May 5, 2017

Even Simple Misconduct Must Be Willful and Deliberate to Disqualify Employees from Unemployment Benefits in New Jersey

In New Jersey, whether and how long an employee discharged for misconduct is ineligible to receive unemployment benefits depends on the level of misconduct. Differentiating degrees of misconduct on a scale from simple to severe to gross, however, has proven to be a challenge for the New Jersey Department of Labor and Workforce Development (the Department). In 2015, the Department adopted a regulation, N.J.A.C. 12:17-2.1, defining what constitutes "simple," "severe," and "gross" misconduct. On May 1, 2017, in *In re: N.J.A.C. 12:17-2.1*, a New Jersey appellate court set aside as arbitrary and capricious the portion of the regulation defining "simple misconduct."

Under New Jersey Unemployment Compensation Law, N.J.S.A. 43:21-1 through -56, employees fired for misconduct are disqualified, at least for a period of time, from receiving unemployment benefits. N.J.S.A. 43:21-5(b). When the New Jersey Legislature first passed this law in 1936, the law distinguished between "misconduct" (also referred to as "simple misconduct") and "gross misconduct." In 2010, the legislature amended the statute to add an intermediate level called "severe misconduct."

Under the statute, the level of misconduct determines the duration of ineligibility. A claimant discharged for "misconduct" is disqualified for the week of discharge and the subsequent seven weeks. A claimant discharged for "severe misconduct" is not eligible for benefits from the time of discharge until such time that the claimant has been reemployed for four weeks and has earned at least six times his or her weekly unemployment benefit rate. A claimant discharged for "gross misconduct" can never receive any unemployment benefits from the employer toward whom the gross misconduct occurred and remains ineligible for unemployment benefits until such time that the individual has been reemployed for eight weeks and has earned at least 10 times his or her weekly benefit.

The statute does not define "simple misconduct." Courts have interpreted simple misconduct to require elements of willfulness, deliberateness, intention and malice. Negligent or inadvertent conduct that may violate an employer's rules does not constitute simple misconduct, because it lacks the required intent. The statute provides a nonexhaustive list of examples of the behavior covered by the term "severe misconduct," including repeated violations of a rule or policy, repeated lateness or absences after a written warning, falsification of records, physical assault or threats that do not constitute gross misconduct, misuse of benefits or of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or other malicious and deliberate conduct that is not gross misconduct. The statute defines "gross misconduct" as "the commission of an act punishable as a crime of the first, second, third, or fourth degree" under New Jersey criminal law and connected to work.

In a 2013 case, *Silver v. Board of Review*, the New Jersey Appellate Division expressed concern that there was no codified rule distinguishing simple misconduct from severe misconduct. In apparent response, the Department adopted the regulation at issue in *In re: N.J.A.C. 12:17-2.1*, further defining "severe misconduct" and "simple misconduct." The regulation defined "simple misconduct" as "an act which is neither 'severe misconduct' nor 'gross misconduct' and which is an act of wanton or willful disregard of standards of behavior that the employer has the right to expect of his or her employee, or 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."

The New Jersey Appellate Division found that the regulation failed to make the "critical distinction" between simple negligence, which in the court's view is not misconduct, and intentional, deliberate or malicious conduct. The court determined that, by failing to make this distinction, the regulation's definition of "simple misconduct" was arbitrary and capricious. The court gave the Department six months to adopt a substitute definition of "simple misconduct," during which time the court's decision is stayed.

Employers should be aware of this decision if they plan to provide evidence to the Department's Division of Unemployment Insurance to establish that a former employee is disqualified from unemployment benefits based on misconduct. The Appellate Division clarified that mistakes, errors in judgment, acts of carelessness or instances of negligence are insufficient to meet the threshold of misconduct, even simple misconduct, needed for benefits disqualification. To be ineligible for unemployment benefits, employees must have acted with deliberate and willful disregard to the employer's standards.

Authors



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com