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### **NO FAULT MEANS NO BENEFITS: “MISCONDUCT” AS DEFINED BY MISSOURI’S EMPLOYMENT SECURITY LAW**

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#### **I. INTRODUCTION**

Paul works for Nee’s Auto Shop, a local automobile service center. Nee’s Auto Shop hired Paul a few months ago for a seasonal position as a customer service associate, because Nee’s Auto Shop is especially busy during the holiday season. After demonstrating a strong work ethic and an aptitude for the position, Nee’s Auto Shop offered Paul full-time employment, which Paul gladly accepted. Paul’s duties include all initial tasks relevant to repairs, such as drafting work orders and assisting the Shop’s customers.

Three years later, Paul still works for Nee’s Auto Shop. Like previous years, the holiday season brings increased business. However, unlike previous years, Nee’s Auto Shop did not hire additional, seasonal employees. As a result, Paul is responsible for handling an ever-increasing workload and is struggling to maintain the shop’s books. Paul fails to charge a group of customers for parts and services, including a customer that Nee’s Auto Shop knows to be Paul’s close friend. Despite the mistake, Nee’s Auto Shop has a very successful holiday season and fails to notice any billing discrepancies.

Three months after Paul’s billing error, Nee’s Auto Shop reviews its past work orders in preparation to file its taxes, and notices a discrepancy in its billing records. The Shop’s owner tracks the customer data to work orders originated by Paul and concludes Paul failed to bill the customers at the shop’s expense. Soon thereafter, the owner confronts Paul about the billing errors. Paul denies knowledge of them and claims that he would never purposefully failed to bill a customer. But, the owner is unsatisfied with Paul’s denial and believes Paul did not charge the customers so that his friend could receive free repairs. The owner also knows his unemployment tax rate will increase if he arbitrarily discharges Paul. To protect his company’s interests, the owner finds an obscure company rule prohibiting preferential billing and discharges Paul citing the billing rule as his basis.

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About a month after his discharge, Paul struggles to find employment. He decides to apply for unemployment benefits in the meantime because his delinquent bills are beginning to pile up. Without a steady income, Paul fears he may default on his home mortgage. To Paul's surprise, Nee's Auto Shop protests Paul's application for benefits, claiming Paul was discharged for violating a company rule. A deputy for the Division of Employment Security investigates Nee's Auto Shop's claim and concludes that it is factually supported. In turn, the deputy finds Paul is disqualified from receiving unemployment benefits for misconduct connected with his work.

Upon receiving the deputy's notice denying his application for unemployment benefits, Paul cannot believe an innocent mistake may ultimately result in him losing his home to foreclosure. He cannot afford representation, and does not attempt to appeal the deputy's decision.

Paul's case, as well as many others similarly situated, raises serious questions regarding the disqualification provisions of Missouri's Employment Security Law. Whose interests deserve protection? And, what can a state like Missouri do to balance the interests of individual claimants and employers?

Public unemployment insurance originally became available in 1932, when Wisconsin enacted the first unemployment insurance laws in the United States.<sup>1</sup> Over the next three years, six additional states enacted similar unemployment insurance laws.<sup>2</sup> Finally, in 1935, amidst the Great Depression, the United States Legislature enacted the Social Security Act, which established a system of state and federal unemployment insurance laws.<sup>3</sup> Soon afterward, in 1937, the Missouri Legislature enacted the Missouri Unemployment Compensation Law.<sup>4</sup>

Initially, state unemployment insurance laws did not include disqualification provisions, and benefits were available to all unemployed workers who were willing, able and available to work.<sup>5</sup> By 1945, however, over half of the states had enacted disqualifying provisions in some form.<sup>6</sup>

Missouri adopted its disqualification provisions in 1951, including a provision disqualifying claimants from receiving benefits for misconduct connected with the claimant's work.<sup>7</sup> Initially, Missouri appellate courts defined "misconduct" through its common law.<sup>8</sup> In 2004, the Missouri Legislature amended Section 288.030.1(23), adopting the common law definition of "misconduct."<sup>9</sup> Ten years later, in 2014, the Missouri Legislature redefined the meaning of "misconduct" when it enacted Senate Bill Number 510.<sup>10</sup>

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<sup>1</sup> Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 26 (1945).

<sup>2</sup> Joshua Alvarez, *A Brief History of Unemployment Insurance*, IVN (Jan. 14, 2014), <http://ivn.us/2014/01/14/brief-history-unemployment-insurance/>.

<sup>3</sup> *Charity Versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357, 358 (1963).

<sup>4</sup> William C. Martucci, *Unemployment Compensation: The Missouri Employment Security Law - Background*, in 37 MO. PRAC., EMPLOYMENT LAW AND PRACTICE § 14:1 (2011 ed.).

<sup>5</sup> U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE 75TH ANNIVERSARY SUMMARY, <http://www.dol.gov/ocia/pdf/75th-Anniversary-Summary-FINAL.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> MO. REV. STAT. § 288.050.2 (1951).

<sup>8</sup> See *Ritch v. Industrial Commission*, 271 S.W.2d 791, 793 (Mo. App. 1954).

<sup>9</sup> H.B. No. 1268 (2004).

<sup>10</sup> S.B. 510, 97th Gen. Ass., 2nd Reg. Sess. (Mo. 2014).

This Article concentrates on the 2014 statutory reform to the definition of “misconduct” in Missouri’s Unemployment Security Law. Specifically, this Article explores how and why the definition of misconduct dramatically affects Missouri’s unemployed. Part I discusses the history of unemployment insurance in Missouri, focusing on the evolution of the definition of “misconduct” over time. Part II analyzes the likely interpretation of Missouri’s new definition of “misconduct,” comments on the 2014 statutory reform and, ultimately, concludes the reform does not comport with the purpose of Missouri’s Employment Security Law.

## II. “MISCONDUCT CONNECTED WITH WORK”

In 1951, the Missouri Legislature enacted Section 288.050 of Missouri’s Employment Security Law.<sup>11</sup> Among other provisions, Section 288.050 disqualifies claimants for unemployment benefits if the claimant was discharged for misconduct connected with work.<sup>12</sup> Initially, the Missouri Legislature did not define the meaning of “misconduct connected with work.”<sup>13</sup> Rather, Missouri’s judiciary interpreted the phrase through its common law and, over the years, developed case law principles relevant in misconduct cases.<sup>14</sup> Eventually, the Missouri Legislature adopted the judiciary’s definition, but only for a short time.<sup>15</sup> Within ten years, the Legislature drastically reformed the definition of misconduct, in hopes a broader definition would decrease financial deficits.<sup>16</sup>

### A. *Ritch v. Industrial Commission*

Cepha Ritch worked for a local delivery servicer, Warwick Delivery Service.<sup>17</sup> On January 11, 1952, Ritch went out to make deliveries.<sup>18</sup> At one delivery address, Ritch double parked his truck and attempted delivery.<sup>19</sup> When the addressee refused delivery, Ritch moved his truck to a legal parking spot in front of a nearby tavern, and went inside to call his employer for further instruction to complete the delivery.<sup>20</sup> Although conflicting evidence existed, Warwick Delivery Service’s owner claimed that he entered the tavern after seeing the truck parked in front of it and saw Ritch lowering a glass of beer.<sup>21</sup> The owner discharged Ritch for violating a company policy, which prohibited consumption of alcoholic beverages while on duty.<sup>22</sup> Ritch, subsequently, applied for unemployment benefits.<sup>23</sup>

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<sup>11</sup> MO. REV. STAT. § 288.050.

<sup>12</sup> MO. REV. STAT. § 288.050.2.

<sup>13</sup> *See id.*

<sup>14</sup> *See Ritch*, 271 S.W.2d at 793 (defining “misconduct” as an act of wanton or wilful disregard of the employer’s interest . . . [or] an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to the employer”).

<sup>15</sup> H.B. No. 1268 (2004).

<sup>16</sup> S.B. 510, 97th Gen. Ass., 2nd Reg. Sess. (Mo. 2014).

<sup>17</sup> *Ritch*, 271 S.W.2d at 791.

<sup>18</sup> *Id.* at 791-92.

<sup>19</sup> *Id.* at 792.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 791.

The Industrial Commission denied Ritch benefits, finding he was discharged for misconduct connected with his work.<sup>24</sup> The trial court overturned the Commission's decision and remanded the case with instructions to award Ritch unemployment benefits.<sup>25</sup>

However, on appeal, the Kansas City Court of Appeals<sup>26</sup> reversed, finding Ritch's discharge was for misconduct connected with his work.<sup>27</sup> The court explained that no Missouri court opinion had construed or defined the meaning of "misconduct," as found in Section 288.050.<sup>28</sup> In turn, the court defined "misconduct" as:

[A]n act of wanton or wilful 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.<sup>29</sup>

The court concluded, although Ritch was not directly informed of the policy regarding consumption of alcoholic beverages while on duty, he "should have known" such conduct was improper.<sup>30</sup> The court also noted Ritch signed an employment contract drafted by his union, which agreed that "misconduct" included consumption of alcoholic beverages while on duty.<sup>31</sup>

## B. Original Version

Following *Ritch*, Missouri appellate courts used the same definition of "misconduct" for nearly fifty years. By 2004, appellate jurisprudence was so well-established that the Missouri Legislature adopted the *Ritch* definition of "misconduct" when it enacted Section 288.030.1(23).<sup>32</sup>

In addition to defining "misconduct," Missouri appellate courts established a significant collection of case law germane to misconduct cases. Notably, Missouri appellate courts recognized "there is a vast distinction between conduct that would justify an employer in terminating an employee and conduct that is misconduct for purposes of denying unemployment benefits."<sup>33</sup> Over the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Ritch v. Industrial Commission* was decided by the Kansas City Court of Appeals. In 1884, the Missouri Legislature adopted a Missouri Constitutional amendment, establishing the Kansas City Court of Appeals to accompany the already established Saint Louis Court of Appeals. In 1909, a third appellate court was established, the Springfield Court of Appeals. For over sixty years, Missouri's appellate courts were separate entities. However, in 1979, Missouri Constitutional amendments combined the appellate courts and established one Missouri Court of Appeals, operating in three districts – South, West, and East – based on the original three Courts of Appeals locations.

<sup>27</sup> *Id.* at 793-94.

<sup>28</sup> *Id.* at 793.

<sup>29</sup> *Id.* (quoting 48 AM. JUR. 2D *Labor and Labor Relations* § 561 (1979)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> MO. REV. STAT. § 288.030.1(23) (2015).

<sup>33</sup> *Williams v. Enterprise Rent-a-Car Shared Servs., LLC*, 297 S.W.3d 139, 144 (Mo. App. 2009).

years, the courts also established that “[p]oor workmanship, lack of judgment, or the inability to do the job” were appropriate grounds to discharge an employee, but did “not disqualify a claimant from receiving benefits on the basis of misconduct.”<sup>34</sup>

### C. Current Version

In 2014, despite prior unsuccessful attempts to enact similar legislation, the Missouri Legislature passed Senate Bill Number 510.<sup>35</sup> As reformed, Section 288.030.1(23) defines “misconduct” as:

conduct or failure to act in a manner that is connected with work, regardless of whether such conduct or failure to act occurs at the workplace or during work hours, which shall include:

(a) Conduct or a failure to act demonstrating knowing disregard of the employer's interest or a knowing violation of the standards which the employer expects of his or her employee;

(b) Conduct or a failure to act demonstrating carelessness or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or a knowing disregard of the employer's interest or of the employee's duties and obligations to the employer;

(c) A violation of an employer's no-call, no-show policy; chronic absenteeism or tardiness in violation of a known policy of the employer; or two or more unapproved absences following a written reprimand or warning relating to an unapproved absence unless such absences are protected by law;

(d) A knowing violation of a state standard or regulation by an employee of an employer licensed or certified by the state, which would cause the employer to be sanctioned or have its license or certification suspended or revoked; or

(e) A violation of an employer's rule, unless the employee can demonstrate that:

- a. He or she did not know, and could not reasonably know, of the rule's requirements;
- b. The rule is not lawful; or
- c. The rule is not fairly or consistently enforced[.]<sup>36</sup>

Of particular importance, the current version of Section 288.030.1(23) supplants the “willful” requirement with a requisite intent of “knowing” conduct. Also, the current version omits any modifying mental state for violations of employer absenteeism and tardiness policies, as well as any other employer rule.

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<sup>34</sup> *Tolliver v. Friend Tire Co.*, 342 S.W.3d 428, 431 (Mo. App. 2011).

<sup>35</sup> *Unemployment Insurance – Disqualification for Benefits*, THINK HR (Aug. 1, 2014), <https://www.thinkhr.com/blog/missouri-employment-law-update-july-2014/>.

<sup>36</sup> MO. REV. STAT. § 288.030.1(23) (2015).

Similar to the prior version, the current version of Section 288.030.1(23) recognizes that carelessness or negligence may support a finding of misconduct where the degree or reoccurrence manifests culpability.

### III. COMMENTARY

Even though a Missouri appellate decision has not yet interpreted and applied the 2014 reformed version of Section 288.030.1(23), claimants for unemployment benefits are currently subject to its terms.<sup>37</sup> Certainly, a Missouri appellate court will hear a misconduct case under the current version of Section 288.030.1(23) in the near future.<sup>38</sup> When doing so, the court will likely focus its attention on the requisite mental state, as the statute's mental state requirement was a frequently litigated issue before the 2014 reform.<sup>39</sup> In all likelihood, the 2014 reform will result in an increased rate of disqualifications, raising the question of whether the reform comports with the purposes of Missouri's Employment Security Law.

#### A. Defining Misconduct

As a threshold matter, Missouri courts will need to determine whether the sub-paragraphs of Section 288.030.1(23) require a certain mental state. In the past, Missouri's appellate courts interpreted the definition of misconduct as only requiring a requisite showing of intent if expressly provided in the statute.<sup>40</sup> In *Seck v. Department of Transportation*, the Missouri Supreme Court discussed whether willfulness was required to establish misconduct.<sup>41</sup> The court explained that its interpretation was guided by the plain language of the statute and "the mental state required for each of the categories of misconduct is only that which is set forth in the statute."<sup>42</sup>

Therefore, looking to Section 288.030.1(23), sub-paragraphs (a) and (d) require the claimant to have "knowingly" acted or failed to act.<sup>43</sup> Sub-paragraph (b) requires the claimant to have "demonstrated carelessness or negligence" in acting or failing to act.<sup>44</sup> Finally, sub-paragraphs (c) and (e) do not provide an express mental state requirement.<sup>45</sup> If Missouri appellate courts apply the reasoning in *Seck*, sub-paragraphs (c) and (e) do not require a showing of intent, and, therefore, a claimant may be found to have discharged for misconduct where he violated an employer's rule, even if his conduct was completely without fault.

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<sup>37</sup> See Mo. Rev. Stat. § 288.030.1(23). Senate Bill 510 became effective as of August 28, 2014. All applications for unemployment benefits thereafter were subject to the current version of Section 288.030.1(23).

<sup>38</sup> The most recent Missouri appellate decision in a misconduct case concerned an employee who was discharged in April of 2014, and, therefore, the current version of Section 288.030.1(23) was not effective yet. See *Menendez v. Division of Employment Security*, \_\_\_ S.W.3d \_\_\_ (Mar. 31, 2015).

<sup>39</sup> See *Fendler v. Hudson Servs.*, 370 S.W.3d 585, 589 (Mo. banc 2012); see also *Seck v. Dep't of Transp.*, 434 S.W.3d 74, 82-83 (Mo. banc 2014).

<sup>40</sup> *Seck*, 434 S.W.3d at 83.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> MO. REV. STAT. §§ 288.030.1(23)(a), (d) (2015).

<sup>44</sup> MO. REV. STAT. § 288.030.1(23)(b) (2015).

<sup>45</sup> Mo. Rev. Stat. §§ 288.030.1(23)(c), (e) (2015).

Once it has been determined whether a showing of intent is required by Section 288.030.1(23), Missouri appellate courts will need to define the requisite mental states. When interpreting the prior version of Section 288.030.1(23), Missouri appellate courts defined the mental states according to their plain and ordinary meanings.<sup>46</sup> For example, the Missouri Court of Appeals defined “willful” as “proceeding from a conscious motion of the will; voluntary; knowingly, deliberate; intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.”<sup>47</sup>

Thus, under sub-paragraphs (a) and (d), a claimant is only disqualified from receiving unemployment benefits for misconduct if his mental state was such that he was aware, understanding, well-informed, deliberate or conscious of his conduct or failure to act.<sup>48</sup> On the other hand, under sub-paragraph (b), a claimant is only disqualified from receiving unemployment benefits for misconduct if he failed to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.<sup>49</sup>

### B. Policy Concerns

The Missouri Legislature’s enactment of Senate Bill Number 510 raises serious policy concerns. Missouri’s Unemployment Security Law intends to offset the negative effects that economic insecurity has on the “health, morals, and welfare” of Missouri’s workers.<sup>50</sup> By acting as a safety net, Missouri workers who are “unemployed through no fault of their own” are provided monetary assistance until they can obtain suitable employment.<sup>51</sup> As a result, even during periods of unemployment, benefit recipients maintain their financial well-being and continue to contribute to Missouri’s economy.

Furthermore, the current version of Section 288.030.1(23) does not benefit Missouri employers. The impetus for Senate Bill 510 was the increasing costs to employers during the financial recession, as an employers unemployment tax rates are based on whether their former employees are receiving benefits.<sup>52</sup> However, the prior version of Section 288.030.1(23) incentivized Missouri employers to conduct thorough hiring practices. Employers were penalized for hiring unqualified employees because subsequently discharged employees were typically eligible to receive unemployment benefits. Thus, employers incurred higher unemployment tax rates.

In contrast, the current version of Section 288.030.1(23) does not incentivize thorough hiring practices, and an increase in unqualified employee hires is likely to occur. In the long-term, such hiring practices do not yield profitable employees. In other words, the current version of Section

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<sup>46</sup> *McClelland v. Hogan Personnel, Inc.*, 116 S.W.3d 660, 666 (Mo. App. 2003).

<sup>47</sup> *Id.*

<sup>48</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>49</sup> *Id.*

<sup>50</sup> MO. REV. STAT. § 288.020.1 (2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Bill Broadens Definition of Worker 'Misconduct,'* COLUMBIA DAILY TRIBUNE, May 23, 2013, [http://m.columbiatribune.com/news/bill-broadens-definition-of-worker-misconduct/article\\_ac608618-c3cf-11e2-92bc-10604b9f6eda.html](http://m.columbiatribune.com/news/bill-broadens-definition-of-worker-misconduct/article_ac608618-c3cf-11e2-92bc-10604b9f6eda.html).

288.030.1(23) disincentivizes the hiring of profitable employees, which, ultimately, negatively affects an employer's bottom line.

In addition, the current version of Section 288.030.1(23) does not comport with the underlying purposes of Missouri's Employment Security Law. Unemployed workers are supposed to be eligible for unemployment benefits if unemployed through no fault of their own. However, the current version of Section 288.030.1(23) allows for the disqualification of claimants without any showing of intent. A claimant is disqualified from receiving benefits even if he violated an employer's rule unintentionally and absent carelessness or negligence. Yet, "fault" requires "[a]n error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement."<sup>53</sup> The current version of Section 288.030.1(23), therefore, does not always require a showing of fault, which is contrary to the Law's public policy.

#### IV. CONCLUSION

The Missouri Legislature's enactment of Senate Bill Number 510 marks a dramatic shift in policy concerns. Although Missouri's Employment Security Law seeks to aid Missouri workers unemployed through no fault of their own, the current version of Section 288.030.1(23) will likely disqualify claimants for faultless conduct. While the reform may lower unemployment tax rates for some employers, both claimants and their employers are likely to ultimately incur harmful consequences due to a broader disqualification provision. As misconduct cases under the current version of Section 288.030.1(23) reach appellate review, the courts will need to determine whether the reformed definition can fairly be enforced in accord with the public policy of Missouri's Employment Security Law.

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<sup>53</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).