



In the Missouri Court of Appeals
Eastern District
DIVISION FIVE

CAROL FENDLER,)
)
 Appellant,) No. ED95903
)
 vs.)
) Appeal from the Labor and Industrial
 HUDSON SERVICES,) Relations Commission
) 10-15331 R-A
 and)
)
 DIVISION OF EMPLOYMENT)
 SECURITY,) Filed: October 11, 2011
)
 Respondents.)

OPINION

Carol Fendler ("Claimant") appeals the decision of the Labor and Industrial Relations Commission denying her unemployment benefits on the ground that she was discharged for misconduct connected with her work. We reverse and remand for the entry of an appropriate award.

I. BACKGROUND

Claimant began working for Hudson Services ("Employer") in 1994. Employer provided commercial property services, including cleaning services. The employees in the housekeeping department were supposed to clock in and out using a telephone system. The employees would call and enter a pin number and job number to clock in and call again to clock out. At times,

employees would forget to clock in or out. In her position as an operations assistant, one of Claimant's responsibilities was to verify payroll. For several years, Claimant would verify the payroll by contacting the employees to determine the hours they worked if the employees failed to clock in or out. Pam Meister, Claimant's immediate supervisor, testified that she instructed Claimant to verify payroll by recording the start and end times for each employee. Meister also testified that approximately one year prior to Claimant's discharge, she warned Claimant about improperly verifying payroll. Evidence was presented that after Meister's warnings to Claimant, she failed on eleven occasions to enter clock-in and clock-out times for employees when verifying payroll. According to Meister, after her warnings, when Claimant verified payroll she continued to input total hours worked rather than the start and end times for each employee. Claimant was terminated for failing to properly verify payroll. Claimant filed a claim for unemployment benefits, and her claim was ultimately denied by the Commission because the Commission found she was terminated for misconduct connected with her work. Claimant appeals this decision.

II. DISCUSSION

In her sole point on appeal, Claimant argues the Commission erred in disqualifying her from receiving unemployment benefits on the ground that her actions constituted misconduct connected with her work.

A. Standard of Review

On appeal from a decision in an unemployment benefits proceeding, we may modify, reverse, remand for rehearing, or set aside the award upon finding: (1) that the Commission acted without or in excess of its powers; (2) that the award was procured by fraud; (3) that the facts found by the Commission do not support the award; or (4) that there was not sufficient

competent evidence in the record to warrant the making of the award. Section 288.210 RSMo 2000.

B. The Commission Erred in Disqualifying Claimant from Receiving Unemployment Benefits Based on Misconduct

1. Relevant Law

Pursuant to section 288.050.2 RSMo Supp. 2006¹, a claimant shall be disqualified from receiving unemployment benefits upon a finding that she was discharged for misconduct connected with her work. Section 288.030.1(23) defines misconduct 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 of the employee's duties and obligations to the employer.

Generally, the claimant bears the burden of proving a right to benefits. *Duncan v. Accent Marketing, LLC*, 328 S.W.3d 488, 491 (Mo. App. E.D. 2010). However, where misconduct is alleged, the employer bears the burden of proof on this issue and must show by a preponderance of the evidence that the employee willfully disregarded or violated the employer's rules. *Id.* The determination of whether an employee is discharged for misconduct connected with work is a question of law that we review de novo. *RPCS, Inc. v. Waters*, 190 S.W.3d 580, 586 (Mo. App. S.D. 2006).

2. Claimant did not Willfully, Deliberately, or Purposefully Violate Employer's Rules

Here, it is Claimant's alleged negligence in failing to follow proper procedure to verify payroll as instructed that constitutes the Commission's basis for finding misconduct. Even where

¹ All further statutory references are to RSMo Supp. 2006.

negligence is the basis for the misconduct, there must still be a showing of willful intent.

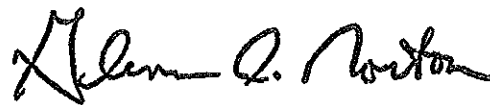
Duncan, 328 S.W.3d at 492. "Without evidence that the claimant deliberately or purposefully erred, the claimant cannot properly be found to have committed an act of misconduct." *Id.* Even with a showing of multiple violations of an employer's policy, as was shown here, absent a showing of willfulness, a claimant will not be disqualified from benefits. *Id.* Moreover, Missouri courts have acknowledged the distinction between the violation of an employer's work rule sufficient to justify termination and a willful, wanton, or deliberate violation of such a rule to warrant a determination of misconduct disqualifying a claimant from unemployment benefits. *See Williams v. Enterprise Rent-A-Car Shared Services, LLC*, 297 S.W.3d 139, 144 (Mo. App. E.D. 2009); *Dameron v. Drury Inns, Inc.*, 190 S.W.3d 508, 512 (Mo. App. E.D. 2006); and *Tutwiler v. Fin-Clair Corp.*, 995 S.W.2d 497, 499 (Mo. App. E.D. 1999).

In *Duncan*, the claimant worked as a customer service representative in a call center. *Duncan*, 328 S.W.3d at 490. His responsibilities included taking calls from customers and assisting them with service related issues. *Id.* The claimant received several warnings for failing to follow certain steps in using a computerized system when assisting customers and was ultimately terminated. *Id.* The Commission found that despite several warnings, the claimant repeatedly failed to properly use the system. *Id.* The Commission found the claimant's repeated failures to follow his employer's instructions demonstrated negligence "to such a degree as to manifest culpability" and therefore, concluded that the claimant committed misconduct. *Id.* at 491. The claimant appealed, arguing the Commission erred in finding he committed misconduct. *Id.* This Court reversed the Commission's decision, holding that the facts did not support the conclusion that the claimant committed misconduct because there was no evidence in the record that he deliberately or purposefully erred. *Id.* at 492-93.

Similarly, in this case there was no evidence in the record to indicate that Claimant intentionally failed to verify payroll by willfully, deliberately, or purposefully refusing to enter specific start and end times for each employee. Although Claimant was instructed to follow a certain procedure for verifying payroll, was warned when she failed to follow the instructions, and repeatedly failed to follow instructions thereafter, as in *Duncan* this evidence was still not sufficient to conclude she deliberately or purposefully did so.² Claimant's failure to follow instructions may be poor workmanship, lack of judgment, or an inability to perform the job which may justify her discharge; however, these things do not serve to disqualify her from benefits on the basis of misconduct. *Murphy v. Aaron's Automotive Products*, 232 S.W.3d 616, 621 (Mo. App. S.D. 2007). As previously noted, absent evidence that Claimant's failure to follow instructions was willful, deliberate, or purposeful, she cannot properly be found to have committed misconduct. There is no such evidence in the record here, and therefore, the decision of the Commission was not supported by competent and substantial evidence and should be reversed. Point granted.

III. CONCLUSION

The Commission erred in finding Claimant's actions constituted misconduct disqualifying her from receiving unemployment benefits. Therefore, the decision of the Commission is reversed and remanded for the entry of an appropriate award.



GLENN A. NORTON, Judge

Kurt S. Odenwald, C.J., dissents
Ben Burkemper, Sp. J., concurs
Kenneth M. Romines, concurs with dissent

² Even deferring to the findings of the Commission, eleven failures to follow Employer's instructions after multiple warnings does not, as a matter of law, constitute misconduct.



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DISSENT

I respectfully dissent. The applicable standard of review requires us to affirm the decision of the Labor and Industrial Relations Commission denying Claimant unemployment benefits on the grounds that Claimant was discharged for misconduct connected with her work.

We will uphold the award of the Commission if there is sufficient competent and substantial evidence to support the award. Berwin v. Lindenwood Female College, 205 S.W.3d 291, 294 (Mo.App. E.D. 2006); Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo.banc 2003). The weight to be given evidence and the resolution of conflicting evidence are for the Commission, and if its decision is supported by competent and substantial evidence, its

decision must be affirmed. Selby v. Trans World Airlines, 831 S.W.2d 221 (Mo.App., W.D. 1992); Burns v. Labor & Industrial Commission, 845 S.W.2d 553 (Mo. banc 1993); Willcut v. Division of Employment Security, 193 S.W.3d 410, 412 (Mo.App., E.D. 2006). The majority opinion falters because it fails to defer to the credibility determinations and factual findings of the Commission, which are supported by competent and substantial evidence.

An employee is prohibited from recovering unemployment benefits if he is discharged for misconduct connected with work. Section 288.050.2. "Misconduct" is defined by statute 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 employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

Section 288.030.1(23). While an employee generally bears the burden of demonstrating he is entitled to unemployment benefits, the burden shifts to the employer to prove misconduct connected with work when the employer asserts the employee was discharged for misconduct. Williams, 297 S.W.3d at 142. The employer must show, by a preponderance of the evidence, that the employee willfully violated the rules or standards of the employer or that the employee knowingly acted against the employer's interest. Venz v. Convergys Customer Management Group, Inc., 326 S.W.3d 554, 557 (Mo.App. E.D. 2010). To satisfy Section 288.030.1(23), the Commission must find that an employee's conduct was willful. See Wieland v. St. Anthony's Med. Ctr., 294 S.W.3d 77, 79 (Mo.App. E.D. 2009); Scrivener Oil Co., Inc. v. Div. of Employment Sec., 184 S.W.3d 635, 641 (Mo.App. S.D. 2006).

In this case, evidence was presented that Claimant was responsible verifying the payroll of hours of employees. For many years, Claimant entered only the number of hours worked by

the employees as verification. At some point, Claimant's new supervisor told Claimant that entering only the number of hours worked was insufficient, and that Claimant must enter the specific start and end times for each employee. Evidence was introduced that Claimant was told more than one time to enter the specific starting and ending work times of employees, and not to enter just the number of hours worked. Specifically, the Commission made the following factual findings:

Claimant's supervisor, Ms. Meister, instructed her to list clock-in and clock-out times on employer's payroll program. Claimant consistently failed to comply with this directive. Ms. Meister gave Claimant three chances to correct her behavior. Claimant was formally warned by Ms. Meister on December 28, 2009, to verify hours. After that warning, claimant failed on eleven occasions to list clock-in and clock-out times for employees.

Because competent evidence exists to support these factual findings, the Commission's factual findings are binding on this Court.

The majority cites Claimant's testimony that she did not follow her supervisor's instructions because she was used to verifying payroll as she previously had by contacting the employees and finding out how many hours they worked. The majority opinion notes that Claimant's failure to follow instructions *may* be poor workmanship, lack of judgment, or an inability to perform the job which may justify her discharge, and that these things do not serve to disqualify her from benefits on the basis of misconduct. Murphy v. Aaron's Automotive Products, 232 S.W.3d 616, 621 (Mo. App. S.D. 2007). I do not disagree that such an inference *may* be drawn from *Claimant's* testimony. However, while such testimony may support a finding that Claimant exercised poor workmanship or lack of judgment, the facts before the Commission and the inferences rationally drawn there from equally support a finding to the contrary, i.e., that Claimant willfully disregarded the express and clear instructions of her supervisor. Important to this appeal is the fact that the Commission expressly found the

testimony of Claimant's supervisor to be more credible than Claimant's testimony. We are not at liberty to disregard the credibility determinations of the Commission, which I believe the majority has done. The evidence before the Commission supports a finding that Claimant willfully, deliberately and purposefully disregarded her employer's clear instruction. An employee's willful violation of the employer's reasonable instructions constitutes misconduct. Noah v. Lindbergh Inv., LLC, 320 S.W.3d 212, 216 (Mo.App., E.D. 2010). Employer has met its burden of proving misconduct.

For these reasons, I would affirm the decision of the Labor and Industrial Relations Commission denying Claimant unemployment benefits on the grounds of misconduct.


Kurt S. Odenwald, Chief Judge