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Docket No. 45555

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEGAN D. KELLER,
Claimant-Respondent

v.

AMERITEL INNS, INC. D/B/A HAMPTON INN AND SUITES,
Employer-Appellant,

and

IDAHO DEPARTMENT OF LABOR,
Respondent.

CLAIMANT-RESPONDENT'S BRIEF

Appeal from the Industrial Commission of the State of Idaho

Commissioner Thomas E. Limbaugh, Presiding.

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1. STATEMENT OF THE CASE

Keller disagrees with AmeriTel's statement of the case to the extent it both misstates law in its nature of the case and misstates and omits facts in its statement of facts.

1.1. NATURE OF THE CASE

Keller disagrees with AmeriTel's framing of the case because it invites the Court to conduct an illegal review of the Idaho Industrial Commission's (the "Commission") decision. AmeriTel insists that this case involves a legal question about the meaning of Idaho Code section 72-1366(5) (the "eligibility statute"), but AmeriTel makes no legitimate argument that the Commission misapplied the law. AmeriTel is not arguing for an interpretation of the eligibility statute. AmeriTel is insisting the Court conduct an **unconstitutional review** of the Commission's decision. AmeriTel's argument only makes sense if the Court disregards its limited power to review Commission decisions and instead dives into the record to make its own findings of fact without deference to the Commission. The Court should ignore AmeriTel's argument under section IV.A. of Appellant's Brief because it begs the Court to exceed its jurisdiction.

1.2. STATEMENT OF THE FACTS

1. Keller disagrees with AmeriTel's Statement of Fact 5. The Commission did not find that Keller received bi-weekly work schedules or that such schedules always stated that "All employees are required to speak with a manager when calling in." The exhibits AmeriTel cites do not clearly support its statement of fact. Two of the schedules do not state what AmeriTel claims. Claimant's Exhibits pp. C-30–31. The two schedules that do make the alleged statement do not show Keller's name, so it's not clear that she received those

schedules. Claimant's Exhibits pp. C-32–33. There is no mention of the alleged statements on schedules in the transcript.

2. Keller's "illness" that AmeriTel notes in its Statement of Fact 6 was complications from her pregnancy that the Commission found to cause her "bouts of extreme nausea and dehydration." R. p. 46.

3. AmeriTel **concedes** in its Statement of Fact 7 that, as the Commission found, Keller's use of text messages to notify her manager of absences complied with its policies even if she sent a message after her shift began. R. p. 46.

4. Keller disagrees with AmeriTel's Statement of Fact 8. Keller did not completely disregard and the Commission made no finding that she "completely disregarded AmeriTel's policies and procedures." The Commission found, in part: "[Keller] was scheduled to work on June 4, 2017. Again, [Keller] was too ill to report to work. [Keller] prepared a text message to inform [AmeriTel], but for whatever reason, the message never transmitted." R. p. 47.

5. Keller disagrees with AmeriTel's Statement of Fact 9. Neither the text message nor the transcript that AmeriTel cites support that its "policy when an employee 'no calls/no shows' is to treat such employee as having voluntarily quit his or her employment." The text message Keller's manager, Cody Black, sent on June 5, 2017 merely shows that AmeriTel treated this instance of no call/no show as a voluntary quit. Claimant's Exhibits p. C-39. That message makes no reference to AmeriTel's policies. The transcript AmeriTel cites contradicts its statement of fact:

> [Charles Everett, representing AmeriTel] Q.[1] What would you do to—what would occur to any other employee that no called or no showed to a shift—a scheduled shift?
>
> [Gary Horton, AmeriTel property manager] A. You know, typically we would—it depends on—on the individual and the history the individual had with us. If—if they had just been hired and they didn't want their employ and—and terminate—and consider them a no show, no call, and a voluntary quit. **There are times that—like we did with Ms. Keller, reach out to her and try to contact them following the shift, giving them the benefit of the doubt** that maybe they had not seen the schedule properly or not been on there and maybe reach out to them.

Tr. p. 18, ll. 11–24 (emphasis added).

6. Keller disagrees with AmeriTel's Statement of Fact 10. The Commission found that while AmeriTel presumed Keller had quit, it was AmeriTel that terminated Keller's employment. R. pp. 46–47.

2. ISSUES PRESENTED ON APPEAL

AmeriTel's first issue presented on appeal is insufficient because it misstates the law. In addition to calling for an unconstitutional review, it assumes a misinterpretation of the eligibility statute and misunderstands the unemployment claims process. AmeriTel's errors lead Keller to raise the following additional issue on appeal per Idaho Appellate Rule 35(b)(4):

1. Is any part of AmeriTel's appeal frivolous or imposed for an improper purpose?

[1] Charles Everett, representing AmeriTel, questioning Gary Horton, AmeriTel property manager. Tr. pp. 4, 14.

AmeriTel's second issue is the proper focus of its appeal and Keller restates it to emphasize the appropriate standard of review:

2. Does substantial and competent evidence support the Commission's factual finding that **misconduct was not the reason** AmeriTel fired Keller?

Keller raises a second issue on appeal per Idaho Appellate Rules 35(b)(4) and (5):

3. Should the Court award Keller attorney fees on appeal?

Keller requests attorney fees on appeal as sanctions against AmeriTel's for presenting a brief that is either or both not well grounded in fact or law or interposed for an improper purpose. I.A.R. 11.2(a).

3. ARGUMENT

3.1. STANDARD OF REVIEW

> When this Court reviews a decision from the Industrial Commission, we exercise free review over questions of law, but review questions of fact only to determine whether the Commission's findings are supported by substantial and competent evidence. Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. We will not disturb the Industrial Commission's conclusions regarding the credibility and weight of evidence unless the conclusions are clearly erroneous and we do not reweigh the evidence or consider whether we would have reached a different conclusion from the evidence presented. This Court views all the facts and inferences in the light most favorable to the party who prevailed before the Industrial Commission. However, we must set aside the order of the Commission where it failed to make a proper application of law to the evidence.
>
> Idaho Code section 72-1366(5) provides that a party seeking unemployment benefits is ineligible for benefits if the claimant's unemployment is "due to the

> fact that he left his employment voluntarily without good cause connected with his employment, or that he was discharged for misconduct in connection with his employment." The claimant has the burden to show that she was discharged and did not voluntarily resign. If the claimant was discharged, it is then the employer's burden to show by a preponderance of the evidence that the discharge was for misconduct in connection with the employment. If, on the other hand, the claimant voluntarily left her employment, it is her burden to show that she had good cause in connection with her employment to do so. Each of these questions—whether the claimant was discharged or voluntarily left her employment, whether a discharge was for misconduct, and whether there was good cause for the claimant to voluntarily leave her employment—are factual questions for the Commission.

Thrall v. St. Luke's Regl. Med. Ctr., 157 Idaho 994, 946–947, 342 P.3d 656, 658–659 (2015) (internal citations and quotation marks omitted).

AmeriTel has not identified any legitimate question of law at issue in its appeal. The question of fact at issue is not, contrary to AmeriTel's statement of the standard of review, whether Keller voluntarily quit, but whether the Commission's finding of fact that misconduct was not the reason AmeriTel discharged Keller is supported by substantial and competent evidence. Before answering that question in the affirmative, Keller must address AmeriTel's myriad errors in presenting its appeal.

3.2. The Court should disregard AmeriTel's arguments in part because they are unsupported by fact or law.

AmeriTel insists that the Commission's factual finding that AmeriTel discharged Keller failed to consider that her conduct may have constituted a voluntary quit and that if it had, then it would have been compelled to find that she quit without good cause as a matter of law. AmeriTel makes at least five mistakes in this argument.

First, it ignores the standard of review derived from Article V, section 9 of the Idaho Constitution that limits this Court's appellate jurisdiction to review orders from the Commission for questions of law. *Locker v. How Soel, Inc.*, 151 Idaho 696, 699, 263 P.3d 750, 753 (2011). This Court does not have the power to disregard the Commission's findings as AmeriTel asks.

Second, AmeriTel misstates what an unemployment claimant's burden under Idaho Code section 72-1366(5) is. A claimant has the burden to prove that his "unemployment is not due to the fact that he left his employment voluntarily without good cause connected with his employment, **or** that he was discharged for misconduct in connection with his employment." I.C. § 72-1366(5) (emphasis added); *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 869, 908 P.2d 560, 562 (1995). A claimant satisfies that burden by proving that he either voluntarily left employment for good cause or that his employer discharged him. No authority supports AmeriTel's implied position that a claimant must prove both that his unemployment was neither the result of his voluntary leave without good cause nor his discharge (although a claimant may implicitly do so, AmeriTel seems to be arguing that a claimant must do so in separate explicit terms). Further, the Idaho Department of Labor's online unemployment claim form permits a claimant to choose only one reason for their separation from a job. Claimant Portal User Guide, Idaho Department of Labor (January 2017), hyperlink[2], 17. Not only is a claimant limited to selecting a single reason for separation but the consequences for selecting the wrong reason can be severe. *Bringman v. New Albertsons, Inc.*, 157 Idaho 71, 334 P.3d 262 (2014) (claimant barred from benefits for a year and required to pay back benefits and a penalty because he selected the wrong reason for separation). Since a claimant seeking unemployment based on discharge has no reason to present proof that he also did not voluntarily leave (though such proof may necessarily be

[2] https://www2.labor.idaho.gov/ClaimantPortal/Content/Documents/ClaimantPortalUserGuide.pdf

implied) the Commission would have no reason to analyze or expressly exclude from its findings of fact that the claimant did not voluntarily leave his employment.

Third, AmeriTel misstates the Commission's role in reviewing unemployment claims. Its job is to test if the claimant and employer meet their respective burdens of proof. No authority requires the Commission to rule out causes of a claimant's unemployment that may render her ineligible for benefits. To the contrary, "[t]he Employment Security Act was enacted to alleviate the hardships of involuntary unemployment and will be construed liberally to effectuate that purpose. . . It is clearly the intent of the legislation that benefits be granted or denied based upon matters of substance rather than mere form, and the act will be construed to effectuate that intent." *Davenport v. Department of Employment*, 103 Idaho 492, 494, 650 P.2d 634, 636 (1982).

Fourth, AmeriTel misapplies *Doran* and *Clay* to this case. *Doran* declares that an employee has duties when he temporarily leaves his employment, and if he fails to meet those duties, then he cannot show good cause for his leave as a matter of law. *Doran v. Employment Sec. Agency*, 75 Idaho 94, 97, 267 P.2d 628, 630 (1954). This leave-duty rule is a burden a claimant seeking unemployment benefits **based on his voluntary leave** during a temporary leave would need to overcome. But it is inapplicable to a discharge analysis.

Similarly, the good cause analysis in *Clay* is inapplicable to a discharge analysis. And the proposition AmeriTel cites in *Clay* is not authoritative.[3] Further, the misconduct analysis in

[3] In *Clay*, the claims examiner determined the claimant, Clay, had been discharged without misconduct but was not able to work. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 503, 903 P.2d 90, 92 (1995). Clay appealed, and the appeals examiner found he had voluntarily quit without good cause. *Id*. Clay appealed again, and, in finding Clay had been discharged without misconduct, the Commission incidentally found that he had not voluntarily quit. *Id*. In addressing the employer's argument on appeal, this Court affirmed the Commission's finding that Clay did not voluntarily quit offhand, stating "[e]ven if one characterized Clay's unexplained absence between July 6th and July 12th as a voluntary termination of employment, the Commission could find that the termination was for good cause under *Peters* and the definition of suitable work in I.C. § 72-1366(g)." *Id*. at 504, 903 P.2d at 93. This hypothesis not only shows that the Court agreed that Clay had not voluntarily

Clay, which AmeriTel ignores, is applicable to this case and directly contradicts AmeriTel's argument.

The claimant, Clay, exceeded medical leave and failed to notify his employer, BMC, for six days because he was recovering from suicidal depression in another state. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 502–503, 903 P.2d 90, 91–92 (1995). During its hearing before the appeals examiner, BMC attempted to argue that Clay disregarded standards of behavior, but it confused its presentation to the point that, on appeal to the Commission, the Commission treated the argument under the willful, intentional disregard of an employer's interest standard. *Id*. at 505, 903 P.2d at 94. In upholding the Commission's finding that BMC discharged Clay without misconduct, this Court explained that the Commission's findings related to the employer's interest standard were sufficient to support a finding that Clay did not disregard BMC's standard of behavior. *Id*. The Court has subsequently approved this manner of review. *Copper v. Ace Hardware/Sannan, Inc.*, 159 Idaho 638, 640, 365 P.3d 394, 396 (2016).

AmeriTel is arguing that the Commission's finding that it discharged Keller is wrong because the Commission did not conduct an analysis (that it was not required to conduct) to separately reach a finding that it implicitly made (an express finding of discharge implies a finding of no voluntary termination). And it makes this argument with the leave-duty rule from *Doran*, which is irrelevant, and dicta from *Clay*, ignoring that this Court in *Clay* affirmed a finding the Commission **did not expressly make by reference to another finding that implicitly supported the former**, to claim that applying those cases here "leads inextricably to a singular conclusion: Keller quit her employment." App. Br. 9. Beyond

quit but that the Court's analysis of good cause was unnecessary. The Commission had found discharge without misconduct and the Court held that finding was supported by substantial and competent evidence. The Court's discussion of good cause is dicta.

lacking grounds in law, this brazen oversight suggests AmeriTel's purpose on appeal is to harass Keller or cause her unnecessary expense.

Fifth, AmeriTel compounds these errors by demanding a radical change in law, oblivious to both the factual circumstances of this case and the flexibility existing law already provides employers to adequately protect their interests. In misapplying *Clay* to this case, AmeriTel agrees that *Doran* does not establish a "bright line rule that an employee who temporarily leaves employment without notifying her employer is always deemed to have quit." App. Br. 9. It favorably cites the good faith and reasonableness standards of the leave-duty rule in reference to *Clay*. *Id*. But it concludes that the Court should now adopt a bright line rule "that a day-long unexcused absence when the employee has the means and ability to notify his or her employer is a voluntary quit under Idaho Code § 72-1366(5)." App. Br. 10.

The contradictions and misapprehensions of AmeriTel's argument should be fatal to its request for a change in law. Its claim that affirming the Commission's findings in this case "will essentially be stating that every employee has one free unexcused absence" is galling. App. Br. 10.

AmeriTel exercised gracious discretion in managing Keller while she suffered from complications of her pregnancy. *Infra* pp. 15–16. Keller left early, showed up late, or called in sick twenty-nine times from December 26, 2016 through June 4, 2017. AmeriTel admits that while that was not typically how it treated its employees, it was "making an attempt to be as accommodating as possible" to Keller. Tr. p. 17 l. 19–p. 18 l. 10. Ignoring that AmeriTel may have had a duty under the Federal Family Medical Leave Act to formally notify Keller of her right to seek medical leave, See 29 C.F.R. § 825.300(b)(1) (2003), it could have demanded strict compliance with its policies or clearly communicated its expectations at any time. *Cf. Copper v. Ace Hardware/Sannan, Inc.*, 159 Idaho 638, 365 P.3d

394 (2016) (employer was able to demand employee's strict compliance with policies after years of leniency and despite allowing other employees to disregard them). It never did. R. pp. 47-48.

Finally, Keller would be remiss not to address that AmeriTel's attempt to apply the substantial-competent evidence standard to its argument that Keller voluntarily quit presupposes a finding of fact that the Commission did not make (that she voluntarily quit) and therefore cannot be reviewed. To the extent AmeriTel's analysis is read as an effort to shore up its argument, it does not perform any substantial-competent evidence analysis. It does not consider the relevance of evidence, how a reasonable mind might consider that evidence in light favorable to the party prevailing on the decision below, how credibility weighs on evidence, and whether any findings of credibility were clearly erroneous. Instead, it restates the dicta of *Clay* and directly concludes that "Keller did not act in good faith." App. Br. 11.

For all these reasons, the Court should disregard AmeriTel's argument under section IV.A. of its brief, except to the extent that it shows AmeriTel has interposed this appeal for an improper purpose or without grounds in fact or law.

3.3. Substantial and competent evidence supports the Commission's decision.

AmeriTel concedes that it discharged Keller. This appeal concerns why it discharged Keller.

A claimant is ineligible for unemployment benefits if she is discharged for misconduct related to her employment. I.C. § 72-1366(5). Misconduct is analyzed under three standards: first, an employee's disregard of a standard of behavior which the employer has a right to expect of its employees; second, an employee's deliberate violation of an employer's reasonable rules; and third, an employee's willful, intentional disregard of an employer's

interest. *Kivalu v. Life Care Ctrs. of Am.*, 142 Idaho 262, 263-64, 127 P.3d 165, 166-67 (2005). AmeriTel makes no argument concerning the Commission's finding that Keller did not willfully, intentionally disregard its interests; therefore, the employer's interest standard is not at issue in this appeal. AmeriTel does dispute the Commission's findings regarding the standard of behavior standard and the reasonable rules standard.

Evidence in the Transcript and Claimant's Exhibits in the Record sufficiently support the Commission's decision that misconduct was not the reason AmeriTel discharged Keller. The Commission found that AmeriTel did not communicate its standards-of-behavior to Keller, that AmeriTel's absence policy was unreasonable, and that Keller did not willfully or intentionally disregard AmeriTel's interests.

In reviewing these findings, it is unimportant, as AmeriTel insists, whether the Commission accurately perceived or accepted AmeriTel's arguments or how thorough the Commission's analysis was. *See Clay*, 127 Idaho at 505, 903 P.2d at 94. The question is whether there is evidence in the record sufficient to support the findings. Applying the evidence to the law of misconduct requires a review of the misconduct standards and how they interact.

"Based upon the facts of a particular case, the classifications [of misconduct standards] can be overlapping." *Copper v. Ace Hardware, Sannan, Inc.*, 159 Idaho 638, 640, 365 P.3d 394, 396 (2016). Each misconduct standard is composed of two elements: some manner of employer expectation and some manner of an employee's failure to meet that expectation. Idaho case law suggests the expectations underlying standards of behavior and rules share essential features.[4]

---

[4] This observation could be extended to the employer's interests standard, but such is unnecessary because that standard is not at issue in this appeal. *Supra* p. 10.

> 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 a particular case.

Id. at 640, 365 P.3d at 396 (citing IDAPA 09.01.30.275.02. (1999)).

The first element of the standard of behavior test is "disregard," which is conduct that falls below, or fails, the standard of behavior in the second element. This interpretation of "disregard" as "failure" is useful in understanding the employee conduct element of all the misconduct standards. The other employee conduct standards, "deliberate violation" and "willful, intentional disregard," necessarily require an employee to fail in his conduct. If evidence is sufficient to support that an employee did not fail to meet an employer's expectation regardless of how that expectation is articulated (as a rule, standard of behavior, or employer interest), then there can be no misconduct as a matter of law. Keller focuses her argument on the reasonableness of AmeriTel's expectation but argues in the alternative that she did not fail to meet that expectation.

> In order for an employer's expectation to be objectively reasonable, the expectation must be communicated to the employee, unless the expectation is the type that flows naturally from the employment relationship. In other words, the relevant question is whether the employee has breached a standard of behavior that would flow normally from an employment relationship or which was communicated to [the employee] because of its uncommon nature. . . .
>
> Expecting an employee to come to work, and stay at work, during scheduled hours is a fundamental expectation shared by employers in every field of work. However, an employer's expectation, even if it flows naturally from the

> employment relationship, is **not objectively reasonable if it is contrary to an established course of conduct**.

Adams v. Aspen Water, Inc., 150 Idaho 408, 413-14, 247 P.3d 635, 640-41 (2011) (citations omitted and emphasis added).

There is no similarly comprehensive statement of rules-misconduct, but Idaho case law suggests that a rule is an objectively reasonable expectation in **writing**. *See Steen v. Denny's Rest.*, 135 Idaho 234, 238, 16 P.3d 910, 914 (2000) (describing a written policy communicated to an employee as "reasonable and necessary to effectively run the employer's business); *Merriott v. Shearer Lumber Prods.*, 127 Idaho 620 (1995) (employee handbook not communicated to employee is an unreasonable rule); *Campbell v. Bonneville County Bd. of Comm'rs*, 126 Idaho 222, 224, 226, 880 P.2d 252, 254, 256 (1994) (county had no reasonable expectation employees would follow a policy because it did consistently enforce it). "When the issue is raised that the employer had allowed its employees to violate the policy, the employer still has the burden of proving that it expected that the policy would be followed by the claimant who was terminated." *Copper*, 159 Idaho at 641, 365 P.3d at 397. And that vague rules are unreasonable. *See Harris v. Elec. Wholesale*, 141 Idaho 1, 4, 105 P.3d 267, 270 (2004) (written policy contained in employee handbook did not specifically inform employee how to remain insurable).

So, standards of behavior and rules both involve objectively reasonable expectations, but standards of behavior are not necessarily written. Consequently, standards of behavior encompass rules. If an employer seeks to establish the same expectation under both standards, then failing to establish the expectation as a standard of behavior should necessarily mean the expectation cannot support a rule. *See Wroble v. Bonners Ferry Ranger Station*, 97 Idaho 900, 902, 556 P.2d 859, 861 (1976) ("While an employer may make almost

any kind of a rule for the conduct of his employees and under some circumstances may be able to discharge an employee for violation of *any* rule, such does not per se, amount to 'misconduct'. . .") (emphasis in original). Specifically, a standard of behavior that flows naturally from an employment relationship is unreasonable if it is contrary to a course of conduct and will not support the reasonableness of an employer's written expectation. Further, a vague rule is unreasonable and will not support the existence of a communicated standard of behavior.

Keller will first address the standard of behavior analysis show how AmeriTel's course of conduct was contrary to its expectation for adequate notice of absences that flowed naturally from the employment relationship. Second, Keller will show how AmeriTel's policies were vague and failed to inform her how to comply with its expectation of adequate notice of absences. Third, Keller will show that she did not willfully or intentionally disregard AmeriTel's interests. Fourth, Keller alternatively argues that she did not fail to adequately notify AmeriTel of her absence on June 4, 2017 under the standards of behavior and rules standards.

3.3.1. AmeriTel's standard of behavior was unreasonable because its course of conduct was contrary to its expectation that flowed naturally from the employment relationship.

An employer must prove it set standards of behavior either expressly by communicating them to the employee or implicitly through an employment relationship were the expectations were common among employees in general or within a particular enterprise. *Adams*, 150 Idaho at 413, 247 P.3d at 640. AmeriTel argues that it set a standard of behavior related to adequate notice of an absence. AmeriTel does not argue and nothing in the record supports that it expressly communicated this standard by means other than its written

policies, which Keller addresses in her rules-misconduct analysis further below. Here, Keller concedes that AmeriTel's expectation of some adequate notice of absences flowed naturally from the employment relationship. But this expectation was unreasonable because AmeriTel's course of conduct was contrary to it.

The Commission found that AmeriTel "did not clearly communicate its expectations" of standards of behavior because it "extended [Keller] leniency regarding her attendance." R. p. 52. The "leniency" the Commission refers to is what AmeriTel's witnesses at the appeals examiner's hearing —property manager Gary Horton and manager on duty, and Keller's direct supervisor at the time, Cody Black—repeatedly referred to as "accommodations" for Keller pregnancy-related illnesses.

3.3.1.1 The Record is filled with evidence of AmeriTel's leniency with Keller towards its expectation of adequate notice.

Horton refers to "accommodations" in explaining that AmeriTel's treatment of Keller was not typical of its employees, Tr. p. 17 l. 19 – p. 18 l. 10, that AmeriTel's policy concerning attendance was generally flexible, Tr. p. 25 ll. 14–22, and that AmeriTel allowed Keller to notify absences after her shift started and that AmeriTel would "reach out to her and make sure that she [was] okay" if she missed or was late to a shift, Tr. p. 31 ll. 1–9. Black refers to "accommodations" in describing how AmeriTel discussed options to help Keller with her attendance problems, Tr. p. 41 ll. 11–22, and in how AmeriTel considered helping her in addition to its scheduling flexibility, Tr. p. 50 l. 12 – p. 51 l. 8. Horton explains "if [an employee] had just been hired and they didn't call in for a shift, we would just assume that they didn't want their employ and . . . consider them a no show, no call, and a voluntary. There are times that—like with Ms. Keller, reach out to her and try to contact them

following the shift, giving them the benefit of the doubt that maybe they had not seen the schedule properly or not been on there and maybe reached out to them." Tr. p. 18 ll.16–24.

Horton also offered a definition of the adequate notice it expected of absences: "it's subjective. I—I perceive adequate notice more—greater than an hour prior to the shift." Tr. p. 22 l. 22 – p. 23 l. 5. But admitted AmeriTel took no action to impose that standard on Keller. Tr. p. 24 l. 23 – p. 25 l. 13. And that AmeriTel allowed Keller to notify absences after her shift started or otherwise without "adequate notice." Tr. p. 32 l. 7 – p. 33 l. 14. Regarding Keller's use of text messages to provide notice of absences, Horton admitted "[i]t was acceptable. . . I don't know if it was perfectly fine. It's probably our error in allowing it to proceed this far. . . without having corrective action taking place." Tr. p. 28 l. 22 – p. 29 l. 1. Black was unaware of any disciplinary notes in Keller's employee file. Tr. p. 63 ll. 4–8.

AmeriTel insists that Keller's history of absences did not enter into its consideration of terminating her and instead it was her failure to notify AmeriTel on June 4, 2017 that is the sole basis its decision to discharge her for misconduct. But there are at least two prior instances where Keller did not notify an absence and AmeriTel took no action. On May 20, 2017, Keller arrived at work fifty minutes late without notifying AmeriTel. Claimant's Exhibits p. 26. And on June 3, 2017, Keller not only failed to notify AmeriTel of her absence but messaged Black of her intent to meet and "figure out her schedule." Claimant's Exhibits pp. 26, 38. If AmeriTel is to be believed that absences were not a factor in its decision to discharge Keller for misconduct, then its actions at least twice before June 5, 2017 were contrary to its expectation that adequate notice required Keller to communicate her absence on June 4, 2017.

Finally, concerning a phone conversation he had with Keller on June 2, Black admitted offering to place Keller on leave he described as "like a medical personal leave. . . to let her

not be put on schedule, but to still retain her job status and . . . employment with [AmeriTel]" and that she wanted to meet to discuss it. Tr. p. 44 l. 1 – p. 45 l. 20. This conversation is relevant to AmeriTel's expectation of adequate notice because it tends to show AmeriTel was less concerned with Keller's attendance and related notice than it was with arranging leave to formally resolve the uncertainty her pregnancy-related illnesses were causing its staff scheduling.

3.3.1.2 Substantial and competent evidence supports that AmeriTel failed to set a standard of behavior for adequate notice.

Combined, the testimony and exhibits are relevant because they tend to show AmeriTel's course of conduct was contrary to its expectation of adequate notice that naturally flowed from its employment relationship with Keller. A reasonable mind could accept this evidence to conclude that AmeriTel's course of conduct was contrary to its expectation because AmeriTel admits treating Keller differently from other employees, permitted Keller's deviations from its expectations dozens of times, never disciplined or otherwise clarified its expectations to Keller, and had an interest in placing her on leave to preserve an employee relationship it valued and to remove uncertainty from its staff scheduling. And the Court should infer that May 20 and June 3, 2017 were prior instances of Keller failing to notify AmeriTel of absences, which AmeriTel took no action to correct, and that Black's June 2, 2017 phone conversation with Keller moved AmeriTel's expectation of Keller from adequate notice to arranging leave. For these reasons, substantial and competent evidence supports the Commission's finding that AmeriTel did not set a standard of behavior for adequate notice with Keller.

3.3.1.3 AmeriTel's argument that it did set a standard of behavior is unsupported by law and fact.

AmeriTel's disagreement with the Commission's finding is not with the evidence but with the Commission's approach: "The Industrial Commission cannot base its opinion on Keller's alleged poor attendance when Keller's attendance had absolutely nothing to do with her losing her job. The simple fact that the Industrial Commission failed to analyze Keller's termination based upon her failure to notify AmeriTel of her absence on June 4, 2017, is by itself sufficient to find there is not substantial and competent evidence to uphold the Order." App. Br. 13.

Again, *Clay* is the prototypical case where this Court upheld the Commission's finding of fact based on evidence while observing the Commission's failure to accurately perceive the employer's argument and failure to expressly address other grounds for misconduct. "If the Commission finds that the claimant's conduct did not constitute misconduct under one classification, but fails to expressly address one or both of the other classifications, its decision will be upheld if its findings are sufficient to establish that the claimant's conduct would not constitute misconduct under the other classification(s)." *Copper*, 159 Idaho at 640, 365 P.3d at 396 (citing *Clay* at 505, 903 P.2d at 94 (1995)). AmeriTel's argument is irrelevant to the substantial-competent evidence standard and has no basis in law.

AmeriTel's entire analysis of the standards-misconduct standard is that it had a "clear policy that Keller was required to notify AmeriTel when she would be absent and/or tardy," which is conclusory and involves no reference to the record or any discussion of its course of conduct. App. Br. 13. Further, AmeriTel's argument that "Keller acknowledged and followed this policy without exception on 30 separate occasions" incorrectly implies that AmeriTel communicated its expectation of adequate notice or the substance of its written

policy analyzed below each time Keller did provide notice of an absence. App. Br. 13. AmeriTel's failure to discuss the record and its effort to confuse the Court demonstrate that its argument has no basis in fact.

AmeriTel repeats these errors in its discussion of the rules standard.

3.3.2. AmeriTel's absence policy is unreasonable because it is vague.

To prove that an employer's rule is objectively reasonable, an employer must show that it is clear and that it expected its employees to follow it. *See Harris v. Elec. Wholesale*, 141 Idaho 1, 4, 105 P.3d 267, 270 (2004) (written policy contained in employee handbook did not specifically inform employee how to remain insurable); *Copper*, 159 Idaho at 641, 365 P.3d at 397 (2016) (when the issue is raised that the employer had allowed its employees to violate the policy, the employer still has the burden of proving that it expected that the policy would be followed by the claimant who was terminated). *Compare Campbell*, 126 Idaho at 224, 226, 880 P.2d at 254, 256 (condoning employee rule violations render rules unreasonable for subsequent violations) *with Alder v. Mountain State Tel. & Tel. Co.*, 92 Idaho 506, 509–511, 446 P.2d 628, 631–633 (1968) (no finding that employer condoned violations).

AmeriTel's absence policy is divided into two parts: notice and excessive absences. Claimant Exhibits p. 14. AmeriTel argues the Commission erred in finding its absence policy "too vague to put [Keller] on notice that her attendance was unacceptable" because the Commission ignored its argument that Keller's absences were irrelevant and that it discharged her solely because of her single failure to notify it of her absence on June 4, 2017. App. Br. 13. Again, the law does not require the Commission to accept AmeriTel's arguments. AmeriTel had the burden of proving that it fired Keller because of that single

failure to notify and it failed to do that. The question here is whether substantial and competent evidence supports the Commission's findings that AmeriTel fired Keller because of her absences and that the relevant part of AmeriTel's absence policy was unreasonable because it was vague.

3.3.2.1 The Record contains testimony and exhibits that conflict with AmeriTel's argument that it discharged Keller because of failure to provide notice of her absence on June 4, 2017.

First, the testimony of AmeriTel's witnesses at the appeals examiner's hearing and exhibits showing Keller's absences support the Commission's finding that AmeriTel terminated Keller because of her absences not her failure to notify her absence on June 4, 2017.

AmeriTel noted that Keller had not timely notified it of her absences at least twenty times before June 2, 2017. Tr. p. 32 l. 7 – p. 33 l. 14. AmeriTel "accommodated" Keller's pregnancy by extending her flexibility in reporting her notices of absences. *Supra* pp. 15–16. However, AmeriTel believed Keller's absences were excessive and occasionally required her to provide doctor's notes as discussed below but never warned her that her absences could result in any form of discipline. Tr. p. 26 ll. 1–12. AmeriTel had prepared and planned to discipline Keller on June 2, 2017 but did not get the chance because she was sick from work that day. Tr. p. 24 l. 15 – p. 25 l. 13. Keller did not notify AmeriTel of her June 2 absence until forty-five minutes after the beginning of her shift. Tr. 21 ll. 10–24. That same day, instead of notifying Keller of its pending discipline action, AmeriTel called Keller to discuss the likelihood of her attendance on June 3 and 4 and her interest in arranging medical leave. Tr. p. 44 l. 1 – p. 45 l. 20. AmeriTel's schedule of Keller's absences also shows that she failed to notify an absence on May 20 when she arrived fifty minutes late to work and again on June 3 when she messaged Black of her intent to meet and discuss medical leave but was

absent instead. *Supra* p. 16. Black's text message to Keller on June 5, 2017 that AmeriTel considered her to have voluntarily quit because she "didn't show up for either of [her] shifts Saturday or Sunday," also suggests that AmeriTel discharged her for her absence instead of her failure to notify. Claimant's Exhibits p. C-39.

3.3.2.2 Substantial and competent evidence supports the finding that AmeriTel discharged Keller because of excessive absences not her failure to provide notice.

The record tends to show that Keller's failure to notify was not the reason AmeriTel terminated her employment, so they are relevant. A reasonable mind could accept this evidence to conclude that her failure to notify was not the reason for her termination because: AmeriTel's testimony and conduct contradicts its argument; Keller's failures to notify were less numerous than her absences that disrupted scheduling even when notified; and AmeriTel has an interest in avoiding developing a record of firing a pregnant employee due to her absences. Implicit in the Commission's finding that AmeriTel's "excessive absence" rule and the consequences related to such absences are vague is its finding that the notice provisions were irrelevant because AmeriTel's claim that it fired Keller for failure to notice was a pretext to avoid questions related to her eligibility for medical leave. Taken together, substantial and competent evidence supports the Commission's finding that AmeriTel discharged Keller for reasons other than her failure to provide notice of her absence on June 4, 2017.

3.3.2.3 The Record does not clarify the vagueness in AmeriTel's absence policy.

The relevant part of AmeriTel's absence policy reads: "In the event an employee has **excessive absences**, before the employee returns to work that employee's supervisor **may** require, as a condition of continued employment, that the employee provide a note or

written work release explaining the reason for the employee's absences and also stating that the employee is fit to perform all duties under the employee's job description. Failure to provide such medical documentation **may** result in termination of employment." Claimant's Exhibits p. C-14. AmeriTel's layers of discretion in requiring a note or work release following "excessive absences" and potentially terminating an employment due to an employee's failure to provide such documentation combined with the vagueness of "excessive" is too attenuated to have provided Keller or any reasonable employee clear instructions on when their absences would jeopardize their employment.

Nothing in the record defines what "excessive absences" are although AmeriTel must have felt Keller's absences occasionally became "excessive" because it did request her to provide doctor's notes. Tr. p. 16 ll. 12–20, p. 50 ll. 18–21. Discussing the interest-misconduct standard, the Commission found that Keller "provided a medical excuse for an absence" when AmeriTel requested one. Keller's testimony supports that she provided those notes, Tr. p. 69 ll. 20–23. As observed above, AmeriTel never complained to Keller about her absences and the evidence supports that AmeriTel was more concerned with preserving her employment than disciplining her.

3.3.2.4 Substantial and competent evidence supports a finding that AmeriTel's absence policy was unreasonable as applied to Keller.

The language of the policy and conduct of the parties tends to show that AmeriTel's "excessive absence" policy is too vague to notify Keller when her absences would result in her termination and AmeriTel had no expectation that she would follow the policy to curtail her absences. To the contrary, AmeriTel was prepared to place her on medical leave. A reasonable mind could accept this evidence to conclude that AmeriTel's "excessive absence" policy was unreasonable because when an employee's absences become

"excessive" or what consequences may result are subject to AmeriTel's whim. Therefore, substantial and competent evidence supports the Commission's finding that AmeriTel failed to establish a reasonable rule.

3.3.2.5 Alternatively, AmeriTel's notice policy was also unreasonable as applied to Keller.

Even if the notice policy were relevant, evidence still supports that it is not a reasonable rule when applied to Keller's circumstances. AmeriTel's notice policy reads: "Whenever an employee intends to be absent from work (whether for one shift or for a longer period of time), or is going to be late, he or she must provide notice to the property manager. Employees are expected to contact their property manager or other designated point-of-contact **as soon as possible** so that a replacement may be brought in for your shift. Failure to follow this protocol **will** result in disciplinary action up to and including termination." Claimant's Exhibits p. C-14.

AmeriTel's course of conduct was contrary to the provision that "[f]ailure to follow this protocol will result in disciplinary action." *Supra* pp. 15–16. The phrase "as soon as possible" is either a vague term that AmeriTel gave Keller increasingly broader license to exercise or AmeriTel cannot expect Keller to have followed the policy because it knowingly allowed her to violate the policy and offered to place her on medical leave which demonstrates that it expected her to continue having attendance problems.

3.3.2.6 Alternatively, Keller did not violate AmeriTel's notice policy.

As AmeriTel explains in its brief, "as soon as possible" implies that an employee must have the "means and opportunity" to provide notice of her absence. App. Br. 14. The Commission found that Keller's failure to send notice of her absence on June 4, 2017 was not intentional. R. p. 53. Keller testified that she had prepared the message and thought she

had sent it but that she was distracted by her pregnancy-related illness and that there may have been a technical problem with her phone. Tr. p. 74 ll. 3–11. A reasonable mind could accept her testimony as evidence that she lacked the opportunity—due to her illness—or the means—due to technical problems with her phone—to notify AmeriTel of her absence.

For these reasons, substantial and competent evidence supports that the notice policy was unreasonable, and, by its own terms, Keller lacked either the means or opportunity to notify AmeriTel of her absence on June 4, 2017.

3.3.2.7 AmeriTel's argument that Keller violated its notice policy is unsupported by law or fact.

Like its argument against the Commission's finding that it failed to establish a standard of behavior, AmeriTel ignores the standard of review and fails to identify or analyze any evidence conflicting with the Commission's finding. AmeriTel's argument is a hodgepodge of conclusory statements that its policies were clear, and that Keller must have deliberately violated them. App. Br. 13–14. AmeriTel's argument concerning rules-misconduct has no basis in law or fact.

3.3.3. Alternatively, Keller either provided AmeriTel adequate notice of her June 4, 2017 absence on June 2 or her failure to provide notice is excusable.

If the Court finds that the Commission erred in finding AmeriTel failed to establish its expectation of adequate notice by standards of behavior or reasonable rules, then substantial and competent evidence still supports the Commission's findings because Keller either provided notice of her June 4, 2017 absence on June 2 or her failure to provide notice is excusable because it was the result of inability, incapacity, inadvertency, or ordinary negligence in an isolated instance.

AmeriTel, through Black, and Keller testified about a phone conversation between them on June 2, 2017. Black called Keller in response to her text message after her shift had started that day that she would be absent. Tr. p. 21 ll. 10–24, p. 46 ll.10–19. Black testified: "I asked her about whether or not she was going to make it the weekend. . ." Tr. p. 44 ll. 23–24. "I specifically asked for the 3rd and the 4th." Tr. p. 52 ll. 20–21. "I left the conversation under the impression that she said that she was feeling okay and that she was going to be into work. . ." Tr. p. 53 ll.12–14. Keller testified that she had told Black that she wasn't sure whether she would attend work that weekend. Tr. p. 68 ll. 9–14.

Black and Keller also discussed arranging medical leave for Keller. Tr. p. 44 l. 25. Black believed that Keller wanted to meet to discuss the details of taking medical leave. Tr. p. 45 ll. 17–20.

This testimony tends to show that Keller either notified AmeriTel that she would be absent both June 3 and 4 or did not, so it is relevant. A reasonable mind could accept Keller's testimony that she told Black she was unsure that she would attend work on June 3 and 4 to conclude that she provided notice of her June 4 absence on June2 because Keller was suffering worsening pregnancy-related illness, and her interest in taking medical leave supports an inference that she was less likely to able to work that weekend. Therefore, substantial and competent evidence supports that Keller provided notice of her June 4, 2017 absence on June 2 in her phone conversation with Black.

"Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, isolated instance of ordinary negligence, or good faith errors in judgment or discretion **are not considered misconduct** connected with

employment." IDAPA 09.01.30.275.03 (1999) (emphasis added). [5]The Commission found that Keller prepared a text message to inform AmeriTel of her June 4, 2017 absence because she was too ill to work, but, for whatever reason, the message was not transmitted. R. p. 47. In finding Keller did not willfully, intentionally disregard AmeriTel's interest in notice of her absence, the Commission also found that her failure was not intentional. R. p. 53. Keller's testimony supports these findings. Tr. p. 74 ll. 3–11. Her testimony tends to show that her failure to send notice on June 4, 2017 was the result of inability, incapacity, inadvertencies, or an isolated instance of ordinary negligence, so it is relevant. A reasonable mind could accept this testimony to conclude that her failure was not misconduct because the rule is directly on point. The Commission's findings implicitly accept Keller's testimony as credible and there is no evidence to suggest trusting her was clearly erroneous. Therefore, substantial and competent evidence supports that even if Keller failed to provide notice, it was excusable and not misconduct.

3.4. The Court should award Keller attorney fees as an appropriate sanction against AmeriTel for interposing this appeal for improper purposes or without grounds in fact or law.

This Court must sanction AmeriTel, its attorney who signed Appellant's Brief, or both if it concludes the brief is not well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or is interposed for any improper purpose. I.A.R. 11.2(a); *Talbot v. Ames Constr.*, 127 Idaho 648, 651–653, 904 P.2d

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[5] AmeriTel argued on appeal from the appeals examiner's decision that this standard (which the appeals examiner cited from a Michigan case instead of the rule, R. p. 4) is irrelevant because AmeriTel did not discharge Keller "because she failed to perform her job duties" but instead "because [she] failed to notify her employer that she would be absent." R. p. 31. Incredibly, AmeriTel continues: "In other words, **this was not a conduct based issue**, it was the failure of Keller to notify her employer of an absence that cause the separation." R. p. 31 (emphasis added). AmeriTel proceeded to argue that Keller's failure to provide notice of her absence was misconduct. R. p. 31–32.

560, 563–565 (1995) (provides a thorough discussion of the Court's sanction power). Proof of any grounds for sanctions is sufficient; it is unnecessary to show a brief is both frivolous and an abuse of judicial process. *Flying "A" Ranch, Inc. v. Bd. of Cty. Comm'rs for Fremont Cty.*, 156 Idaho 449, 452, 328 P.3d 429, 432 (2014). A sanction may include an order to pay another party's reasonable attorney fees. I.A.R. 11.2(a).

This Court imposed attorney fees as sanctions where an attorney admitted during oral argument that substantial and competent evidence supported the Industrial Commission's decision in a workers' compensation case. *Talbot*, 127 Idaho at 653, 904 P.2d at 565. That decision was also supported by this Court's conclusion that the attorney's "sole argument on appeal was an attempt to have this Court try the case anew. . . to reexamine the findings of the Commission and to reweigh the evidence and credibility determination of the Commission, which this Court may not do as prescribed by the Constitution, statute, and established precedent." *Id*. In another case, this Court imposed sanctions because the party was "unable to do more than dispute minor details and point to conflicts in the evidence which were factual matters properly resolved by the Commission." *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1096, 695 P.2d 1231, 1234 (1984).

AmeriTel refuses to analyze the Commission's findings for insufficient evidence, busying itself with constructing hypothetical and irrelevant "findings" instead of trying to topple the pillars of evidence that support the Commission's decision. AmeriTel persists because it would be compelled to admit that substantial and competent evidence supports the Commission's decision otherwise. Worse, as explained above, each of AmeriTel's arguments are premised on its unconstitutional insistence that this Court can freely review questions of fact on appeals from orders of the Industrial Commission. *Supra* pp. 5–10, 17–18, 23–24. And these arguments are not innovative theories to reframe the record or

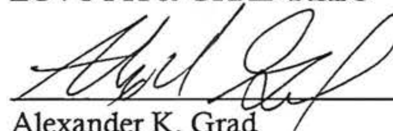
deconstruct the Commission's legal analysis but retreads of its arguments from the appeals examiner's decision. R. pp. 27–29 (attempting to apply *Doran* and *Clay* to argue Keller voluntarily quit), pp. 31–32 (asserting without analysis that its standard of behavior and policy concerning notice of absences were reasonable and Keller disregarded both). AmeriTel is entitled to disagree with the Commission's decision, as it was entitled to discharge Keller for reasons other than misconduct, but an appeal based merely on disagreement has no proper purpose. AmeriTel's brief is not well grounded in fact or law, and it is interposed for an improper purpose. For these reasons, the Court must sanction AmeriTel, its attorney who signed its brief, or both.

4. CONCLUSION

This Court must affirm the Idaho Industrial Commission's findings of fact that AmeriTel discharged Keller for reasons other than misconduct. The record overflows with relevant testimony and exhibits that a reasonable mind could accept in concluding that AmeriTel discharged Keller for reasons other than misconduct. AmeriTel disregards this substantial and competent evidence in support of the Commission's findings, invites the Court to conduct an unconstitutional review of the facts, and misinterprets irrelevant law. Therefore, Keller requests the Court affirm the Commission's Decision and Order and sanction AmeriTel by awarding her reasonable attorney fees on appeal.

May 10, 2018

LOVOTTI & GRAD PLLC



Alexander K. Grad
Attorney for the Claimant-Respondent

CERTIFICATE OF SERVICE

I certify that on May 10, 2018, I served a true and correct copy of the foregoing document, CLAIMANT-RESPONDENT'S BRIEF, upon the following parties or their attorneys by the method indicated:

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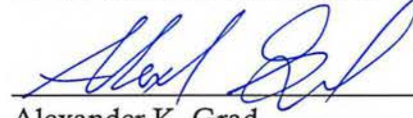
May 10, 2018

LOVOTTI & GRAD PLLC



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