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IN THE SUPREME COURT OF THE STATE OF IDAHO

SIRANOUSH M. HIATT, an individual,

Plaintiff-Appellant,

vs.

IDAHO DEPARTMENT OF LABOR
Respondent, and

HEALTH CARE IDAHO CREDIT UNION

Respondent.

**SUPREME COURT
NO. 46672-2019**

APPELLANT'S OPENING BRIEF

**Appeal From Industrial Commission
Case No. IDOL #42102551-2018**

Thomas E. Limbaugh, Chairman of the Industrial Commission, Presiding

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 5

 A. Nature of the Case..... 5

 B. Proceedings Before the Department of Labor and the Industrial Commission 5

 C. Statement of Facts..... 6

II. ISSUES PRESENTED ON APPEAL..... 9

III. ARGUMENT..... 10

 A. The Commission’s findings do not support its conclusion that Hiatt is ineligible for unemployment benefits..... 10

 1) Standard of Review..... 10

 2) Argument 10

 i. The Commission’s findings do not establish that Hiatt’s actions were deliberate or willful..... 12

 ii. The Commission’s findings do not establish that Hiatt disregarded a “standards of behavior.”..... 14

 a. Hiatt’s behavior was not misconduct because her actions complied with HCIC’s communicated expectations 14

 b. Hiatt’s behavior was not misconduct because HCIC’s expectations did not flow naturally from the employment relationship..... 16

 B. As a matter of policy, reporting discrimination cannot be a workplace-related misconduct..... 17

 C. As a matter of policy, it should not be workplace misconduct for an employee to attempt to negotiate conditions of employment rather than voluntarily quitting..... 19

IV. CONCLUSION..... 21

TABLE OF CASES AND AUTHORITIES

Cases

Adams v. Aspen Water, Inc. 150 Idaho 408, 247 Idaho P.3d 635 (2011) 11

Avery v. B & B Rental Toilets, 97 Idaho 611, 549 P.2d 270 (1976) 11, 12

Davis v. Howard O. Miller Co., 107 Idaho 1092, 695 P.2d 1231 (1984)..... 16

Folks v. Moscow Sch. Dist. # 281, 129 Idaho 833, 933 P.2d 642 (1997) 10, 13, 14, 16

Harris v. Elec Wholesale, 141 Idaho 1, 105 P.3d 2667 (2004) 10

Kyle v. Beco Corp., 109 Idaho 267, 707 P.2d 378 (1985) 19

Locker v. How Soel, Inc. 151 Idaho 696, 263 P.3d 750 (2011) 10, 11, 13

Matthews v. Bucyrus-Erie Co., 101 Idaho 657, 619 P.2d 1110 (1980) 11

Mendez v. Univ. Health Servs. Boise State Univ., 163 Idaho 237, 409 P.3d 817 (2018) 18

Puckett v. Idaho Dep't of Corrections, 107 Idaho 1022, 695 P.2d 407 (1985)..... 14

Stark v. Assisted Living Concepts, Inc., 152 Idaho 506, 272 P.3d 478 (2012)..... 13

Welch v. Cowles Publ'g Co., 127 Idaho 361, 900 P.2d 1372 (1995)..... 10

Wroble v. Bonners Ferry Ranger Station, 97 Idaho 900, 556 P.2d 859 (1976) 18

Idaho Constitution, Statutes, And Regulations

I.C. § 67-5909 18

I.C. § 67-5911 18

I.C. § 72-1302 17

I.C. § 72-1366 5, 10, 19

I.C. § 72-732 10

Idaho Const. Art. V, § 9 10

IDAPA 09.01.30.275 10, 11

IDAPA 09.01.30.275.01 10

IDAPA 09.01.30.450 19

I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves the Department of Labor’s finding that Appellant Siranoush Hiatt (“Hiatt”) is ineligible for unemployment insurance because her employment with Health Care Idaho Credit Union (“HCIC”) was terminated for workplace-related misconduct. This appeal also involves the Industrial Commission’s Decision and Order that Hiatt is ineligible for unemployment benefits because HCIC discharged Hiatt for employment-related misconduct.

B. Proceedings Before the Department of Labor and the Industrial Commission

Hiatt applied for unemployment benefits on February 28, 2018. On August 24, 2018, the Idaho Department of Labor (“IDOL”) issued a Personal Eligibility Determination that Hiatt was not eligible to receive unemployment benefits because HCIC discharged Hiatt for work-related misconduct; specifically, that Hiatt’s actions fell below the standard of behavior the employer had a right to expect.

Hiatt appealed IDOL’s Determination and, on September 25, 2018, IDOL conducted an audio-recorded telephonic hearing. The IDOL Appeals Examiner issued its Decision on September 28, 2018. The Appeals Examiner denied Hiatt’s unemployment benefits claim and found that HCIC discharged Hiatt for misconduct in connection with employment-related misconduct as defined by Idaho Code § 72-1366 (5).

On October 9, 2018, Hiatt appealed the IDOL Appeal Examiner’s decision to the Idaho Industrial Commission (“Commission”). Following briefing by Hiatt, the Commission issued its

Decision and Order. The Commission conducted a *de novo* review of the record and affirmed IDOL's finding that Hiatt is ineligible for unemployment benefits by finding that Hiatt was discharged for employment-related misconduct.

C. Statement of Facts

On June 25, 2016, HCIC hired Hiatt as a mortgage loan officer. On February 25, 2017, Hiatt suffered a workplace injury, specifically a brain trauma. Agency Record: Exhibits ("R.") p. 40-44. As a result of her workplace injury, and at the direction of her doctor, Hiatt began working reduced hours and receiving workers compensation. *Id.*

In the ensuing months, Hiatt felt that HCIC management, specifically HCIC's CEO, Fallon Eisenbarth ("Eisenbarth"), resented Hiatt's reduced working hours. R. p. 4, 52. Hiatt became fearful that she would lose her job as a result of her disability. R. p. 40-44, 52. Specifically, Hiatt informed her doctors, and the Industrial Commission investigating agent, that she feared losing her job in retaliation for her reduced working hours. *Id.*

On or about September 27, 2017, HCIC reduced Hiatt's pay despite Hiatt performing her job at a high level. R. p. 12, 40. On or about December 13, 2017, HCIC amended its short-term disability and sick leave policy; the practical consequences of this change forced Hiatt to expend accrued sick time to offset her reduced hours. R. p. 30-37. Hiatt interpreted such actions by HCIC as discrimination, and as attempts to get rid of Hiatt.

Sometime before Feb. 21, 2018, the HCIC Board determined that it would again decrease Hiatt's pay scale. On February 21, 2018, Eisenbarth informed Hiatt that her compensation plan

would be changed to a no-commission, flat salary wage. Agency Record: Audio Hearing Transcript (“R. Aud.”) p. 12. In the previous year, Hiatt’s wages totaled nearly \$156,000.00; the new pay-cut would reduce Hiatt’s pay to only \$72,000.00. *Id.* While Eisenbarth maintains that financial considerations motivated HCIC’s decision, no other employee took a pay-cut and at least one other HCIC employee received a raise. R. Aud. p. 13, L. 2; R. p. 27.

Upon hearing of this most recent pay-cut, Hiatt responded by asking to speak with the HCIC Board of Directors concerning the pay-cut and why it occurred. R. Aud. p. 41 L. 19-20; R. p. 52. At no time during this exchange did Hiatt raise her voice or yell. R. p. 39, 52. Later that day, Eisenbarth delivered to Hiatt a written reprimand in which she cites Hiatt’s unprofessional behavior as being insubordinate, specifically identifying, “rais[ing] your voice in an unprofessional manner”, as the behavior that would not be further tolerated. R. p. 9. The February 21 reprimand letter also requested that Hiatt prepare for a meeting the next day to discuss Hiatt’s pay-cut. *Id.*

On February 22, 2018, Eisenbarth, Hiatt, and HCIC Operations Supervisor Arminda Kindrick (“Kindrick”) entered a closed conference room to conduct the meeting regarding Hiatt’s reduced compensation (“Feb. 22 Meeting”). R. p. 3, 5, 10, 20, 27. The parties began by discussing the reasons behind Hiatt’s new, reduced compensation plan. R. p. 10, 27. Thereafter, Hiatt reported that she believed her pay cut was the result of discrimination and retaliation for her workplace injury and accompanying reduced hours. R. p. 10, 27. As the meeting continued, Hiatt requested to speak to the HCIC Board of Directors to report her belief that she was being retaliated or discriminated against for her injury. R. Aud. p. 19, L. 19-20; R. Aud. p. 10, L. 20-21; R. Aud. p. 45 L. 23; R. p. 4, 10, 27. Despite the difficulty of reporting workplace discrimination and

retaliation, and the frustration of having her pay reduced by more than half, Hiatt did not raise her voice. R. p. 4, 10, 27, 53. In response to Hiatt's request to report the retaliation to the Board of Directors, Eisenbarth terminated Hiatt's employment for insubordination. R. Aud. p. 45, L 22-23; R. p. 6, 20.

II. ISSUES PRESENTED ON APPEAL

- A. Do the Commission's findings support its conclusion that Hiatt's conduct constituted workplace-related misconduct so as to render her ineligible for unemployment benefits?
- B. Can an employee's reporting of discrimination render her ineligible for unemployment benefits?
- C. Should an employee be protected for negotiating the conditions of her work rather than voluntarily quitting when good cause exists to do so?

III. ARGUMENT

A. The Commission's findings do not support its conclusion that Hiatt is ineligible for unemployment benefits.

1) Standard of Review

In appeals from the Industrial Commission, the Idaho Supreme Court is limited to reviewing questions of law. Idaho Const. Art. V, § 9; *Folks v. Moscow Sch. Dist. # 281*, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997). *Welch v. Cowles Publ'g Co.*, 127 Idaho 361, 363, 900 P.2d 1372, 1374 (1995). The Court will uphold the decisions of the Commission unless, as a matter of law, the findings of fact do not support the order. I.C. § 72-732 (4); *Locker v. How Soel, Inc.* 151 Idaho 696, 699, 263 P.3d 750, 753 (2011). The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer, and where the burden is not met, benefits must be awarded to the claimant." *Harris v. Elec Wholesale*, 141 Idaho 1, 3, 105 P.3d 2667, 269 (2004); IDAPA 09.01.30.275.01.

2) Argument

An individual is only entitled to unemployment benefits where "[t]he claimant's unemployment is not due to the fact . . . that [s]he was discharged for misconduct in connection with [her] employment." I.C. § 72-1366 (5). Misconduct in connection with employment is defined as one of the following:

“(1) Disregard of Employer's Interest. A willful, intentional disregard of the employer's interest. (2) Violation of Reasonable Rules. A deliberate violation

of the employer's reasonable rules. (3) 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.”

IDAPA 09.01.30.275.02 (c); See also, *Adams v. Aspen Water, Inc.* 150 Idaho 408, 413, 247 Idaho P.3d 635, 641 (2011).

The Commission contends that Hiatt’s misconduct arises under third prong - the “standards of behavior” analysis. Additionally, HCIC discharged Hiatt for insubordination,¹ The Idaho Supreme Court has recognized insubordination as one form of conduct that violates the standard of behavior test. *Avery v. B & B Rental Toilets*, 97 Idaho 611, 549 P.2d 270 (1976).

In determining whether an alleged misconduct disregards a standard of behavior which the employer has a right to expect, the test is two-fold, “(1) Whether the claimant's conduct fell below the standard of behavior expected by the employer; and (2) Whether the employer's expectation was objectively reasonable in the particular case.” IDAPA 09.01.30.275.02 (c)(i-ii); See also, *Matthews v. Bucyrus-Erie Co.*, 101 Idaho 657, 659, 619 P.2d 1110, 1112 (1980).

Insubordination is an employee’s “deliberate or willful refusal...to obey a reasonable order or directive which an employer is authorized to give and entitled to have obeyed. *Locker*, 151

¹ During the telephonic hearing held by the Department of Labor, Eisenbarth was directly asked what the reason was for Hiatt’s discharge, to which Eisenbarth responded, “Insubordination.” R. Aud. P. 9, L. 3-4 Additionally, HCIC listed “Insubordination” as the cause of discharge on its Notice of Claim and Employer Separation Statement filed with IDOL. R. p. 6.

Idaho at 700, 263 P.3d at 754 (quoting *Avery*, 97 Idaho at 614, 549 P.2d at 273). Thus, despite the admonition in case law and regulations that the “standards of behavior” analysis does not require a showing that the employee’s behavior was subjectively willful, intentional, or deliberate, insubordination *does* require a showing of willfulness.²

The Commission’s findings, therefore, must demonstrate that Hiatt was insubordinate in order to maintain its conclusion that Hiatt’s actions were an employment related misconduct. Specifically, the Commission must demonstrate that Hiatt *deliberately or willfully* refused a reasonable order or directive which HCIC was authorized to give and Hiatt was entitled to obey.

i. The Commission’s findings do not establish that Hiatt’s actions were deliberate or willful.

The Commission makes no finding that Hiatt’s actions were willful or deliberate. Instead, the Commission states, contrary to the definition of insubordination in *Locker*, that the employer need not demonstrate that Hiatt’s behavior was willful or deliberate. Nonetheless, the record shows that Hiatt’s behavior was neither deliberate nor willful such as to establish insubordination.

When reviewing claims of insubordination, this court looks to the facts of each case to determine whether an employee’s conduct is reasonable under the circumstances; thus, an employee’s expression of disagreement or discontentment to her employer may not be an act of

² Insubordination appears to be a hybrid ground for employment related misconduct. This court has recognized insubordination as a conduct violating the “standards of behavior” prong. *Avery*, 97 Idaho at 614, 549 P.2d at 273. It has also defined insubordination as a deliberate or willful refusal; but elsewhere clarified that the subjective intent of the employee is irrelevant in a “standards of behavior” analysis.

insubordination. *Locker*, 151 Idaho at 700, 263 P.3d at 754. Although an employer cannot expect employees to at all times be absolutely docile or servile, it can expect employees to comply with the employer's direct orders. *Stark v. Assisted Living Concepts, Inc.*, 152 Idaho 506, 509, 272 P.3d 478, 481 (2012). Thus, the applicable law takes the social realities of the workplace into account. *Locker*, 151 Idaho at 700, 263 P.3d at 754.

The Idaho Supreme Court, in reviewing whether an employee's outburst was intentional insubordination or a "comparatively nonserious disrespect," considered the nature of the interaction between the employer and the employee. *Folks*, 129 Idaho at 837, 933 P.2d at 646. Factors considered include: the emotional state of the employee; specifically, that the employee had received upsetting news the previous day regarding an employment decision effecting her main work; and, that the employer was aware of the employee's emotional state. *Id.*

These factors, and Hiatt's intentionality, were not considered by the Commission. There is ample evidence in the record however, to demonstrate that, similar to the fact considered in *Folk*, Hiatt was under extreme emotional stress. The day prior to her discharge, Hiatt was informed that her pay would be cut by more than half. When Hiatt expressed her concern that the pay-cut was in response to her disability, she was sent home. At the meeting the next day, Hiatt was brought into a closed-door meeting with the CEO and the Operation Supervisor; this was an unusual meeting arrangement that made Hiatt anxious and fearful. R. Aud. p. 43-44. Hiatt had previously feared losing her job, was given a massive pay-cut, and now had a closed-door meeting with two members of management. The evidence demonstrates that Hiatt's conduct was an emotional reaction to a

stressful situation. As such, Hiatt lacked the requisite intent and her behavior does not rise to the level of intentional insubordination. See *Folks*, 129 Idaho at 838, 933 P.2d at 647.

ii. The Commission’s findings do not establish that Hiatt disregarded a “standards of behavior.”

The Commission’s findings, even applied to the regular “standards of behavior” analysis, fail to establish Hiatt’s conduct was employment-related misconduct. Under the “standards of behavior” analysis, the employer must show, “(1) Whether the claimant's conduct fell below the standard of behavior expected by the employer; and (2) Whether the employer's expectation was objectively reasonable in the particular case.” *Folks*, 129 Idaho at 837, 933 P.2d at 646.

a. Hiatt’s behavior was not misconduct because her actions complied with HCIC’s communicated expectations

The Idaho Supreme Court has stated, an “employer’s expectations are ordinarily reasonable only where they have been communicated to the employee.” *Id.* Further, an employee can only be held accountable for failing those expectations that he or she understood, explicitly or implicitly, and was capable of satisfying. *Puckett v. Idaho Dep’t of Corrections*, 107 Idaho 1022, 695 P.2d 407 (1985).

What communication did not or did not occur before the alleged failure to meet a “standard of behavior” is key in determining whether the employer made it clear that such behavior is not appropriate. Following the February 21 interaction between Eisenbarth and Hiatt, Eisenbarth

informed Hiatt that she was reprimanded for “unprofessional conduct;” specifically, that Hiatt engaged in insubordinate conduct *by raising her voice*. R. p. 9. Thus, Eisenbarth communicated to Hiatt that raising her voice in an unprofessional manner was the insubordinate behavior that would not be tolerated.

Eisenbarth only identifies the raising of Hiatt’s voice as insubordinate behavior. The events precipitating Eisenbarth’s reprimand were contentious in so far as Hiatt received a drastic pay-cut and indicated her concern that she was being discriminated against. Yet, of all the interactions on February 21, Eisenbarth only identifies Hiatt’s raising of her voice as the unprofessional behavior. Thus, the standard of behavior which was communicated to Hiatt, and the expectation which she understood, was to refrain from raising her voice.

The Commission, however, does not make a finding that Hiatt raised her voice at the Feb. 22 Meeting. While the Commission briefly mentions Eisenbarth’s contention that Hiatt raised her voice at the Feb. 22 Meeting, the Commission does not find that Hiatt raised her voice, only that Hiatt’s behavior was deteriorating, accusatory, or combative. The record does not contain substantial or competent evidence to find that Hiatt raised her voice during the Feb. 22 Meeting.

In order to find that Hiatt’s conduct was misconduct, said behavior had to be communicated to her. Because Hiatt did not breach a communicated expectation or order, Hiatt did not breach a standard of behavior communicated to her. Thus, the Commission’s findings of fact do not support its conclusion of law.

b. *Hiatt's behavior was not misconduct because HCIC's expectations did not flow naturally from the employment relationship.*

In addition to communicating a behavioral expectation to the employee, the employer's expectations must be reasonable. "An employer's expectations are ordinarily reasonable only where they have been communicated to the employee, some expectations and standards of behavior flow normally from an employment relationship and need not be communicated to the employee to support a claim of employment related misconduct." *Folk*, 129 Idaho at 838, 933 P.2d at 647 (internal citations omitted). Some expectations flow normally from an employment relationship; but, "if certain practices or expectations are not common among employees in general or within a particular enterprise and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct." *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1094, 695 P.2d 1231, 1233 (1984).

The Feb. 22 Meeting was not a common occurrence. The record indicates that Hiatt had never had a closed-door meeting with two members of management, and the record indicates that Hiatt was the only one effected by pay-cuts. The only clear instruction given to Hiatt for the tense and novel meeting that was going to occur, was that she was not to raise her voice. Hiatt was told that the purpose of the Feb. 22 Meeting was to discuss the pay-cut; any expectation regarding deference or docility that might flow naturally from the normal work-relationship are inapplicable to the Feb. 22 Meeting, as it was by nature a contentious meeting concerning Hiatt's wage being reduces by more than 50% and Hiatt's reporting of disability discrimination.

The written reprimand given to Appellant on February 21, 2018 *specifically* asks Appellant to return the following day ready to discuss the issues. At the February 22 Meeting, Appellant talked about her concerns regarding pay scale and discussed her concerns that she was being retaliated against for receiving worker's compensation benefits. Thus, Appellant engaged in behavior that was initiated by, and discussed topics that were presented by, Eisenbarth. Appellant's behavior, therefore, conformed not only to a reasonable expectation standard, but to the expectations of Eisenbarth.

B. As a matter of policy, reporting discrimination cannot be a workplace-related misconduct.

The purpose of Idaho unemployment security law is to “set aside unemployment reserves to be used for workers who are unemployed through no fault of their own.” I.C. § 72-1302. The record establishes that before February 21, Hiatt feared she was being discriminated against because of her disability. On both February 21 and 22, Hiatt reported or attempted to report to her supervisor a belief that she was being discriminated against on the basis of her disability. HCIC and the Commission contend that Hiatt's “insubordination” or “unprofessional behavior” while reporting this discrimination was both satisfactory to discharge her, and to render her ineligible for unemployment benefits.

Hiatt's reporting, however, is a protected activity under the Idaho Commission on Human Rights. I.C. § 67-5901 *et seq* (“ICHR”). Under the ICHR, it is unlawful to discriminate on the basis of disability, and it is unlawful to discriminate against a person who opposes such discrimination.

I.C. § 67-5909; I.C. § 67-5911. A claim under I.C. § 67-5911 is commonly known as a retaliation claim, and requires a plaintiff demonstrate that (1) she engaged in a protected activity; (2) suffered an adverse employment action; and, (3) there is a causal link between the two. *Mendez v. Univ. Health Servs. Boise State Univ.*, 163 Idaho 237, 409 P.3d 817 (2018).

The record is far too sparse to litigate the issue of retaliation or discrimination under the ICHR. However, the record does contain enough evidence to demonstrate that Hiatt was engaging in a protected activity—reporting workplace discrimination. Hiatt feared she would lose her job due to her disability, Hiatt believed she had been discriminated against, and on February 21 and 22, Hiatt reported this discrimination to the HCIC CEO and attempted to meet with the HCIC Board to further report the discrimination. Hiatt was then discharged while making these reports.

Not all actions which justify termination also justify a finding of unemployment ineligibility. The Idaho Supreme Court does not,

“...require that any violation of *any* rule of an employer will, per se, constitute misconduct such as will result in the denial of unemployment compensation benefits upon discharge. While an employer may...discharge an employee for violation of *any* rule, such does not, per se, amount to “misconduct” constituting a bar to unemployment compensation benefits.”

Wroble v. Bonners Ferry Ranger Station, 97 Idaho 900, 902, 556 P.2d 859, 861 (1976).

The Court clearly indicates that there are some actions which warrant dismissal of an employee, but which will not rise to the level of employment-related misconduct so as to bar unemployment benefits.

The ICHR seeks to protect workers from discrimination, going as far as creating a cause of action for adverse actions taken against employee's seeking the ICHR's protections. Idaho's unemployment security law also seeks to protect employees. And yet, if Hiatt is deemed ineligible for unemployment benefits, the purpose of the latter policy will be thwarted because Hiatt sought the protections of the former. Reporting discrimination is an inherently anxious and tense experience, the ICHR retaliation claim is meant to alleviate an employee's fears and encourage them to report discrimination. If a reporting employee must maintain proper decorum, calmness, and amicability while they report workplace discrimination, lest they not only lose their job but also their right to unemployment benefits, then even fewer employees will come forward. By recognizing that, as a matter of public policy, an employee reporting discrimination or engaging in similar protected activities will remain eligible for unemployment benefits, the policies of both Idaho's Human Rights Commission, and Idaho's unemployment security law, will be furthered.

C. As a matter of policy, it should not be workplace misconduct for an employee to attempt to negotiate conditions of employment rather than voluntarily quitting.

HCIC's drastic pay-cut is the type of "good cause related to employment" occurrence where, if Hiatt had voluntarily quit, she would have received unemployment benefits. IDAPA 09.01.30.450. An employee who with good cause terminates their employment, shall be entitled to unemployment benefits. I.C. §72-1366.

Receiving a 50% pay cut is good cause for voluntarily quitting. *Kyle v. Beco Corp.*, 109 Idaho 267, 707 P.2d 378 (1985). Had Hiatt refused to return to work on February 22, by voluntarily

quitting, she would have been eligible for unemployment benefits. Instead, Hiatt returned to work in order to further discuss the pay-cut and discrimination. HCIC goaded Hiatt into a contentious conversation, and instead of choosing unemployment, Hiatt tried to discuss the reasons for of her pay-cut and attempted to keep her job.

Hiatt should not be punished for making a good faith effort to continue her employment and negotiate reasonable wages. Hiatt came to the table on February 22 rather than quitting. Employers should not be able to drastically diminish an employee's wages and then, when asking them to discuss such a pay-cut, terminate their employment for opposing such actions. Policy is better served in promoting employer-employee negotiations, and in prohibiting an employer from baiting employees into antagonistic conflict.

IV. CONCLUSION

The Industrial Commission has failed to establish that Hiatt's discharge was due to employment-related misconduct. The statutes, authorities, and record herein all evidence that: (1) Hiatt was discharged for insubordination, but neither the Commission's findings, nor the record, establish that Hiatt was insubordinate so as to render her ineligible for unemployment benefits; (2) Hiatt complied with the communicated expectations of her employer; and, (3) Hiatt was engaged in a protected activity when she was discharged, and public policy is furthered by protecting her access to unemployment benefits. As such, the Decision and Order of the Industrial Commission should be overruled, and Hiatt should be deemed eligible for unemployment benefits.

Respectfully submitted this 23rd day of May 2019.

McCONNELL WAGNER SYKES & STACEY PLLC

/s/ Michael A. Short

By: Michael A. Short, Attorneys For
Plaintiff, Siranoush M. Hiatt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May 2019, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Idaho Industrial Commission Judicial Division, IDOL Appeals 700 South Clearwater Lane Boise, Idaho 83712 Facsimile: 208.332.7558	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> iCourt Filing
<u>With a copy to:</u> Appeals Bureau Idaho Department of Labor 317 West Main Street Boise, Idaho 83735-0720 Telephone: 208.332.3572 Facsimile: 208.334.6440	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> iCourt Filing
Health Care Idaho Credit Union c/o Fallon Eisenbarth Registered Agent 208 West Jefferson Street Boise, Idaho 83702	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> iCourt Filing

/s/ Michael A. Short
Michael A. Short