

Summary of SC92177, *Carol Fendler v. Hudson Services and Division of Employment Security*

Appeal from the labor and industrial relations commission
Argued and submitted May 9, 2012; opinion issued July 3, 2012

Attorneys: Fendler was represented by Timoth A. Weil of Haar & Woods LLP in St. Louis, (314) 241-2224, and John J. Ammann and Julianne M. Rodriguez of the Saint Louis University Legal Clinic in St. Louis, (314) 977-2778; and the division was represented by Ninion S. Riley of the division in Jefferson City, (573) 751-3844.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A woman appeals the labor and industrial relations commission's finding that her employer fired her for misconduct, claiming that the evidence shows only that she acted negligently, not willfully. In a 6-1 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the commission's decision. Repeated failure to follow a supervisor's reasonable, known and understood instructions can provide sufficient evidence that an employee willfully disregarded the instructions. Here, the woman was warned by her supervisor three times that she needed to enter into the payroll system the exact times that employees started and ended work but still failed to do so on 11 subsequent occasions. This provided substantial and competent evidence to support the commission's determination that she willfully violated her supervisor's instructions, constituting misconduct.

Chief Justice Richard B. Teitelman wrote a dissenting opinion. He would hold the evidence fails to show the woman's actions constituted a deliberate disregard of her employer's interests.

Facts: Hudson Services hired Carol Fendler in 1994; by 2008, she had become an operations assistant in the housekeeping department. One of her duties was to verify the hours of employees who did not use the telephone system that automatically recorded clock in and clock out times. Until July 2008, Fendler's supervisor allowed her to verify hours by calling employees and entering into the payroll system the total hours they said they worked. Beginning in July 2008, Fendler's new supervisor instructed her to enter the exact times that employees started and ended work instead of the total hours worked. During 2009, the supervisor warned Fendler three times that she needed to comply with the new procedure. Nevertheless, on 11 separate occasions during January 2010, Fendler failed to enter the exact times employees clocked in and out. As a result, she was fired. After the division of employment security denied Fendler unemployment benefits because she was fired for misconduct, she sought review in the appeals tribunal. A hearing was held at which both Fendler and her supervisor testified. Fendler admitted that her supervisor told her to enter exact starting and ending times into the payroll and that she knew how to comply but did not do so because she was used to entering the total hours worked. Fendler also claimed that her supervisor did not give her a third warning

and that she would have complied with the instructions if she knew her job was in jeopardy. The supervisor testified that she instructed Fendler to enter exact start and stop times, warned her to comply with these instructions three times and then fired Fendler after she failed to enter exact start and stop times on 11 subsequent occasions. After the appeals tribunal reversed the division of employment security's finding of misconduct, Hudson sought review in the commission. The commission found the supervisor's testimony to be credible and concluded that Fendler was fired for misconduct, stating that her "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." Fendler appeals.

AFFIRMED.

Court en banc holds: (1) Under section 288.030.1(23), RSMo Supp. 2005, an employee engages in misconduct if she deliberately violates her employer's rules or instructions, or if she acts negligently "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." Under the plain language of the statute, even an employee's repeated negligence may constitute misconduct if the employee repeatedly chooses to act in what amounts to reckless disregard of the employer's rules or the employee's duties or obligations. Here, the commission properly concluded that Fendler's conduct went beyond negligence and that she deliberately violated her supervisor's instructions.

(2) An employee's repeated violation of a known, understood and reasonable work rule, in and of itself, can provide competent and substantial evidence that the employee willfully or deliberately violated the rule. Here, Fendler violated her employer's instructions on at least 11 different occasions after receiving a third and formal warning not to do so again. Further, she admitted that she knew her supervisor wanted her to enter exact start and end times; she knew how to do so and would have done so had she known her job was in jeopardy. This shows that her failure to follow her supervisor's instructions was not the result of negligence or poor judgment but rather a deliberate choice to disregard the instructions. The commission's finding that Fendler was fired for misconduct is affirmed.

Dissenting opinion by Judge Teitelman: The author agrees with the Court's holding that Fendler was warned to enter specific start and end times into the payroll system for each employee. He disagrees, however, that the evidence shows Fendler's actions constituted a deliberate disregard of her employer's interests to qualify as misconduct and disqualify her from receiving unemployment benefits. There is no evidence supporting the finding that Fendler's conduct was willful as opposed to negligent. The conclusion that her conduct was willful is an inference drawn from the evidence. He would hold that the facts demonstrate Fendler was negligent and that the commission erred in concluding she engaged in willful misconduct that disqualified her from receiving unemployment benefits.