***Menendez v. Division of Employment Security*,**

No. ED101860, 2015 WL 1211315, --- S.W.3d --- (Mo. Ct. App. E.D., March 17, 2015)

Eastern District of Missouri: Ex-Employee's Isolated Act of Negligence Is Not "Misconduct" to Support Denial of Unemployment Benefits.

In a case with serious implications for both employers and terminated employees applying for unemployment benefits, the Missouri Eastern District Court of Appeals recently reversed the Missouri Labor and Industrial Relations Commission's ("Commission") denial of unemployment benefits based on an isolated incident of negligence.

In *Menendez*, Appellant had been employed as a medical assistant for an orthopedic clinic for more than ten years. Her employment was terminated in April, 2014 because she prematurely removed a patient's sutures without a supervising doctor's permission, causing the patient to undergo a second surgery to replace the sutures. In her employer's words, she was terminated for failure to "use reasonable judgment in removing [the] sutures." Notwithstanding, the Employer informed Ms. Menendez that should be eligible for unemployment benefits.

Ms. Menendez applied for unemployment benefits with the Division of Employment Security but was denied because it was determined that she had been discharged for employment-related "misconduct." She appealed this determination to the Unemployment Claims Tribunal. The evidence there showed, *inter alia*, that Ms. Menendez mis-read the patient's chart while angry at a co-worker. As such, the Tribunal affirmed the denial benefits. She appealed once more to the Labor and Industrial Relations Commission, but to no avail as it affirmed the lower Tribunal's findings.

On appeal to the Eastern District, Ms. Menendez argued that the denial of benefits was improper because her "isolated act of negligence" in removing the sutures did not amount to "misconduct" under Mo. Rev. Stat. §288.030, which defines the term.

The Eastern District agreed. Relying on the recent Supreme Court case of *Seek v. Dept. of Transp.*, 434 S.W.3d. 74 (Mo. 2014) (en banc), the *Menendez* Court (authored by the Honorable Robert Dowd) reasoned that while a "single act in disregard of the employer's interest can constitute 'misconduct' for purposes of [Mo. Rev. Stat. §288.030]," it will only constitute "misconduct" if the disregard for the employer's interest is "willful or wanton." Simple negligence, Judge Dowd opined, will only constitute "misconduct" "if the nature or recurrence of the employee's action demonstrates the employee's motive or purpose was to injure the employer or the employee's disregard of those interests was intentional or substantial."

Applying this rationale, the Court concluded that Ms. Menendez's removal of sutures was not wanton, willful, a deliberate violation of her employer's rules nor of the nature to indicate it was done to purposely injure the employer or intentionally disregard the employer's interests.

Therefore, the only remaining question was whether her actions "disregarded standards of behavior which [the] employer had a right to expect in so doing committed misconduct." Finding no evidence of anything beyond an "isolated act of negligence," the Eastern District answered this question in the negative as well.

In doing so, the Court rejected the Employer and the Commission's contention that because she worked in the medical profession, a higher standard applied: "[w]hile a mistake in the medical field might have more serious consequences than a mistake in a non-medical job, our analysis is the same." The Court specifically noted that his finding aligned with similar case law in the Western District of Missouri Court of Appeals. *See Hoover v. Community Blood Ctr.*, 153 S.W.3d 9 (Mo. Ct. App. W.D. 2005) (reversing Commission's decision, concluding that act of employee causing blood donations to be destructed did not support "a determination that the [employee's] comments were the result of anything more than a lack of judgment…").

Menendez has clear implications for terminated employees and employers alike. For terminated employees, it offers the additional security to know that an unintentional, good faith mistake at work will likely not jeopardize the safety net of unemployment benefits if terminated for the mistake. For employers, the additional security enjoyed by such ex-employees will affect whether or not to contest an unemployment insurance claim. It further reinforces the well-heeled maxim that employers should carefully consider contesting claims, weighing the relative costs and benefits on a case-by-case determination. Moreover, it neuters the crafty, yet unavailing argument that terminated employees in highly skilled professions like medicine will be held to a higher standard of "misconduct" than others.

If you are an employer or terminated ex-employee seeking guidance on this or any other employment related matter, Herzog Crebs LLP has a team of experienced professionals in labor and employment law eager to work with you to accomplish your goals and objectives.

To contact the Firm, call (314)-231-6700, or you can email the author at bmw@herzogcrebs.com.