

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

SIRANOUSH M. HIATT,  
Claimant-Appellant,

vs.

HEALTH CARE IDAHO CREDIT UNION,  
Employer-Respondent,

and

IDAHO DEPARTMENT OF LABOR,  
Respondent.

**Supreme Court  
No. 46672-2019**

**RESPONDENT'S BRIEF (IDAHO DEPARTMENT OF LABOR)**

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**Appeal from the Idaho Industrial Commission  
Case No. IDOL #42102551-2018**

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

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## STATEMENT OF THE CASE

### A. Nature of the Case

This is an unemployment benefits case. Claimant-Appellant Siranoush Hiatt (“Hiatt”) appeals from a finding of the Idaho Industrial Commission (“Commission”) that she was discharged for workplace misconduct by her employer, Health Care Idaho Credit Union (“HCICU”), and thus ineligible for benefits under the Idaho Employment Security Law, Idaho Code §§ 72-1301 *et seq.*

### B. Course of the Proceedings

Hiatt applied for unemployment benefits after she separated from her employment with HCICU on February 22, 2018. Exhibit, p.6.<sup>1</sup>

On August 5, 2018, IDOL denied Hiatt’s request for benefits on the basis that she had been discharged for misconduct. Exhibit, p.45. Hiatt timely appealed to the Appeals Bureau of IDOL. Exhibit, pp.52-53.

A telephonic hearing on the appeal was held on September 25, 2018. Tr., p.4, ll.19-20. In a written decision dated September 28, 2018, the Appeals Examiner also concluded that Hiatt was discharged for employment-related misconduct. R., *Decision of Appeals Examiner*, p.4.<sup>2</sup>

Hiatt timely appealed to the Commission on October 9, 2018. R., *Claimant’s*

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<sup>1</sup> “Exhibit” refers to the written record before the IDOL Appeals Examiner, which was included in the record before the Commission.

<sup>2</sup> “R.” refers to the Agency Record prepared by the Commission for the instant appeal. Unfortunately, the pages are not numbered. Throughout this brief, reference will be made to the name of the pleading or order in the Agency Record, with a citation to the relevant page or pages within that document.

*Notice of Appeal; Notice of Appearance; Request for Written Transcript; and Request for Written Brief.*

The Department filed its Notice of Appearance on October 22, 2018. R., *Notice of Appearance.*

Hiatt filed a written brief in support of her appeal. R., *Appellant's Brief.*

Thereafter, the Commission conducted its *de novo* review and on November 27, 2018, entered its decision. R., *Decision and Order.* The Commission found, based on the record created before the Appeals Examiner, that Hiatt was not eligible for unemployment benefits because she was discharged for workplace misconduct. *Id.*, p.8.

On January 7, 2019, Hiatt filed a notice of appeal to the Idaho Supreme Court. R., *Notice of Appeal.*

C. Statement of the Facts

HCICU hired Hiatt on June 25, 2016, Tr., p.8, ll.14-16, as a full-time mortgage loan officer. Tr., p.8, ll.21-24. HCICU had seven employees at the time and Hiatt was paid significantly more than other employees, even more than HCICU's CEO, Fallon Eisenbarth, who had been working there for 14 years. Tr., p.12, l.25 - p.13, l.20; p.16, ll.15-17. Hiatt's compensation included a base salary and various rates of commissions on loans. After working at HCICU for a short time, Hiatt requested that a mortgage loan processor be hired to assist her and that request was granted. Tr., p.50, ll.15-20. Hiatt's total compensation increased multiple times during her first

year working at HCICU, including a commission increase in February of 2017. Tr., p.13, ll.9-13; p.47, ll.8-11; p.49, ll.9-10; p.55, ll.14-18.

In April 2017, Hiatt hit her head when she fell at work and suffered a mild traumatic brain injury. Tr., p.14, l.21 – p.15, l.9. By all accounts, at first Eisenbarth and HCICU were very compassionate about Hiatt's situation and accommodated her disability. Tr., p.16, ll.5-14; p.38, ll.7-11.

According to Hiatt, after a period of time Eisenbarth became frustrated because Hiatt was unable to return to full-time status and complained about having to pay vacation pay, 401k benefits, sick leave, and other benefits for Hiatt. Tr., p.39, ll.2-6.

In August of 2017, Hiatt's pay was decreased for the first time. Tr., p.39, ll.9-11. Both her hourly wage and commission rates were reduced, and her monthly commissions were capped. Tr., p.49, ll.14-20.

Later, Eisenbarth met with her board of directors to review the upcoming annual budget and the decision was made to again reduce Hiatt's pay because HCICU had lost money during the prior year, which was the first time that had happened since Eisenbarth took over as CEO in 2014. Tr., p.9, ll.7-10; p.16, l.21 – p.17, l.3; p.53, l.15 – p.54, l.2.

In early February 2018, Eisenbarth told Hiatt that she would have to start using her sick leave and vacation pay for the time she was off of work for disability and worker's compensation. Tr., p.39, ll.18-24. (Since April 2017, Hiatt had been receiving worker's compensation and was working on a three-quarters of the time

basis. Tr., p.15, ll.10-13.) In or about the second week of February 2018, Hiatt was told that she was going to receive a second pay decrease. Tr., p.40, l.25 – p.41, l.3. Hiatt proposed a flat salary of \$100,000 per year. Tr., p.12, l.17; p.53, ll.5-6. The year before, Hiatt had made \$156,000 in salary and commissions. Tr., p.12, ll.10-12.

HCICU offered Hiatt an annual flat salary of \$72,000. Tr., p.53, ll.7-8. Eisenbarth explained what happened next during a meeting with Hiatt held on February 21, 2018, to discuss Hiatt's reduction in pay. When Hiatt was called into Eisenbarth's office to discuss the proposed pay cut, "she just became very hostile and started yelling at me and I couldn't get anywhere with her." Tr., p.9, ll.14-15. Hiatt was very upset and Eisenbarth told her to work the rest of the day from home and return the next day at 10:00 a.m. with any questions she had regarding the salary change "so that we could stay on track." Tr., p.9, ll.16-19. Eisenbarth testified that Hiatt was told to go home that day "due to her unprofessional behavior towards me," not because Hiatt had asked to talk with the board of directors about her decrease in pay and Eisenbarth's treatment of her. Tr., p.50, l.24 – p.51, l.4.

An hour after being sent home, Hiatt received a written warning letter by email, Tr., p.42, l.23 – p.43, l.1, which read:

2/21/2018

To: Sira Hiatt  
Mortgage Loan Officer

From: Fallon Eisenbarth  
CEO

Subject: Written Warning-Insubordination



This letter serves as a formal written reprimand for your unprofessional conduct. I asked you to leave today because you engaged in insubordinate conduct by raising your voice. This behavior will not be tolerated.

It's best if you work from home the rest of the day and document your hours worked. I would like to discuss questions you may have tomorrow at 10:00. I would like you to write your questions down so we can stay on track.

/s/  
Fallon Eisenbarth

Exhibit, p.9.

The next day, February 22, 2018, Hiatt arrived at 10:00 a.m. and met with Eisenbarth and Arminda Kindrick, HCICU's operations supervisor. Tr., p.28, l.21 – p.29, l.1. Hiatt was asked if she had brought any questions and said she had not. Tr., p.9, ll.20-23. Eisenbarth summarized what happened after that, before later testifying in more detail:

And I started to discuss the changes that were going to take place and she did the exact same thing she did the day before and just freaked out. I couldn't get a word in. So, at that time I just decided to terminate her, because this was, you know, the third time she's done that to me and I'm not going to tolerate that kind of behavior in the office. It was really unprofessional.

Tr., p.9, l.23 – p.10, l.5.

Eisenbarth testified that Hiatt wanted to know why her salary was being changed because she had performed very well the year before. Eisenbarth could not get a word in. Tr., p.10, ll.10-15. "She was yelling saying I'm a liar." Tr., p.10, l.16. "I'm not fair. Why didn't I cut everyone else's salary." Tr., p.10, ll.16-17. "[S]he just

was screaming at me about miscellaneous things.” Tr., p.10, l.18. Hiatt said she wanted to talk to the board and she was going to get Eisenbarth fired. Tr., p.10, ll.20-22. “A lot of nonsense. Nothing professional.” Tr., p.10, l.22. It was “hostile and out of control.” Hiatt was very mad about her salary change and “just screaming at [Eisenbarth] the entire time random things.” Tr., p.10, l.23 – p.11, l.3. Eisenbarth terminated Hiatt “during her screaming and freaking out.” Tr., p.11, ll.11-13. She was “just shocked” by Hiatt’s unprofessional actions. Tr., p.53, ll.10-12. In closing, Eisenbarth stated “the whole reason why [Hiatt] was terminated was because of her behavior on the 21st and 22nd and she had already been warned prior to – 9/27 about, you know (unintelligible) it’s in her file, so I – it was kind of the final straw.” Tr., p.58, ll.14-18.<sup>3</sup>

Hiatt painted an entirely different picture. She testified that Eisenbarth shouted at her to go home during the February 21st meeting and said, “I want you to go home. Fine. You can talk to the board. Go home.” Tr., p.41, ll.19-22. Hiatt said she thought Eisenbarth “was just like mad and kidding.” Tr., p.42, ll.11-12. Hiatt left the office in tears and about an hour later received an insubordination letter by email which said there would be a meeting at 10:00 a.m. the next day. Tr., p.42, l.23 – p.43, l.1.

Hiatt admitted she was upset at the meeting on February 22nd, but “was not

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<sup>3</sup> The record before the Appeals Examiner and the Commission includes handwritten notes, apparently taken from Hiatt’s personnel file, that include the following notation: “9/27/17 Sira screamed in my office during salary discussion. Let her know this is not tolerated. Verbal warning.” Exhibit, p.12.

yelling in any way, shape or form. I was talking just like I'm talking right now [during her testimony] and I had – I had expressed my concern that I was being targeted because of my disability.” Tr., p.44, ll.13-18. Later in her testimony, Hiatt acknowledged that “[t]he conversation got a little heated, because [Eisenbarth] was getting frustrated because of me questioning why is my pay being cut and nobody else’s is being cut.” Tr., p.45, ll.7-9.

Arminda Kindrick was present during the February 22, 2018, meeting. In contrast to Hiatt’s somewhat mild description, she testified it was “a pretty difficult meeting” and was “more accusations and supposition.” Tr., p.24, ll.3-4. Kindrick stated there “wasn’t really much discussion as far as anything noteworthy that would actually lead anywhere to any kind of compromise or – it was, basically, just off topic.” Tr., p.24, ll.9-12. Kindrick repeated that “it was just basically accusations,” that Hiatt was “pretty combative” and “upset and accusatory,” Tr., p.24, l.16 – p.25, l.4, and that Hiatt “[d]idn’t really want to listen to anything anybody had to say.” Tr., p.25, ll.4-5. She added that “when it became more volatile . . . [Hiatt] said when the board heard exactly things that were going on that it would be [Eisenbarth’s] job on the line.” Tr., p.25, ll.5-9. According to Kindrick, Hiatt also said she believed the salary adjustments were because of her disability and that she was being retaliated against because of her disability. Tr., p.26, ll.10-12; p.28, l.21 – p.29, l.1.

Kindrick believed Hiatt was terminated for her volatile behavior, not because of her disability, explaining:

The meeting was supposed to be a discussion regarding [Hiatt’s]

questions about the pay structures and there were no questions, it was just accusations and quite volatile at that point . . . it was just straight out insubordination. I mean it was unprofessional and there was, basically, no recovery of the relationship there.

Tr., p.26, l.15 – p.27, l.3.

Christy Ford, a teller at HCICU, said that when Hiatt left on February 22nd, she seemed upset and said something like “Good luck keeping your jobs here.” Tr., p.36, ll.5-11.

As discussed below in the argument section of this brief, the Commission found that Eisenbarth’s testimony was more credible than Hiatt’s testimony. It concluded that Hiatt was not eligible for unemployment benefits because she was discharged for workplace misconduct.

## ISSUE ON APPEAL

Does substantial and competent, though conflicting, evidence support the Commission's finding that Hiatt was discharged for employee misconduct under the Employment Security Law?

## ARGUMENT

### I.

#### The Commission's Finding That Hiatt Was Discharged for Employee Misconduct Is Supported By Substantial and Competent Evidence

##### A. Standards of Review

When considering an appeal from the Industrial Commission, the Idaho Supreme Court's review is limited to questions of law. Harper v. Idaho Department of Labor, 161 Idaho 114, 116, 384 P.3d 361, 363 (2016). Indeed, the 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). *See also*, Idaho Const., Art. V, § 9.

In conducting its deferential review of Commission findings, this Court will view all the facts and inferences in the light most favorable to the party who prevailed before the Commission. Ehrlich v. DelRay Maughan, M.D., P.L.L.C., 165 Idaho 80, 83, 438 P.3d at 777, 780 (2019), *citing*, Bell v. Dep't of Labor, 157 Idaho 744, 746-47, 339 P.3d 1148, 1150-51 (2014). Even if the Court might have reached different conclusions from the facts, it will not overturn the Commission's findings if supported by substantial and competent evidence. Ehrlich, 165 Idaho at 83, 438 P.3d at 780; Christy v. Grasmick Produce, 162 Idaho 199, 201, 395 P.3d 819, 821. "Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant

evidence that a reasonable mind might accept to support a conclusion.” Ehrlich, 165 Idaho at 83, 438 P.3d at 780, *quoting*, Christy, 162 Idaho at 201-02, 395 P.3d at 821-22.

B. Legal Framework for Review of Employee Misconduct Cases

Personal eligibility conditions for unemployment benefits include, *inter alia*, the requirement that, in cases of termination, a claimant’s termination was not “for misconduct in connection with his employment.” I.C. § 72-1366(5). Although a claimant generally has the burden of establishing eligibility, in circumstances where the claimant was terminated, the employer has the burden of demonstrating the discharge was for conduct that constituted misconduct under the Employment Security Law. Copper v. Ace Hardware/Sannan, Inc., 159 Idaho 638, 641, 365 P.3d 394, 397 (2016), *citing*, IDAPA 09.01.30.275.01.

There are three, sometimes overlapping, categories of disqualifying employee misconduct:

**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, *quoted in Harper, supra, and Cooper, supra*. These categories of misconduct are consistent with well-established Idaho case law. Jenkins v. Agri-Lines Corp., 11 Idaho 549, 602 P.2d 47 (1979); Johns v. S. H. Kress & Co., 78 Idaho 544, 548, 307 P.2d 217, 219 (1957).

The parties do not dispute that Hiatt was discharged, as opposed to having voluntarily quit. Consequently, HCICU had the burden of demonstrating that Hiatt's discharge was for misconduct in connection with employment. IDAPA 09.01.30.275.02.c.

Under the "standards of behavior" analysis, the employer must show by a preponderance of the evidence that (1) the employee's conduct fell below a standard of behavior the employer had a right to expect; and (2) the employer's expectations were objectively reasonable under the circumstances. Folks v. Moscow School District No. 281, 129 Idaho 833, 837, 933 P.2d 642, 646 (1997). 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 v. Aspen Water, Inc., 150 Idaho 408, 413, 247 P.3d 635, 640 (2011). An expectation is objectively reasonable if it was communicated to the employee, or if it "flows naturally" from the employment relationship. *Id.*

C. Substantial and Competent Evidence Supports the Finding that Hiatt Was Discharged for Employee Misconduct Under the "Standards of Behavior" Prong of Misconduct Analysis

The Commission conducted a *de novo* review of the record and found the



evidence insufficient to show misconduct based upon a violation of the employer's reasonable rules. See IDAPA 09.01.30.275.02.b. R., *Decision and Order*, pp.5-6. It did, however, find misconduct based upon Hiatt's disregard of "standards of behavior" reasonably expected by HCICU. It weighed the conflicting evidence, and, quite obviously, found Hiatt's testimony to be less credible:

Claimant [Hiatt] denies she was combative during either meeting with Eisenbarth. Claimant explained that she thought Eisenbarth was "joking" when she told Claimant to go home on February 21, 2018, and was shocked when she received the reprimand by email later that day. Claimant points to written statements Kindrick provided as evidence supporting Claimant's contention that she did not raise her voice or threaten Eisenbarth because Kindrick did not mention such behavior. However, both of Kindrick's statements describe Claimant's behavior during the meeting on February 22, 2018 as deteriorating and accusatory. . . .

A preponderance of the totality of the competent evidence in this record establishes that Claimant was upset and combative during both meetings. By her own admission Claimant suspected that Eisenbarth was plotting against her for months and these feeling likely boiled over when she met with Eisenbarth about her salary. Claimant made accusatory and threatening statements. In all likelihood, they were delivered in a hostile rather than conversational tone.

Claimant's annoyance over her compensation is understandable, but her frustration did not entitle her to unprofessional behavior towards her supervisor. After Claimant's behavior on February 21, 2018, Eisenbarth warned Claimant that her behavior was unacceptable and would not be tolerated. Nevertheless, Claimant did not heed the warning when she returned on February 22, 2018 and that behavior resulted in her discharge.

R., *Decision and Order*, pp.7-8 (emphasis added; citations to record omitted).

The Commission found Hiatt was discharged for employment-related misconduct. *Id.*, p.8. In doing so, it understood the applicable law, reciting that misconduct under the "standards of behavior" category requires a showing that

employer's expectations were either communicated to the claimant or "flowed naturally" from the employment relationship. R., *Decision and Order*, p.5. The Commission's finding that Hiatt did not heed HCICU's warning "that her behavior was unacceptable and would not be tolerated," was a finding that HCICU had communicated its expectations to Hiatt.

This finding is supported by substantial and competent evidence. As noted above, on February 21, 2018, Eisenbarth send Hiatt a letter by email, with the subject line: "Written Warning-Insubordination." R., *Decision and Order*, p.9. This letter stated it was "a formal written reprimand" and placed Hiatt on notice that "unprofessional conduct," "insubordinate conduct," and "raising your voice" "will not be tolerated." *Id.* Hiatt confirmed in her testimony that she received this letter. Tr., p.42, l.23 – p.43, l.1. There also was evidence that some five months earlier Hiatt was reprimanded for similar conduct and received a similar warning. Tr., p.58, ll.14-18. This oral warning was documented in Hiatt's personnel file: "9/27/17 Sira screamed in my office during salary discussion. Let her know this is not tolerated. Verbal warning." R., *Decision and Order*, p.12.

HCICU's expectations were objectively reasonable because they were communicated to Hiatt. They also were objectively reasonable because it "naturally flows" both from this particular employment relationship and from most other employment relationships in general, that a CEO, the supervisory head of a business, may not be yelled at, threatened, and subjected to unprofessional conduct by a subordinate employee. The Commission's findings that Hiatt engaged in this type of

conduct, and was terminated for doing so, is supported by substantial and competent evidence. The Commission observed that Kindrick described the February 22, 2018, meeting as deteriorating and accusatory, that Hiatt was “upset and combative,” and that Hiatt made accusatory and threatening statements that “[i]n all likelihood were delivered in a hostile rather than conversational tone.” R., *Decision and Order*, p.7. The Commission stated that Hiatt’s frustration “did not entitle her to unprofessional behavior towards her supervisor.” *Id.*

“Insubordination” is a form of misconduct that violates the “standards of behavior” prong. Harper, 161 Idaho at 114, 384 P.3d at 754; Locker, 151 Idaho at 700, 263 P.3d at 754. This word merely describes misconduct that is directed at a supervisor; it does not define an entirely separate category of misconduct. Here, Hiatt’s conduct was, in addition to being insubordinate, “unprofessional,” “hostile,” “threatening,” and “combative.” Although perhaps an argument can be made that all insubordination is unprofessional, it cannot be said that all insubordination is hostile, threatening, and combative. Essentially, Hiatt’s conduct was beyond the pale. The descriptive words chosen by Eisenbarth in her testimony were “out of control” and “freaking out.” Tr., p.11, l.1-13.

In Muchow v. Varsity Contractors, Inc., 156 Idaho 457, 461, 328 P.3d 437, 441 (2014), this Court upheld a finding by the Commission that an insubordinate employee engaged in misconduct when she shredded documents contrary to the order of her superior:

In this case, the commission found that by disobeying the director's

order not to shred the documents, the claimant disregarded a standard of behavior that the employer has a right to expect of an employee. “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.

Muchow, 156 Idaho at 461, 328 P.3d at 441. The insubordination letter Hiatt received on February 21, 2018, was an order or directive from Eisenbarth. Hiatt was told a recurrence of her unprofessional and insubordinate conduct would not be tolerated. When Hiatt violated that order or directive in less than a day, Eisenbarth was true to her word.

Hiatt’s conduct constituted workplace misconduct under the standards of behavior prong of analysis. Although there are some instances where an employee’s expression of disagreement or discontent may not amount to insubordinate misconduct, *e.g.*, Folks, 129 Idaho at 838, 933 P.2d at 647, this is not such a case because of the temporal proximity and clarity of the warning given to Hiatt and the magnitude of her breach of that warning. Clearly, the Commission did not find Hiatt’s conduct to be reasonable under the circumstances.

Hiatt attempts to excuse her behavior by arguing that Eisenbarth terminated her, not for her misconduct, but because she was disabled, or because she was going to advise the board of directors of Eisenbarth’s alleged maltreatment of her. There was conflicting evidence on this point. Contrasting Hiatt’s suppositions were the testimony of both Eisenbarth and Kindrick that Hiatt was terminated for her behavior on February 22, 2018. When Kindrick was asked if Hiatt’s termination had

anything to do with her disability, she answered “Absolutely not.” Tr., p.22, ll.8-11. Eisenbarth stated that Hiatt’s disability had nothing to do with anything, Tr., p.18, ll.15-15, and that Hiatt was terminated for her unprofessional conduct. Tr., p.9, l.23 – p.10, l.5. Eisenbarth added that there was nothing inappropriate about Hiatt’s request to speak to the board of directors and that Hiatt could do so “in a professional manner.” Tr., p.18, l.18 – p.19, l.6.

Although Hiatt testified that she was discharged because she wanted to talk to the board, Tr., p.38, ll.7-11, Eisenbarth was adamant that this was not the reason: “[S]he wasn’t kicked out of my office on the 20 – 21st because she wanted to talk to the board, she was kicked out of the office due to her unprofessional behavior towards me.” Tr., p.50, l.24 – p.51, l.4. In the end, the Commission measured the conflicting evidence and entered findings of fact consistent with the testimony of HCICU’s witnesses. It did not find that Hiatt was discharged because of her disability or in retaliation for her request to speak with the board.

Even if this Court were to go down the path of analyzing the facts within the framework of a discrimination claim, which would be inappropriate for a number of reasons including for the reason that the Commission’s findings of fact do not support such a claim, NCICU’s non-discriminatory reasons for terminating Hiatt were not shown to be a pretext and, as the Eighth Circuit Court of Appeals explained in Ebersole v. Novo Nordisk, Inc., 758 F.3d 917, 927 (8th Cir. 2014), courts should not sit as “a super-personnel department” and second-guess business decisions:

In one of our most oft-quoted passages, we said in 1994 that “[f]ederal

courts do not sit as a super-personnel department that reexamines an entity's business decisions.” One reason we emphasize this point is that a number of plaintiffs present a sympathetic situation in which the employer's judgment in imposing discipline may appear poor or erroneous to outsiders. It is tempting to think that the role of the federal courts is to offer a remedy in that sort of case. Whether we might believe that [the employer] was unduly harsh in its treatment of [the plaintiff], however, is not a matter to be considered in deciding this appeal. Our authority is to determine only whether there is a genuine issue for trial on the question whether [the employer] discharged [the employee] because of his race.

Ebersol, 758 F.3d at 927 (citations omitted). The Court in Ebersol added:

Thus, whether a prudent employer would have treated Ebersole's actions more leniently because of Reichard's authorization is not our call. Ebersole has not produced sufficient probative evidence that her termination was the result of unlawful FMLA retaliation.

*Id.*

It was for the Commission to determine the credibility and weight to be given to the testimony admitted. It found Hiatt's suppositions about the reasons for her discharge unsupported by the evidence. Even though conflicting evidence was presented to the Commission, the deference to be accorded to the Commission's factual findings is not thereby diminished. To the contrary, in cases such as these, faithful application of this Court's deferential standard of review becomes even more necessary and important.

## CONCLUSION

Substantial and competent evidence supports the factual findings of the Commission. It is respectfully requested that this Court affirm the Commission's findings and decision that Hiatt was terminated for misconduct in connection with employment and, thus, was ineligible for unemployment benefits.

Respectfully submitted,

/s/ Doug Werth  
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9<sup>th</sup> of August, 2019, I caused to be served a true and correct copy of the foregoing by the following method to:

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