMPLOYING INDIVIDUALS IN THE CARE AND TRAINING OF HORSES.

ISSUE: Whether work performed in the care and training of horses on leased property meets agricultural exemption from covered employment.

FACTS:
1. Employer leases a barn, paddock and ten acres of fenced pasture at a race horse training operation known as the Kentucky Horse Center.
2. Employer oversees the care and training of thoroughbred racing horses.
3. Employer owns some of the horses but is paid a fee for handling horses owned by others.
4. Employer takes horses to the race track and cares for them while they are there.
5. No plant crop is grown on the leased property.
6. Ninety-eight percent of the work time involved in appellant's operation is spent on the leased premises.
7. Employer utilizes employees to care for and train horses but has never had more than five working at a time.
8. Quarterly payroll has never exceeded $20,000.00.

REASONS: KRS 341.050, in pertinent part, includes as "covered employment" service performed by:

> (f) An individual in the employ of an employing unit performing agricultural service, as defined in section 3306 (k) of the Internal Revenue Code, if either of the following conditions are met:
>
> (1) The employing unit paid wages of twenty thousand dollars ($20,000) or more in a calendar quarter in either the current or preceding calendar year for service performed in agricultural labor; or
>
> (2) The employing unit employed for some portion of a day in each of twenty (20) different calendar weeks whether or not such weeks are consecutive, ten (10) or more workers irrespective of whether the same workers were in employment in each such weeks performing service in agricultural labor

In this case, appellant clearly met neither of these two provisions. Thus, if appellant's operation is agricultural, the service provided by workers is non-covered. If the operation is not agricultural, other provisions of the statutes concerning "covered" employment would be applicable.

This specific situation relative to unemployment insurance coverage is not addressed by Commission precedent or Kentucky Courts, as far as we have been able to determine.

Furthermore, the Internal Revenue Code itself does not specifically address in its references a situation like the case at bar. The code does refer to a case styled U.S. V. TURNER TURPENTINE CO., C.C.A. Ga. 1940, 111 F. 2d 400 and comments relative to such case,

> "A term of as general import as "agricultural labor" was considered to have a meaning broad enough to embrace agricultural labor of every kind, as that term was understood in the various sections of the United States where 1400 et seq. (I.R.C. 1939 (now this chapter)) operated, but a mere local custom which was in the face of the meaning of a general term used in said sections could not have been read into said sections to vary their terms."

Horse raising, training, and racing has long been considered an agricultural endeavor in Kentucky. Although not a precedent decision, the Kentucky Unemployment Insurance Commission held in 1968 in its Order Number 8034 that workers providing service to an individual engaged on his farm in training horses for others was involved in agricultural labor. We do not believe the old Commission order and the court ruling cited above constrain a ruling that work performed for an entity engaged exclusively in handling horses for a race or races is agricultural labor. However, we believe it does provide significant support for finding that work for appellant is agricultural labor. If the service was in fact performed on a farm, the service must be found to be non-covered.

DECISION: Employer is an agricultural employer and services provided to him as of April, 1991, have not met coverage requirements.

C.O. # 56768 PRECEDENT

8007 EMPLOYER-EMPLOYEE RELATIONSHIP - CONSIGNMENT CONTRACT BY OPERATOR OF BULK PETROLEUM PLANT.

ISSUE: Whether appellant is an employee or an independent contractor.

FACTS:

1. Frank J. Kolb entered into two consignment agreements with the Indian Refining Company.
2. The plant in Paducah was owned by the company, but the plant at Mayfield was built entirely by Mr. Kolb.
3. Mr. Kolb used his own trucks and machinery and none of the equipment used by him in operating the plants was owned by the company.
4. Mr. Kolb devoted about 10% of his time to the business of distributing petroleum products under his consignment agreements with the company.
5. The remainder of his time was devoted to the operation of a wholesale drug business in Paducah.
6. Mr. Kolb employed managers to operate the bulk plants.
7. Mr. Kolb employed about six men to assist him at the Paducah plant and two men at the Mayfield plant.
8. Mr. Kolb had made regular reports to the commission and paid taxes for the years 1937 and 1938.
9. Mr. Kolb carried his own workmen's compensation insurance and liability insurance.
10. The company had nothing to do with Kolb's employees.
11. The Indian Refining Company filed suit against V.E. Barnes and others (Unemployment Compensation Commission) to obtain a declaration of its rights under the unemployment compensation laws and to obtain an adjudication that Frank J. Kolb was not its employee, but an independent contractor.
12. Mr. Kolb filed an answer in the prayer of the petition and asked that it be adjudged that the company was not his employer or the employer of his employees.
13. Franklin Circuit Court entered judgement for the plaintiffs, and the defendants appealed.

REASONS: In the contract between the company and Mr. Kolb there is no right to control details or methods of procedure. The contract is directed toward results and not how they are obtained. There is no proof of any modification of this agreement, but the petition alleges facts indicating that no control of methods exists and the Mr. Kolb is to all intents and purposes an entrepreneur, free to manage his business as he sees fit.

He is responsible to the company for results, but except to the extent that an interest in the results may influence methods of operation, the company does not control the details of his operation or have a right to exercise any control.

The Unemployment Compensation Law is a taxing statute and the limitations therein must be strictly construed. The Court, in giving a liberal construction to it cannot extend its coverage to those not within its metes and bounds since it is for the legislature to fix limits within which the law shall operate.

DECISION: Judgment affirmed.

BARNES V. INDIAN REFINING CO. 134 S.W. 2d 620 PRECEDENT

8008 EMPLOYER-EMPLOYEE RELATIONSHIP - SECURITY OFFICERS OF BUSINESS ENGAGED IN PROVIDING SECURITY FOR BUSINESSES.

ISSUE: Whether an employer-employee relationship exists between the business furnishing security officers and the security officers themselves or the property owner and the security officer for which the security officer performs their service.

FACTS:

1. Appellees furnished individuals to preserve the peace and protect and preserve property of private persons or corporations.
2. Property owners made application to the Governor and had the person, furnished by the appellee, designated as special police officer.
3. The appellees collected the fees from the private property owners or corporations.
4. Appellees then forwarded with the application to the Governor the salaries of the special officers.
5. Salaries were paid into the treasury, and the salary was paid directly to the officer by the State Treasurer.
6. The officers duties were confined to the premises to be protected (except in certain contingencies).
7. The Governor could remove the officer at will or at the request of the property owner.
8. Division attempted to recover contributions from appellees by filing action in Franklin Circuit Court. The Court dismissed action.
9. Division appealed.

REASONS: The officers are employed by the appellees and furnished to the property owners pursuant to the contract to furnish guarding and police protection. The property owner looks to the appellee to furnish the protection called for by the contract and the protection is furnished by the appellees' employees. Since the contract calls for the appellees to furnish the protection, the police officers' employment may be terminated at any time by the appellees. The fact that he is an officer is immaterial, since the Governor is authorized by the statute to revoke his appointment as such when the cessation of his employment is certified by the property owner.

The fact that the officers' salaries are delivered to them by the State Treasurer have no material bearing. It is nothing more nor less than a mere legal fiction that these officers are paid by the state. Their salaries are actually paid by the appellees from the money collected by them from the

property owner and the State Treasurer is merely an intermediary through whom this money passes.

When legal fictions are disregarded and the situation viewed realistically, the conventional relation of employer and employee exists between the appellees and the special officers.

DECISION: Judgment reversed.

Commonwealth v. Potts 175 S.W. 2d 515 PRECEDENT

8009 EMPLOYER-EMPLOYEE RELATIONSHIP - BEAUTY OPERATORS RENTING OR LEASING BOOTHS FROM OWNER OF BEAUTY SHOP.

ISSUE: Whether or not the legal relationship of employer and employee existed between appellant and those persons working in business.

FACTS:
1. Appellant operated a beauty parlor.
2 Appellant personally engaged in the type of work usually performed in such places of business.
3. Appellant owned or furnished all equipment and supplies used on the premises.
4. Premises were divided into small rooms or booths, which he rented or leased to other beauty operators.
5. There was a mutual agreement with regard to the time of opening the beauty parlor between the operators and the appellant.
6. Appellant was advised of any expected absence.
7. Operators fixed their own working hours.
8. Appellant did not supervise or control their actual work.
9. Appellant could discharge an operator for misconduct but not otherwise.
10. There was a weekly settlement between appellant and the operators and the gross receipts were divided on a commission basis.
11. Deductions were made for Federal Old Age Insurance, but operators did not wish deduction to be made for state unemployment insurance.

REASONS: KRS 341.050 defines "covered employment" as that where the relationship between the individual performing a service and the employing unit for which such service is rendered is "the legal relationship of employer and employee."

Appellant owned and carried on this business as a unit. The operators clearly worked for him, and are not engaged in an independent enterprise. The accounting method of payment is immaterial, and it is not important that appellant does not exercise a close control of the operator's actual labors. The case is very similar to that of Radley et al. v. Commonwealth, 297 Ky. 830, 181 S.W. 2d 417. In that case the defendants operated a taxicab business and leased their vehicles to drivers.

DECISION: The legal relationship of employer and employee exists between appellant and the operators; and, therefore, unemployment compensation contributions should be paid. Judgment is affirmed.

LITTERAL V. COMMONWEALTH 228 S.W. 2d 37 PRECEDENT

8010 EMPLOYER-EMPLOYEE RELATIONSHIP - SALESMEN FOR REAL ESTATE BROKER.

ISSUE: Whether or not the legal relationship of employer and employee exist between real estate brokers and salesmen.

FACTS:

1. Appellee was a real estate broker.
2. Salesmen worked under a Real Estate Broker-Salesman contract.
   a. Broker agrees to make available to the salesman all current listings of the office and assist the salesman in his work.
   b. Salesman agrees to work diligently and with his best efforts to sell, lease or rent any and all real estate listed.
   c. Salesman agrees to conduct his business and regulate his habits so as to maintain and to increase good will and reputation of the broker.
   d. Usual and customary commissions shall be charged for any service performed. When the salesman shall perform any service whereby a commission is earned, said commission, shall be divided between the broker and salesman, in which division the salesman shall receive a percentage and the broker shall receive the balance. In no case shall the broker be liable to the salesman for any commission unless the same shall have been collected from the party for whom the service was performed.
   e. Broker shall not be liable to the salesman for any expenses incurred by him, or for any of his acts, nor shall the salesman be liable to the broker.
   f. Contract and the association may be terminated by either party.
3. Salesmen paid all their own expenses, did not make periodic reports, did not go through prescribed training, had no regular schedule or office hours, were not required to produce a minimum value of sales, worked only such hours as they pleased, could engage in any other business, and were not directed by the broker.
4. Appellee filed declaratory judgment action in Franklin Circuit Court asking court to determine and declare liability of appellee for unemployment compensation contributions on salesmen.
5. Court held salesmen were independent contractors.
6. Division appealed.

REASONS: In GUARANTY MORTAGE CO. OF NASHVILLE V. BRYANT, 179 Tenn. 579, 168 S.W. 2d 182, 184, a contract similar to the one here was before the Supreme Court of Tennessee. That Court held that salesmen under such a contract did not perform services for the broker for "wages or under a contract of hire" within the Unemployment Compensation Act definition of employment. The Court said: "... Commissions were not paid by complainant, but by the parties to the sale. Complainant did not pay, or promise to pay, any wages or commissions to the salesmen. The situation was that the salesmen paid one-half of commissions earned by them to complainant, rather than that complainant was paying them commissions."

It appears the salesmen are responsible to the broker for results, but except to the extent that results may influence the method of operation, the broker does not control the details of the salesman's operation.

DECISION: The legal relationship of employer and employee does not exist between the broker and the salesman. Therefore, unemployment compensation contributions are not required. Judgement affirmed.

Commonwealth v. Kendall, 233 S.W. 2d 511 PRECEDENT

8011 EMPLOYER-EMPLOYEE RELATIONSHIP - MINERS WORKING UNDER PARTNERSHIP AGREEMENT WITH OWNER OF COAL RIGHTS AND MINING EQUIPMENT.

ISSUE: Whether coal miners operating as partnerships were properly held to be employees rather than independent contractors.

FACTS:

1. Appellant was a coal company.
2. Appellant owned certain coal rights and mining equipment.

3. Appellant entered into an oral agreement with coal miners operating as four partnerships.
4. Under agreement with appellant the miners performed their work without supervision or direction.
5. Miners were paid a set amount, from which no deductions were made, for each ton of coal mined and placed in bins at the mouth of the mines.
6. By an order of the Kentucky Unemployment Insurance Commission, unemployment taxes plus interest and penalties were assessed against the appellant based upon the finding that four groups of coal miners with whom the company had mining contracts were actually employees rather than independent contractors.
7. Assessment affirmed by circuit court when appealed by appellant.
8. Appellant appealed circuit court judgment.

REASONS: Under the Unemployment Compensation Act, the question of whether a person is an employee or an independent contractor is to be determined under the common law rules of master and servant. Ky. St. Supp. 1939, § 4748-1 et seq.

The facts do not show any right of control by the coal company over the details of the work. The miners were not required to produce any specific quantity of coal; they were free not to work whenever they chose; they had sole choice as to the part of the mine in which they would work; they performed their work without supervision or direction; and were responsible to the coal company only for results.

It is a simple fact that the miners here enjoyed a freedom of activity in their labors not common to the master-servant relationship. Accordingly, the coal company should not be subjected to the burdens that attach to an employer.

DECISION: Judgement reversed. Miners held to be independent contractors.

STURGILL V. BARNES KY., 300 S.W. 2d 574 PRECEDENT

8012 COVERED EMPLOYMENT - SALESMEN FOR A FLOOR COVERING BUSINESS.

ISSUE: Whether salesmen for a floor covering business who receive no benefits and are only paid commission on their sales are considered employees or independent contractors.

FACTS:
1. Appellant engaged in a retail-wholesale floor covering sales business.
2. Division audit revealed contributions had not been paid in 1982, 1983, and 1984 for salesmen, office workers and warehouse workers.
3. Determination was made that these individuals were in covered employment and contributions were owed on earnings paid to them.
4. Appellant disagreed with the assessment only as it included salesmen and installers.
5. The salesmen worked on company premises, during business hours set by the company, selling the company's products.
6. Their relationship with the company was ongoing and indefinite.
7. The salesmen were paid by commission, set their own hours and their days off.
8. The salesmen did not work as carpet salesmen for other companies or independently.
9. Salesmen received no benefits or any compensation in addition to their commission.
10. The salesmen were found to be employees and covered under the provisions of Unemployment Insurance Law.
11. The Commission found the installers were independent contractors and earnings paid are not subject to contribution assessment.
12. Appellant appealed to the Franklin Circuit Court where the Commission's ruling was sustained.
13. An appeal was made to the Kentucky Court of Appeals.

REASONS: KRS 341.050(1)(a) defines "covered employment" as service performed by an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The common-law factors usually invoked in such cases have been those used by courts to determine the master/servant relationship. Those factors are given in RESTATEMENT OF AGENCY (SECOND) § 220 (1958), and include the extent of the master's control over details of the work, the kind of occupation and degree of skill involved, the duration of the employment, the method of payment, and the belief of the parties concerning their relationship. The courts have agreed that no single factor is determinative and that a realistic appraisal of the situation as a whole is necessary; still the "right to control" test ranks high.

Considering all factors, the salesmen are dependent on the employer for a place to work and products to sell. Without the company, there would be no work. Their economic livelihood is tied to the company. While little control was exerted by the company, considerable control existed. The company could choose when to open and close its facilities and what products to stock. It determined the base price of the products. The salesmen were an integral part of the companies ongoing operation, not independent contractors hired to do a specialized service on a limited basis.

DECISION: The salesmen were found to be employees and are covered under the provisions of Unemployment Insurance Law.

KEN'S CARPETS UNLIMITED, INC. V. KUIC (NOT Published) NONPRECEDENT

8013 EMPLOYER-EMPLOYEE RELATIONSHIP - DRIVERS AND OTHER WORKERS FOR A TRUCKING COMPANY.

ISSUE: Whether individuals who lease equipment from and perform services for a business are considered employees of that business or independent contractors.

FACTS:

1. In 1983 and 1984 the appellant was a partnership.
2. Appellant later became a proprietorship.
3. Appellant was in the business of hauling commodities for individuals and businesses by truck.
4. Appellant utilized the services of a number of individuals to conduct business.
5. Some service was provided by individuals or entities who owned and operated their own trucks and were independent contractors.
6. Another group of individuals were considered lessee-drivers.
7. Lessee-drivers signed written contracts with the appellant.
8. Appellant owned, maintained and paid all expenses for operation and use of the trucks and equipment used by the lessee-drivers.
9. Lessee was liable only for speeding citations or negligent acts.
10. Lessee was to provide the labor and be personally liable for any other driver(s) he provided.
11. Leases were for a six (6) month term with either party having the authority to terminate with thirty (30) days notice.
12. Lease contained a provision that the lessee acknowledged he was self-employed.
13. Another group of individuals provided service to the appellant doing work on appellant's trucks, business records work, and moving vehicles or picking up vehicle parts.
14. An investigation was conducted as a result of two unemployment insurance claims filed by individuals who had worked for the company.
15. Records revealed the company had not paid contributions on those individuals and a number of others.

16. Notice of assessment for four quarters of 1983 and the four quarters of 1984 were issued with contributions and penalties totalling $20,685.93.
17. After review the Commission found the appellant owed contributions and penalties totalling $26,547.92 relative to drivers and other workers.
18. Decision was affirmed by the Franklin Circuit Court and the Kentucky Court of Appeals.
19. Motion for discretionary review by the Supreme Court of Kentucky was denied.

REASONS: KRS 341.050(1)(a) provides that individuals are subject to contribution when they have the status of an employee as determined by common law. The court in STURGILL V. BARNES, Ky., 300 S.W.2d 574 (1957), set forth the criteria recognized for determining the status of such an individual. The chief criterion is the right to control the details of the work. However, the control or the degree thereof is not the only criterion. The cases of RADLEY V. COMMONWEALTH, 297 Ky. 830, 181 S.W.2d 417 (1944) and LITTERAL V. COMMONWEALTH, 312 Ky. 505, 228 S.W.2d 37 (1950), are very clearly on point. In RADLEY, SUPRA, the issue involved was the relationship between taxicab owners and drivers with whom they had entered into written contracts or leases. In LITTERAL, the issue was the relationship between the operator of beauty parlor who rented or leased booths to beauty operators who rented the space. In both instances, the court found that the lessees were employees and therefore liable for unemployment compensation contributions. As in RADLEY and LITTERAL, the evidence reflected that the lessees and other designated persons were the employees of the appellant. As the court stated:

Whitaker possessed the right to control them, owned the equipment, determined who would be employed, where the work would be performed, the method and time of payment. These are all indica of an employer-employee relationship.

DECISION: Courts held individuals were employees and their earnings subject to contribution.

WHITAKER TRUCKING COMPANY, INC. V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION 87-CA-000859-S (Not Published) NONPRECEDENT

8014 EMPLOYER-EMPLOYEE RELATIONSHIP - TRUCK DRIVERS OF COMPANY WITH CONTRACT TO PROVIDE DRIVERS TO HAUL FREIGHT FOR ANOTHER TRUCKING COMPANY.

ISSUE: Whether truck drivers for appellant company with contract to provide drivers to operate trucks to haul freight for another trucking company were employees of appellant company.

FACTS:
1. Appellant, under contract, provided drivers to operate trucks hauling general freight for North American Van Lines.
2. A note was signed with North American van Lines for trucks used and payments were deducted by the van lines from monies paid to appellant for hauling freight.
3. Appellant hauled only for North American Van Lines and all hauls were dispatched by North American Van Lines.
4. Appellant advertised for drivers and had prospective drivers complete applications that were mailed to North American Van Lines.
5. Only drivers approved by North American Van Lines could drive for the appellant.
6. North American Van Lines could withdraw approval of drivers under certain circumstances such as driving under the influence of alcohol and failure to pick up loads.
7. Appellant business could terminate the relationship with a driver without North American Van Lines' concurrence.
8. The drivers had no financial investment in the trucks used.
9. Drivers were paid by check by appellant and appellant deducted drivers advances and workmen's compensation premiums.
10. All drivers signed an indefinite agreement with the appellant agreeing to contract their labor on a "cents per mile pay rate" and that they were responsible for paying workmen's compensation, personal taxes and expenses.

11. As a result of an unemployment insurance claim being filed in 1989 and an investigation by a Division Auditor, the trucking business was notified it was a subject employer effective January 1, 1984 and required to file wages reports and contributions for quarters thereafter.
12. On May 30, 1989, the Division issued a notice of assessment for quarters of 1984, 1985, 1986, 1987 and 1988.
13. An appeal was filed arguing that the drivers were not employees.
14. In July, 1989, the business incorporated and began reporting drivers as employees and changed some aspects of their relationship between the drivers.
15. No formal action was taken on the appeal and none of the assessment which had been made relative to 1984 through 1988 was paid.
16. On March, 1990, the business protested the contribution rate of 9.00% which had been assigned to the business.
17. The high rate was applicable as appellant had not filed contributions.

REASONS: KRS 341.050 (1)(a) defines "covered employment" as service performed by an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

To make such determinations, we utilize those factors usually invoked by the courts to determine the master/servant relationship. Those factors are given in Restatement OF AGENCY (SECOND) S 220 (1958), and include the extent of the master's control over details of the work, the kind of occupation and degree of skill involved, the duration of the employment, the method of payment and the belief of the parties concerning their relationship. The courts have agreed that no single factor is determinative and that a realistic appraisal of the situation as a whole is necessary.

Kentucky courts have adopted the factors mentioned above in determining whether individuals are employees for state unemployment insurance purposes. They have rejected the argument that the term employee in state unemployment insurance law is to be given a broader meaning than the ordinary meaning of the work. However, S.W. 2d, that a situation must be viewed, "realistically in light of the business conducted and the nature of the service rendered." In that same case, the court referred to another of its rulings, COMMONWEALTH V. POTTS ET AL., 295 KY 724, 175 WW. 2d 515, wherein it was held that, "legal fictions would be disregarded if the conventional relationship of employer and employee existed."

It is clear that Korsgaard wished to create a relationship with drivers which was not that of employer-employee. It is also clear that this intent was made known to the drivers and that they accepted such a characterization of the relationship agreeing to the responsibility of reporting and paying their own taxes. If we were obliged to decide this case on contract law on under the notion that unemployment insurance statutes are simply taxing statutes, we could perhaps quickly conclude that the drivers during the period in question were not employees. However, such an analysis would be superficial and contrary to the basic premise under which the unemployment insurance program was created, to establish a mandatory unemployment insurance program to provide coverage to workers who become unemployed through no fault of their own. The federal statutes, as well as state statutes often identical or similar to them which establish the program clearly envision general, broad-brush coverage of workers. This is evidenced by the general and somewhat subjective definition of coverage as extending to common law employees, which is then followed by very specific definitions relative to certain kinds of service which are covered or non-covered.

Statutes governing the unemployment insurance program are not simply taxing statues. To be so construed would be contrary to the purpose for which they were created. The statues are social legislation creating a social benefit program supported by an employer tax. Thus, in the area of coverage, the taxing provisions cannot be separated from benefit provisions. If the worker is to covered for taxing purposes, he is not covered for benefit purposes.

The courts have held that the entire relationship must be examined realistically. Doing so in this case leaves little doubt that the drivers in the case are employees. Although having much freedom in their work duties, it is clear that Korsgaard ultimately controlled the relationship of the drivers to his business and could exercise the degree of control he wished to. Although the agreement signed by the drivers does speak to the intent of the parties, it does not realistically characterize the relationship. The drivers having no significant investment in any business, simply drove trucks under conditions mandated by the government, North American Van Lines and Korsgaard. They owned no trucks and if they lost their relationship with Korsgaard had no business to continue working in. They'd simply have to find another business to drive for. Their relationship to Korsgaard was of indefinite duration and the service they performed was an integral, essential part of Korsgaard's business. Korsgaard was responsible for the expenses of carrying on the business and the drivers were only responsible for their personal expenses. While they agreed to pay their own taxes this does not compel a finding that Korsgaard was not their employer for unemployment insurance purposes.

DECISION: Drivers were covered employees and determinations of subject-ivity and assessment are affirmed. The 1990 contributions rate of 9.00% is affirmed.

C.O. # 56629 PRECEDENT

8015 DIVISION ACTION REQUIRED PRIOR TO COLLECTION EFFORTS AGAINST SUCCESSOR FOR DELINQUENCY OF PREDECESSOR.

ISSUE: Whether Division may pursue collection efforts against successor prior to completing all reasonable collection efforts against predecessor.

FACTS:

1. Entity succeeded to a restaurant business.
2. Predecessor had failed to pay contributions for workers.
3. Successor was notified that successorship had occurred and reserve account had been transferred to successor.
4. Predecessor was notified of delinquency.
5. Successor then notified of predecessor's delinquency and that successor was secondarily liable for such delinquency.
6. Predecessor entered into a partial payment agreement with division but subsequently defaulted.
7. A lien was filed against the predecessor's property in January, 1990. In February, 1990, the successor was notified that a lien had been filed against the successor's property.

REASONS: KRS 341.540 imposes upon a successor secondary liability for delinquent contributions, penalties, and interest of the predecessor. Section (2) of the statute establishes the order of execution for predecessor delinquencies. Since the successor's liability is secondary for a predecessor's delinquencies and the order established for execution of a judgment for a predecessor's delinquencies reaches the assets of a successor lastly, all reasonable collection efforts should be taken against a predecessor before demanding payment from and taking collection actions against the successor. The division must notify the successor of predecessor delinquencies and of secondary liability for such delinquencies within six months of leaning of successorship. But collection efforts against the successor must be postponed until collection efforts including liens and levy are taken against the predecessor. Only if a property search reveals no attachable property and no reasonable collection efforts against the predecessor remain should the division take collection actions against the successor.

DECISION: Determination holding successor secondarily liable for predces-sor delinquencies was affirmed. However, the division's action to file a lien against assets of successor and demand payment from successor for predecessor delinquencies was set aside as premature.

C.O. # 54871 PRECEDENT

8016 SUCCESSORSHIP - PURCHASER OF LIQUOR BUSINESS LIABLE FOR DEBT TO DIVISION OF SELLER EVEN THOUGH SELLER FAILED TO DISCLOSE DEBT UNDER KENTUCKY BULK SALES STATUTE.

ISSUE: Whether a buyer of a business is liable for unemployment tax not paid by the seller.

FACTS:
1. Appellant purchased an operating retail liquor business.
2. Seller transferred his entire business, good will and all assets to the appellant on the day of purchase.
3. Business had been operating in a manner to make it subject to the unemployment tax prescribed in Chapter 341 of KRS.
4. In accordance with the Kentucky Bulk Sales Statute, the seller furnished the appellant with a written verified statement of all creditors and the amount of the indebtedness due.
5. Seller did not include the amount of unemployment insurance tax owed.
6. Seller had never made a report to the Unemployment Compensation Commission, consequently, the seller had no record of the amount that was owed.
7. Subsequent to the making of the sale the seller died.
8. Later action was taken to recover from appellant the amount of the tax, penalties and interest due from the seller to the Commonwealth of Kentucky for the benefit of the Unemployment Compensation Commission.
9. Appellant appealed to Franklin Circuit Court but the Court upheld the action.
10. Appellant appealed.

REASONS: In Chapter 377 of KRS is what is known as the Kentucky Bulk Sales Statute, and its section 377.020 requires the seller under such sale to furnish to the buyer "a written verified statement of all of the creditors of the vendor together with their addresses and the amount of the indebtedness due and to become due to each of the creditors", etc. The seller made that statement and delivered it to appellant at the time of the sale, but he did not include the amount of the tax due as a subject employer.

The appellant admitted its knowledge of liability of such tax because it made inquiry of the Unemployment Compensation Commission as to whether any such liability had been reported by him, thereby indicating that the business conducted by the seller made the operator liable.

In OPPENHEIMER V. COMMONWEALTH, 305 Ky. 147, 202 S.W. 2d 373, 374, it was held that the contributions exacted from an employer described in Chapter 341 is a tax levied for the public policy purpose described therein, and being a tax it was a debt or an obligation which the act imposed on a purchaser of the entire business of the seller to the extent of the value of the stock purchased.

DECISION: Judgment is affirmed. Appellant liable for the amount of the judgment rendered against it.

KENTUCKY STATE LIQUORS V. COMMONWEALTH 223 S.W. 2d 368 PRECEDENT

8017 SUCCESSORSHIP - ENTITY WHICH ASSUMED ABANDONED RESTAURANT BUSINESS NOT A SUCCESSOR UNDER KRS 341.540.

ISSUE: Whether a subsequent franchisee occupying the same premises and conducting the same type of business can be found a successor employing unit of a previously abandoned franchise for unemployment insurance contribution purposes.

FACTS:

1. Zenco Corporation operated a restaurant under the franchise name of "Duff's Smorgasbord."
2. Prior to April 8, 1983, Zenco was experiencing financial difficulties and had notified its landlord it would have to abandon the leased premises.
3. On April 11, 1983, the day after Zenco ceased operations, Wildot Inc., negotiated a lease with the owner of the building, occupied the premises and began a restaurant operation under the franchise name "Duff's Smorgasbord."
4. To avoid repossession, Wildot paid Zenco's debts on movable restaurant equipment.
5. Several of Zenco's former employees were hired.
6. Wildot acquired inventory worth approximately $1000.00 which was abandoned by Zenco and later disposed of most of it as worthless.
7. Wildot was notified it had been determined to be a successor to Zenco for unemployment insurance contributions purposes.
8. Wildot appealed and the Commission affirmed the administrative determinations.
9. The Franklin Circuit Court affirmed and Wildot appealed.
10. Court of Appeals affirmed and Wildot petitioned for discretionary review.

REASONS: The facts are not in dispute. The only question presented is whether these facts come within the language of the statute:

KRS 341.540 (1) provides:

Any employing unit which succeeds to or acquires the organization, trade or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including penalties, and shall continue the payment of all contributions and penalties due under this chapter, except that the successor or acquirer shall not be required to assume the liability of any delinquent contributions and penalties of a predecessor or predecessors unless the cabinet notifies the successor or acquirer of such delinquency within six (6) months after the department has notice of the succession or acquisition.

The Court held that under the facts presented Wildot did not "succeed to the business of Zenco." There is not any way that Zenco could be considered a going concern on April 11 when Wildot commenced business. It is clear that Zenco was out of business, that there was absolutely no connection, negotiation, or transaction between Zenco and Wildot, and that Wildot did not succeed to or acquire anything from Zenco.

The plain language of the statute requires some connection between the two businesses before liability can be imposed. There is none at all here.

DECISION: The Supreme Court of Kentucky held that subsequent franchisee was not successor employing unit of previous franchise. Reversed.

WILDOT, INC. V. UNEMPLOYMENT INS. COM'N KY., 762 S.W. 2d 17 PRECEDENT

8018 SUCCESSORSHIP - LENDING INSTITUTION FORECLOSES ASSETS, SELLS TO ANOTHER PARTY.

ISSUE: Whether purchase of business assets from mortgage holder, hiring of workers of previous owner, and resumption of same kind of business in same location without significant interruption is sufficient to establish successorship.

FACTS:

1. Company A operated manufacturing business and had contracts to produce customer restaurant furniture in several states.
2. Company A's business assets were security for loans from lending institutions.

3. Company A defaulted on loans and became delinquent in filing contributions with the division.
4. Lending institution notified company A of intent to foreclose.
5. Company A notified lending institution it would close business.
6. Lending institution sought and found purchaser for secured assets, including machinery, inventory, property lease and accounts receivable.
7. Company A notified workers of closure on June 26, 1989. No work performed. Applications made available to workers for employment with company B.
8. On June 27, 1989, company B interviewed workers, changed signs, began production. Most workers for company A hired by company B.
9. Company B contacted all companies which had contracted with company A offering to complete those contracts under same terms. Most agreed.
10. The division held successorship and transferred the reserve account of company A to company B and held the latter secondarily liable for the delinquencies of company A.

REASONS: The Commission had traditionally held successorship when two of five factors were met:

1. The business was a going concern when acquired.
2. The same type of business was continued or resumed in the same establishment.
3. The subsequent owner employed fifty percent or more of previous owner's personnel.
4. The previous owner employed fifty percent or more of subsequent owner's personnel.
5. The subsequent owner acquired significant work contracts or commitments from the previous owner.

These factors had been derived from one of the few court rulings in Kentucky on the issue of successorship. OPPENHEIMER V. COMMONWEALTH, 202 SW 2d 373. In 1988, the Kentucky Supreme Court ruled in another case involving successorship, WILDOT INC. V. UNEMPLOYMENT INSURANCE COMMISSION, Ky., 762 SW 2d 17 (1988). In that case the court held that for successorship to occur, regardless of the other factors involved, there must be some connection, negotiation or transfer between the parties considered predecessor and successor.

In this case, the lending institution foreclosed on the assets of company A which were then sold to company B. No connection, negotiation or transfer between company A and company B was shown. Thus, company B was not successor for unemployment insurance purposes.

DECISION: The determination of successorship, reserve account transfer, and secondary liability for delinquencies were set aside.

C.O. # 56418 PRECEDENT

8019 SUCCESSORSHIP - PURCHASER OF DONUT SHOP LIABLE FOR CONTRIBUTIONS OF PREDECESSOR EVEN THOUGH SELLER DID NOT DISCLOSE TO PURCHASER DEBT OWED TO DIVISION.

ISSUE: Whether a buyer of a business is liable for unpaid unemployment insurance delinquent taxes or contributions owed by the seller.

FACTS:
1. Appellant purchased all assets of donut shop and they were transferred to him on June 30, 1944.
2. Appellant continued to operate the business in the same place, with substantially the same employees and therefore became subject employer.
3. Seller owed taxes and contributions to its reserve account for the year 1943 and the first half of 1944.

4. Appellant received a verified statement of all the sellers creditors and it did not disclose the amount due for delinquent taxes and contributions.
5. The Commission attempted recovery of seller's unpaid contributions from appellant.
6. Appellant appealed to Franklin Circuit Court.
7. Court affirmed recovery action.
8. Appellant appealed.

REASONS: KRS 341.540 provides, "If a subject employer shall transfer or otherwise reorganize his entire organization, trade or business, the successor in interest is hereby required to assume the resources and liabilities of such employer's reserve account and to continue the payment of all contributions due under this chapter. If, however, a successor employing unit was a subject employer at the time of the transfer, its contribution rate shall not be affected by the transfer, but such rate shall apply to the whole of its business, including that portion acquired by the transfer, until the next computation date."

The appellant was not a subject employer at the time, so only the first part of the quoted statute is applicable. This is an absolute and unqualified provision. The transferee of the business or successor in interest takes the transferer's reserve account as it is - its "resources and Liabilities." The work "resources" means what has been credited and what is due it. The account becomes his whether it be overpaid or balanced or delinquent. He steps into the shoes of the transferor.

DECISION: Judgment affirmed.

OPPENHEIMER V. COMMONWEALTH 202 S.W. 2d 373 PRECEDENT

8020 ESTABLISHING CONTRIBUTION RATE FOR EMPLOYER WHO HAS BEEN SUBJECT FOR TWELVE CALENDAR QUARTERS.

ISSUE: Whether employer must be subject twelve calendar quarters or twelve COMPLETED calendar quarters to have rate assigned on basis of reserve account experience rather than an assigned rate of 3.00 percent.

FACTS:
1. Employer became subject effective October 2, 1986.
2. Employer was assigned 3.00 percent rate for 1986, 1987, 1988 and 1989 pursuant to KRS 341.270 (2).
3. Division assigned rate for 1990 pursuant to same subsection on basis that as of computation date, employer had not been subject for twelve completed calendar quarter.

REASONS: The statute did not specify that an employer be subject to twelve COMPLETED calendar quarters to be assigned contribution rates based on experience. Since employer had been subject in twelve quarters as of the computation date for the determination of the rate for 1990, the rate must be determined on the basis of the account's experience.

DECISION: The rate determination was set aside and the case remanded to the division to assign another contribution rate for 1990 based on account experience.

C.O. # 55442 PRECEDENT

8021 ASSIGNING RATE UNDER KRS 341.272 TO NEW EMPLOYER CLASSIFIED IN MAJOR GROUP 87 OF STANDARD INDUSTRIAL CLASSIFICATION MANUAL REQUIRES THAT EMPLOYER MANAGE CONSTRUCTION CARRIED OUT BY OTHERS.

ISSUE: Whether land survey company which does computer and design consultation relative to subdivision design in addition to boundary surveys for engineers, real estate agents, or mortgage companies should be assigned contribution rate under KRS 341.272.

FACTS:
1. New employer engaged in doing boundary surveys and design and computer consulting relative to subdivision development is classified under SIC Major Group 87. Employer does not manage construction.
2. Division assigns contribution rate of 9.00 percent for 1990.
3. Appeal made to Commission.

REASONS: KRS 341.272 requires the assignment of the highest rate on the tax table in effect for new employers engaged in the contract construction trades. 903 KAR 5.370 defines contract construction as these types of services classified under Major Group 15, 16, and 17 of the Standard Industrial Classification Manual and those services under Major Group 87 engaged in management of construction carried out by others. Since the land survey company was merely providing professional services and consultation rather than actually managing construction and since much of its work involved boundary surveys of parties not involved in construction, the company did not meet the requirements of 903 KAR 5:370.

DECISION: Division's assignment of 9.00 percent rate set aside and case remanded to division for assignment of rate under KRS 341.270.

C.O. # 57263 PRECEDENT

8022 REIMBURSING EMPLOYER MAY OBTAIN ADJUSTMENT OR CREDIT FOR AMOUNTS DIVISION PAID EX-EMPLOYEE INITIALLY HELD QUALIFIED FOR BENEFITS IF FOUND DISQUALIFIED FROM RECEIVING BENEFITS DURING APPEAL.

ISSUE: Whether or not reimbursing employer may receive adjustment or credit for amounts of benefits paid to a claimant for which employer was required to reimburse division when claimant later and finally determined to be disqualified for such benefits.

FACTS:
1. Claimant files claim and receives benefits which must be reimbursed by former employer.
2. Employer files appeal and following hearing, referee upholds claimant's qualification for benefits.
3. Employer appeals to Commission.
4. Ruling by Commission is postponed as criminal charges are still pending concerning circumstances which led to claimant's separation from employer.
5. After much delay, claimant pleads guilty to charges.
6. Commission holds claimant disqualified for benefits he'd received and established overpayment.
7. The employer requested an adjustment for monies it had paid to the division in reimbursement for monies paid to claimant as benefits.
8. In another case of earlier origin, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KACO UNEMPLOYMENT INSURANCE FUND INC., 37 KLS 9, p.6, the Kentucky Court of Appeals held that benefits paid to workers later held to be overpayment as a result of departmental error must be charges to the pooled account under KRS 341.550 (2) and reimbursement by employers who have elected to make payments in lieu of contributions is not required.

REASONS: KRS 341.330 provides that an employer may request adjustment for contributions, interest, and penalties erroneously paid. The cited court ruling held that benefits paid in cases where claimant found disqualified on appeal must be charged to the pooled account under KRS 341.550 (2), implying that such benefits were paid in error.

The court specifically held that an employer electing to make payments in lieu of contributions was not required to reimburse the division for such benefits.

In its decision, the court cited KRS 341.550 (2) and KRS 341.415 (1). Although the circumstances involved in the case before the court predated a change in the wording of KRS 341.415 (1), the court cited the newer version of the statute but discussed no significance in the wording which had been added. That wording is as follows: "For purposes of this section, overpayments as a result of a reversal of entitlement to benefits in the appeal or review process shall not be construed to be the result of departmental error."

Considering the court's discussion in the cited cased, we are convinced that the change in wording in KRS 341.415 (1) does not provide a basis for ruling in the present case contrary to the court's ruling there.

In the case at bar the situation is similar to that in the case presented to the court. Thus, the employer is not required to reimburse the division for benefits paid to the claimant. The employer may be granted an adjustment to its account.

DECISION: Employer's request for adjustment was granted and the reimbursing employer's account was adjusted to reflect no liability for the benefits paid to claimant.

C.O. # 55369 PRECEDENT

NOTE: This precedent in no way affects policy involving recoupment or recovery of overpayments from claimants under KRS 341.415.

8023 REIMBURSING EMPLOYERS NOT REQUIRED TO REIMBURSE DIVISION FOR BENEFITS PAID TO CLAIMANTS WHICH EVENTUALLY HELD TO BE OVERPAYMENT AS A RESULT OF REVERSAL ON APPEAL.

ISSUE: Whether KRS 341.550 (2) which provides that any benefits paid through error shall be charged against the pooled account, is applicable to reimbursing employers.

FACTS:

1. Employers were reimbursing governmental employers.
2. Employers elected to reimburse the Division of Unemployment Insurance for benefits paid to their former employees in lieu of paying contributions.
3. Employers were members of Kentucky Association of Counties, which administers the quarterly reimbursement of benefit payments.
4. Former employees filed for unemployment insurance benefits during 1985 to 1987.
5. Employees were paid benefits, the employers were charged for these benefits and the Division was reimbursed by the employers.
6. Each employer challenged the awarding of benefits to each claimant.
7. The Division reversed the initial determination and held each claimant was disqualified from receiving benefits and that benefits paid constituted overpayments.
8. Division sought recoupment from the claimants and obtained some repayment.
9. In mid-1987 the Division, subsequent to the Kentucky Court of Appeals ruling in KUIC V. MURPHY, 714 SW 2d 488, ceased recoupment from the claimants, reversed credits given the reimbursing employers, returned recouped monies to the claimants and began seeking reimbursement from the reimbursing employers.
10. Employers refused to pay and appealed to the Commission for review.
11. The Commission affirmed the determinations.
12. Rulings were appealed to Franklin Circuit Court which ruled the Commission was in error as a matter of law, and reversed and set aside the Commission Orders.
13. Commission appealed the ruling to the Kentucky Court of Appeals.

REASONS: KRS 341.550 (2) provides ANY BENEFITS PAID THROUGH ERROR SHALL be CHARGED AGAINST THE POOLED ACCOUNT. The repayment of benefits paid erroneously as provided in subsection (1) of KRS 341.415 shall be credited to the pooled account. The pooled account shall be credited with any sums deducted from future benefits as provided in KRS 341.415. (Emphasis added.)

Recovery is provided for in KRS 341.415 (1) as follows: Any person who has received any sum as benefits under this chapter . . . while any condition for the receipt of such benefits was not fulfilled. . . shall, in the discretion of the secretary, either have such sum deducted from any future benefits payable to him under this chapter or repay the department for the fund a sum equal to the amount received by him. If after due notice the recipient of such sum fails to remit or arrange for remittance of the sum, the sum may be collected in the manner provided in subsection (2) of KRS 341.300 for collection of past due contributions and ANY SUMS SO COLLECTED SHALL BE CREDITED TO THE POOLED ACCOUNT. Unless there has been a false statement, misrepresentation, or concealment of material information by a recipient of benefits, THERE SHALL BE NO RECOUPMENT OR RECOVERY OF AN IMPROPERLY PAID BENEFIT, EXCEPT BY DEDUCTION FROM ANY FUTURE BENEFITS PAYABLE TO HIM UNDER THIS CHAPTER, IF THE BENEFIT WAS PAID AS A RESULT OF DEPARTMENTAL ERROR. For PURPOSES OF THIS SECTION, OVERPAYMENTS AS A RESULT OF A REVERSAL OF ENTITLEMENT TO BENEFITS IN THE APPEAL OR REVIEW PROCESS SHALL NOT BE CONSTRUED TO BE THE RESULT OF DEPARTMENTAL ERROR. (Emphasis added.)

KRS 341.550 (2) mandates that ANY benefits paid by the department through error shall be charged against the Pooled Account. There are no qualifications or exceptions to this term. Chapter 341 establishes an unemployment insurance fund consisting, INTER ALIA, of "all contributions, PAYMENTS IN LIEU OF CONTRIBUTIONS, and money collected under this Chapter, except fines, penalties, and interest on delinquent contributions collected under KRS 341.300." The defendant Division in administering the unemployment insurance fund is required by KRS 341.040 to establish and maintain a "reserve account" for all employers covered under KRS 34l1.530 and .540 and a "Pooled Account" pursuant to KRS 341.550. Benefits incorrectly or wrongfully paid to a claimant by a Division error are to be recouped by the Division and paid over into the Pooled Account. However, benefits paid through departmental error are not recoupable unless those benefits are paid based upon a false statement, misrepresentation or material concealment of facts by the claimant. KRS 341.415. (Emphasis in original.)

If the words of the statute are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation. The Court of Appeals held that the trial court's ruling correctly interpreted the statute and the intent of the General Assembly.

DECISION: The Kentucky Court of Appeals affirmed the judgment of the Franklin Circuit Court.

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION V. KACO UNEMPLOYMENT INS. FUND. INC. KY. App., 793 S.W. 2d 845 PRECEDENT

8024 TRANSFER OR RETURN OF CONTRIBUTIONS WHEN RAILROAD WORKERS REMOVED FROM STATE AND FEDERAL U.I. PROGRAMS TO A SEPARATE FEDERAL PROGRAM.

ISSUE: Whether funds from the "Pooled Account" should be transferred to the Federal Government or refunded to the contributing employees.

FACTS: 1. The Kentucky Unemployment Compensation Act established a comprehensive plan for providing unemployment benefits to workers in covered employment.

2. Employers are required to pay unemployment taxes into a fund known as the Unemployment Insurance Fund, which is to be administered "separate and apart from all public money or funds of the State".
3. From January 1, 1937 to July 1, 1939, railroad employees were required to contribute one percent of their wages to the fund.
4. This fund was on deposit with the Secretary of the Treasury of the United States to the credit of the account of this State in the Unemployment Trust Fund.
5. Money was requisitioned from this fund from time to time by the State Commission as needed for the payment of benefits.
6. The Federal Government funds the State Commission on a yearly basis to pay administrative expenses of the Commission.
7. All contributions made by the employer are credited to the employer's reserve account.
8. The Commission is required to maintain within the fund a Pooled Account, mingled and undivided, where all worker contributions are credited.
9. $1,040,000.00 of the Pooled Account represented contributions made by railroad workers who were in covered employment from January 1, 1937 to July 1, 1939.
10. On July 1, 1939, railroads and their employees were removed from the operation of state unemployment compensation acts and placed under the federal act.
11. Railroad employees could not assert any right to unemployment benefits under an unemployment compensation law of any state thereafter.
12. In subsections (b) and (c) of the Railroad Unemployment Insurance Act, 45 U.S.C.A. § 363 it was provided in substance, that unless the State Commission, on or before April 13, 1940, authorized the Secretary of the Treasury to transfer from its account in the unemployment trust fund to the railroad unemployment insurance account in the unemployment trust fund an amount equal to the balance of the railroad employer's reserve accounts, plus the amount transferred to the Pooled Account from contributions of the railroad workers, the Federal Government would no longer pay to the State Commission the funds to pay for their administration expenses.
13. The 1940 General Assembly of Kentucky enacted House Bill No. 536 which authorized the transfer of these funds.
14. The State Commission filed suit seeking a declaration of rights.
15. The defendants in the action were three railroad employees who represented all others similarly situated.
16. These defendants answered the suit asserting the right of the railroad workers to have refunded to them their contributions.
17. Decision of the circuit court voided the transfer of funds and held each railroad worker should be refunded his contributions to the pooled account.
18. The Unemployment Compensation Commission appealed to the Kentucky Court of Appeals.

REASONS: Section 180 of the Constitution of Kentucky provides in part: "Every act enacted by the general assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

Monies may be requisitioned from the State's account in the Unemployment Trust Fund solely for the payment of benefits. The Act, which is the levying statute, levies a tax for the specific purpose only of paying benefits to unemployed workers. The contributions of the railroad workers paid pursuant to the Act and credited thereunder the Pooled Account are taxes validly levied, in accordance with the Constitution, section 180, that purpose being solely for the payment of Unemployment Compensation benefits under the Kentucky act. The Legislature was consequently without power, by virtue of the Constitution, to devote the taxes raised by this levy to another purpose.

DECISION: Judgement is affirmed in part and reversed in part.

1. The fund in controversy may not be transferred to the Federal Government.
2. The fund must remain in the Pooled Account.
3. No part of the fund in the Pooled Account may be used for administrative expenses.

UNEMPLOYMENT COMPENSATION COMMISSION V. SAVAGE, 140 S.W. 2d 1073 PRECEDENT

8025 MISINTERPRETATION OF INFORMATION GIVEN BY THE DIVISION DOES NOT EXCUSE EMPLOYER FROM PAYMENT OF CONTRIBUTIONS.

ISSUE: Whether misinterpretation of a statement of an employee of the Division of Unemployment Insurance by an employer can stop the Division from collecting contributions due.

FACTS:
1. During 1948 appellant was a "subject employer" under Unemployment Compensation Act.
2. Appellant misinterpreted a statement by an employee of the Division of Unemployment Insurance, as to number of employees receiving specified wages in three of four quarters required by Unemployment Compensation Act to subject employer to liability for contributions under Act, as meaning that such employees must be the same persons during three calendar quarters.
3. Appellant failed to file the proper contributions reports.
4. Division of Unemployment Insurance brought action against appellant to recover contributions and penalties allegedly due for the years 1949 through 1953.
5. The court entered a judgment for the appellant.
6. Division moved for an appeal.

REASONS: The information given by the Division employee was the abstract proposition. The appellant chose to place upon that information its own interpretation.

It is very doubtful whether the state government can be estopped by a mistake, unauthorized act or dereliction of duty on the part of an employee. Even if an estoppel might be invoked in special circumstances, the case here in which the appellant has shown only their own misinterpretation of a statement of law by an employee of a state agency, is not one in which to invoke the doctrine.

DECISION: Judgment reversed.

COMMONWEALTH EX REL. DIV OF U.I. V. STONE 297 S.W. 2d 58 PRECEDENT

8026 REQUIRED FILING OF CONTRIBUTIONS AND CONTRIBUTION REPORTS BY BUSINESS MEETING COVERAGE CRITERION NOT UNCONSTITUTIONAL.

ISSUE: The constitutionality of the Unemployment Compensation Law.

FACTS:
1. Appellant was a car wash establishment.
2. Appellant employed four persons.
3. Appellant refused to submit to the law by paying the required tax or even by filling out any forms.
4. Division of Unemployment Insurance brought action against the appellant and its principal stockholder to enjoin operation of the establishment until the law was complied with. Franklin Circuit Court issued injunction against appellant.
5. Appellant appealed pleading unconstitutionality of the law.
6. Appellant asserts that the law is discriminatory in requiring employers to pay the tax while automated businesses rendering the same kind of service were exempt.

7. Appellant argued that the provisions of unemployment compensation law requiring the filing of informational reports by employers was unreasonable and therefore invalid because the same information was included in income tax reports to the Kentucky Department of Revenue.
8. Appellant suggested that it was "arbitrary" to use an injunction shutting down their business as a means of enforcing compliance on their part with the unemployment compensation law, because the effect was to put their employees out of work and thus create unemployment in violation of the very purpose of the law.

REASONS: Unemployment Compensation laws uniformly have been upheld against the contention that they were discriminatory in exempting business with less than a prescribed number of employees, or with no employees at all. A classification based on having more than a minimal number of employees validly may be used in subjecting employers to an unemployment compensation tax, it should make no difference for what reason the exempted businesses happen to have less than the minimum number of employees, or even none - whether it is because the businesses are automated or for some other reason.

The primary objective of the unemployment compensation laws is to provide relief against the kind of unemployment that is created when jobs that once existed cease to exist. The automated business that employs no workers does not contribute to that kind of unemployment; it merely fails to create any jobs. While that lessens the number of jobs available, it does not cause a decrease in the number of existing jobs. It is not discriminatory for the tax to be imposed upon those who create jobs while exempting those who do not.

The unemployment compensation information reports are designed for a purpose entirely different from that of income tax reports, and although the information sought by the former might be obtainable from the latter it would increase the administrative work of both agencies. In the absence of a showing that the filing of unemployment compensation returns is unreasonably burdensome on the employer in comparison with the ease with which the information could be obtained, the requirement for filing the unemployment compensation returns cannot be held unconstitutional.

The legislature in enacting the law authorized injunctive procedure, KRS 341.265, and thus decided that the use of that procedure would have beneficial effects in achieving compliance with the law outweighing any incidental effect it might have offending the purpose of the law.

DECISION: Judgment affirmed.

WASHER ONE, INC. V. COMMONWEALTH EX REL. DIV. OF U.I. KY., 482 S.W. 2d 500
PRECEDENT

8027 RETROACTIVE CHANGE IN CONTRIBUTION ASSESSMENT STATUTE DOES NOT VIOLATE CONSTITUTION WITH REGARD TO RIGHTS AND OBLIGATIONS OF CONTRACTS.

ISSUE: Whether making the amendments passed by the 1982 General Assembly, increasing the wage base and tax rate payable by employers, retroactive to January 1 is unconstitutional.

FACTS:
1. The 1982 session of the General Assembly amended KRS 341.030 (6) and KRS 341.270 to increase the wage base and tax rate payable by employers for the purpose of unemployment insurance contributions.
2. Increase would become effective retroactively to January 1, 1982.
3. On July 8, 1982, the appellee filed an action for declaration of rights and injunctive relief to prevent the Division from applying Section 1 and 2 of House Bill 746 to its members having contracts executed prior to April 1, 1982, contending that such application would impair rights and obligations accrued under those contracts in violation of Section 19 of the Kentucky Constitution.

4. On July 8, 1982, Franklin Circuit Court entered a temporary injunction, restraining the Division from imposing any tax which was not in effect prior to April 1, 1982, upon general contractors, or its members.
5. After motions for judgment on the pleadings, a judgment was entered and subsequently the lower court issued a permanent injunction holding that Section 1 and 2 of the Act were unconstitutional to the extent that those sections imposed a tax on the appellee and its members in excess of the tax in effect at the time of execution of any construction contracts.
6. Motion for transfer of appeal to the Kentucky Supreme Court of Kentucky followed and was granted.

REASONS: It is within the power of the General Assembly to levy taxes upon employers for the purpose of their contribution to the Unemployment Insurance Trust Fund. LEXINGTON CEMETERY CO. V. COMMONWEALTH, 297 Ky. 851, 181 S.W. 2d 699 (1944). It has long been the law that if a tax assessed by the state is within the taxing power of the state it does not unconstitutionally impair the obligation of a contract. LAKE SUPERIOR CONSILIDATED IRON MINES V. LORD, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093 (1926).

The Constitution of the United States, Article 1, § 10{1}, contains a virtually identical provision to Section 19 of the Kentucky Constitution, prohibiting any law impairing the obligation of contracts. In speaking of that clause in the United States Constitution, the court stated, in UNITED STATES TRUST CO. OF NEW YORK V NEW JERSEY, 431 U.S. 1, 97 S. Ct. 1505, 1517, 52 L.Ed.2d 92 (1977), as follows:

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes's well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." HUDSON WATER CO. V MCCARTER, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908).

DECISION: House Bill 746 in no way impairs the rights and obligations under any contract, the judgement of the Franklin Circuit Court is reversed and the permanent injunction is dissolved.

COMMONWEALTH VS. ASSOCIATED GENERAL CONTRACTORS OF KY. INC AND STEVEN L. BESHEAR, ATTORNEY GENERAL, COMMONWEALTH OF KY. 656 SW 2d 729 (Ky 1983) PRECEDENT

8028 FAILURE TO FILE REPORT - DOMESTIC EMPLOYMENTS.

ISSUE: Whether a domestic employer who is unaware of their responsi-bilities to the Division of Unemployment Insurance is liable for penalties and interest for failure to file reports and contributions when due for periods prior to notice of their liability.

FACTS:
1. Appellant was an elderly blind women who employed a worker to assist her in personal care and housekeeping duties.
2. Appellant was unaware of reporting responsibilities to the Division.
3. Appellant's nephew, who assisted her in handling her personal affairs, was unaware of the amount paid to the worker.
4. In 1986, after reviewing bank records from one of the two banks the appellant had accounts, the nephew realized the amounts of money paid to the worker might require payment of unemployment insurance contributions.
5. The Division was contacted, forms were completed and the Division assessed contributions for quarters in 1985 and 1986.

6. The Division assessed penalties totalling $325.00 and interest totaling $59.16 for failure to file reports and contributions when due.

REASONS: The appellant is a domestic employer, an individual who has engaged the services of others to assist in personal matters. This is not a business nor an entity attempting to further a cause or philosophy. It is an individual engaging a personal service. Liability for unemployment contributions arises from statutes concerned with providing coverage to workers, not statutes primarily concerned with the collection of contributions. Such an individual is viewed as liable for such penalties and interest pursuant to the wording of the applicable statutes and regulations. However, it goes beyond the bounds of common sense that the legislature in enacting these statutes and adopting regulations envisioned and intended to punish an individual engaging workers for personal service who unknowingly fails to file reports and contributions. While all citizens bear the burden of knowing and complying with the law, it is unreasonable to hold a citizen simply engaging domestic help to the same standard of knowledge and compliance with employment law as that expected of employers in general, employers who employ for the purpose of conducting a business for profit or operating an organization to further a cause or philosophy.

The application of penalty and interest statutes and regulations, which are clearly appropriate in general, are clearly absurd in particular to domestic employers. The application of those statutes and regulations to these employers leads to an unreasonable result. It is found that absent clear specific wording to include such class of employers, a sufficient basis exists to exclude them and that such exclusion would not add to or detract from the statutes so as to encroach upon legislative authority. The legislature did not intend the application as described above when it enacted KRS 341.262.

It is reasonable to exclude domestic employers from automatic assessment of penalties and interest when identification of a new, subject, domestic employer occurs after the date or dates reports and contributions would have been due. Detailed investigation should be made and unless the domestic employer has knowingly failed to report the employment of workers or unreasonably failed to explore possible liability, penalty and interest should not be assessed. After such domestic employer is made aware of reporting requirements, assessment of interest and penalties would apply as with any other employer.

DECISION: Set aside. Penalties and interest removed.

CO# 48256 PRECEDENT

NOTE: Regulatory change makes the penalty portion of this order obsolete. (See 903 KAR 5:300). However, this order is still precedential regarding interest for new domestic employers.

THE FOLLOWING PAGES CONTAIN ENTRIES FOR THE 1993 UPDATE.

8029 EMPLOYER/EMPLOYEE RELATIONSHIP - USING DOMESTIC HELP THROUGH A SERVICE.

ISSUE: Whether individuals engaged in domestic service through a homecare service were independent contractors, employees of the party for whom service is performed or employees of the homecare service.

FACTS:
1. Appellant is 95 years old and requires daily assistance.
2. Individuals have been employed by appellant in the past to provide the appellant with daily assistance in her home.
3. A reserve account was established for the appellant in 1987 and wages paid the workers were reported to the Division.

4. The Division investigated the appellant's failure to file a third quarter, 1990 report and learned the appellant was paying workers associated with an entity known as Southern Homecare.
5. A client-aide agreement, listing Southern Homecare - Registry and stating an aide or companion would provide 24 hour service 3 days per week, was completed and signed on September 21, 1989, relative to appellant.
6. Individuals used had a signed agreement with Southern Homecare and could not work for a client for a period of one year after working for that same client through Southern Homecare.
7. Forms were completed weekly by the aides and given to the appellant showing the amount owed.
8. Appellant paid the aides directly and also paid Southern Homecare $5.00 per day.
9. Taxes or other deductions were not withheld by appellant or Southern Homecare.
10. Aides received no employee benefits from the appellant or Southern Homecare.
11. Southern Homecare did carry business liability insurance relative to the work by care givers for clients.
12. Southern Homecare did have an account with the Division but did not report the aides as employees.
13. Appellant was informed by Southern Homecare that the aides were self-employed and paid their own taxes.
14. The Division issued an assessment against appellant involving payments to six individuals during the calendar year of 1990. Contributions totaled $382.27 and interest totalled $48.94.
15. An appeal was filed asserting that the workers were not employees of the appellant.

REASONS: KRS 341. 050 (1)(a) defines "covered employment" as service performed by an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

To make such determinations, we utilize those factors usually invoked by the courts to determine the master/servant relationship. Those factors as given in RESTATEMENT OF AGENCY (SECOND) § 220 (1958), include the extent of the master's control over details of the work, the kind of occupation and degree of skill involved, the duration of the employment, the method of payment, and the belief of the parties concerning their relationship. The courts have agreed that no single factor is determinative and that a realistic appraisal of the situation as a whole is necessary.

The workers in this case perform routine household duties, using supplies and equipment provided by the party for whom they provide service in that party's home. They are generally provided food and lodging and the party outlines the duties expected of them. The workers have no financial investment in a business or advertise to the public that they are in business. The workers have no special skills or training and the work does not involve skilled nursing care. The workers are under the direction and control of the party for whom they perform service exchanging their time and labor for an hourly or daily wage.

This Commission in the past has held that the type of work performed by these individuals is "domestic service". Domestic employees are generally employed by the party for whom they actually perform the service. However, the significant involvement of Southern Homecare in this case obscures that relationship. Southern Homecare advertised for workers, gave them tests, solicited clients, entered into contracts with workers and clients, was involved in determining the rate of pay for the workers, received regular reports concerning the amount of work performed, and generally provided a replacement when the usual worker was to be absent. Southern Homecare has purposefully entered into a relationship with both workers and clients which restricts the activities of both and certainly imposes some control over the workers.

DECISION: Considering all factors referred to above and the fact that the type of service provided is domestic in nature, it was found these workers are appellant's employees, performing the work personally for appellant, in appellant's home, ultimately under the direction and control of appellant.

Administrative determination is affirmed.
C.O. # 57342 PRECEDENT

8030 MAJOR POLICY MAKING OR ADVISORY POSITIONS; NONCOVERED EMPLOYMENT.
06/15/ 92

ISSUE: Whether the job title and nonclassified status of a claimant's position, or the actual job duties performed should be the primary considerations when determining whether a claimant held a major policy making or advisory position.

FACTS:
1. The last position held by the claimant was nonclassified pursuant to KRS 18A.115.
2. Claimant was dismissed without cause January 31, 1988.
3. Rather than summarily hold claimant disqualified under KRS 341.055 (4)(f) because of his job title and nonclassified status, the Commission chose to base its decision on the actual job duties performed.
4. Commission held that the bulk of claimant's job duties were administrative in nature rather than policy making or advisory.
5. Claimant's employment was held to be covered employment.

REASONS: KRS 341.055 provides that "covered employment" shall not include employment: (f) In a position which, under or pursuant to the state law is designated as a major nontenured policymaking or advisory position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight (8) hours per week or by reason of service on any appointed state or local board or commission.

In a published decision, the Kentucky Court of Appeals held:

> (1) The precise issue involved in this case is an issue of first impression in this Court. A review of Kentucky appellate case law yields no opinions squarely addressing this issue. This Court must now examine the method that the Commission and reviewing courts should utilize in determining whether a discharged employee who has held a nonclassified position pursuant to KRS 18A.115 should be entitled to receive unemployment compensation. Specifically, the Commission, pursuant to KRS 341.055 (4)(f) is required to determine whether the individual claiming unemployment compensation was employed in a position which under or pursuant to state law is designated as a major nontenured policymaking or advisory position. If the Commission finds that a claimant was employed in such a position, the Commission must deny the claimant's claim. Due to the differing nature and responsibilities of both classified and nonclassified positions in Kentucky, making this determination can often be difficult.

The Commission has come to rely on two primary sources to support its decision to analyze the duties of each claimant's position on an individual basis. The Franklin Circuit Court in HORN V. UNEMPLOYMENT INSURANCE COMMISSION AND DEPARTMENT OF TRANSPORTATION, No. 80-CI-0259, in deciding to remand the case back to the Commission, held that the Commission should scrutinize the actual duties and responsibilities of a claimant's job to determine whether he is entitled to unemployment compensation. The claimant's title or the fact that the claimant was employed in a noncovered merit position should not be controlling in this matter. The court stated that the policy or advisory nature of the actual job's duties must be controlling. The federal guidelines to 1976-PL-94-566, which stated that government employees are entitled to receive unemployment compensation, encouraged a case-by-case consideration to determine a claimant's eligibility. The Commission relied on both of these sources in analyzing

each individual appellee's duties in the instant case before reaching its decision to grant the appellees compensation.

(2) Although the Franklin Circuit Court's decision in HORN is not controlling on this Court, we have reviewed this decision and find it to be a well reasoned opinion and find that the case-by-case approach that it favors is legally sound. The key consideration in such cases is whether the claimant's job duties were major policymaking or advisory. The title or nonclassified status of a claimant's position are not the primary considerations. The Commission correctly analyzed the appellee's positions in reaching its decision.

(7) The Franklin Circuit Court correctly found that the Commission's findings were supported by substantial evidence and that the Commission applied the correct rule of law. In this case the evidence showed that, although some of the appellees had minor advisory duties, the bulk of their duties was administrative. The Commission correctly considered the duties of each position on an individual basis in determining that none of the claimants were employed in major, nontenured policymaking or advisory positions as stated in KRS 341.055. As a result, the Commission correctly found that each of the appellees was entitled to receive unemployment compensation.

DECISION: In determining whether a claimant held a major policymaking or advisory position primary consideration must be given to actual job duties performed.

Kentucky Court of Appeals, KENTUCKY DEPARTMENT OF EDUCATION V. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION AND GREGG, KENT, PLANICK, BUCHALAW AND MCCLAIN, 798 SW 2d 464. PRECEDENT

NOTE: The Cabinet for Human Resources has elected to cover the wages of all of its employees, irrespective to whether they are classified as major, non-tenured policy makers. The election of coverage remains in effect during the whole calendar year, unless the Cabinet terminates such election prior to April 15 of that year. When there is no election of coverage, the above cited precedent will apply.

8031 "FINALITY OF FEDERAL FINDINGS"; UCFE CLAIMS (UCX CLAIMS).

ISSUE: Whether the division is compelled by federal law to abide by "federal findings" of a federal agency in a UCFE claim.

FACTS:

1. Claimant worked for the Internal Revenue Service, became separated from his employment and filed for benefits.
2. A request for Information or Reconsideration of Federal Findings - UCFE was submitted to IRS Claims Analyst, The Frick Company, concerning wages reported for the first and second quarter of 1993.
3. Report received concurred with previously reported wages.
4. Claimant found ineligible for benefits due to the fact that his base period wages were not one and one-half times the high quarter.
5. Pay period for the Internal Revenue Service ran from Sunday through Saturday.
6. Employees paid biweekly, with the official payday being Thursday.
7. Salary for the period ending March 20, 1993, was made available to claimant on March 29, 1993.
8. Those earnings were reported in the second quarter of 1993 because the official payday was April 1, 1993.
9. It is the practice of James E. Frick, Inc., to report wages earned in the quarter when the official payday falls, regardless of when the employees actually receive the money.

REASONS: KRS 341.090 (1) defines "Base Period" as the first four (4) of the last five (5) completed calendar quarters immediately proceeding the first day of a worker's benefit year.

KRS 341.090 (4) defines "Base-Period Wages" as the wages paid to a worker during his base period by subject employers for covered employment.

KRS 341.080 (b) defines "Calendar Quarter" as three (3) consecutive months beginning on January 1, April 1, July 1, or October 1.

KRS 341.350 sets forth the conditions of qualification for benefits. Section (5) provides that a claimant's base-period wages in that calendar quarter of his base period in which such wages were highest are equal to at least seven hundred and fifty dollars ($750), and his total base-period wages are not less than one and one-half (1 1/2) times the base-period wages paid to him in such quarter and he was paid base-period wages in the last six (6) months of his base period equal to at least eight (8) times his weekly benefit rate with a minimum of seven hundred and fifty dollars ($750) earned outside the high quarter.

Obviously, the statute envisions that wages be applied to appropriate quarters and that such wages be attributed to the quarters in which they were paid. The evidence in this case clearly shows that the claimant was paid wages in the first quarter of 1993 which were erroneously reported by The Frick Company as having been paid in the second quarter of 1993.

In precedent Commission Order 53574, the commission held that the division was compelled by federal law to abide by the "federal findings" of a federal agency (in the case herein under appeal the Frick Company's reporting of claimant's wages) in a UCFE claim. The instant case presented a situation which has caused extensive review of the precedent order and the federal law upon which it was predicated. As a result, we are convinced that Commission Order Number 53574 misconstrued federal law in effect at that time, (1989) and conflicts with federal law currently in effect. UIPL 12-77, dated December 30, 1976, specifically stated that the finality provisions in federal law no longer applied to "federal findings" in UCFE claims. Indeed, review of federal law reveals the existence of a "finality of federal findings" provision for UCFE claims prior to 1976 which no longer existed after 1976. Thus, the division may make determinations which conflict with "federal findings" in UCFE claims.

We note that federal law, 20 CFR, chapter V, part 614.23, does provide that findings of a federal military agency shall be final and conclusive on the division. Thus, for UCX claims, the division must make determinations consistent with the findings of the military agency, although the same is not true of UCFE claims.

DECISION: Claimant's wages for the first and second quarter of 1993 to be changed to reflect the total wages PAID in those quarters. Division to re-evaluate the claimant's eligibility for benefits based upon the changes.

CO# 66272 PRECEDENT

8032 RETROACTIVE ASSESSMENT; ERROR IN CONTRIBUTION RATE.

ISSUE: Whether the commission can require payment of additional unemployment contributions after determining that the rate initially assigned was determined to be incorrect.

FACTS:

1. Appellants are three companies engaged in the contract construction business.
2. Paid unemployment contributions at the three percent (3%) rate assigned by the Division of Unemployment Insurance.
3. Rate assessment was a mistake on the part of the division and was substantially lower than the rate required by KRS 341.272.
4. Commission ruled each appellant was liable for additional assessments to correct erroneous initial assessment.

5. An appeal to Franklin Circuit Court resulted in a judgement to uphold the additional assessments.
6. Appellants appealed to the Kentucky Court of Appeals.
7. Appellants argued that the doctrine of equitable estoppel must be applied to prevent the Commission from retroactively tripling the unemployment tax rate it had previously assigned them; that any retroactive assessment by the Commission is prohibited; and finally, that Kentucky Constitution §§ 1, 2, 3, 26, and 171 prohibit the Commission from making the reassessments in question.

REASONS: KRS 341.272 (1) notwithstanding any section of this chapter to the contrary on or after July 15, 1984, any new domestic corporation, or any foreign corporation authorized to do business in this state, or any foreign corporation active in conjunction with a domestic corporation in a joint venture, partnership or other legal entity engaged in the contract construction trades shall pay contributions equal to the maximum rate of contributions payable under the rate schedule in effect for any given calendar year as determined by KRS 341.270; and, such maximum rate of contributions shall remain in effect until the employer has employed persons in this state for not less than twelve (12) consecutive calendar quarters ending as a September 30 immediately preceding that computation date. Thereafter, such employer's contribution rate shall be determined in accordance with the provisions of subsection (4) of KRS 341.270.

Appellants asserted that the commission had no statutory authority to correct errors in assessments. KRS 341.125 (1) plainly authorized the Secretary of the Cabinet for Human Resources to "take such other action: as is necessary for the proper administration of KRS Chapter 341. Considering the duty that statute imposes on the Secretary to administer the chapter, one need not venture far from the statute itself to find authority to correct erroneous assessments. The court did not find appellant's constitutional and collateral estoppel arguments persuasive.

DECISION: Judgment of the Franklin Circuit Court is in all respects affirmed.

Kentucky Court of Appeals, J. Branham Erecting & Steel Service Company, Inc., Etc., Et Al. v. Kentucky Unemployment Insurance Commission, Etc.

93-CA-765-MR PRECEDENT

8033 COVERED EMPLOYMENT - SALESMEN FOR AN INSURANCE COMPANY.

ISSUE: Whether salesmen for an insurance company who are compensated by way of commission plus provided life insurance and the benefit of having half of the premium for their health insurance paid are performing services in covered employment.

FACTS:
1. Appellant worked as a salesman for an insurance company beginning May of 1990 in Massachusetts.
2. He began performing services for the company in Kentucky in February 1994.
3. While performing services for the company in Kentucky, the appellant was compensated by way of commission, plus the company paid half of appellant's health insurance premium, and provided life insurance for him.
4. Appellant was provided a 1099 and the end of each year that included the cost of the health insurance benefits.

REASONS: KRS 341.055 (10) exempts insurance agents or solicitors from covered employment if all their service is remunerated solely by way of commission. In the case before us, the value of the health

insurance provided by the company, must be considered remuneration for services, therefore, the exclusion under KRS 341.055 (10) does not apply.

There is no Kentucky case law relative to provided health insurance being considered remuneration for purposes of unemployment insurance. There is, however, an unemployment insurance case out of Florida which has dealt with this issue. Case Number 90-2746 in the District Court of Appeal of Florida, Third District, January Term, A.D. 191 affirmed the Florida Unemployment Appeals Commission upholding a referee decision, that the claimant, an insurance agent, was not compensated solely by way of commission. This was based upon the employer's payment of a portion of the claimant's medical insurance. The case was appealed to the next higher level court and is cited as follows: COMMONWEALTH LIFE INSURANCE V. WALTERS, 581 S.2d, 1991. The decision was not overturned by the higher court, and became final. Although the Florida case is not controlling in this jurisdiction, we find its reasoning persuasive.

DECISION: The services performed by the appellant were performed in covered employment.

CO# 70794 PRECEDENT

8034 SUCCESSORSHIP – DOMESTIC EMPLOYMENT

ISSUE: Whether a domestic employer can be held as successor to the reserve account of another domestic employer.

FACTS: 1. Father needed assistance in caring for an invalid son.

2. Father became a subject employer in 1995, as a domestic employer.

3. Invalid son applied for a grant from the Kentucky Supported Living Council.

4. The grant required the father to obtain a Power of Attorney to handle his son's paperwork. It also required the son to obtain his own Federal and State tax numbers, and to obtain his own Unemployment Insurance Employer Reserve Account since he would become the employer.

5. The Division of Unemployment Insurance held the son to be 100% successor to the reserve account of his father.

6. The Division held that successorship occurred on the basis the father was an employing unit, and the same employee continued to work at the same location for the son.

7. The Division believed that negotiations occurred because the father had Power of Attorney to make decisions for the son.

REASONS: KRS 341.050(1)(g) defines "covered employment" as service by an individual in the employ of an employing unit performing domestic service in a private home, if wages of one thousand dollars ($1,000) or more are paid in a calendar quarter in either the current or preceding calendar year.

The statute does not specifically define the term "domestic service," however, a generally accepted definition is found in Social Security Handbook, DHEW # (SSA) 73-0135, 1974, 917, "Domestic Service" means work, ordinarily performed as an integral part of household duties, that contributes to the maintenance of the employer's residence or administers to the personal wants and comforts of the employer and other members of the household and guests. In general, this includes work performed by cooks, waiters, butlers, housekeepers,

housemen, watchmen, governesses, maids, companions, nursemaids, valets, babysitters, janitors, laundresses, furnacemen, caretakers, gardeners, footmen, grooms, seamstresses, handymen, and chauffers of family automobiles. Domestic workers employed by landlords or rental agencies to do work in or about property being rented as a private home are not performing work in the private home of the employer.

KRS 341.540 (1), in pertinent part, provides that any employing unit which succeeds to or acquires the organization, trade or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including interest, and shall continue the payment of all contributions and interest due under this chapter ...

787 KAR 1:300, Section 1, provides:

Successorship shall be deemed to have occurred between two employing units when the following conditions exist:

(1) Negotiation occurs to bring about the transfer, either directly between the parties to the transfer, or indirectly through a third party intermediary.

(2) At least two of the following conditions are met, provided that this condition shall be not satisfied if only (c) and (d) are met:

(a) The business was a going concern when acquired. For the purpose of this regulation, a going concern shall also include a business which has temporarily ceased subsequent to the date on which negotiations to transfer the business were begun.

(b) The subsequent owner or operator continued or resumed basically the same type of business in the same location.

(c) The subsequent owner employed fifty percent (50%) or more of the previous owner's workers in covered employment.

(d) The previous owner employed fifty percent (50%) or more of the subsequent owner's workers in covered employment.

(e) The subsequent owner acquired work contracts or commitments from the previous owner.

The Kentucky Unemployment Insurance Law must be in conformity with the Federal Unemployment Tax Act which is a part of the Internal Revenue Code, 26 U.S.C. 3301-3309. A Federal Circuit Court of Appeals in the case of McDowell v. Ribicoff, C.A.N.J., 292 F. 2d 174, 178 said, "'Trade or business' within the Internal Revenue Code. . .refers. . . to extensive activity over a substantial period of time during which the tax payer holds himself out as selling goods or services...".

DECISION: A domestic employer has no trade or business to transfer. The son is not a successor to the reserve account of the father, a domestic employer.

C.O. # 78349A PRECEDENT

MASTER LIST OF COURT CASES

(ALPHABETICAL BY APPELLANT)
See Below

* Those cases wherein the Commission is the only appealing party appear alphabetically by appellee.

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