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## **JURISDICTIONAL STATEMENT**

Respondent agrees that this Court has jurisdiction to hear this matter because the controversy concerns an unemployment benefit claim by an individual residing within the jurisdiction of this Court. Section 288.210 RSMo 2000.<sup>1</sup>

## **INTRODUCTORY STATEMENT**

The appellant administered the employer's time-clock records. For more than a year, the appellant was under specific instructions 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 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."

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<sup>1</sup> Unless otherwise stated all statutory references are to Missouri Revised Statutes 2000.

## 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 numbers 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 records by one of the 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). Ms. Meister reminded her of the requirement about asking the supervisor, the General Manager or asking the employees and not just plugging in time for people." (Tr. 21). Appellant testified 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 Appellant 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).

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

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<sup>2</sup> Appellant alleged she was not told that she would be fired for failing to do so. (Tr. 31).

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 this Court.

**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);

## 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 reasonably could have made its findings and drawn its conclusions. *Burns v. Labor & Industrial Com'n*, 845 S.W.2d 553 (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); *Burns, supra.*; *Willcut v. Division of Employment Security*, 193 S.W.3d 410, 412 (Mo.App., E.D. 2006). 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 may believe or disbelieve all, none or any part of the testimony, even when the testimony is produced by only one of the interested parties.” *Chemtech Industries, Inc. v. Labor and Industrial Relations Commission*, 617 S.W.2d 121, 123 (Mo.App., E.D. 1981). 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*. Since the Commission found the testimony of Ms. Meister more credible than that of Appellant (L.F. 27), so should this Court.

This Court stated the following in *Madewell v. Division of Employment Security*, 72 S.W.3d 159, 162 (Mo.App., W.D. 2002):

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].

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). Employer provided competent evidence to support those findings. 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. 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).

## 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 discharged for misconduct connected with her work because she repeatedly failed to insert employees' actual clock-in and clock-out times into Employer's computer time clock, as instructed.

Section 288.050.2 RSMo Cum Supp. states in pertinent part:

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. ...

The term "misconduct", as used in §288.050.2, is defined by statute in Section 288.030.1(23) RSMo Cum Supp., which states as follows:

**"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 (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) (The 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).

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. App. 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>3</sup> Further, the Commission 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*, 386 S.W. 3d 488 (Mo. App. E.D. 2010). In *Duncan*, Claimant worked as a customer service representative for Employer. *Id.* at 490. Employer had a policy that required customer service representatives to perform certain troubleshooting steps when assisting customers. *Id.* Claimant had demonstrated his ability to use the system in the past but was counseled when he began

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<sup>3</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).

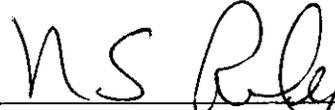
failing to follow the procedure. *Id.* He failed to follow the procedure multiple times. *Id.* The court found that Claimant did not commit misconduct. *Id.* at 492-493. By failing to follow the troubleshooting steps and calling customers back, Claimant demonstrated poor workmanship or lack of judgment, but not a willfulness to violate Employer's policy. *Id.* Here, however, the Commission specifically found that Appellant's repeated failures were *not* due to poor work performance or mere mistakes but insubordination. (L.F.28). Insubordination is not a product of poor work performance, lack of judgment, or mere mistakes. Insubordination requires willfulness. Thus, if Appellant's conduct was insubordination as the Commission found, Appellant's conduct was willful. Because the evidence in the record shows that Appellant willfully failed to follow Employer's rule, the Commission correctly found Appellant to have committed misconduct connected to the work.

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

**CONCLUSION**

The Commission did not err in finding that Appellant was discharged for misconduct connected with her work. Therefore, the Commission's decision should be affirmed by this Court.

Respectfully submitted,



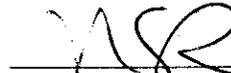
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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed one copy of the foregoing Brief and one diskette containing the Brief on June 14, 2011, to the following:

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Ninion S. Riley

**CERTIFICATE OF WORD COUNT  
AND VIRUS FREE DISK**

I hereby certify the following:

1. The foregoing brief complies with the word count limitations.
2. The foregoing brief contains 3,378 words.
3. The enclosed diskette containing the brief has been scanned for viruses and is virus free.

  
Ninion S. Riley

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

**DECISION OF COMMISSION**

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

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**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.

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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.

#### **IV. 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.

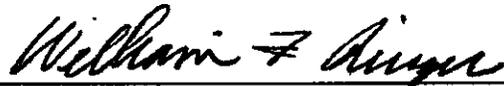
Claimant was in charge of checking employer's payroll and reconciling discrepancies in employees' reported hours. Claimant's supervisor, Ms. Meister, instructed her to list clock-in and clock-out times on employer's payroll program. Claimant consistently failed to comply with this directive. Ms. Meister 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.

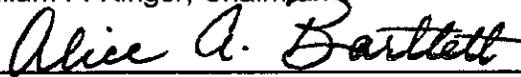
#### V. Decision

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

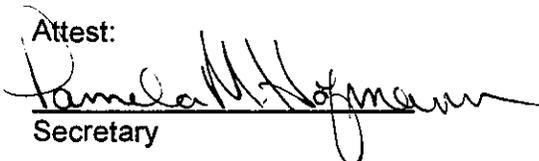


William F. Ringer, Chairman



Alice A. Bartlett, Member

Attest:

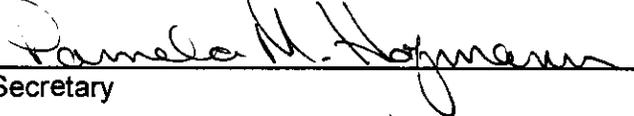
  
Secretary

DISSENTING OPINION FILED

John J. Hickey, Member

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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.

  
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John J. Hickey, Member  
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# *Missouri Revised Statutes*

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;

## ***Missouri Revised Statutes***

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.



JEREMIAH W. (JAY) NIXON  
GOVERNOR

**MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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June 14, 2011

Laura Thielmeier Roy, Clerk  
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FEB 8 2012

**CLERK, SUPREME COURT  
92177**

**FILED**  
JUN 15 2011  
LAURA ROY  
CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

RE: Carol Fendler, Appellant vs. Hudson Services and Division of Employment Security, Respondents  
Case No. ED95903

Dear Ms. Roy:

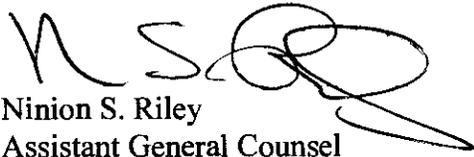
Enclosed for filing in the above-referenced matter are an original and nine (9) copies of the Brief of Respondent, Division of Employment Security.

It would be appreciated if you would file stamp the copy of the cover page and return it to me in the self-addressed, postage paid envelope.

Your assistance on this matter is greatly appreciated.

Sincerely,

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

  
Ninion S. Riley  
Assistant General Counsel

NSR:rb

Enclosure

cc: John J. Ammann  
Hudson Services