
SC89239

IN THE MISSOURI SUPREME COURT

AMY DIFATTA-WHEATON, Appellant

v.

DIVISION OF EMPLOYMENT SECURITY, Respondent

Appeal from the Labor and Industrial Relations Commission

**SUBSTITUTE REPLY BRIEF OF APPELLANT
AMY DIFATTA-WHEATON**

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ARGUMENT

The Division's first two points advanced in its brief should be summarily rejected. This Court has jurisdiction to hear and decide all issues in the case as on original appeal. Mo. Const. Article V Section 10; Mo. R. Civ. Proc. 83.09; *State ex rel. Field v. Randall*, 308 S.W.2d 637 (Mo. 1958). Neither Difatta-Wheaton nor this Court is limited to the assignment of errors or points made in the appellate court. *Cash v. Sonken-Galamba Co.*, 17 S.W.2d 927 (Mo. banc 1929); *Asel v. Order of United Commercial Travelers of America*, 197 S.W.2d 639 (Mo. banc 1946). Whether Difatta-Wheaton's brief before the appellate court complied with Rule 84.04 is irrelevant in addressing this Court's jurisdiction to determine the present matters of public interest and importance of whether individuals who are unable to work because of illness or disease are automatically disqualified from receiving unemployment benefits. See *Thummel v. King*, 570 S.W.2d 679, 690 (Mo. banc 1978); *Milani v. Miller*, 515 S.W.2d 412, 414 (Mo.1974).

The remainder of the Division's arguments should also be rejected. The constant throughout this Court's analysis must be recognizing and upholding the legislative intent of Missouri's unemployment statutes—to provide unemployment benefits for those individuals who find themselves unable to work through no fault of their own. Regardless of whether this Court chooses to engage in a microscopic grammatical analysis of Section 288.050.1(1), or whether it prefers to try to follow the tortured and splintered paths taken throughout the years by the appellate courts in interpreting this statutory provision—this Court should never lose sight of the public policy to be advanced.

Amy Difatta-Wheaton suddenly became severely ill at work and was subsequently diagnosed with ovarian cancer. Her employer gave permission for her to be off from work for the week after she became ill. On the day she was to return, she was too ill to come to work and so she called and notified her employer of her condition. When she could not and did not return that week to work, her employer considered her as quitting her employment and she was subsequently denied unemployment benefits. Under these facts, did she voluntarily quit or was she fired?

The Division goes outside the record before this Court and argues the impact a decision by this Court could have on employers if allowing unemployment compensation to Difatta-Wheaton. The Division argues that because the Missouri Unemployment Trust Fund disburses a large amount of benefits to a great number of people, Difatta-Wheaton's claim (and others in similar situations) should be denied because "there has to be a limit to everything and the limit established by the legislature in this situation is reasonable when considering the purpose of the law." (Resp. Brief at 42.)

The purpose of the law is to set aside unemployment reserves to be used for the benefit of people unemployed through no fault of their own. "Fault" has been interpreted as not meaning something blameworthy, culpable, or wrongful, but as meaning failure or volition. *Bussmann Manufacturing Co. v. Industrial Commission*, et al., 335 S.W.2d 456, 461 (Mo.App. 1960). Other jurisdictions have similarly ruled. See *Walter Bledsoe Coal Co. v. Review Board of Employment Security Division*, 46 N.E.2d 477, 479 (Ind. 1943)("fault" must be construed as meaning failure or volition); *Board of Review v. Mid-*

Continent Petroleum Corp., 141 P.2d 69, 72 (Okla. 1943)(“fault” must be construed as meaning failure or volition); *Auker v. Review Board, et al.*, 71 N.E.2d 629, 632 (Ind. en banc 1947)(“fault” must be construed as meaning failure or volition); *Tucker v. American Smelting & Refining, Co.*, 55 A.2d 692, 695 (Md. 1947)(“fault” must be construed as meaning failure or volition).

Difatta-Wheaton was unemployed due to no fault of her own and she is entitled to unemployment compensation. Her inability to physically come to work was not a voluntary choice or as the Division contends, a “conscious decision not to come to work.” (Resp. Brief at 37.) As succinctly stated by Judge Blackmar in his dissent in *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 688 S.W.2d 344, 352 (Mo. banc 1985) “It is a perversion of language to say that pregnancy is ‘voluntary.’” Cancer certainly cannot be construed to be voluntary either.

The Division accuses Difatta-Wheaton of urging this Court to adopt the reasoning and vision set forth in Judge Blackmar’s dissent. Difatta-Wheaton does not argue with that proposition. Cases with too much focus on whether there is a personal illness involved or whether there is a causal relationship between the illness and the workplace should be overruled if they are used to justify the Commission’s denial of benefits in this case. See *LaPlante v. Industrial Commission*, 367 S.W.2d 179 (Mo.App. 1976) and *Duffy v. Labor and Industrial Relations Commission*, 556 S.W.2d 195 (Mo.App. 1977). This court’s opinion in *Hessler v. Labor and Industrial Relations Commission*, 851 S.W.2d 516, 518 (Mo banc 1993) should not be construed to deny benefits either. If they are so

construed, look where we have ended up since the years since Judge Blackmar reasoned that disqualification for compensation should occur only if the termination of employment is voluntary and not related to employment. *Wimberly*, 688 S.W.2d at 351, 352.

We have come to the antiseptically disingenuous place where we deny benefits to those who truly are the most deserving. And the ramifications are personally and financially devastating. What really happens to people who find themselves in positions like Amy Difatta-Wheaton? She found herself suddenly becoming ill at work and subsequently being diagnosed with ovarian cancer and needing a hysterectomy. Her employer permitted her to have time off when she first was diagnosed. She submitted a claim for her necessary medical services to the employer's insurance company and the surgery was approved. On the morning that she was to return to work, she called and notified her employer that she was too sick to come to work. Shortly thereafter, she had the hysterectomy but because her employer took the position she quit, the insurance company denied coverage and refused to pay for the surgery. Being out of a job, denied unemployment benefits, and denied health insurance benefits caused a financial spiral that lead to Difatta-Wheaton losing her house and her car and she had to file for bankruptcy.

The ramifications of this Court's review of the Commission's decision is of the utmost importance to Difatta-Wheaton and others who want to work, but find themselves too ill to do so. Cases will still be fact-dependent but this Court has the tremendous

opportunity to ensure that Missouri's strong public policy is followed by providing unemployment benefits to those who find themselves unemployed through no fault of their own.

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CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF BOONE)

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on October 10, 2008, she served two (2) copies of the foregoing REPLY BRIEF OF APPELLANT on Respondent's attorney by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope addressed to: Mr. Mathew Murphy, 421 East Dunklin, P.O. Box 50, Jefferson City, MO 65104 as general counsel for Respondent Missouri Division of Employment Security. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 1,330 words, excluding the cover, the certification and the appendix as determined by

Microsoft Word software and that the floppy disk filed with the brief containing a copy of this brief has been scanned for viruses and is virus free.

SUSAN FORD ROBERTSON, Attorney

Subscribed and sworn to before me this _____ day of _____ here in my office in Columbia, Missouri.

NOTARY PUBLIC

(seal)

My commission expires:_____

