SC89239

IN THE MISSOURI SUPREME COURT

AMY DIFATTA-WHEATON, Appellant

v.

DIVISION OF EMPLOYMENT SECURITY, Respondent

Appeal from the Labor and Industrial Relations Commission

SUBSTITUTE BRIEF OF APPELLANT AMY DIFATTA-WHEATON

SUSAN FORD ROBERTSON #35932

FORD, PARSHALL & BAKER,
3210 Bluff Creek Drive
Columbia, MO 65201
573-449-2613 (phone)
573-875-8154 (fax)
srobertson@fpb-law.com
www.fpb-law.com

ATTORNEYS FOR APPELLANT
AMY DIFATTA-WHEATON

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF FACTS 4

POINT RELIED ON:

THE COMMISSION ERRED IN FINDING THAT DIFATTA-WHEATON WAS DISQUALIFIED FOR UNEMPLOYMENT BENEFITS BECAUSE SHE DID NOT VOLUNTARILY QUIT WORK BUT INSTEAD WAS INVOLUNTARILY TERMINATED IN THAT COMPLICATIONS FROM A HYSTERECTOMY AND OVARIAN CANCER PREVENTED HER FROM RETURNING TO WORK AS ANTICIPATED BY HER AND HER EMPLOYER ALTHOUGH SHE NOTIFIED HER EMPLOYER OF HER CONDITION AND INABILITY TO RETURN BUT HER EMPLOYER TERMINATED HER THE FOLLOWING WEEK FOR UNEXCUSED ABSENCES.

..... 6

ARGUMENT 8

STANDARD OF REVIEW 7

CONCLUSION 15

CERTIFICATE OF SERVICE AND COMPLIANCE 16

APPENDIX 17

TABLE OF CASES AND AUTHORITIES

Cases

Ayers v. Sylvia Thompson Residence Center,
211 S.W.3d 195 (Mo.App. W.D. 2007) 14

Board of Education v. Labor and Industrial Relations Commission,
633 S.W.2d 126 (Mo.App. 1982) 13

Bussman Manufacturing Co. v. Industrial Commission of Missouri,
327 S.W.2 487 (Mo.App. 1959) 10, 11

Division of Employment Security v. Labor &
Industrial Relations Commission,
617 S.W.2d 620 (Mo.App. W.D. 1981) 13

Duffy v. Labor & Industrial Relations Commission,
556 S.W.2d 195 (Mo.App. 1977) 13

Garden View v. Labor & Industrial Relations Commission,
848 S.W.2d 603 (Mo.App. E.D. 1993) 14

Lake v. Labor & Industrial Relations Commission,
781 S.W.2d 207 (Mo.App. E.D. 1989) 14

Lindsey v. University of Missouri,
254 S.W.3d 168 (Mo.App. W.D. 2008). 11

Madewell v. Div. Of Employment Security,

72 S.W.3d 159 (Mo.App. W.D. 2002) 7

Miller v. Help At Home, Inc.,

186 S.W.3d 801 (Mo.App. W.D. 2006) 11

Mo. Div. Of Employment Sec. v. Labor & Indus. Relations Comm'n,

651 S.W.2d 145, 148 (Mo. banc 1983) 10

Quik 'N Tasty Foods, Inc., v. Division of Employment Security,

17 S.W.3d 620 (Mo.App. W.D. 2000) 7, 13

Reutzel v. Missouri Division of Employment Security,

955 S.W.2d 239 (Mo.App. S.D. 1997) 10, 14

Turner v. Labor & Industrial Relations Commission,

793 S.W.2d 191 (Mo.App. W.D. 1990) 14

Wimberly v. Labor and Industrial Relations Commission of Missouri,

688 S.W.2d 344 (Mo. banc 1985) 13

Statutes

Section 288.020 R.S.Mo 9

Section 288.050.1(1) R.S.Mo 3, 10, 15

Section 228.210 R.S.Mo. 7

JURISDICTIONAL STATEMENT

This appeal involves a petition for judicial review of a decision of the Labor and Industrial Relations Commission pursuant to Chapter 288 R.S.Mo. Difatta-Wheaton was denied unemployment benefits for the reason that the Commission found that she was disqualified from unemployment benefits because she voluntarily quit her employment without good cause attributable to the work or to the employer pursuant to Section 288.050.1(1) R.S.Mo. Difatta-Wheaton appealed the adverse decision to the Missouri Court of Appeals for the Western District. The appellate court reversed the Commission's decision and found Difatta-Wheaton was entitled to unemployment benefits. The Division of Employment Security applied for transfer to this Court arguing that the appellate court's decision was in conflict with prior cases interpreting Section 288.050.1(1). This Court accepted transfer. This court has jurisdiction to address the decision of the Labor and Industrial Relations Commission on the merits. Mo.Const.Art.V, Section 10.

STATEMENT OF FACTS

Amy Difatta-Wheaton began work for Dolphin Capital Corporation in November 2005 as a sales representative. (Tr. 5, 14.) She worked 40 hours a week and earned an annual salary of $18,500. (Tr. 6.) In 2006 she was diagnosed as having ovarian cancer and was told that she needed a full hysterectomy. (Tr. 8.) She was given a medical leave by Dolphin from May 23, 2006-May 29, 2006 because she was unable to work due to excessive bleeding. (Tr. 6, 8, 13.) Dolphin had been provided a doctor's statement that she was unable to return to work until May 29, 2006. (Tr. 13; A-13.)

She was scheduled to return to work at 8:00 a.m. on Monday May 29, but on the Sunday evening of May 28, she suffered a medical emergency in connection with her cancer. (Tr. 7, 9.) She called her Dolphin supervisor at 7:30 Monday morning and left a message explaining she had suffered medical complications and that she would not be at work that day. (Tr. 7, 9.) She said that she would have her doctor fax over another excuse to work. (Tr. 7, 9.) Difatta-Wheaton testified that the doctor faxed an excuse to Dolphin and that Difatta-Wheaton had a friend, Shelly Parrish, take a copy of the excuse to Dolphin on Monday May 29th. (Tr. 9, 10; A-13, 14.) Difatta-Wheaton also said that she left several phone messages for her supervisor that were never returned so she got another copy of the excuse and had her boyfriend deliver it to Dolphin. (Tr. 10.)

Joan Powell-Lucchese testified that she is the office administrator for Dolphin. (Tr. 11.) She admitted that she received a message from Difatta-Wheaton that she was

going to get a doctor's excuse after she did not return to work on May 29. (Tr. 13.) Powell-Lucchese denies ever receiving a doctor's excuse after May 29. (Tr. 13.)

Difatta-Wheaton got a letter from Dolphin dated June 5, 2006 stating that she had voluntarily resigned because of unexcused absences from May 29-June 5 without evidence of reason for absence. (Tr. 6-8.) She denies she resigned. (Tr. 6.)

Difatta-Wheaton filed an initial claim for unemployment benefits on June 8, 2006. (L.F. 1.) A Division deputy determined that Difatta-Wheaton voluntarily quit her employment without good cause attributable to the work or to her employment (L.F. 4.) She appealed and a hearing was held. (Tr. 1.) The Appeals Tribunal affirmed the determination that denied Difatta-Wheaton benefits. (L.F. 13-15; A-6.)

Difatta-Wheaton filed an Application for Review before the Labor and Industrial Relations Commission and the Commission affirmed the decision finding Difatta-Wheaton disqualified from receiving unemployment benefits. (L.F. 25-27; A-9.) Difatta-Wheaton appealed to the Missouri Court of Appeals and the appellate court reversed the Commission's decision and determined that Difatta-Wheaton was entitled to unemployment benefits. The Division of Employment Security requested that this Court accept transfer of the case, which this court accepted.

POINT RELIED ON

THE COMMISSION ERRED IN FINDING THAT DIFATTA-WHEATON WAS DISQUALIFIED FOR UNEMPLOYMENT BENEFITS BECAUSE SHE DID NOT VOLUNTARILY QUIT WORK BUT INSTEAD WAS INVOLUNTARILY TERMINATED IN THAT COMPLICATIONS FROM A HYSTERECTOMY AND OVARIAN CANCER PREVENTED HER FROM RETURNING TO WORK AS ANTICIPATED BY HER AND HER EMPLOYER ALTHOUGH SHE NOTIFIED HER EMPLOYER OF HER CONDITION AND INABILITY TO RETURN BUT HER EMPLOYER TERMINATED HER THE FOLLOWING WEEK FOR UNEXCUSED ABSENCES.

Bussman Manufacturing Co. v. Industrial Commission of Missouri,
327 S.W.2 487 (Mo.App. 1959).

Reutzel v. Missouri Division of Employment Security,
955 S.W.2d 239 (Mo.App. S.D. 1997).

Section 288.020 R.S.Mo.

Section 288.050.1(1) R.S.Mo.

.

Standard of review

Judicial review of the Commission's decision is governed by Section 228.210 R.S.Mo. that provides that this Court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds:

(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. (A-1.)

The Commission's determination of whether an employee voluntarily left her employment or was discharged is a factual determination and this Court will defer to the Commission as to its finding that the claimant left her employment voluntarily. *Quik 'N Tasty Foods, Inc., v. Division of Employment Security*, 17 S.W.3d 620, 624 (Mo.App. W.D. 2000). However, the question of whether the claimant had good cause to leave is a legal issue and this court does not defer to the Commission on that issue. *Id*. In this case the facts are not in dispute on why Difatta-Wheaton could not return to work and that she notified her employer of her situation. Because the facts are not disputed, but the application and significance of the facts can be viewed in different ways, this case involves primarily the application of the law to the facts. *Madewell v. Div. Of Employment Security*, 72 S.W.3d 159, 163 (Mo.App. W.D. 2002).

ARGUMENT

THE COMMISSION ERRED IN FINDING THAT DIFATTA-WHEATON WAS DISQUALIFIED FOR UNEMPLOYMENT BENEFITS BECAUSE SHE DID NOT VOLUNTARILY QUIT WORK BUT INSTEAD WAS INVOLUNTARILY TERMINATED IN THAT COMPLICATIONS FROM A HYSTERECTOMY AND OVARIAN CANCER PREVENTED HER FROM RETURNING TO WORK AS ANTICIPATED BY HER AND HER EMPLOYER ALTHOUGH SHE NOTIFIED HER EMPLOYER OF HER CONDITION AND INABILITY TO RETURN BUT HER EMPLOYER TERMINATED HER THE FOLLOWING WEEK FOR UNEXCUSED ABSENCES.

The question before this Court is whether an individual who is unable to work because of illness or disease is automatically disqualified from receiving unemployment benefits. For decades Missouri has expressed a strong public policy in providing unemployment benefits for people who find themselves unemployed through no fault of their own. Equally strong are the courts' declarations that the unemployment disqualifying statutory provisions are to be strictly construed. Yet somehow through the years an incongruous and unfair result has occurred---unemployment benefits are being denied to some of our state's most deserving--those who are unable to work at all because

of serious illness or disease. The articulated justification does not appear to withstand careful scrutiny.

Our legislature has declared that the public policy to be used in interpreting and applying the unemployment statutes is as follows:

1. …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. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.
2. This law shall be liberally construed to accomplish its purpose to promote employment security both by increasing opportunities for jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment. Section 288.020 R.S.Mo. (A-2.)

The clear legislative intent and public policy in liberally construing the unemployment statutes to provide compensation to those who are unemployed through no fault of their own is the guidepost for resolution in this case. The disqualifying provisions are to be strictly construed against the disallowance of benefits to unemployed

but available workers. *Mo. Div. Of Employment Sec. v. Labor & Indus. Relations Comm'n*, 651 S.W.2d 145, 148 (Mo. banc 1983).

In this case the Commission affirmed the Appeals Tribunal finding that Difatta-Wheaton was disqualified to receive unemployment benefits pursuant to Section 288.050.1(1) R.S.Mo. in that she had "left work voluntarily without good cause attributable to such work or to the claimant's employer." (A-3.) The Appeals Tribunal relied upon *Reutzel v. Missouri Division of Employment Security*, 955 S.W.2d 239 (Mo.App. S.D. 1997) in finding Difatta-Wheaton's failure to work at the expiration of her approved leave of absence constituted a voluntary separation from employment. It also justified the denial of unemployment benefits finding that she failed to prove a causal relationship requirement that the work at Dolphin caused an aggravation of an existing condition or work was a contributing factor to her illness, citing, *Bussman Manufacturing Co. v. Industrial Commission of Missouri*, 327 S.W.2 487, 491 (Mo.App. 1959).

The appellate court determined that perhaps reliance upon those cases was misplaced. The appellate court's research, analysis and result appear to be correct and more in line with the purpose and policy behind Missouri's statutory commitment to provide unemployment benefits to those deserving who find themselves unable to work through no fault of their own.

As the appellate court notes, this Court does not appear to have addressed the specific situation now present before it—whether our statutes were designed to deny

unemployment benefits to individuals prevented or prohibited from working because of serious illness or disease.

Bussman was one of the first cases to ascribe a causal requirement between work and an employee's illness. In *Bussman*, the appellate court determined that the phrase following the word "voluntarily" must have been intended by the legislature to require a causal connection that either work caused an aggravation of an existing condition or that work was a contributing factor to the illness. *Bussman*, 327 S.W.2d at 491. Many courts have held that an employee is deemed to have left work "voluntarily" when the worker leaves of his or her own accord, as opposed to being discharged, dismissed or subjected to layoff by the employer. *Miller v. Help At Home, Inc.*, 186 S.W.3d 801, 806 (Mo.App. W.D. 2006); *Lindsey v. University of Missouri*, 254 S.W.3d 168, 171 (Mo.App. W.D. 2008). However, the difficulty arises in addressing whether an individual who cannot work at all because of illness or disease necessarily results in a voluntary termination.

In this case, Difatta-Wheaton was so ill by virtue of having ovarian cancer that she needed a total hysterectomy. Her employer gave her permission to be off work from May 23-May 29, 2006. On the Sunday night before she was scheduled to return to work she experienced a medical emergency connected to her cancer. She notified her employer on the following morning that she was unable to return that day and would have her doctor send another note. Though her employer admits receiving the message, Difatta-Wheaton was sent a letter the following week stating due to excessive absences without explanation for the absences she was deemed to have voluntarily terminated her

employment. The Appeals Tribunal and Commission found that she failed to prove a causal relationship between work and her illness and as a result, she was denied unemployment compensation.

That result simply cannot be justified on the facts adduced or under an appropriate analysis of the law. Either the *Bussman* court was incorrect in ascribing a required causal relationship between the employee's work and illness, disease or disability; or factually Difatta-Wheaton proved the required causal relationship. If she was so sick from complications attributable to her ovarian cancer that she could not physically sit in a chair at Dolphin and make her required phone calls—how can it be said that physically coming to work would not aggravate her condition? As the appellate court found, her severance from Dophin's employment was in no way "voluntary." The court correctly found:

> It is difficult to imagine how an employee's battle with ovarian cancer and ancillary complications, the sole cause of unemployment, could be construed as fault on her part. She suffered a medical emergency, not caused by negligence or choice, acted diligently to maintain her employment. A contrary interpretation of the term "voluntary termination" defies any reasonable and ordinary meaning of the term, the express legislative intent to provide benefits to those who become 'unemployed through no fault of their own' and the rule of construction, which requires that disqualification provisions be strictly construed in favor of granting benefits.

See Judge Blackmar's dissent in *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 688 S.W.2d 344, 352 (Mo. banc 1985) wherein he noted that it is a perversion of language to say that pregnancy is "voluntary."

As noted in *Quik 'N Tasty Foods,* , 17 S.W.3d at 625 fn 3, claims of involuntary separation have arisen in other factual circumstances such as (a) mandatory retirement, (b) leave of absence, (c) job ceasing to exist, (d) employee illness, (e) non-renewal of employment contract and others. See *Board of Education v. Labor and Industrial Relations Commission*, 633 S.W.2d 126 (Mo.App. 1982).

The appellate court in this case found that the Commission's focus on the issue of a medical leave was misplaced. Cases analyzed by the appellate court seem to support the court's conclusion that personal illness that causes a leave of absence has only been held to cause a voluntary termination of employment in three distinct situations, none of which apply in this case. The first is when there is sufficient evidence on the record for the deputy to find that the employee expressly tendered a resignation without a guarantee of reemployment, citing *Duffy v. Labor & Industrial Relations Commission*, 556 S.W.2d 195, 197 (Mo.App. 1977) wherein the employee told the employer that she would not return; and *Division of Employment Security v. Labor & Industrial Relations Commission*, 617 S.W.2d 620, 626-27 (Mo.App. W.D. 1981), where a voluntary leave of absence was conditioned upon employment being available upon return.

These cases do not warrant a denial of benefits for Difatta-Wheaton as there is no evidence that she voluntarily tendered her resignation by oral notice, letter or implication.

Also, she did not knowingly take a leave of absence conditioned upon there being an available position upon her return. Though Dolphin had a policy requiring notice from an employee to an employer, the Commission made an express finding that she made considerable effort to contact her employer concerning her medical emergency.

The second type of situation is when the employee violates a well-known, written employment policy, such as was found in *Turner v. Labor & Industrial Relations Commission*, 793 S.W.2d 191, 195 (Mo.App. W.D. 1990) and in *Ayers v. Sylvia Thompson Residence Center*, 211 S.W.3d 195, 199 (Mo.App. W.D. 2007). Again, no evidence exists in this case to support application of these cases to deny Difatta-Wheaton benefits.

The third type of case involves employees who take authorized voluntary leaves of absence but then fail to take reasonable measures to maintain their position as in *Madewell v. Division of Employment Security*, 72 S.W.3d 159, 163 (Mo.App. W.D. 2002) and *Garden View v. Labor & Industrial Relations Commission*, 848 S.W.2d 603, 606 (Mo.App. E.D. 1993). The evidence in this case supports the inapplicability of these cases to deny Difatta-Wheaton benefits.

In this case the appellate court found that reliance upon *Reutzel v. Missouri Division of Employment Security*, 955 S.W.2d 239 (Mo.App. S.D. 1997) and *Lake v. Labor & Industrial Relations Commission*, 781 S.W.2d 207, 208 (Mo.App. E.D. 1989) should not be followed because adherence to the principles set forth in those cases that lead to the subversion of the strong public policy behind the unemployment statutes: to

provide economic security to those who are unemployed through no fault of their own. This Court should determine if a proper statutory interpretation of Section 288.050.1(1) requires a causal relationship between a worker's illness, disease or disability and his or her work and if so, to what extent.

Conclusion

Appellant Any Difatta-Wheaton requests that this court reverse the Commission's denial of her unemployment benefits and for whatever further relief this Court deems fair and just.

.

SUSAN FORD ROBERTSON #35932

FORD, PARSHALL & BAKER
3210 Bluff Creek Drive
Columbia, MO 65201
573-449-2613 (phone)
573-875-8154 (fax)
srobertson@fpb-law.com

ATTORNEYS FOR APPELLANT
AMY DIFATTA-WHEATON

CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF BOONE)

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on August 19, 2008, she served two (2) copies of the foregoing BRIEF OF APPELLANT on Respondent's attorney by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope addressed to: Ms. Marilyn Green, 421 East Dunklin, P.O. Box 50, Jefferson City, MO 65104 as counsel for Respondent Missouri Division of Employment Security. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 3, 081words, excluding the cover, the certification and the appendix as determined by Microsoft Word software and that the floppy disk filed with the brief containing a copy of this brief has been scanned for viruses and is virus free.

_____
SUSAN FORD ROBERTSON, Attorney

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

_____
NOTARY PUBLIC

(seal)
My commission expires:_____

INDEX OF APPENDIX

Section 228.210 R.S.Mo A-1

Section 228.020 R.S.Mo A-2

Section 288.050 R.S.Mo. A-3

Appeals Tribunal Decision A-6

Labor and Ind. Relations Comm'n Order A-9

Dolphin Capital letter of June 16, 2006 ..... A-12

Medical Excuses A-13