

No. ED95903

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**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

92177

CAROL FENDLER,

Appellant,

v.

FILED

FEB 8 2012

**HUDSON SERVICES
and
DIVISION OF EMPLOYMENT SECURITY,
Respondents.**

CLERK, SUPREME COURT

**Appeal from the Decision of the
Labor and Industrial Relations Commission**

APPELLANT'S BRIEF AND APPENDIX

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JURISDICTIONAL STATEMENT

This is an appeal from the November 3, 2010, decision of the Labor and Industrial Relations Commission denying Carol Fendler unemployment benefits. This case does not raise an issue that is directly appealable to the Missouri Supreme Court. Section 288.210 of the Missouri Revised Statutes permits any party aggrieved by a Commission decision to appeal to the appellate court having jurisdiction where the claimant resides. Ms. Fendler resides in St. Louis, Missouri, so the proper venue and jurisdiction for this action is the Court of Appeals for the Eastern District of Missouri.

STATEMENT OF FACTS

Factual History

On November 21, 1994, Ms. Fendler began working full-time for Hudson Services (the “Employer”), a company which provides property management services, including commercial cleaning, security, and mechanical maintenance. TR. 7. At the time of Ms. Fendler’s separation on January 25, 2010, she was an Operations Assistant in the Housekeeping Department. TR. 7.

The Employer uses a computerized payroll system that runs through the telephone lines. TR. 10. An employee calls in from a customer job site and plugs in his or her PIN number and job number at the beginning and end of a work shift. TR. 10. The system takes that information and inputs the time-stamped records into the timekeeping reports, and based on those reports, the employee is paid every two weeks according to the number of hours worked. TR. 10.

Oftentimes, the timekeeping reports have incomplete records because an employee may forget to call in at the beginning or end of a work shift. TR. 10. Ms. Fendler was responsible for reconciling these discrepancies in the payroll system. TR. 10. William Hudson, the President of Hudson Services, testified at the hearing before the Appeals Tribunal that Ms. Fendler had to reconcile the payroll by either calling the employee directly or by verifying with the manager the number of hours the employee worked, and then inputting the correct time into the timekeeping report. TR. 12. Mr. Hudson, however, later changed his testimony and asserted that Ms. Fendler always had to obtain

manager approval of any payroll verifications, but he admitted that there was no written policy reflecting this requirement. TR. 17.

Pam Meister, Ms. Fendler's immediate supervisor since July 2008, stated that Ms. Fendler "was supposed to either ask the supervisor or the General Manager for approval to pay these people, or she was to call the employee to find out when they actually worked their time, and not just give them the time not knowing when they actually worked." TR. 20. Like Mr. Hudson, however, Ms. Meister changed her testimony later in the hearing, asserting that Ms. Fendler always had to obtain approval from the manager to pay an employee. TR. 42.

Ms. Meister stated that on December 28, 2009, she verbally warned Ms. Fendler for inputting into the timekeeping reports the number of hours worked by employees without inputting the exact in and out times. TR. 20; LF 24. Ms. Meister believed that Ms. Fendler was not calling employees to verify their hours. According to Ms. Meister, if Ms. Fendler had been calling the employees, then specific in and out times would have been entered into the timekeeping reports. TR. 22-23, 25. Ms. Meister informed Ms. Fendler that "she needed to start asking the supervisor, the General Manager or asking the employees and not just plugging in time for people." TR. 21. Ms. Meister, however, did not issue any documentation of the warning, nor did she indicate that Ms. Fendler's job was in jeopardy. TR. 20, 28.

Contrary to Ms. Meister's belief that Ms. Fendler was indiscriminately plugging in time for people, Ms. Fendler testified that, while she was not entering the specific clock-in and clock-out times, she had been calling employees and asking them the number of

hours that they worked. TR. 29, 32. She stated that “[if] somebody was there, I just put their time in. I would just put--if they were--said they were there four hours, I put in four hours--if they were there three hours, I put in three hours.” TR. 30–31. Ms. Fendler further stated that she had been instructed by the managers, including Ms. Meister, to call the employees to ask them how many hours they worked, and in “[a]ll the years [she had] been doing it that’s the way [she] had been doing it.” TR. 29, 30, 39. Ms. Fendler added that, while Ms. Meister had informed her in the year leading up to her employment separation that she wanted Ms. Fendler to input exact in and out times, Ms. Meister did so informally and did not indicate that Ms. Fendler’s job would be in jeopardy for failing to input exact in and out times. TR. 31.

On January 21, 2010, the Employer terminated Ms. Fendler because it believed she was continuing to not verify payroll by calling the employees or obtaining approval from the manager. TR. 8, 13. In support of this determination, the Employer offered a timekeeping report for the period between January 4, 2010, and January 17, 2010, which had several entries inputted by Ms. Fendler that showed total hours worked by individual employees, but did not show clock-in and clock-out times. TR. 13, 52–56. Again, Ms. Meister inferred from the fact that there were no clock-in and clock-out times that Ms. Fendler was not calling the employees to determine the number of hours the employee worked, nor approving the time with the General Manager. TR. 22–23, 25. The Employer, however, presented no evidence that the employees did not work the number of hours that Ms. Fendler had inputted into the timekeeping reports. Moreover, Ms. Meister did not have any conversations with Ms. Fendler about the report, and Ms.

Fendler reasserted that, except for one instance where she had inputted hours without obtaining verification from the employee, she had consistently been calling employees and asking them the number of hours worked:

Q. So what about the other people highlighted in . . . Exhibit E-1, say John Hood on January 12th? He has 3 point 5 zero hours but no in and out times. How did you know that he was to be paid for that time?

A. Just call and verified with him that he was there at those times.

Q. What about Geraldine Jeffery? The same thing?

A. Yes.

Q. What about all the rest--all the workers highlighted on this document?

A. Basically, the same thing.

Q. Did you check with any of the managers or just with the workers?

A. No, just with the workers.

Q. Do you have any reasons to believe that the workers were not being truthful?

A. No. There were other people on the job, not just them.

TR. 32–33.

Procedural History

Ms. Fendler filed her initial claim for benefits on February 3, 2010, and the Employer filed its letter of protest on February 9, 2010. L.F. 1–3. On March 3, 2010, the Deputy determined that Ms. Fendler was discharged for misconduct connected with work because she did not verify hours that the employees worked despite being specifically

instructed to do so. L.F. 4. Accordingly, the Deputy concluded that Ms. Fendler was disqualified from January 31, 2010, for waiting week credit and benefits until she had earned wages for insured work equal to six times the weekly benefit amount. L.F. 4.

Ms. Fendler filed an appeal, and the Appeals Tribunal conducted a hearing on April 16, 2010. L.F. 5–8. On April 19, 2010, the Appeals Tribunal issued an opinion reversing the Deputy’s determination on the basis that Ms. Fendler was discharged, but not for misconduct connected with work. L.F. 10. On May 5, 2010, the Employer filed an Application for Review with the Labor and Industrial Relations Commission. L.F. 12–15. The Commission issued an Order setting aside the decision of the Appeals Tribunal because of a malfunction of the tape recorder at the hearing. L.F. 16. A second hearing before the Appeals Tribunal was held on July 19, 2010. On August 3, 2010, the Appeals Tribunal issued an opinion reversing the Deputy’s determination on the basis that Ms. Fendler was discharged, but not for misconduct connected with work. L.F. 21.

On August 8, 2010, the Employer filed an Application for Review and accompanying memorandum with the Labor and Industrial Relations Commission. L.F. 23–25. In a divided opinion, the Commission reversed the decision of the Appeals Tribunal and determined that Ms. Fendler was discharged for misconduct connected with work. The Commission, in its findings of fact, determined that “Ms. Meister testified that she instructed [Ms. Fendler] to either call the employees and verify when they worked or ask the general manager to approve the hours.” L.F. 27. In its conclusions of law, the Commission found that Ms. Meister “instructed [Ms. Fendler] to list clock-in and clock-out times on employer’s payroll system,” that Ms. Fendler “consistently failed to comply

with this directive” despite the December 28, 2010 warning, and that Ms. Fendler’s “repeated failure to comply with explicit instructions take her conduct outside the realm of mere mistakes or poor work performance and into the realm of insubordination.” L.F. 28.

The dissenting Commissioner found that Ms. Fendler could not be found to have committed an act of misconduct, because the employer failed to present sufficient evidence that she deliberately or purposefully erred. L.F. 30. In support of this conclusion, the dissenting Commissioner found that “while [Ms. Fendler] admitted she did not always list clock-in and clock-out times for employees, [she] credibly testified that, at the time, she didn’t know this was required of her.” L.F. 30. The dissenting Commissioner further noted that the majority incorrectly found that “[Ms. Fendler] was discharged for failing to list clock-in and clock-out time for employees, when in actuality, it appears that this was the *evidence* that [Ms. Fendler’s] supervisors relied on to determine that [she] was not verifying payroll—the stated offense for which [she] was discharged.” L.F. 30 (emphasis in original). As such, Ms. Fendler’s failure to list in and out times, according to the dissenting Commissioner, “cannot be the basis of a finding of misconduct where it was not the conduct for which the employer discharged the claimant.” L.F. 30.

On November 23, 2010, Ms. Fendler filed a Notice of Appeal with the Commission.

POINTS RELIED ON

- I. The Labor and Industrial Relations Commission erred in finding that Ms. Fendler was discharged for misconduct connected with work, because there was not sufficient competent evidence in the record to warrant making the decision pursuant to section 288.210 of the Missouri Revised Statutes, in that Hudson Services failed to meet its burden of proving that Ms. Fendler intentionally failed to verify payroll.**

Duncan v. Accent Marketing, LLC, 328 S.W.3d 488 (Mo. App. E.D. 2010)

Frisella v. Deuster Elec. Inc., 269 S.W.3d 895 (Mo. App. E.D. 2008)

Section 288.030.1(23), RSMo. (Cum. Supp. 2010)

Section 288.050.2, RSMo. (Cum. Supp. 2010)

Section 288.210, RSMo. (2000)

ARGUMENT

I. The Labor and Industrial Relations Commission erred in finding that Ms. Fendler was discharged for misconduct connected with work, because there was not sufficient competent evidence in the record to warrant making the decision pursuant to section 288.210 of the Missouri Revised Statutes, in that Hudson Services failed to meet its burden of proving that Ms. Fendler intentionally failed to verify payroll.

The Court of Appeals may modify, reverse, remand for hearing, or set aside the decision of the Labor and Industrial Relations Commission if, *inter alia*, “the facts found by the Commission do not support the decision” or “there was not sufficient competent evidence in the record to warrant the making of the decision.” Section 288.210, RSMo. (2000). In reviewing the Commission’s decision, the factual determinations are conclusive if supported by competent and substantial evidence and absent indications of fraud. *Scrivener Oil Co., Inc. v. Div. of Employment Sec.* 184 S.W.3d 635, 638 (Mo.App. S.D. 2006). This Court, however, “is not bound by the Commission’s conclusions of law or the Commission’s application of law to the facts.” *Hoover v. Community Blood Ctr.*, 153 S.W.3d 9, 12 (Mo. App. W.D. 2005). The determination of whether a claimant’s actions amount to misconduct is a question of law which this Court reviews *de novo*. *McClelland v. Hogan Personnel, LLC*, 116 S.W.3d 660, 664 (Mo. App. W.D. 2003).

An employee will be denied unemployment benefits if the claimant has been discharged for misconduct connected with the claimant's work. Section 288.050.2, RSMo. (Cum. Supp. 2010). Misconduct is defined as

[A]n 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(23), RSMo. (Cum. Supp. 2010).

When the employer claims that the employee was discharged due to misconduct, the burden shifts to the employer to prove through a "preponderance of the evidence" the misconduct asserted. *Frisella v. Deuster Elec. Inc.*, 269 S.W.3d 895, 899 (Mo. App. E.D. 2008).

In order to prove the misconduct asserted, the employer must demonstrate by a preponderance of the evidence that the claimant "willfully violated the rules or standards of employer and that his actions were not simply the result of poor workmanship, lack of judgment, or an inability to do the job." *Id.* (internal quotation marks omitted). Thus, an "employee may be terminated for poor judgment and irresponsible actions," but "such actions are generally not a ground for denying compensation." *Id.* In addition, "violation

of a reasonable work rule is not dispositive proof of misconduct connected with work,” but serves only as a “relevant factor” in determining whether the employee’s behavior constitutes misconduct sufficient to disqualify the claimant from receiving benefits.

McClelland v. Hogan Personnel, LLC, 116 S.W.3d 660, 665 (Mo. App. W.D. 2003). It follows that an employee’s failure to follow the employer’s instructions is not necessarily grounds for finding misconduct. *Frisella*, 269 S.W.3d at 899.

Here, the facts found by the Commission do not support its conclusion that Ms. Fendler’s actions constituted misconduct, because the Commission only found that Ms. Fendler failed to follow the Employer’s instructions regarding the manner in which she had to verify payroll. According to the Commission’s findings, “Ms. Meister testified that she instructed [Ms. Fendler] to either call the employees and verify when they worked or ask the general manager to approve the hours.” L.F. 27. The Commission, however, did not find that Ms. Fendler was failing to call the employees to verify the number of hours worked. Instead, the Commission’s conclusion that Ms. Fendler committed misconduct was based on the fact that she failed to input in and out times into the timekeeping reports as instructed by Ms. Meister. L.F. 28. Consistent with *Frisella*, this finding—that Ms. Fendler merely failed to follow Ms. Meister’s instructions regarding the precise manner in which she was to verify payroll—is not necessarily grounds for a finding of misconduct.

Instead, an employee’s failure to adhere to his employer’s policy amounts to misconduct only where there is evidence that the failure was deliberate or purposeful. *Duncan v. Accent Marketing, LLC*, 328 S.W.3d 488, 491 (Mo. App. E.D. 2010). In

Duncan, the employer terminated a customer service representative because he failed to call a customer back after a disconnected call and failed to use a computer-based system when assisting customers, even though he knew about the system and was warned for not using it. *Id.* at 492. On appeal from the Commission's decision denying the representative unemployment benefits, the Court of Appeals reversed. The Court noted that the Commission based its determination on the fact that the representative failed to use the computer-based system and failed to call the customer back, but held that the Commission did not find any facts suggesting that the representative's mistakes and omissions were deliberate or purposeful. *Id.* Thus, the facts found by the Commission, according to the Court, may have reflected lack of judgment, but they did not amount to misconduct connected with work. *Id.* at 492–93.

Here, like *Duncan*, the Commission's findings indicate only that Ms. Fendler failed to input exact in and out times into the timekeeping reports despite being instructed to do so. The Commission did not find any facts suggesting that Ms. Fendler's failure to follow these instructions was deliberate or purposeful. Instead, the record shows, and the Commission found, that Ms. Fendler was instructed that she could verify hours by calling the employee directly or verifying the hours with the manager, and consistent with those instructions, Ms. Fendler contacted employees and verified total hours worked. Although she was further instructed that she had to input in and out times into the timekeeping reports in addition to the number of hours worked, Ms. Fendler testified that for several years the Employer's policy required that she enter only the total number of hours worked. TR. 30. As such, the record demonstrates that Ms. Fendler's failure to input in

and out times reflected merely a lack of judgment or poor job performance, and the employer has offered no countervailing evidence that the omissions were otherwise purposeful or deliberate.

Finally, the Commission has relied on *Freeman v. Gary Glass & Mirror, L.L.C.*, 276 S.W.3d 388 (Mo. App. S.D. 2009), to support its finding that Ms. Fendler committed misconduct connected with work. In *Freeman*, the Court determined that a glass installation technician willfully committed misconduct by turning away profitable business and by intentionally disobeying the employer's specific instructions regarding installations. The Court inferred the requisite intent based on its finding that the claimant, after more than three years of satisfactory work, recommended installation of a semiframe shower door "after he had specifically been told not to do so," used two-inch screws on an installation "after he had specifically been told to use three-inch screws," and failed to double-check certain measurements "after he had been specifically instructed to do so." *Id.* at 392. According to the Court, this "repeated failure to follow the Employer's specific directions, without any explanation, after demonstrating his ability to do so over a long period of time, speaks just as loudly about the willfulness of Claimant's actions" as would an employee's deliberate, verbal refusal to follow the employer's instructions. *Id.* at 393.

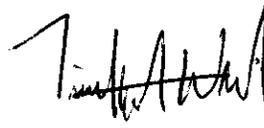
In the present case, *Freeman* does not support a finding that Ms. Fendler willfully committed misconduct connected with work, because there is no evidence that Ms. Fendler intentionally disobeyed, without explanation, the Employer's specific instructions regarding payroll verification. Like *Freeman*, where the employer instructed

the technician to follow certain work-related procedures, here the Commission found that Ms. Meister instructed Ms. Fendler to verify payroll by either calling the employee or obtaining approval from the manager. However, in contrast to *Freeman*, Ms. Fendler did not wholly fail to verify payroll after being specifically instructed to do so, because she did call individual employees and enter their total hours worked. Moreover, while she did not enter the exact in and out times, she offered as an explanation for her failure to do so the fact that for the past several years she had verified payroll by entering only total hours worked. Clearly, therefore, *Freeman* is distinguishable and does not support the inference that Ms. Fendler willfully committed misconduct connected with work.

CONCLUSION

The Commission's own factual findings indicate that Ms. Fendler could verify employee work hours by calling the employees directly or by verifying the hours with the manager. Consistent with those instructions, Ms. Fendler testified that she was calling the employees and verifying the total number of hours worked. Moreover, the Commission made no findings that Ms. Fendler was not calling the employees to verify total work hours. Although the Commission did find that Ms. Fendler failed to input exact in and out times into the timekeeping reports in addition to the total number of hours worked, it pointed to no facts nor made any findings that Ms. Fendler's failure to follow this instruction was deliberate or purposeful. For these reasons, Ms. Fendler respectfully requests that this Court reverse the decision of the Labor and Industrial Relations Commission and remand the case with instructions to award her unemployment benefits.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE AND SERVICE

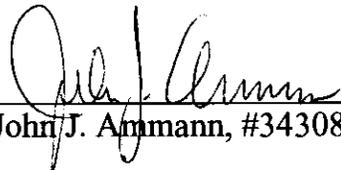
I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,907 words, including this certification as performed by Microsoft Word software; and
2. That the attached brief includes all the information required by Supreme Court Rule 55.03; and
3. That the CD-ROM filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and
4. That one (1) true and correct copy of the foregoing brief was sent via U.S. Postal Service, first class, postage prepaid, on this 14th day of April, 2011, to the attorneys or officials listed below:

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APPENDIX

| | |
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Appeal No. 10-07371 TYPE R-A ISSUE 001

CAROL FENDLER HUDSON SERVICES

(Claimant) SSN 497-42-3274 (Employer)

Deter. Date: 03-03-10 Appeal Filed: 06-23-10 Filed By: CLAIMANT

A deputy determined under the Missouri Employment Security Law that the claimant was disqualified for waiting week credit and benefits until the claimant has earned wages for insured work equal to six times the claimant's weekly benefit amount, on a finding that the claimant was discharged on January 25, 2010, for misconduct connected with the claimant's work. The claimant filed an appeal from that determination.

After due notice to the interested parties the appeal was heard in St. Louis, Missouri in April 16, 2010. The claimant was present and testified. Two witnesses were present and testified on behalf of the employer. On April 19, 2010 the Appeals Tribunal issued a decision reversing the deputy's determination and deciding that the claimant was not disqualified for benefits by reason of her discharge on January 25, 2010 because the discharge was not for misconduct connected with work.

The employer filed an application for review with the Labor and Industrial Relations Commission on May 5, 2010. The Labor and Industrial Relations Commission issued a Remand Order on June 23, 2010 setting aside the Decision of the Appeals Tribunal due to a malfunction of the tape recording and remanding the matter to the Appeals Tribunal to conduct a new hearing and to issue a new decision.

After due notice to the interested parties the Appeals Tribunal heard the

appeal on July 19, 2010, in St. Louis, Missouri. The claimant was present and testified. Two witnesses were present and testified on behalf of the employer.

FINDINGS OF FACT:

The claimant worked for the employer from November 21, 1994 through January 25, 2010. The claimant last worked as an operations assistant in the housekeeping department. The claimant was discharged on January 25, 2010 for defective work, carelessness, disobedience and improper record keeping. The employer provides janitorial services to clients. Under the employer's personnel policy, the janitorial workers are expected to call in and out on the client's dedicated phone line when they arrive and when they depart work sites. The purpose of the call is to determine when the workers report for work and the number of hours of work they perform.

The claimant's responsibilities included verifying the hours worked by the janitorial workers for payroll purposes. If the computer records containing the in and out times of the worker were incomplete, the claimant was required to verify the hours for payment. The claimant had verified the hours in the same manner for the past nine years, she called the worker and asked the worker the hours worked. The claimant would then enter the total number of hours worked into the payroll system and the worker would be paid.

In the last year or two, since the employer's administrative assistant had been the claimant's supervisor, the claimant had been told by her supervisor to list the in and out times on the report in addition to the total number of hours the worker worked. The claimant continued to enter the total number of hours only.

The employer contends the claimant had received verbal warnings on two occasions, one for the report period September 2009 through November 2009, and one on December 28, 2009. The claimant denied receiving warnings. The claimant's supervisor had told the claimant that she could not just plug in time for people. The claimant was not specifically told that if she failed to put in and out times for the workers she could be discharged. The claimant was not asked to sign a warning or even given a copy of a warning. The claimant was not told the exact in and out times were required by law. The claimant was not aware that her job was in jeopardy for failing to complete the documentation with in and out times in addition to total number of hours worked.

LAW:

The Missouri Employment Security Law, Chapter 288, RSMo 2000, as amended, provides in part as follows:

288.020.1. As a guide to the interpretation and application of this law, the public policy of this state is declared 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.

288.020.2. This law shall be liberally construed to accomplish its purpose to promote employment security both by increasing opportunities for jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment.

288.030.1 As used in this chapter, unless the context clearly requires otherwise, the following terms mean:

(23) "Misconduct", 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;

288.050.2. If a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work, such claimant shall be disqualified for waiting week credit and benefits, and no benefits shall be paid nor shall the cost of any benefits be charged against any employer for any period of employment within the base period until the claimant has earned wages for work insured under the unemployment laws of this state or any other state as prescribed in this section. In addition to the disqualification for benefits pursuant to this provision the division may in the more aggravated cases of misconduct, cancel all or any part of the individual's wage credits, which were established through the individual's employment by the employer who discharged such individual, according to the seriousness of the misconduct. A disqualification provided for pursuant to this subsection shall not apply to any week which occurs after the claimant has earned wages for work insured pursuant to the unemployment compensation laws of any state in an amount equal to six times the claimant's weekly benefit amount. Should a claimant be disqualified on a second or subsequent occasion within the base period or subsequent to the base period the claimant shall be required to earn wages in an amount equal to or in excess of six times the claimant's weekly benefit amount for each disqualification.

288.200.1. Any of the parties (including the division) to any decision of an appeals tribunal, may file with the commission within thirty days following the date of notification or mailing of such decision, an application to have such decision reviewed

by the commission. The commission may allow or deny an application for review. If an application is allowed, the commission may affirm, modify, reverse, or set aside the decision of the appeals tribunal on the basis of the evidence previously submitted in such case or may take additional evidence or may remand the matter to the appeals tribunal with directions. Any additional hearing shall be conducted in accordance with the requirements of subsection 2 of section 288.190. The commission shall promptly notify the parties of its decision and its reasons therefor. If an application for review is denied, the decision of the appeals tribunal shall be deemed to be the decision of the commission for the purpose of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to decisions of the commission except that the time limitations shall run from the date of notice of the order of the commission denying the application for review.

CONCLUSIONS OF LAW:

The claimant was discharged on January 25, 2010 for failing to complete the reports with the exact in and out times instead of just total hours worked. The issue is whether the claimant was discharged for misconduct connected with work.

"Where an employer claims that an employee was discharged for misconduct, the employer has the burden of proving misconduct by competent and substantial evidence." Business Centers of Missouri, Inc. v. Labor and Industrial Relations Commission, 743 S.W.2d 588, 589 (Mo.App. E.D. 1988).

The claimant failed to input exact in and out times for the workers but instead entered only total hours worked. The claimant had completed the payroll report in the same way for nine years. Although the claimant was aware of the supervisor's expectation of putting the in and out times in addition to the total hours worked, the claimant was not placed on notice that her failure to do so would result in her separation. Particularly since the claimant was doing the report in the same manner for many years, the employer was under a duty to give the claimant specific warning to put her on notice that she was required to change her behavior. Without an appreciation of the consequences for failure to complete both the specific in and out times as well as the number of hours worked, the claimant's actions were benign neglect or poor performance.

"Poor workmanship, lack of judgment or the inability to do the job do not disqualify a claimant from receiving benefits on the basis of misconduct." Powell v. Division of Employment Security, 669 S.W.2d 47, 51 (Mo.App. W.D. 1984)
. Poor work performance alone is not misconduct.

Without evidence that the claimant was warned that her continued poor performance would result in separation, the employer has not demonstrated that the claimant intentionally violated an employer policy or willfully and

vantly failed to disregard the employer's interest. Therefore, the employer has not met its burden of proof. The claimant was discharged on January 25, 2010 but not for misconduct connected with work.

DECISION:

The deputy's determination is reversed. The claimant is not disqualified for benefits by reason of the claimant's discharge from work on January 25, 2010.

Dated and mailed at Jefferson City, Missouri, this 3rd day of August, 2010.

A.J. BURKHARDT
REFEREE

is

This decision will become the final decision of the Division unless a further appeal is filed as set out below.

APPEAL RIGHTS

If you disagree with this decision of the Appeals Tribunal, you may appeal the decision by filing an application for review (Application) to the Labor and Industrial Relations Commission. No Special form is needed to file an application to the commission. An application for review must be filed within thirty (30) days from the date of this decision. The Application may be filed by mail or by fax to the address or number shown below:

DIVISION OF EMPLOYMENT SECURITY
APPEALS TRIBUNAL
P.O. BOX 59
JEFFERSON CITY, MO 65104-0059

573-751-7893 (FAX)

An Application for Review may be filed by the claimant, an individual who is a sole proprietor, a partner in a partnership, an officer or employee of a corporation or governmental entity (Including Indian Tribes), the Division of Employment Security, or a licensed Missouri Attorney on behalf of any interested party. An Application for Review should be signed by the interested party for whom it is filed or by a licensed Missouri attorney.

The appeal number of the decision being appealed and the claimant's social security number should be included in the application.

If you are filing an application and you missed the scheduled hearing, your application should indicate briefly why you did not appear for the hearing.

Special Notice for Governmental Entities (including Indian tribes), Partnerships, Corporations and LLCs: Because you are an entity that is not a

natural person, you may only present legal arguments, evidentiary objections and other legal requests to the Commission through a duly licensed Missouri attorney.

Special Notice for Claimants: If you are still unemployed, you should continue to file your weekly claims and report as directed by a deputy of the Division of Employment Security. An overpayment may be established if you have previously been allowed benefits and this decision reverses that ruling. You will be expected to repay any overpayment of benefits to the Division of Employment Security.

Before the
LABOR AND INDUSTRIAL RELATIONS COMMISSION
P. O. Box 599, Jefferson City, MO 65102
(573) 751-2461
<http://www.dolr.mo.gov/lirc>

DECISION OF COMMISSION

IN RE: Claim for benefits of CAROL FENDLER
Social Security No. 497-42-3274, under
the Missouri Employment Security Law
HUDSON SERVICES, Employer

REVERSE

I. Introduction

A deputy determined under the Missouri Employment Security Law that the claimant was disqualified for waiting week credit and benefits until the claimant has earned wages for insured work equal to six times the claimant's weekly benefit amount, on a finding that the claimant was discharged on January 25, 2010, for misconduct connected with the claimant's work. The claimant filed an appeal from that determination.

After due notice to the interested parties, the Appeals Tribunal heard the appeal in St. Louis, Missouri, on April 16, 2010. The claimant was present and testified. Two witnesses were present and testified for the employer. On April 19, 2010, the Appeals Tribunal issued a decision reversing the deputy's determination and deciding that the claimant was not disqualified for benefits by reason of her discharge on January 25 2010, because the discharge was not for misconduct connected with work.

The employer filed an Application for Review with the Labor and Industrial Relations Commission (Commission) on May 5, 2010. The Commission issued an Order on June 23, 2010, setting aside the decision of Appeals Tribunal due to a malfunction of the tape recording and remanding the matter to the Appeals Tribunal to conduct a new hearing and to issue a new decision.

After due notice to the interested parties the Appeals Tribunal heard the appeal on July 19, 2010, in St. Louis, Missouri. The claimant was present and testified. Two witnesses were present and testified on behalf of the employer. In its decision of August 3, 2010, the Appeals Tribunal reversed the deputy's determination. The Appeals Tribunal concluded that claimant is not disqualified for benefits by reason of claimant's discharge from work on January 25, 2010, on a finding that claimant was discharged on that date, but not for misconduct connected with work. Employer filed a timely application for review with the Labor and Industrial Relations Commission (Commission).

II. Issue Presented

Was claimant discharged for misconduct connected with her work for employer?

III. Findings of Fact

Claimant worked for employer from November 21, 1994, through January 25, 2010, as an operations assistant in employer's housekeeping department.

- 2 -

Employer has a computerized payroll system that operates via telephone. Employees call a special number to report their hours. Employees give a PIN number and a Job Number when they call in. Claimant was responsible for checking the hours recorded via employer's payroll system before payroll went out. If there were any discrepancies, such as an employee who forgot to clock in or out, claimant was required to contact the employee in question and verify the hours or discuss the discrepancy with her manager, who would approve the hours:

Employer discharged claimant because her supervisors believed she was routinely failing to verify hours, and that as a result she was crediting employees with hours that were not reflected in payroll records. Claimant's supervisor, Pam Meister, testified that she warned claimant for failure to verify discrepancies in payroll on December 28, 2009. Ms. Meister testified that she instructed claimant to either call the employees and verify when they worked or ask the general manager to approve the hours. Ms. Meister believed claimant wasn't calling the employees to verify discrepancies because there were no clock-in or clock-out times listed on employer's payroll records for the shifts in question. Ms. Meister testified that, over the course of approximately one year, she gave claimant three chances to comply with her directives, but claimant kept making the same errors.

Claimant testified as follows. Claimant testified that she never saw the warning of December 28, 2009. Claimant testified that she was not aware her job was in jeopardy. Claimant testified that whenever there was a discrepancy in payroll she called the employees and verified hours as she had been instructed to do.

Claimant admitted, however, that Ms. Meister had asked her to input an employee's clock-in and clock-out times on employer's payroll program. Claimant admitted that she didn't do this because she was used to not having to do it that way when another manager was in charge of payroll.

Employer's Exhibit 1, entitled "Timekeeping Report," lists eleven instances between January 7, 2010, and January 15, 2010, in which claimant approved hours for employees when there was no record that the employee clocked in or out. This exhibit was received into evidence without objection by the claimant.

We find the testimony of Ms. Meister more credible than claimant. We find claimant was warned on December 28, 2009, to verify hours. We find that claimant knew she was supposed to list clock-in and clock-out times on employer's payroll system. We find that claimant failed to do so on eleven occasions after the warning on December 28, 2009.

Claimant was discharged on January 25, 2010.

Conclusions of Law

The only issue before this Commission is whether claimant was discharged for misconduct connected with work. Section 288.050.2, RSMo, provides as follows:

If a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work, such claimant shall be disqualified for waiting week credit and benefits ...

Section 288.030.1(23), RSMo, defines "misconduct" as follows:

- 3 -

[A]n 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 ...

Employer bears the burden of introducing competent and substantial evidence to establish misconduct. *Business Centers of Missouri, Inc. v. Labor and Indus. Rel. Comm.*, 743 S.W.2d 588, 589 (Mo. App. 1988). We conclude that employer has succeeded in meeting its burden of demonstrating misconduct in this case.

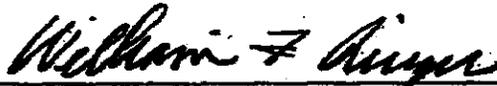
Claimant was in charge of checking employer's payroll and reconciling discrepancies in employees' reported hours. Claimant's supervisor, Ms. Meister, instructed her to list clock-in and clock-out times on employer's payroll program. Claimant consistently failed to comply with this directive. Ms. Meister gave claimant three chances to correct her behavior. Claimant was formally warned by Ms. Meister on December 28, 2009, to verify hours. After that warning, claimant failed on eleven occasions to list clock-in and clock-out times for employees. Claimant's repeated failure to comply with explicit instructions takes her conduct outside the realm of mere mistakes or poor work performance and into the realm of insubordination. See *Freeman v. Gary Glass & Mirror, L.L.C.*, 276 S.W.3d 388, 393 (Mo. App. 2009) (holding that a claimant's "repeated failure to follow the Employer's specific directions" amounts to misconduct connected with work).

For the foregoing reasons, we conclude that employer discharged claimant for misconduct connected with her work.

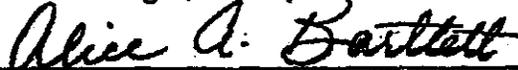
V. Decision

The decision of the Appeals Tribunal dated August 3, 2010, is reversed. Claimant is disqualified for waiting week credit and benefits until the claimant has earned wages for insured work equal to six times the claimant's weekly benefit amount after January 25, 2010, because claimant was discharged on that date for misconduct connected with her work.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



William F. Ringer, Chairman

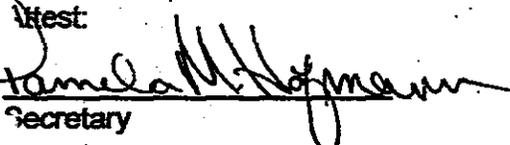


Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

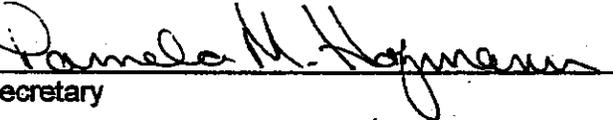
Test:



Pamela M. Hoffman
Secretary

- 4 -

I HEREBY CERTIFY that on NOV 03 2010 copies of this order were mailed to all interested parties on the OFFICIAL ADDRESS RECORD.


Secretary

The Commission decision becomes final ten days after the date of mailing pursuant to § 288.200.2 RSMo. Within twenty days after this decision becomes final, an aggrieved party may secure an appeal to the appropriate Missouri Court of Appeals provided in § 288.210 RSMo.

~~You will not receive additional notice. If you choose to appeal this decision to the Missouri Court of Appeals, a Form 8-B, Notice of Appeal, must be filed with the Commission within thirty days of the date of this Decision.~~

DISSENTING OPINION

(This is not the decision of the Commission)

Based on my review of the evidence and consideration of the relevant provisions of the Missouri Employment Security Law, I believe the decision reached by the Commission reversing the Appeals Tribunal is in error.

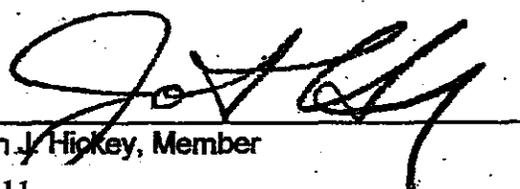
In order to establish misconduct, "[e]mployer [bears] the burden of proving by a preponderance of the evidence that Claimant willfully violated the rules or standards of the employer and that his actions were not simply the result of poor workmanship, lack of judgment, or an inability to do the job." *Frisella v. Deuster Elec., Inc.*, 269 S.W.3d 895, 899 (Mo. App. 2008) (citations omitted). Employer's evidence of misconduct in this case is confusing and contradictory. This has resulted in the majority finding claimant was discharged for failing to list clock-in and clock-out times for employees, when in actuality, it appears that this was the evidence that claimant's supervisors relied on to determine that claimant was not verifying payroll—the stated offense for which claimant was discharged.

While claimant admitted she did not always list clock-in and clock-out times for employees, claimant credibly testified that, at the time, she didn't know this was required of her. As a result, claimant's failure to list clock-in and clock-out times cannot be the basis of a finding of intentional misconduct. More importantly however, it cannot be the basis of a finding of misconduct where it was not the conduct for which employer discharged claimant. This was recently addressed by the Missouri Court of Appeals. See *Munson v. Division of Employment Security*, No. WD71827 (October 26, 2010) (reversing the Commission's decision where the Commission found the claimant was discharged for misconduct based on conduct other than that for which the employer discharged her).

Contrary to the findings and conclusions of the majority, claimant was discharged for failing to "verify payroll." This task was defined by employer's witnesses as a requirement that claimant either call an employee or ask the manager to approve hours where there was a discrepancy with an employee's reported time. Employer's witnesses consistently indicated that claimant could fulfill her obligation to verify payroll by taking either of these two steps. Claimant's undisputed testimony is that she called each of the workers when there were discrepancies and that the workers provided their hours to her. Claimant testified that she had no reason to doubt that the employees were telling her the truth. Toward the end of the hearing, employer's witness Ms. Meister changed her testimony and asserted that claimant was required to not only call the employee, but also verify the hours with a manager. This blatant reversal of testimony robs Ms. Meister of any credibility whatsoever.

I find claimant did what she had been asked to do and that she verified payroll in accordance with her understanding of employer's requirements. Because employer failed to present sufficient evidence that claimant "deliberately or purposefully erred, [she] cannot properly be found to have committed an act of misconduct." *Murphy v. Aaron's Auto. Prods.*, 232 S.W.3d 616, 621 (Mo. App. 2007). I find that claimant's conduct does not meet the definition of "misconduct" for purposes of the Missouri Employment Security Law. I would affirm the decision of the Appeals Tribunal that claimant is not disqualified for benefits by reason of her separation from work.

Because the majority has determined otherwise, I respectfully dissent from the Commission's decision in this matter.


John J. Hickey, Member

Transient employers to post registration with department of revenue, workers' compensation and unemployment insurance, 285.234
Vocational and technical education, duties of director, 178.585
Youth service and conservation corps act, 620.552

288.020.

CROSS REFERENCE:

Division of motor carrier and railroad safety abolished, duties and functions transferred to highways and transportation commission and department of transportation, 226.008

288.030. Definitions — calculation of Missouri average annual wage. — 1. As used in this chapter, unless the context clearly requires otherwise, the following terms mean:

(1) "Appeals tribunal", a referee or a body consisting of three referees appointed to conduct hearings and make decisions on appeals from administrative determinations, petitions for reassessment, and claims referred pursuant to subsection 2 of section 288.070;

(2) "Base period", the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year;

(3) "Benefit year", the one-year period beginning with the first day of the first week with respect to which an insured worker first files an initial claim for determination of such worker's insured status, and thereafter the one-year period beginning with the first day of the first week with respect to which the individual, providing the individual is then an insured worker, next files such an initial claim after the end of the individual's last preceding benefit year;

(4) "Benefits", the money payments payable to an insured worker, as provided in this chapter, with respect to such insured worker's unemployment;

(5) "Calendar quarter", the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirtieth, or December thirty-first;

(6) "Claimant", an individual who has filed an initial claim for determination of such individual's status as an insured worker, a notice of unemployment, a certification for waiting week credit, or a claim for benefits;

(7) "Commission", the labor and indus-

trial relations commission of Missouri;

(8) "Common paymaster", two or more related corporations in which one of the corporations has been designated to disburse remuneration to concurrently employed individuals of any of the related corporations;

(9) "Contributions", the money payments to the unemployment compensation fund required by this chapter, exclusive of interest and penalties;

(10) "Decision", a ruling made by an appeals tribunal or the commission after a hearing;

(11) "Deputy", a representative of the division designated to make investigations and administrative determinations on claims or matters of employer liability or to perform related work;

(12) "Determination", any administrative ruling made by the division without a hearing;

(13) "Director", the administrative head of the division of employment security;

(14) "Division", the division of employment security which administers this chapter;

(15) "Employing unit", any individual, organization, partnership, corporation, common paymaster, or other legal entity, including the legal representatives thereof, which has or, subsequent to June 17, 1937, had in its employ one or more individuals performing services for it within this state. All individuals 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 the purposes of this chapter. Each individual engaged to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by such employing unit for all the purposes of this chapter, whether such individual was engaged or paid directly by such employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work;

URITY

... federal income tax refund may be intercepted
... debt defined — debtor defined — use of collection agencies authorized.

... administrative appeals on disputed determinations — right to appeal decision, right to counsel.

... confidential — privileged communications — penalty.

... employment compensation fund, established — administration, deposit of funds — purposes — collection of interest or penalties.

... employment security fund — use of funds — transferred between funds, when.

... liability for benefits limited, authority for application and repayment of federal advances — board of employment fund financing created, duties, requirements — disposition of unobligated funds.

... offenses, penalties — deductions from obligations and uncollected overissuance of stamps — offset for overpayment of benefits by other states, when — definitions.

... of benefits paid when claimant later determined eligible or awarded back pay — violation, penalty.

... misrepresentation, penalties.

... contracts with consumer reporting agencies authorized — information limited — privacy rules apply — consent, contents — use of information limited, by consumer reporting agency — confidentiality — noncompliance, liability — information obtained under false pretenses, penalty — disputes.

... Missouri STATE EMPLOYMENT COUNCIL

... Missouri state unemployment council created, meetings, terms, duties — proposals submitted to — when — access to records — outside study.

... PRIMARY SHARED WORK PROGRAM

... work program created — definitions — plan denied, submission of new plan, contribution by employer, how computed — benefits.

... DEFERRED BENEFITS UNDER FEDERAL STIMULUS ACT

... extension of benefits — alternate base period defined — use of federal moneys.

... Cross References

... of desired employment, 217.437

... notification lists, investigative reports, division may

... training opportunities, priorities for veterans,

... benefits receipt while receiving unemployment benefits, 208.179

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(16) "Employment office", a free public employment office operated by this or any other state as a part of a state controlled system of public employment offices including any location designated by the state as being a part of the one-stop career system;

(17) "Equipment", a motor vehicle, straight truck, tractor, semi-trailer, full trailer, any combination of these and any other type of equipment used by authorized carriers in the transportation of property for hire;

(18) "Fund", the unemployment compensation fund established by this chapter;

(19) "Governmental entity", the state, any political subdivision thereof, any instrumentality of any one or more of the foregoing which is wholly owned by this state and one or more other states or political subdivisions and any instrumentality of this state or any political subdivision thereof and one or more other states or political subdivisions;

(20) "Initial claim", an application, in a form prescribed by the division, made by an individual for the determination of the individual's status as an insured worker;

(21) "Insured work", employment in the service of an employer;

(22) (a) As to initial claims filed after December 31, 1990, "insured worker", a worker who has been paid wages for insured work in the amount of one thousand dollars or more in at least one calendar quarter of such worker's base period and total wages in the worker's base period equal to at least one and one-half times the insured wages in that calendar quarter of the base period in which the worker's insured wages were the highest, or in the alternative, a worker who has been paid wages in at least two calendar quarters of such worker's base period and whose total base period wages are at least one and one-half times the maximum taxable wage base, taxable to any one employer, in accordance with subsection 2 of section 288.036. For the purposes of this definition, "wages" shall be considered as wage credits with respect to any benefit year, only if such benefit year begins subse-

quent to the date on which the employing unit by which such wages were paid has become an employer;

(b) As to initial claims filed after December 31, 2004, wages for insured work in the amount of one thousand two hundred dollars or more, after December 31, 2005, one thousand three hundred dollars or more, after December 31, 2006, one thousand four hundred dollars or more, after December 31, 2007, one thousand five hundred dollars or more in at least one calendar quarter of such worker's base period and total wages in the worker's base period equal to at least one and one-half times the insured wages in that calendar quarter of the base period in which the worker's insured wages were the highest, or in the alternative, a worker who has been paid wages in at least two calendar quarters of such worker's base period and whose total base period wages are at least one and one-half times the maximum taxable wage base, taxable to any one employer, in accordance with subsection 2 of section 288.036;

(23) "Misconduct", 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;

(24) "Referee", a representative of the division designated to serve on an appeals tribunal;

(25) "State" includes, in addition to the states of the United States of America, the District of Columbia, Puerto Rico, the Virgin Islands, and the Dominion of Canada;

(26) "Temporary employee", an employee assigned to work for the clients of a temporary help firm;

(27) "Temporary help firm", a firm that hires its own employees and assigns them to clients to support or supplement the clients' workforce in work situations such as

employee absences, temp ages, seasonal workloads signments and projects;

(28) (a) An individual "totally unemployed" in which the individual performs and with respect to which wages are payable to such individual

(b) a. An individual "partially unemployed" in which the individual performs less than full-time work if the wages payable to such individual for such week equal or exceed the insured weekly benefit amount plus twenty percent of his or her fit amount, whichever is greater;

b. Effective for each calendar year thereafter, an individual shall be deemed "partially unemployed" in which the individual performs less than full-time work if the wages payable to such individual for such week do not equal or exceed the insured weekly benefit amount plus twenty percent of his or her fit amount, whichever is greater;

(c) An individual's "unemployment" shall begin the first calendar week in which the individual is terminated at an employment office for good cause the individual is delayed, the week of unemployment shall begin the first day of the week in which the individual would have been registered. The requirements may be regulated by regulation in case of a mass layoff or cessation of work;

(29) "Waiting week" means a week of unemployment for which no wages were received in a benefit year or if no wages were received in a benefit year effective date of a shared work arrangement, a week of participation in unemployment compensation pursuant to section 288.5

2. The Missouri average shall be computed as of each year, and shall be the following calendar year

...ate on which the employing
... such wages were paid has
... employer;

...initial claims filed after Decem-
... ages for insured work in the
... thousand two hundred dol-
... after December 31, 2005, one
... hundred dollars or more,
... b. 31, 2006, one thousand four
... dollars or more, after December 31,
... thousand five hundred dollars or
... as one calendar quarter of such
... se period and total wages in the
... se period equal to at least one
... times the insured wages in that
... part of the base period in which
... insured wages were the highest,
... alternative, a worker who has been
... in at least two calendar quarters
... base period and whose total
... wages are at least one and one-
... e maximum taxable wage base,
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...conduct", an act of wanton or
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... e, or negligence in such degree
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...efr ee", a representative of the
... g igned to serve on an appeals

...ate" includes, in addition to the
... United States of America, the
... Colombia, Puerto Rico, the Vir-
... and the Dominion of Canada;

...emporary employee", an em-
... ployee to work for the clients of a
... help firm;

...emporary help firm", a firm
... s c / m employees and assigns
... nts to support or supplement the
... force in work situations such as

employee absences, temporary skill short-
ages, seasonal workloads, and special as-
signments and projects;

(28) (a) An individual shall be deemed
"totally unemployed" in any week during
which the individual performs no services
and with respect to which no wages are
payable to such individual;

(b) a. An individual shall be deemed
"partially unemployed" in any week of
less than full-time work if the wages payable
to such individual for such week do not
equal or exceed the individual's weekly
benefit amount plus twenty dollars;

b. Effective for calendar year 2007 and
each year thereafter, an individual shall be
deemed "partially unemployed" in any
week of less than full-time work if the
wages payable to such individual for such
week do not equal or exceed the individual's
weekly benefit amount plus twenty dollars
or twenty percent of his or her weekly bene-
fit amount, whichever is greater;

(c) An individual's "week of unem-
ployment" shall begin the first day of the
calendar week in which the individual regis-
ters at an employment office except that, if
for good cause the individual's registration is
delayed, the week of unemployment shall
begin the first day of the calendar week in
which the individual would have otherwise
registered. The requirement of registration
may by regulation be postponed or elimi-
nated in respect to claims for partial unem-
ployment or may by regulation be postponed
in case of a mass layoff due to a temporary
cessation of work;

(29) "Waiting week", the first week of
unemployment for which a claim is allowed
in a benefit year or if no waiting week has
occurred in a benefit year in effect on the
effective date of a shared work plan, the first
week of participation in a shared work
unemployment compensation program
pursuant to section 288.500.

2. The Missouri average annual wage
shall be computed as of June thirtieth of
each year, and shall be applicable to the
following calendar year. The Missouri

average annual wage shall be calculated by
dividing the total wages reported as paid for
insured work in the preceding calendar year
by the average of mid-month employment
reported by employers for the same calendar
year. The Missouri average weekly wage
shall be computed by dividing the Missouri
average annual wage as computed in this
subsection by fifty-two.

(L. 1951 p. 564, A.L. 1957 p. 531 §§ 288.031, 288.033, 288.035,
288.037, A.L. 1959 HB. 331, A.L. 1965 p. 420, A.L. 1972 HB.
1017, A.L. 1974 S.B. 452, A.L. 1975 S.B. 325, A.L. 1977 HB.
707, A.L. 1979 S.B. 477, A.L. 1984 HB. 1251 & 1549, A.L.
1986 HB. 1572, A.L. 1987 S.B. 153, A.L. 1988 HB. 1485,
A.L. 1995 HB. 300 & 95, A.L. 1996 HB. 1368, A.L. 2004
HB. 1268 & 1211, A.L. 2006 HB. 1456)

Effective 10-01-06

288.032. Employer defined, exceptions.

— 1. After December 31, 1977, "em-
ployer" means:

(1) Any employing unit which in any
calendar quarter in either the current or
preceding calendar year paid for service in
employment wages of one thousand five
hundred dollars or more except that for the
purposes of this definition, wages paid for
"agricultural labor" as defined in paragraph
(a) of subdivision (1) of subsection 12 of
section 288.034 and for "domestic services"
as defined in subdivisions (2) and (13) of
subsection 12 of section 288.034 shall not
be considered;

(2) Any employing unit which for some
portion of a day in each of twenty different
calendar weeks, whether or not such weeks
were consecutive, in either the current or the
preceding calendar year, had in employment
at least one individual (irrespective of
whether the same individual was in employ-
ment in each such day); except that for the
purposes of this definition, services per-
formed in "agricultural labor" as defined in
paragraph (a) of subdivision (1) of subsec-
tion 12 of section 288.034 and in "domestic
services" as defined in subdivisions (2) and
(13) of subsection 12 of section 288.034
shall not be considered;

(3) Any governmental entity for which
service in employment as defined in subsec-
tion 7 of section 288.034 is performed;

(4) Any employing unit for which service

ing the policy in the including the policy in a policy or handbook, or by policy in a collective m it governing employ- loyee. The policy, public k collective bargaining er ritten notice provided must state that a positive ult in suspension or termi- m t.

sl. ll be admissible if the clearly states an employee r' dom, preemployment, ik or post-accident test- may require a preemploy- ol or controlled substance 10 employment, and test id. issible so long as the rmed of the test require- air the test. A random, re sonable suspicion or t result, conducted under h is positive for alcohol or ce use shall be considered

ation of this section for r' ed substance testing, e ods of testing, criteria of custody for samples or ue process for employee dt s shall not apply in the ai ant is subject to the applicable collective bar- nt, o long as said agree- et s for alcohol or con- esting that meet or exceed ndards established in this in is chapter is intended m, oyer to test any appli- for alcohol or drugs in any nt ith Missouri or United n, aw, statute or regula- se imposed by the Ameri- ties Act and the National

n collection for drugs and is chapter shall be per- ar : with the procedures

provided for by the United States Department of Transportation rules for workplace drug and alcohol testing compiled at 49 C.F.R., Part 40. Any employer that performs drug testing or specimen collection shall use chain-of-custody procedures established by regulations of the United States Department of Transportation. "Specimen" means tissue, fluid, or a product of the human body capable of revealing the presence of alcohol or drugs or their metabolites. "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances, and providing for accountability at each stage in handling, testing, and storing specimens and reporting test results.

7. The employee may request that a confirmation test on the specimen be conducted. "Confirmation test" means a second analytical procedure used to identify the presence of a specific drug or alcohol or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity and quantitative accuracy. In the event that a confirmation test is requested, such shall be obtained from a separate, unrelated certified laboratory and shall be at the employee's expense only if said test confirms the original, positive test results. For purposes of this section, confirmation test shall be a split specimen test.

8. Use of a controlled substance as defined under section 195.010 under and in conformity with the lawful order of a health-care practitioner, shall not be deemed to be misconduct connected with work for the purposes of this section.

9. This section shall have no effect on employers who do not avail themselves of the requirements and regulations for alcohol and controlled drug testing determinations that are required to affirm misconduct connected with work findings.

10. Any employer that initiates an alcohol

and drug testing policy after January 1, 2005, shall ensure that at least sixty days elapse between a general one-time notice to all employees that an alcohol and drug testing workplace policy is being implemented and the effective date of the program.

11. Notwithstanding any provision of this chapter to the contrary, any claimant found to be in violation of this section shall be subject to the cancellation of all or part of the claimants wage credits as provided by subsection 2 of section 288.050.

(L. 2004 HB. 1268 & 1211, A.L. 2006 HB. 1456)
Effective 10-01-06

288.046. General assembly's intent to abrogate certain case law — determining misconduct, evidence of impairment. —

1. In applying provisions of this chapter, it is the intent of the general assembly to reject and abrogate previous case law interpretations of "misconduct connected with work" requiring a finding of evidence of impairment of work performance, including but not limited to, the holdings contained in *Baldor Electric Company v. Raylene Reasoner and Missouri Division of Employment Security*, 66 S.W.3d 130 (Mo.App. E.D. 2001).

2. In determining whether misconduct connected with work has occurred, neither the state, any agency of the state, nor any court of the state of Missouri shall require a finding of evidence of impairment of work performance.

(L. 2006 HB. 1456)
Effective 10-01-06

288.050. Benefits denied unemployed workers, when — pregnancy, requirements for benefit eligibility. —

1. 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. A temporary employee of a temporary help firm will be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment prior to filing for benefits. Failure to contact the temporary help firm will not be deemed a voluntary quit unless the claimant has been advised of the obligation to contact the firm upon completion of assignments and that unemployment benefits may be denied for failure to do so. The claimant shall not be disqualified:

(a) If the deputy finds the claimant quit such work for the purpose of accepting a more remunerative job which the claimant did accept and earn some wages therein;

(b) If the claimant quit temporary work to return to such claimant's regular employer, or

(c) If the deputy finds the individual quit work, which would have been determined not suitable in accordance with paragraphs (a) and (b) of subdivision (3) of this subsection, within twenty-eight calendar days of the first day worked;

(d) 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;

(2) That the claimant has retired pursuant to the terms of a labor agreement between the claimant's employer and a union duly elected by the employees as their official

representative or in accordance with an established policy of the claimant's employer; or

(3) That the claimant failed without good cause either to apply for available suitable work when so directed by a deputy of the division or designated staff of an employment office as defined in subsection 16 of section 288.030, or to accept suitable work when offered the claimant, either through the division or directly by an employer by whom the individual was formerly employed, or to return to the individual's customary self-employment, if any, when so directed by the deputy. An offer of work shall be rebuttably presumed if an employer notifies the claimant in writing of such offer by sending an acknowledgment via any form of certified mail issued by the United States Postal Service stating such offer to the claimant at the claimant's last known address. Nothing in this subdivision shall be construed to limit the means by which the deputy may establish that the claimant has or has not been sufficiently notified of available work.

(a) In determining whether or not any work is suitable for an individual, the division shall consider, among other factors and in addition to those enumerated in paragraph (b) of this subdivision, the degree of risk involved to the individual's health, safety and morals, the individual's physical fitness and prior training, the individual's experience and prior earnings, the individual's length of unemployment, the individual's prospects for securing work in the individual's customary occupation, the distance of available work from the individual's residence and the individual's prospect of obtaining local work; except that, if an individual has moved from the locality in which the individual actually resided when such individual was last employed to a place where there is less probability of the individual's employment at such individual's usual type of work and which is more distant from or otherwise less accessible to the community in which the individual was last employed, work

offered by the employer if similar performance and conditions within those prevail in the community, or which is capable of prevailing for which the individual is not hazardous to the individual's morals, safety or health; or

(b) Notwithstanding the provisions of this law, no claimant shall be eligible to receive unemployment benefits if the individual has voluntarily quit work under any of the following conditions:

a. If the individual quit work directly to a dispute;

b. If the individual's work was not as favorable to the individual as the prevailing work in the community;

c. If as a result of the individual's work, the individual was expelled from any company union or expelled from any business;

2. If a deputy finds that the claimant has been discharged with the claimant's discharge benefits, and shall the cost of such discharge be against any employment agency if the claimant has been discharged under the unemployment law or any other statute. In addition, the claimant shall not be eligible to receive unemployment benefits pursuant to the provisions of this law if the claimant has been discharged from employment as a result of misconduct, or if the individual's discharge was caused by the individual's discharge from employment by the employer, or if the individual, accord

offered by the individual's most recent employer if similar to that which such individual performed in such individual's last employment and at wages, hours, and working conditions which are substantially similar to those prevailing for similar work in such community, or any work which the individual is capable of performing at the wages prevailing for such work in the locality to which the individual has moved, if not hazardous to such individual's health, safety or morals, shall be deemed suitable for the individual;

(b) Notwithstanding any other provisions of this law, no work shall be deemed suitable and benefits shall not be denied pursuant to this law to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

a. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

b. If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

c. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

2. If a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work, such claimant shall be disqualified for waiting week credit and benefits, and no benefits shall be paid nor shall the cost of any benefits be charged against any employer for any period of employment within the base period until the claimant has earned wages for work insured under the unemployment laws of this state or any other state as prescribed in this section. In addition to the disqualification for benefits pursuant to this provision the division may in the more aggravated cases of misconduct, cancel all or any part of the individual's wage credits, which were established through the individual's employment by the employer who discharged such individual, according to the seriousness of the

misconduct. A disqualification provided for pursuant to this subsection shall not apply to any week which occurs after the claimant has earned wages for work insured pursuant to the unemployment compensation laws of any state in an amount equal to six times the claimant's weekly benefit amount. Should a claimant be disqualified on a second or subsequent occasion within the base period or subsequent to the base period the claimant shall be required to earn wages in an amount equal to or in excess of six times the claimant's weekly benefit amount for each disqualification.

3. Absenteeism or tardiness may constitute a rebuttable presumption of misconduct, regardless of whether the last incident alone constitutes misconduct, if the discharge was the result of a violation of the employer's attendance policy, provided the employee had received knowledge of such policy prior to the occurrence of any absence or tardy upon which the discharge is based.

4. Notwithstanding the provisions of subsection 1 of this section, a claimant may not be determined to be disqualified for benefits because the claimant is in training approved pursuant to Section 236 of the Trade Act of 1974, as amended, (19 U.S.C.A. Sec. 2296, as amended), or because the claimant left work which was not suitable employment to enter such training. For the purposes of this subsection "suitable employment" means, with respect to a worker, work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less than eighty percent of the worker's average weekly wage as determined for the purposes of the Trade Act of 1974.

(L. 1951 p. 564, A.L. 1957 p. 531, A.L. 1975 S.B. 325, A.L. 1979 S.B. 477, A.L. 1982 H.B. 1521, A.L. 1984 H.B. 1251 & 1549, A.L. 1988 H.B. 1485, A.L. 1996 H.B. 1368, A.L. 1997 H.B. 472, A.L. 2004 H.B. 1268 & 1211, A.L. 2006 H.B. 1456)

Effective 10-01-06

288.051. Temporary employees, defined, deemed to have voluntarily quit employment, when. — 1. For the purposes of this section, "temporary help firm"

security law in any other proceeding; except that, the commission may on its own motion and by a written decision reconsider any determination or redetermination or decision wherein any such right, fact or matter at issue was determined or necessarily involved when it appears that such reconsideration is essential to accomplish the object and purposes of the law. Judicial review of any decision of the commission shall be permitted only after the party claiming to be aggrieved thereby has exhausted the administrative remedies as provided by this law and the rules and regulations of the division.

(L. 1951 p. 564 § 288.170, A.L. 1984 H.B. 1251 & 1549, A.L. 1992 S.B. 626, A.L. 1996 H.B. 1368)

288.210. Judicial review of decisions of industrial commission, grounds — division to be a party, when. — Within twenty days after a decision of the commission has become final, the director or any party aggrieved by such decision may appeal the decision to the appellate court having jurisdiction in the area where the claimant or any one of the claimants reside. In such cases involving a claimant who is not a resident of this state, and in all cases not involving a claimant, the Missouri court of appeals for the western district shall have jurisdiction of the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers filed in the matter, together with a transcript of the evidence, the findings and the award, which shall become the record of the cause. The commission shall notify the division of the commencement of the appeal, and, upon receipt of such notice, the division shall be a party to any judicial action involving any such decision and may be represented by any qualified attorney who may be employed or appointed by the director and designated by the director for this purpose. 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.

An appeal shall not act as a supersedeas or stay unless the commission shall so order.

(L. 1951 p. 564 § 288.180, A.L. 1961 p. 435, A.L. 1978 H.B. 1634, A.L. 1985 H.B. 373, A.L. 1995 H.B. 300 & 95)

(1975) A determination that a person is an "employer" must be reviewed by the circuit court of Cole County. *Hansen v. Division of Employment Security (A.)*, 520 S.W.2d 150.

(1976) Held, exclusive jurisdiction of appeals from industrial commission is in circuit court of Cole County. *Springfield Gen. Osteo. Hosp. v. Indus. Comm. (A.)*, 538 S.W.2d 364.

(1977) Claimant is disqualified from receiving unemployment benefits when reason for leaving job was her inability to find a baby-sitter. *Lyell v. Labor and Industrial Relations Commission (A.)*, 553 S.W.2d 899.

(1985) The residence of a claimant is determined for circuit court jurisdiction at the time the aggrieved party files its original claim. *Magdala Foundation v. Labor and Indus. Rel. (A.)*, 693 S.W.2d 193.

(1995) Statutory requirement of naming defendants is for administrative convenience and is not jurisdictional. *Clay v. Labor and Industrial Relations Commission of Missouri*, 908 S.W.2d 351 (Mo.banc).

(1997) Commission may not reconsider and reverse itself after the time for appeal expires. *Burch Food Services v. Division of Employment Security*, 945 S.W.2d 478 (Mo.App. W.D.).

288.215. Finding of fact, conclusion of law, judgment or order not conclusive or binding, when — use of evidence in other proceedings. — 1. Any finding of fact, conclusion of law, judgment or order made by an appeals tribunal, the labor and industrial relations commission or any person with the authority to make findings of fact or law in any proceeding under this chapter shall not be conclusive or binding in any separate or subsequent action not brought under this chapter, and shall not be used as evidence in any subsequent or separate action not brought under this chapter, before an arbitrator, commissioner, commission, administrative law judge, judge or court of this state or of the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

2. Any finding of fact, conclusion of law, judgment or order made by an arbitrator, commissioner, commission, administrative law judge, judge or any other person or body with authority to make findings of fact or law in any proceeding not brought under this chapter shall not be binding or conclusive on an appeals tribunal or the