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Barr v. Citicorp Credit Service, Inc Respondent's Brief Dckt. 43122

IN THE SUPREME COURT OF THE STATE OF IDAHO

JESSICA E. BARR, Claimant/Appellant, vs. CITICORP CREDIT SERVICES, INC. USA, Employer; and STATE OF IDAHO, DEPARTMENT OF LABOR, Respondents.	)	SUPREME COURT NO. 43122-2015 BRIEF OF RESPONDENT DEPARTMENT OF LABOR

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
R. D. MAYNARD, CHAIRMAN

IDAHO DEPARTMENT OF LABOR

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Constitutional Provisions and Statutes

Court Rules

Administrative Rules

STATEMENT OF THE CASE

A. Nature of the Case

This unemployment benefits case involves a claimant's discharge for misconduct. Jessica E. Barr ("Barr") appeals from the decision of the Idaho Industrial Commission ("Commission") finding her ineligible for unemployment benefits. The Commission found Barr was discharged by her employer, Citicorp Credit Services, Inc. USA ("Citicorp"), for misconduct in connection with employment and, thus, was not eligible for benefits under the Idaho Employment Security Law, I.C. §§ 72-1301 *et seq.*

B. Course of the Proceedings

Following her discharge from Citicorp, Barr applied for unemployment benefits and IDOL initially determined she was eligible for benefits. Agency Exhibit, p.29. The administrative determination was dated October 8, 2014. *Id.*

Citicorp timely appealed from the determination; its appeal letter was received by the Department on October 22, 2014. Agency Exhibit, p.32.

On November 7, 2014, a telephonic hearing was held before an Appeals Examiner of IDOL's Appeals Bureau. Tr., p.4, ll.16-17; Agency Exhibit, Notice of Telephonic Hearing.

In a written decision dated November 10, 2014, the Appeals Examiner reversed and found Barr ineligible for unemployment benefits. Agency Exhibit, pp.1-5.

On November 24, 2014, Barr timely appealed to the Commission. R., pp.8-9.

The Commission conducted a *de novo* review of the record. R., p.29. On February 25, 2015, the Commission entered its decision. It found that Citicorp had discharged Barr for misconduct in connection with her employment; and that, as a result, she was ineligible for unemployment benefits. R., pp.28-35.

On April 8, 2015, Barr timely filed a notice of appeal to the Idaho Supreme Court. R., pp.36-50.

C. Statement of the Facts

Barr was hired by Citicorp in August 2004 as a customer service representative and continued in that position until she was fired in August 2014. Tr., p.11, ll.18-19; p.26, ll.19-22; p.11, ll.8-11; p.27, ll.4-8.

Barr was terminated for failing to comply with Citicorp's directive relating to the proper scheduling of unpaid voluntary time off ("VTO"). Barr ignored the policy directive, despite the fact that it was repeatedly communicated to her during corrective coaching sessions and in a final written warning. Tr., p.6, ll.14-17.

After Barr's initial claim for unemployment benefits was approved by IDOL, Citicorp appealed. Agency Exhibit, p.29. The notice of hearing issued by IDOL framed the issue pertinent to this appeal as follows: "whether the claimant was discharged, and if so, whether for misconduct in connection with employment, according to §72-1351(2)(a) of the Employment Security Law."

Agency Exhibit, Notice of Telephonic Hearing, p.2.

It is uncontroverted that Barr was discharged by Citicorp on or about August 25, 2014. Tr., p.6, ll.19-21; p.11, ll.8-11; p.27, ll.4-8. The factual dispute in the proceedings below, which the Commission resolved in favor of Citicorp, centered upon the events leading up to Barr's firing.

Three witnesses testified during the telephonic hearing before the Appeals Examiner: Isaac Downey ("Downey"), the operations manager at Citicorp, Tr., p.5, l.23 - p.6, l.1, Tiffany Endicott ("Endicott"), a customer service supervisor at Citicorp and Barr's senior supervisor. Tr., p.8, ll.8-11; p.18, l.1, and Barr. Tr., p.26, l.17 - p.33, l.8.

Downey testified that on December 23, 2013, Citicorp's site director, Rob Warner, sent an email to all floor agents, including Barr, which directed that agents were "not to contact the workforce management group if [they] wanted any sort of voluntary time off." Tr., p.7, ll.4-6. Agents were instructed to sign up for VTO by telephone or computer through Citicorp's electronic scheduling planner. Tr., p.7, ll.6-10; p.23, ll.8-11. If an agent needed additional help scheduling VTO, they were to contact on-site supervisors or managers, who were available at all times during the week ("24-7"), to answer VTO questions, and to address emergency situations that might arise requiring immediate approval of VTO. Tr., p.12, ll.19-25; p.15, l.23 - p.16, l.10; p.16, ll.13-14; p.23, ll.4-7. Agents were not to call the Workforce Management Group ("WMG") (also referred to in these proceedings as The Command Center ("TCC")) to obtain VTO. Tr., p.18,

ll.21-25; p.6, l.24 - p.7, l.6; p.8, ll.3-5.

This directive concerning the scheduling of VTO was important because the WMG or TCC was located off-site in Irving, Texas, and its primary function within the organization was not to take messages or phone calls from employees with questions about VTO, which it was ill-suited to handle. Tr., p.7, l.15 - p.8, l.1; p.9, l.23 - p.10, l.1. Rather, TCC was responsible for assuring that customers were being serviced efficiently. In addition, TCC had responsibilities to other groups within Citicorp. *Id.*

The electronic scheduling planner operated similar to a queue. Agents could sign up for VTO through the system, and when Citicorp was overstaffed the system would automatically approve agents for VTO. If an agent's VTO request was approved, the agent could leave work once notified by the electronic scheduling planner. *See* Tr., p.11, l.22 - p.12, l.15.

Endicott testified that her entire team was aware of the company policy articulated in the December 23, 2013 email, and that to her knowledge Barr was the only member of her entire team who continued to contact TCC against this policy. Tr., p.23, ll.12-17; p.24, ll.4-11.

Endicott explained that Barr was aware of Citicorp's policy concerning VTO requests, and the other means that could, and should, be used by agents seeking VTO. Tr., p.11, ll.13-17. Barr had used those other means numerous times. Tr., p.18, ll.6-12. She had requested VTO through an on-site supervisor. Tr., p.18, ll.12-14. Downey testified that he told Barr she could contact him or

her manager for assistance with VTO. Tr., p.8, ll.19-20.

Endicott reviewed Director Warner's December 2013 email with Barr and confirmed that Barr had read the email. Tr., p.21, ll.3-12. Endicott was very clear with Barr that she was not to contact TCC in any way. Tr., p.34, ll.12-13; p.34, l.25 - p.35, l.5. In her questioning of Endicott, Barr attempted to suggest that she may not have been aware of this email:

> Q. [by Barr]. Okay. Now -- and also the e-mail that was sent on December 23rd, that was just like a generic e-mail. It doesn't necessarily mean I was even at work that day; correct?
>
> A. [by Endicott]. It wasn't a generic e-mail. It was an e-mail that was written up by the director Rob Warner and, then, I actually covered the e-mail with you when you returned to work to insure that you received the e-mail. So, you were aware of the e-mail.

Tr., p.20, l.24 - p.21, l.7.

Barr did not heed the repeated warnings she received. At least three times in January 2014 Barr contacted TCC; after each occasion, Barr was told that she should not be contacting TCC. Tr., p.8, ll.13-19. According to Endicott, Barr was counseled by her on January 13th, 15th and 21st, concerning her repeated communications with TCC about VTO. Tr., p.6, ll.14-17; p.8, ll.8-13; p.10, ll.11-16; p.18, ll.17-18; p.18, l.25 - p.19; p.24, ll.14-18. Endicott explained what transpired during each coaching:

> Each time that I coached her[,] Jessica stated that she knew that she wasn't to contact TCC. Each of the times she said that she didn't believe that applied to her. I let her know that it actually applies to everyone. Despite what you might think you need to follow this direction that the business is giving you. Every time that I coached her on that she laughed it off. She didn't take it seriously. She understood it, but she didn't -- she didn't follow

through.

Tr., p.19, ll.10-18. *Accord*, Tr., p.34, ll.13-23.

Barr even used her sister to contact TCC. During the January 21, 2014, coaching, Barr admitted that she solicited her sister, who worked in a different division of Citicorp, to call TCC on her behalf. *Id.*; p.35, l.23 - p.36, l.3.

In April 2014, Endicott took leave from her work and then transferred elsewhere within Citicorp until August 2014. Tr., p.8, ll.23-25. Then on July 6th or 7th, 2014, Citicorp received an unsolicited communication from TCC stating that Barr had contacted them several times during the month. Tr., p.9, ll.1-6; Agency Exhibit, p.28. TCC stated further that "over the last couple of months [Barr] had called in on an almost daily basis inquiring on [sic] voluntary time off." Tr., p.9, ll.21-23. TCC wanted Citicorp to be aware of this because it was not able to handle these telephone calls and because it wanted Citicorp to follow-up with Barr, presumably to get her to stop calling TCC. Tr., p.9, l.23 - p.10, l.1.

On July 7, 2014, Downey met with Barr about her improper contacts with TCC and expressed his disappointment that she continued to contact TCC despite being advised on numerous occasions not to do so. Tr., p.10, ll.2-10. At that time a final warning was issued to Barr. *Id.* This final written warning, which was given to Barr, Tr., p.36, ll.16-23, explained the reasons for its issuance:

> **Requesting VTO**: You were included in an email from Rob Werner in December 2013 and had conversations with Tiffany Endicott in which you acknowledge the proper way to request VTO. You indicated that you understood the policy change and that you

> would no longer contact TCC for VTO. On July 7, 2014 we received an email from TCC stating that you continue[d] to call them daily over the last couple of months requesting VTO.

Agency Exhibit, p.23. The warning continued:

> When making a request for VTO (or any schedule change) you must request it in Esp [the electronic scheduling planner]. The TCC's responsibility is to ensure that our calls are being routed appropriately. Processing VTO requests over the phone is not one of their job responsibilities. Agents should not be calling this number to get approved for VTO.

Id. Barr was cautioned:

> Failure to demonstrate immediate, significant and sustained improvement and/or further occurrences of the conduct may result in further corrective action up to and including termination of employment.

Id., p.24.

Downey explained further in his testimony:

> So, I had at that time issued a final warning to her advising her that if she continued to contact the Irving command center regarding voluntary time off that that would be job impactful, which meant it could mean the termination and separation of employment for her.

Tr., p.10, ll.11-16.

On August 21, 2014, Citicorp discovered that earlier on July 27, 2014, Barr had contacted TCC about a request for VTO. Tr., p.6, ll.14-19; p.10, ll.17-22; p.25, ll.15-17. *See also* Agency Exhibit, p.28. This was discovered when another unsolicited email was received from TCC stating it again had been contacted by Barr via instant messaging. Tr., p.10, ll.19-22. The substantive text of Barr's communications with TCC on July 27, 2014, reads as follows, with extraneous identifying information removed:

Barr [4:31 p.m.]: Can you tell me if i show up in the request thing for vto i did it on my phone and it was giving me error messages?

TCC [4:55 p.m.]: since you signed up, yes you are in the database

Barr [4:55 p.m.]: Ok, just making sure it actually signed me up

Barr [5:53 p.m.]: Can you happen to tell me what managers are supposed to be here today?

TCC [5:55 p.m.]: you should have the MOD line for Boise - 208-822-2077

Barr [5:57 p.m.]: Whats the mod line?

TCC [5:57 p.m.]: Manager on Duty

Barr [5:57 p.m.]: I have to call it tho there isnt any mangers here i could IM or talk to in person?

Barr [6:52 p.m.]: Hey do you know how far out they have gone cause some one who gets off at 9 said they got it and i still dont have any

TCC [6:53 p.m.]: please check with the local manager

Barr [6:53 p.m.]: Is there one here or just call the mod number? Sorry I Just think my request isnt working or something

Agency Exhibit, p.21 (punctuation and other errors in original).

On August 25th, Downey met with Barr, who was asked to explain her conduct. Barr said she understood the final warning; she said calling TCC was "like an addiction" and she couldn't help herself. Tr., p.11, ll.3-5. Barr was suspended and sent home. Tr., p.11, ll.3-5.

The next day, after confirming that, in fact, Barr had been coached multiple times in January, Tr., p.38, ll.21-23, Downey informed Barr that she was fired. Tr., p.6, ll.19-21; p.11, ll.8-11; p.27, ll.4-8.

During the telephonic hearing before the Appeals Examiner, Barr

attempted to controvert the testimony of Citicorp's witnesses. She denied that any of the January coaching sessions took place. Tr., p.28, ll.18-22. Although Barr admitted she read site director Warner's email during January, 2014, she claimed to have received confusing communications from supervisors about VTO requests. Tr., p.27, l.21 - p.28, l.6. Barr also claimed not to understand the final warning, asserting that she thought only the initial VTO request could not be made to TCC, Tr., p.29, l.20 - p.30, l.4, and that the prohibition was limited to requesting that TCC "give" or "approve" VTO. Tr., p.30, ll.5-9.

Barr raised a host of other claims during the hearing, which were unsupported by any other testimony. According to Barr, Endicott said she [Endicott] wasn't sure about the Warner email and that she [Endicott] didn't see why requesting VTO through TCC would be a problem, Tr., p.28, ll.11-17. Barr also stated she could not find a manager on July 27, 2014. Tr., p.31, ll.3-4. Barr further stated that a day or two after her July 27, 2014, instant messages, she spoke with Downey, told him about the messages, and related to him an unspecified family emergency. Tr., p.32, l.25 - p.33, l.4. Downey reportedly said it was fine. Tr., p.33, ll.2-4. Downey did not recall ever talking to Barr shortly after the July 27, 2014, instant messages. Tr., p.13, l.20 - p.14, l.1.

Barr also suggested that she was being singled out and retaliated against because she had made a complaint to the human resources department. Tr. p.32, ll.16-21. Endicott testified that she was never contacted by the human resources department about a complaint from Barr. Tr., p.24, ll.23-24. Downey

testified that Barr's firing had nothing to do with any complaint Barr had made:

> [I]f you're asking if it was in -- like in response to the dispute that you had with human resources or the complaint that you had, absolutely not. It was in a continuation of the final warning conversation that we had had and I had felt that you were not adhering to that final warning conversation based on the IM that I read.

Tr., p.15, ll.7-13. Nothing in the record provides any specifics about the claimed retaliation.

To the extent that there were any factual disputes in the proceedings below, it is apparent from the record that the Commission found the testimony of Citicorp's witnesses more credible.

ISSUES ON APPEAL

I.

Whether Barr's assertions of error on appeal fail to meet the requirements of I.A.R. 35(a) and are too indefinite for appellate review?

II.

Should this Court decline to consider the documents Barr attached to her brief on appeal where they were not in the record before the Commission and no motion to augment the record has been filed?

III.

Is the decision of the Industrial Commission finding that Barr was discharged for employee misconduct under the Idaho Employment Security Law supported by substantial and competent evidence?

ARGUMENT

I.

Barr's Claim of Error on Appeal Fails to Meet the Requirements of I.A.R. 35(a) and Is Too Indefinite for Appellate Review

The requirements of an appellate brief are prescribed by I.A.R. 35(a). These include, *inter alia*:

> (4) *Issues Presented on Appeal.* A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.
>
> . . .
>
> (6) *Argument.* The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

I.A.R. 35 (emphasis added).

Consistent with this rule, this Court holds that

> [w]here an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. . . . A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue.

Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). *Accord,* Inama v. Boise County ex rel. Bd. of Comm'rs, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (constitutional takings issue not reviewed where issue was not supported

by legal authority and was only mentioned in passing).

Stated another way, this Court "will not search the record on appeal for error," Bach v. Bagley, 148 Idaho at 790, 229 P.3d at 1152; *citing* Suits v. Idaho Board of Professional Discipline, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003), and "to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived." Bach v. Bagley, *supra*; *citing* Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

These rules apply to all parties, whether represented by counsel or appearing *pro se*. LeBow v. Commercial Tire, Inc., 157 Idaho 379, 384, 336 P.3d 786, 791 (2014); Huff v. Singleton, 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006); Suitts v. Nix, 141 Idaho at 709, 117 P.3d at 123.

The brief submitted by Barr contains only one citation to legal authority: I.C. § 72-1368(7).[1] Appellant's Brief, p.5. The citation appears in a quotation from the Commission's decision where the statute is cited for the proposition that "the Commission will consider only the evidence in the record as established by the Appeals Examiner." *Id.*

Barr's statement of issues is equally unhelpful. The sole issue she presents in her brief is the following:

---

[1] I.C. § 72-1368(7) reads in part:

> The commission shall decide all claims for review filed by any interested party in accordance with its own rules of procedure not in conflict herewith. The record before the commission shall consist of the record of proceedings before the appeals examiner, ...

> Did Citi bank representatives, Mr. Downey and Mrs. Endicott retaliate upon Ms. Barr and her benefits by providing false information to the appeals examiner causing her to be denied benefits based on false facts? Should her unemployment benefits be reversed back to the original finding where she was granted said benefits?

Appellant's Brief, p.6. Barr's argument section does little more than restate this issue: "Ms. Barr asserts that the employers, who represented Citi Bank Credit Services INC, USA, abused their discretion when it [sic] retaliated upon the employee (Ms. Barr) which resulted in termination of employment as well as retaliation upon benefits [sic]." *Id.*, p.7.

Barr's claim of retaliation by Citibank is never logically connected to any issue that could be raised in an unemployment benefits appeal. At most, this claim appears to be an attack on the credibility of Downey and Endicott. This Court in Huff v. Singleton, 143 Idaho 498, 148 P.3d 1244 (2006), found a similarly vague attack on credibility to be legally insufficient:

> Huff presents eight issues on appeal. Seven of these issues fail to set forth legal arguments and are not supported by legal authority or propositions of law. Rather, these issues merely attempt to attack the credibility of Singleton or refute testimony presented by Singleton at the telephonic hearing. This Court will not reweigh the evidence or consider the credibility of witnesses. Because these issues are not supported by legal argument or authority, and are mere attempts to attack the credibility of Singleton, they will not be considered by this Court.

Huff v. Singleton, 143 Idaho at 500, 148 P.3d at 1246 (citation omitted).

The dearth of legal authority and legal argument in Barr's brief provides no meaningful guidance as to the legal issues Barr may be attempting to assert. The Court is given no tools with which to review this appeal, such as citations to

authority or citations to portions of the record that have a bearing on this appeal. This Court, like undersigned counsel, is left to speculate as to the issues Barr may be attempting to raise, to research those issues for her, and to craft an argument or opinion applying the fruits of that research to the record. Under the authorities discussed above, this is something Barr should have done in her brief.

Because of these circumstances, it is respectfully submitted that Barr has waived any issue or issues she may have desired to raise in this appeal.

II.

This Court Should Not Consider the Documents Attached to Barr's Brief Where They Were Not Presented Below and No Motion to Augment the Record on Appeal Has Been Made

Barr attached a number of documents to the Appellant's Brief she filed with this Court. These documents were not part of the record before the Commission below; nor have they been the subject of a motion to augment the record on appeal. Accordingly, these documents should not be considered on appeal.

In reaching this conclusion, the Court need look no further than its opinion in Flynn v. Amfac Foods, Inc., 97 Idaho 768, 769, 554 P.2d 946, 947 (1976). In Flynn, a claimant sought to augment the record on appeal with evidence that was not before the Appeals Examiner or the Commission. The request was denied: "This Court can only consider the facts as contained in the

record below and thus such new 'evidence' cannot be considered." Flynn v. Amfac Foods, Inc., 97 Idaho at 769, 554 P.2d at 947. The Court cited I.C. § 73-1368(i), which is now codified as I.C. § 73-1368(7). This statute reads in pertinent part: "[t]he record before the commission shall consist of the record of proceedings before the appeals examiner . . . ."

Western Community Insurance Co. v. Kickers, Inc., 137 Idaho 305, 48 P.3d 634 (2002), also is instructive. In the appeal of this case, the appellant asserted that the trial court erred in ruling upon a motion to intervene. However, the record on appeal did not include the pleadings that related to the motion. This Court observed that "[e]rror will not be presumed but must be affirmatively shown on the record by appellant" and that "[t]he appellant has the obligation to provide a sufficient record to substantiate his or her claims on appeal." Western Community Insurance Co., 137 Idaho at 306, 48 P.3d at 635 (2002). This Court held: "Attaching documents to a brief is not a substitute for a motion under Idaho Appellate Rule 30 to augment the record on appeal. Because the documents attached to [Intervenor]'s brief are not a part of the record, we cannot consider them." *Id.*

Based on this precedent, the documents attached to Barr's brief on appeal should not be considered.

III.

Substantial and Competent Evidence Supports the Commission's Finding That Barr Was Discharged For Misconduct

A. Standard of Review

Article V, § 9 of the Idaho Constitution vests the Idaho Supreme Court with jurisdiction to hear appeals from the Industrial Commission. Under its provisions the scope of this jurisdiction is limited: "the court shall be limited to questions of law." *Id.* Accordingly, this Court is "constitutionally compelled to defer to the Industrial Commission's findings of fact where supported by substantial and competent evidence." Locker v. How Soel, Inc., 151 Idaho 696, 699, 263 P.3d 750 753 (2011), *quoting* Teffer v. Twin Falls School Dist. No. 411, 102 Idaho 439, 439, 631 P.2d 610, 610 (1981). "Because the Commission is the fact finder, its conclusions on the credibility and weight of the evidence will not be disturbed unless they are clearly erroneous." Locker, *supra.* *See also* Talbot v. Desert View Care Ctr., 156 Idaho 517, 520, 328 P.3d 497, 500 (2014) (Commission findings upheld unless "clearly erroneous, which means they are not supported by substantial and competent evidence.").

Substantial and competent evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Folks v. Moscow School District No. 281, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997). Under this standard of review, all facts and inferences are to be viewed in the light most favorable to the prevailing party before the Commission. Sadid v.

Idaho State University, 154 Idaho 88, 94, 294 P.3d 1100, 1106 (2013). The Court will not reweigh the evidence, or consider whether it may have drawn a different conclusion from the evidence had it been the finder of fact. Folks, *supra.*

In an employee misconduct case, whether an employee's behavior constitutes misconduct in connection with employment is a question of fact and reviewed on appeal for substantial and competent evidence. Adams v. Aspen Water, Inc., 150 Idaho 408, 413, 247 P.3d 635, 640 (2011).

B. Substantial and Competent Evidence Supports the Commission's Finding that Barr Was Discharged for Misconduct in Connection With Her Employment

The Commission found that Barr was discharged for misconduct in connection with her employment. The personal eligibility conditions for unemployment benefits under the Idaho Employment Security Law provide, *inter alia*, that a claimant who "was discharged for misconduct in connection with his employment" is not eligible for benefits. I.C. § 72-1366(5); IDAPA 09.01.30.275.

Misconduct cases focus not on whether the employer had reasonable grounds for discharge, but rather on whether the facts resulting in the discharge constitute misconduct under Idaho Code § 72-1366(5) and IDAPA 09.01.30.275.02. *See* Adams, *supra,* 150 Idaho at 413, 247 P.3d at 640.

The employer has the burden of proving an employee's discharge was for misconduct in connection with employment. *Id.*; IDAPA 09.01.30.275.01. The Idaho Department of Labor's administrative rules describe three separate,

though sometimes overlapping, sets of proof that may establish misconduct:

> **02. Disqualifying Misconduct.** Misconduct that disqualifies a claimant for benefits must be connected with the claimant's employment and involve one of the following:
>
> > **a.** Disregard of Employer's Interest. A willful, intentional disregard of the employer's interest.
> >
> > **b.** Violation of Reasonable Rules. A deliberate violation of the employer's reasonable rules.
> >
> > **c.** Disregard of Standards of Behavior. If the alleged misconduct involves a disregard of a standard of behavior which the employer has a right to expect of his employees, there is no requirement that the claimant's conduct be willful, intentional, or deliberate. The claimant's subjective state of mind is irrelevant. The test for misconduct in "standard of behavior cases" is as follows:
> >
> > > i. Whether the claimant's conduct fell below the standard of behavior expected by the employer; and
> > >
> > > ii. Whether the employer's expectation was objectively reasonable in the particular case.

IDAPA 09.01.30.275.02. This three-pronged approach follows well-established Idaho case law. *E.g.*, Johns v. S. H. Kress & Co., 78 Idaho 544, 548, 307 P.2d 217, 219 (1957); Jenkins v. Agri-Lines Corp., 11 Idaho 549, 602 P.2d 47 (1979); Folks, *supra*, 129 Idaho at 836-837, 933 P.2d at 645-646. The Commission must consider all three potential factual bases for misconduct -- disregard of employer's interest, violation of reasonable rules, and disregard of standards of behavior. Adams, *supra*.

The Commission found that Barr deliberately disregarded her employer's rules. This finding falls within the second of the three bases for misconduct. IDAPA 09.01.30.275.02(b). More specifically, the Commission found that

"Employer discharged [Barr] for failing to follow its policy regarding requests for voluntary time off" and that this policy "was adequately communicated to [Barr]." R., p.33.

Substantial and competent evidence supports these Commission's findings. The VTO rule was communicated to Barr in an email dated December 23, 2014. Tr., p.7, ll.4-10; p.23, ll.8-11. The VTO rule was explained to Barr. Tr., p.8, ll.13-19; p.11, ll.13-17; p.21, ll.3-12. When Barr failed to comply with this rule, she received three corrective coaching sessions in January, 2014. Tr., p.6, ll.14-17; p.8, ll.8-13; p.10, ll.11-16; p.18, ll.17-18; p.18, l.25 - p.19; p.24, ll.14-18. When Barr failed to comply with those corrective coaching sessions, she received a final written warning on July 7, 2014. Tr., p.10, ll.2-10. When Barr failed to comply with Citicorp's final warning she was fired. Tr., p.6, ll.19-21; p.11, ll.8-11; p.27, ll.4-7. All of these actions related to Barr's employment and, thus, were "in connection with" her employment with Citicorp. That is this case in a nutshell. These facts establish the Citicorp policy or rule, Barr's knowledge of that policy or rule, and her disregard of it. In Endicott's words, Barr "just laughed it off." Tr., p.19, ll.10-18.

The Commission also found that Citicorp's rule was reasonable: "Employer's policy is also objectively reasonable. Employer needs to be able to streamline requests for time off." R., p.33. The business need for the policy was aptly explained in Downey's testimony. *See* Respondent's Brief, *supra*, p.4.

Consequently, the Commission's finding of misconduct should be upheld

based upon Barr's deliberate violation of the VTO policy.

The finding of misconduct also may be upheld where a claimant disregarded "standards of behavior" relating to the employment, which is the third prong of misconduct. As a general rule, it need not be shown that an employee's disregard of a standard of behavior was willful, intentional, or deliberate. Adams, *supra.*

The "standards of behavior" prong involves two inquiries: (1) whether the employee's conduct fell below a standard of behavior the employer had a right to expect; and (2) whether the employer's expectations were objectively reasonable under the circumstances. Folks, *supra,* 129 Idaho at 837, 933 P.2d at 646. The first inquiry focuses on the employer's subjective expectations, while the latter inquires as to whether those expectations are objectively reasonable. *Id.* An expectation is objectively reasonable if it was communicated to the employee, or if it "flows naturally" from the employment relationship. *Id.*

The testimony of Downey and Endicott establishes Citicorp's subjective expectation that Barr would not involve TCC in her VTO requests. Citicorp's reasons for that expectation were the remote location of TCC, the fact that TCC's primary function was not to take calls from agents about VTO, and the fact that TCC had responsibilities to other groups within Citicorp and taking calls from agents about VTO deflected TCC resources from its primary responsibilities. Tr., p.7, l.15 - p.8, l.1; p.9, l.23 - p.10, l.1.

Substantial competent evidence supports the finding that Citicorp

communicated its expectation to Barr. Again, the record recounts the December email, the multiple coaching sessions and the final warning. Tr., p.6, ll.14-17; p.8, ll.8-13; p.10, ll.11-16; p.18, ll.17-18; p.18, l.25 - p.19; p.24, ll.14-18; p.10, ll.2-10. Because Citibank's expectation concerning VTO requests was communicated to Barr, it is objectively reasonable. Adams, *supra*.

In Locker, *supra*, this Court reviewed a finding by the Commission that an employee's failure to obtain a medical release as requested by her employer was insubordination. The facts showed that the employee made a single half-hearted attempt to get a release and then, without explanation, did nothing more. The Court, after emphasizing it was "constitutionally constrained" from finding its own facts as employee urged on appeal, held:

> We are unable to conclude, as a matter of law, that an employee has not willfully and deliberately disregarded the employer's order when the employee has both failed to comply with her employer's order and also failed to communicate any justification for her lack of compliance.

Locker, *supra,* 151 Idaho at 700, 263 P.3d at 754. The same can be said for the case at bar.

In the instances below where Barr's testimony contradicted that of Downey and Endicott, the testimony of the latter two witnesses must be accepted on appeal because the facts and inferences on appeal from the Commission are to be viewed in the light most favorable to the prevailing party before the Commission. Sadid, *supra,* 154 Idaho at 94, 294 P.3d at 1106.

C. Conclusion

It is for the Commission to determine the credibility and weight to be given to the testimony admitted. Adams, *supra*. Substantial and competent evidence supports the Commission's finding of misconduct. Even if there may be conflicting evidence in the record as to one or more of the Commission's findings, relevant evidence supports the conclusions it reached. The Commission's decision should be affirmed.

CONCLUSION

Barr has failed to list any germane legal issues or present any legal argument on appeal. It is respectfully requested that this Court decline to review or dismiss the appeal. Barr's tacit request to augment the record on appeal should be denied. Substantial and competent evidence supports the factual findings of the Commission. If this Court reviews this case on appeal, the Commission's findings should be affirmed, and Respondent awarded its costs on appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15th day of January, 2016, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

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