

MISSOURI'S UNEMPLOYMENT CRISIS: THE LABOR AND INDUSTRIAL RELATIONS COMMISSION IGNORES THE MISSOURI SUPREME COURT

INTRODUCTION

Unemployment insurance has long been part of the American social and economic structure. It has been called by many names and has been given a myriad of definitions. Socially, it has been defined as a “safety net” for those who have been employed for a long period of time but who find themselves without a job for reasons beyond their control.¹ Unemployment insurance arguably allows these individuals to avoid impoverishment while searching for other meaningful employment.² Economically, unemployment insurance has been held out as an economic stabilizer which assures “that there is no permanent underclass of needy made up of the temporarily unemployed.”³ However, a corporation, small business owner, or conservative economist may feel that unemployment insurance is just a form of social welfare, “doled out to those unable to hold a job, and thus an unfair burden on commerce and business owners.”⁴ Today, with the economic recession affecting small and big business alike, and with unemployment figures soaring over ten percent, the importance of deciding who does and who does not receive unemployment benefits has never had greater implications.⁵

Historically, unemployment insurance was created by the Social Security Act of 1935⁶ due to the large number of unemployed persons during the Great Depression.⁷ The Act established a system of state and federal unemployment insurance laws.⁸ Under the Act, each state establishes its own eligibility requirements and regulations via statute and bureaucratic systems, with some

1. L’Nayim A. Shuman-Austin, Comment, *Is Leaving Work to Obtain Safety “Good Cause” to Leave Employment?—Providing Unemployment Insurance to Victims of Domestic Violence in Washington State*, 23 SEATTLE U. L. REV. 797, 798–99 (2000) (citing 1 THE PUBLIC ROOSEVELT PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 445–73 (1938)).

2. *Id.*

3. *Id.* at 798.

4. *Id.*

5. See Peter S. Goodman, *Economists Scan Jobs Data, Seeking Signs of Hope*, N.Y. TIMES, Nov. 7, 2009, at B1.

6. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

7. Shuman-Austin, *supra* note 1, at 807.

8. Social Security Act of 1935, preamble, 49 Stat. at 620.

minimal guidelines provided by the federal government.⁹ These state statutes and bureaucratic regulations are open to interpretation by state courts.¹⁰ So, state judiciaries play a large role in shaping policies and rules regarding access to unemployment insurance benefits.¹¹

In Missouri, eligibility for unemployment insurance is governed by Section 288 of the Missouri Revised Statutes¹² and the rules and regulations promulgated by the Labor and Industrial Relations Commission, Division of Employment Security.¹³ However, Missouri courts have had a dramatic impact on unemployment insurance in Missouri, particularly regarding the determination of what qualifies as voluntarily leaving one's employment.¹⁴ Generally, Missouri courts held that if an individual left his job "voluntarily," that individual was disqualified from receiving benefits unless there was a "causal connection" between the individual leaving and his job.¹⁵ In *Difatta-Wheaton v. Dolphin Capital Corp.*, the Missouri Supreme Court fundamentally changed Missouri's policy regarding how a non-work-related illness affects whether a separation from employment is considered voluntary.¹⁶ The court correctly expanded access to unemployment insurance for individuals with various illnesses not related to their work.¹⁷ However, the Missouri Labor and

9. See 26 U.S.C. § 3304(a)(5) (2006) (preventing states from denying benefits to an eligible claimant under certain circumstances).

10. See MO. REV. STAT. § 288.020(2) (2005 & Supp. 2010) ("This law shall be liberally construed to accomplish its purpose 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.").

11. See, e.g., *Campbell v. Labor & Indus. Relations Comm'n*, 907 S.W.2d 246, 249 (Mo. Ct. App. 1995) ("The general purpose of the Act is to provide unemployment compensation benefits to those who are unemployed through no fault of their own. . . . Courts should liberally construe the law to meet that goal.") (citing MO. REV. STAT. § 288.020 (1994); *O'Dell v. Div. Emp't Sec.*, 376 S.W.2d 137, 141 (Mo. 1964)).

12. See generally MO. REV. STAT. § 288 (2005 & Supp. 2007).

13. MO. REV. STAT. § 288.220(5) (2005); see also *About the Division of Employment Security*, MO. DEP'T OF LAB. & INDUS. RELATIONS, <http://www.labor.mo.gov/DES/about.asp> (last visited July 31, 2011).

14. See *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 596–97 (Mo. 2008) (en banc) (demonstrating that Missouri courts have altered and changed the criteria for voluntarily leaving employment due to an illness).

15. See, e.g., *id.* at 597 (citing *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977)).

16. See *id.* at 598.

17. See *id.* at 599 (holding that an employee did not leave work voluntarily and, therefore, should not be denied unemployment benefits, despite the fact that her illness was non-work-related).

Industrial Relations Commission has wrongly refused to recognize the policy shift *Difatta-Wheaton* represents.¹⁸

In Part I, this Comment will discuss the labyrinth an employee must find their way through when attempting to obtain unemployment insurance benefits. Part II will discuss Missouri's unemployment insurance law prior to *Difatta-Wheaton*. Specifically, Part II will lay out how Missouri courts and the Labor and Industrial Relations Commission determined if an individual had left work voluntarily when a non-work-related illness was the cause of their departure. Part III of the comment will focus on the Missouri Supreme Court's analysis in *Difatta-Wheaton* and demonstrate how the policy in *Difatta-Wheaton* has been widely accepted by Missouri courts. Moreover, Part III will show how the analysis in *Difatta-Wheaton* was intended to expand access to unemployment insurance benefits to those who left work because of an illness, even if the illness was not caused, or made worse by, their jobs. Part IV will demonstrate that the Labor and Industrial Relations Commission has failed to recognize the policy change *Difatta-Wheaton* and subsequent cases have created. Moreover, the Comment will conclude by showing that the Labor and Industrial Relations Commission's decision to ignore *Difatta-Wheaton* has caused an unemployment crisis in Missouri.

I. NAVIGATING THE LABYRINTH—GAINING ACCESS TO UNEMPLOYMENT BENEFITS IN MISSOURI

To understand the crises the Labor and Industrial Relations Commission's decision to ignore *Difatta-Wheaton* has created,¹⁹ one must first understand the time-consuming labyrinth that an unemployed individual must navigate through when attempting to get benefits. This confusing process is compounded when the law is applied incorrectly at different levels of the Commission, as a wrongful denial of benefits forces the claimant to go through a confusing appellate process within the Commission itself.²⁰ Moreover, if the Commission ultimately denies the claimant benefits wrongfully and incorrectly applies the law, the claimant can only appeal to the appropriate appellate court, initiating another confusing and lengthy process.²¹ The confusion for

18. See *infra* notes 276–92 and accompanying text; see also *Selected Case Law Passages*, MO. DEP'T OF LAB. & INDUS. RELATIONS, http://www.labor.mo.gov/DES/Appeals/selected_caselaw.asp (last visited June 20, 2011) (characterizing *Difatta-Wheaton* as a misconduct case).

19. See, e.g., *Johnson v. Div. of Emp't Sec.*, 318 S.W.3d 797, 802–03 (Mo. Ct. App. 2010) (discussing the Commission's decision to interpret the *Difatta-Wheaton* holding as a unique exception to quitting voluntarily because the claimant had a life-threatening illness).

20. See *infra* notes 28–49 and accompanying text (describing the procedure a claimant must follow in order to appeal a denial of unemployment benefits within the Commission).

21. See *infra* notes 50–68 and accompanying text (describing the procedure that must be followed when a claimant appeals the Commission's decision to the Missouri Court of Appeals).

claimants is only further exacerbated when they must proceed pro se, which a large portion are forced to do.²²

A. *The Filing and Appeals Process at the Administrative Level*

In Missouri, to receive unemployment insurance benefits, an employee must file a claim with the Missouri Division of Employment Security.²³ The claim process begins when a claimant calls the Division center, or logs onto the Division's website, and files the "initial claim."²⁴

After the claim is filed, the claimant's employer is given an opportunity to file a response to the claim for unemployment benefits.²⁵ The claim is then assigned to a "Deputy," who decides if the employee qualifies for benefits.²⁶ The Deputy is required to issue a written statement stating the factual and legal reasons the employee was either granted or denied benefits.²⁷ Unless the claimant or the employer files an appeal from the Deputy's determination within thirty days, the determination becomes final.²⁸ If an appeal is filed, the claim is sent to the "Appeals Tribunal."²⁹

The Missouri Division of Employment Security's Appeals Tribunal consists of a "referee" or a body consisting of three referees.³⁰ The tribunal conducts a hearing, in which it may collect additional evidence and must issue its own independent decision.³¹ These hearings have their own rules regarding order of proof, burden of proof, evidence, and objections.³² Based on the evidence admitted at the hearing, which can include testimony by the employee and employer, the tribunal makes a record and determines whether or not the claimant will receive benefits.³³ The decision of the tribunal is required to set forth findings of fact, state the applicable provisions of the law,

22. Claimants who must appeal to an appellate court without a lawyer often have their cases dismissed. *See, e.g.,* Tavecchi v. Div. of Emp't Sec., 261 S.W.3d 708, 710 (Mo. Ct. App. 2008); Rainey v. Express Med. Transporters, Inc., 254 S.W.3d 905, 906, 908 (Mo. Ct. App. 2008).

23. *See* MO. REV. STAT. § 288.030.1(20) (Supp. 2011); MO. CODE REGS. ANN. tit. 8, § 10-3.010(1) (Supp. 2011); 1 MO. EMPLOYER-EMPLOYEE LAW § 4.5 (MoBarCLE, 3d ed. 2008) [hereinafter MO. EMPLOYER-EMPLOYEE LAW].

24. MO. REV. STAT. § 288.030.1(20); MO. CODE REGS. ANN. § 10-3.010(1); MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.5.

25. MO. REV. STAT. § 288.070.1.

26. *Id.* § 288.070.4.

27. *Id.* § 288.070.5.

28. *Id.* § 288.070.6. The thirty-day period may be expanded for good cause. *Id.* § 288.070.10.

29. *Id.* § 288.190; *see also* MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.12.

30. MO. REV. STAT. §§ 288.030(1), 288.190.1.

31. *Id.* § 288.190.1; MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.26.

32. *See* MO. CODE REGS. ANN. tit. 8, § 10-5.015 (Supp. 2011); MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, §§ 4.21–4.24.

33. MO. REV. STAT. § 288.190.2–3.

and state the tribunal's ultimate holding.³⁴ The tribunal may "affirm, modify, or reverse the determination of the deputy, or shall remand the matter to the deputy with directions."³⁵ However, the decision becomes final thirty days after the date of the decision, if the claimant or the employer fails to file a motion for reconsideration.³⁶ Moreover, if there is no filing within the thirty days, the parties lose all rights to appeal.³⁷

If the claimant or employer is not satisfied with the Tribunal's decision, they can appeal, via a motion for reconsideration or application for review, to the Labor and Industrial Relations Commission.³⁸ The Commission may deny the motion or application for review, and it is not required to issue a written decision as to why.³⁹ In this instance, the decision of the Appeals Tribunal is treated as the decision of the Commission itself.⁴⁰

If the Commission grants the motion or application, the Commission then decides whether or not it wants to take new evidence on the matter or hold oral arguments.⁴¹ If the Commission decides it needs more evidence to make a determination, it may remand the matter to the Appeals Tribunal for an additional hearing.⁴² If oral argument is requested within ten days of the application for review the Commission may grant the request.⁴³ If oral argument is granted, however, the parties are required to file a brief before the date of the oral argument, and new evidence and facts are generally not allowed to be presented.⁴⁴

In most cases, the Commission restricts itself to a review of the record made at the Appeals Tribunal's hearing without holding an additional hearing or oral argument.⁴⁵ The Commission is allowed to simply adopt the findings of fact made by the Appeals Tribunal.⁴⁶ The Commission, however, may also make its own findings of fact and conclusions of law based on the whole record because the Commission is not bound by any of the Tribunal's findings.⁴⁷ That is, the Commission is not bound by the Tribunal's credibility,

34. MO. CODE REGS. ANN. tit. 8, § 10-5.050(2) (Supp. 2011).

35. MO. REV. STAT. § 288.190.3.

36. *Id.*

37. *Id.*

38. MO. REV. STAT. § 288.200.1 (2005).

39. *Id.*

40. *Id.*

41. *Id.*; MO. CODE REGS. ANN. tit. 8, § 20-4.010 (Supp. 2011).

42. MO. REV. STAT. § 288.200.1.

43. MO. CODE REGS. ANN. tit. 8, § 20-4.010(4) (Supp. 2011).

44. *Id.* § 20-4.010(4)-(5).

45. MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.53.

46. *Id.*

47. *Id.*

evidentiary, or legal determinations.⁴⁸ The Commission is required to make “unequivocal, affirmative findings of the facts” when coming to an ultimate conclusion, which it can do by simply adopting the holding of the Appeals Tribunal.⁴⁹ If a claimant or employer is unsatisfied with the Commission’s ultimate decision, then the claimant or the employer can seek review of the decision in the courts.⁵⁰

B. *Getting the Courts Involved*

Jurisdiction to review a decision of the Commission lies with the appropriate appellate court.⁵¹ The claimant, however, has only twenty days from the date of the Commission’s final decision until an appeal must be filed.⁵² In order to initiate an appeal, the claimant must file two copies of Form No. 8-B with the secretary of the Commission and pay the appropriate docket fee.⁵³ If the claimant is the party appealing, he or she is exempt from paying the docket fee.⁵⁴ The claimant, however, is not exempt from the requirements to serve a copy of the notice of appeal on the attorneys of all parties represented and to serve appropriate notice on all parties not represented.⁵⁵

The appellate court reviews the record created at the Commission level, and there is no opportunity for the parties to present additional evidence or facts.⁵⁶ Moreover, the findings of fact of the Commission are conclusive if they are supported by substantial evidence and are not fraudulent.⁵⁷ The appellate court, however, is not bound by the conclusions of law made by the Commission.⁵⁸ Thus, the jurisdiction of the court is confined solely to questions of law.⁵⁹ The appellate court can “modify, reverse, remand for rehearing, or set aside the decision” on the grounds that “the Commission acted without or in excess of its powers . . . the decision was procured by fraud . . . the facts found by the Commission do not support the award . . . [or] there was

48. *Id.* (citing *Husky Corp. v. Labor & Indus. Relations Comm’n*, 628 S.W.2d 378, 379 (Mo. Ct. App. 1982) (holding that the Commission is the trier of fact with the right to determine the credibility of witnesses)).

49. *McClellan v. Brown Transfer & Storage Co.*, 950 S.W.2d 704, 707 (Mo. Ct. App. 1997).

50. MO. REV. STAT. § 288.210 (2005).

51. *Id.*

52. *Id.*

53. MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.56.

54. MO. REV. STAT. § 288.380.5 (Supp. 2011).

55. MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.56.

56. MO. REV. STAT. § 288.210 (2005) (“Upon appeal no additional evidence shall be heard.”); MO. EMPLOYER-EMPLOYEE LAW, *supra* note 23, § 4.57.

57. MO. REV. STAT. § 288.210.

58. *Id.*

59. *Id.*

no sufficient competent evidence in the record to warrant the making of the award.”⁶⁰

Filing an appeal will require a claimant to file a brief with the court.⁶¹ If a party fails to file a brief, then the appealing party is considered to have “abandoned the appeal” and its case will be dismissed.⁶² The appellant’s initial brief must conform to the Missouri Supreme Court Rules.⁶³ Specifically, it must conform to the many requirements found in Missouri Supreme Court Rule 84.⁶⁴ Although courts are generally more understanding of a party who is proceeding pro se, a brief that fails to comply with the requirements of Rule 84 and other Missouri Supreme Court Rules can result in the case being dismissed.⁶⁵ The appealing claimant, after all briefs are filed, also may have to argue the case in open court.⁶⁶ Oral argument may be waived in some jurisdictions, but if either party requests oral argument it is generally ordered.⁶⁷ If oral argument is ordered, therefore, an appealing claimant must argue the law applicable to the case in front of a panel of judges.⁶⁸

The appellate process is very complicated and arduous. Moreover, there are skilled attorneys that dedicate their entire practice to appellate law. It would be very difficult, if not impossible, for a pro se claimant to be successful in any appellate court in Missouri, especially considering the courts have

60. *Id.*

61. MO. SUP. CT. R. 84.035(g); *see Vaughn v. Table Rock Asphalt Constr. Co.*, 984 S.W.2d 215, 216 (Mo. Ct. App. 1999) (“Requirements of rule governing appellate briefs are mandatory. . . . An appellant that does not file a brief on the issues pertaining to its appeal is deemed to have abandoned that appeal.”) (citing *Brachter v. Sequel Corp.*, 969 S.W.2d 827, 828 (Mo. Ct. App. 1998)).

62. *See Vaughn*, 984 S.W.2d at 16.

63. MO. SUP. CT. R. 84.04.

64. *Id.* The appellant’s brief must begin with a cover page, must contain a table of contents, table of authorities, jurisdictional statement, statement of facts, points relied on, argument, conclusion, and certification of service. *Id.* R. 84.04(a); *id.* R. 84.06(f). The rules specify what information each of these sections must contain, and how each of them must be formatted. *Id.* R. 84.04(a). Moreover, in an appeal from a decision of the Commission it is likely the brief would need to include an appendix. *See id.* R. 84.04(h). An appellant’s initial brief cannot exceed 31,000 words, or 2,200 lines of text, and cannot be longer than one hundred pages. *See id.* R. 84.06(b), (e).

65. *See, e.g., Rainey v. Express Med. Transporters, Inc.*, 254 S.W.3d 905, 908 (Mo. Ct. App. 2008). Also, local court rules not included in the codified Supreme Court Rules can affect the requirements for formatting, filing, and length of the brief, as well as the requirements of oral arguments. *See* MO. APPELLATE COURT PRACTICE §§ 6.2, 6.15, 6.17 (MoBar 5th ed. 2007).

66. *See* MO. CT. APP. E.D. SPEC. R. 390, 395; MO. CT. APP. S.D. SPEC. R. 1(b); MO. CT. APP. W.D. SPEC. R. I.

67. *See* MO. CT. APP. E.D. SPEC. R. 390, 395; MO. CT. APP. S.D. SPEC. R. 1(b); MO. CT. APP. W.D. SPEC. R. I.

68. *See* MO. CT. APP. E.D. SPEC. R. 390, 395; MO. CT. APP. S.D. SPEC. R. 1(b); MO. CT. APP. W.D. SPEC. R. I.

signaled a willingness to dismiss pro se claimants' cases for failure to comply with Missouri Supreme Court Rules.⁶⁹ Navigating the labyrinth that is the appeals process within the Commission is difficult enough. Moreover, when the Commission errs, the process a claimant must go through to get access to entitled benefits only becomes more complicated. Combined, these processes present insurmountable problems for many unemployed individuals, especially those that cannot attain representation.⁷⁰

As this Comment will discuss in subsequent pages, when the Commission fails to appropriately apply the law, it effectively denies benefits to individuals who deserve them. In fact, it is this exact type of failure by the Commission that has created an unemployment crisis in Missouri. The following section will discuss how personal illness affected the voluntary quit analysis prior to *Difatta-Wheaton*, the same law the Commission is still erroneously applying today.

II. WHAT THE LAW WAS—"VOLUNTARY" QUIT PRIOR TO *DIFATTA-WHEATON*

A. *Personal Illness as Voluntarily Quitting*

The Missouri statute on unemployment insurance, Section 288.050.1, disqualifies an individual from receiving unemployment insurance benefits if "the claimant has left work voluntarily without good cause attributable to such work or to the claimant's employer."⁷¹ Prior to *Difatta-Wheaton*, courts interpreted the language of the statute to mean that, if an employee left work because of a personal illness, that employee had voluntarily quit, unless the court found that there was a causal connection between the employee's illness and his work.⁷²

Courts reasoned that Section 288.050.1 "imposed dual elements" for a finding of disqualification from benefits.⁷³ To be disqualified from benefits, the employee's termination had to be "both voluntary and without good cause attributable" to the employee's work or to the employer.⁷⁴ Thus, the courts

69. See *Rainey*, 254 S.W.3d at 908 (holding that a pro se claimant's appeal for unemployment benefits be dismissed because her brief failed to comply with Missouri Supreme Court Rules 84.04 (c) through (d) and 84.04(i)).

70. John J. Ammann, Attorney and Director of the Saint Louis University Law Clinic, stated that "for [pro se claimants] to handle their own appeal at the Commission level, write a brief that conforms to the rules, and handle their own case in the appellate courts, would be like asking me, an untrained mechanic, to change the transmission in my car." Interview with John J. Ammann, Dir., Saint Louis Univ. Legal Clinic, in St. Louis, Mo. (Jan. 28, 2010).

71. MO. REV. STAT. § 288.050.1 (Supp. 2011).

72. See *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977).

73. *Id.* (citing *Bussman Mfg. Co. v. Indus. Comm'n*, 335 S.W.2d 456 (Mo. Ct. App. 1960)).

74. *Id.*

came to the conclusion that the statutory language “without good cause attributable to her work or her employer” defined, at least in part, the term “voluntarily.”⁷⁵ Under this interpretation, termination of employment was only involuntary if there was a “legally sufficient reason for leaving which [was] causally connected to the work or the employer.”⁷⁶ A personal illness of the employee, unrelated to his employment, would “not render termination involuntary unless the illness was caused or aggravated by the work or the employer.”⁷⁷ Thus, an individual who had a personal illness, and as a result was unable to work, could not receive unemployment benefits, unless the employee could prove that the condition was caused by, or made worse by, the employee’s job.⁷⁸

In *Duffy v. Labor and Industrial Relations Commission*, a seminal unemployment case decided prior to *Difatta-Wheaton*, the court denied an employee unemployment insurance benefits.⁷⁹ Ms. Duffy was a secretary at the Saint Louis University Medical School.⁸⁰ Ms. Duffy could not go to work at the medical school because she had a serious personal illness that required daily care at a local hospital.⁸¹ Ms. Duffy called her supervisor at the medical school to notify him of the situation and to tell him that she did not know how long the illness would persist.⁸² Ms. Duffy’s supervisor considered this to be a voluntary resignation.⁸³ Ms. Duffy’s subsequent claim for unemployment insurance benefits was denied by the Commission, and she appealed.⁸⁴

On appeal from the circuit court’s judgment affirming the Commission’s denial of unemployment benefits, Ms. Duffy argued that she had been forced to leave work through no fault of her own because her illness was not her fault.⁸⁵ She contended that she should receive benefits because this was consistent with the “no fault” language found in the unemployment insurance statute.⁸⁶ The court, however, denied Ms. Duffy unemployment insurance benefits, despite the fact that Ms. Duffy had been forced to leave work because of an illness and despite the fact she had contacted her supervisor to notify him of the situation.⁸⁷ The court found that there was no evidence that Ms. Duffy’s

75. *Id.*

76. *Duffy*, 556 S.W.2d at 198.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 197.

81. *Duffy*, 556 S.W.2d at 197.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Duffy*, 556 S.W.2d at 197 (quoting MO. REV. STAT. § 288.020(1) (2005)).

87. *Id.* at 197, 198.

illness was caused by her job or that her job aggravated the illness.⁸⁸ Thus, the court decided that, even though Ms. Duffy had to miss work through no fault of her own, she had still left work voluntarily under Section 288.050.1(1).⁸⁹

In *Wimberley v. Labor and Industrial Relations Commission*, the Missouri Supreme Court held that a woman who had to leave work because of her pregnancy was disqualified from receiving unemployment insurance benefits.⁹⁰ Ms. Wimberley was a cashier and sales clerk at J.C. Penney Company for three years before she became pregnant.⁹¹ In August 1980, during her seventh month of pregnancy, Ms. Wimberley requested a leave of absence due to the pregnancy, and the employer granted the request, but with no guarantee of reinstatement.⁹² Ms. Wimberley's child was born on November 5, 1980, and one month later, when Ms. Wimberley attempted to return to work, she was informed that there were no positions open.⁹³ Ms. Wimberley applied for unemployment insurance benefits and was denied by the Division of Employment Security.⁹⁴ She appealed the decision to the Appeals Tribunal.⁹⁵

On appeal, the Tribunal held that, although Ms. Wimberley had a legally sufficient reason for leaving her job, "that reason was in no way attributable to her work or to her employer."⁹⁶ Thus, the Tribunal held that she was disqualified from receiving benefits.⁹⁷ The Labor and Industrial Relations Commission adopted the decision of the Appeals Tribunal and affirmed the denial of benefits.⁹⁸

Ms. Wimberley then petitioned the circuit court to review the decision.⁹⁹ The circuit court reversed the decision of the Commission, and the Western District of Missouri affirmed.¹⁰⁰ The Missouri Supreme Court, however, reversed the decision of the Western District and affirmed the holding and reasoning of the Commission.¹⁰¹ The court found that Ms. Wimberley's work and her pregnancy were not "causally connected," because her job was not the

88. *Id.*

89. *Id.*

90. *Wimberley v. Labor & Indus. Relations Comm'n*, 688 S.W.2d 344, 345 (Mo. 1985) (en banc).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Wimberley*, 688 S.W.2d at 345.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Wimberley*, 688 S.W.2d at 345-46.

101. *Id.* at 350.

cause of her becoming pregnant.¹⁰² Thus, she had left work voluntarily and was not entitled to receive unemployment benefits.¹⁰³

B. The Elemental Approach to Denying Benefits Because of a Personal Illness

Not all Missouri courts followed the exact line of reasoning laid out in *Duffy* and *Wimberley*. The end result, however, was largely the same: employees who left work because of illnesses were disqualified from unemployment insurance benefits.¹⁰⁴ Some Missouri courts read Section 288.050.1 as raising three distinct issues: 1) “Was there a voluntary quitting”; 2) if so, was there a “good cause”; and 3) if both were found, “was the good cause attributable to the claimant’s work or his employer?”¹⁰⁵

1. Voluntarily Quitting

The first facet to the elemental approach prior to *Difatta-Wheaton* was a determination of whether the employee was removed from his job or left work on his own accord, i.e., “self-termination.”¹⁰⁶ In many instances, the court would disqualify the employee from receiving benefits without analyzing the last two elements because the courts viewed not following an employer’s reporting or leave of absence policy as a “self-termination.”¹⁰⁷ Moreover, courts have held that not reporting a personal illness, and the subsequent need to be absent from work to the employer, was per se a voluntary quit and disqualified the employee from benefits without considering any of the other elements.¹⁰⁸ However, when dealing generally with a case where an employee left work due to an illness, if the examining court determined that the separation was “voluntary” (i.e., it was caused by the employee leaving due to the illness and not some act of the employer), then the court examined the question of whether there was a “good cause,” and if there was a “causal

102. *Id.* at 346

103. *Id.*

104. *See, e.g.,* Mo. Forge, Inc. v. Turner, 118 S.W.3d 313, 316 (Mo. Ct. App. 2003) (denying a claimant benefits because his back injury, which he claimed as good cause for quitting, was not sufficiently attributable to his work or his employer).

105. *Trail v. Indus. Comm’n, Div. of Emp’t. Sec. of Dept. of Labor & Indus. Relations*, 540 S.W.2d 179, 181 (Mo. Ct. App. 1976) (citing *S. Cent. Bell Tel. Co. v. Admin. Div. of Emp’t Sec., Dept. of Labor*, 247 So. 2d 615, 617 (La. Ct. App. 1971)).

106. *See Reutzel v. Mo. Div. of Emp’t Sec.*, 955 S.W.2d 239, 242 (Mo. Ct. App. 1997).

107. *See id.* at 241–42.

108. *Turner v. Labor & Indus. Relations Comm’n*, 793 S.W.2d 191, 195 (Mo. Ct. App. 1990) (holding that it was “clear that the direct and immediate cause of claimant’s unemployment was her inaction in not notifying her employer of any need to be absent, or intent to be absent for more than three consecutive days after checking out of the hospital against medical advice,” and thus, she was not entitled to benefits).

connection” between the separation and the work performed.¹⁰⁹ If the court could find facts to support the last two elements, then unemployment insurance benefits would still be available.¹¹⁰

2. Good Cause

Prior to *Difatta-Wheaton*, “[a] worker ha[d] good cause to terminate [his or her] employment when that conduct conform[ed] to what an average person, who acts with reasonableness and in good faith, would do.”¹¹¹ Generally, to establish “good faith,” the employee had to prove that a reasonable effort was made to “resolve the dispute before resorting to the drastic remedy of quitting his or her job.”¹¹² “Good cause” was “limited to instances where the unemployment [was] caused by external pressures so compelling that a reasonably prudent person would be justified in giving up employment.”¹¹³ In the context of personal illness, “good cause” meant that it would be unreasonable to expect the employee to continue working given their health condition.¹¹⁴ Thus, many illnesses and medical conditions were held not to constitute good cause, and the claimants were denied benefits without further analysis.¹¹⁵ However, even if the medical condition was recognized as a good cause in a general sense, if the good faith part of the element was not satisfied, the court would hold that the employee had not left work for “good cause.”¹¹⁶

In *Hessler v. Labor and Industrial Relations Commission*, the Missouri Supreme Court held that a pregnant woman, who had left work because of complications related to her pregnancy, had not left her employment for a

109. *Hessler v. Labor & Indus. Relations Comm’n*, 851 S.W.2d 516, 518 (Mo. 1993) (en banc).

110. *Id.*

111. *See Clark v. Labor & Indus. Relations Comm’n*, 875 S.W.2d 624, 627 (Mo. Ct. App. 1994) (citing *Contractors Supply Co. v. Labor & Indus. Relations Comm’n*, 614 S.W.2d 563, 564 (Mo. Ct. App. 1981)).

112. *Id.* (quoting *Tin Man Enters., Inc. v. Labor & Indus. Relations Comm’n*, 866 S.W.2d 147, 149 (Mo. Ct. App. 1993)).

113. *Id.* (quoting *Div. of Emp’t Sec. v Labor & Indus. Relations Comm’n*, 625 S.W.2d 882, 884 (Mo. Ct. App. 1981)).

114. *Hessler*, 851 S.W.2d at 518.

115. *See, e.g., id.* at 518–19 (holding that the claimant’s health condition was not a good cause); *Wimberly v. Labor & Indus. Relations Comm’n*, 688 S.W.2d 344, 345 (Mo. 1985) (en banc) (holding that the inability to work because of pregnancy was not a good cause); *Kansas City Power & Light Co. v. Searcy*, 28 S.W.3d 891, 896 (Mo. Ct. App. 2000) (holding that medical evidence presented was not sufficient to show good cause); *Fifer v. Mo. Div. of Emp’t Sec.*, 665 S.W.2d 81, 81 (Mo. Ct. App. 1984) (reasoning that an extended absence because of illness was not a good cause for termination); *Clevenger v. Labor & Indus. Relations Comm’n*, 600 S.W.2d 675, 676 (Mo. Ct. App. 1980) (holding that an emotional or mental condition was not good cause).

116. *Hessler*, 851 S.W.2d at 519.

“good cause.”¹¹⁷ Ms. Hessler was a billing clerk and receptionist for Suburban Business Products.¹¹⁸ During her employment she became pregnant and started having complications including severe vaginal bleeding and a threatened abortion.¹¹⁹ These complications stemmed from job stress and being on her feet, so Ms. Hessler’s doctor ordered her to stay home, off of her feet, and she was eventually bed ridden.¹²⁰ Thus, Ms. Hessler was forced to quit her job.¹²¹ Upon quitting, Ms. Hessler did not specify to her employer what her doctor’s orders were, nor did she tell her employer of the specifics of her pregnancy complications, until her doctor sent the company a note detailing her complications and his recommendation that she stay in bed.¹²² The Missouri Supreme Court denied Ms. Hessler’s request for unemployment benefits because she had not shown a “good cause” for leaving her employment.¹²³

The court held that, even if it assumed that Ms. Hessler’s pregnancy complications made leaving her job reasonable, it could not award her unemployment benefits because she did not act in good faith.¹²⁴ Moreover, the court held that Ms. Hessler had to show that her pregnancy complications necessitated her leaving work and that she gave her employer appropriate time and chance to provide her with a less stressful work environment and a job that she could do off of her feet, before she quit.¹²⁵ However, the court failed to mention how long Ms. Hessler should have continued to work to afford her employer appropriate time to find her a different job. Since Ms. Hessler had not given them adequate time, the court held the vaginal bleeding and threatened abortion resulting from Ms. Hessler’s pregnancy complications were not “good cause” for leaving work, and Ms. Hessler was disqualified from receiving benefits.¹²⁶

Under the “good cause” element, the employee had to show (1) that it would be unreasonable for his employer to expect him to continue working given his health condition, and (2) that he gave the employer an adequate opportunity to find a job that he could perform.¹²⁷ Otherwise, the employee was not entitled to benefits.¹²⁸ However, even if the employee was able to

117. *See id.* at 518–19.

118. *Id.* at 517.

119. *Id.* at 517–18.

120. *Id.* at 518.

121. *Hessler*, 851 S.W.2d at 518.

122. *Id.*

123. *Id.* at 519.

124. *Id.*

125. *Id.* at 518–19.

126. *Hessler*, 851 S.W.2d at 519.

127. *Id.* at 518–19.

128. *Id.* at 519.

prove both good cause elements, he would still have to show that there was a causal connection between his illness and the work.¹²⁹

3. Causal Connection

Prior to *Difatta-Wheaton*, an employee also had to show a causal connection between his illness and his employment.¹³⁰ Section 288.050.1 states that if “the claimant has left work voluntarily without good cause attributable to such work or to the claimant’s employer,” then he is disqualified from receiving benefits.¹³¹ Courts interpreted “[a]ttributable to . . . work or to . . . employer” to mean that it “must be the work or the employer himself that creates the condition making it unreasonable to expect this employee to continue work.”¹³² “Work causing an aggravation of an existing condition [was] also sufficient” to fulfill the causal connection element.¹³³

However, this causal connection generally had to be demonstrated with medical evidence.¹³⁴ Courts held that, where the causal connection between the employee’s work and the medical reason relied upon for establishing good cause for quitting was not within the “common knowledge or experience of a layperson,” expert medical evidence was required to establish the causal connection.¹³⁵ Where the causal connection was within the common knowledge or experience of a layperson, expert medical evidence was not needed.¹³⁶ However, courts have held that medical evidence was necessary in most cases.¹³⁷ For example, medical evidence was found necessary for claims regarding workplace aggravation of “injuries to the body”¹³⁸ and in several cases regarding mental and emotional illnesses.¹³⁹ Thus, generally, if an employee quit a job and sought unemployment insurance benefits “alleging

129. *Id.* at 518.

130. *See* *Kansas City Power & Light Co. v. Searcy*, 28 S.W.3d 891, 894 (Mo. Ct. App. 2000).

131. MO. REV. STAT. § 288.050.1 (Supp. 2011).

132. *Mena v. Consentino Grp., Inc.*, 233 S.W.3d 800, 804 (Mo. Ct. App. 2007) (quoting *Baker v. Midway Enters., Inc.*, 78 S.W.3d 188, 192 (Mo. Ct. App. 2002)).

133. *Id.* (citing *Bussmann Mfg. Co. v. Indus. Comm’n*, 327 S.W.2d 487, 491 (Mo. Ct. App. 1959)).

134. *See id.*

135. *Id.* (quoting *Smith v. U.S. Postal Serv.*, 69 S.W.3d 926, 928 (Mo. Ct. App. 2002)).

136. *Id.*

137. *See Mena*, 233 S.W.3d at 804.

138. *Id.* at 804 (“*See Mo. Forge, Inc. v. Turner*, 118 S.W.3d 313, 316 (Mo. Ct. App. 2003) (requiring expert medical evidence to show that back pain was aggravated by the claimant’s employment); *VanDrie v. Performance Contracting & Div. of Emp’t Sec.*, 992 S.W.2d 369, 374 (Mo. Ct. App. 1999) (noting that the claimant did not meet his burden of establishing by sufficient medical evidence the causal connection between his preexisting back injury and the workplace aggravation of that injury)”).

139. *See, e.g., Mena*, 233 S.W.3d at 804 (discussing “many cases” requiring medical evidence).

medical reasons as good cause for quitting,” the employee had to provide expert medical evidence as a way to prove the causal connection between “the employee’s work and the medical reason relied on.”¹⁴⁰

In *Hessler*, mentioned above, the Missouri Supreme Court held that even if Ms. Hessler had shown that her pregnancy complications constituted a “good cause” for leaving her job, she still would have been disqualified from receiving unemployment benefits because she failed to fulfill the causal connection element.¹⁴¹ The court reasoned that the statute’s purpose was to incentivize employees to stay at their jobs and to only allow unemployment benefits when the cause was “real, not imaginary, substantial, not trifling, and reasonable, not whimsical.”¹⁴² The court determined that Section 288.050 required that good cause be attributable to Ms. Hessler’s work or to her employer, which meant “it must be the work or employer himself that creates the condition making it unreasonable to expect *this employee* to continue work.”¹⁴³ So, since Ms. Hessler’s work did not cause her to become pregnant, the complications arising from her pregnancy were not causally connected to her work.¹⁴⁴ Moreover, the court ignored the statements of Ms. Hessler and her doctor, indicating that the stress of her job made her pregnancy complications worse.¹⁴⁵ Thus, the court held that Ms. Hessler was disqualified from receiving benefits despite the fact that she was experiencing severe pregnancy complications that were not her fault and that were exacerbated by her job.¹⁴⁶

The Missouri Court of Appeals for the Western District, in *Mena v. Consentino Group, Inc.*, held that the employee had failed to produce enough medical evidence to support the causal connection element.¹⁴⁷ Ms. Mena’s job as a cashier at a Price Choppers grocery store required her to stand for long periods of time.¹⁴⁸ Ms. Mena had arthritic knees and standing for long periods caused her significant pain.¹⁴⁹ Her employer denied her request for a stool to

140. *Id.* (quoting Smith, 69 S.W.3d at 928). For a brief explanation of the proof requirement under the causal connection element and what types of proof may or may not be needed after *Difatta-Wheaton*, see Appellant’s Brief and Appendix at 17, *Davis v. Transp. Sec. & Div. of Emp’t Sec.*, 295 S.W.3d 594 (Mo. Ct. App. 2009) (No. ED 92287).

141. *Hessler v. Labor & Indus. Relations Comm’n*, 851 S.W.2d 516, 519 (Mo. 1993) (en banc).

142. *Id.* at 518 (quoting *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. Ct. App. 1977)).

143. *Id.* (emphasis in original).

144. *Id.* at 518–519.

145. *Id.* at 518.

146. *Hessler*, 851 S.W.2d at 518–19.

147. *Mena v. Consentino Grp., Inc.*, 233 S.W.3d 800, 806 (Mo. Ct. App. 2007).

148. *Id.* at 802.

149. *Id.*

sit on, telling her that if she wanted a stool she should find a new job.¹⁵⁰ Thus, Ms. Mena was forced to leave her employment.¹⁵¹ She subsequently filed for unemployment benefits.¹⁵² At the Appeals Tribunal hearing, Ms. Mena produced a medical certificate from her doctor that diagnosed her with osteoarthritis of the knees and restricted her to lifting or pushing fifty pounds.¹⁵³ She also produced a form, filled out by her doctor, requesting handicapped automobile license plates because she could not walk more than fifty feet without resting.¹⁵⁴ In addition, Ms. Mena informed the Commission that her doctor advised her to quit if she would have to continue standing at her job, and she produced a medical certificate that indicated she could not stand continuously for more than one hour.¹⁵⁵ However, the Commission denied Ms. Mena benefits because she failed to produce enough medical evidence to show a causal connection indicating that her job made her illness worse.¹⁵⁶

The appellate court affirmed the Commission's findings.¹⁵⁷ The court reasoned that there was insufficient medical evidence to show that Ms. Mena's arthritis was made worse by standing at the cashier's station, holding that even if her doctor's verbal statement—advising Ms. Mena to leave her job—had been in writing, it would not have been enough evidence to prove a “causal connection.”¹⁵⁸ The court stated that the doctor's statement was only a “suggestion” and not “medical evidence of an aggravated condition.”¹⁵⁹ The court held that it would need a statement from Ms. Mena's medical doctor specifically stating that the existing medical condition was made worse by Ms. Mena's employment, requiring her to quit.¹⁶⁰ Absent such a statement, the court reasoned it could not hold that the causal connection element was satisfied.¹⁶¹ Thus, the court held that Ms. Mena was not entitled to unemployment benefits, even though she demonstrated that she had a serious medical condition which limited her physical abilities and that her doctor had advised her to quit her job.¹⁶²

150. *Id.*

151. *Id.*

152. *Mena*, 233 S.W.3d at 802.

153. *Id.*

154. *Id.*

155. *Id.* (explaining that the medical certificate, which stated that Ms. Mena could not stand for more than an hour, was made after she left her job and was not given to the Appeals Tribunal; however, it was provided to the Commission and the Court of Appeals).

156. *Id.* at 803.

157. *Mena*, 233 S.W.3d at 806.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Mena*, 233 S.W.3d at 806.

In *Difatta-Wheaton*, the Missouri Supreme Court took a drastically different approach to analyzing whether an employee had left work voluntarily. Unlike in *Duffy*¹⁶³ and *Wimberley*,¹⁶⁴ where the courts disqualified an ill receptionist and a woman with pregnancy complications, respectively, even though the women left work through no fault of their own, in *Difatta-Wheaton* the Missouri Supreme Court looked to the purpose of the statute, which was to protect individuals who had lost their jobs “through no fault of their own.”¹⁶⁵ Rather than disqualifying a woman suffering from severe pregnancy complications because she did not give her employer adequate time to find her an alternative job or because the job was not the direct cause of her pregnancy, as the court did in *Hessler*,¹⁶⁶ the court looked at the plain meaning of the terms of Section 288 and the public policy that was purportedly behind the statute’s passage.¹⁶⁷ Accordingly, rather than disqualifying a woman with arthritic knees because she failed to provide a specific type of medical evidence, as the court did in *Mena*,¹⁶⁸ the court supplanted the previous elemental approach in favor of a new analysis that considers the true policy goals of unemployment insurance statutes.

III. WHAT THE LAW IS—*DIFATTA-WHEATON* AND SUBSEQUENT CASES CHANGE THE “VOLUNTARY” QUIT ANALYSIS

A. *The Supreme Court’s Analysis in Difatta-Wheaton*

The Missouri Supreme Court fundamentally changed how illness and medical conditions of an employee affect the voluntary quit determination. Amy Difatta-Wheaton was a sales representative with the Dolphin Capital Corporation.¹⁶⁹ In 2006, Ms. Difatta-Wheaton was diagnosed with ovarian cancer.¹⁷⁰ Because of complications stemming from her ovarian cancer, including excessive bleeding and severe pain, Ms. Difatta-Wheaton was forced to take a medical leave of absence from May 24 to May 29, 2006.¹⁷¹ However, the night before her scheduled return to work, Ms. Difatta-Wheaton began suffering severe cancer-related complications and was forced to miss additional days of work to receive “emergency medical treatment she needed

163. See *supra* notes 79–89 and accompanying text.

164. See *supra* notes 90–103 and accompanying text.

165. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 598 (Mo. 2008) (en banc) (citing MO. REV. STAT. § 288.020.1 (2000)).

166. See *supra* notes 117–29, 141–46 and accompanying text.

167. *Difatta-Wheaton*, 271 S.W.3d at 597–98.

168. See *supra* notes 147–62 and accompanying text.

169. *Difatta-Wheaton*, 271 S.W.3d at 595.

170. *Id.*

171. *Id.*

to save her life.”¹⁷² Although Ms. Difatta-Wheaton contacted her employer several times to notify it that she would be forced to miss additional days of work, she was terminated.¹⁷³ Subsequently, Ms. Difatta-Wheaton filed a claim for unemployment insurance benefits.¹⁷⁴

Applying the pre-*Difatta-Wheaton* reasoning, the Deputy for the Division of Employment Security found that Ms. Difatta-Wheaton was disqualified from receiving unemployment benefits because her actions amounted to a “voluntary quit.”¹⁷⁵ That is, Ms. Difatta-Wheaton had left her job voluntarily because no causal connection was found between her cancer and her job at Dolphin Capital.¹⁷⁶ This finding was affirmed and adopted by both the Appeals Tribunal and the Labor and Industrial Relations Commission.¹⁷⁷ However, Ms. Difatta-Wheaton, with the help of an appointed attorney acting pro bono, appealed the Commission’s decision.¹⁷⁸ Ultimately, the Missouri Supreme Court reversed the decision of the Commission.¹⁷⁹ The court held that because Ms. Difatta-Wheaton was not responsible for her ovarian cancer, its complications, or the timing of their occurrence, and she took necessary steps to preserve her employment given “uncontrollable factors,” that she left work through “no fault” of her own, and did not do so voluntarily.¹⁸⁰ Thus, the court granted her unemployment benefits.¹⁸¹

In reaching its decision the court took a fundamentally new approach. Rather than disqualifying Ms. Difatta-Wheaton from benefits because her ovarian cancer was not caused by her job, as the Commission had done when applying *Duffy*, the Missouri Supreme Court looked at the plain meaning of Section 288’s terms and the public policy behind the statute’s passage.¹⁸² The Missouri Supreme Court thought it was imperative to decipher the meaning of leaving work “voluntarily” in light of Section 288’s goals, which are to provide

172. *Id.* at 594–95.

173. *Id.* at 595 (in repeatedly attempting to notify her employer of her illness, Ms. Difatta-Wheaton left a message with her supervisor on the morning of May 29, had her doctor fax a statement regarding her condition to Dolphin Capital on May 29, had her friend deliver a doctor’s note to Dolphin Capital, and had her boyfriend deliver another doctor’s note on June 5).

174. *Difatta-Wheaton*, 271 S.W.3d at 595.

175. *Id.* (stating the deputy’s agreement with Dolphin Capital’s assessment that Ms. Difatta-Wheaton had resigned because of unexcused absences between May 29 and June 5, 2009).

176. *Id.* at 597.

177. *Id.* at 595.

178. *Id.* at 594, n.1 (court expressing its appreciation to attorney Susan Ford Robertson for representing Ms. Difatta-Wheaton pro bono).

179. *Difatta-Wheaton*, 271 S.W.3d at 599.

180. *Id.* at 598–99.

181. *Id.* at 599.

182. *Id.* at 597–98.

assistance to employees who have become unemployed through no fault of their own.¹⁸³

The court first looked at the public policy behind the statute to determine the meaning of “voluntarily.”¹⁸⁴ More specifically, the court examined the public policy goals stated in the public policy statement of Section 288.¹⁸⁵ The statute stated that the purpose of the legislation was to benefit “persons unemployed through no fault of their own.”¹⁸⁶ The court determined that the word “fault,” as used in the statute, meant “responsibility for wrongdoing or failure.”¹⁸⁷ Further, the court noted that the legislature said that “[t]his law shall be liberally construed to accomplish its purpose.”¹⁸⁸ In other words, the court reasoned that the legislature “sought to provide help to those who were not themselves to blame for their unemployment” and “to have courts construe the specific provisions of Missouri’s employment security law accordingly.”¹⁸⁹ With these policy objectives in mind, the court then looked at the term “voluntarily” in Section 288.050.1(1).¹⁹⁰

The court held that the term “voluntarily,” in light of the statute’s “plain language,” meant “proceeding from the will: produced in or by an act of choice.”¹⁹¹ Based on this interpretation and the stated public policy in the statute, the court found previous Missouri cases holding that “leaving employment for a non-work-related illness is, as a matter of law, leaving work voluntarily,” to be inconsistent with the statute.¹⁹² Thus, the court held that leaving work because of an illness, even if that illness was not caused or exacerbated by the employee’s job, was not “voluntary” under Section 288.050.1(1), so long as the employee takes necessary steps, in light of

183. *Id.* (quoting *Abrams v. Ohio Pac. Express*, 819 S.W.2d 338, 340 (Mo. 1991) (en banc) (“The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent.”)).

184. *Difatta-Wheaton*, 271 S.W.3d at 598.

185. *Id.* at 598 (emphasis omitted) (quoting MO. REV. STAT. § 288.020.1 (2000)).

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

187. *Difatta-Wheaton*, 271 S.W.3d at 598.

188. *Id.* (quoting MO. REV. STAT. § 288.020.2 (2000)).

189. *Id.*

190. *Id.*

191. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2564 (unabridged ed. 1993)).

192. *Difatta-Wheaton*, 271 S.W.3d at 598 (citing MO. REV. STAT. §§ 288.020, 288.050.1(1) (Supp. 2000)). With this holding, the Missouri Supreme Court specifically disaffirmed such language in *Wimberly v. Labor & Industrial Relations Commission*, 688 S.W.2d 344, 346 (Mo. 1985), *Lake v. Labor & Industrial Relations Commission*, 781 S.W.2d 207, 208 (Mo. Ct. App. 1989), *Fifer v. Missouri Division of Employment Security*, 665 S.W.2d 81, 82 (Mo. Ct. App. 1984), *Duffy v. Labor & Industrial Relations Commission*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977), and *Bussmann Manufacturing Co. v. Industrial Commission*, 335 S.W.2d 456, 461 (Mo. Ct. App. 1960). *Difatta-Wheaton*, 271 S.W.3d at 597, 598 n.7.

“uncontrollable factors” stemming from his illness, to preserve his employment.¹⁹³

Specifically, the court held that Ms. Difatta-Wheaton did not leave her job voluntarily for two reasons.¹⁹⁴ First, Ms. Difatta-Wheaton was forced to miss work because of her ovarian cancer, which was not her “fault.”¹⁹⁵ The court reasoned that it could not be said that Ms. Difatta-Wheaton “made a choice or was otherwise responsible for her ovarian cancer, its complications, or the timing of their occurrence.”¹⁹⁶ Secondly, the court held that Ms. Difatta-Wheaton took necessary and appropriate steps to preserve her employment, especially given the circumstances with which she was dealing.¹⁹⁷ Therefore, the court ultimately held that “it would be inconsistent with the statutory language of ‘no fault’ and ‘voluntarily’” to deny Ms. Difatta-Wheaton unemployment insurance benefits because she voluntarily left work.¹⁹⁸

Based on the Missouri Supreme Court’s interpretation of Missouri’s unemployment insurance statutes, and its ultimate holding in *Difatta-Wheaton*, the court has supplanted old approaches to determining whether an employee has voluntarily left work when a personal illness is involved. Rather than disqualifying the employee from benefits because the illness was not caused, or made worse by, the employee’s job, or analyzing the three elements to see if there was a “voluntary quit,” the Missouri Supreme Court has adopted a new elemental approach.¹⁹⁹ The court has held that an employee is entitled to unemployment benefits if: 1) the employee suffers from a personal illness which is the reason that he cannot work; and 2) the employee takes necessary and reasonable steps, considering the circumstances and uncontrollable factors that result from his illness, to preserve his employment.²⁰⁰

The *Difatta-Wheaton* approach broadens access to unemployment insurance benefits to many employees who would have been denied access under previous approaches, including employees who would have been disqualified in the past because their illness was not related to their work. For example, the employee in *Duffy*, who had to receive daily treatments at the

193. *Difatta-Wheaton*, 271 S.W.3d at 599.

194. *Id.* at 598–99.

195. *Id.*

196. *Id.* at 599.

197. *Id.* Ms. Difatta-Wheaton left a message with her supervisor on the morning of May 29, had her doctor fax a statement regarding her condition to Dolphin Capital on May 29, had her friend deliver a doctor’s note to Dolphin Capital, and had her boyfriend deliver another doctor’s note on June 5, despite being severely ill. *Id.* at 595.

198. *Difatta-Wheaton*, 271 S.W.3d at 599.

199. *See id.* at 598–99.

200. *See id.*

hospital,²⁰¹ would no longer have to prove her illness was causally connected with her work and could now receive benefits. Similarly, the employees in *Wimberley* and *Hessler* could no longer be excluded from receiving benefits because their jobs did not cause their pregnancy,²⁰² or because they did not give their employer enough time to find them an alternative job when faced with a threatened abortion.²⁰³ Moreover, *Difatta-Wheaton* does not require expert medical evidence to show the “causal connection” element because it is no longer a part of the analysis.²⁰⁴ This lessens the burden of proof on employees seeking benefits by allowing them to receive unemployment without proving their medical condition caused them to quit work or that their job exacerbated their illness.²⁰⁵ For example, the arthritic plaintiff in *Mena* would not be disqualified from receiving unemployment benefits because she failed to produce a specific type of medical evidence. It would now be enough to demonstrate that she had the arthritis and that she tried to maintain her employment.²⁰⁶

It is evident that *Difatta-Wheaton* will expand access to Missouri's unemployment insurance benefits and will fundamentally change Missouri's unemployment insurance law. What effect has the *Difatta-Wheaton* decision had in Missouri thus far? Have the courts adopted *Difatta-Wheaton*? Has the Labor and Industrial Relations Commission adopted the new policy? How has all of this affected Missouri residents seeking unemployment benefits? These are the questions that the remainder of this Comment will seek to address.

B. The Courts Support *Difatta-Wheaton*

Difatta-Wheaton was decided in December 2008.²⁰⁷ So, it is difficult to gauge what long-lasting impact the case will have on access to Missouri's unemployment insurance benefits. However, even though the policy shift

201. See *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195, 197 (Mo. Ct. App. 1977).

202. See *Hessler v. Labor & Indus. Relations Comm'n*, 851 S.W.2d 516, 518–19 (Mo. 1993) (en banc); *Wimberley v. Labor & Indus. Relations Comm'n*, 688 S.W.2d 344, 345 (Mo. 1985) (en banc).

203. *Hessler*, 851 S.W.2d at 518–19.

204. See *Difatta-Wheaton*, 271 S.W.3d at 598–99.

205. There have been cases decided post-*Difatta-Wheaton* that have lessened the expert medical evidence requirement. See, e.g., *Hernandez v. Staffing Solutions, Inc.*, 295 S.W.3d 564, 567 (Mo. Ct. App. 2009) (holding that expert medical evidence was not needed, and common knowledge would suffice).

206. *Mena v. Consentino Grp., Inc.*, 233 S.W.3d 800, 802 (Mo. Ct. App. 2007) (finding that Ms. Mena did try to preserve her employment by asking for a stool and discussing her condition with her employer).

207. *Difatta-Wheaton*, 271 S.W.3d at 594.

Difatta-Wheaton represents has been short-lived, it has already begun to widen access to unemployment benefits at the judicial level.

In *Hernandez v. Staffing Solutions*, an employee was granted unemployment benefits by the Missouri Court of Appeals for the Eastern District.²⁰⁸ Ms. Hernandez, the employee, performed administrative work at Washington University in Saint Louis.²⁰⁹ During the time she worked at the university she became pregnant and began to experience back pain due to her pregnancy.²¹⁰ Her pain was exacerbated by sitting for long periods of time, which her job required.²¹¹ Eventually, Ms. Hernandez was forced to leave her job because of pregnancy complications.²¹² However, the Labor and Industrial Relations Commission denied Ms. Hernandez unemployment benefits because her pregnancy, and the resulting complications, were not causally connected to her job.²¹³ The Eastern District Court of Appeals overturned the Commission's decision and remanded the case with instruction that Ms. Hernandez be awarded benefits.²¹⁴ Rather than disqualifying Ms. Hernandez because her job was not the cause of her pregnancy, as the court did in *Hessler*²¹⁵ and *Wimberley*,²¹⁶ the court based its reasoning on *Difatta-Wheaton*.²¹⁷ The court reasoned that leaving work for a non-work-related illness is not a "per se . . . disqualification" from unemployment benefits.²¹⁸ Following *Difatta-Wheaton*, the court held that leaving work due to a personal illness can be considered involuntary if the employee lost their job "through no fault of her own."²¹⁹ Thus, because Ms. Hernandez's pregnancy complications were not her fault, she was entitled to unemployment benefits.²²⁰ The Eastern District clearly adopted the policy of *Difatta-Wheaton*, thus, expressly overturning the Commission's decision which relied on old policies found in *Duffy*,²²¹ *Wimberley*,²²² and *Hessler*.²²³

The Eastern District Court of Appeals also followed the reasoning of *Difatta-Wheaton* in *Davis v. Transportation Security and Division of*

208. *Hernandez*, 295 S.W.3d at 566.

209. *Id.* at 565.

210. *Id.* at 566.

211. *Id.* at 565.

212. *Id.* at 566.

213. *Hernandez*, 295 S.W.3d at 567.

214. *Id.*

215. *See supra* notes 116–29, 141–46 and accompanying text.

216. *See supra* notes 90–103 and accompanying text.

217. *Hernandez*, 295 S.W.3d at 566–67.

218. *Id.* at 566.

219. *Id.* at 566–67.

220. *Id.* at 567.

221. *See supra* notes 79–89 and accompanying text.

222. *See supra* notes 90–103 and accompanying text.

223. *See supra* notes 117–29, 141–46 and accompanying text.

Employment Security.²²⁴ Ms. Davis, the employee, worked at Lambert International Airport in St. Louis, Missouri.²²⁵ During that time, she became pregnant and began to have severe complications.²²⁶ The complications included heavy vaginal bleeding and several instances in which Ms. Davis had to seek emergency medical treatment.²²⁷ Eventually, it was discovered that Ms. Davis's pregnancy was ectopic and she was forced to terminate the pregnancy.²²⁸ However, her medical problems persisted after the termination.²²⁹ Ms. Davis still experienced severe pain, chest pains, and blurred vision, which precluded her from working.²³⁰ Because Ms. Davis was required to miss work due to her ectopic pregnancy and the complications after the termination of the pregnancy, she was fired.²³¹ Ms. Davis subsequently applied for unemployment benefits and was denied by the Commission because, although she had a "good cause" for leaving her job, it "was not attributable to her work."²³² However, the Court of Appeals refused to follow the Commission's error in applying the old policies found in *Duffy*,²³³ *Hessler*,²³⁴ and *Wimberley*,²³⁵ and would not disqualify Ms. Davis because her job had not caused her pregnancy or its resulting complications.²³⁶

The Eastern District Court of Appeals followed the *Difatta-Wheaton* analysis, stating that the two cases were "indistinguishable."²³⁷ Borrowing language from *Difatta-Wheaton*, the court held that there was no evidence that Ms. Davis had "made a choice or was otherwise responsible for her [ectopic pregnancy], its complications, or the timing of their occurrence."²³⁸ Thus, the court concluded that it was not Ms. Davis's fault that she had become

224. See *Davis v. Transp. Sec. & Div. of Emp't Sec.*, 295 S.W.3d 594, 596–97 (Mo. Ct. App. 2009).

225. *Id.* at 595.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Davis*, 295 S.W.3d at 595.

230. *Id.*

231. *Id.*

232. *Id.* at 595–96. For a more detailed discussion of the errors in the Appeals Tribunal and Commission's decisions, see Appellant's Brief and Appendix at 12–23, *Davis v. Transp. Sec. & Div. of Emp't Sec.*, 295 S.W.3d 594 (Mo. Ct. App. 2009) (No. ED 92287).

233. See *supra* notes 79–89 and accompanying text.

234. See *supra* notes 117–29, 141–46 and accompanying text.

235. See *supra* notes 90–103 and accompanying text.

236. *Davis*, 295 S.W.3d at 596–97.

237. *Id.* at 596.

238. *Id.* at 596–97 (alteration in original) (quoting *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 598 (Mo. 2008)).

unemployed.²³⁹ She had left work involuntarily and was, therefore, entitled to unemployment insurance benefits.²⁴⁰

The *Difatta-Wheaton* policy shift was also recognized and followed in *Korkutovic v. Gamel Company*.²⁴¹ Mr. Korkutovic, the employee, had non-work-related problems with the arteries in his legs.²⁴² Mr. Korkutovic gave his employer doctor's notes with work restrictions stemming from his medical problem, and was subsequently fired.²⁴³ Even after being fired, Mr. Korkutovic tried to work out an arrangement where he could continue working; he even offered to ignore his doctor's work restrictions and continue with his old job.²⁴⁴ However, Gamel Company refused to allow him to continue his employment.²⁴⁵ Under the old voluntary standard, Mr. Korkutovic would have been disqualified.²⁴⁶ For example, in *Mena*, the employee who was denied benefits had leg problems which were not work-related,²⁴⁷ just like Mr. Korkutovic.²⁴⁸ Moreover, the employee in *Mena* failed to produce specific medical evidence that stated her work made her arthritis worse and that she should leave her job.²⁴⁹ Similarly, Mr. Korkutovic only produced medical evidence that his work was restricted because of his medical condition, not that he should leave his employment.²⁵⁰ Thus, under the old approach in *Mena*,²⁵¹ Mr. Korkutovic would have been disqualified from receiving benefits. However, the court expressly rejected this approach and held that Mr. Korkutovic was entitled to unemployment benefits.²⁵²

The appellate court, following the reasoning of *Difatta-Wheaton*, held that Mr. Korkutovic was not responsible for his medical problems or the consequences that resulted from them.²⁵³ Thus, he was not responsible for his inability to do his job.²⁵⁴ Further, Mr. Korkutovic had attempted to preserve his employment, even going beyond what would be reasonable to ask of him, by asking to continue working despite his doctor's recommendation.²⁵⁵ Thus,

239. *Id.*

240. *See id.*

241. *Korkutovic v. Gamel Co.*, 284 S.W.3d 653, 658 (Mo. Ct. App. 2009).

242. *Id.* at 655.

243. *Id.*

244. *Id.*

245. *Id.*

246. *See supra* notes 73–78 and accompanying text.

247. *Mena v. Consentino Grp., Inc.*, 233 S.W.3d 800, 803, 805 (Mo. Ct. App. 2007).

248. *Korkutovic*, 284 S.W.3d at 655.

249. *Mena*, 233 S.W.3d at 803.

250. *Korkutovic*, 284 S.W.3d at 658.

251. *See supra* notes 147–62 and accompanying text.

252. *Korkutovic*, 284 S.W.3d at 658.

253. *Id.*

254. *Id.*

255. *Id.* at 655, 658.

Mr. Korkutovic met the *Difatta-Wheaton* standard and was entitled to unemployment benefits.²⁵⁶

The Southern District Court of Appeals has also accepted and applied *Difatta-Wheaton*.²⁵⁷ In *Strahl*, the court held that the Labor and Industrial Relations Commission made an “error of law” in denying benefits to the employee, Mr. Strahl.²⁵⁸ Mr. Strahl worked for the Transportation Security Administration.²⁵⁹ He suffered from chronic back problems and pneumonia.²⁶⁰ Mr. Strahl’s back problems eventually required surgery, so his family doctor ordered him to take a number of days off of work prior to the surgery in order to rebuild his immune system, which had been affected by the pneumonia.²⁶¹ The doctor also put Mr. Strahl on a twenty-pound lifting restriction because of his back condition.²⁶² This restriction prevented Mr. Strahl from performing his job duties, and therefore, Mr. Strahl felt he had no choice but to resign.²⁶³

The Labor and Industrial Relations Commission denied Mr. Strahl unemployment benefits.²⁶⁴ The Commission stated that under *Bussmann Manufacturing* and *Duffy*, Mr. Strahl had to demonstrate that his back problems were a result of his work or were made worse by his work, which he had failed to do.²⁶⁵ Thus, the Commission held that he was not entitled to benefits.²⁶⁶ However, the Southern District Court of Appeals held that the Commission had made a fundamental “error of law” in applying the old *Duffy* standard.²⁶⁷ The court recognized that *Difatta-Wheaton* had specifically overturned the language in *Duffy* and *Bussmann Manufacturing* and that the “causal connection” standard found in those cases should no longer be applied.²⁶⁸ Thus, the court overturned the Commission’s decision and remanded the case to the Commission for further proceedings.²⁶⁹

It is unclear the real breadth and depth of the change that *Difatta-Wheaton* will have on Missouri’s unemployment insurance law in the future. What is clear is that *Difatta-Wheaton* represents an entirely new definition of

256. *Id.* at 658.

257. *See Strahl v. Transp. Sec. Admin.*, 299 S.W.3d 298, 301 (Mo. Ct. App. 2007).

258. *Id.*

259. *Id.* at 299.

260. *Id.*

261. *Id.*

262. *Strahl*, 299 S.W.3d at 299.

263. *Id.*

264. *Id.* at 300.

265. *Id.* at 301.

266. *Id.*

267. *Strahl*, 299 S.W.3d at 301.

268. *Id.* at 300–01.

269. *Id.* at 301.

“voluntarily” when personal illness is involved.²⁷⁰ That is, if a personal illness is the cause of the claimant’s unemployment and the claimant takes necessary and reasonable steps to preserve their employment, then they have not left work voluntarily.²⁷¹ At this point in time, it is clear that Missouri courts have recognized the policy shift that *Difatta-Wheaton* represents and are applying its reasoning in a variety of cases. This means that individuals like Ms. Davis,²⁷² Ms. Hernandez,²⁷³ Mr. Korkutovic,²⁷⁴ and Mr. Strahl²⁷⁵ are receiving unemployment benefits when they would not have under old rules and definitions. Thus, *Difatta-Wheaton* represents a policy that expands access to unemployment insurance benefits in Missouri. However, the Missouri Labor and Industrial Relations Commission has been reluctant to adopt *Difatta-Wheaton*, stifling the expansion of benefits *Difatta-Wheaton* requires and creating an unemployment crisis in this state.

IV. MISSOURI’S UNEMPLOYMENT CRISIS

A. *The Labor and Industrial Relations Commission Ignores the Courts*

The Missouri Labor and Industrial Relations Commission is ignoring the Missouri Supreme Court. The Commission, the bureaucratic agency charged with administering the unemployment insurance program in Missouri, has not recognized *Difatta-Wheaton* or the policy change *Difatta-Wheaton* represents. Rather, the Commission continues to apply the old standards regarding how personal illness affects the voluntary quit analysis²⁷⁶ found in cases like *Duffy*,²⁷⁷ *Hessler*,²⁷⁸ *Wimberley*,²⁷⁹ and *Mena*.²⁸⁰ To date, the Commission maintains that in order to receive unemployment benefits, an employee who has left work due to an illness must show that his job aggravated or caused the medical condition.²⁸¹

270. See *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 598 (Mo. 2008) (en banc).

271. *Id.* at 598–99.

272. See *supra* notes 224–36 and accompanying text.

273. See *supra* notes 208–20 and accompanying text.

274. See *supra* notes 241–56 and accompanying text.

275. See *supra* notes 257–69 and accompanying text.

276. See, e.g., *Davis v. Transp. Sec. & Div. of Emp’t Sec.*, 295 S.W.3d 594, 596–97 (Mo. Ct. App. 2009); *Hernandez v. Staffing Solutions, Inc.*, 295 S.W.3d 564, 566–67 (Mo. Ct. App. 2009); *Strahl v. Transp. Sec. Admin.*, 299 S.W.3d 298, 301 (Mo. Ct. App. 2007).

277. See *supra* notes 79–89 and accompanying text.

278. See *supra* notes 117–29, 141–46 and accompanying text.

279. See *supra* notes 90–103 and accompanying text.

280. See *supra* notes 147–62 and accompanying text.

281. See, e.g., *Brown v. Div. of Emp’t Sec.*, 320 S.W.3d 748, 751 (Mo. Ct. App. 2010); *Johnson v. Div. of Emp’t Sec.*, 318 S.W.3d 797, 802 (Mo. Ct. App. 2010); see also *Selected Case Law Passages*, *supra* note 18. The Commission maintains that *Difatta-Wheaton* is a case dealing

Prior to January 2010 the Commission's website, which is where claimants are directed to go when applying for benefits, stated:

Work causing an aggravation of an existing condition, or work that was a contributing factor to the illness is also encompassed within the meaning of the clause "attributable to his work or to his employer," the only requirement being that there exist a causal connection between the work and the aggravation of, or contribution to, the disability.²⁸²

Further, the website used to contend that, where a medical condition is "not within common knowledge," there "must be scientific or medical evidence" showing a causal connection between the illness and the employee's job.²⁸³ The Commission was still explicitly applying the standard as stated in *Duffy*,²⁸⁴ which had been overturned by the Missouri Supreme Court two years earlier.²⁸⁵

Although the Commission's website has changed, the Commission itself is still blatantly ignoring the courts. The Commission continues to apply the *Duffy* standard, even though *Duffy*'s language was specifically disaffirmed by the Missouri Supreme Court in *Difatta-Wheaton*.²⁸⁶ Also, the Southern District Court of Appeals in *Strahl* specifically stated that the Commission is making an "error of law" when it applies the old standard that requires claimants to demonstrate a causal connection between their work and their illness in order to receive benefits.²⁸⁷ Moreover, the Eastern District Court of Appeals in *Davis* and *Hernandez* has overturned Commission decisions because they have not followed the policy of *Difatta-Wheaton*.²⁸⁸ However, the Commission continues to ignore the courts and apply the voluntary quit

with the court's misconduct analysis, as they place it under the heading of "Misconduct Cases." The Commission states that *Difatta-Wheaton* stands for the proposition that "When claimant was not able to return to work after approved leave, due to serious health issues, she was not disqualified from receiving benefits because she did not quit her employment 'voluntarily.' The claimant did everything possible to retain her job." *Id.*

282. *Selected Case Law Passages*, *supra* note 18 (quoting *Bussmann Mfg. Co. v. Indus. Comm'n*, 335 S.W.2d 456, 491 (Mo. Ct. App. 1960)).

283. *Id.* (quoting *Clevenger v. Labor and Indus. Relations Comm'n*, 600 S.W.2d 675, 676 (Mo. Ct. App. 1980)).

284. *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1972) (citing *La Plante v. Indus. Comm'n*, 327 S.W.2d 487 491 (Mo. Ct. App. 1959); *Bussmann Mfg. Co. v. Indus. Comm'n*, 327 S.W.2d (Mo. Ct. App. 1959)) ("Personal illness of the employee unrelated to her employment will not render termination involuntary unless the illness was caused or aggravated by the work or the employer.").

285. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 598 n.7 (Mo. 2008) (en banc).

286. *Id.*

287. *Strahl v. Transp. Sec. Admin.*, 299 S.W.3d 298, 301 (Mo. Ct. App. 2007).

288. *Davis v. Transp. Sec. & Div. of Emp't Sec.*, 295 S.W.3d 594, 596 (Mo. Ct. App. 2009); *Hernandez v. Staffing Solutions*, 295 S.W.3d 564, 567 (Mo. Ct. App. 2009).

analysis as found in *Duffy* and similar cases.²⁸⁹ Even after having several decisions overturned, the Commission is still wrongfully denying benefits. John J. Ammann, Director of the Saint Louis University Legal Clinic, has stated that his organization, which provides free legal services to indigent individuals, is still receiving new clients who have been wrongfully denied unemployment benefits by the Commission.²⁹⁰ So, it is clear that the Commission is continuing to misapply the law.

The broader legal community, not just the courts, has recognized the change of law found in *Difatta-Wheaton*. In fact, the aforementioned cases of *Davis* and *Strahl*, which held that *Difatta-Wheaton* was the applicable policy, were the two most important Missouri decisions regarding unemployment in the last half of 2009 according to *Missouri Lawyers Weekly*.²⁹¹ However, the Labor and Industrial Relations Commission has continued to ignore the courts completely and the law. The Commission continues to apply the reasoning and policy of *Duffy*, *Hessler*, *Wimberley*, and *Mena*.²⁹² However, *Difatta-Wheaton* still represents an expansion of unemployment insurance in Missouri, as courts have been more than willing to overturn unlawful Commission decisions. Unfortunately, the Commission's continued defiance of the courts and the law has created a crisis for many Missouri residents, who are already facing the crisis of unemployment.

B. Missouri's Unemployment Crisis

The Labor and Industrial Relations Commission is continuing to ignore *Difatta-Wheaton*, and this is creating an unemployment crisis in Missouri.²⁹³ The most obvious consequence of the Commission's misapplication of the law

289. As recently as September 2010, the Commission argued that the *Difatta-Wheaton* holding was "limited to situations involving a life-threatening medical condition." *Johnson v. Div. of Emp't Sec.*, 318 S.W.3d 797, 802 (Mo. Ct. App. 2010); *see also* *Brown v. Div. of Emp't Sec.*, 320 S.W.3d 748, 751 (Mo. Ct. App. 2010) ("[T]he Commission's conclusions . . . included no analysis of voluntariness of her resignation as required by *Difatta-Wheaton*").

290. Interview with John J. Ammann, *supra* note 70.

291. *Major Opinions From the Second Half of 2009*, MO. LAW. WKLY., Jan. 4, 2010, at 6, 27–29.

292. *See supra* notes 286–90 and accompanying text; *see, e.g.*, Respondent's Brief at 20–24, *Hernandez v. Staffing Solutions*, 295 S.W.3d 564, 567 (Mo. Ct. App. 2009) (No. ED92154), wherein the Division of Employment Security articulates the "cause attributable to such work or to the claimant's employer" standard, suggests that *Difatta-Wheaton*'s holding is limited to "medical emergenc[ies]" and cites *Mena* for authority.

293. *See, e.g., Brown*, 320 S.W.3d at 751 (*Difatta-Wheaton* was used to overturn the Commission's determination that a domestic abuse victim's resignation from her job was voluntary when she resigned to move to another state to get away from her abuser); *Johnson*, 318 S.W.3d at 802 (*Difatta-Wheaton* was used to overturn the Commission's determination that a single-mother whose car and child-care problems precipitated her dismissal for absenteeism was a "voluntary quit").

is that individuals who should receive benefits when they initially apply are being wrongfully denied.²⁹⁴ However, the misapplication of law by the Commission is having a whole host of negative effects on unemployed Missouri residents seeking benefits.

For those that do apply for benefits, the Commission's misapplication of the law has a host of negative consequences. As discussed previously, the Commission has a complex and lengthy appeals process.²⁹⁵ So, a misapplication of law by the Commission means that a claimant will be denied several times before he ever reaches the courts.²⁹⁶ For example, if the Commission applied the *Duffy* standard, instead of the correct *Difatta-Wheaton* standard, a claimant would have to appeal three times before the courts could overturn the Commission's erroneous application of law.²⁹⁷ Thus, a denial at each level within the Commission has a host of negative consequence for the wrongfully denied employee.

After the initial claim is filed, a wrongful denial by the Deputy means that, in the best case scenario, the claimant will have to wait up to an additional thirty days to receive benefits.²⁹⁸ This can be particularly difficult for an individual who is unemployed and suffering from a medical condition. The Deputy's wrongful denial also forces the claimant to fill out additional paperwork so that the matter can be appealed.²⁹⁹ Additionally, the claimant would need to collect evidence in preparation for the hearing before the Appeals Tribunal.³⁰⁰ The claimant would also want to become familiar with the rules and procedures applicable to a Tribunal hearing, all of which would take the claimant additional time. In the worse case, a claimant who does not know the matter can be appealed, or who is not mentally or physically able to appeal, would not receive the benefits they are entitled to. Also, it is likely that many claimants would simply accept the Deputy's denial, reasoning that the Deputy would understand, and correctly apply, the laws of Missouri to their case. These individuals would also not receive the benefits they are entitled to.

If the matter is appealed, a wrongful denial by the Appeals Tribunal also has a host of negative consequences for the wrongfully denied claimant. The wrongful denial means another thirty days the claimant will have to wait for benefits.³⁰¹ Moreover, if the claimant does not realize they can appeal past the Tribunal, and fails to file for a review of the Tribunal's decision within thirty

294. Interview with John J. Ammann, *supra* note 70.

295. See *supra* notes 19–68 and accompanying text (discussing the appeals process).

296. See *supra* notes 19–68 and accompanying text (discussing the appeals process).

297. See *supra* notes 19–68 and accompanying text (discussing the appeals process).

298. See MO. REV. STAT. § 288.070.6. (Supp. 2011).

299. *Id.*

300. See *id.* § 288.190.2.

301. See *id.* § 228.190.3.

days, the claimant loses all right to appeal further, thereby permanently losing benefits.³⁰² A wrongful denial by the Tribunal also requires the claimant to file a motion for reconsideration or an application for review with the Commission.³⁰³ Also, depending on how the Commission wishes to proceed, the claimant may have to file a brief, argue his case before the Commission, or be prepared for additional hearings.³⁰⁴ These activities require a claimant to expend a lot of time, effort, and resources. Once again, this can be difficult for someone who is having financial troubles, as a result of being unemployed, and who may be dealing with an illness. Furthermore, if a claimant has been denied by the Deputy and by the Appeals Tribunal, he may simply give up and not appeal to the Commission even if he is aware of that right.

A wrongful denial by the Commission means the claimant must file an appeal from the Commission's decision with the Missouri Court of Appeals.³⁰⁵ The claimant could proceed pro se in the court of appeals, but this would require the claimant to draft and file legal briefs, motions, and possibly argue the case in open court.³⁰⁶ Of course, this level of law practice is beyond the capabilities of most individuals who are not trained lawyers, as there are a plethora of rules that must be followed.³⁰⁷ So, the wrongfully denied claimant would likely have to pay for the services of a licensed attorney. This presents complications to the claimant who has lost his employment. John J. Ammann, Legal Clinic Director at Saint Louis University, stated "many of the wrongfully denied claimants cannot afford representation because they no longer have gainful employment, and have been denied their only benefits."³⁰⁸ Thus, many claimants would have no ready source of income to pay an attorney to take up their cause if he or she is still unemployed. Moreover, on top of all of this, the claimant may still be dealing with an illness so severe that it caused him to leave his job. Thus, a severely ill individual would have to shoulder the burden of paying hefty legal fees, mounting medical expenses, and all while being unemployed. It is likely that a number of claimants who are wrongfully denied benefits by the Commission would simply give up and never get the benefits they deserve because of the costs and complications of continuing to fight.

302. *Id.*

303. MO. REV. STAT. § 288.190.3

304. *See* MO. CODE REGS. ANN. tit. 8, § 20-4.010 (Supp. 2011).

305. MO. REV. STAT. § 288.210 (2005).

306. *See supra* notes 61-70 and accompanying text.

307. Interview with John J. Ammann, *supra* note 70 ("For [pro se claimants] to handle their own appeal at the Commission level, write a brief that conforms to the rules, and handle their own case in the appellate courts, would be like asking me, an untrained mechanic, to change the transmission in my car.").

308. *Id.*

A small number of claimants can seek out the aid of free legal services. For instance, attorney John J. Ammann and the law students at the Saint Louis University Legal Clinic have represented many clients in the appellate court who are appealing from wrongful denials of unemployment benefits by the Commission.³⁰⁹ For the few individuals who can find this type of help, successfully overturning the Commission's erroneous decision is likely. However, these appeals can take months, if not years, leaving an already ill person without a source of income, and the money they deserve, for a lengthy period of time. Additionally, these cases place a strain on institutions, like the Saint Louis University Legal Clinic, that provide free legal services to indigent individuals. Appellate cases are time consuming, and clinics and free legal service providers are forced to take time and resources away from other worthy causes to help those that have been erroneously denied unemployment benefits. When asked about the toll that the unemployment appeals cases have on the clinic at Saint Louis University, John Ammann replied, "the unemployment appeals take up the biggest part of the clinic's time and resources and precludes the clinic from representing other individuals in other matters."³¹⁰ Specifically, Mr. Ammann stated "the clinic is no longer in a position to take on social security cases, and we are no longer able to take on the number of consumer protection cases we have in the past."³¹¹ These problems would be substantially alleviated if the Commission would simply apply the correct legal standard initially.

It is impossible to say with certainty how many individuals are not receiving the unemployment benefits that they deserve. Based on the preceding discussion, it would not be surprising if the number is in the hundreds or even the thousands. However, it would be a crisis if even one unemployed individual were denied the benefits he is entitled to when the Commission could easily remedy the problem. It would be a crisis if individuals like Ms. Davis, Ms. Hernandez, and Mr. Strahl would have lost the benefits they deserve because the Commission refuses to listen to the Missouri Supreme Court. Luckily, those three individuals were able to get representation and correct the injustice that had befallen them. However, there are many individuals who are not so fortunate. The Commission should end this crisis and follow the law.

CONCLUSION

The judiciary has played a large role in shaping Missouri's unemployment policies. The Missouri Supreme Court in *Difatta-Wheaton* fundamentally

309. See, e.g., *Davis v. Transp. Sec. & Div. of Emp't Sec.*, 295 S.W.3d 594 (Mo. Ct. App. 2009) (noting that John J. Ammann of St. Louis, Mo., represented the claimant).

310. Interview with John J. Ammann, *supra* note 70.

311. *Id.*

changed the availability of unemployment benefits to individuals who were forced to leave their job because of a personal illness. The Missouri Supreme Court expanded access to unemployment insurance to those individuals by no longer requiring that an illness or medical condition be related to their job for benefits to be available. So, under the new *Difatta-Wheaton* policy, an employee who becomes ill and cannot work is entitled to benefits.³¹² However, for reasons unknown, the Missouri Labor and Industrial Relations Commission is not following the precedent set in *Difatta-Wheaton* and is denying benefits to individuals who are entitled to them.

The Commission is continuing not to apply *Difatta-Wheaton* even though it is having decisions overturned by the courts for failure to do so.³¹³ The Commission is persisting in applying old standards found in cases that have been explicitly disaffirmed by the Missouri Supreme Court. This is causing the Commission, at all levels, to deny claimants wrongfully who left work because of a personal illness. These wrongful denials are placing an extreme burden on claimants who are forced into a complex and confusing appeals process within the Commission and in the courts. Moreover, the Commission's misapplication of law is creating a crisis for many unemployed Missouri residents who, for a plethora of reasons, cannot seek assistance from the courts in overturning the Commission's unlawful decisions. In reality, the Commission's misapplication of law is resulting in individuals who deserve benefits not receiving them, or receiving them months or years after they should. While the exact number of individuals being wronged by the Commission's failure to recognize *Difatta-Wheaton* is not yet known, if even one person is denied the benefits they deserve it would constitute a crisis, especially considering that the Commission could fix the problem by simply correctly applying the law. It is important to understand that this comment does not ask the Commission to change its structure fundamentally, invest resources into some vast new venture, or make personnel changes. This Comment simply asks that the Commission apply the law correctly and stop the injustices occurring to many unemployed Missouri residents. The Commission could, and should, end this crisis now.

ANTHONY G. LARAMORE*

312. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 598–99 (Mo. 2008) (en banc).

313. See, e.g., *Brown v. Div. of Emp't Sec.*, 320 S.W.3d 748, 751 (Mo. Ct. App. 2010); *Johnson v. Div. of Emp't Sec.*, 318 S.W.3d 797, 802 (Mo. Ct. App. 2010); *Davis*, 295 S.W.3d at 596.

* J.D. 2010, Saint Louis University School of Law. Current partner at the St. Louis law firm of Going & Laramore LLP.

I would like to thank my wife Kelly for her support and love, and my beautiful son Noah who was born during the inception phase of this article. You are both my life and my heart.

A special thanks to Rochelle K. Balentine, former editor for the Saint Louis University Law Journal and current attorney with the National Labor Relations Board, for all her help in drafting and researching this casenote. Ms. Balentine zealously represented clients who found themselves in situations similar to those discussed in this article as a Rule 13 Student Attorney at the Saint Louis University Legal Clinic. Her passion for the unemployed Missourians that she represented was truly a source of inspiration when drafting this casenote.

I would also like to thank Professor Susan A. FitzGibbon and Clinical Professor John J. Amman for their guidance and direction.