

No. SC92177

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IN THE SUPREME COURT OF MISSOURI

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CAROL FENDLER, Appellant,

v.

HUDSON SERVICES and  
DIVISION OF EMPLOYMENT SECURITY,  
Respondents.

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Review on Transfer after opinion  
from the Missouri Court of Appeals, Eastern District

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SUBSTITUTE BRIEF OF RESPONDENT  
DIVISION OF EMPLOYMENT SECURITY

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## JURISDICTIONAL STATEMENT

This is an unemployment benefit appeal from the Labor and Industrial Relations Commission. The Court of Appeals, Eastern District had jurisdiction under Section 288.210 RSMo Supp.<sup>1</sup> After opinion by the Court of Appeals, this Court ordered the case be transferred pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction of this case under Article V, Section 10 of the Missouri Constitution.

## INTRODUCTORY STATEMENT

This Court, when discussing cases from other states, stated the following:  
These cases proceed generally upon the theory that, since the Commission is charged with the administration of the law and the protection of the fund, it has a direct interest in seeing that there is a uniform system of interpretation and application, that the funds and accounts be protected against erroneous or unwarranted decision, and that this is true regardless of the status of the claimant, who may already have been paid and thus have lost all interest. Essentially, these cases hold that the Commission may be an “aggrieved” party, even where benefits to the claimant have been denied, and that on such an appeal it is representing the interests of the public, and not the claimant.

*Dubinsky Brothers v. Industrial Commission of Missouri*, 373 S.W.2d 9, 13 (Mo. banc 1963); *see also*, *Division of Employment Security v. Labor and Industrial Relations Commission*, 739 S.W.2d 747, 749 (Mo.App. 1987). The Division of Employment Security is representing the interests of the public herein, not those of Employer.

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<sup>1</sup> Unless otherwise stated all statutory references are to Missouri Revised Statutes Supp.

The appellant administered the employer's time-clock records. For more than a year, the appellant was repeatedly instructed to list employees' missing clock-in and clock-out times into the employer's payroll system, after speaking with the employees. During the month after receiving a final warning about this matter, Appellant violated the rule eleven times. The issue before this Court is whether this is competent evidence to support the Commission's finding that the appellant was discharged for misconduct connected with her work.

The administrative transcript will be referred to as "Tr. \_\_\_"; and the legal file will be designated "L.F. \_\_\_". At times the appellant, Carol Fendler, will be called "Appellant"; the employer, Hudson Services, will be "Employer"; Respondent, Division of Employment Security, will be "the Division"; and the Labor and Industrial Relations Commission will be "the Commission."

## STATEMENT OF FACTS

The Division provides its own Statement of Facts pursuant to Rule 84.04(f).

Employer provides property management services, including commercial cleaning, security, and mechanical maintenance. (Tr. 7). Appellant worked for Employer from November 21, 1994, to January 25, 2010. (Tr. 7). At the time of her discharge, she was an Operations Assistant in the Housekeeping Department. (Tr. 7).

For its janitorial workers, Employer uses a computerized time clock that utilizes a dedicated telephone line. (Tr. 10). Janitorial employees are expected to call the dedicated line when they arrive and depart customer job sites. (Tr.10). The employees input their PIN and the job number at the beginning and end of each work shift. (Tr. 10). The system takes that information and inputs the time-stamped records into the timekeeping reports, and based upon those reports, the employees are paid every two weeks according to the number of hours worked. (Tr. 10). However, an employee may fail to register the beginning or ending of a work shift, in which case the employee cannot be paid without further action by Appellant. (Tr. 10). Appellant was responsible for correcting these gaps in the payroll system. (Tr. 10). Appellant had to reconcile the gap in an employee's payroll record by one of two methods: (1) Appellant called the employee and obtained the employee's unreported starting time and/or ending time for the work shift in question and inputted the time into the system; or (2) Appellant spoke with Employer's general manager and obtained permission to input the employee's scheduled number of hours into the payroll system. (Tr. 12). Since July of 2008, Appellant could not input the employee's general number of hours into the payroll system without the approval of her

supervisor or the General Manager. (Tr. 20). On December 28, 2009, Ms. Meister, Appellant's supervisor, verbally warned Appellant for inputting into the timekeeping reports the general number of hours for a number of employees, instead of inputting the exact starting and ending times. (Tr. 20, L.F. 24). This was the third time that Ms. Meister reminded Appellant of her duty to create accurate payroll records. (Tr. 23, 20). Appellant testified that inputting the true starting and ending work times into the system had been a requirement for the last year or two; and that Ms. Meister spoke with her about the requirement. (Tr. 31). Appellant testified that she did not comply with the requirement because she "was used to doing it the other way." (Tr. 31). Appellant testified that she would have complied if she had been told that she would be fired for violating the rule. (Tr. 32).<sup>2</sup>

On January 21, 2010, Appellant was discharged because she continued to input general work hours into the system without approval. (Tr. 8, 13). At the hearing, Employer offered a timekeeping report for the period between January 4, 2010, and January 17, 2010, which had several entries inputted by Appellant that showed general hours worked by individual employees, not true starting and ending times. (Tr. 13, 52–56). Appellant admitted that she did not obtain permission from her supervisor regarding these actions. (Tr. 31).

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<sup>2</sup> Appellant testified she was not told that she would be fired for failing to follow these instructions. (Tr. 31). Her supervisor testified that Appellant should have been aware that this placed her job in jeopardy. (Tr. 21).

Appellant filed an initial claim for unemployment benefits. (L.F. 1). Employer protested the claim. (L.F. 2-3). The Division determined that Appellant was disqualified from receiving benefits because she was discharged for having committed misconduct connected with her work. (L.F. 4). Appellant appealed the determination. (L.F. 5-7). After an administrative hearing, the referee awarded Appellant benefits. (L.F. 8-11). Employer filed an Application for Review with the 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). After a second hearing before the Appeals Tribunal, the referee found that Appellant had not committed misconduct. (L.F. 17-22).

Employer filed an Application for Review with the Commission. (L.F. 23-25). In a divided opinion, the Commission found that Appellant was discharged for misconduct connected with her work. (L.F. 26-30). The Commission's decision stated, in part the following:

We find the testimony of Ms. Meister more credible than claimant.  
(L.F. 27).

\* \* \*

... 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. (L.F. 28).

The labor representative on the Commission dissented. The dissent believed Appellant and found that Appellant did what had been expected of her, "to verify payroll." (L.F. 30).

Appellant appealed the Commission's decision to the Court of Appeals, Eastern District. The Court of Appeals issued a decision reversing the Commission. A majority of the court declared that there was no evidence in the record to indicate that Appellant intentionally failed to verify payroll as instructed because her actions may have been the result of poor workmanship, lack of judgment or an inability to perform the job. Chief Justice Kurt S. Odenwald dissented. The dissent found that the evidentiary facts supported the inference drawn by the majority and the contrary inference drawn by the Commission (that Appellant's behavior was deliberate and willful). The dissent found that the majority decision exceeded the court's scope of review because a court should defer to the Commission on conflicting inferences.

The Division filed a Motion for Rehearing and/or Transfer with the Court of Appeals, which were denied. The Division filed an Application for Transfer with this Court, which was granted.

**POINT RELIED ON**

**The Commission did not err in deciding that Appellant was discharged for misconduct connected with her work because the Commission's decision was supported by the evidence, in that Appellant willfully failed to input employees' beginning and ending times into Employer's computer time clock and the evidence does not mandate a finding that Appellant's conduct was the result of a mistake, negligence or poor judgment.**

*Hurlbut v. Labor and Industrial Rel. Com'n*, 761 S.W.2d 282 (Mo.App. 1988);

*Freeman v. Gary Glass & Mirror, L.L.C.*, 276 S.W.3d 388 (Mo.App. 2009).

### SCOPE OF REVIEW

In reviewing an administrative decision, a court's inquiry is limited. *Pulitzer Pub. Co. v. Labor & Indus. Relations Com'n*, 596 S.W.2d 413, 417 (Mo. banc 1980). Judicial review of Commission decisions in employment security matters is governed by Section 288.210. *Shields v. P & G Paper Products, Co.*, 164 S.W.3d 540, 543 (Mo.App. E.D. 2005). Section 288.210 provides as follows:

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

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

It is the function of the reviewing court to decide whether the Commission's factual findings are supported by competent and substantial evidence. *Burns v. Labor & Industrial Com'n*, 845 S.W.2d 553, 554 (Mo. banc 1993). The weight to be given

evidence and the resolution of conflicting evidence are for the Commission, and if its decision is supported by competent and substantial evidence, its decision must be affirmed. *Selby v. Trans World Airlines*, 831 S.W.2d 221 (Mo.App. W.D. 1992); *Willcut v. Division of Employment Security*, 193 S.W.3d 410, 412 (Mo.App. E.D. 2006); *Burns*, 845 S.W.2d 554. The court must determine "whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). A reviewing court, thus, must affirm those decisions of the Commission which are supported by substantial and competent evidence taken from the whole record.

"The Commission, as the trier of facts, can believe or disbelieve none, all or part of any witness' testimony and draw inferences from facts dissimilar to those which a court on judicial review may have drawn." *Lightwine v. Republic R-III Sch. Dist.*, 339 S.W.3d 585,590 (Mo.App. S.D. 2011)(quoting *Lauderdale v. Div. of Emp. Sec.*, 605 S.W.2d 174, 178 (Mo.App. E.D. 1980)). See also *Rush v. Kimco Corp.*, 338 S.W.3d 407, 410 (Mo.App. W.D. 2011). A court must defer to the Commission's determination of the credibility of witnesses. *Sartori v. Kohner Props., Inc.*, 277 S.W.3d 879,883 (Mo.App. E.D. 2009), *Burns*, 845 S.W.2d 555. Since the Commission found the testimony of Ms. Meister more credible than that of Appellant (L.F. 27), so should this Court.

The Court of Appeals, Western District, stated the following in regard to the scope of review:

In reviewing a decision of the Commission, an appellate court may not substitute its judgment on factual matters for that of the Commission.

Section 288.210 provides that the Commission's findings of fact, if supported by competent and substantial evidence and absent fraud, shall be conclusive. Substantial evidence is evidence which has probative force on the issues, and from which the trier of facts can reasonably decide the case.

[Citations omitted].

*Madewell v. Division of Employment Security*, 72 S.W.3d 159, 162 (Mo.App. W.D. 2002).

The Commission made the following factual findings:

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.

(L.F. 28). The credible testimony of Ms. Meister provided competent evidence to support those findings. (Tr. 20, 23). Therefore, they should be binding upon appeal.

What Appellant did to cause her discharge is a question of fact. Whether Appellant's actions were motivated by mistake, misunderstanding or insubordination is a question of fact. The Commission found that Appellant's actions were insubordination. Since this finding is supported by a reasonable inference, it is binding upon appeal.

Whether 11 occasions of intentional failure to follow her supervisor's instructions and warnings is "misconduct" is a legal question to be decided by the court. *Miller v. Kansas City Station Corp.*, 996 S.W.2d 120 (Mo.App. W.D. 1999).

### **OVERVIEW OF THE EMPLOYMENT SECURITY LAW**

The Employment Security Law was described as follows in *Graves v. Meystrik*, 425 F.Supp. 40, 41 (D.C.Mo. 1977):

The Missouri Division of Employment Security (hereinafter Division) is a federal-state-local partnership ... The Employment Security Program was established under the Wagner-Peyser Act, 1933 and the Social Security Act, 1935. The Division pays unemployment insurance benefits and collects necessary payroll taxes from Missouri employers in accordance with the Missouri Employment Security Law.

Administrative and operating costs of the Division are paid out of federal grants derived from federal taxes paid by employers and made available by Congressional appropriations. Funds for the payment of weekly benefits to qualified workers are collected through payroll taxes paid by Missouri employers, as defined by the Missouri Employment Security Law, and are maintained in the "Unemployment Compensation Fund," which is set aside for that sole purpose, and is administered by the Division.

"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." Section 288.020.1. The Missouri Employment Security Law was enacted to address this problem by

promoting employment and paying unemployment benefits to individuals who are unemployed through no fault of their own.

The Missouri Employment Security Law is not a fault free system. Quite to the contrary. Within the law, the legislature balanced the rights and obligations of employers against the rights and obligations of employees. There are numerous provisions within the law designed to promote appropriate behavior and dissuade inappropriate behavior by employers and employees. The focus of these provisions is to promote employment. Employees are dissuaded from causing their unemployment and dissuaded from conduct that protracts their period of unemployment. Employers are dissuaded from discharging employees who have not committed misconduct.

#### **EMPLOYEE PROVISIONS:**

A claimant is disqualified from receiving unemployment benefits until he earns wages equal to ten times his weekly benefit amount if he: voluntarily leaves work, without good cause attributable to the work; fails to accept an offer of suitable work by a former employer; or fails, without good cause, to apply for available suitable work when so directed by a Division deputy. Section 288.050.1(1).<sup>3</sup> A temporary employee of a temporary help firm is deemed to have voluntarily quit employment if he does not contact the temporary help firm for reassignment prior to filing a claim for benefits. Section 288.051. A claimant who is discharged for misconduct connected with work is

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<sup>3</sup> A claimant is not disqualified if he quits a temporary job to return to his regular job, he quits his job for a more remunerative job, or he quits a new job that is not suitable work. Sections 288.050.1(1)(a)-(c).

disqualified from receiving unemployment benefits until he earns wages equal to six times his weekly benefit amount. Section 288.050.2. Once the claimant earns sufficient wages to overcome these disqualifications, he may receive unemployment benefits.

If a claimant is not disqualified from receiving benefits or has overcome the disqualification, he must satisfy a number of additional requirements to receive benefits. The claimant must register for work at the local unemployment office and must visit the local office periodically to seek reemployment. Section 288.040.1(1). Each week for which he seeks benefits, the claimant must be: able to work, available for work and actively and earnestly seeking work. Section 288.040.1.

In common vernacular, a person does not receive unemployment benefits just because he is unemployed. The above provisions are designed to dissuade employees from causing their own unemployment and to motivate claimants to obtain reemployment as quickly as possible.

#### **EMPLOYER PROVISIONS:**

The Division maintains a separate account for each employer who is paying unemployment taxes (“contributions”). Section 288 100.1(1). The employer pays quarterly contributions into its account, based upon the taxable wages paid to its employees during the said calendar quarter. Sections 288.090 and 288.100. The account is generally debited for unemployment benefits paid to former employees of the employer. Section 288.100. In other words, contributions remitted by the employer increase the account balance and benefit charges decrease it.

The tax rate imposed on an employer is a function of the employer's average annual payroll and the employer's account balance. Section 288.120. If an employer's account obtains a sufficiently high balance, in relation to its annual payroll, the employer will be entitled to a tax rate of 0.0%, in which case it need not pay unemployment taxes until its payroll increases or the account balance decreases because of benefits charges. Section 288.120.1. For calendar year 2011, there were 20,914 employers in Missouri with a 0.0% tax rate. United States Department of Labor, Employment Training Administration 204 Report, 2011.

Whether the claimant is an "insured worker" and the benefit amount the claimant may received is figured on all of the wages paid during the claimant's base period by all of the claimant's employers.<sup>4</sup> 1 Mo. Employer-Employee Law §§4.7-4.9 (MoBar 3<sup>rd</sup> ed. 2008); Sections 288.030.1(22)(b); 288.038; and 288.060.4.

A claimant's benefits are generally chargeable to the respective account of each employer based on the formula found in the statute. Section 288.100.1(1). So, if an employer lays off employees, or discharges employees for reasons other than misconduct, the employer's unemployment account will be debited for the unemployment benefits paid to the claimants and the employer's tax rate will rise until the employer pays enough contributions to offset the charges.

However, an employer's account is not charged for benefits paid to a claimant who was initially disqualified under § 288.050 and overcame the disqualification with wages of

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<sup>4</sup> The claimant's base period is the first four of the last five completed calendar quarter immediately preceding the first day of the claimant's benefit year. Section 288.030.1(2).

six times or ten times.<sup>5</sup> Section 288.100.1(4)(a). Disqualifying acts include, but are not limited to the following two examples: (1) the employee voluntarily left employment without good cause attributable to the work or employer [§ 288.050.1(1)]; and (2) the employee was discharged for misconduct connected with his or her work [§ 288.050.2]. So, the law does not require an employer choose between retaining a recalcitrant employee or having it's account subject to more than \$8,000.00 of unemployment benefit charges.<sup>6</sup>

#### **CORRESPONDING PROVISIONS:**

An employer's account is not subject to benefit charges if the individual was not employed longer than a probationary period of twenty-eight days. Section 288.100.1(4)(d). Correspondingly, an individual is not disqualified from receiving benefits if the Division finds that the person quit a job that is not suitable within twenty-eight calendar days of the first day worked. Section 288.050.1(1)(c). These provisions promote employment by allowing for a little risk taking. An employer is allowed to hire an applicant that may be a little doubtful without having its unemployment account charged. Correspondingly, an individual can try a job that might seem doubtful without being disqualified for quitting the job if it does not work out.

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<sup>5</sup> When this happens, the Unemployment Compensation Trust Fund absorbs the debt. If the Trust Fund balance is too low, a surcharge is imposed upon Missouri employers (increasing their unemployment tax rate). Section 288.121.

<sup>6</sup> Appellant's maximum benefit amount (MBA) is \$8,294.00. (L.F. 1).

The unemployment law is a comprehensive system loaded with provisions to motivate behavior that promotes employment. While provisions denying benefits should be strictly construed, a court should not lose sight of the grand design present in this law. A court should apply the unemployment statutes as written.

## ARGUMENT

**The Commission did not err in deciding that Appellant was discharged for misconduct connected with her work because the Commission's decision was supported by the evidence, in that Appellant willfully failed to input employees' beginning and ending times into Employer's computer time clock after being instructed several times to do so, and the evidence does not mandate a finding that Appellant's conduct was the result of a mistake, negligence or poor judgment.**

The Commission found that Appellant was disqualified from receiving benefits because she was discharged for misconduct connected with her work because she deliberately violated Employer's instructions, in that eleven times after her last warning, she failed to reconcile missing start and stop times within Employer's payroll records.

Section 288.050.2 states in pertinent part as follows:<sup>7</sup>

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 ... 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. ...

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<sup>7</sup> This subsection has been amended numerous times over the years, with the current version substantially similar to Section 288.120.1 RSMo 1949.

Section 288.030.1(23) defines "misconduct" as follows:<sup>8</sup>

**"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;

The court stated the following in *Powell v. Division of Employment Security, et al*, 669 S.W.2d 47, 51 (Mo.App. W.D. 1984):

We recognize that 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. ... Furthermore, poor attitude per se cannot usually rise to the level of misconduct so as to disqualify a claimant for benefits. But, poor attitude coupled with specific conduct adverse to an employer's interest or resulting in detriment to an employer can justify a finding of misconduct.

To satisfy Section 288.030.1(23), the Commission must find that a claimant's conduct was willful. See *Wieland v. St. Anthony's Med. Ctr.*, 294 S.W.3d 77, 79

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<sup>8</sup> This is a recent codification of the definition used by Missouri courts. *Rich v. Industrial Commission*, 271 S.W.2d 791, 793 (Mo.App. 1954); and *Laswell v. Industrial Commission*, 534 S.W.2d 613, 616 (Mo.App. 1976).

(Mo.App. E.D. 2009); *Scrivener Oil Co., Inc. v. Div. of Employment Sec.*, 184 S.W.3d 635, 641 (Mo.App. S.D. 2006). An employee's willful violation of the employer's reasonable instructions constitutes misconduct. *Noah v. Lindbergh Inv., LLC*, 320 S.W.3d 212, 216 (Mo.App. E.D. 2010) (The claimant did not appear for two work shifts and failed to speak with the supervisor, as instructed.).

“Willful misconduct is established when action or inaction by the claimant amounts to conscious disregard of the interests of the employer or constitutes behavior contrary to that which an employer has a right to expect from an employee.” *Hurlbut v. Labor and Industrial Relations Commission*, 761 S.W.2d 282, 285 (Mo.App. S.D. 1988). In every contract of employment, it is implied that the employee will obey the lawful and reasonable rules, orders and instructions of the employer. *Dixon v. Stoam Industries, Inc.*, 216 S.W.3d 688, 693 (Mo.App. S.D. 2007)(claimant refused to comply with the supervisor’s instructions to change job assignment.). An employee's refusal to comply with a lawful and reasonable directive from a supervisor constitutes misconduct as that term is defined by Section 288.030. *Id.* A claimant's repeated failure to follow directions, without explanation, after demonstrating ability to do so in the past, proves willfulness for a misconduct finding. *Freeman v. Gary Glass & Mirror, L.L.C.*, 276 S.W.3d 388 (Mo.App. S.D. 2009)(construction worker turned away business that he knew the employer could accomplish and, on at least three occasions, disobeyed specific instructions from his superior on how to perform the duties).

Courts have found misconduct in instances where the claimant intentionally fails to comply with Employer’s rules and procedures. *Hurlbut; Koret of California, Inc. v.*

*Zimmerman*, 941 S.W.2d 886 (Mo. pp. S.D. 1997). In *Hurlbut*, Claimant worked as a manager at Employer's convenience store. *Id.*, 761 S.W.2d at 284. Employer had a policy that required a calculator tape to be run on the change box and placed in the change box. *Id.* Claimant was aware of the procedure and had instructed other employees in the procedure. *Id.* On three successive days, Claimant failed to change the calculator tape despite knowing that it was time to change the tape. *Id.* at 284-285. Because Claimant was aware of the procedure, knew the tape needed to be changed, and did not change it, the Court concluded that there was sufficient evidence to show that Claimant's failure to follow Employer's procedure was willful and thus constituted misconduct connected with the work. *Id.* at 285.

Like the claimant in *Hurlbut*, Appellant knew what Employer expected from her, yet willfully failed to meet those expectations. The Commission found that Appellant "knew she was supposed to list clock-in and clock-out times on employer's payroll system." (L.F. 27). Appellant had been reminded by her general manager of the time requirements and even testified that inputting the true starting and ending times into the system had been a requirement for the last year or two. (Tr. 21, 31). Additionally, Appellant was given specific instructions to insert the employees' missing start and stop times into Employer's computer payroll records. (L.F. 28).<sup>9</sup> Further, the Commission

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<sup>9</sup> The Commission found that Ms. Meister credibly testified that Appellant was told that she must have the general manager's approval to list an employee's number of hours worked, instead of the start and stop times. (L.F. 27). Appellant did not obtain permission from her supervisor before entering general hours worked. (Tr.31).

found that Appellant was given three chances to correct her behavior, yet “consistently failed to comply with this directive.” (L.F. 28). Finally, Appellant received a formal warning on December 28, 2009, and thereafter “failed on eleven occasions to list clock-in and clock-out times for employees.” (L.F. 28). The Commission found that Appellant’s actions were not “mere mistakes or poor work performance.” (L.F. 28).

Appellant relies on *Duncan v. Accent Marketing*, 328 S.W.3d 488 (Mo.App. E.D. 2010). In *Duncan*, Claimant’s employer provided call service assistance to cellular telephone customers of various clients. 328 S.W.3d at 490. Employer had a policy that required customer service representatives to perform certain troubleshooting steps when assisting customers, by using the employer’s Knowledge Management System (“KMS”). *Id.* Claimant received positive performance reviews and pay raises prior to September 1, 2009. *Id.* Claimant was fired on September 9, 2009 because of problems he experienced on September 1, 3, 5 and 9. *Id.* While he used KMS on these days, Claimant did not always use it fully and correctly; he did not find the most relevant document on one occasion and did not follow all of the suggested steps on another occasion. *Id.* The Commission found that Claimant’s repeated efforts demonstrated negligence to such a degree as to manifest culpability. 328 S.W.3d at 492. The court reversed the decision because:

[The Commission] did not find that Claimant’s actions were willful.

We find no evidence that Claimant deliberately or purposefully erred.

... However, the Commission did not find any facts that suggest Claimant’s inadequate use of KMS or his failure to call the customer back

was deliberate or purposeful. An employee's failure to follow an employer's instructions is not necessarily grounds for finding misconduct.

[Citation omitted].

328 S.W.3d 492. The evidentiary facts and the Commission's factual findings in *Dunkin* vary so greatly from the current matter that the court's decision in *Duncan* is not applicable herein.

In *Duncan*, the claimant had a range of problems retrieving and using documents within a complicated computer system during a ten-day period. In the current case, Appellant's supervisor repeatedly gave her one simple instruction from July of 2008 through December of 2009: "you must input the worker's missing starting or ending time; you cannot use the worker's general number of hours without a supervisor's approval." Appellant admitted that this had been a requirement for the last year or two and that Ms. Meister had spoken with her about it. The simplicity of the duty and instruction, and the duration of the misconduct, makes this situation different than *Duncan*.

The result in *Duncan* and the result herein depends upon the inferences drawn by the trier of fact. The trier of fact in *Duncan*, the Commission, found that the claimant's actions were the result of negligence, which is rarely misconduct. 328S.W.3d 492. In the current matter, however, the Commission specifically found that Appellant's repeated failures were *not* due to poor work performance or mere mistakes; they were

insubordination.<sup>10</sup> (L.F.28). Insubordination is not synonymous with incompetency. It is defined as “A willful disregard of any employer’s instructions, esp. behavior that gives the employer cause to terminate a worker’s employment. An act of disobedience to proper authority; esp. a refusal to obey an order that a superior officer is authorized to give.” Black’s Law Dictionary, ninth edition; *Dixon*, 216 S.W.3d 693. Thus, if Appellant’s conduct was insubordination as the Commission found, Appellant’s conduct was willful. In the current matter, the minority opinion properly noted that the Commission’s insubordination finding should have been accepted by the Court of Appeals because it is supported by a reasonable inference. *Hurlbut* is applicable and *Duncan* is not because the Commission found Appellant’s actions to be deliberate and willful, not negligent.

The Commission found that Appellant willfully failed to follow Employer’s rule after repeated warnings. This factual finding is binding on appeal because it is supported by competent evidence. The Commission correctly concluded that Appellant committed misconduct connected to the work because she willfully violated an important rule after repeated warnings.

**WHEREFORE**, this Court should affirm the Commission's decision that Appellant was discharged for misconduct connected to the work.

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<sup>10</sup> The evidence supports an inference that Appellant liked using the other payroll method and would not change unless she was threatened with discharge.

**CONCLUSION**

The Commission's decision should be affirmed because its findings of fact are supported by the evidence and its conclusions of law are not in error.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this brief was served via electronic filing system upon John J. Ammann and I mailed, postage prepaid, one copy of the brief and one diskette containing the brief on March 8, 2012, to the following:

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