

Summer 2013

## Mental States and Misconduct: The Supreme Court of Missouri Interprets an Important Disqualification from Unemployment Benefits

Brian Stair

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Brian Stair, *Mental States and Misconduct: The Supreme Court of Missouri Interprets an Important Disqualification from Unemployment Benefits*, 78 Mo. L. REV. (2013)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol78/iss3/9>

This Notes and Law Summaries is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## NOTE

# Mental States and “Misconduct”: The Supreme Court of Missouri Interprets an Important Disqualification from Unemployment Benefits

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

BRIAN STAIR \*

### I. INTRODUCTION

Unemployment insurance has been part of America’s social and economic tradition for several decades.<sup>1</sup> A significant increase in the number of unemployed Americans during the Great Depression led to the passage of the Social Security Act of 1935, which “established a system of state and federal unemployment insurance laws.”<sup>2</sup> Stemming from Title IX of the Social Security Act, the Missouri Unemployment Compensation Law was enacted in 1937<sup>3</sup> and imposed on employers a duty to pay taxes (contributions), beginning in January 1939, from which benefit payments would be made to qualified claimants.<sup>4</sup> Today, this set of unemployment insurance laws is known as Missouri Employment Security Law (MESL).<sup>5</sup>

In 2011, over 500,000 initial unemployment claims were filed with the Division of Employment Security (DES), a branch of the Missouri Depart-

---

\* B.A. History, Covenant College, 2011; J.D. Candidate, University of Missouri School of Law, 2014; Associate Member, *Missouri Law Review*, 2012-13; Senior Note and Comment Editor, 2013-14. I would like to express my gratitude to Associate Dean Rafael Gely for providing guidance, insight, and encouragement throughout the writing and revision of this Note.

1. Anthony G. Laramore, Note, *Missouri’s Unemployment Crisis: The Labor and Industrial Relations Commission Ignores the Missouri Supreme Court*, 55 ST. LOUIS U. L.J. 1469, 1469 (2011).

2. *Id.*

3. William C. Martucci, *Unemployment Compensation: The Missouri Employment Security Law – Background*, in 37 MO. PRAC., EMPLOYMENT LAW & PRACTICE § 14:1 (2011 ed.).

4. James R. Skain, *Unemployment Compensation*, in MISSOURI EMPLOYER-EMPLOYEE LAW 4-1, 4-4 (MoBarCLE Publ’ns, 3rd ed. 2008).

5. MO. REV. STAT. § 288.010 (2000).

ment of Labor and Industrial Relations.<sup>6</sup> During that year, more than \$710 million in unemployment insurance benefits were paid, and more than 42,000 appeals were filed following DES determinations.<sup>7</sup> In September 2012, Missouri had an unemployment rate of 6.9%, and more than 25,000 initial unemployment claims were filed in that month alone.<sup>8</sup> Overall, nearly 80,000 people received unemployment insurance benefits in September.<sup>9</sup>

Under MESL, claimants are disqualified from receiving unemployment benefits if they were terminated for “misconduct” connected with their work.<sup>10</sup> Although MESL provides a definition of what type of behavior constitutes “misconduct,”<sup>11</sup> Missouri appellate courts review decisions regarding the granting and denial of unemployment benefits,<sup>12</sup> and these courts have provided judicial interpretations of this statutory definition. Obviously, such interpretations have a practical effect on who does and does not qualify for and receive unemployment insurance payments. Furthermore, the potential effects of these decisions have practical implications in the realm of public policy.<sup>13</sup>

*Fendler v. Hudson Services* features the Supreme Court of Missouri’s first thorough discussion of section 288.030.1(23) and the Court’s decision illustrates a development in Missouri appellate court interpretation of the statute’s definition of “misconduct.”<sup>14</sup> This Note describes that definitional development and addresses its potential effect on future disputes in which employers are seeking to prove that an employee’s behavior constituted misconduct. Specifically, this Note focuses on how the Supreme Court of Missouri, by refusing to require a showing of “willfulness” to prove “misconduct,” has further complicated the use of mental states in “misconduct” analysis and potentially broadened the scope of what qualifies as statutory “misconduct.” Finally, this Note will identify a potential result of this broadened definition<sup>15</sup> and seek to show how this “*Fendler* effect” relates to two very important, competing public policy interests.

---

6. MO. DEP’T OF LABOR AND INDUS. RELATIONS: 2011 ANNUAL REPORT 16 (2011), available at <http://www.labor.mo.gov/documents/2011AnnualReport.pdf>.

7. *Id.*

8. *Data and Statistics*, MO. DEP’T LAB. & INDUS. REL., <http://www.labor.mo.gov/data/> (last visited Nov. 4, 2012); see also MO. DEP’T OF LABOR & INDUS. RELATIONS: 2012 ANNUAL REPORT 7 (2012), available at <http://www.labor.mo.gov/documents/2012AnnualReport.pdf>.

9. *Data and Statistics*, *supra* note 8.

10. MO. REV. STAT. § 288.050.2 (Supp. 2011).

11. § 288.030.1(23).

12. § 288.210 (2000).

13. Laramore, *supra* note 1, at 1470.

14. 370 S.W.3d 585 (Mo. 2012) (en banc).

15. The practical effect will be the increased denial of unemployment benefits to claimants. See *infra* Part V.B.

## II. FACTS AND HOLDING

The DES is the state agency that is responsible for administering the unemployment insurance benefit and tax program.<sup>16</sup> The DES collects tax contributions from employers and distributes unemployment benefits to individuals who qualify under Missouri law.<sup>17</sup> Hudson Services (Hudson) is a company that provides various property management services, including commercial cleaning and security.<sup>18</sup> Hudson hired Carol Fendler in 1994, and by 2008, Fendler held the position of "operations assistant" in Hudson's house-keeping department.<sup>19</sup>

One of Fendler's official duties was to verify the number of hours worked by janitorial employees on a given shift when those workers failed to properly clock in and out of work.<sup>20</sup> Prior to July 2008, Fendler's supervisor allowed her to complete this verification by calling the janitorial employees and simply recording into the payroll system the total number of hours the employees said they worked.<sup>21</sup> However, in July 2008, Pam Meister became Fendler's new supervisor, and although Hudson had no written policy on how to complete Fendler's duty of verification, Meister told Fendler that Fendler's usual method of verification would no longer be sufficient.<sup>22</sup> Instead, Meister instructed Fendler to record the specific times that the janitorial employees began and ended work on a given shift.<sup>23</sup> Further, Meister informed Fendler that she would need to get approval from the general manager if she wanted to merely record the total hours worked.<sup>24</sup> During 2009, Meister gave Fendler three warnings after Fendler failed to comply with the new required verification procedure; the third warning came on December 28, 2009.<sup>25</sup> Despite these formal warnings, Fendler failed to comply with the procedure on eleven separate occasions during the month of January, and on January 25, 2010, Hudson terminated Fendler.<sup>26</sup>

Subsequently, Fendler filed a claim for unemployment benefits with the DES, but in March 2010, in accordance with sections 288.030.1(23) and 288.050.2 of the Missouri Revised Statutes, the DES denied her benefits be-

---

16. *About the Division of Employment Security*, MO. DEP'T LAB. & INDUS. REL., <http://www.labor.mo.gov/DES/about.asp> (last visited Sep. 3, 2013).

17. *Id.*

18. *Fendler*, 370 S.W.3d at 587.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

cause it determined that she had been fired for “misconduct.”<sup>27</sup> Fendler appealed and received a hearing before the appeals tribunal, at which both she and Meister testified.<sup>28</sup> Fendler testified that she had received instructions regarding the new verification procedures from Meister and that she had failed to record the exact times.<sup>29</sup> However, Fendler claimed that the reason she had failed to do so was because she was so familiar with the old verification procedures under her former supervisor.<sup>30</sup> Fendler also denied having received a third warning in late 2009, and she claimed that she was unaware that her failure to comply with Meister’s instructions would threaten her job, adding that she would have followed the instructions had she known that she would be fired.<sup>31</sup> Meister testified that she warned Fendler on three occasions (including the warning in December 2009) that she needed to follow the new verification procedures, adding that she believed that Fendler’s continued failure to comply was caused by a failure to call the janitorial employees in the first place.<sup>32</sup>

Finding that Fendler had not engaged in misconduct, the tribunal reversed the DES’s decision to withhold unemployment benefits.<sup>33</sup> Hudson then appealed to Missouri’s Labor and Industrial Relations Commission (Commission), which serves as an appeals board for unemployment insurance cases.<sup>34</sup> Finding Meister’s testimony to be more credible than Fendler’s, the Commission concluded that Hudson had met its burden of proving that Fendler’s behavior constituted misconduct.<sup>35</sup> In coming to that conclusion, the Commission stated that Fendler’s “repeated failure to comply with explicit instructions takes her conduct outside the realm of mere mistakes or poor work performance and into the realm of insubordination.”<sup>36</sup>

Fendler next appealed to the Eastern District of the Missouri Court of Appeals, claiming that the Commission erred in disqualifying her from receiving unemployment insurance by finding that she had engaged in misconduct connected with her work.<sup>37</sup> Specifically, Fendler argued that the record only supported a finding that she acted negligently (not willfully) and that

---

27. *Id.* These specific Missouri statutory provisions are discussed more fully in the Legal Background section of this Note. See *infra* notes 59-62 and accompanying text.

28. *Fendler*, 370 S.W.3d at 587.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 588.

33. *Id.*

34. *Id.*; *About the Labor and Industrial Relations Commission*, MO. DEP’T LAB. & INDUS. REL., <http://labor.mo.gov/lirc/> (last visited Sep. 3, 2013).

35. *Fendler*, 370 S.W.3d at 588.

36. *Id.* (emphasis omitted).

37. *Fendler v. Hudson Servs.*, No. ED 95903, 2011 WL 4790628, at \*1 (Mo. App. E.D. Oct. 11, 2011), *transferred to* 370 S.W.3d 585 (Mo. 2012) (en banc).

negligent behavior cannot support a finding of misconduct.<sup>38</sup> Relying heavily on *Duncan v. Accent Marketing, LLC*, the Eastern District determined that the Commission had erred in finding that Fendler's actions constituted misconduct, reversing the Commission's decision and remanding "for the entry of an appropriate award."<sup>39</sup> In doing so, Judge Glenn Norton emphasized that a finding of misconduct always requires a showing of "willful intent" and deliberate or purposeful error (even where negligence is the basis for the finding of misconduct or where there is a showing of multiple violations of an employer's policy).<sup>40</sup> According to the court, the evidence was insufficient to conclude that Fendler deliberately or purposely failed to follow Meister's instructions.<sup>41</sup> However, while the case was still pending in the Eastern District, the Supreme Court of Missouri granted transfer of the case.<sup>42</sup>

The Supreme Court disagreed with the Eastern District and affirmed the Commission's determination that Fendler's actions constituted misconduct.<sup>43</sup> Emphasizing Fendler's admission that she would have complied with Meister's instructions had she known that she would lose her job, the Court concluded that sufficient evidence existed to establish Fendler's conduct as deliberate and "willful disregard" of her employer's instructions.<sup>44</sup> However, the Court made it clear that a lack of willfulness does not "preclude a finding of misconduct," pointing out that negligence (at a high degree or level of recurrence) can constitute statutory misconduct.<sup>45</sup> Further, the Court explicitly agreed with the Commission's statement that Fendler's repeated failure to

---

38. *Fendler*, 370 S.W.3d at 589.

39. *Fendler*, 2011 WL 4790628, at \*2-3.

40. *See id.* at \*2.

41. *Id.* at \*3.

42. *Fendler*, 370 S.W.3d at 588. The case was transferred in accordance with Mo. CONST. art. V, § 10, which states:

Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all cases coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as an original appeal.

Mo. CONST. art. V, § 10. Because the case was transferred while the case was still pending in the Court of Appeals, the Eastern District's opinion has not been published in the Southwestern Reporter (as of Sep. 3, 2013). Until the opinion is released for publication in the permanent law reports, it is subject to revision or withdrawal.

43. *Fendler*, 370 S.W.3d at 591.

44. *See id.* at 590-91.

45. *Id.* at 589.

follow instructions constituted insubordination, rather than mere mistake or poor work performance.<sup>46</sup> Therefore, the Supreme Court of Missouri held that the fact that Fendler knew Hudson's rule, repeatedly failed to comply after formal warnings, and admitted that she would have followed the rule had she known that she would lose her job, established competent and substantial evidence to support the Commission's conclusion that Fendler "engaged in misconduct by repeatedly and deliberately violating a reasonable, known and understood work rule."<sup>47</sup>

### III. LEGAL BACKGROUND

This section will discuss both the statutory and judicial understandings of "misconduct" as they relate to disqualification from unemployment benefits. The first subsection will cover policy concerns, funding mechanics, and eligibility issues related to Missouri's employment security statutes. The subsection will also describe the statutory definition "misconduct" and present a piece of proposed legislation that would alter that definition. The second subsection will describe the role that Missouri courts have played in determining what type of behavior constitutes "misconduct" in the context of unemployment compensation. Specifically, the second subsection will discuss past Missouri Court of Appeals decisions relating to "misconduct" mental states and other issues that are relevant to the *Fendler* decision and its doctrinal implications.

#### A. Missouri Employment Security Law

MESL declares that "[e]conomic insecurity due to unemployment is a serious menace to health, morals, and welfare of the people of this state resulting in a public calamity."<sup>48</sup> MESL, true to its original purpose,<sup>49</sup> uses state police power to compel the "setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own"<sup>50</sup> and states that its purpose is to "promote employment security both by increasing opportunities for jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment."<sup>51</sup> MESL is to be "liberally

---

46. *Id.* at 590.

47. *Id.* at 591. While this precise expression of the Court's holding seems rather insignificant, it is important to note that the true significance of *Fendler* is actually found in the Court's interpretation of section 288.030.1(23).

48. MO. REV. STAT. § 288.020.1 (2012).

49. See Skain, *supra* note 4.

50. § 288.020.1.

51. § 288.020.2.

construed" to accomplish this purpose.<sup>52</sup> More recently, the Missouri Department of Labor stated that the desired effect of paying unemployment benefits to qualified individuals is to help "maintain the economy of the state during periods of economic downturn by helping preserve the level of consumer purchasing power."<sup>53</sup>

In terms of funding, DES collects tax contributions from employers (based on the wages that company pays) on a quarterly basis.<sup>54</sup> Any benefit payments made to qualified insureds are generally charged against the employer's individual account.<sup>55</sup> Unemployment taxes in the state of Missouri are paid entirely by those employers that are liable to do so under MESL; that is, a company does not make deductions from its workers' wages in order to make these tax payments to DES.<sup>56</sup>

To be eligible for unemployment benefits, an individual must be able to work, available to work, and "actively and earnestly" seeking work.<sup>57</sup> Further, a claimant must register at and continue to report to an employment office.<sup>58</sup> MESL provides additional requirements in the form of various disqualifications.<sup>59</sup> One of these disqualifications relates to an employee's termination for "misconduct" connected with their work.<sup>60</sup> Section 288.050.2 states (in relevant part), "If a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work, such claimant shall be disqualified for waiting week credit and benefits . . ."<sup>61</sup>

Various provisions in MESL provide some guidance in determining what exactly constitutes "misconduct." For example, section 288.030.1(23) defines misconduct as: (1) "an act of wanton or willful disregard of the employer's interests"; (2) "a deliberate violation of the employer's rules"; (3) "a disregard of standards of behavior which the employer has the right to expect of his or her employee, or"; (4) "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>62</sup> Section 288.050.3 provides a concrete example by stating that "[a]bsenteeism or tardiness may constitute a rebuttable presumption of misconduct . . . if the discharge was the result of a

---

52. *Id.*

53. *About the Division of Employment Security, supra* note 16.

54. *See Missouri Dep't of Emp't Sec. Quarterly Contribution and Wage Report, available at* <http://www.labor.mo.gov/DES/Forms/4-7-AI.pdf>.

55. *About the Division of Employment Security, supra* note 16; *see also* MO. REV. STAT. § 288.090.3(4) (Supp. 2011); § 288.100.1(1).

56. *About the Division of Employment Security, supra* note 16.

57. § 288.040.1(2).

58. § 288.040.1(1).

59. *See* § 288.050.

60. § 288.050.2 (2012).

61. *Id.*

62. § 288.030.1(23) (Supp. 2011).

violation of the employer's attendance policy."<sup>63</sup> Further, depending on an employer's policy, showing up to work "with a detectable amount of alcohol or a controlled substance" may also constitute misconduct connected with work.<sup>64</sup> Finally, MESL has a clarifying provision stating that proving "misconduct" does not require evidence showing "impairment of work performance."<sup>65</sup>

Recent proposed legislation from Missouri's 2012 General Assembly sought to redefine statutory misconduct in MESL.<sup>66</sup> Missouri Senate Bill No. 816 (SB 816) seeks to replace the current definition in section 288.030.1(23) with the following:

(23) "Misconduct," regardless of whether the misconduct occurs at the workplace or during working hours, includes:

(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) Violation of an employer's no-call, no-show policy; chronic absenteeism or tardiness in violation of a known policy of the employer; or one or more unapproved absences following a written reprimand or warning relating to an unapproved absence;

(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 rules requirements; or

---

63. § 288.050.3.

64. § 288.045.1.

65. § 288.046.1.

66. S.B. 816, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

b. The rule is not lawful.<sup>67</sup>

Additionally, the proposed legislation would entirely remove the provision relating misconduct and absenteeism that is currently found in section 288.050.3.<sup>68</sup>

### *B. Missouri Courts' Decisions Regarding "Misconduct"*

MESL, the Missouri Constitution, and Missouri case law establish a framework for judicial review of the Commission's decisions by providing the applicable standard of review, burden of proof, and statutory construction. Article V of the Missouri Constitution grants the courts the ability to review these types of administrative decisions and to determine whether those decisions "are supported by competent and substantial evidence upon the whole record."<sup>69</sup> Also giving insight into the standard of review is section 288.210, which states, "The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law."<sup>70</sup> The courts review questions of law *de novo*, and determining whether the Commission's findings support a conclusion that the employee engaged in misconduct is a question of law.<sup>71</sup> Although the claimant usually has the burden of showing that he or she is entitled to unemployment insurance, the burden shifts to the employer to prove misconduct if the employer asserts that the claimant was terminated because of misconduct.<sup>72</sup> Further, the employer must prove the employee's misconduct by a preponderance of the evidence.<sup>73</sup> Finally, in accordance with the liberal construction instruction in section 288.020, Missouri courts are to construe disqualification provisions "strictly against the disallowance of benefits."<sup>74</sup>

The Missouri Court of Appeals has delivered numerous opinions regarding unemployment benefits that provide guidance by expressing a legal description of "misconduct connected to work," especially in the context of following the employer's rules, standards, or instructions (the *Fendler* con-

---

67. *Id.*

68. *Id.*

69. MO. CONST. art. V, § 18.

70. § 288.210 (2000).

71. *Tenge v. Wash. Grp. Int'l, Inc.*, 333 S.W.3d 492, 496 (Mo. App. E.D. 2011).

72. *Evans v. Div. of Emp't Sec.*, 354 S.W.3d 220, 224 (Mo. App. W.D. 2011).

73. *Wooden v. Div. of Emp't Sec.*, 364 S.W.3d 750, 753-754 (Mo. App. W.D. 2012).

74. *St. John's Mercy Health Sys. v. Div. of Emp't Sec.*, 273 S.W.3d 510, 514 (Mo. 2009) (en banc) (quoting *Mo. Div. of Emp't Sec. v. Labor & Indus. Relations Comm'n of Mo.*, 651 S.W.2d 145, 148 (Mo. 1983) (en banc)) (internal quotation marks omitted).

text).<sup>75</sup> The court has also stated that “the violation of an employer’s reasonable work rule can constitute misconduct.”<sup>76</sup> In fact, “[a] single instance of intentional disobedience of an employer’s directive can constitute misconduct.”<sup>77</sup> However, while “a reasonable work rule serves as a relevant factor in determining if the behavior at issue is in fact misconduct,” the violation of a work rule is not “dispositive proof of misconduct connected with work.”<sup>78</sup> Finally, the courts have provided some perspective by pointing out that “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>79</sup> For example, the Court of Appeals has made it clear that while “[p]oor workmanship, lack of judgment, or the inability to do the job” may result in termination, these qualities “do not disqualify a claimant from receiving benefits on the basis of misconduct.”<sup>80</sup> Therefore, an employee’s violation of an employer’s rule, standard, or policy does not necessarily constitute misconduct that disqualifies the claimant from unemployment benefits.

An important aspect of the Missouri courts’ discussion of statutory misconduct is the employee’s mental state relating to a given violation. Specifically, does proving statutory misconduct always require a showing of willful-

75. See *Tolliver v. Friend Tire Co.*, 342 S.W.3d 428 (Mo. App. E.D. 2011); *Noah v. Lindbergh Inv., LLC*, 320 S.W.3d 212 (Mo. App. E.D. 2010); *Williams v. Enterprise Rent-a-Car Shared Servs., LLC*, 297 S.W.3d 139 (Mo. App. E.D. 2009); *McClelland v. Hogan Pers., LLC*, 116 S.W.3d 660 (Mo. App. W.D. 2003).

76. *Williams*, 297 S.W.3d at 144 (citing *Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731, 740 (Mo. App. E.D. 2001)). In *Williams*, the court determined that the Commission erred in finding that the employee, a single parent who had been terminated in accordance with her employer’s attendance policy, engaged in misconduct by repeatedly arriving late to work. *Id.*

77. *Noah*, 320 S.W.3d at 216 (quoting *Finner v. Americold Logistics, LLC*, 298 S.W.3d 580, 584 (Mo. App. S.D. 2009)) (internal quotation marks omitted). In *Noah*, the court found that the employee had engaged in willful misconduct by failing to follow his employer’s reasonable directive to report to work (after denying his request to take time off). *Id.* at 217.

78. *McClelland*, 116 S.W.3d at 665 (quoting *Baldor Elec. Co. v. Reasoner*, 66 S.W.3d 130, 134 (Mo. App. E.D. 2001)) (internal quotation marks omitted). In *McClelland*, the court reversed the Commission’s finding that a terminated employee had engaged in misconduct by failing to follow his employer’s inspection policy (which had resulted in loss and damage to company property). *Id.* at 666.

79. *Williams*, 297 S.W.3d at 144 (citing *Pemiscot Cnty. Mem’l Hosp. v. Mo. Labor & Indus. Relations Comm’n*, 897 S.W.2d 222, 226 (Mo. App. S.D. 1995)).

80. *Tolliver*, 342 S.W.3d at 431 (Mo. App. E.D. 2011) (quoting *Hoover v. Cmty. Blood Ctr.*, 153 S.W.3d 9, 13 (Mo. App. W.D. 2005)) (internal quotation marks omitted). In *Tolliver*, the court determined that the Commission erred in finding that an employee truck driver had engaged in misconduct by speeding on the highway and unintentionally damaging the truck when he drove under an overpass that was not high enough for the truck to clear. *Id.* at 432.

ness? Several decisions from the Court of Appeals have required that there be "some form of 'willfulness' on behalf of the claimant" in order to constitute misconduct.<sup>81</sup> For instance, the Eastern District has stated that the initial requirement for proving misconduct is that the employee must have "in some way willfully violate[d] the rules and standards of the employer."<sup>82</sup> Therefore, "[e]ven where negligence is alleged as the basis for misconduct, there must be a showing of willful intent."<sup>83</sup> That exact quotation (from *Duncan v. Accent Marketing, LLC*) was recited by the Eastern District's discussion of the *Fendler* situation, quoting *Duncan* again later to add that a claimant cannot properly be found to have engaged in misconduct "[w]ithout evidence that the claimant deliberately or purposefully erred."<sup>84</sup> Therefore, by equating "willful intent," deliberation, and purposefulness, the *Duncan* understanding of "willfulness" allows other cases that do not explicitly use the term "willful" to be read in a way that requires misconduct to be proven by a showing of "willfulness." For instance, one case stated that all four types of statutory "misconduct" require a finding of "culpable intent" on the part of the employee,<sup>85</sup> adding that section 288.030.1(23) can only be satisfied if the employer presents evidence "that the employee deliberately or purposefully erred."<sup>86</sup> Under *Duncan*, this last standard could effectively be considered a *de facto* willfulness requirement.

However, at other times, the Court of Appeals has not required a showing of "willfulness" to prove misconduct. Juxtaposing "intent" and "negligence," the Western District has stated that proving misconduct requires "a finding of some intent on the part of the discharged employee *or* repeated negligent acts amounting to culpable conduct."<sup>87</sup> Distinguishing between

---

81. See *Bolden v. Cura, Inc.*, 350 S.W.3d 878, 881 (Mo. App. E.D. 2011); *Brinker v. N & R of Jonesburg, Inc.*, 350 S.W.3d 874, 877 (Mo. App. E.D. 2011); *Fendler v. Hudson Servs.*, No. ED 95903, 2011 WL 4790628, at \*2 (Mo. App. E.D. Oct. 11, 2011), *transferred to* 370 S.W.3d 585 (Mo. 2012) (en banc); *Scrivener Oil Co. v. Crider*, 304 S.W.3d 261, 268 (Mo. App. S.D. 2010) (quoting *Silman v. Simmons' Grocery & Hardware, Inc.*, 204 S.W.3d 754, 756 (Mo. App. S.D. 2006)) (internal quotation marks omitted); *Duncan v. Accent Mktg., LLC*, 328 S.W.3d 488, 492 (Mo. App. E.D. 2010); *Wieland v. St. Anthony's Med. Ctr.*, 294 S.W.3d 77, 79 (Mo. App. E.D. 2009); *Frisella v. Deuster Elec., Inc.*, 269 S.W.3d 895, 899 (Mo. App. E.D. 2008); *Dobberstein v. Charter Commc'ns, Inc.*, 241 S.W.3d 849, 852 (Mo. App. E.D. 2007); *Murphy v. Aaron's Auto. Prods.*, 232 S.W.3d 616, 622 (Mo. App. S.D. 2007); *White v. Wackenhut Corp.*, 208 S.W.3d 916, 918 (Mo. App. E.D. 2006).

82. *Wieland*, 294 S.W.3d at 79 (citing *White*, 208 S.W.3d at 918).

83. *Duncan*, 328 S.W.3d at 492 (citing *Wieland*, 294 S.W. 3d at 79).

84. *Fendler*, 2011 WL 4790628, at \*2 (quoting *Duncan*, 328 S.W. 3d at 492).

85. *Wooden v. Div. of Emp't Sec.*, 364 S.W.3d 750, 753 (Mo. App. W.D. 2012) (citing *Bostic v. Spherion Atl. Workforce*, 216 S.W.3d 723, 725 (Mo. App. W.D. 2007)).

86. *Id.* (citing *Duncan*, 328 S.W. 3d at 492).

87. *Harris v. Div. of Emp't Sec.*, 350 S.W.3d 35, 42 (Mo. App. W.D. 2011) (emphasis added) (quoting *Bostic*, 216 S.W.3d at 725).

“willfulness” and “knowledge,” the Southern District has stated that an employer may prove misconduct by showing that “the claimant willfully violated the rules or standards of the employer *or* that the claimant knowingly acted against the employer’s interest.”<sup>88</sup> Further, other cases have discussed and evaluated an employee’s conduct in terms of willfulness without expressly stating that willfulness is required to prove misconduct.<sup>89</sup> In *Fendler*, the Supreme Court of Missouri relied heavily on these two previously-cited cases, *Freeman v. Gary Glass & Mirror, LLC* and *Moore v. Swisher Mower and Mach. Co., Inc.*<sup>90</sup>

Related to the question of whether willfulness is required is the question of what “willful” even means in this context. A few Missouri Court of Appeals decisions have tried to answer that question. Both the Southern and Western Districts have defined the term “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>91</sup> However, the use of this definition has not been widespread.

It is within this uncertain legal context of definitional mental states that the Supreme Court of Missouri handed down the *Fendler* decision. Instead of clearing things up, the Court established a poorly-defined distinction within the statutory definition of misconduct that could potentially lead to a broader practical application of misconduct analysis.

#### IV. INSTANT DECISION

##### A. Majority

In *Fendler*, the Supreme Court of Missouri affirmed the Commission’s decision to deny Carol Fendler’s claim for unemployment benefits.<sup>92</sup> Specifically, the Court found that competent and substantial evidence existed to support the Commission’s determination that Fendler had engaged in misconduct.<sup>93</sup> Focusing on this notion of statutory “misconduct,” the Court re-

---

88. *Freeman v. Gary Glass & Mirror, LLC*, 276 S.W.3d 388, 391 (Mo. App. S.D. 2009) (emphasis added) (citing *Croy v. Div. of Emp’t Sec.*, 187 S.W.3d 888, 892 (Mo. App. S.D. 2006)).

89. *See Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731, 739-40 (Mo. App. E.D. 2001).

90. *See infra* notes 108-116 and accompanying text.

91. *Butrick v. Peterbilt of Springfield, Inc.*, 373 S.W.3d 473, 479 (Mo. App. S.D. 2012) (quoting *Lightwine v. Republic R-III Sch. Dist.*, 339 S.W. 585, 590 (Mo. App. S.D. 2011)) (internal quotation marks omitted); *McClelland v. Hogan Pers., LLC*, 116 S.W.3d 660, 666 (Mo. App. W.D. 2003) (quoting *Black’s Law Dictionary* 1599 (6th ed. 1990)) (internal quotation marks omitted).

92. *Fendler v. Hudson Servs.*, 370 S.W.3d 585, 591 (Mo. 2012) (en banc).

93. *Id.*

jected Fendler's negligence arguments, concluding: (1) negligence (without willfulness) can constitute misconduct, and (2) Fendler's conduct constituted willful disregard of her employer's rule.<sup>94</sup>

After reviewing the facts and standard of review, Judge Laura Denvir Stith began the majority's analysis by making some introductory remarks regarding both unemployment insurance and misconduct.<sup>95</sup> The Court stated that "[t]he purpose of unemployment benefits is to provide financial assistance to people who are unemployed through no fault of their own."<sup>96</sup> The Court then quoted Missouri's definition of misconduct as it relates to work.<sup>97</sup> Following these introductory statements, the Court addressed Fendler's argument that: (1) the record only supports a finding that she acted negligently (not that she acted willfully), and (2) "negligence cannot support a finding of misconduct" (only willful conduct).<sup>98</sup> The Court stated that her argument failed for two reasons.<sup>99</sup>

In rejecting Fendler's argument, the Court first addressed the notion that negligence cannot support a finding of misconduct and that a showing of willfulness is required.<sup>100</sup> The Court began its rejection of Fendler's proposition by stating, "[E]ven had the record not supported the commission's finding that Ms. Fendler's conduct was willful, that would not preclude a finding of misconduct."<sup>101</sup> More specifically, the Court stated that the statutory definition of "misconduct" includes more than "just a willful violation of employer's rules."<sup>102</sup> While conceding that "simple negligence" never constitutes misconduct,<sup>103</sup> the Court emphasized the existence of the negligence prong in section 288.030.1(23), reciting the clause in its entirety.<sup>104</sup> Immediately following, the Court concluded, "Therefore, an employee may engage in misconduct under the statute by repeatedly choosing to act in what amounts to reckless disregard of the employer's rules or the employee's duties or obligations."<sup>105</sup>

The Court then addressed Fendler's claim that the record did not support a finding that she behaved willfully (only that she behaved negligently).<sup>106</sup> In rejecting this position, the Court found that the record supported the Commis-

---

94. *Id.* at 589, 590-91.

95. *Id.* at 589.

96. *Id.* (citing MO. REV. STAT. § 288.020 (2000)).

97. *Id.* (quoting § 288.030 (Supp. 2005)).

98. *Id.* at 589.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (citing *Yellow Freight Sys. v. Thomas*, 987 S.W.2d 1, 4 (Mo. App. W.D. 1998)).

104. *Id.* at 589 (quoting MO. REV. STAT. § 288.030.1(23) (Supp. 2005)).

105. *Id.* at 589-90.

106. *Id.* at 590.

sion's determination that Fendler's repeated failure to follow Meister's explicit instructions "[took] her conduct outside the realm of mere mistakes or poor work performance and into the realm of insubordination."<sup>107</sup> Harkening back to the Commission's findings, the Court stated that "an employee's repeated violation of a known, understood and reasonable work rule, in and of itself, can provide competent and substantial evidence that the employee willfully or deliberately violated the rule."<sup>108</sup> To exemplify this rule, the Court examined two previously-mentioned "misconduct" cases decided by the Missouri Court of Appeals in recent years, *Freeman* and *Moore*.<sup>109</sup>

In *Freeman*, the Court noted, the employee was terminated based on his work performance, which had declined abruptly after three years of satisfactory performance.<sup>110</sup> The Court noted that this decline in performance included improperly installing doors on two separate occasions, turning away a job that the company could have performed, failing to double check the measurements of a mirror (which he had been instructed to do by his supervisor), and recommending a product to a customer after he had been told not to do so.<sup>111</sup> The Court concluded its discussion of *Freeman* by adding that the Court of Appeals, in finding that competent and substantial evidence existed to support the Commission's determination that Freeman had deliberately violated the employer's instructions, stated that a "repeated failure to follow the Employer's specific instructions, without any explanation . . . speaks just as loudly about the willfulness of Claimant's actions as [does a] . . . verbal refusal [to follow instructions]."<sup>112</sup>

In *Moore*, as the Supreme Court pointed out, the employee was terminated after failing to contact his employer and explain his absence from work for three consecutive days.<sup>113</sup> In fact, the Court added, the employee had been arrested for assault and held in jail for those three days.<sup>114</sup> The employer maintained an absentee policy that required employees to call in each day if they were going to miss work, and it was the employee's failure to comply with this policy, not the arrest itself, that resulted in his termination.<sup>115</sup> The Court emphasized that despite the employee's argument that his failure to call was simply bad judgment, the Court of Appeals held that his knowledge of the policy and failure to comply for three straight days supported a finding of misconduct.<sup>116</sup>

---

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting *Freeman v. Gary Glass & Mirror, LLC*, 276 S.W.3d 388, 393 (Mo. App. S.D. 2009)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Applying its understanding of *Freeman* and *Moore*'s discussion of misconduct, the Court determined that Fendler willfully disregarded her employer's instructions.<sup>117</sup> In fact, the Court explicitly stated that the facts supporting a finding of willful disregard were stronger in Fendler's situation than they had been in either the *Freeman* or *Moore* cases.<sup>118</sup> In reaching that conclusion, the Court pointed out that Fendler failed to comply with Meister's instructions on at least eleven separate occasions after having received a third formal warning.<sup>119</sup> Further, the Court emphasized Fendler's admissions that: (1) she knew that Meister wanted her to record the exact start and end times of the janitorial employee's shifts; (2) she knew how to comply with Meister's instructions; and (3) she would have complied with Meister's instructions if she had known that her job was in jeopardy.<sup>120</sup> Therefore, the majority concluded, the facts proved that Fendler's failure to follow Meister's instructions "was not the result of negligence or poor judgment but a deliberate choice to disregard the instructions."<sup>121</sup>

### B. Dissent

In his dissent, Judge Richard Teitelman, like the Eastern District, expressed disagreement with the Commission's finding of misconduct.<sup>122</sup> By strictly construing the statutory definition of misconduct "against the disallowance of benefits," Teitelman found that Fendler's behavior only established negligence.<sup>123</sup> Specifically, Teitelman stated that Fendler's actions did not constitute misconduct because the evidence failed to show that her behavior established deliberate disregard of her employer's interests.<sup>124</sup>

After stating that the determination of work-related misconduct is a question of law and that the Court was not bound by the Commission's legal conclusions or application of law to facts, Teitelman cited case law and a relevant statute to propose his preferred method of interpreting MESL.<sup>125</sup> Teitelman stated that a determination of whether misconduct exists should be guided by the Missouri legislature's "mandate" that MESL "shall be liberally construed to accomplish its purpose to promote employment security . . . by providing compensation to individuals in respect to their unemployment."<sup>126</sup>

---

117. *Id.* at 590-91.

118. *Id.* at 590.

119. *Id.* at 590-91.

120. *Id.* at 591.

121. *Id.*

122. *Id.* at 592 (Teitelman, J., dissenting).

123. *Id.* at 591-92.

124. *Id.*

125. *Id.* at 591.

126. *Id.* (quoting MO. REV. STAT. § 288.020 (2000)).

Therefore, “Disqualifying provisions are construed strictly against the disallowance of benefits.”<sup>127</sup>

In applying a strict construction of the word “misconduct,” Teitelman concluded that the Commission erred in finding that Fendler engaged in misconduct and in denying her claim for unemployment benefits.<sup>128</sup> While conceding that Fendler did indeed fail to record start and end times as instructed, Teitelman found no evidence that directly supported a determination that Fendler acted willfully as opposed to negligently.<sup>129</sup> Specifically, Teitelman characterized the determination of willfulness as “drawing a disputed inference in favor of the employer.”<sup>130</sup> Although he admitted that violating “an employer’s reasonable work rule can constitute misconduct,” Teitelman emphasized that there is a “vast distinction” between the type of conduct that justifies the termination of an employee and the type of conduct that constitutes misconduct for the purposes of denying unemployment insurance.<sup>131</sup> Therefore, Teitelman concluded, Fendler’s failure to comply with Hudson’s verification process “does not necessarily provide a basis for disqualifying her from receiving unemployment benefits.”<sup>132</sup> In conclusion, Teitelman stated that he would strictly construe MESL as “required” by section 288.020.2, holding that the facts merely established negligence and that the Commission erred in determining that Fendler engaged in “willful misconduct” that disqualified her from receiving unemployment benefits.<sup>133</sup>

The majority of the Supreme Court of Missouri held that because Fendler knew her employer’s rule and how to comply with it, violated the rule on eleven different occasions after receiving three warnings, and admitted that she would have complied had she known that her job was in danger, competent and substantial evidence existed to support the Commission’s conclusion that Fendler engaged in misconduct by deliberately and repeatedly failing to comply with Hudson’s reasonable, known, and understood work rule.<sup>134</sup>

---

127. *Id.* (quoting *St. John’s Mercy Health Sys. v. Div. of Emp’t Sec.*, 273 S.W.3d 510, 514 (Mo. 2009) (en banc)).

128. *Id.* at 591.

129. *Id.* at 591-92.

130. *Id.* at 592.

131. *Id.* (quoting *Williams v. Enter. Rent-A-Car Shared Servs.*, 297 S.W.3d 139, 144 (Mo. App. E.D. 2009) (citing *Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731, 740 (Mo. App. E.D. 2001); *Pemiscot Cnty. Mem. Hosp. v. Mo. Labor & Indus. Relations Comm’n*, 897 S.W.2d 222, 226 (Mo. App. S.D. 1995))).

132. *Id.* at 592. In support of this proposition, Teitelman points to *Duncan* and *Frisella*, cases in which an employee’s failure to follow instructions or heed repeated warnings did not establish misconduct. *Id.*

133. *Id.*

134. *Id.* at 590-91.

## V. COMMENT

Although the Supreme Court of Missouri has previously heard cases relating to "misconduct connected with work" in the context of unemployment benefits,<sup>135</sup> *Fendler v. Hudson Services* provides the Supreme Court's first thorough discussion of the statutory definition of misconduct since its codification in section 288.030.1(23).<sup>136</sup> In taking the opportunity to interpret this specific provision, the Court attempted to clarify the statute's mental state requirements. The result was a broadening of misconduct analysis, and the potential long-term effects of this expansion bring to light important competing policy considerations.

A. *The Mental States of Misconduct*

Culpable mental states play an important role in determining whether an employee has engaged in statutory "misconduct."<sup>137</sup> However, for being such determinative factors, the distinctions between these mental state standards are unclear. Specifically, section 288.030.1(23) uses the terms "willful," "deliberate," and "negligence in such degree or recurrence as to manifest culpability [or] wrongful intent."<sup>138</sup> How distinct are these standards? To a certain extent, can the latter two be equated with some level of willfulness? As mentioned above, the Missouri Court of Appeals has already arguably equated "willfulness" and "deliberateness" to some extent.<sup>139</sup> Further, while "simple negligence" is admittedly different than "intent," the type of negligence that manifests "wrongful intent" as described in the statute sounds ra-

---

135. See, e.g., *M.F.A. Milling Co. v. Unemp't Comp. Comm'n*, 169 S.W.2d 929, 930 (Mo. 1943) ("The sole question is whether the claimant was discharged for 'misconduct connected with his work' and thereby disqualified from receiving unemployment benefits."). Despite having a similar issue on appeal, this case was decided before the modern definition of "misconduct" was codified in section 288.030 and therefore does not contain a discussion of the four-pronged definition found discussed in *Fendler*. See *id.*

136. The modern definition of "misconduct" was first codified in section 288.030.1 in 2005 under subsection 24. H.B. 1268, 92nd Gen. Assemb., 2d Reg. Sess. (Mo. 2004). In 2006, section 288.030 was amended, and the definition now falls under subsection 23. H.B. 1456, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006). In 2007, after the definition's codification, the Supreme Court of Missouri ruled on a determination by the Commission that an employee had engaged in misconduct and was disqualified from unemployment benefits; however, in affirming the Commission's decision, the Court did not provide any analysis or discussion of statutory misconduct, stating that "[a]n opinion would have no precedential value." *Williams v. Cent. Mo. Pizza, Inc.*, 225 S.W.3d 431, 431 (Mo. 2007) (en banc).

137. See MO. REV. STAT. § 288.030.1(23) (Supp. 2011).

138. *Id.*

139. See *supra* notes 83-86 and accompanying text.

ther willful. Why would this distinction be made? The point is this: on its own, the statute can be confusing as to mental states.<sup>140</sup>

Prior to *Fendler*, Missouri case law had not provided a uniform interpretation of this statute. As stated above, while several Court of Appeals decisions had required a showing of willfulness to prove misconduct,<sup>141</sup> others had not,<sup>142</sup> and further, no consensus on the exact meaning of “willfulness” had emerged.<sup>143</sup> After having stayed silent on the matter for so long, the Supreme Court of Missouri had an opportunity to clarify what these mental state standards meant and to set the record straight on the requirements for finding misconduct.

In *Fendler*, the Supreme Court determined that a finding of willfulness was not required to prove misconduct.<sup>144</sup> The Court clearly stated that “even had the record not supported the commission’s finding that Ms. Fendler’s conduct was willful, that would not preclude a finding of misconduct.”<sup>145</sup> By then emphasizing the negligence prong of section 288.030.1(23), the Court made an express distinction between “willfulness” and the type of “negligence” that manifests culpability.<sup>146</sup> In making this distinction, the Court refused to require a showing of willfulness, finding that negligence (without willfulness) can indeed support a finding of misconduct.<sup>147</sup> However, in coming to this decision, the Court failed to recognize or mention any of the numerous Court of Appeals decisions<sup>148</sup> that had come to the opposite conclusion.

By making this type of statutory “negligence” separate and distinct from “willfulness,” the Court further muddied the waters of misconduct mental states. Specifically, the difference between “simple negligence” (which does not constitute misconduct)<sup>149</sup> and the statutory prong of “negligence” (which does constitute misconduct), neither of which requires “willfulness,” is now

140. For the remainder of the Note (unless otherwise noted), any use of the term “negligence” refers to the type of statutory negligence that constitutes “misconduct” under section 288.030.1(23).

141. See *supra* note 80 and accompanying text.

142. See *supra* notes 86-89 and accompanying text.

143. *Duncan* seemed to equate willfulness with intent and deliberation. See *supra* notes 80-81 and accompanying text. However, other cases have used a seemingly over-inclusive definition (from Black’s Law Dictionary) that includes the terms “knowingly,” “deliberate,” “intentional,” and “purposeful” and the phrase “not accidental or involuntary.” See *supra* note 88 and accompanying text.

144. *Fendler v. Hudson Servs.*, 370 S.W.3d 585, 589 (Mo. 2012) (en banc).

145. *Id.*

146. *Id.* at 589-90.

147. See *id.*

148. See *supra* note 80.

149. See *supra* note 102 and accompanying text.

unclear.<sup>150</sup> In an attempt to explain what type of behavior may fall under the statute's "negligence" prong, the Court stated, "[A]n employee may engage in misconduct under the statute by repeatedly choosing to act in what amounts to reckless disregard of the employer's rules or the employee's duties or obligations."<sup>151</sup> In other words, the Court attempted to clarify this statutory "negligence" standard by throwing another mental state into the mix: recklessness.<sup>152</sup> Under this interpretation, a single prong of section 288.030.1(23) now involves three mental states: "negligence," "intent," and "recklessness." Therefore, determining whether an employee's negligent conduct establishes misconduct is now more confusing than ever.

Although the Supreme Court established that "willfulness" and statutory "negligence" are separate and distinct, the Court failed to provide a clear practical understanding of what "willfulness" means and how it is different from statutory "negligence." As mentioned above, the Court stated that "repeatedly choosing to act" in a way that recklessly disregards an employer's rules satisfies the "negligence" prong.<sup>153</sup> However, in determining that Fendler's behavior was "willful," the Court later stated that Fendler's failure to follow Meister's instructions "was not the result of negligence or poor judgment but a deliberate choice to disregard the instructions."<sup>154</sup> Both of these quotations emphasize Fendler's choice. Is the only difference between "willfulness" and statutory "negligence" the distinction between a deliberate choice and a choice amounting to recklessness? By using the term "deliberate" in the context of "willfulness," the Court seems to find some common ground with *Duncan*, but in any case, a distinction based on these two kinds of choices seems to be too obscure. To a certain extent, every choice is deliberate; it would be hard to differentiate between a choice that amounts to a reckless disregard of a rule and a deliberate choice to break a rule. Either way, the employee is choosing to break a rule. Although employers will jump at the chance to use the term "reckless" and differentiate it from "willfulness" in an effort to prove misconduct,<sup>155</sup> the practical distinction is not very clear. Therefore, this seems to be a failed attempt to clearly explain "willfulness" as it differs from statutory "negligence." The only thing that can be said with certainty after *Fendler* is that "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" does not fall under the

---

150. Comparatively, the difference between these two concepts would be clearer if proving "misconduct" (including under the "negligence" prong) required a showing of "willfulness."

151. *Fendler*, 370 S.W.3d at 589-90.

152. Missouri's criminal code describes recklessness as "conscious disregard." MO. REV. STAT. § 562.016.4 (Supp. 2009).

153. *Fendler*, 370 S.W.3d at 589-90.

154. *Id.* at 590-91.

155. *See infra* note 158.

statutory understanding of “willful.”<sup>156</sup> In sum, while *Fendler* does provide an example of “willful” behavior, the Court’s own analysis merely provides an obscure distinction between the terms “willful” and statutory “negligence,” and the Court’s failure to discuss the Court of Appeals’ past uses of “willful” leaves the exact meaning of the term unclear.

By distinguishing between “willfulness” and “negligence” in this context, stating that a finding of misconduct need not include a finding of “willfulness,” and blurring the line between “simple negligence” and the statutory negligence prong, the *Fendler* decision has potentially broadened the definition of misconduct.<sup>157</sup> A broadened definition could make it more difficult for unemployed individuals to qualify for unemployment benefits and therefore, over time, reduce the overall number of individuals that receive unemployment insurance (UI). Although, as mentioned above, the specific, practical distinction between these particular forms of statutory “willfulness” and “negligence” remains unclear, the most obvious takeaway from *Fendler* for employers seems to be that negligence without willfulness (which can be reduced to the term “recklessness”)<sup>158</sup> can establish misconduct. In future cases, employers and the DES will be able to emphasize the Supreme Court of Missouri’s determination that employee misconduct can be proven without a showing of willfulness. In fact, this has already occurred.<sup>159</sup> It logically follows that, if the Missouri Court of Appeals can no longer require a showing of willfulness, it is possible that certain non-willful forms of negligence that would not have been found to constitute misconduct before *Fendler* will now in fact be found to establish misconduct, disqualifying many future

---

156. See *supra* notes 144-147 and accompanying text.

157. See Brief of Respondent, Mo. Dept. of Labor and Indus. Relations, Div. of Emp’t Sec., *Corbin v. Alliance Fire Prot., LLC*, 391 S.W.3d 513 (Mo. App. W.D. 2013) (No. WD74652), 2012 WL 3931052, at \*21 (“The Missouri Supreme Court has now expanded the analysis to be used in determining whether a claimant’s actions amount to misconduct under the Missouri Employment Security Law.”).

158. See Brief of Respondent Div. of Emp’t Sec., *Rankin v. Laclede Gas Co.*, 388 S.W.3d 599 (Mo. App. E.D. 2012) (No. ED98410), 2012 WL 4372415, at \*14-15 (stating that a finding of misconduct requires proof that the employee willfully violated the employer’s rules or was reckless under the negligence prong of section 288.030.1(23)); Brief of Respondent Div. of Emp’t Sec., *Nunn v. Div. of Emp’t Sec.*, 388 S.W.3d 644 (Mo. App. W.D. 2013) (No. WD75213), 2012 WL 5248671, at \*10; Brief of Respondent, *supra* note 157, at \*21 (emphasis added) (citing *Fendler*, 370 S.W.3d at 589-90) (“[W]ork-related misconduct must involve some form of willfulness or recklessness for the claimant to be disqualified.”). The brief goes on to recite the “reckless choice” quotation from *Fendler*. *Id.* at \*22.

159. See Brief of Respondent, *supra* note 157, at \*21; Brief of Respondent, *Sunny Hill, Inc., Harris v. Sunny Hill, Inc.*, 387 S.W.3d 409 (Mo. App. E.D. 2012) (No. ED 98226), 2012 WL 4370221, at \*19 (“As the Supreme Court of Missouri has recently clarified, willfulness or intentional conduct is not necessarily a prerequisite for a finding of misconduct.”).

claimants from unemployment benefits.<sup>160</sup> Only time will tell if the *Fendler* decision will dramatically increase the number of unemployed individuals who will be found to have engaged in misconduct, thereby reducing the number of individuals that receive unemployment compensation. The Supreme Court's analysis has directly affected the outcome of at least one misconduct case so far.<sup>161</sup>

In summary, the *Fendler* decision made it clear that proving misconduct does not require a showing of "willfulness."<sup>162</sup> By refusing to require "willfulness" and distinguishing between "willfulness" and statutory "negligence," the Supreme Court blurred the line between "simple negligence" and the type of "negligence" that constitutes misconduct under the statutory "negligence" prong.<sup>163</sup> The Court does provide "recklessness" as a guiding principle for the "negligence" prong, but the introduction of this mental state term is a complicating factor in itself. Additionally, the Court failed to clearly explain its obscure and poorly-defined distinction between "willfulness" and statutory "negligence," both of which seem to involve choice. All of these factors could result in a broadened definition of "misconduct," which may make it harder for employees to qualify for unemployment compensation in the future and could eventually reduce the overall number of individuals who receive these benefits.

### B. Policy Considerations

If the *Fendler* decision has the overall effect of excluding many individuals from receiving unemployment insurance and reducing the number of individuals who receive such benefits, this effect would be relevant to two competing policy considerations stemming from the realm of unemployment compensation.

---

160. After all, many of the appellate court decisions that required a showing of willfulness (cited *supra* note 81) ended up holding that the employee's behavior did not establish misconduct that disqualified them from benefits or that the commission had erred in finding misconduct. See, e.g., *Scrivener Oil Co. v. Crider*, 304 S.W.3d 261, 271 (Mo. App. S.D. 2010); *Duncan v. Accent Mktg., LLC*, 328 S.W.3d 488, 493 (Mo. App. E.D. 2010). Conversely, two cases cited in this Note as examples of decisions that did not explicitly require a showing of willfulness (*Freeman* and *Moore*) found the claimant's behavior to constitute misconduct. See *Freeman v. Gary Glass & Mirror, LLC*, 276 S.W.3d 388, 393 (Mo. App. S.D. 2009); *Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731, 740 (Mo. App. E.D. 2001). Interestingly enough, the *Fendler* decision, in finding that Fendler's committed misconduct, relied heavily on both of those cases. *Fendler*, 370 S.W.3d at 590.

161. *Brown v. Frankerum 1, Inc.*, 370 S.W.3d 932, 932 (Mo. App. E.D. 2012) ("In light of the Supreme Court's recent holding in *Fendler* . . . we cannot find that the Commission erred in finding that Claimant was discharged for conduct connected with his work. An extended opinion would have no precedential value.").

162. *Fendler*, 370 S.W.3d at 589-90.

163. See *id.*

First, this “*Fendler* effect” could affect Missouri’s UI trust fund, which is currently running at an overall deficit of over \$500 million.<sup>164</sup> The national recession caused a significant increase in Missouri’s unemployment rate, and these economic factors put a substantial strain on the state’s UI trust fund.<sup>165</sup> Due to similar conditions, over thirty states began borrowing money from the federal UI trust fund to cover the payment of state unemployment benefits, and Missouri began to do so in February of 2009.<sup>166</sup> By September 2010, Missouri owed the federal trust fund over \$722 million.<sup>167</sup> Although this figure has decreased over the last few years, the remaining debt will cause Missouri employers to suffer a decrease in their Federal Unemployment Tax Act (FUTA) tax credits.<sup>168</sup> Related to this massive debt is the problem of false and fraudulent claims for unemployment benefits. Because of almost 15,000 known fraudulent claims, Missouri’s DES paid more than \$20 million in overpayments in 2011.<sup>169</sup>

SB 816<sup>170</sup> attempted to address and might have solved this debt problem.<sup>171</sup> This proposed legislation redefined misconduct to include the viola-

164. *Missouri Employers Face Higher Taxes for Unemployment Insurance*, MO. CHAMBER COM. & INDUS., <http://www.mochamber.com/mx/hm.asp?id=083112ui> (last visited Sep. 3, 2013) [hereinafter MO. CHAMBER COM. & INDUS.]; *Missouri Unemployment Trust Fund Projection*, MO. DEP’T LAB. & INDUS. REL., (May 15, 2012), <http://labor.mo.gov/DES/Forms/MOBFM2012Q1.pdf>. On their data and statistics page, the Missouri Department of Labor and Industrial Relations reports the UI trust fund balance separately from the amount owed to the federal government from Title XII loans. *Data and Statistics*, *supra* note 8. As of September 26, 2012, the trust fund’s “balance” was \$36,567,114.85 and the amount of Title XII loans \$569,252,812.84 (creating the overall deficit of over \$500 million). *Id.*

165. Amy Blouin & Tom Kruckmeyer, *State Unemployment Insurance Trust Fund Faces Major Deficit*, MO. BUDGET PROJECT 1 (Sept. 28, 2010), <http://www.mobudget.org/files/UI%20Trust%20Fund%20Faces%20Deficit%20August%202010.pdf>.

166. *Id.* at 2. Title XII allows this borrowing by states from the federal unemployment account. 42 U.S.C. 1321(a)(1) (2012).

167. Blouin & Kruckmeyer, *supra* note 165, at 1.

168. MO. CHAMBER COM. & INDUS., *supra* note 164. In addition to their contributions to the state UI system, employers must pay a FUTA tax each year that contributes to the federal UI trust fund. Blouin & Kruckmeyer, *supra* note 165, at 3. The federal government gives FUTA tax credits to employers in states that have not borrowed from the federal UI trust fund and in states that are current on their loan payments. *Id.* These credits are reduced when a state does not keep up with its loan payments. *Id.*; MO. CHAMBER COM. & INDUS., *supra* note 164.

169. MO. CHAMBER OF COM. & INDUS., *supra* note 164. Examples of fraudulent claims include claims by individuals who are not actively searching for a job, individuals who were fired for misconduct or quit their job voluntarily, or individuals that continue to file claims even though they have a new job. *Id.* Another common scam is that convicted criminals have someone else file claims for them while they are in prison. *Id.* Further, claims are sometimes filed on behalf of deceased individuals. *Id.*

170. *See supra* notes 66-68 and accompanying text.

tion of any rule that the employee knew or should have known about.<sup>172</sup> Under such a rule analysis of the *Fendler* situation and other similar cases would be quite simple. Further, the bill purports to deny unemployment benefits to individuals "regardless of whether the misconduct occurs at the workplace or during work hours."<sup>173</sup> By significantly broadening the definition of statutory misconduct (resulting in an increase in disqualifications due to misconduct), SB 816 could have, over time, resulted in a significant reduction in the amount of unemployment benefits being paid by the state of Missouri. This effect could have aided the reduction of Missouri's UI trust fund debt. However, although SB 816 was passed out of committee, it was never debated on the Senate floor.<sup>174</sup>

Although it clearly does not define misconduct as broadly as SB 816, the *Fendler* decision could potentially have similar effects, but on a smaller scale. If employers continue to emphasize the Supreme Court's determination that a showing of "willfulness" is unnecessary to find misconduct, and if the Court's emphasis on the "negligence" prong leads the Court of Appeals to find more cases of misconduct than they would have otherwise (leading to a reduction in the number of individuals that qualify for UI), then the long-term use of *Fendler* analysis could have a significant effect on the financial health of Missouri's UI trust fund. Therefore, the *Fendler* decision could be seen primarily as a partial solution to Missouri's UI system's debt problem and as form of relief from the tax burdens of Missouri's employers.

The second policy consideration is how this "*Fendler* effect" relates to the purposes of the unemployment benefit system. The system was put in place to avoid the negative effects that economic insecurity has on the "health, morals, and welfare of the people."<sup>175</sup> Further, unemployment benefits are meant to help "maintain the economy of the state during periods of economic downturn by helping preserve the level of consumer purchasing power."<sup>176</sup> This "safety net" of unemployment insurance arguably allows unemployed individuals "to avoid impoverishment while searching for other meaningful employment" and can be "held out as an economic stabilizer" that ensures the non-existence of a "permanent underclass" of needy, temporarily unemployed individuals.<sup>177</sup> Under this line of thinking, a decline in the availability of unemployment benefits would allow economic insecurity to harm the "health, morals, and welfare" of an increased portion of the public. Further, according to the DES, a decrease in the number of unemployed individuals receiving UI could have a negative impact on the state's overall economy

---

171. See MO. CHAMBER OF COM. & INDUS., *supra* note 164.

172. S.B. 816, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

173. *Id.*

174. MO. CHAMBER OF COM. & INDUS., *supra* note 164.

175. MO. REV. STAT. § 288.020.1 (2000).

176. *About the Division of Employment Security*, *supra* note 16.

177. Laramore, *supra* note 1, at 1469.

if “consumer purchasing power” is not preserved.<sup>178</sup> Therefore, if *Fendler* has this proposed effect on the realm of unemployment benefits, the decision could alternatively be seen primarily as a frustration of the important purposes of the unemployment benefit system.

So, how should the *Fendler* decision be viewed? Which set of problems is more pressing? Such questions are difficult, and determining the answers requires practical experience and economic expertise beyond that of this author. However, this discussion could be moot if the decision fails to have any significant impact on how broadly the Missouri Court of Appeals applies the *Fendler* understanding of “misconduct.” Nevertheless, regardless of whether one sees *Fendler* as a potential problem or solution, one must not lose sight of the fact that the stated purpose of Missouri’s UI system is to set aside funds in order to provide benefits to individuals who are unemployed “through no fault of their own.”<sup>179</sup>

## VI. CONCLUSION

*Fendler v. Hudson Services* illustrates the intricate use of mental state standards within the current definitional landscape of the phrase “misconduct connected with work” as it relates to unemployment benefits. By refusing to require that an employee’s conduct be “willful” in order to constitute “misconduct” and emphasizing an unclear distinction between the “negligence” (or “recklessness”) prong and “willfulness,” the Supreme Court of Missouri attempted to clarify the separate elements of the statutory definition of “misconduct.” However, as a result, the Court not only made mental state matters more confusing with a poor distinction, but it also potentially broadened the type of behavior that establishes “misconduct.” This last potential result could have the overall effect of reducing the percentage of claimants that qualify for unemployment benefits.

This case represents the difficulty of interpreting and applying the statutory definition of a term as vague and relative as “misconduct.” However, regardless of the difficulty, the long-term effects of *Fendler* are relevant to both social and economic public policy concerns. Assuming that *Fendler* does make it harder for claimants to qualify for unemployment benefits, this decision can be viewed as a problem or a solution. From the employer’s viewpoint, the “*Fendler* effect” could help restore Missouri’s UI trust fund to solvency. While SB 816 would have been more aggressive in cutting back on UI spending, *Fendler* is potentially a step in the right direction. On the other hand, *Fendler* could be seen as a major obstacle to accomplishing some of the purposes of MESL. Perhaps a detailed analysis of the state’s economy, UI trust fund, and unemployment rate would provide an informed opinion as to which set of concerns are more pressing and how the *Fendler* decision should

---

178. See *About the Division of Employment Security*, *supra* note 16.

179. § 288.020.1.

2013]

*MENTAL STATES AND "MISCONDUCT"*

977

be viewed, but such analysis is beyond the scope of this Note. One thing is for sure: as employers, claimants, and courts continue to generate and resolve disputes over statutory "misconduct," one must evaluate each situation with both of these policy considerations in mind.