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EMPLOYEE MISCONDUCT -- HOW MUCH IS IT COSTING YOU?

By Okechi C. Ogbuokiri

For those employers who have been frustrated by the obligation to provide unemployment benefits to individuals terminated for misconduct, recent changes in New Jersey law and a recent decision issued by the New Jersey Appellate Division could lower the amount of funds awarded to such undeserving individuals. *Silver v. Bd. of Review*, 430 N.J. Super. 44 (App. Div. 2013) (citing Governor's Conditional Veto Message, S1813, P.L. 2010, c. 37).

The Unemployment Compensation Law, specifically, *N.J.S.A.* 43:21-5, now includes a new "severe misconduct" provision. Under the current provision, an individual terminated for "gross misconduct" will be permanently disqualified from receiving unemployment benefits until the individual is re-employed for at least eight weeks and earns ten times his or her benefit rate. *Id.* Termination resulting from "severe misconduct" will result in disqualification from the receipt of benefits until the individual is re-employed for at least four weeks and has earned at least six times his or her weekly benefit rate. *Id.* Termination resulting from "simple misconduct" will result in an individual being disqualified from receiving benefits for a period of up to eight weeks. *Id.*

There is a clear distinction between gross misconduct (i.e., the commission of a criminal act in either the first, second, third or fourth degree) and the other tiers of conduct. Despite the intention to bring more clarity to this issue, the Legislature failed to define "severe misconduct," making it more difficult for employers to assert that an employee is disqualified from receiving unemployment insurance benefits. The Appellate Division in *Silver* and *Tarnowski v. Bd. of Review*, 2013 WL 3778170 (App. Div. Sept. 9, 2013), attempted to provide guidance on what conduct constitutes severe misconduct. However, the Court only defined "misconduct" and in turn requires an employer to meet a higher burden to prove simple misconduct.

The Facts

In *Silver*, a former employee appealed a final decision of the Board of Review of the New Jersey Department of Labor, which upheld the Appeal Tribunal's decision to disqualify the former employee from receiving unemployment insurance benefits. *Silver*, 430 N.J. Super. at 46. The former employee worked as a teacher at a county youth detention facility. *Id.* She was discharged because over the course of her employment she repeatedly failed to collect ink pens from her students, which posed a safety risk within the school. On the seventh occurrence, the county youth facility terminated the teacher. *Id.* at 47. The teacher ultimately appealed her denial of benefits to the Appellate Division, and the Court reversed the Board of Review's decision.

The Court's Decision

The Appellate Division held that "disqualification under *N.J.S.A.* 43:21-5(b) is warranted only when the employee's conduct that resulted in his or her discharge had the 'ingredients of willfulness, deliberateness and intention.'" *Silver*, 430 N.J. Super. at 52. The Court noted that, prior to the amendment, previous courts held that misconduct was defined as

an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or reoccurrence 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.

Id. at 49 (citing 48 Am.Jur., Social Security, Unemployment Compensation, etc. § 38 at 541). The Court reasoned that, based on the progression of case law, which emphasized a demonstration of intentional misconduct on the part of the employee, the definition of misconduct must be more stringent. The Court outlined two prongs to establish misconduct: first, the conduct must be improper, intentional, connected with the work, malicious, and within the employee's control; second, the conduct also must be either a deliberate violation of the employer's rules or a disregard of the standards of behavior which the employer has the right to expect.

Despite the lack of a statutory or regulatory definition of "severe misconduct," the Court recognized that the statute did provide examples of "severe misconduct," such as repeated lateness or absences and repeated violations of an employer's rule or policy¹. However, the Court opined that the examples failed to include the requirement of a demonstration that the employee acted intentionally, deliberately, and with malice. *Id.* at 55-56. The Court noted that a repetitive violation of a rule, policy or standard of conduct might justify a "reasonable inference" that the employee's disregard was deliberate. However, if there is evidence to the contrary, then the individual cannot be deemed to have engaged in misconduct.

In *Silver*, the teacher demonstrated that, in certain circumstances, she could not comply with the rule regarding the collection of the ink pens and her violation of the county facility's policy was done mistakenly. Because there was no showing of any intentional conduct, the Court reversed the Board of Review's decision.

The Bottom Line

Although the Appellate Division provides clarity to the definition of "misconduct" in the context of unemployment insurance benefits, it is still unclear how the courts and the Department of Labor define "severe misconduct." Hopefully, the Department of Labor will promulgate regulations that clearly define both "simple misconduct" and "severe misconduct." However, in the interim, employers should seek the assistance of legal counsel to ascertain whether an employee should be disqualified from the receipt of unemployment insurance benefits. The list of examples of "severe misconduct" set forth in *N.J.S.A.* 43:21-5(b) and the *Silver* test will assist in determining whether an employee's actions rise to the level of "severe misconduct."

¹ Other examples of "severe misconduct" include, but are not limited to, falsification of records, physical assault or threats that do not constitute gross misconduct, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, and theft of time.

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