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## Employment Law Monthly

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### Redefining "Simple Misconduct" in Unemployment Benefits Eligibility

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Unemployment benefits are crucial to thousands of employees who lose their employment. However, the unemployment benefits law is also crucial for employers to understand, as they often make determinations regarding whether contesting the eligibility of former employees' benefits is worth the effort and cost, and often work on their own to gather the relevant information and testify in appeals. Understanding which former employees are generally eligible for benefits, and which may be disqualified from benefits, is important.

The New Jersey Appellate Division recently provided some guidance when it invalidated a new definition of "simple misconduct" that had been adopted by the New Jersey Department of Labor and Workforce Development (the "Department"). *In re N.J.A.C. 12:17-2.1*, 2017 WL 1548683 (App. Div. 2017). The definition of "simple misconduct" had included a negligence-based term, which the Appellate Division found confused the issue, since negligence inherently excludes purposeful conduct.

#### A REFRESHER

The Appellate Division provided a brief overview of the rationale behind, and the history of, the State's unemployment benefits laws. This background is helpful as a refresher, and provides context for its recent decision regarding the definition of "simple misconduct."

Unemployment benefits laws existed as early as 1936. The goal is to provide financial compensation to individuals who lose their jobs. However, there has always been a disqualification for the loss of employment under certain circumstances. First, an employee cannot simply leave his job and qualify for benefits, unless he can prove that he was effectively terminated ("constructive discharge").

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Second, when employees are terminated for some sort of "misconduct," they may be disqualified from receiving unemployment benefits. The law has always distinguished in some way between "gross misconduct" and the lesser general "misconduct." In 2010, the category of "severe misconduct" was added. "Gross misconduct" (the commission of certain crimes under the criminal code) is more serious than "severe misconduct" (e.g., repeated lateness after warnings or destruction/theft of company property), which is in turn more serious than the newly named "simple misconduct" (e.g., lateness with no warnings or insubordination).

The more serious the misconduct, the more severe the sanctions. "Simple misconduct" disqualifies an individual from benefits for a waiting period, after which eligibility is restored. For "severe misconduct" and "gross misconduct," the Department may effectively disqualify an individual from receiving benefits at that time.

However, "simple misconduct" was never specifically defined to differentiate it from "severe misconduct." Case law helped to fill this gap by finding that the penalty of disqualification from benefits was meant to address "deliberate and willful disregard of the standard of conduct an employer has a right to expect." Case law made the distinction "between intentional and deliberate conduct on the one hand and negligent or inadvertent conduct on the other." Actions that lead to a disqualification from benefits included "acts done intentionally, deliberately, and with malice." Therefore, negligence or even poor performance would rarely have disqualified individuals from benefits.

#### **THE ISSUE**

In 2014, the Department proposed amendments to the regulations that dealt with applicants leaving their jobs voluntarily or being terminated for misconduct. Relevant to the appeal here, "misconduct" was still categorized as "simple misconduct, severe misconduct, or gross misconduct." Additionally though, "simple misconduct" was now defined and included "negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer." Various entities submitted objections to the amendments, including the appellants in this appeal. A hearing was held, after which the amendments were adopted in substantially the same language as proposed.

Appellants argue that the inclusion of a negligence-based term within any definition of "misconduct" is improper. They contend that "intentional negligence" is essentially an oxymoron, and that the "simple misconduct" definition should be revised.

#### **THE DECISION**

It is worth noting that the standard of review here was fairly stringent. Appellate review of agency decisions is generally deferential in nature, affording the agency latitude to carry out its mandate. Despite this deferential review, the Appellate Division found that the regulation was unclear, not easily understandable, and would lead to a non-uniform application.

A key consideration was that the unemployed individuals seeking these benefits are often representing themselves in these proceedings, without the assistance of an attorney. Thus, the possibility of confusion was significant.

The Appellate Division found that the regulation confuses negligence and purposeful behavior. As negligence, by definition, does not involve purposeful behavior, the Appellate Division objected to the inclusion of it with terms like "wrongful intent," "deliberate violation," or "wanton or willful disregard."

Ultimately, the provision was deemed arbitrary and capricious, and ordered to be set aside, awaiting a revised version from the Department. In so holding, the Appellate Division was clear that the unemployment benefits laws are to be "construed and applied so as to not deprive claimants of unemployment benefits based on . . . nothing more than simple negligence." As the overarching goal is to permit terminated employees to acquire benefits, the law is construed liberally in favor of a qualification for benefits.

## **TAKEAWAYS**

As this decision merely invalidates the previously adopted version and tasks the Department with revision of the definition, there is no change in the definitions. As such, we will continue to monitor this area over the coming months.

However, the decision reminds employers that the unemployment benefits system will be construed liberally in favor of those who have lost their jobs. Be aware that, based upon existing law, employers must show that employees acted in a deliberate and purposeful manner in order for the Department to disqualify them from unemployment benefits. Mere negligence will generally not suffice for disqualification. Therefore, employers must make a business decision as to whether it would be worth the time and effort to challenge a former employee's application for unemployment benefits if the employee was terminated for an act (or acts) that may only constitute negligence, such as failure to do a good job, or even inadvertently causing harm to the company. Consider the nature of the transgressions that led to termination before deciding to challenge an application for unemployment or appeal a determination of eligibility.

As employers often address appeals of benefits determinations without the assistance of legal counsel, it is important for them to be familiar with the definitions so that they can provide relevant testimony as appropriate. The Department's generally qualification-friendly stance should inform employers' choices and the type of data and documents pulled together to dispute eligibility. If there remains doubt, consult legal counsel.

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