

BRIEF TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| Brief Table Of Contents | 1 |
| Table Of Cases and Statutes | 2-6 |
| Jurisdictional Statement | 7 |
| Introductory Statement | 8 |
| Statement of Facts | 9-11 |
| Points Relied On | 12-13 |
| Argument | 14-32 |
| Scope Of Review | 14-15 |
| Point I | 16-20 |
| Point II | 21-32 |
| Conclusion | 33 |
| Proof Of Service | 34 |
| Certificate Of Word Count And Virus Free Disk | 35 |
| Appendix Table Of Contents | 36 |

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

I. CASES

Ayers v. Sylvia Thompson Learning Center, 211 S.W.3d 195

(Mo.App., S.D. 2006), p. 2, 24;

Burns v. Labor & Industrial Relations Commission, 845 S.W.2d 553

(Mo. banc 1993), p. 2, 14, 25;

Business Centers of Missouri, Inc. v. Labor and Industrial Relations Commission,

743 S.W.2d 588 (Mo.App., E.D. 1988), p. 2, 18;

Cecil v. Arrowhead Management and Unemployment Insurance Appeals Board,

C.A. No. 96A-11-002, (1998 Delaware Superior Court LEXIS 44), p. 2, 12, 19;

City of Gainesville v. Gilliland, 718 S.W.2d 553 (Mo.App. 1986), p. 2, 27;

Clark v. Labor and Industrial Relations Commission, 875 S.W.2d 624

(Mo. App., W.D. 1994), p. 2, 15;

DolgenCorp, Inc. v. Zatorski, 134 S.W.3d 813 (Mo. App., W.D. 2004), p. 2, 14;

Dixon v. Division of Employment Security, 106 S.W.2d 536

(Mo. App., W.D. 2003), p. 2, 15;

Dubinsky Brothers, Inc., v. Industrial Commission of Mo., 373 S.W.2d 9

(Mo. banc 1963), p. 2, 24;

England v. Regan Marketing, Inc., 939 S.W.2d 62

(Mo. App., S.D. 1997), p. 2, 14;

Garden View Care Center, Inc. v. Labor and Industrial Relations Commission,

848 S.W.2d 603 (Mo. App., E.D. 1993), p. 3, 14;

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220

(Mo. banc 2003), p. 3, 14;

Jeffreys v. Everett, Director of Labor, 640 S.W.2d 465

(Court of Appeals of Arkansas 1982), p. 3, 12, 20;

Laswell v. Industrial Commission, 534 S.W.2d 613

(Mo. App., K.C.D. 1976), p. 3, 17;

Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864

(Mo.App. Spr. 1919), p. 3, 13, 29, 30;

Massey v. Labor and Industrial Relations Commission,

740 S.W.2d 680 (Mo.App., E.D. 1987), p. 3, 16;

Mitchell v. Division of Employment Security, 922 S.W.2d 425

(Mo. App., S.D. 1996), p. 3, 14;

Miller v. Help at Home, Inc., 186 S.W.3d 801

(Mo. App., W.D. 2006), p. 3, 15;

Miller v. Kansas City Station Corp., 996 S.W.2d 120

(Mo. App., W.D. 1999), p. 3, 15;

Moore v. Unemployment Compensation Board of Review,

578 A.2d 606 (Pa.Cmwlth., 1990), p. 3, 13, 30;

Nell v. Fern-Thatcher Co., 952 S.W.2d 749,
(Mo. App., W.D. 1997), p. 4, 15;

Panzau v. JDLB., Inc., 169 S.W.3d 122
(Mo.App., E.D. 2005), p. 4, 26;

Parker v. Ramada Inn, 572 S.W.2d 409 (Ark.Sup.Ct. 1978), p. 4, 12, 20;

Silman v. Simmons' Grocery, 204 S.W.3d 754
(Mo.App., S.D. 2006), p. 4, 24;

Smith v. Labor & Industrial Relations Commission, 656 S.W.2d 812
(Mo. App., W.D. 1983), p. 4, 13, 22, 28;

Sulls v. Director of Revenue, 819 S.W.2d 782 (Mo.App., S.D. 1991), p. 4, 27;

Tri-State Motor Transit Company v. Industrial Commission, 509 S.W.2d 217
(Mo. App., Spr.D. 1974), p. 4, 15;

White v. St. Louis Teachers Union and Division of Employment Security,
Case No. WD67177, Handdown Date March 27, 2007, Slip Opinion, p. 4, 13, 29;

Williams v. Review Board of Indiana, Employment Security Division and Jeffboat, Inc., 366 N.E.2d 712 (Court of Appeals of Indiana 1977), p. 4, 12, 19;

Wingo v. Pediatric and Adolescent Medical Consultants, Inc., 932 S.W.2d 898,
(Mo. App., E.D. 1996), p. 4, 14, 22.

II. STATUTES

Section 288.020.1, RSMo 2000, p. 5, 23;

Section 288.030.1(24), RSMo Cum.Supp. 2005, p. 5, 12, 13, 17, 19, 21, 31, 32, 33, 36;

Section 288.050.1(1), RSMo Cum.Supp. 2005, p. 5, 27;

Section 288.050.2, RSMo Cum.Supp. 2005, p. 5, 10, 12, 13, 16, 19, 21, 36;

Section 288.050.3, RSMo Cum.Supp. 2005, p. 5, 19;

Section 288.070.1, RSMo 2000, p. 5, 10, 23;

Section 288.100, RSMo Cum.Supp. 2005, p. 5, 24, 25;

Section 288.113, RSMo 2000, p. 5, 25;

Section 288.125, RSMo 2000, p. 5, 25;

Section 288.130, RSMo 2000, p. 5, 23;

Section 288.180, RSMo 2000, p. 5, 24;

Section 288.190, RSMo 2000, p. 5, 26;

Section 288.210, RSMo 2000, p. 5, 8, 14;

Section 288.220, RSMo 2000, p. 5, 24;

Section 288.290, RSMo Cum.Supp. 2005, p. 5, 24;

26 U.S.C. § 3301 *et seq.*, the Federal Unemployment Tax Act, p. 5, 23.

III. CODE OF STATE REGULATIONS

8 CSR 10-5.015, p. 5, 29.

IV. CORPUS JURIS SECUNDUM

31A C.J.S. Evidence § 121, pg. 257 (1996), p. 6, 13, 29.

V. COURT RULES

Rule 81.12, p. 6, 8;

Rule 83.04, p. 6, 7;

Rule 84.06(b), p. 6, 35.

VI. MISSOURI CONSTITUTION

Article V, Section 9, Mo. Const., p. 6, 7.

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Labor and Industrial Relations Commission, which affirmed and adopted the decision of the Appeals Referee of the Missouri Division of Employment Security, that the appellant is disqualified for unemployment benefits because she was discharged for misconduct connected with her work. (L.F. 7-9, 16). On February 27, 2007, this Court ordered this case transferred from the Eastern District Court of Appeals pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction of this case under Article V, Section 9 of the Missouri Constitution.

INTRODUCTORY STATEMENT

Since this appeal involves a Petition for Judicial Review under Section 288.210¹ of the Missouri Employment Security Law, Chapter 288, the Administrative Transcript and Exhibits have been filed separately pursuant to Supreme Court Rule 81.12. The Administrative Transcript and Legal File contain all the evidence in this case, including the testimony given at the hearing before the Appeals Referee of the Division of Employment Security, the Decision of said Appeals Referee, and the Order of the Labor and Industrial Relations Commission. The pages of the complete Administrative Transcript will be referred to in this brief as "(Tr. ____.)"

Reference to the Legal File will be designated as "(L.F. ____.)"

Reference to the Appellant's Brief will be designated as "(App.Brf. ____.)"

The parties will at times be referred to in this brief as follows:

The Labor and Industrial Relations Commission of Missouri will be called the "Commission."

Appellant, Andrea Williams, will be called the "claimant."

Respondent, Missouri Division of Employment Security, will be called the "Division."

Respondent, Central Missouri Pizza, Inc., will be called the "employer."

¹ Unless otherwise stated, all references herein are to the Revised Statutes of Missouri 2000.

STATEMENT OF FACTS

The claimant worked for the employer, a chain of pizza delivery stores, from February 24, 2003 until December 27, 2005, at its store located at 2181 Droste, St. Charles, Missouri (Tr. 4, 5, 10). For the last month of her employment, the claimant worked as a phone order intake person (Tr. 5). Starting around Thanksgiving 2005 and continuing up until about a week before Christmas 2005, the claimant inquired several times about taking off work on Christmas Eve to enable her to travel to Springfield Missouri to spend Christmas Eve with her fiancé's family.(Tr. 8, 9). The claimant's requests to be off the work schedule on December 24, 2005, were denied and the claimant was scheduled to work on December 24, 2005, beginning at 5:00 p.m. and continuing until 9:00 p.m. (Tr. 7). The claimant did not report for work on December 24, 2005 as scheduled, and on that date she left at about 6:00 a.m. to travel to Springfield Missouri to spend Christmas Eve with her fiancé's family (Tr. 7). The claimant did not return home to the Saint Charles area until about 9:00 p.m. on December 25, 2005 (Tr. 7). On Tuesday December 27, 2005, the claimant called in to the store to inform the manager that she was having car problems and would need to start work a half hour later than scheduled on Wednesday, December 28, 2005, her next scheduled work day (Tr. 9, 10).

When the claimant talked with her manager he informed her that she was discharged because of her failure to work her shift, as scheduled, on December 24, 2005 (Tr. 6, 9, 10).

Procedural Facts

Claimant filed a claim for unemployment benefits. (L.F. 1). The employer filed a timely protest pursuant to Section 288.070.1, alleging that the claimant was discharged for not showing up for her shift on December 24, 2005, as scheduled (L.F. 2-3). The Division determined that the claimant was disqualified for unemployment benefits because she was discharged by the employer on December 27, 2005, for misconduct connected with her work in that the claimant was discharged because she was absent on December 24, 2005 and the claimant's attendance at work on that date was mandatory; and she did not call to report her absence (L.F. 4).

The claimant timely appealed the deputy's determination on January 13, 2006 (L.F. 5-6). A hearing was held by an Appeals Tribunal on February 1, 2006. The claimant appeared and testified. The employer did not attend the appeals hearing. The Appeals Tribunal entered a decision affirming the deputy's determination and finding that the claimant was disqualified for unemployment insurance benefits because she was discharged by the employer on December 27, 2005, for misconduct connected with her work pursuant to Section 288.050.2, RSMo Cum.Supp. 2005 (Tr. 1-13; L.F. 7-9). The claimant filed an application for review with the Labor and Industrial Relations Commission on February 24, 2006 (L.F. 10-15). On March 29, 2006, the Commission issued an Order affirming and adopting as its own the decision of the Appeals Tribunal (L.F. 16).

On April 10, 2006, the claimant filed her appeal to the Missouri Court of Appeals, Eastern District (L.F. 17-25), and this appeal was thus initiated. On October 31, 2006, the Eastern District issued its Decision reversing the Decision of the Labor and Industrial Relations Commission and finding "that there was insufficient competent evidence to support the Commission's finding that Claimant was discharged for misconduct connected with her work." The Division filed its Motion for Rehearing and/or Transfer to the Supreme Court of Missouri on November 14, 2006. Said Motion was denied by the Eastern District on December 14, 2006.

The Division filed its Application For Transfer from the Missouri Court of Appeals, Eastern District, with this Court on December 27, 2006. On February 27, 2007, this Court issued its Order sustaining the Division's Application For Transfer, and ordered the Eastern District to recall its mandate and transfer the case to the Missouri Supreme Court.

POINTS RELIED ON

I.

The Commission did not err in finding that Andrea Williams was discharged for misconduct connected with her work because the decision is supported by competent and substantial evidence of Ms. Williams' wanton or willful misbehavior in that Ms. Williams testified that she lost her job because of the following: she was scheduled to work the evening in question; her request for leave was denied because there was only a skeleton staff scheduled for this shift; she did not go to work because she left town to visit friends and relatives; and she did not inform her manager that she would not be going to work.

Williams v. Review Board of Indiana, Employment Security Division and

Jeffboat, Inc., 366 N.E.2d 712 (Ct. of Appeals Indiana 1977);

Cecil v. Arrowhead Management and Unemployment Insurance Appeals Board,

C.A. No. 96A-11-002, (1998 Delaware Superior Court LEXIS 44);

Jeffreys v. Everett, Director of Labor, 640 S.W.2d 465

(Court of Appeals of Arkansas 1982);

Parker v. Ramada Inn, 572 S.W.2d 409 (Ark.Sup.Ct. 1978);

Section 288.030.1(24), RSMo Cum.Supp. 2005;

Section 288.050.2, RSMo Cum.Supp. 2005.

II.

The Commission did not err in finding that the employer's burden of proving that the claimant committed misconduct was satisfied because the claimant's testimony provided competent and substantial evidence of the claimant's misconduct in that the administrative hearing officer has the duty to build the record and evidence produced by one party may satisfy the burden of proof for the other party.

Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864

(Mo.App. Spr. 1919);

White, v. St. Louis Teachers Union and Division of Employment Security,

Case No. WD67177, Handdown Date March 27, 2007, Slip Opinion;

Moore v. Unemployment Compensation Board of Review,

578 A.2d 606 (Pa.Cmwlth.,1990);

Smith v. Labor & Industrial Relations Commission, 656 S.W.2d 812

(Mo. App., W.D. 1983);

Section 288.030.1(24), RSMo Cum.Supp. 2005;

Section 288.050.2, RSMo Cum.Supp. 2005;

31A C.J.S. Evidence § 121, pg. 257 (1996).

ARGUMENT

SCOPE OF REVIEW

Judicial review in employment security cases is governed by Section 288.210, which provides that 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. *Garden View Care Center, Inc. v. Labor and Industrial Relations Commission*, 848 S.W.2d 603, 605 (Mo. App., E.D. 1993). A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the Commission's decision. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003); *Dolgencorp, Inc. v. Zatorski*, 134 S.W.3d 813, 818 (Mo. App., W.D. 2004).

Determination of credibility of witnesses is a function of the Commission. *England v. Regan Marketing, Inc.*, 939 S.W.2d 62, 66 (Mo. App., S.D. 1997). The Commission may disbelieve or discount the testimony of any party's witnesses. *Burns v. Labor and Industrial Relations Commission*, 845 S.W.2d 553, 556 (Mo. banc 1993). The Court defers to the Commission's resolution of credibility. *Mitchell v. Division of Employment Security*, 922 S.W.2d 425, 427 (Mo. App., S.D. 1996).

The Court must decide whether the Commission could have reasonably made its findings based on the evidence before it. *Wingo v. Pediatric and Adolescent Medical Consultants, Inc.*, 932 S.W.2d 898, 899 (Mo. App., E.D. 1996). Where the Commission, as trier of fact, has reached one of two possible conclusions from the evidence, the Court

should not reach a contrary conclusion even if such a conclusion might have reasonably been reached. *Clark v. Labor and Industrial Relations Commission*, 875 S.W.2d 624, 626-627 (Mo. App., W.D. 1994). The Court should not substitute its own judgment on the evidence for that of the Commission, but should set aside the Commission's judgment only if it is clearly contrary to the overwhelming weight of the evidence. *Tri-State Motor Transit Company v. Industrial Commission*, 509 S.W.2d 217, 220 (Mo. App., Spr.D. 1974). Whether a separation is a voluntary quit or a discharge is a question of fact. *Miller v. Help at Home, Inc.*, 186 S.W.3d 801, 805 (Mo. App., W.D. 2006). If there is conflicting evidence as to a factual issue, the resolution of that conflict is for the Labor and Industrial Relations Commission. *Id.*

Questions of law are reviewed independently by the appellate court, *Miller v. Kansas City Station Corp.*, 996 S.W.2d 120 (Mo. App., W.D. 1999) and no deference is given to the Commission. *Nell v. Fern-Thatcher Co.*, 952 S.W.2d 749, 752 (Mo. App., W.D. 1997). Whether an employee's actions constitute misconduct associated with work is a question of law. *Dixon v. Division of Employment Security*, 106 S.W.2d 536, 540 (Mo. App., W.D. 2003).

POINT I

The Commission did not err in finding that Andrea Williams was discharged for misconduct connected with her work because the decision is supported by competent and substantial evidence of Ms. Williams' wanton or willful misbehavior in that Ms. Williams testified that she lost her job because of the following: she was scheduled to work the evening in question; her request for leave was denied because there was only a skeleton staff scheduled for this shift; she did not go to work because she left town to visit friends and relatives; and she did not inform her manager that she would not be going to work.

The issue to be decided herein is whether the claimant was discharged for conduct sufficiently egregious to disqualify her from receiving unemployment benefits. This Court need not decide whether the employer was justified in discharging the claimant. Those two issues are separate and distinct, with different standards. The Eastern District highlighted the difference when it noted in *Massey v. Labor and Industrial Relations Commission*, 740 S.W.2d 680, 683 footnote 1 (Mo.App., E.D. 1987):

"The 'misconduct' which disqualifies one for unemployment compensation benefits is different from good cause for discharge by an employer. Thus, an employer may have good cause to discharge an employee ... yet may not prevent the employee from receiving unemployment benefits... ."

Section 288.050.2, RSMo Cum. Supp. 2005, states in part 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, 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."

The term "misconduct" is now defined in Section 288.030.1(24), RSMo Cum. Supp. 2005, 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;"

This statutory definition is the same as the definition established in prior case law, and, therefore, prior case law is still applicable. See *Laswell v. Industrial Commission*, 534 S.W.2d 613, 616 (Mo.App., K.C.D. 1976).

Where the 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 Division asserts that because the employer did not appear at the hearing in this matter does not mean that the employer's burden of proof cannot be met. In the case at bar, the employer's burden of proof was clearly met by the testimony of the claimant. The Commission correctly noted that "[a]bsences due to illness or family emergency are absences caused through no fault of Employee and as such cannot be willful misconduct, especially if properly reported to Employer." *Garden View Care Center, Inc.*, supra, 848 S.W.2d at 603. However, in the case at bar, the claimant testified that she had asked her manager Mike Arena, several times during the weeks leading up to Christmas Eve of 2005 if she could be off of work on Christmas Eve 2005 so that she could visit her fiancé's family in Springfield Missouri (Tr. 8, 9). Mr. Arena informed the claimant that it was mandatory that she work her assigned shift from 5:00 p.m. to the end of the rush period at approximately 9:00 p.m. on December 24, 2005 (Tr. 7-9). The claimant admitted that she did not show up for her shift on Christmas Eve and that was the reason why she was discharged by the employer (Tr. 6, 10). Thus, the totality of the evidence in this case shows that the claimant's actions in failing to report for work and not reporting her absence to her manager on December 24, 2005, as specifically instructed by her supervisor (Tr. 8), was not "due to illness or family emergency", but rather the claimant's failure to show up for work as scheduled and expected, intentional behavior that constituted misconduct under the Missouri Employment Security Law.

The Division submits that the December 24, 2005 no call/no show incident standing by itself is sufficient to constitute misconduct connected with the claimant's work under the guidelines set out by the General Assembly in Sections 288.050.2, RSMo Cum.Supp. 2005; 288.050.3, RSMo Cum.Supp. 2005; and 288.030.1(24), RSMo Cum.Supp. 2005.

There are a number of cases from other jurisdiction that support the finding that a single incident of willful failure to appear, without an excuse, for scheduled work can constitute misconduct requiring the forfeiture of unemployment insurance benefits.

In *Williams v. Review Board of Indiana, Employment Security Division and Jeffboat, Inc.*, 366 N.E.2d 712 (Court of Appeals of Indiana 1977), the Indiana Court of Appeals held that the claimant was guilty of misconduct where the claimant's actions in not reporting for work as scheduled evidenced intentional and substantial disregard of his duties and obligations to the employer when he was absent from work without prior verification of his excuse.

In *Cecil v. Arrowhead Management and Unemployment Insurance Appeals Board*, C.A. No. 96A-11-002, (1998 Delaware Superior Court LEXIS 44), the court commented that a single act could constitute misconduct where the employer had warned the claimant of the consequences of the claimant actions. The claimant knew that she had to call the employer and that "a failure to do so represented a violation of [the] employers practice."

In *Jeffreys v. Everett, Director of Labor*, 640 S.W.2d 465 (Court of Appeals of Arkansas 1982), the Court held that a desk clerk was properly disqualified from receiving unemployment benefits when he was four hours late for his shift from 4:00 p.m. to midnight.

In *Parker v. Ramada Inn*, 572 S.W.2d 409 (Ark.Sup.Ct. 1978), the Arkansas Supreme Court held that "[a] single incident of missing work has ordinarily been considered misconduct within the meaning of the Employment Security Laws when the failure to report and appear for work involves a disregard of standards of behavior which the employer has a right to expect."

In the case at bar the claimant's manager specifically instructed her that it was mandatory that she be present for her shift from 5:00 p.m. to approximately 9:00 p.m. on December 24, 2005 (Tr. 7-9). Thus, the evidence clearly shows that the claimant was discharged for willfully violating the employer's explicit attendance directive, and such conduct clearly was misconduct under the Missouri Employment Security Law. Therefore, the decision of the Commission denying unemployment benefits to the claimant, is supported by competent and substantial evidence upon the record as a whole and is correct according to the law.

POINT II.

The Commission did not err in finding that the employer's burden of proving that the claimant committed misconduct was satisfied because the claimant's testimony provided competent and substantial evidence of the claimant's misconduct in that the administrative hearing officer has the duty to build the record and evidence produced by one party may satisfy the burden of proof for the other party.

This case is of great importance to the citizens and employers in the State of Missouri because it concerns how the burden of proof can be met in unemployment insurance matters. The outcome of this case can affect many aspects of the administration of the Missouri Employment Security Law, Chapter 288, RSMo Cum.Supp. 2005, and many thousands of cases each year. While the Eastern District properly characterized the burden of proof for proving the application of the misconduct penalty, i.e. Section 288.050.2. RSMo Cum.Supp. 2005; the Eastern District failed to recognize that another party can provide evidence that satisfies the employer's burden of proof, even if the employer is not present at the unemployment insurance appeals hearing.

In its decision, the Eastern District erred in finding that the claimant did not commit misconduct connected with her work, because the employer failed to prove that claimant willfully violated its rules. Whether there was a willful violation of a rule is not the sole factor that needs to be determined in a misconduct evaluation. Section

288.030.1(24), RSMo Cum.Supp. 2005, sets out the criteria that need to be examined in a misconduct situation:

(24) "**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 Eastern District improperly did not consider the fact that the record could, and did support, a finding that the claimant committed misconduct under the Missouri Employment Security Law, even if the employer "offered no evidence relating to its policies regarding absences from work or mandatory shifts or as to any misconduct by Claimant." Eastern District Decision, page 5. The facts of this case were properly developed by the Appeals Referee, as was his duty. *Smith v. Labor & Industrial Relations Commission*, 656 S.W.2d 812 (Mo. App., W.D. 1983). The facts show that the claimant was correctly denied unemployment benefits because her actions in being absent from work on December 24, 2005, a properly scheduled, mandatory work day, without contacting her manager, was intentional behavior that showed a "wanton or willful disregard of the employer's interest [and] a disregard of standards of behavior which the

employer ... [had] the right to expect of ... [its] employee." *Wingo v. Pediatric and Adolescent Medical Consultants, Inc.*, 932 S.W.2d 898 (Mo. App., E.D. 1996).

At all levels, it is possible to have the claimant, the employer and the Division of Employment Security as interested parties. The reason for this is to protect the basic integrity of the system, i.e. that unemployment benefits should be paid through an administrative system that has been set up to provide for the payment of benefits of those unemployed through no fault of their own. Section 288.020.1. While the money paid out to claimants is all paid for by the employers of this State, there are checks in the system to ensure that benefits are only paid out when warranted under the law. This is why the employer is made an interested party when a protest is filed by that employer. (See Section 288.070.1). If a protest is filed by the employer, as was the situation in this case (L.F. 2-3), the employer remains an interested party throughout the entire process and can participate at each level. Section 288.070.1. The Division of Employment Security is also a party throughout the entire process and can participate at each level. The Division has an obligation to see that the law is properly administered and to protect the Unemployment Insurance Fund from which claimant benefits are paid. (See Section 288.130).

The unemployment insurance system is a state-federal system in which the Federal government collects taxes from employers, through the Internal Revenue Service, and then grants the money collected back to each state, to pay for the administration of the system. See 26 U.S.C. § 3301 *et seq.*, the Federal Unemployment Tax Act. As a matter

of fact, the preparation of this brief is being paid for by Federal grant money given to the State of Missouri to be used for unemployment insurance purposes only. The money to pay unemployment insurance benefits comes out of the "Unemployment Compensation Fund," which is collected by the State of Missouri through the Division of Employment Security. (See Section 288.100-288.180; 288.290, RSMo Cum.Supp. 2005). The Division has an obligation to protect the "Unemployment Compensation Fund" to ensure that there is money to provide to claimants who rightfully deserve benefits under the law. The Division of Employment Security is charged with the administration of the Missouri Employment Security Law and the protection of the unemployment compensation trust fund; the agency is representing the interest of the public, not that of an employer or claimant. Section 288.220; *Dubinsky Brothers, Inc., v. Industrial Commission of Mo.*, 373 S.W.2d 9, 13 (Mo. banc 1963). This duty is present in each and every unemployment insurance case, at every level of review, including this case.

The question might be asked, what has this got to do with the employer's burden of proof in this case? The answer is everything. While the Courts have established a structure that provides for burdens of proof in unemployment insurance matters, e.g. *Silman v. Simmons' Grocery*, 204 S.W.3d 754 (Mo.App., S.D. 2006), burden of proof on employer for misconduct; *Ayers v. Sylvia Thompson Learning Center*, 211 S.W.3d 195 (Mo.App., S.D. 2006), burden of proof on claimant for voluntary quit issue; these burdens should be tempered by the overall structure of the unemployment insurance system as described above. The Division submits that while the burden was on the

employer in this case, because this case involves the misconduct provision, that burden should be applied in the context of the entire Missouri Employment Security Law and structure. That is, the burden needs to be met, as case law points out, but the integrity of the system demands that the employer's burden of proof can be met by evidence presented by the claimant or the Division, even if the employer chooses not to participate, as is the situation in this case.

This honorable Court should also note that if benefits are paid in this case, the amount of taxes paid by the employer in this matter, would not cover the total benefits paid to the claimant. This is because under the experience rating system set up in the law, the employer would not pay penny for penny the amount paid in benefits; but rather, said amount would be charged to the employer's account and only used for calculating the employer's experience rating. (See Section 288.100, RSMo Cum.Supp. 2005; 288.113-288.125). This means that the actual amount paid by the particular employer in this case, would not cover the total amount of benefits paid. The difference would be paid by the pool of all employers. This is one of the reasons why the Division is obligated to protect the fund; i.e. all the employers whose taxes are directly affected can not participate in this case, but the Division can participate. Thus, if the Eastern District's decision is allowed to stand, the basic integrity of the Missouri unemployment insurance system would be adversely affected.

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 &*

Indus. Com'n, 845 S.W.2d 553 (Mo. banc 1993). A Court does not "reweigh the evidence; the Commission judges the weight to be given to conflicting evidence and the credibility of witnesses." *Panzau v. JDLB., Inc.*, 169 S.W.3d 122, 126 (Mo.App., E.D. 2005). A reviewing court, thus, must affirm those decisions of the Commission which are supported by any substantial and competent evidence taken from the whole record.

While the Eastern District correctly notes in its Opinion that the employer bore the burden of proof because this is a misconduct issue under the Missouri Employment Security Law, the Court's finding that the "[e]mployer ... failed to participate at any stage in this matter" is not correct. The employer in this case, under the provisions of Section 288.070 did file a protest to the claim for benefits (L.F. 2, 3). The employer specifically stated in its protest the reason why the claimant was discharged:

"Reason - Did not show up for her shift - no call, no show. ... Did not show for shift on 12-24-05." (L.F. 2 & 3).

Further, even if the employer had failed to file a timely protest and was not an interested party to this matter, the employer's failure to participate at any stage in this matter would not, and could not, be the dispositive element of this case. A Division deputy is required to examine each initial claim and each weekly claim and determine whether a claimant is entitled to unemployment benefits. Section 288.190. If during the examination (investigation) a claimant admits that she committed misconduct, the deputy will disqualify the claimant from receiving unemployment benefits, even if the employer never contacted the Division. The Division's deputy disqualified claimant from receiving

benefits because she was absent from work on December 24, 2005, a mandatory work day, and she did not call in to report her absence. (L.F. 4.)

In 2004, the Division received 475,253 initial claims, the Appeals Tribunal received 31,362 appeals and the Commission received 4,493 unemployment insurance appeals. Missouri Department of Labor and Industrial Relations 2004 Annual Report, pages 11, 12.² In addition, in calendar year 2004 the Division made 76,153 determinations concerning misconduct issues and 41,822 determinations concerning voluntary quit issues; Section 288.050.1(1), RSMo Cum.Supp. 2005. (See Affidavit of Janice Belt, Chief of Unemployment Insurance Programs, attached.) Thus the burden of proof issue in this case has enormous implications for the administration of the Missouri Employment Security Law.

The reasoning of the Eastern District would hold that if the employer had appeared for the hearing, but had no evidence other than allowing the claimant to testify, and the claimant testified, as is the norm; then the misconduct finding could be upheld because the employer was present, and thus met its burden. Yet, if you remove the employer from this scenario, and are left with exactly the same evidence, the Eastern District would

² A court can take judicial notice of statistics contained in a governmental publication without having said publication in evidence. *City of Gainesville v. Gilliland*, 718 S.W.2d 553 (Mo.App. 1986). *See also, Sulls v. Director of Revenue*, 819 S.W.2d 782 (Mo.App., S.D. 1991).

say that the misconduct finding would have to be reversed. The Division submits that this is an absurd result, and goes against basic principles of fairness and justice.

Many employers fail to participate in unemployment insurance proceedings. The Eastern District's decision herein would prevent the Division from disqualifying a claimant who admitted acts of misconduct if the employer did not participate. That could result in the Division paying thousands of dollars of unemployment benefits to hundreds, if not thousands, of claimants who admit facts that disqualify them. Conversely, employers admit facts that justify payment of unemployment benefits to claimants. The Eastern District's decision would also prohibit the Division's use of employer's admissions to pay claimants.

It should also be noted that it has been recognized that the Appeals Referee at an unemployment insurance hearing has the duty to develop the record in a manner that best develops all of the pertinent facts that pertain to the particular issues presented in the case. The Western District explained the reasoning behind this duty when it stated in *Smith v. Labor And Industrial Relations Commission*, 656 S.W.2d 812 (Mo.App., W.D. 1983):

"A duty rests upon the agency administering the beneficent social security laws to exercise considerable responsibility to explore the factual aspects of each situation which tend to prove or disprove the right of the claimant. The claimants are usually poor and inexperienced in legal matters, the sums involved are small and the claimants are rarely represented by counsel."

Id. at 818.

The State's regulations pertaining to the conduct of unemployment insurance hearings also support the position that the Appeals Referee is obligated to obtain and consider all of the pertinent evidence available at the time of the hearing, regardless of which party has the burden of proof. 8 CSR 10-5.015. Obviously, the Referee is required to consider and weigh all of the evidence when making the decision in the case.

Thus, the Division's deputy, the Appeals Tribunal, and the Commission are required to apply the Missouri Employment Security Law to the facts presented, whether the employer chooses to participate or not. The Division submits that while the employer bore the burden of proof, that burden can be met by the testimony and/or evidence presented by any party. The Missouri Court of Appeals stated the following in *Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 864 (Mo.App. Spr. 1919):

"It should be noted, however, that in all cases where the burden of proof is on one party the evidence produced by the other party may lift or lighten the load."

This sometimes overlooked precept is hornbook law and is explained as follows at 31A C.J.S. Evidence § 121, pg. 257 (1996):

"The burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence."

The Western District recently examined this very issue in *White v. St. Louis Teachers Union and Division of Employment Security*, Case No. WD67177, Handdown

Date March 27, 2007, Slip Opinion. In *White*, the claimant suggested that she should have been awarded benefits by default because her employer failed to participate, present evidence, or call any witnesses, before the Appeals Tribunal. The Western District affirmed the Commission's decision, which was "based [solely] upon the evidence presented at the hearing before the Appeals Tribunal." Relying on *Malone*, supra, the Western District found that "[t]here is no requirement that the evidence presented and considered by the decision-maker must have been offered by the party bearing the burden of proof." This is exactly the same position proffered by the Division in the case at bar.

The Commonwealth Court of Pennsylvania specifically applied this principle in *Moore v. Unemployment Compensation Board of Review*, 578 A.2d 606 (Pa.Cmwlth.,1990):

"As previously stated, the employer failed to appear at the hearing to attempt to meet its burden of establishing willful misconduct. Even where an employer fails to appear having the burden of proving willful misconduct, benefits may be denied if the employee seeking benefits proves the employer's case. We stated ... that the employee can sustain the employer's burden 'either in whole ... or in part, by corroborating unobjected to hearsay evidence of the employer....'" [Citations omitted.]

While it is true that the employer did not appear at the appeals hearing and present evidence concerning its attendance rules, the real analysis of the case concerns not whether the claimant violated one particular rule of the employer, but rather whether any

of the elements of Section 288.030.1(24), RSMo Cum.Supp. 2005, apply to the facts of this case.

The Division believes that the claimant's own testimony supports the finding that "the claimant was intentionally absent for her scheduled shift on December 24, 2005," and that her testimony fully supports the Commission's conclusion that her actions constituted "a wanton and willful disregard of the employer's interest" and a "disregard of standards of behavior which the employer has the right to expect of ... [its] employee".

There was no need for the employer to present evidence relating to its attendance policies. An employee's failure to call in and failure to report for work as scheduled, is misconduct without the employer even having such a policy. Herein, an employer has the right to operate a restaurant on Christmas Eve. It may be a very busy night for pizza delivery. Employees simply do not have the right to expect an employer to close its business because all of them want the night off. Rather, the employer has the right to tell some of its employees that they must work. If the employer is generous enough to grant some of the employees the night off, it simply cannot operate its business without workers. Claimant testified that her request for leave was denied, and knowing this, she still left town for a family gathering (Tr. 7-9). An employer has a right to expect more of its employees. Therefore, the Commission did not err in denying Appellant unemployment benefits.

The Division submits that considering the totality of the facts in this case, the actions of the claimant in violating the employer's directive that it was mandatory that she

be present for her shift from 5:00 p.m. to approximately 9:00 p.m. on December 24, 2005 (Tr. 7-9), could only be done by someone acting in a deliberate and purposeful manner.

Employees' showing up for work as scheduled is critical to the success of any pizza delivery business. The claimant's actions in failing to report for work and not reporting her absence to her manager on December 24, 2005, as specifically instructed by management was intentional behavior that showed a "wanton or willful disregard of the employer's interest [and] a disregard of standards of behavior which the employer has the right to expect of ... [its] employee"; and said actions constituted misconduct under the Missouri Employment Security Law. The Commission properly applied the standard for misconduct as stated in Section 288.030.1(24), RSMo Cum.Supp. 2005, when it affirmed and adopted the decision of the Appeals Tribunal, which affirmed the original determination of the deputy of the Division of Employment Security.

The Commission's decision in this case is reasonable, and clearly is based on competent and substantial evidence in the record. The Commission properly found that under the circumstances presented in this case, the claimant was discharged by the employer on December 27, 2005, for misconduct connected with the work. The Division of Employment Security asks that this court affirm the decision of the Commission.

CONCLUSION

The Eastern District misapplied the law when it focused on the employer's failure to participate in the appeals hearing and rules violation. Claimant's failure to call in and failure to report for work as scheduled, even if not proved to be a rules violation, constituted misconduct under the provisions of Section 288.030.1(24), RSMo Cum.Supp. 2005.

Wherefore, Respondent Division of Employment Security prays that the Court affirm the Decision of the Commission and for such other and further relief as the Court deems appropriate.

Respectfully submitted,

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PROOF OF SERVICE

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CERTIFICATE OF WORD COUNT

AND VIRUS FREE DISK

I hereby certify the following:

1. The foregoing brief has been prepared in Microsoft Word 2003, 13 font, Times New Roman.
2. The foregoing brief complies with the word count limitations contained in Supreme Court Rule 84.06(b).
3. The foregoing brief contains 7,198 words; and complies with the limitations contained in Rule 84.06(b).
4. The enclosed diskette containing the brief has been scanned for viruses using Symantec AntiVirus and is virus free.

This 30th day of March, 2007.

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APPENDIX TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|-------------|
| Appendix A – Decision of Commission | A1 |
| Appendix B – Decision of Appeals Tribunal | A2-A4 |
| Appendix C – Section 288.030.1(24), RSMo Cum.Supp. 2005 | A5-A7 |
| Appendix D – Section 288.050.2, RSMo | A8-A10 |
| Appendix E - 8-CSR 10-5.015 | A11-A13 |
| Appendix F - Affidavit of Janice Belt, Chief of Unemployment Insurance Programs | A14 |

No. SC88217

**IN THE
SUPREME COURT OF MISSOURI**

**DIVISION OF EMPLOYMENT SECURITY,
Respondent,**

v.

**ANDREA WILLIAMS, Appellant and
CENTRAL MISSOURI PIZZA, INC., Respondent**

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

**SUBSTITUTE BRIEF OF
RESPONDENT DIVISION OF EMPLOYMENT SECURITY**

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