No. SC93628

IN THE MISSOURI SUPREME COURT

CHEIKH SECK,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION AND DIVISION OF EMPLOYMENT SECURITY,

Respondent.

Appeal from the Decision of the Labor and Industrial Relations Commission

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SUBSTITUTE REPLY BRIEF FOR APPELLANT

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ARGUMENT

The Department of Employment Security's ("DES") argument heavily relies on the assumption that this Court must view all reasonable inferences in favor of the Labor and Industrial Commission's decision. Recently, this Court explicitly stated that approach is *not* the proper standard of review. *See Fendler v. Hudson Servs.*, 370 S.W.3d 585, 588 (Mo. 2012) (stating this Court "does *not* view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award") (emphasis in original); *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo. 2012) ("Nothing requires this Court to review the evidence and all reasonable inferences…in the light most favorable to the Commission's decision."); *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. 2012) (same quote as *Hornbeck*). Despite these clear articulations, DES insists this Court *must* draw inferences in the Commission's favor. (Res. Br. at 18, 30). DES also inaccurately describes the Commission's factual findings, by suggesting DES found Seck guilty of criminal activity, including "forgery" and "stealing."

This case has never been about forgery, stealing, or even deception. Forgery and stealing are legal conclusions, neither of which was made by the Commission. Whether Seck deceived MoDot is a factual determination, which the Commission did not make. Nonetheless, DES uses these terms to characterize Seck's actions. Seck's annotation of the release form was immaterial to his employment, as MoDot did not rely on it. Even if similar actions *could* constitute misconduct under certain circumstances, Seck's actions do not, given the unique sequence of events surrounding his termination. The Court

should not ignore the totality of the circumstances present in the evidence, as did the Commission when it denied Seck unemployment compensation. The Commission's decision, i.e. the result requested by respondent, DES, is only reasonable if portions of the whole record are ignored.

Seck testified he informed his supervisor on August 3, 2011 that he obtained a release form allowing him to return to work, but that he would miss work on August 3 and 4, in order to finish his prescription medication. (TR 19). He would return to work on August 8 (TR 19). He so informed MoDot *before* he faxed in the release form with his annotation. Thus, his annotation was immaterial to his employment. It did not influence MoDot's decision to allow Seck to miss work on August 3 and 4. MoDot did not rely on Seck's annotation. The Commission's decision ignored this evidence, even though it was not contradicted by MoDot or found to be unworthy of belief by the Commission. However, DES suggests this Court must assume the Commission *did* find this evidence to be not credible, arguing it is required by the scope of review. Such an inference would be required only if the evidence was to be viewed most favorably to the Commission, but it is not. The Court should not infer a credibility determination the Commission did not make.

DES acknowledges the Commission "found [Seck] not to be credible **about his desire to return to work**," (Res. Br. at 15), but it cannot identify a similar finding with respect to Seck's testimony about the August 3 phone conversation. In fact, DES assumed this testimony to be true in its briefing to the Missouri Court of Appeals. This phone call is insurmountable for DES because it renders Seck's annotation of the release

form immaterial to his employment. Accordingly, the release form should not be the basis of a misconduct finding by this Court. If MoDot knew, on August 3, 2011, that Seck was not returning to work until August 8, 2011, then what effect on Seck's employment did his annotation of the note have?

The Commission determined Seck "falsified" the release form, which it found constitutes misconduct under Section 288.030.1(23) of the Revised Missouri Statutes. It is important to note that the Commission never found that Seck "lied" to MoDot, committed "forgery," or "stole" from MoDot, (LF 7-9), even though DES acts as if the Commission based its decision on such findings. DES argues Seck's actions constitute "misconduct" under the "disregard" clause of the definition of misconduct found in Section 288.030.1(23). DES's reliance on the "disregard" clause demonstrates DES's criminal accusations are not only unwarranted, but they inaccurately represent the evidence and factual findings made by the Commission.

If Seck had actually committed forgery in order to steal from MoDot, he would have engaged in misconduct under any clause of misconduct's definition. And if the Commission actually made such findings, DES would not be arguing the "disregard" clause requires a less culpability than the rest of the definition. Seck did not engage in these activities, and the Commission made no such findings. He wrote on a release form, previously signed by a doctor, to reflect the agreement he made with his supervisor. He poorly chose not to initial or otherwise acknowledge his annotation. In an abstract sense, altering a doctor's release and turning it in as genuine in order to deceive an employer would be misconduct. But Seck is entitled to have his case adjudicated based on the

evidence in the whole record as it pertains to him individually, not based upon DES's exaggerated generalization of what evidence exists therein. Seck's actions only constitute misconduct if removed from their true context. But removing Seck's actions from their context would be a departure from the proper scope of review, which takes into account the "whole record." *See Fendler*, 370 S.W.3d at 588. Instead of drawing inferences in the Commission's favor, the Court must determine if the Commission's decision is reasonable, based on "all of the evidence before it." *Hornbeck*, 370 S.W.3d at 629. Thus, the Commission's decision must have been reasonable, considering the totality of the circumstances surrounding Seck's annotation of the release form, and his termination that occurred approximately one month later.

Proper resolution of any dispute first requires proper identification of the dispute itself. The question presented by Seck's appeal is not whether an employee who forges a document to steal from his employer engages in misconduct. The question is whether the Commission reasonably determined Seck was fired for engaging in statutory misconduct. DES proffers the two inquiries are one in the same. But the Commission decided neither that Seck committed forgery, nor stole from MoDot. Thus, whether a forgery, designed to facilitate stealing, is misconduct cannot be the focus of this Court. Rather, the question addressed by the Court must be: considering the totality of the circumstances, did MoDot satisfy its burden to prove Seck engaged in statutory misconduct by faxing a release form to his employer after making a note on it, without proper self-attribution, even though his note had no material impact on his employment?

During the administrative process, MoDot bore the burden of proving Seck engaged in misconduct. *See Fendler,* 370 S.W.3d at 589. Whether MoDot made this showing is a question of law, which is reviewed *de novo*. *Id.* at 588-89. DES argues Seck's actions constitute misconduct under the "disregard" clause of Section 288.030.1(23), which it argues requires a diminished degree of culpability compared to other clauses within the same statutory definition. Even though misconduct need not be "willful," *see Fendler,* 370 S.W.3d at 589, Missouri Courts consistently hold that to constitute "misconduct," there must be a finding of culpability on the part of the employee. This Court should find the same in interpreting the "disregard" clause of Section 288.030.1(23).

I. Interpretation of the "disregard" clause.

The applicable statutory definition of "misconduct" contains four distinct clauses. *See* R.S.Mo. § 288.030.1(23). DES concedes the only "statutory provision at issue herein is 'a disregard of standards of behavior which the employer has the right to expect of his or her employee.'" (Res. Br. at 23). As pointed out in Seck's Substitute Brief to this Court, the Missouri legislature codified this judicially-created definition of "misconduct" in 2005. DES pointed out this definition was first adopted in Missouri and applied to the Missouri Employment Security Law by the Court of Appeals in 1954. (Res. Br. at 22, *citing Ritch v. Indus. Comm'n*, 271 S.W.2d 791, 793 (Mo. App. W.D. 1954)). As DES also points out, this clause has not been specifically interpreted by this Court, even though the Court of Appeals has done so. This Court should find that when the Missouri legislature adopted this judicially-created definition of "misconduct," it incorporated the

general requirement that the employee act with a requisite culpability against his employer, as was consistently required by Missouri Courts. This Court's interpretation of the "disregard" clause is guided by canons of construction recognized in Missouri.

"The primary rule of statutory construction … is to ascertain and give effect to the legislative intent." *State v. Van Horn*, 625 S.W.2d 874, 877 (Mo. 1981). DES argues that the legislature, by including the "disregard" clause, intended to allow for a finding of misconduct based upon a diminished finding of culpability by the employee. This argument fails to consider both the history of the definition of misconduct, and the pertinent case law which existed at the time the definition was codified.

This Court has stated it presumes the legislature is aware of the case law which exists when a statute is enacted. *Kilbane v. Dir. of Dep't of Revenue*, 544 S.W.2d 9, 11 (Mo. 1976). This presumption includes statutory interpretation. *Id.* Thus, when the legislature *amends* a statute, which was previously interpreted as having one meaning, it is presumed the legislature intended the Courts to abandon the old interpretation and apply a new one. *Id.* Likewise, "[w]hen the Legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the Legislature is presumed to have acted with knowledge of that judicial or legislative action." *Hudson v. Sch. Dist.*, 578 S.W.2d 301, 311 (Mo. App. W.D. 1979). This Court should presume that when the legislature adopted the judicially-created definition of misconduct, it incorporated the applicable case law surrounding that definition.

Missouri Courts consistently presume the legislature "acted with full knowledge of the subject matter, relevant facts, and existing conditions." *Wilson v. Pulitzer Publ'g Co.*,

575 S.W.2d 802, (Mo. App. 1978) (*superseded* on other grounds) (*citing Smith v. Pettis Cnty.*, 136 S.W.2d 282 (Mo. 1940)). When only a portion of a statute is amended, Court presume that the "unamended [sic] part [should] remain operative and effective as before." *Klein v. Hughes*, 173 S.W.2d 877, 880 (Mo. 1943). Most relevant to this case is the general rule that where "the wording of a new statute follows the language of the pre-existing common law it must be presumed the legislature intended the same meaning. It is irrational to say that the same language has two separate meanings when used in the first instance by the courts and employed subsequently by the legislature." *State v. White*, 622 S.W.2d 939, 945 (Mo. 1981) (*overruled on other grounds*). As such, this Court should interpret Section 288.030.1(23) to require culpability on the part of the employee, regardless of which clause applies.

When the legislature enacted Section 288.030.1(23), defining misconduct, it should have been clear that Missouri Courts had been interpreting that definition as requiring culpability on the part of the employee. *See, e.g., Pemiscot Cnty. Mem'l Hosp. v. Missouri Labor & Indus. Relations Comm'n*, 897 S.W.2d 222, 225 (Mo. App. S.D. 1995) (noting that misconduct requires "wrongful action or inaction"); *Dixon v. Div. of Emp't Sec.*, 106 S.W.3d 536, 541 (Mo. App. W.D. 2003) ("all expressly require a showing of culpability on the part of the employee…"); *Dolgencorp, Inc. v. Zatorski*, 134 S.W.3d 813, 818 (Mo. App. W.D. 2004) (stating that under each clause, "there is the requirement that the employee willfully violate the rules or standards of the employer"). The fact that this requirement was generally applied to the Employment Security Law

before the legislature adopted the definition suggests the legislature intended to incorporate it when it enacted Section 288.030.1(23).

Even though the previous interpretation was not based on a *statutory* definition of misconduct, the *Kilbane* presumption (that the legislature is aware of courts' statutory interpretation) still applies, because Courts' definition of "misconduct" was an interpretation of the disqualifying provision found in Section 288.050.2. The Court should not presume the legislature intended to change anything where it adopted a definition from the Courts verbatim. In fact, the presumption announced in *White* suggests this Court should presume the legislative intent was to incorporate the case law interpreting the definition of misconduct that existed before its codification. Accordingly, because the legislature adopted the definition of "misconduct" verbatim, which was consistently interpreted to require culpability, this Court should presume the legislature intended that requirement to remain intact.

As DES points out, the Courts' interpretation that misconduct requires culpability has remained consistent, and is the current state of the law. (Res. Br. at 23). The Court of Appeals still recognizes that an employee must act with requisite culpability in order to be found guilty of misconduct. *See e.g., Wooden v. Div. of Emp't Sec.*, 364 S.W.3d 750, 753 (Mo. App. W.D. 2012) ("All four types…require a culpable intent on the part of the employee."); *Williams v. Enter. Rent-A-Car Shared Servs.*, 297 S.W.3d 139, 142 (Mo. App. E.D. 2009) ("Each of the four criteria…has an element of culpability or intent."); *Finner v. Americold Logistics, LLC*, 298 S.W.3d 580, 583 (Mo. App. S.D. 2009) (same). Other persuasive authority suggests a similar standard should be required. Specifically,

Missouri's definition of misconduct comes directly from the treatise American Jurisprudence. *See Ritch*, 271 S.W.2d at 793 (adopting the definition from therein). Today, American Jurisprudence 2d advises that "[t]here is an element of intent associated with a determination of misconduct...." 76 Am. Jur. 2d § 68 (Appendix at A1). This requirement is most consistent with the primary rule of statutory construction, because the legislative intent behind the Employment Security Law is to protect against economic insecurity. R.S.Mo. § 288.020.1. This is why the legislature expressly instructed the Courts to liberally construe the law, § 288.020.2, and why this Court has stated the "disqualifying provisions...are to be strictly construed against disallowance of benefits." *Missouri Div. of Emp't Sec. v. Labor & Indus. Relations Comm'n*, 651 S.W.2d 145, 148 (Mo. 1983).

DES suggests such a requirement is contrary to this Court's recent recognition that an employee's actions do not need to be willful actions against their employer in order to be misconduct. (Res. Br. at 23, *starting with* "Despite this Court's *Fendler* decision..."). However, this Court also recognized "simple negligence cannot support a finding of misconduct." *Fendler*, 370 S.W.3d at 588. Therefore, it is clear that the requisite mental state required to result in actions being "misconduct" is at least more than negligence. DES's suggested interpretation of the "disregard" clause of Section 288.030.1(23) is more akin to simple negligence than to the requisite culpability consistently required by Missouri Courts. DES argues the Court of Appeals' decision in *Watson v. Ladelle Inv. Co., Inc.*, No. ED 99500, 2013 WL 5979520 (Mo.App. E.D. Nov. 12, 2013) is inconsistent with *Fendler*, but it is not.

In *Watson*, the Court held the claimant had engaged in misconduct by lying to her employer during an internal investigation into a patient's injury. *Id.* at *1. In reaching its holding, it recognized the criteria for finding misconduct require an element of "culpability **or** intent." *Id.* at *2. It further stated the claimant's actions must be subject to characterization as "manifest culpability, wrongful intent, or evil design." *Id.* The Court reasoned that because the claimant had injured a patient by not following workplace procedures, then lied about it during a subsequent investigation, her "repeated dishonesty in a matter of substantial significance" to her employer constituted misconduct. *Id.* at *3. The Court of Appeals did not err by requiring a showing of culpability.

In *Fendler*, this Court noted that "simple negligence" is not enough to constitute misconduct, suggesting a more culpable mental state is required. Section 288.030.1(23)'s "negligence" clause, as discussed in *Fendler*, suggests this standard is gross negligence. Even though Missouri Courts are reluctant to recognize "differing degrees of negligence" *see Edwards v. Gerstein*, 363 S.W.3d 155, 165 (Mo. App. W.D. 2012), there is good reason to do so when a statute refers to "negligence **in such degree**…." Mo. Rev. Stat. § 288.030.1(23) (emphasis added). If simple negligence does not meet this threshold, then it must be gross negligence. Gross negligence is defined as "improper conduct greater in kind or degree or both than ordinary negligence." *Edwards*, 363 S.W.3d at 165. Gross negligence has been defined as "conscious indifference." *Id.* (*citing Boyer v. Tilzer, M.D.*, 831 S.W.2d 695, 697 (Mo. App. E.D. 1992). It is also properly described as "reckless conduct done with knowledge that there is a strong possibility of harm and indifference

as to that likely to harm." *Edwards*, 363 S.W.3d at 165. When this Court stated in *Fendler* that "simple negligence" does not constitute misconduct, a reasonable interpretation suggests this Court requires at least gross negligence. Seck is unaware of any level of culpability existing between negligence and gross negligence, and does not request this Court carve out a new degree of negligence. Thus, when the Court of Appeals requires a showing of manifest culpability, it is acting within the bounds of *Fendler*. Likewise, this Court should interpret the "disregard" clause of misconduct's definition to require a similarly culpable mental state as the rest of the statute.

In addition to the presumption that the legislature intended the Courts' application of the definition of misconduct to remain the same, the presumption that every word and phrase has meaning supports an interpretation that does not render any portion of the definition meaningless. If DES is correct, and the definition of misconduct requires varying degrees of culpability, rather than expressing examples of how to characterize actions that amount to misconduct, then any clause requiring a higher level of culpability would be surplusage. One clause would have no purpose if there was another, in the same statute, requiring less, to achieve the same result. Interpreting the "disregard" clause as suggested by DES would result in an internal conflict between the different clauses of misconduct's definition. This Court has stated that "every word, clause, sentence, and section of an act must be given some meaning unless it is in conflict with the ascertained legislative intent." *Van Horn*, 625 S.W.2d at 877. Thus, the Court should interpret statutes in a manner, where reasonable, that avoids internal conflict. DES's proposed interpretation would create unavoidable conflict between the four clauses

defining misconduct. Based on the turn of events leading to the definition's codification, it is apparent the legislature intended to capture all the pre-existing case law using the subsequently codified definition of misconduct. There is no basis to infer the legislature intended to change the law. As such, this Court should refrain from interpreting the "disregard" clause in a manner which does so.

Seck suggests the Court interpret the "disregard" clause as requiring a conscious disregard. DES urges this Court to adopt the Court of Appeals' interpretation of the "disregard" clause from *West v. Baldor Elec. Co.*, 326 S.W.3d 843 (Mo. App. E.D. 2010). The claimant in *West* was found guilty of misconduct under the "disregard" clause. *See id.* at 847. But even the Court of Appeals in *West* required evidence that the employee "deliberately or purposefully erred." *Id.* Furthermore, the Court in *West* found that the claimant has **consciously disregarded** a standard of behavior his employer had the right to rely on. *Id.* (stating "we see no possible argument that…[claimant's] sexual interaction with his co-worker … [is] anything less than a **conscious disregard** of the standards of conduct [his employer] was entitled to expect of him." (emphasis added)). The Missouri Court of Appeals also interpreted the "disregard" clause in a similar fashion in *Dixon v. Division of Emp't Sec.*, 106 S.W.3d 536 (Mo. App. S.D. 2003).

In *Dixon*, the Court of Appeals noted "disregard is defined as either 'an intentional slight' or 'neglect.'" *Id.* at 541. It subsequently noted, however, as did this Court in *Fendler*, that "negligent conduct" does not constitute misconduct. *Id.* Accordingly, it applied the "intentional slight" definition of disregard, as it is more consistent with the other definitions of misconduct. *Id.* (applying the same definition subsequently codified,

id. at 540). The *Dixon* Court also surveyed a number of other cases applying the "disregard" clause of the definition of misconduct, and noted that "[i]n all of these cases, there was a **conscious inattention** to do the act that was found to be a 'disregard of the standards of behavior which the employer has the right to expect of his employees." *Id.* at 542 (emphasis added). Requiring a conscious disregard, or inattention, is most consistent with the legislative intent behind Section 288.030.1(23), is a reasonable interpretation of the "disregard" clause that avoids unnecessary conflict within the statutory definition, and prevents this Court from overruling an unascertainable number of cases.

This interpretation is consistent with the plethora of case law requiring a showing of culpability from the employee to find misconduct. A "conscious disregard" is a sufficient mental state to justify an award of punitive damages in a civil case in Missouri courts. *See, e.g., Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc.*, 700 S.W.2d 426, 435-36 (Mo. 1985) (discussing the standard for punitive damages when based on a "conscious disregard"). As punitive damages are intended to punish tortfeasors and deter similar conduct, the disqualifying provisions of the Employment Security Law are intended to only punish those employees who become employed through their own fault. *See* Mo. Rev. Stat. § 288.020.1.

Seck's proposed interpretation of the "disregard" clause is also most consistent with the rule of *noscitur a sociis.* This Court recognizes the rule that "[w]ords are known by the company they keep." *State v. Bratina*, 73 S.W.3d 625, 627 (Mo. 2002). The "disregard" clause does not explicitly contain a requisite culpability. *See* Mo. Rev. Stat. § 288.030.1(23). But the company it keeps requires a "wanton or willful disregard,"

"manifest culpability, wrongful intent or evil design," and the like. *See id.* Based on the company it keeps, the legislature intended the "disregard" clause to require a conscious disregard. Based on the known legislative history, the pre-existing case law, and the canons of statutory construction recognized in Missouri, interpreting the "disregard" clause in this manner would be most proper. It would also be most consistent with the known legislative intent behind the disqualifying provision of the Employment Security Law that denies compensation to employees who have engaged in misconduct.

II. The Court should disregard facts DES relies on that were not found by the Commission

DES's argument contains facts and inferences from the evidence that were not made by the Commission, although DES argues as if they were. As discussed previously, DES's reference to "stealing," "forgery," and "lying" are facts that were not found by the Commission. DES also claims "[Seck] was receiving sick leave **pay** during his absence." (Res. Br.at 7) (emphasis added). But the portion of the record DES cites merely indicates Seck was on sick leave, with no indication of whether he was being paid. (Tr. 22). DES's argument substantially depends on Seck being paid, an assumption DES makes without evidentiary support.

Likewise, DES's assertion that MoDot was "left short handed" and "had to adjust its work schedule unnecessarily" are assumptions made by DES, (Res. Br. at 28), not facts found by the Commission or supported by substantial, competent evidence in the record. DES also concludes that Seck's "forgery was the method by which he missed two days of work and obtained twenty hours of paid leave." (Res. Br. at 25). The

Commission's decision did not find Seck's annotation was a prerequisite for him missing work until August 8. Even more, the Commission did not find Seck received pay while absent from work. These are all conclusions drawn by DES, not facts found by the Commission. As such, this Court should disregard them.

DES also admits certain facts were not found by the Commission, but nonetheless relies on them as if they did. These facts should also be disregarded. DES states, "whether claimant needed to take a muscle relaxant after August 2, 2011 is a question of fact for the Commission." (Res. Br. At 16). It then argues Seck did not need to continue taking the medication. (Res. Br. at 31). But the Commission never made this finding. (LF 7-9). Seck testified he was prescribed medication, and advised to seek physical therapy and ask for light duty at work. DES admits MoDot denied Seck's request for light duty. (Res. Br. at 7). The Commission never concluded Seck did not need to finish the medication previously prescribed to him just because he acquired a release form from Dr. Allen. In a similar fashion, DES states "[w]hether [Seck]'s conduct was motivated by mistake or insubordination is also a question of fact…." (Res. Br. at 16). The Commission did not determine this fact one way or the other. (LF 7-9). However, DES argues that Seck "was attempting to steal 20 hours of sick leave pay" (Res. Br. at 15) as though the Commission made this conclusion. It did not.

Once DES's version of the Commission's factual findings are disregarded, it becomes apparent that the Commission did not reasonably determine Seck engaged in misconduct. His actions were more akin to "simple negligence," which is not

enough. Seck's actions do not constitute the "intentional slight" this Court should find is required by the "disregard" clause within misconduct's definition.

III. The Commission did not reasonably conclude Seck engaged in misconduct

The Commission's decision is unreasonable because it fails to consider evidence in the record. For instance, Seck's absence from work was not only due to his doctor's restrictions, it was also because MoDot denied his request for light duty, which is a fact admitted by DES. (*See* Res. Br. at 7). In addition to his doctor advising him not to operate machinery under the influence of muscle relaxers, his supervisor told him he was not allowed to work while taking cyclobenzaprine. (TR 20). Seck's absence from work was a result of more than one medical condition. First, his doctor restricted him to lifting no more than twenty pounds. (TR 51; LF 13). Second, he could not work while taking his medication. Even if the release form signed by Dr. Allen removed the physical restrictions from Seck, its purpose was not to convey medical instructions to Seck to stop taking the medication previously prescribed to him. Surely, DES is not arguing the release form signed on August 2 permitted Seck to do his job while under the influence of cyclobenzaprine.

Most importantly, the Commission ignored Seck's testimony that he called his supervisor on Wednesday, August 3, 2011. The Commission neither weighed the evidence of the August 3 phone conversation against other evidence, nor found it to be unworthy of belief. In fact, the Commission's decision never mentioned this evidence. (Decision of Appeals Tribunal, LF 7-9, adopted by Commission, LF 25). Additionally,

MoDot failed to present any evidence showing this phone conversation did not occur. (TR 54). Moreover, DES admitted this conversation took place within its briefing to the Missouri Court of Appeals. Despite these facts, DES requests this Court *assume* the Commission disbelieved this evidence. (Res. Br. at 11-12). Because the Commission failed to address this evidence, such an assumption is not required. This Court consistently indicates it is *not* required to draw inferences in a light most favorable to the Commission's decision. *See Fendler*, 370 S.W.3d at 588 (quoting *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003)). If the Commission simply disregarded this testimony, then its decision was not reasonable, and must be reversed.

It is also not a reasonable inference that MoDot relied on the annotation when it allowed Seck to stay home from work on August 3 or 4. Seck did not inform his supervisor he obtained the release from until Wednesday, August 3. (TR 19). He was already absent from work at that time. Therefore, his annotation did not persuade his supervisor to allow him to remain at home. DES's assertion that the annotation was required in order to miss work is unwarranted. The Commission found that MoDot "required [Seck] to provide a doctor's note releasing [him] from restrictions **before** [he] could return to work." (LF 7). The Commission never made a factual finding that a doctor's note was required for Seck to miss work, and the record is void of any evidence that Seck turned in a excusal note from Dr. Allen or any other medical provider. The Court should consider what would have happened if Seck did not acquire the release form. He would have been forced to remain absent from work. His actions were, therefore, immaterial to his ability to stay home from work on August 3 and 4.

Seck's annotation of the release form does not constitute anything greater than simple negligence. This Court should not find Seck engaged in misconduct, because his actions of staying home from work while under the influence of cyclobenzaprine was the most responsible course of action under the circumstances. Although comparing his actions to lying about a pie-eating contest seem to trivialize the potential degree of culpability that can coexist with writing a note on a form previously signed by a doctor, the underlying rationale in that analogy makes sense. There is no reason to punish Seck for doing something foolish when, in the end, it did not harm his employer. Seck's actions do not rise to the level of being misconduct.

CONCLUSION

It seems as though DES is under the belief that the only way for this Court to reverse the Commission's decision is to conclude that forgery and stealing are not misconduct. But Seck did not engage in these criminal activities. The Commission did not determine otherwise, and the evidence does not support such a finding. DES improperly places those criminal accusations before the Court. The evidence in this case presents a unique situation, and the Court's holding need not immunize the actions of employees who intentionally deceive their employers in order to acquire a material benefit. It would be proper for the Court to recognize that in most situations, altering a doctor's note would be misconduct, because in most situations, those actions would presumably be designed to achieve a sinister result. But Seck's actions were not so designed. His display of poor judgment may have been a just reason to terminate his employment, but he is not within the class of persons the legislature intended to exclude

from receiving unemployment compensation when it codified the present definition of misconduct. As such, Seck respectfully requests this Court reverse the Commission's decision with instructions to award him the compensation for which he was originally denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court 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 Rule 84.6(b) limitations, in that it contains 5526 words and 426 lines of text, not including the cover, certificate of service, certificate of compliance, and signature blocks, according to Microsoft Word.

Respectfully Submitted,

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Supervising Attorney

/s/ Kenneth Kinney
Kenneth D. Kinney, Rule 13 Certified

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was e-filed on this 3rd Day of January, 2014, and served upon:

1. Respondent Division of Employment Security via the e-filing system;
2. Ninion S. Riley, attorney for Respondent, Division of Employment Security, via email transmission to ninion.riley@labor.mo.gov;
3. Paula Bangert Lambrecht, attorney for Defendant, via email transmission to paula.lambrecht@modot.mo.gov; and
4. Mailed to the Department of Transportation, Attn: Human Resources, P.O. Box 270, Jefferson City, Missouri 65102.

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