No. SC93628

IN THE MISSOURI SUPREME COURT

CHIEKH SECK,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION AND DIVISION OF EMPLOYMENT SECURITY,

Respondent.

Appeal from the Decision of the Labor and Industrial Relations Commission

---

SUBSTITUTE BRIEF FOR APPELLANT

Kenneth D. Kinney, Rule 13
Jeffrey Berman, #25158
University of Missouri-Kansas City School of Law
Appellate Practice Clinic
500 East 52nd Street
Kansas City, Missouri 64110
Telephone: 816.235.1640
Facsimile: 816.235.5276
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES and REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER SOURCES

JURISDICTIONAL STATEMENT

Seck appeals the March 27, 2012 decision of the Labor and Industrial Relations Commission ("Commission"), which denied him unemployment benefits. Seck initially appealed the Commission's decision to the Missouri Court of Appeals, Western District pursuant to Sections 288.210 and 477.070 of the Missouri Revised Statutes. The Western District reversed the Commission's decision on June 11, 2013.

Respondent, Division of Employment Security ("DES") filed, in the Western District Court of Appeals, pursuant to Missouri Supreme Court Rules 83.02 and 84.17, a motion for rehearing and/or application for transfer on June 25, 2013, which was denied on July 30, 2013. DES filed an application to transfer with this Court pursuant to Rule 83.04 on August 14, 2013. This Court granted DES's application to transfer on October 1, 2013.

This Court has appellate jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution as this Court ordered transfer after an opinion was entered by the Western District Court of Appeals. *See* Mo. Const. art. V, § 10.

STATEMENT OF THE CASE

I. Statement of Facts

Mr. Seck became employed with the Missouri Department of Transportation ("MoDOT") on July 19, 2010. (Legal File, "LF" 7). MoDOT terminated Seck's employment on September 8, 2011, after fourteen months of successful employment. (LF 1; Transcript on Appeal "TR" 35, 51). Seck's employment was terminated for allegedly falsifying a doctor's note that he procured in order to return to work after being on sick leave for work-related injuries. (TR 54).

Mr. Seck suffered his first work-related injury on February 16, 2011, when he injured his right thumb in the course of his employment. (TR 47, 51). In June of 2011, he subsequently injured his shoulder while working on bridge maintenance. (TR 47). Due to a misunderstanding of MoDOT's health insurance and worker's compensation policy, caused in part by a language barrier (Seck is from Senegal and his native language is French), Seck did not seek immediate care because he thought he had to be employed and insured for one year before he could utilize his health insurance or apply for worker's compensation. (TR 51). When he reached the one year mark, he reported the injuries to his superior, Glenda Sunders and Safety Officer Joe Jarboe. (TR 51). Though his injury complaint was timely, he was refused access to a worker's compensation doctor; he was instead told to see a physician of his choice. (TR 51). This occurred on July 18, 2011. (TR 22).

July 19, 2011 was the first day Seck was on sick leave for his injuries, and he also had his initial doctor's appointment. (TR 15, 22). Dr. Jacquelyn Allen at St. Luke's Hospital determined Seck had tissue damage, prescribed cyclobenzaprine, a muscle relaxer, and recommended physical therapy. (TR 47, 51). Dr. Allen advised Seck that he could return to work the next day, but could not operate heavy machinery or lift heavy objects; Seck was instructed to request light duty. (TR 15). When Seck tried to return to work with the Doctor's note, containing the physician's operating, lifting and light duty conditions, his supervisor told him MoDot does not assign light duty, and he needed to return to Dr. Allen and obtain the proper doctor's release form, which was the standard MoDot form. (TR 15). Seck's supervisor told him he needed the MoDot doctor's release form completed with all the restrictions taken out before he could work. (TR 17). The Supervisor also told him he could not work while taking the medication. (TR 20).

On July 25th Seck returned to Dr. Allen and asked for a doctor's note that indicated no restrictions. (TR 17-18). Dr. Allen provided Seck with a note, written on a prescription slip, and Seck returned to work the next day with the note. (TR 18). This was Seck's second attempt to return to work. The July 25th prescription slip note stated that "Pt. is OK to return to work on 07-27-11 without restrictions." (TR 47). When Seck provided his supervisor with this note, she told him it was inadequate, because it was not an official MoDOT medical release form. (TR 47). After rejecting the prescription slip note, Seck's supervisor told him he needed two official MoDot release forms, one for his thumb, and one for his shoulder. (TR 51). She finally provided Seck with two blank forms. (TR 51).

Seck returned to Dr. Allen, who filled out both release forms, which Seck took back to work with him. (TR 51). But on these release forms, Dr. Allen noted Seck could not lift more than 20 pounds, and needed to be placed on light duty. (TR 51). These release forms were rejected because they included restrictions, and Seck was forced to return to Dr. Allen again. (TR 51). During Seck's final trip to St. Luke's, he did not see or talk to Dr. Allen; he only met with the nurse. (TR 21). Seck asked the nurse to complete new release forms, free of any restrictions whatsoever, at which point the nurse expressed his frustration and confusion with the situation, and Dr. Allen was frustrated with the situation as well. (TR 21). Seck did not ask about his remaining medication because of the frustration he witnessed. (TR 21). Seck instead just explained his supervisor rejected the previous release forms, and asked for a new one. He obtained an adequate release form on August 2, 2011, and later faxed it to MoDot. (TR 56). Dr. Allen did not tell Seck he should stop taking the prescription medication. (TR 28), and Seck had not yet finished the prescription. (TR 15).

For every day Seck was absent from work, from July 19, 2011 until August 4, 2011, Seck used personal sick days, because he was denied worker's compensation time. (TR 23). He never exceeded his available sick days or vacation time. (TR 23). Seck called in every day to report to his supervisor that he would be absent from work. (TR 24). On Wednesday, August 3, 2011, Seck called MoDOT to inform them that he finally obtained the correct release form on August 2, 2011, free of all restrictions. (TR 19). He told his supervisor during the phone conversation that although he had the release form, his prescription medication was not yet finished and he wanted to finish it before work.

(TR 19). This would result in Seck being absent from work for one more day, Thursday August 4, 2011, because bridge maintenance workers do not work Friday through Sunday. (TR 19). Pursuant to his supervisor's request, and on August 3, 2011, Seck faxed in the release form, but before doing so, he added the words "finish medecine [sic] and return to work on 8/8," which reflected his understanding of the conversation he just had with his supervisor. (TR 19, 56).

Seck freely admitted annotating the release form when asked. Because the word medicine was misspelled, MoDOT contacted Dr. Allen's office and verified that no one in the office wrote the statement. (TR 54). When Seck returned to work on Monday, August 8, 2011, Seck's supervisor asked him about the annotation, and Seck immediately admitted he wrote it. (TR 54). According to MoDOT, Seck said he annotated the medical release form "because he believed he was not supposed to return back until he had finished all his medication." (TR 54). Seck was not fired at that time, and he received no written or verbal discipline for his actions.

Seck continued to work for an entire month, with no documented incidents, until he was fired on September 8, 2011. (TR 35). He was informed of his termination by the Regional Supervisor. (TR 48).

II. Procedural History

Seck applied for unemployment benefits on September 15, 2011. (TR 57). On September 21, 2011, MoDOT elected to protest Seck's unemployment claim because, in its opinion "Mr. [Seck] was released from employment due to unsuccessful conduct." (LF 2). On October 5, 2011 Seck was denied unemployment compensation by the

Missouri Division of Employment Security in a Deputy's Determination Concerning Claim for Benefits on the basis of misconduct connected with work. (LF 3).

Seck timely appealed the Deputy's decision to deny him benefits. He filed his Notice of Appeal to Appeals Tribunal on October 14, 2011. (LF 4-6). On November 4, 2011, at 10:45 am, Seck participated in a phone hearing with the Honorable G. Barnhart, Appeals Referee, of the Missouri Division of Employment Security ("Division"). (LF 7; TR 1). Seck testified, but MoDOT elected not to participate in the telephone conference, and gave no testimony. (LF 7). However, the morning of the telephone conference, MoDot provided the Division with a telephone statement, stating why Seck was released from employment:

> …[Seck] was discharged because he provided a return to work form by his doctor and there was a handwritten note on it that said he is to finish all his medicine and return back to work on 8/8/11. The word medicine was misspelled, so it made us suspicious and we called the doctor's office to verify the note. The doctor's office stated that they did not write the hand written note on the release and they indicated he was released to return back to work on 8/2/11. He was confronted by his supervisor about the note and he admitted to writing the handwritten note on the doctor's note because he believed he was not supposed to return back to work until he had finished all his medication. He was released for falsifying a doctor's note.

(TR 54).

In addition to providing testimony, Seck sent a number of documents to the Division the morning of the telephone conference, including the July 25, 2011 prescription note from Dr. Allen (LF 15), and the two MoDOT release forms signed by Dr. Allen on June 28, 2011, which included work restrictions and were rejected by his supervisor as inadequate (LF 13-14), and other medical records (LF 16-18). The Appeals Referee did not consider this evidence, concluding Seck was furnished it too late. (TR 40-42). On November 10, 2011, the Division affirmed the Deputy's determination to deny Seck unemployment benefits. (LF 9).

The Division's findings of fact were:

> Claimant was hired on July 19, 2010....Claimant was absent from work due to an injury to his neck and shoulder. The employer required claimant to provide a doctor's note releasing claimant from the restrictions before claimant could return to work. On August 2, 2011, the claimant was released to work without restrictions by his physician. Claimant falsified the doctor's note by writing on the document that he was released to return to work on August 8, 2011. Claimant was discharged on September 8, 2011.
>
> Claimant asserts that he wanted to return to work. However, [he] changed his return to work date from August 2, 2011 to August 8, 2011. Claimant was not credible.

(LF 7-8). The Division concluded Seck was fired for statutory misconduct. (LF 9).

On November 30, 2011, Seck filed his Application for Review to the Labor and Industrial Relations Commission ("Commission"). (LF 11). With the notice, Seck included the documents that were rejected by the Division. (LF 12-18). The Commission also refused to consider this evidence. (LF 19). The Commission made no new findings of fact, affirmed the November 10, 2011 Decision of the Appeals Tribunal, and adopted the decision as its own. (LF 19). But Curtis E. Chick, Jr. filed a dissenting opinion. (LF 19; 21-22). The Commission's decision was entered on March 27, 2012. (LF 20).

Mr. Chick concluded that MoDot had not carried its burden of proving Seck engaged in statutory misconduct as to disqualify him from unemployment benefits as a matter of law. (LF 21). He noted that:

> [w]hen claimant added the notation about finishing his medicine and returning to work on August 8, his intention was simply to reflect his understanding of employer's expectations and his conversation with the supervisor on August 3. Therefore, claimant's actions were not intended to disregard any standards or interests of employer. Accordingly, claimant's act that caused his discharge was not the type of behavior normally encompassed within the definition of misconduct connected with work.

(LF 22). On April 16, 2012, Seck timely appealed the Commission's decision to the Missouri Court of Appeals, Western District. (LF 23).

In the briefing to the Court of Appeals, Respondent admitted that Seck and his supervisor spoke on the phone on August 3, 2011, and that Seck told his supervisor he was going to delay his return in order to finish his prescription medication. *See*

Respondent's Brief, Seck v. Dep't of Transportation & Div. of Employment Sec., No. WD75148, at 5. On June 11, 2013, the Court of Appeals, filed its opinion, reversing the Commission's decision. (WD 75148, 1, 8). The Court held that MoDOT failed to carry its burden of proving that Seck engaged in statutory misconduct in that his annotation was neither intended to deceive MoDOT nor material to his employment. (WD 75148, 7-8). The Division of Employment Security ("DES") filed, in the Western District Court of Appeals, a motion for rehearing and/or application for transfer on June 25, 2013, which was denied on July 30, 2013. DES filed an application to transfer with this Court pursuant to Rule 83.04 on August 14, 2013. This Court granted DES's application to transfer on October 1, 2013.

POINT RELIED ON

I. **The Labor and Industrial Relations Commission erred in denying unemployment benefits to Mr. Cheikh Seck because the Missouri Department of Transportation's burden to prove Seck was fired for misconduct was not reasonably met with sufficient, competent evidence in that the evidence shows that Seck's annotation of the doctor's release form was not intended to mislead or deceive MoDot, it did not misrepresent the understanding between Seck and his supervisor, it was not used to fraudulently obtain additional sick days, did not induce MoDot's reliance, was not material to Seck's employment, nor was it anything more than an innocent mistake reflecting poor judgment on Seck's behalf.**

Fendler v. Hudson Servs., 370 S.W.3d 585 (Mo. banc 2012)

Guccione v. Ray's Tree Serv., 302 S.W.3d 252 (Mo. App. E.D 2010)

Frisella v. Duester Electric, Inc., 269 S.W.3d 895 (Mo. App. E.D. 2008)

West v. Baldor Electric Co., 326 S.W.3d 843 (Mo. App. E.D. 2010)

Mo. Rev. Stat. § 288.020

Mo. Rev. Stat. § 288.030.1(23)

Mo. Rev. Stat. § 288.050.2

ARGUMENT

I. The Labor and Industrial Relations Commission erred in denying unemployment benefits to Mr. Cheikh Seck because the Missouri Department of Transportation's burden to prove Seck was fired for misconduct was not reasonably met with sufficient, competent evidence in that the evidence shows that Seck's annotation of the doctor's release form was not intended to mislead or deceive MoDot, did not misrepresent the understanding between Seck and his supervisor, was not used to fraudulently obtain additional sick days, did not induce MoDot's reliance, was not material to Seck's employment, nor was it anything more than an innocent mistake reflecting poor judgment on Seck's behalf.

a. Standard of Review

Appellate review of the Labor and Industrial Relations Commission's ("Commission") decision is governed by Section 288.210 of the Revised Statutes of Missouri, and Article V, Section 18 of the Missouri Constitution. The decision denying Seck benefits may be reversed if, *inter alia*, the Commission's factual findings do not

support it, or if the factual findings are not supported by "sufficient competent evidence in the record." Mo. Rev. Stat. § 288.210(3) – (4).[1]

The Commission's factual findings are conclusive, but only if they are "supported by competent and substantial evidence." Mo. Rev. Stat. § 288.210. If the Commission's factual findings are adequately supported, the Court's review is "confined to questions of law." *Id.* The Commission's legal conclusions and application of the law are disregarded on appeal. *Valdez v. MVM Sec., Inc.*, 349 S.W.3d 450, 454 (Mo. App. W.D. 2011). Although the Court must defer to the Commission's properly supported factual findings, the scope of review is broader, because whether the Commission's decision "is supported by competent and substantial evidence is judged by examining the evidence in the context of the **whole record**." *Fendler v. Hudson Servs.*, 370 S.W.3d 585, 588 (Mo. banc 2012) (bold added), and this Court should "consider[] whether the Commission could have **reasonably** made its findings, and reached its result, upon consideration of all the evidence before it." *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo. banc 2012) (bold added);[2] *accord Lance v. Div. of Employment Sec.*, 335 S.W.3d 32, 34 (Mo.

---

[1] Seck does not contend the Commission acted in excess of its authority or its decision was procured by fraud. *See* Mo. Rev. Stat. § 288.210(1) – (2).

[2] The fact that *Hornbeck* was reviewing a decision made by the Labor and Industrial Relations Commission regarding a workers' compensation claim, *Hornbeck*, 370 S.W.3d at 626, does not mean this statement regarding the scope of review is irrelevant. In *Fendler*, this Court cited another workers' compensation case when defining the scope of

App. W.D. 2011) ("We review the Commission's decision to determine if based upon the whole record, the Commission could reasonably have reached its result."). Furthermore, the evidence and reasonable inferences drawn therefrom are *not* viewed in the light most favorable to the Commission's decision. *Fendler*, 370 S.W.3d at 588, *quoting Hampton v. Big Boy Steel Electric*, 121 S.W.3d 220, 223 (Mo. banc 2003). The Court defers to the

---

review of an unemployment decision. *See Fendler*, 370 S.W.3d at 588 *quoting Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). Additionally, review of both unemployment and workers' compensation decisions by the Commission are subject to Article V, Section 18 of the Missouri Constitution, and the relevant portions of the statutes governing appellate review are identical. *Compare* Mo. Rev. Stat. § 288.210(1) – (4) *with* §287.495.1(1) – (4) (starting with "The court, on appeal…"). These similarities justify having congruous scopes of review for both types of decisions. The Court of Appeals has routinely included this standard into the scope of review. *See, e.g., Anthony v. Div. of Employment Security,* 351 S.W.3d 275, 277 (Mo. App. W.D. 2011) (determining whether the Commission could have "reasonably" reached its result); *Lanham v. Div. of Employment Sec.,* 340 S.W.3d 324, 326 (Mo. App. W.D. 2011) (same); *Shields v. Proctor & Gamble Paper Prods. Co.,* 164 S.W.3d 540, 543 (Mo. App. E.D. 2005) (same)*; Reed v. Labor & Indus. Relations Comm'n of Missouri,* 664 S.W.2d 650, 652 (Mo. App. S.D. 1984) (same). Accordingly, this Court's should apply a reasonableness standard to the Commission's unemployment decisions.

Commission's determinations of witness credibility. *Murphy v. Aaron's Auto. Prods.*, 232 S.W.3d 616, 620 (Mo. App. S.D. 2007).

Ultimately, this Court must decide if the whole record reasonably supports and leads to the conclusion that Seck is disqualified from unemployment compensation because he engaged in statutory misconduct. *See* Mo. Rev. Stat. §§ 288.030.1(23), 288.050.2. This is a question of law, which is reviewed *de novo*. *Fendler*, 370 S.W.3d at 588-89. An employer protesting an employee's application for unemployment benefits on the grounds that he or she was fired for misconduct connected with work bears the burden to prove it by a preponderance of evidence. *Id.* at 589. Once raised by the employer, disqualification for termination based on misconduct is procedurally analogous to an affirmative defense. *Id.*; *see also Guccione v. Ray's Tree Serv.*, 302 S.W.3d 252, 256 (Mo. App. E.D. 2010) (employer bears the burden of proof). Thus, if MoDot failed to prove by a preponderance of the evidence that Seck was fired for misconduct, reversal is proper, and Seck is entitled to unemployment benefits.

b. Discussion

The Commission's decision should be reversed because the evidence in the record, when viewed as a whole, does not reasonably support a finding that the conduct Seck was allegedly terminated for, i.e., annotating a doctor's note without proper attribution, constitutes statutory misconduct. Seck wrote a note on the doctor's release form that he would return to work on August 8 after finishing his muscle relaxer prescription, even though the release form was signed by the doctor on August 2. No evidence suggests Seck intended to deceive MoDot. No evidence contradicts Seck's testimony that his

supervisor was aware he would not return to work until August 8. No evidence suggests MoDot desired that he return to work before August 8 or that it relied on the annotation.

Seck's failure to attribute his annotation was arguably unwise and reflects poor judgment. But Seck was acting in furtherance of MoDot's interest, not against it, by seeking to protect the safety of his co-workers, the public, and himself. He is among the persons Missouri's employment security laws seek to protect, and should not be denied unemployment benefits. Accordingly, reversal is proper.

i. Misconduct under Missouri Employment Security Law

By law, the Court's interpretation and application of the employment security statutes is guided by the statutes' purpose. *See* Mo. Rev. Stat. § 288.020.1. That purpose is to minimize social harms that result from economic insecurity associated with unemployment, in an effort to prevent "public calamity." *Id.* The legislature's intent is to eradicate these threats to public safety; therefore, it prescribed liberal application of the Employment Security laws, favoring employees who are terminated for something less than misconduct. *See* § 288.020.2.

A terminated employee seeking unemployment compensation may be denied benefits if he is found to have "been discharged for misconduct connected with [his] work." § 288.050.2. Section 288.020.2 is a "disqualifying provision." *Guccione*, 302 S.W.3d at 256. The "disqualifying provisions of the law are to be strictly construed against the disallowance of benefits to unemployed but available workers." *Missouri Div. of Emp't Sec. v. Labor & Indus. Relations Comm'n of Missouri*, 651 S.W.2d 145, 148

(Mo. banc 1983). Before the Missouri legislature specifically defined "misconduct," the courts defined it as:

> [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 the employee's duties and obligations to the employer.

Dolgencorp, Inc. v. Zatorski, 134 S.W.3d 813, 818 (Mo. App. W.D. 2004) (*quoting Sain v. Labor & Indus. Relations Comm'n*, 564 S.W.2d 59, 62 (Mo.App. 1978) (emphasis added). The Missouri legislature subsequently adopted this judicial definition verbatim. *See* H.B. Nos. 1268 & 1211, 92nd Gen. Assemb., 2nd Reg. Sess. (Mo. 2004) (included in appendix) (effective Jan. 1, 2005). This verbatim definition of misconduct is now found in the Revised Missouri Statutes. *See* Mo. Rev. Stat. § 288.030.1(23).

The majority of this definition expressly requires a willful, culpable, intentional, or deliberated violation, and the Missouri Court of Appeals has consistently required such a finding. *See, e.g., Jenkins v. George Gipson Enters., LLC,* 326 S.W.3d 839, 842 (Mo. App. E.D. 2010) ("each of these criteria … has an element of culpability or intent."); *Frisella v. Duester Electric, Inc.*, 269 S.W.3d 895, 899 (Mo. App. E.D. 2008) ("must involve a willful violation of the rules or standards of the employer"); *Murphy v. Aaron's Auto. Prods.*, 232 S.W.3d 616, 621 (Mo. App. S.D. 2007) ("must involve some form of

willfulness"); *Hoover v. Cmty. Blood Ctr.*, 153 S.W.3d 9, 12-13 (Mo. App. W.D. 2005) ("with regard to each … there is the requirement that the employee willfully violate the rules or standards."). But this Court stated, in *Fendler*, that such a showing is not *always* required.

In *Fendler*, this Court recognized that the negligence clause's presence in Section 288.030.1(23) does not mean that simple negligence can support a finding of misconduct. *See Fendler*, 370 S.W.3d at 589. Accordingly, in *Fendler* the Court stressed that because the employee "repeatedly" acted contrary to the employer's wishes, demands, and interests, she had engaged in such negligent conduct that disqualified her from benefits. *Fendler*, 370 S.W.3d at 589-90. This is because, in order to find disqualifying negligence, the record should identify acts of "such degree or recurrence as to manifest culpability, wrongful intent or evil design." *See* Mo. Rev. Stat. § 288.030.1(23); *Fendler*, 370 S.W.3d at 589. In *Fendler*, the record showed this much because the employee failed to properly verify hours worked by other employees at least twelve times, despite being reprimanded on three separate occasions; because she refused to comply again, she was fired. *Fendler*, 370 S.W.3d at 587-88. But Seck was fired for one single act: annotating a doctor's release form without proper self-attribution. *Fendler's* recognition that repeated failures to comply with required workplace procedure may constitute misconduct, even if each failure is merely negligent, is not dispositive of Mr. Seck's claim for compensation. Because Seck was fired for a single act, an act not manifesting culpability, wrongful intent or evil design, he should be entitled to unemployment benefits unless MoDot proved he intentionally acted against MoDot's interests.

Likewise, the "disregard of standards of behavior which the employer has the right to expect of his or her employee," clause of Section 288.030.1(23) should be interpreted to include a showing of culpability or intent, and the employee's disregard should have to be proven to be material to the employment. Merriam-Webster defines "disregard" as "to treat as unworthy of regard or notice" and notes it is synonymous with "despise, scorn, [and] flout." MERRIAM-WEBSTER'S ONLINE DICTIONARY, www.merriam-webster.com/dictionary/disregard (last visited Nov. 10, 2013). The Court of Appeals has interpreted the "disregard" clause of Section 288.030.1(23) to require a showing of conduct that "demonstrate[s] a wanton and willful" or "conscious disregard" of standards an employer should reasonably expect from its employees. *West v. Baldor Elec.Co.*, 326 S.W.3d 843, 847 (Mo. App. E.D. 2010). The Court concluded the claimant in *West* had consciously disregarded a standard of behavior his employer was entitled to expect from him because he was "engaging in inappropriate sexual conduct while *being paid and on company property.*" *Id.* (emphasis added). Thus in *West*, the employee's conduct disqualified him from benefits because it was material to his employment, as he was having a sexual relation with co-worker while on company time and on company property. *See id.* at 845-46. Seck unwisely annotated the doctor's release form, but his conduct did not rise to a level that constitutes statutory misconduct.

ii. A justified termination does not require disqualification from unemployment compensation.

Even if Seck's actions justified the termination of his employment, it does not necessarily follow that he is disqualified from receiving unemployment compensation. "While poor judgment or irresponsible actions may justify an employer's discharge, it does not necessarily provide a basis for disqualifying an employee from receiving unemployment benefits." *Comeaux v. Convergys Customer Mgmt. Grp., Inc.*, 310 S.W.3d 759, 763 (Mo. App. E.D. 2010) (internal quotations omitted). "There is a vast distinction between conduct that would justify an employer terminating an employee and conduct that is misconduct for the purposes of denying unemployment benefits." *Id.* (finding employer was justified in terminating employee who was inappropriately rude to customers, but employee's conduct did not constitute misconduct). This distinction has been described as "essential." *Frisella*, 269 S.W.3d at 899. This is especially true because Missouri is an at-will employment state. *See Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90-91 (Mo. banc 2010). Even though a rightfully terminated employee generally has no legal recourse against the employer, *id*, he is entitled to unemployment compensation unless he engaged in statutory misconduct. An employee may be entitled to compensation even where they intentionally violated a work rule. *Guccione*, 302 S.W.3d at 256.

iii. An intentional action does not require disqualification from unemployment compensation.

Seck intentionally annotated the doctor's note, but this does not constitute substantial competent evidence that he intentionally acted against the interests of his employer. In *Guccione*, the employee was fired for disobeying a direct instruction from

his employer, *i.e.*, he was told not to wear climbing spikes when climbing live trees to trim branches, but nonetheless wore climbing spikes while trimming a live tree, for which he was fired. *Guccione*, 302 S.W.3d at 257. The employee "testified that he knew he was not allowed to wear spikes on live trees." *Id.* at 254. He also testified he was unaware of another way to safely complete the job, and the Court found no evidence in the record to the contrary. *Id.* at 257-58. The Court of Appeals reversed the Commission's denial of benefits because the claimant was acting in the interests of safety, and not intentionally acting against his employer's interests. *Id.* at 259.

Whether the claimant in *Guccione* intentionally wore the climbing spikes and whether he knew it was allowed were not material issues; rather the court focused on whether the claimant acted against his employer's interest, as the statutory definition of "misconduct" mandates. Whether the employee acted intentionally is irrelevant, the correct focal point is the intentions that motivated the action. Seck's physical action of annotating the doctor's note cannot be described as anything other than an intentional act, but that is not substantial competent evidence that he intended to mislead his employer or act against his employer's interests. Conversely, his intentional act was done to advance the employer's interest of workplace safety. The fact that he freely admitted he added the note without hesitation indicates he did not intend to mislead his employer. MoDot required a properly completed release form before Seck was allowed to return to work, but there is no evidence in the whole record that he needed a doctor's note to take a sick day. There is no evidence in the whole record that MoDot relied on Seck's annotation. Therefore, the record is completely void of any competent evidence that suggests Seck

acted against the interests of his employer. This fact was neither alleged by MoDot, nor found by the Commission.

iv. Credibility determinations are narrowly limited in scope and inapplicable to undisputed testimony that was not expressly found to be incredible.

The Commission found Seck's statement that "he wanted to return to work" to be incredible. This determination does not justify disregarding portions of Seck's statement that were not contradicted or disputed with other evidence. This Court does defer to the Commission's credibility determinations. *Fendler*, 370 S.W.3d at 588. But credibility determinations are irrelevant where testimony is not contradicted. "[T]he Commission may not disregard or ignore undisputed testimony of a witness not shown to have been impeached or disbelieved by the agency." *Scrivener Oil Co., Inc. v. Div. of Emp't Sec.*, 184 S.W.3d 635, 639 (Mo. App. S.D. 2006). The Commission may only disregard evidence or testimony that it expressly determines is unbelievable or incredible. *Guccione*, 302 S.W.3d at 257.

Here, the Commission's credibility determination was expressly limited to Seck's statement that "he wanted to return to work." It did not make a general credibility determination or any other specific determinations regarding Seck's remaining testimony. The fact that one statement made by Seck was discredited does not mean MoDot's burden of producing positive evidence of Seck's intent was relieved. MoDot bore the burden of proof, and the remainder of Seck's testimony, which was neither contradicted nor found to be incredible, cannot be disregarded.

Thus, the facts Seck testified to that should not have been disregarded by the Commission include:

- The first time Seck attempted to return to work his supervisor told him he could not work while taking the prescribed medication (TR 20);
- When Seck requested light duty, his supervisor denied his request and said there was no light duty at MoDot (TR 15);
- Seck returned to work twice with release forms that were inadequate and rejected by his supervisor, he was not allowed to work, and he returned to Dr. Allen's office each time in order to obtain another release form (TR 15, 17-18, 47, 51);
- When Seck obtained the release form on August 2, he had not finished his prescription (TR 15);
- Dr. Allen never told Seck he could stop taking the prescription before it was completed (TR 28)
- After acquiring a release form adequate to allow Seck to return to work, during the August 3 phone conversation, he told his supervisor he had two days of medicine to finish, and he asked to be allowed to miss work Thursday and return to work the following Monday (August 8, 2011) (TR 19);
- Seck never exceeded his allotted sick time (TR 23);
- Seck called MoDot and informed them of every day he was going to be absent from work (TR 24);
- Seck never denied writing on the doctor's note (TR 54, TR 54).

During the administrative appeals process, only the Appellant is required by law to attend, because if the appellant does not appear, the appeal is dismissed. *See* Mo. Rev. Stat. § 288.190.3; 8 C.S.R. 10-5.040(2)(A). There is no statutory *requirement* for the respondent to appear. However, there is no provision of law that states a party who elects to remain absent from the administrative appellate hearing is immune from an adverse inference. Even though MoDot was not required to participate in the hearing before the Division, it *did* bear the burden of proof with respect to whether Seck was fired for misconduct. *See Dobberstein v. Charter Commc'ns, Inc.*, 241 S.W.3d 849, 852 (Mo. App. E.D. 2007). Because MoDot failed to offer evidence or testimony contradicting the aforementioned portions of Seck's testimony, which was not within the scope of the Commission's credibility determination, it is not now free to argue that the remainder of Seck's testimony should be disregarded. This remaining testimony should not have been disregarded by the Commission.

v. *Based on the whole record, the Commission's decision is not reasonable because MoDot's allegation that Seck was fired for statutory misconduct connected with work is not supported by substantial, competent evidence. Therefore, Seck is entitled to unemployment compensation.*

The record neither competently nor substantially supports the conclusion that Seck acted against MoDot's interests when he annotated the doctor's note. The record shows that Seck made multiple attempts to return to work, and was met with resistance every time. During his first attempt, Seck was told that he could not work while taking

cyclobenzaprine, which is a muscle relaxer. Such a prohibition is reasonable, because the risks associated with bridge maintenance are too severe to allow employees to work while taking medication that impairs their physical performance. As a MoDot bridge maintenance worker, Seck was exposed to "physical hazards, health and safety risks," and was thus required to have "significant physical stamina and endurance." *See* Missouri Dep't of Transp., Job Description, Bridge Maintenance Worker (included in appendix).[3] Because of the nature of Seck's work, it would be improper for him to work while under the influence of cyclobenzaprine.

The work Seck performed included "routine and emergency repairs to bridges" and the "operat[ion of] vehicles and equipment," both within close proximity to moving traffic. *See id*, Examples of Work, (1), (4), and (5) (including setting-up "traffic control devices" and "flagging responsibilities for traffic work zones"). A bridge maintenance

---

[3] MoDot's job description of Bridge Maintenance Worker is available online at https://www4.modot.mo.gov/eHrJobsWeb/jobspec.pdf?id=14602. The Court may properly take judicial notice of this job description even though it is not a matter of common knowledge, because it "can be readily determined by resort to a readily available, accurate and credible source." *State v. Weber*, 814 S.W.2d 298, 303 (Mo. App. E.D. 1991). MoDot's own description of bridge maintenance worker meets each of these criteria. Furthermore, the Court may take judicial notice of facts for the first time on appeal. *See Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480, 483 fn. 3 (Mo. 1973).

worker being under the influence of a prescription-strength muscle relaxer poses safety threats to the worker under the influence, his co-workers, and motorists in the vicinity. It also creates potential liability for MoDot and the State of Missouri. Allowing an employee to work under such conditions would be unreasonable. Recognition of this fact is crucial because it heavily influenced Seck's actions after he acquired the release from Dr. Allen.

On August 3, Seck informed his supervisor that he had finally acquired an adequate release form the previous day. There was only one problem: he had two additional days of cyclobenzaprine to take. He was already aware of the risks of working under the influence of cyclobenzaprine, and MoDot's stance on allowing workers to work while taking it. Also, he had already been denied light duty, so making such a request would be useless. He informed his supervisor that he was going to finish his medication, miss one more day of work (August 4), and return to work the following Monday. Before he faxed the form in, he wrote on it that he would finish his medicine and return to work on Monday, August 8. He failed to include his initials next to his annotation. But even a cursory inspection of the release form indicates he did not attempt to disguise his handwriting. Surely if he was trying to deceive MoDot, he would have ensured he did not misspell "medicine." Even stronger evidence that he meant no ill will toward MoDot is that when he was approached on Monday and asked about the annotation, he did not hesitate to tell the truth.

Seck annotated the release form and stayed home from work because he was acting in MoDot's interest, and following doctor's orders. The purpose of the release

form was to inform MoDot that Seck was fit for work. The release form's purpose was not to alter the medical advice Seck previously received. It did not tell him to cease taking the cyclobenzaprine without completing the prescription. Also, it made no mention of physical therapy, which Dr. Allen also recommended to Seck. Before Seck took any action, he ensured that he and his supervisor had a meeting of the minds. Only then did he annotate the note, and fax it in. MoDot admitted during the appeal to the Division that when Seck was confronted by his supervisor about the note that he admitted to writing it and gave as his reason that he did so "because he believed he was not supposed to return back to work until he had finished all his medication." (TR 54). Moreover, in the Court of Appeals, DES admitted to the conversation between Seck and his supervisor, wherein Seck informed his supervisor of his intentions to return to work on Monday, August 8, 2011. *See supra,* Statement of the Case, p. 9.

Seck's actions can be properly described as an exercise of poor judgment, but to classify them as misconduct under the law would not be consistent with Missouri law. This display of poor judgment is arguably a just reason to terminate employment, but it does not rise to a level that disqualifies him from unemployment compensation. This act does not constitute a wanton or willful disregard of MoDot's interests. It is not a deliberate violation of MoDot's work rules. He did not disregard a standard of behavior that MoDot relied on, and it does not indicate any wrongful intent or evil design. In fact, other than being the purported reason MoDot fired him (which occurred an entire month after the fact), Seck's actions had no effect on his employment.

Seck began missing work on July 19, 2011. The Commission found that MoDot "required [Seck] to provide a doctor's note releasing [him] from the restrictions before [he] could ***return*** to work." (LF 7) (emphasis added). The Commission made no finding that MoDot required a doctor's note in order for Seck to be absent from work. Seck was using personal sick days to be absent, and still had available days remaining. If Seck had not acquired the release, he would not have been allowed to return to work. Seck's supervisor was aware Seck would be absent until Monday, August 8, before receiving the release form. Therefore, MoDot did not rely on the annotation when it allowed him to stay home from work. Considering the totality of the circumstances, as reflected by the whole record, Seck's actions do not place him in the group of individuals the Missouri legislature intended to preclude from receiving unemployment benefits by making misconduct a disqualifying provision.

MoDot failed to prove by a preponderance of the evidence that Seck was fired for misconduct connected with work. Because this Court does not view the facts in the record and inferences therefrom in the light most favorable to the Commission's decision, and because the disqualifying provisions are to be strictly construed against the disallowance of benefits, this Court should reverse the Commission's decisions. The evidence in the whole record indicates that Seck made a poor choice, but that his intentions were to comply with directives from both his doctor and employer. He should not be disqualified.

CONCLUSION

Mr. Seck's decision to annotate the doctor's release form was unwise and may reflect poor judgment, but it does not constitute statutory misconduct. He acted neither to deceive MoDot, nor against MoDot's interests. He simply did not want to return to work under the influence of a powerful muscle relaxer, which would have diminished his capacity to complete his job and potentially risk the safety of others. He informed his supervisor of his intentions before he acted; therefore, the annotation was immaterial to his employment, and did not induce MoDot's reliance. When asked, he freely admitted he wrote on the release form, which demonstrates his innocent state of mind. These actions do not rise to the level of statutory misconduct, because Seck meant no ill will toward his employer. There is no evidence to support a finding of misconduct.

WHEREFORE, Mr. Seck respectfully requests the Court reverse the decision of the Labor and Industrial Relations Commission and remand to the Division of Employment Security with instructions to award Seck the unemployment benefits for which he was originally denied, but to which he is entitled.

Respectfully Submitted,

Jeffrey Berman, #25158
500 E. 52nd Street
Kansas City, Missouri 64110
Telephone: (816) 235-1640
Facsimile: (816) 235-5276
Email: bermanj@umkc.edu

Kenneth D. Kinney, Rule 13

ATTORNEY FOR APPELLANT

CERTIFICATION OF COMPLIANCE AND SERVICE

Pursuant to Missouri Supreme Court Rule Rule 84.06(c), I hereby certify that:

1. The attached brief includes all the information required by Rule 55.03; and
2. The attached brief complies with the Rule 84.06(b) limitations, and contains 7529 words and 705 lines of text according Microsoft Word.

I further certify that:

1. A copy of the foregoing brief was e-filed on this 12th Day of November, 2013, and that e-filing system and served upon:
    a. Respondent, Division of Employment security via the e-filing system;
    b. Ninion S. Riley, attorney for Respondent, Division of Employment Security, via email transmission to ninion.riley@labor.mo.gov; and
    c. Mailed to the Department of Transportation, Attn: Human Resources, P.O. Box 270, Jefferson City, Missouri 65102, which will be mailed on November 12, due to the national holiday (Veterans' Day, Nov. 11).

Jeffrey B. Berman, # 25158
Supervising Attorney

Kenneth D. Kinney, Rule 13 Certified

ATTORNEY FOR APPELLANT