

IN THE MISSOURI SUPREME COURT

AMY DIFATTA-WHEATON,)
)
 Appellant,)
)
 v.) Case No. SC89239
)
 DOLPHIN CAPITAL CORPORATION and)
 DIVISION OF EMPLOYMENT SECURITY,)
)
 Respondents.)

RESPONDENT'S SUBSTITUTE BRIEF

Appeal from the Missouri Labor and Industrial Relations Commission
Commission No. LC-06-02599
Appeal No. 06-14030 R-A

MATTHEW W. MURPHY #47786
Post Office Box 59
Jefferson City, Missouri 65104
TEL: (573) 751-3844
FAX: (573) 751-2947

Attorney for the respondent,
Division of Employment Security

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
Jurisdictional Statement	6
Introductory Statement	7
Statement of Facts.....	8
Points Relied On	11
Scope of Review	16
Argument	
I. The Court of Appeals should have dismissed the case	18
II. The Court of Appeals did not review on "plain error"	20
III. The appellant withdrew from employment.....	24
IV. The legislature considered and rejected the appellant's argument	33
V. The Court of Appeals would place too great a burden upon employers ...	39
Conclusion	44
Certificate of Service	45
Certificate of Word Count and Virus Free Disk.....	45
Appendix	
Decision of the Appeals Tribunal	A-2
Decision of the Labor and Industrial Relations Commission.....	A-5
Section 288.050.1(1) RSMo Cum Supp. 2006	A-8
S.D. Codified Laws § 61-6-13.1	A-11

Tenn. Code Ann § 50-7-303	A-13
Ark. Code § 11-10-513	A-19
Cal. Un. Ins. Code §2601.....	A-21

TABLE OF AUTHORITIES

Cases

Pages

Error! No table of authorities entries found.**Error! No table of authorities entries**

found.Error! No table of authorities entries found.JURISDICTIONAL

STATEMENT

This is an appeal from the decision of the Labor and Industrial Relations Commission, that found that the appellant was not entitled to benefits pursuant to Section 288.050.1(1) RSMo Cum Supp. 2006 because the appellant left her work without good cause attributable to the work or to the employer. (L.F. 25-27). On May 20, 2008, this Court ordered this case transferred from the Western District Court of Appeals pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction of this case under Article V, Section 9 of the Missouri Constitution.

INTRODUCTORY STATEMENT

The appellant did not return to work after her medical leave expired. Instead, she informed the employer that she would not return for at least two more months. The appellant did not have accrued leave and was not entitled to FMLA leave. The employer sent the appellant a letter stating that she had abandoned her job. The issue before this Court is whether the appellant "left work voluntarily" when she stopped coming to work without having been granted additional medical leave by the employer.

Reference to the Administrative Transcript will be designated as "Tr.____."

Reference to the Legal File will be designated as "L.F.____" and reference to the appellant's brief will be designated as "Br. ____." The parties will be referred to as follows: the appellant, Amy Difatta-Wheaton, will be called "Claimant"; Dolphin Capital Corporation will be called "Dolphin" or "Employer"; and Division of Employment Security will be called "the Division." At times the Labor and Industrial Relations Commission will be referred to as "the Commission." All statutory references hereinafter are to the Revised Statutes of Missouri 2000 unless otherwise stated.

STATEMENT OF FACTS

Claimant began working for Dolphin on November 14, 2005 (Tr. 14). Claimant was employed as a sales representative (Tr. 5 & 12). Claimant worked 40 hours per week (Tr. 6). Claimant received a salary plus commissions (Tr. 12). Claimant did not work between May 24, 2006 and May 29, 2006 because of health problems (Tr. 6-7).¹ On or about May 22, 2006, Claimant provided Employer with a doctor's excuse to be off work until May 29, 2006 (L.F. 22). The medical leave granted to Claimant by Dolphin expired on May 29 (Tr. 13). Claimant was expected to return to work at 8:00 a.m. on May 29, 2006 (Tr. 9). However, Appellant did not return to work on May 29, 2006 (Tr. 13).

On the evening of May 28, 2006, Claimant had another spell (Tr. 9). At approximately 7:30 a.m. on May 29, 2006, Claimant called Employer and left a voice mail message for Dolphin's Office Administrator, Joan Boyetchwars (Tr. 7& 9). The message said that Claimant would not be at work and her doctor would send an excuse to Employer (Tr. 7 & 9). Claimant also called the doctor's office and obtained an appointment for that morning (Tr. 9). On May 30, 2006, Claimant left another telephone message for Joan, in which Claimant said that she would provide the doctor's excuse by Friday June 2, 2006 (Tr. 13). On June 2, 2006, Employer received a doctor's excuse saying that Claimant could return to work on May 29, 2006 (L.F. 9-10). The only doctor's excuse Employer ever received was the first excuse, which said that Claimant could return to work on May 29, 2006 (Tr. 6 & 13 & L.F. 9-10). Joan testified that nobody ever provided Employer with an excuse for the second absence (Tr. 13).

¹ Dolphin's witness testified that Claimant's last day of work was May 18, 2006 (Tr. 13).

Claimant testified that she never spoke directly with anyone at Dolphin about her need for a second leave of absence (Tr. 10). Claimant did not work from May 29, 2006 through June 5, 2006 (Tr. 13).

Thereafter, Claimant received a letter dated June 5, 2006 from Dolphin, which stated that Claimant had voluntarily resigned (Tr. 7 & L.F. 9-10).² Claimant testified the letter stated that she had unexcused absences from May 29 through June 5 (Tr. 7). On June 8, 2006, Claimant obtained a doctor's excuse for being absent on and after May 29, 2006 (L.F. 21).

Claimant testified that her medical condition was not caused or aggravated by her work (Tr. 10). Claimant had surgery on July 15, 2006 (Tr. 8). Claimant needed a full hysterectomy and had cancer on her ovaries (Tr. 8).³

Claimant filed an initial claim for unemployment benefits on June 8, 2006 (L.F. 1). The Division determined that Claimant was disqualified from receiving benefits because of her work separation (L.F. 4). Claimant appealed the deputy's determination (L.F. 5-12) and a hearing was held before the Appeals Tribunal (Tr.1-19). The Tribunal issued a decision that Claimant was disqualified from receiving benefits because she left work without good cause attributable to her work (L.F. 13-15). Claimant filed an Application for Review with the Labor and Industrial Relations Commission (L.F. 16-

² Claimant did not speak directly with Dolphin's administrator until after receiving the separation/resignation letter (Tr. 10).

³ There was no evidence presented when Claimant was actually able to work after her surgery.

24). The Commission issued a decision affirming and adopting the Tribunal's decision (L.F. 25-27). Then, Claimant filed an appeal to the Court of Appeals (L.F. 28-35).

POINTS RELIED ON

I.

The Court of Appeals erred in reversing the decision of the Labor and Industrial Relations Commission because the Court lacked jurisdiction to review the Commission's decision in that Claimant's amended appellate brief did not comply with Supreme Court Rule 84.04.

Supreme Court Rule 84.04

Livingston v. Schnuck Markets, Inc., 184 S.W.3d 617, 618 (Mo. App. E.D. 2006)

Ward v. United Engineering Co., 249 S.W.3d 285, 287 (Mo. App. E.D. 2008)

Vance Brothers, Inc. v. Obermiller Construction Services, Inc., 181 S.W.3d 562, 564 (Mo. banc 2006)

II.

The Court of Appeals erred in reversing the decision of the Labor and Industrial Relations Commission because it exceeded the scope of judicial review of a decision of the Commission in that (a) the Court did not limit its review of the Commission's decision to plain error after finding that the claimant's brief did not comply with Supreme Court Rules, and (b) the Court made findings of fact that are not supported by the evidence in the record.

Section 288.210, RSMo.

Burns v. Labor & Indus. Com'n, 845 S.W.2d 553 (Mo. banc 1993)

Wimberly v. Labor and Industrial Relations, 688 S.W.2d 344, 346 (Mo. banc 1985)

III.

The Commission did not err in finding the Claimant disqualified from receiving unemployment benefits pursuant to Section 288.050.1, RSMo. because the Claimant voluntarily left work without good cause attributable to her work or employer in that she withdrew from employment due to a personal illness unrelated to her work.

Section 288.050.1 RSMo.

Hessler v. Labor and Industrial Relations Commission, 851 S.W.2d 516, 518 (Mo. en banc 1993)

Wimberly v. Labor and Industrial Relations, 688 S.W.2d 344, 346 (Mo. banc 1985)

Wolpers v. Unemployment Compensation Commission, 186 S.W.2d 440, 442 (Mo. 1945)

IV.

This Court should reject Claimant's argument that all individuals who are forced to leave work because of a medical condition are entitled to unemployment benefits because the legislature considered and rejected this argument in that the legislature enacted a medical exception for only individuals who are forced to leave because of pregnancy. [This responds to the appellant's argument].

Section 288.050.1(1)(d) RSMo Cum Supp 2006;

Lake v. Labor and Industrial Relations Commission, 781 S.W.2d 207 (Mo. App. E.D. 1989);

Wimberly v. Labor and Industrial Relations Commission, 688 S.W.2d 344 (Mo. banc 1985);

State v. Carouthers, 714 S.W.2d 867, (Mo. App. 1986).

V.

The Court of Appeals, Western District erred when it decided that Claimant is not disqualified from receiving unemployment benefits because the Missouri Employment Security Law is not a disability program in that the exception from disqualification contained within Paragraph 288.050.1(1)(d) applies only to claimants who are "forced to leave" because of pregnancy.

Section 288.050.1(1)(d) RSMo Cum. Supp. 2006;

Strahler v. St. Luke's Hospital, 706 S.W.2d 6 (Mo. 1986);

Neely v. Industrial Comm. of Mo., 379 S.W.2d 201, 205 (Mo. App. W.D. 1964);

Haynes v. Unemployment Compensation Commission, 183 S.W.2d 77 (Mo. 1944);

Hessler v. Labor and Industrial Relations Commission, 851 S.W.2d 516, (Mo. banc. 1993).

SCOPE OF REVIEW

Judicial review of Commission decisions in employment security matters is governed by Section 288.210. This section provides in part as follows:

Upon appeal no additional evidence shall be heard. The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the decision was procured by fraud;
- (3) That the facts found by the commission do not support the award; or
- (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

It is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions. *Burns v. Labor & Indus. Com'n*, 845 S.W.2d 553 (Mo. banc 1993). Determination of the credibility of witnesses is a function of the Commission, which may disbelieve or discount the testimony of a party's witnesses. *Id.* "If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the

administrative determination, and it is irrelevant that there is supporting evidence for the contrary finding. *Pulitzer Pub. Co. v. Labor & Indus. Relations Com'n*, 596 S.W.2d 413, 417 (Mo. banc 1980). The court must determine “whether, considering the whole record, there is sufficient competent and substantial evidence to support the award.” *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). A reviewing court, thus, must affirm those decisions of the Commission which are supported by substantial and competent evidence taken from the whole record.

The Commission, as the trier of facts, can believe or disbelieve none, all or part of any witness’ testimony, and draw inferences from facts dissimilar to those which a court on judicial review may have drawn. *Lauderdale v. Division of Employment Security*, 605 S.W.2d 174 (Mo. App. E.D. 1980); see also, *Asaro v. Division of Employment Security*, 32 S.W.3d 623 (Mo. App. W.D. 2000). Concomitant with the burden of proof is the risk of nonpersuasion. *Burns, supra*.

The Commission’s finding that Claimant did not return to work on May 29 and did not have permission to extend her leave was supported by competent and substantial evidence. As stated before, the Commission’s findings of fact are binding on this court unless contrary to the overwhelming weight of the evidence. *CNW Foods*, 141 S.W.3d 100 (Mo. App. S.D. 2004). Claimant would have this Court reweigh the evidence, which this Court may not do. *Nell v. Fern-Thatcher Company and Division of Employment Security*, 952 S.W. 2d 749 (Mo. App. W.D. 1997).

POINT I.

The Court of Appeals erred in reversing the decision of the Labor and Industrial Relations Commission because the Court lacked jurisdiction to review the Commission's decision in that Claimant's amended appellate brief did not comply with Supreme Court Rule 84.04.

The Court of Appeals did not have jurisdiction to review the decision of the Labor and Industrial Relations Commission because Claimant's amended appellate brief did not comply with Supreme Court Rule 84.04. Therefore, the Court of Appeals should have dismissed Claimant's appeal.

"*Pro se* appellants are held to the same standards as are attorneys and must comply with the Supreme Court Rules, including Rule 84.04." *Livingston v. Schnuck Markets, Inc.*, 184 S.W.3d 617, 618 (Mo. App. E.D. 2006). The Court of Appeals found Claimant's amended appellate brief to be "patently noncompliant with the Missouri briefing requirements." *Difatta-Wheaton v. Dolphin Capital Corporation*, ___ S.W.3d ___, 2008 WL 220197, at *3 (Mo. App. W.D. 2008)(citing Supreme Court Rule 84.04). Therefore, the brief was insufficient to invoke the jurisdiction of the Court of Appeals. "A deficient appellate brief that does not comply with the briefing requirements of Rule 84.04 preserves nothing for appellate review and is inadequate to invoke [the Court's] jurisdiction." *Ward v. United Engineering Co.*, 249 S.W.3d 285, 287 (Mo. App. E.D. 2008). Therefore, the Court of Appeals should have dismissed Claimant's appeal from the decision of the Labor and Industrial Relations Commission. *Id.*

Furthermore, the Division did not waive the issue of jurisdiction by failing to file a motion to dismiss Claimant's appeal in the Court of Appeals. "The question of jurisdiction may be raised at any stage of the proceedings, even for the first time on appeal." *Vance Brothers, Inc. v. Obermiller Construction Services, Inc.*, 181 S.W.3d 562, 564 (Mo. banc 2006). The issue of jurisdiction is not subject to waiver. *L&L Wholesale, Inc. v. Gibbens*, 108 S.W.3d 74, 79 (Mo. App. S.D. 2003). Additionally, the Court of Appeals had a duty to determine its jurisdiction *sua sponte*. *Crawford v. Crawford*, 31 S.W.3d 451, 453 (Mo. App. W.D. 2000).

Since Claimant's amended appellate brief did not comply with Rule 84.04, the Court of Appeals should have dismissed Claimant's appeal for lack of jurisdiction.

POINT II.

The Court of Appeals erred in reversing the decision of the Labor and Industrial Relations Commission because it exceeded the scope of judicial review of a decision of the Commission in that (a) the Court did not limit its review of the Commission's decision to plain error after finding that the claimant's brief did not comply with Supreme Court Rules, and (b) the Court made findings of fact that are not supported by the evidence in the record.

The Court of Appeals erred in reversing the decision of the Labor and Industrial Relations Commission because the Court exceeded the scope of judicial review for a decision of the Commission. Judicial review of a decision of the Commission is provided for by § 288.210, RSMo. In reviewing a decision of the Commission, it is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions. *Burns v. Labor & Indus. Com'n*, 845 S.W.2d 553 (Mo. banc 1993). Determination of the credibility of witnesses is a function of the Commission, which may disbelieve or discount the testimony of a party's witnesses. *Id.* The Commission, as the trier of facts, can believe or disbelieve none, all or part of any witness' testimony, and draw inferences from facts dissimilar to those which a court on judicial review may have drawn. *Lauderdale v. Division of Employment Security*, 605 S.W.2d 174 (Mo. App. E.D. 1980); *see also*, *Asaro v. Division of Employment Security*, 32 S.W.3d 623 (Mo. App. W.D. 2000). "If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supporting evidence for the

contrary finding." *Pulitzer Pub. Co. v. Labor & Indus. Relations Com'n*, 596 S.W.2d 413, 417 (Mo. banc 1980).

(a).

The Court of Appeals should have limited its review of the Commission's decision to whether the Commission committed plain error in reaching its decision. *See*, Supreme Court Rule 84.13(c). Pro se claimants are held to the same standards as an attorney and must comply with the rules pertaining to appellate briefs. *Livingston v. Schnuck Markets, Inc.*, *supra*, 184 S.W.3d at 618. The Claimant's amended appellate brief before the Court of Appeals did not comply with Supreme Court Rule 84.04. *Difatta-Wheaton v. Dolphin Capital Corporation*, *supra*, 2008 WL 220197, at *3. Therefore, the brief preserved nothing for review. *Ward v. United Engineering Co.*, *supra*, 249 S.W.3d at 287. As a result, the Court of Appeals should have limited its review to plain error as provided in Supreme Court Rule 84.13(c). *See, England v. Regan Marketing, Inc.*, 939 S.W.2d 62 (Mo.App. S.D. 1997). The Court of Appeals did not limit its review to plain error. Therefore, the Court of Appeals exceeded the scope of judicial review.

In this case, the Commission did not commit plain error in deciding that the Claimant was disqualified from receiving unemployment benefits because she voluntarily left work without good cause attributable to the work or employer. The Commission's decision is supported by competent and substantial evidence on the whole record. The Claimant withdrew from regular employment due to a personal medical condition. (Tr. 7-8 & 10). She had permission to be absent from work until May 29, 2006. (Tr. 6 & 7). However, the claimant did not return to work on May 29, 2006. (Tr. 7 & 9).

In addition, as will be discussed further in Point III of this brief, the Commission's decision is consistent with long-standing Missouri case law. Missouri courts have interpreted Section 288.050.1 as disqualifying claimants who leave work due to personal illness unrelated to their employment. *See, Wimberly v. Labor and Industrial Relations*, 688 S.W.2d 344, 346 (Mo. banc 1985). Clearly, the Commission did not commit plain error. Therefore, the Court of Appeals erred in reversing the decision of the Commission.

(b).

The Court of Appeals also exceeded the scope of judicial review for a Commission decision by making findings of fact which are not supported by the evidence in the record.

The Court of Appeals stated that, "On the evening of May 28, 2006, [the Claimant] had a medical emergency and her doctor requested that she go to the doctor's office early on the morning of May 29, 2006." *Difatta-Wheaton v. Dolphin Capital Corporation, supra*, 2008 WL 220197, at *1. The testimony at the hearing does not support a finding that there was an "emergency" on May 28, 2006. The testimony at the hearing also does not support the court's implication that the Claimant spoke with her doctor on May 28, 2006 and was told to visit the doctor's office early on the morning of May 29. The Claimant's testimony was as follows:

Q: All right. Now, May 29, 2006, according to the calendar fell on a Monday.

A: Yes.

Q: What time were you expected to work?

A: I was supposed to be at work at 8:00.

Q: And what happened?

A: And that Sunday the - - the 28th I had another spell that evening. And I called the doctor first thing in the morning and they wanted me to come in first thing that Monday morning. And I called Joan at 7:30 and told her I will not be in work and my doctor will send over an excuse to you this afternoon.... (Tr. 9).

The Claimant does not explain what she meant when she said that she had "another spell." There was no evidence presented that the Claimant sought emergency medical care after experiencing her spell. And it is clear that her doctor did not send her to the hospital after she called in the morning. Rather, it is apparent that the Claimant waited until the next day to seek medical attention; and that was merely to call her doctor's office and obtain an office visit. The evidence does not support the Court of Appeals finding that the Claimant experienced a medical emergency on May 28, 2006. Additionally, the evidence does not support an inference that the Claimant called her doctor's office on May 28, 2006.

Based upon the foregoing, the Court of Appeals erred in reversing the decision of the Commission. The Commission's decision is supported by competent and substantial evidence on the whole record and is consistent with long-standing Missouri case law. Therefore, the Division requests that this Court affirm the Commission's decision.

POINT III.

The Commission did not err in finding the Claimant disqualified from receiving unemployment benefits pursuant to Section 288.050.1, RSMo. because the Claimant voluntarily left work without good cause attributable to her work or employer in that she withdrew from employment due to a personal illness unrelated to her work.

The Commission properly found the claimant disqualified from receiving unemployment benefits pursuant to § 288.050.1, RSMo. because she voluntarily left work without good cause attributable to her work or employer in that she withdrew from employment due to a personal illness unrelated to work.

Some states have enacted statutes defining good cause for voluntarily leaving work as including illness. *See, S.D. Codified Laws § 61-6-13.1(1)* (2004) (Appendix at A-11). Other states, by statute, have created disqualification exceptions which include illness, disability, and pregnancy. *See, Tenn. Code Ann. § 50-7-303(a)(1)* (Supp. 2007); and *Ark. Code Ann. § 11-10-513(b)(2)* (Supp. 2007) (Appendix at A-13 and A-19). However, the Missouri Legislature has not enacted a disqualification exception for personal illness or physical disability.⁴

The Missouri Legislature has narrowly defined the term good cause in regard to voluntarily leaving work. Under § 288.050.1, RSMo., good cause must be “attributable

⁴ In 1988, the Missouri Legislature enacted a disqualification exception for pregnancy. Section 288.050.1(1)(d), RSMo. However, the exception does not include illness or physical disability.

to such work or to the claimant's employer.” This phrase “attributable to such work or to the claimant's employer” requires that the work or employer himself created the condition making it unreasonable to expect the employee to continue work. *Hessler v. Labor and Industrial Relations Commission*, 851 S.W.2d 516, 518 (Mo. en banc 1993).

Section 288.050.1, RSMo. states in relevant part as follows:

Notwithstanding the other provisions of this law, a claimant shall be disqualified for waiting week credit or benefits until after the claimant has earned wages for work insured pursuant to the unemployment compensation laws of any state equal to ten times the claimant's weekly benefit amount if the deputy finds:

(1) That the claimant has left work voluntarily without good cause attributable to such work or to the claimant's employer....

Missouri courts have interpreted this provision as disqualifying claimants who leave work due to personal illness unrelated to the employment. *See, Wimberly v. Labor and Industrial Relations*, 688 S.W.2d 344, 346 (Mo. banc 1985). Similarly, the Missouri Courts have held that, when an individual takes a leave of absence from work for personal illness without a guarantee of reinstatement, the individual is disqualified from receiving unemployment benefits pursuant to § 288.050.1, RSMo. *See, Division of Employment Security v. Labor and Industrial Relations Commission*, 617 S.W.2d 620 (Mo. App. W.D. 1981); and *Lake v. Labor and Industrial Relations Commission*, 781 S.W.2d 207 (Mo. App. E.D. 1989). Those interpretations of Section 288.050.1 are

consistent with both the public policy underlying the Missouri Employment Security Law and the purpose of that law.

The nation's unemployment compensation system is a federal-state partnership. *Graves v. Meystrik*, 425 F.Supp. 40, 41 (E.D. Mo. 1977). The system had its genesis during the great depression of the 1930's. At that time, the nation experienced massive unemployment due to industry's inability to provide sufficient jobs for the nation's workforce.

The Missouri Employment Security Law (the state's unemployment compensation program) was enacted by the Legislature in 1937. The program was enacted through use of the state's police power for the general welfare of the citizens of this state. The declared public policy behind the enactment of the law is set forth in § 288.020.1, RSMo. That section states in part as follows:

As a guide to the interpretation and application of this law, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to health, morals, and welfare of the people of this state resulting in a public calamity. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

As used by the Legislature, the word unemployment in § 288.020 means “unemployment resulting from the failure of industry to provide employment.” *Haynes v. Unemployment Compensation Commission*, 183 S.W.2d 77, 81 (Mo. 1944). The word unemployment does not include the situation in which an individual withdraws from regular employment because of illness or physical disability unrelated to that employment. *See, Wolpers v. Unemployment Compensation Commission*, 186 S.W.2d 440, 442 (Mo. 1945). *See also, Haynes, supra*, 183 S.W.2d at 81. “The unemployment is incident to the [illness or physical disability], which is peculiar to the individual afflicted therewith.” *Wolpers, supra*, 186 S.W.2d at 442. The unemployment did not result from industry’s failure to provide employment. Unemployment resulting from personal illness or disability “is not within the provisions of the Unemployment Compensation law when viewed in the light of the declared public policy of the state and the declared purposes of the law itself.” *Id.* “It is the public’s welfare, not the individual’s, that justifies an exercise of the police power of the State.” *Wolpers*, 186 S.W.2d at 442. As will be discussed further in Point V, relief for an individual that must withdraw from regular employment due to personal illness or physical disability is available in the form of disability insurance, Social Security disability, or other social welfare benefits.

The purpose of the Employment Security Law is to provide for the “compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.” Section 288.020.1, RSMo. As used in § 288.020.1, RSMo., the word ‘fault’ does not mean “something blameworthy, culpable, or wrongful”, but instead, the word means “‘failure’ or ‘volition.’” *Bussmann Manufacturing Co. v.*

Industrial Commission, 335 S.W.2d 456, 461 (Mo. App. St. L. 1960); and *see also*, *Neeley v. Industrial Commission of Missouri*, 379 S.W.2d 201, 205 (Mo. App. K.C. 1964). “Thus, the purpose of the Employment Security Act is to provide for the compulsory setting aside of an unemployment reserve to be used for the benefit of persons unemployed through no volition of their own.” *Bussman Manufacturing Co.*, *supra*, 335 S.W.2d at 461.

“The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and ‘the manifest purpose of the statute, considered historically,’ is properly given consideration.” *Haynes*, *supra*, 183 S.W.2d at 81. The words and phrases of a statute “shall be taken in their plain or ordinary and usual sense....” *Id.* The Employment Security Law is to be construed liberally to accomplish its intended purpose. Section 288.020.2, RSMo. The disqualifying provisions of the law are to be strictly construed. *Bussmann*, *supra*, 335 S.W.2d at 460. However, those statutory provisions should be interpreted “in the light of the evil which it seeks to remedy and in light of the conditions obtaining at the time of [their] enactment.” *See, Haynes*, *supra*, 183 S.W.2d at 82. The claimant bears the burden of establishing his or her right to unemployment benefits. *Id.* at 80.

Section 288.050.1, RSMo. provides that a claimant shall be disqualified for waiting week credit or benefits if the Division deputy finds “That the claimant has left work voluntarily without good cause attributable to such work or to the claimant's employer....” The word “left” is the past tense or past participle of the word leave. The

word “leave” has been defined as “to go away from” or “to stop living in, working for, or belonging to.” New World Dictionary, Second College Edition (1976), at 804. Black’s Law Dictionary (8th ed. 1999) at 910 defines the word “leave” as follows: “departure; the act of going away.” The word “voluntarily” is the adverb form of voluntary. The word “voluntary” has been defined as “intentional; not accidental” and “controlled by one’s mind or will.” New World Dictionary, Second College Edition, at 1592. “[V]oluntary implies the exercise of one’s own free choice or will in action, whether or not external influences are at work....” *Id.* at 1593. Black’s Law Dictionary (8th ed. 1999) at 1605 defines the word “voluntarily” as follows: “Intentionally; without coercion.” Therefore, under § 288.050.1, RSMo, an individual voluntarily leaves work if he or she makes a conscious decision (volitional) to withdraw from regular employment.

The Legislature’s use of the phrase “attributable to such work or to the claimant’s employer” in § 288.050.1(1) is also of particular significance. In the *Bussmann* case the Court noted as follows at 335 S.W.2d 460:

By the use of the words employed in this clause [“attributable to such work or to the claimant’s employer”], the legislature recognized that when the pressure of real, not imaginary, substantial, not trifling, reasonable, not whimsical, circumstances compel the decision to leave employment, the decision may be said to be voluntary in the sense that the worker has willed it, but may equally be said to be involuntary because outward pressures have compelled it, and sought to avoid such semantics in defining when a leaving was voluntary or involuntary by further restricting that term by

adding ‘* * * without good cause attributable to his work or to his employer.’

For approximately fifty (50) years the Missouri courts have held that, when an individual leaves employment due to personal illness unrelated to the work, the individual leaves work voluntarily without good cause attributable to the work or employer and is disqualified from receiving unemployment benefits pursuant to § 288.050.1, RSMo.⁵ See, *Duffy v. Labor and Industrial Relations Commission*, 556 S.W.2d 195 (Mo. App. St.L. 1977); and *Wimberly, supra*, 688 S.W.2d 344 (and cases cited therein). Likewise, the Missouri Courts have held that, when an individual takes a leave of absence from work for personal illness without a guarantee of reinstatement to the same position upon expiration of the leave of absence, the individual leaves work voluntarily without good cause attributable to the work or employer and is disqualified from receiving unemployment benefits pursuant to § 288.050.1, RSMo. See, *Division of Employment Security v. Labor and Industrial Relations Commission*, 617 S.W.2d 620 (Mo. App. W.D. 1981); and *Lake v. Labor and Industrial Relations Commission, supra*, 781 S.W.2d 207.

Some states have enacted statutory disqualification exceptions which include illness and disability. See, *Tenn. Code Ann. § 50-7-303(a)(1)*; and *Ark. Code Ann. § 11-*

⁵ The issue is not whether the individual voluntarily became ill, but instead, the issue is whether the individual, based upon his or her illness, makes a conscious decision to withdraw from employment.

10-513(b)(2).⁶ The Missouri Legislature has chosen not to enact a disqualification exception for personal illness or physical disability. Instead, the Missouri Legislature has narrowly defined the term good cause by requiring the good cause be “attributable to such work or to the claimant's employer.” Section 288.050.1(1), RSMo. That is the Legislature’s prerogative. Therefore, the Court should not create, through judicial decision, a disqualification exception for personal illness or physical disability. The Court should reaffirm the fifty (50) years of case law interpreting § 288.050.1 as disqualifying claimants who leave work due to personal illness unrelated to the employment. *See, Wimberly, supra*, 688 S.W.2d at 346.

In this case, the employer did not fail to provide the Claimant with a job. Therefore, the Claimant’s unemployment did not result from industry’s failure to provide employment. *See, Haynes, supra*, 183 S.W.2d at 81. The Claimant’s unemployment was incident to her medical condition that was unrelated to her work or employer. *See, Wolpers, supra*, 186 S.W.2d at 442. Consequently, the Claimant’s unemployment does not fall “within the provisions of the Unemployment Compensation Law when viewed in the light of the declared public policy of the state and the declared purposes of the law itself.” *Id.* As a result, the Commission properly found that the Claimant voluntarily left

⁶ The Arkansas statute states in part as follows:

(b) No individual shall be disqualified under this section if after making reasonable efforts to preserve his or her job rights he or she left his or her last work:

* * *

(2) Because of illness, injury, pregnancy, or disability....

work without good cause attributable to her work or employer and was disqualified from receiving unemployment benefits pursuant to § 288.050.1, RSMo.

Finally, in her brief, the Claimant mischaracterizes the issue involved in this case. The issue is not whether an individual voluntarily became ill, but instead, the issue is whether the individual, based upon his or her illness, makes a conscious decision to withdraw from employment. It is the individual's intentional or conscious withdrawal from regular employment for a reason unrelated to the work or employer (not attributable to the work or employer) which triggers the disqualification under § 288.050.1, RSMo. For nearly five decades, Missouri courts have interpreted § 288.050.1 as disqualifying claimants who leave work due to personal illness unrelated to their employment. *See, Wimberly*, 688 S.W.2d at 346. The Commission's decision in this case is consistent with that case law.

The Commission's decision is supported by competent and substantial evidence on the whole record and the decision is correct as a matter of law. Therefore, the Commission's decision should be affirmed.

POINT IV.

This Court should reject Claimant's argument that all individuals who are forced to leave work because of a medical condition are entitled to unemployment benefits because the legislature considered and rejected this argument in that the legislature enacted a medical exception for only individuals who are forced to leave because of pregnancy.

Section 288.050.1(1) RSMo disqualified claimants from receiving unemployment benefits if they leave work voluntarily without good cause attributable to the work. Claimant asserts that while forced to leave work because of a medical condition, she did not intend to quit her job; she intended to return to work in a few months if her medical condition improved. Claimant would have this Court adopt the dissent in *Wimberly v. Labor and Industrial Relations Commission*, 688 S.W.2d 344 (Mo. banc 1985). As will be explained below, however, the legislature adopted the majority decision in *Wimberly* in later legislation.

As mentioned in Point III, Missouri courts have held that, when an individual leaves employment due to personal illness unrelated to the work, the individual leaves work voluntarily without good cause attributable to the work or employer and is disqualified from receiving unemployment benefits pursuant to Section 288.050.1, RSMo. See, *Bussmann Manufacturing Company v. Industrial Commission*, 335 S.W.2d 456 (Mo. App. St.L. 1960). When an individual takes a leave of absence from work for personal illness without a guarantee of reinstatement, the individual is disqualified from receiving unemployment benefits for leaving work voluntarily without good cause

attributable to the work or employer. *See, Neeley v. Industrial Commission of Missouri*, 379 S.W.2d 201 (Mo. App. K.C. 1964).

In *Wimberly, supra*, the majority opinion declined to overturn the case law interpreting Section 288.050.1(1), RSMo. as disqualifying claimants who left work due to pregnancy or personal illness unrelated to the employment. In the *Wimberly* case, Ms. Wimberly worked for J.C. Penny Company, Inc., as a cashier and sales clerk. Due to her pregnancy, Ms. Wimberly requested a leave of absence. The company granted her a leave without a guarantee of reinstatement. After the birth of her child, Ms. Wimberly notified the company of her desire to return to work. However, at that time, no position was available.

Ms. Wimberly filed a claim for unemployment benefits. The Division determined that Ms. Wimberly was disqualified from receiving unemployment benefits under § 288.050.1(1) because she voluntarily left work without good cause attributable to her work or employer. On appeal, the determination was affirmed by the Division's Appeals Tribunal and the Labor and Industrial Relations Commission.

Ms. Wimberly challenged the Commission's decision on the basis that Missouri law violated 26 U.S.C. § 3304(a)(12) (1982). The federal statute provided that an individual could not be denied unemployment compensation based solely upon pregnancy or the termination of pregnancy. The majority stated as follows:

Missouri courts have interpreted this provision to disqualify claimants who quit their job on account of pregnancy or personal illness unrelated to the employment. * * * These decisions persuasively demonstrate that the

wording of § 288.050.1(1) evidences a manifest legislative desire to disqualify claimants who, like respondent, left work for reasons that, while perhaps legitimate and necessary from a personal standpoint, were not causally connected to the claimant's work or employer. [Case Citations omitted.]

Wimberly, 688 S.W.2d at 346. This Court upheld the Commission's decision to disqualify Ms. Wimberly.

Ms. Wimberly petitioned the United States Supreme Court for a writ of certiorari. The U.S. Supreme Court granted cert. 475 U.S. 1118, 106 S.Ct. 1633, 90 L.Ed.2d 179 (1986). In its decision, the U.S. Supreme Court found that 26 U.S.C. § 3304(a)(12) prohibited States from singling out pregnancy for unfavorable treatment by denying unemployment compensation "solely on the basis of pregnancy or termination of pregnancy." 107 S.Ct. at 825. The U.S. Supreme Court noted that "the Missouri scheme treats pregnant women the same as all other persons who leave for reasons not causally connected to their work or their employer, including those suffering from other types of temporary disabilities." 107 S.Ct. at 824.

Judge Blackmar dissented in the Missouri Supreme Court *Wimberly* decision. In the dissent, Judge Blackmar opined that claimants who withdraw from the workforce have not voluntarily quit if medical conditions make continued employment impossible. *Wimberly*, *supra* 688 S.W.2d at 350. Claimant cites to Judge Blackmar's dissent in support of her argument that all claimants who are forced to leave work because of a medical condition should be entitled to unemployment benefits. (Br. 13). As will be

explained below, however, the legislature has already considered and rejected the position articulated by the dissent in *Wimberly*.

In 1988, the Missouri legislature amended § 288.050.1(1) by inserting a disqualification exception exemption within § 288.050.1(1)(d). *A.L. 1998 H.C.S.H.B. 1485*. That statute states as follows:

As to initial claims filed after December 31, 1988, if the claimant presents evidence supported by competent medical proof that she was forced to leave her work because of pregnancy, notified her employer of such necessity as soon as practical under the circumstances, and returned to that employer and offered her services to that employer as soon as she was physically able to return to work, as certified by a licensed and practicing physician, but in no event later than ninety days after the termination of the pregnancy. An employee shall have been employed for at least one year with the same employer before she may be provided benefits pursuant to the provisions of this paragraph....

In enacting this disqualification exception, it is presumed that the Legislature was fully aware of the Missouri Courts interpretation of Section 288.050.1(1), RSMo. “The Legislature is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent.” *Harding v. Lohman*, 27 S.W.3d 820, 824 (Mo. App. W.D. 2000). In the amendment, the legislature

adopted the majority decision in *Wimberly*.⁷ By placing an exemption within § 288.050.1(1)(d) for claimants who are "forced to leave work" because of pregnancy, the legislature must have believed these women would otherwise be disqualified from receiving unemployment benefits. That was, in fact, the case law for decades before the amendment.

It is also important to note that this disqualification exception does not include other types of personal illness and physical disability. "It is an elementary principle of statutory construction, as well as established law in Missouri, that the expression of one thing means the exclusion of another." *Wicklund v. Handoyo*, 181 S.W.3d 143, 152 (Mo. App. E.D. 2005). This Court should reject Claimant's prayer to expand the legislature's exception to include all types of personal illness and physical disability.

Claimant failed to return to work when her leave expired on May 29, 2006. Claimant made a conscious decision not to come to work because of a medical reason unrelated to work and unrelated to a pregnancy. Employer sent Claimant a letter stating that Claimant had abandoned her job when she was absent from work, without leave, for seven working days on and after May 29, 2006. The decision of the Commission that Claimant left work voluntarily without good cause attributable to the work or to the employer is supported by competent and substantial evidence and properly applies the law. Therefore, the Division urges this Court to affirm the Commission's decision.

⁷ The legislature could have rejected the *Wimberly* decision and prior case law within the amendment, as was done in § 288.046 RSMo.

Claimant focuses on her illness and her lack of fault. But, Claimant would have this Court impose an unreasonable burden upon employers. If an employee cannot work for a reason unrelated to the job, must the employer choose between keeping the employee's position open indefinitely, or filling the vacancy and becoming liable for up to \$8,320.00 in unemployment benefits?⁸ In addition, an illness is not the only "fault free" reason an employee may cease going to work. One example would be an employee who lacks transportation to work because he or she was in a car accident that was not the employee's fault. Another example would be an employee who must care for a seriously ill relative. Most employers must fill vacancies, and it is untenable for this Court to impose thousands of dollars of unemployment benefit charges upon them whenever they fill a vacancy. Claimant was not discharged by her employer. Employer had a job available for her on May 29, but she did not go to work. Employer had no legal obligation to hold the job open for Claimant for two more months. A reasonable person would not expect her employer to hold her job open indefinitely; and the Missouri unemployment laws do not require this of the employer. As such, this Court should reject Claimant's argument that employees who stop going to work should receive unemployment benefits if they wanted to retain their jobs.

⁸ 26 weeks at \$280 per week equals \$8,320.00. *Sections 288.038 and 288.060.4.*

POINT V.

The Court of Appeals, Western District erred when it decided that Claimant is not disqualified from receiving unemployment benefits because the Missouri Employment Security Law is not a disability program in that the exception from disqualification contained within Paragraph 288.050.1(1)(d) applies only to claimants who are "forced to leave" because of pregnancy.

Claimant would have this Court follow the Western District's decision in this case, which expressly overruled *Lake v. Labor and Industrial Relations Commission*, 781 S.W.2d 207 (Mo. App. E.D. 1989) and placed in doubt *Reutzel v. Division of Employment Security*, 955 S.W.2d 239 (Mo. App. S.D. 1997) and *Wimberly v. Labor and Industrial Relations Commission*, 688 S.W.2d 344 (Mo. banc 1985). Claimant would have this Court disregard the string of Court of Appeals cases cited by the majority opinion in *Wimberly* and disregard the legislature's enactment of the pregnancy exemption within § 288.050.1(1)(d).

The controversy herein started with Employer's protest to Claimant's unemployment claim. An employer may file a written protest against the allowance of benefits. *Section 288.070.1*. If an employer files a protest in response to the notice of initial claim, it is deemed an interested party until the issue raised by the protest is finally decided. *Id.*

Both the claimant and the employer have a statutory right of appeal concerning a claim for unemployment benefits because they have a direct financial stake in the outcome. The claimant's financial interest in the controversy should be apparent. The

employer's interest, however, may be less apparent. As will be explained below, an employer is ultimately responsible for the payment of unemployment benefits to its employees.

Once subject to the Missouri Employment Security Law (§ 288.032.1), an employer must report and pay contributions on its employees' wages. The Division maintains a separate account for each employing unit and credits its account with all contributions paid the Division. *Section 288.100*. The Division debits from the account unemployment benefits paid to the employer's employees. *Id.*

When enacting laws relating to unemployment benefits, therefore, the legislature is called upon to balance the needs of claimants against the costs to employers. As will be explained below, the legislature considered the case law and the competing financial interests when an employee stops going to work because of a medical condition and modified § 288.050.1(1) accordingly. Only a limited group of claimants who stop coming to work because of a medical condition are exempted from disqualification. *Section 288.050.1(1)(d)*. The appellant in this case is not entitled to the statutory medical exemption from disqualification.

During fiscal year 2007, 375,951 Missouri workers filed initial claims for unemployment benefits regarding separations from 139,148 Missouri employers. *Missouri Department of Labor and Industrial Relations Annual Report, 2007*. A significant number of those separations were caused by medical reasons unrelated to work or to the employer. There are also a number of other reasons unrelated to work that would prevent an employee from going to work for an extended period of time. Claimant

would have this Court declare all of these individual's eligible for unemployment benefits because they wanted to retain their jobs when they stopped going to work. As will be explained below, that is not the purpose of this Act.

The Family Medical Leave Act ("FMLA") is a federal government program designed to protect an employee's job in the case of a personal or family medical situation. However, Claimant was not eligible for such protection because she did not meet the eligibility criteria for FMLA because she had not worked for Dolphin at least 12 months. Claimant only worked for Employer from November 14, 2005 to May 23, 2006.

Some states have their own type of Family Medical Leave, which provides greater coverage or greater benefits than the federal version. Some states, such as California, have medical disability programs built into their unemployment insurance laws.⁹ Some states have enacted statutes defining good cause for voluntarily leaving work as including illness. *See, S.D. Codified Laws § 61-6-13.1(1)*. Other states, by statute, have created disqualification exceptions which include illness, disability, and pregnancy. *See, Tenn. Code Ann. § 50-7-303(a)(1)*; and *Ark. Code Ann. § 11-10-513(b)(2)*. However, the Missouri Legislature has not enacted a disqualification exception for personal illness or physical disability. Missouri has not enacted a state FMLA law, nor does it have a disability program built into its unemployment insurance program.

The Missouri Employment Security Law does not contain a disability provision. *Wolpers v. Unemployment Compensation Commission*, 186 S.W.2d 440, 442 (Mo. 1945). Instead, the Missouri Legislature has narrowly defined the term good cause by requiring

⁹ *West's Ann. Cal. Un. Ins. Code §2601* (Appendix at A-21).

the cause to be “attributable to such work or to the claimant's employer.” *Section 288.050.1(1), RSMo.* That is the Legislature’s prerogative. *Strahler v. St. Luke’s Hospital*, 706 S.W.2d 6 (Mo. 1986). Therefore, this Court should not create, through judicial decision, a disqualification exception for personal illness or physical disability. This Court should reaffirm the fifty (50) years of case law interpreting § 288.050.1 as disqualifying claimants who leave work due to personal illness unrelated to the employment. *See, Wimberly v. Labor and Industrial Relations*, 688 S.W.2d 344, 346 (Mo. banc 1985).

In fiscal year 2007, 375,951 initial claims for benefits were filed by employees in the State of Missouri. *Department of Labor and Industrial Relations Annual Report, 2007*, pg. 277.¹⁰ In that same year, \$420,098,000.00 of benefits were paid out of the unemployment trust fund. *Id.* It should be apparent that the Missouri Unemployment Compensation Trust Fund disburses a large amount of benefits to a great number of people. However, there has to be a limit to everything and the limit established by the legislature in this situation is reasonable when considering the purpose of the law. The Division understands that a person who becomes ill and is not able to work may need financial assistance. But, a prior employer's unemployment account is not the

¹⁰ A court can take judicial notice of statistics contained in a governmental publication without having said publication in evidence. *City of Gainesville v. Gilliland*, 718 S.W.2d 553 (Mo. App. S.D. 1986). *See also, Sulls v. Director of Revenue*, 819 S.W.2d 782 (Mo. App. S.D. 1991). The Division requests that this Court take judicial notice of the statistics presented here.

appropriate source of that assistance. This employer should not be required to pay this claimant unemployment benefits. If a claimant needs financial assistance during her illness, she needs to seek that assistance from another source.

WHEREFORE, the Division prays this Court affirm the Commission's decision.

CONCLUSION

Claimant stopped coming to work on May 23, 2006 and did not return when her leave of absence expired on May 29, 2006. Employer had a job waiting for Claimant on May 29. With one exception, the Missouri Employment Security Law does not require an employer to hold an employee's job open for her return. Since Claimant does not qualify for the exemption contained in § 288.050.1(1)(d), Claimant is disqualified from receiving unemployment benefits. This Court should not expand the medical exemption contained in § 288.050.1(1)(d).

WHEREFORE, the Division prays that this Court clarify the law and remand the case for further action.

Respectfully submitted,

MATTHEW W. MURPHY #47786
Division of Employment Security
P.O. Box 59
Jefferson City, Missouri 65104
TEL: (573) 751-3844
FAX: (573) 751-2947

Attorney for Respondent
Division of Employment Security

CERTIFICATE OF SERVICE

I hereby certify that I mailed one copy of the foregoing Brief and one diskette containing the Brief on this 23rd day of September, 2008, to the following:

Susan Robertson
3210 Bluff Creek Drive
Columbia, MO 65201-3525

Dolphin Capital Corporation
101 Summer Street
Boston, MA 02110

Matthew W. Murphy

CERTIFICATE OF WORD COUNT AND VIRUS FREE DISK

I hereby certify the following:

1. The foregoing brief complies with the word count limitations contained in Supreme Court Rule 84.06(b).
2. The foregoing brief contains 8,861 words.
3. The enclosed diskette containing the brief has been scanned for viruses using Symantec AntiVirus and is virus free.

Matthew W. Murphy

APPENDIX TABLE OF CONTENTS

	<u>Page</u>
Decision of the Appeals Tribunal	A-2
Decision of the Labor and Industrial Relations Commission.....	A-5
Section 288.050.1(1) RSMo Cum Supp. 2006	A-8
S.D. Codified Laws § 61-6-13.1	A-11
Tenn. Code Ann § 50-7-303	A-13
Ark. Code § 11-10-513	A-19
Cal. Un. Ins. Code §2601.....	A-2

