

NO. ED87889

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

ANDREA WILLIAMS

Appellant

vs.

CENTRAL MISSOURI PIZZA, INC.

d/b/a DOMINO'S

and DIVISION OF EMPLOYMENT SECURITY

Respondents

Appeal From Decisions of the Labor and Industrial Commission

Appeal No. 06-01187 R-A

Comm. No. LC-06-00775

APPELLANT'S BRIEF

Andrea Williams
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APPELLANT

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STATEMENT OF FACTS

Andrea Williams (Appellant) was an employee of Central Missouri Pizza, Inc., d/b/a Domino's (Respondent) from February 2003 until December 2005. Appellant had made numerous requests from July 4, 2005 to December 17, 2005, to be off work on December 24, 2005. The schedule for Saturday, December 24, 2005, was posted on December 17, 2005. Appellant was scheduled to work 5 to R. R stands for Rush.

Appellant left at 6 a.m. on December 24, 2005, to travel to Springfield, Missouri to spend Christmas with her fiancée's family and did not return until 9 p.m. on December 25, 2005. Appellant was absent from work on December 24, 2005. Appellant was notified on December 27, 2005, of her termination status, when she contacted the Respondent regarding her work schedule. Appellant was told she has been terminated for a no show no call for December 24, 2005. Appellant had no prior no show no call shifts.

Notices of mandatory meetings or work schedules had previously been posted when all employees were required to attend or face termination. A mandatory work notice was not posted with this work schedule. Appellant was not notified verbally or in writing that the December 24, 2005, shift was mandatory.

Appellant filed for unemployment compensation and was disqualified for “misconduct” under R.S.Mo 288.050.1 and R.S.Mo 288.050.2. Unemployment compensation was denied on January 12, 2006, and the decision was appealed. The Appellant’s appeal was conducted on February 1, 2006, by a telephone conference that originated from St. Louis, Missouri. The Appellant testified and the Respondent did not participate. On February 8, 2006, the appeal was also denied. The Appellant appealed this decision to the Labor and Industrial Relations Commission. They denied the claim on March 29, 2006. The Appellant is now appealing her claim to the Missouri Court of Appeals, Eastern Division.

POINTS RELIED ON

POINT I

I. APPELLANT WAS NOT NOTIFIED PRIOR TO THE OCCURRENCE THAT THE WORK SHIFT ON DECEMBER 24, 2005, WAS MANDATORY. ACCORDING TO R.S.Mo. 288.050.3 THE DIVISION SHALL TAKE INTO CONSIDERATION THE EMPLOYER'S ATTENDANCE POLICY. THE DETERMINATION OF THE DIVISION DID NOT TAKE THIS INTO CONSIDERATION WHEN DISQUALIFYING THE APPELLANT'S RIGHT TO RECEIVE UNEMPLOYMENT COMPENSATION.

R.S.Mo 288.050.3

POINT II

II. THE DIVISION OF EMPLOYMENT SECURITY ERRED BY NOT RECEIVING SUBSTANTIAL AND COMPETENT EVIDENCE FROM THE RESPONDENT THAT THE APPELLANT WAS DISCHARGED FOR “MISCONDUCT” CONNECTED WITH WORK.

Akers, 164 S.W.3d at 138; Tutwiler, 995 S.W.2d at 499.

ARGUMENT

POINT I

I. APPELLANT WAS NOT NOTIFIED PRIOR TO THE OCCURRENCE THAT THE WORK SHIFT ON DECEMBER 24, 2005, WAS MANDATORY. ACCORDING TO R.S.Mo. 288.050.3 THE DIVISION SHALL TAKE INTO CONSIDERATION THE EMPLOYER'S ATTENDANCE POLICY. THE DETERMINATION OF THE DIVISION DID NOT TAKE THIS INTO CONSIDERATION WHEN DISQUALIFYING THE APPELLANT'S RIGHT TO RECEIVE UNEMPLOYMENT COMPENSATION.

In the decision of the Appeals Tribunal (LC-06-00775) regarding the Appellant, the referee did not take into consideration or request any employment policies or handbook provided by the Respondent. Instead, the entire decision deals with a single occurrence of absenteeism on the part of the Appellant.

Under Section 288.050.2 RSMo 2000, a claimant may be denied waiting-week credit of four to sixteen weeks of unemployment benefits if the claimant is fired for "misconduct" connected with his work. Akers v. Barnes-Jewish Hospital, 164 S.W.3d 136, 137-8 (Mo.App. E.D. 2005). "Misconduct" is defined under the Missouri employment-security laws as follows:

an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest

culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

Section 288.030.1(24). This statutory definition, effective January 1, 2005, sets forth a nearly identical definition of "misconduct" to that announced by the appellate courts of this State. *See Akers*, 164 S.W.3d at 138. As noted in prior decisions, in each of the alternative ways in which an employee can engage in misconduct disqualifying the employee from receiving unemployment compensation, there is the requirement that the employee willfully violate the rules or standards of the employer. *Hoover v. Community Blood Center*, 153 S.W.3d 9, 13 (Mo.App. W.D. 2005). The violations must be intended. *Dolgencorp, Inc. v. Zatorski*, 134 S.W.3d 813, 818 (Mo. App. W.D. 2004).

There is a vast distinction between the violation of an employer's work rule, which would justify the discharge of the employee, and a willful, wanton, or deliberate violation of such rule, which would warrant a determination of misconduct disqualifying the claimant for unemployment-compensation benefits. *Hoover*, 153 S.W.3d at 13. "Violation of an employer's absence policy, which may be adequate cause for dismissal, is not, standing alone, necessarily a finding of misconduct connected with work, so as to deny unemployment benefits." *Division*

of Employment Security v. Gardner-Denver Machinery, Inc., 941 S.W.2d 13, 16
Mo.App. W.D. 1997); *see also*, Tutwiler, 995 S.W.2d at 499.

POINT II

II. THE DIVISION OF EMPLOYMENT SECURITY ERRED BY NOT RECEIVING SUBSTANTIAL AND COMPETENT EVIDENCE FROM THE RESPONDENT THAT THE APPELLANT WAS DISCHARGED FOR “MISCONDUCT” CONNECTED WITH WORK.

Where, the employer contends that a claimant was discharged for “misconduct,” it is the employer, not the claimant that bears the burden of proving by substantial and competent evidence that the claimant was discharged for “misconduct” connected with work. Akers, 164 S.W.3d at 138; Tutwiler, 995 S.W.2d at 499.

The Respondent did not provide substantial and competent evidence that the work schedule for December 24, 2005, was mandatory. The Respondent here simply failed to meet that burden. The employer’s evidence was that they had a mandatory work policy for December 24, 2005, but failed to provide evidence that the Appellant was in fact, told of the mandatory requirement verbally or in writing.

Conclusion

In conclusion, we contend that the Division of Employment Security did not take into consideration the Respondent's attendance police as a whole. The single absence does not mandate complete disqualification to unemployment compensation.

I hold there is insufficient evidence of "misconduct" in the record to support the Commission's decision. I ask the Court to reverse the Commission's decision, since there was not sufficient competent evidence to support the decision. Section 288.210 RSMo. 2000; Akers, 164 S.W.3d at 137.

Respectfully Submitted,

By _____
Andrea Williams
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(636) 940-0585

APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellant's Brief and a copy of a disk containing the same were mailed by United States mail, postage prepaid to:

Department of Labor and Industrial Relations
Division of Employment Security
P O Box 59
Jefferson City, MO 65104

this _____ day of _____, 2006.

Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellant's Brief and a copy of a disk containing the same were mailed by United States mail, postage prepaid to:

Central Missouri Pizza, Inc.
d/b/a Domino's
Suite 208
1350 Elbridge Payne Road
Chesterfield, MO 63017

this _____ day of _____, 2006.

Appellant

CERTIFICATE OF SERVICE

I hereby certify that ten copies of the foregoing Appellant's Brief and a copy of a disk containing the same were mailed by United States mail, postage prepaid to:

Missouri Court of Appeals
Eastern District
One Post Office Square
815 Olive Street
St. Louis, MO 63101

this _____ day of _____, 2006.

Appellant

Certificate Required by Rule 84.06(c)

I hereby certify that the foregoing Appellant's Brief (a) is submitted in compliance with Rule 55.03, (b) complies with the limitations appearing in Rule 84.06(b), and (c) contains 2,221 words as calculated by the Word 2000, The software package used to prepare the brief.

Appellant