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Pennsylvania Unemployment Compensation Newsletter

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WHEN DOES AN "HONEST MISTAKE" CONSTITUTE WILLFUL MISCONDUCT?

Under Section 402(e) of the Unemployment Compensation Law, an employee shall be ineligible for unemployment compensation benefits where the unemployment is due to discharge for "willful misconduct." The term "willful misconduct" is not defined by statute, but the Courts have defined it as: (a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rules; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties and obligations.

Given that definition, mere negligence is not generally found to be willful misconduct. For example, in the case of Marysville Body Works, Inc. v. UCBR, 419 A.2d 238 (Pa.Cmwlth. 1980), an employee violated a shop rule by punching the time card of another employee. Finding the employee's action was solely based on mistake, the Court affirmed the UCBR's grant of unemployment compensation benefits.

In contrast, in the case of Heitzman v. UCBR, 638 A.2d 461 (Pa.Cmwlth. 1994), the Court found the claimant's negligence to be willful misconduct. Mr. Heitzman was a truck driver. His employer had a policy of which he was aware that required truck drivers to get out of the truck before backing up to make a "walk around" to ensure that the path was clear. Mr. Heitzman failed to do so and backed his truck into a light standard, causing extensive damage to the truck and the light standard. The Court noted: "Such conduct is not the type of inadvertence, i.e., negligence, that…Marysville addressed, but is more akin to the disobedience of a direct instruction."

Likewise, in the recent case of Oliver v. UCBR, 5 A.3d 432 (Pa.Cmwlth. 2010), what would seem to be negligence rose to the level of willful misconduct. The claimant worked as a preschool teacher. The school had a policy that a teacher must supervise all of the children in her charge at all times. Claimant took her group of 6 children from the playroom to an outdoor play area. While doing so, claimant stumbled and did not realize that one child returned to the playroom until she started to play with the children. A few minutes later, claimant was confronted by her supervisor, who had found the unsupervised child. Claimant was discharged as a result. While the Court found the claimant to be sympathetic, the Court also noted that claimant did not have good cause for violating employer's rule of 100% supervision.

The Court stated: "Even if her actions constituted an honest mistake, it would not justify the violation of Employer's rule." Accordingly, the denial of benefits was affirmed.

When negligence equals willful misconduct is determined on the facts of each case. As noted above, however, the Courts have found that negligence which results in the violation of an employer rule or policy does rise to the level of willful misconduct.

RECENT DECISIONS OF NOTE

CLAIMANT'S FAILURE TO BECOME UNION MEMBER MAY BE WILLFUL MISCONDUCT

Section 402(e) of the Unemployment Compensation Law provides that a claimant shall be ineligible for compensation for any week "in which his unemployment is due to his discharge for willful misconduct connected with his work." Over the years, numerous court decisions have defined willful misconduct as 1) an act of wanton or willful disregard of the employer's interests, 2) a deliberate violation of the employer's rules, 3) a disregard of the standards of behavior which the employer has a right to expect of an employee, or 4) negligence indicating an intentional disregard of the employer's interests or of the

employee's duties and obligations to the employer.

At the time of his hire, James Bryant was notified by Anderson Equipment Company that his position was subject to the terms and conditions of Anderson's collective bargaining agreement (CBA) with the International Union of Operating Engineers. Under the CBA, all employees must become members of the Union and Anderson may not employ non-union workmen for more than 90 days. Bryant failed to pay his initiation fee and union dues, despite verbal and written notice that he must do so. Employer thus terminated his employment after 90 days.

Claimant's application for unemployment compensation benefits was denied. The Commonwealth Court upheld that denial, noting that employer had a rule requiring new employees to join the union under the CBA, that rule was reasonable, and claimant failed to comply with it. Therefore, employer met its burden of establishing willful misconduct. The burden then shifted to claimant to establish that he had good cause for violation of employer's rule. Here, claimant simply failed to save money to make the necessary payments, despite receiving his salary up to the date of his termination. Claimant argued that he needed the funds to purchase Christmas presents for his family. The Court was not persuaded.

The complete opinion may be found at *Anderson Equipment Company v. UCBR, 994 A.2d 1192 (Pa. Cmwlth. 2010).* A copy of the opinion may also be requested at uc@trc-law.com.

"EMPLOYEE" OR "INDEPENDENT CONTRACTOR?"

In accordance with Section 402(h) of the Unemployment Compensation Law, an individual is ineligible for benefits for any week in which he or she is engaged in self-employment. "Self-employment" is not defined in the law. There is a presumption that one who performs services for wages is an employee and not an independent contractor. This presumption may be overcome if the alleged employer proves that the claimant was (a) free from control and direction in the performance of the work, where the ability to control and not actual control is determinative; and (b) as to such services, was customarily engaged in an independent trade or business.

Marci Schneider, a lawyer, was denied unemployment compensation benefits when her association with Treadwell Law Offices ended on January 6, 2009. Schneider began performing services for Treadwell in 2003. Overtime, her work for Treadwell increased and Schneider began to scale back her work for private clients. The evidence showed that Treadwell did not require Schneider to work specific hours. Schneider was free to accept work from her own private clients. Treadwell did not pay Schneider's expenses. Treadwell did not supervise Schneider in the performance of her work or provide her training. No taxes were deducted from Schneider's pay.

The Commonwealth Court upheld the denial of benefits based upon Schneider's status as an independent contractor. A complete copy of the Court's opinion may be obtained at *Schneider v. UCBR*, ___ *A.2d* ___, *2010 WL 2441029 (Pa. Cmwlth. 2010)* or by sending an email request to uc@trc-law.com.

SLEEPING ON THE JOB FOUND NOT TO BE WILLFUL MISCONDUCT

Charlene Heeney, who was diagnosed with sleep apnea, a condition which would cause her to fall asleep without realizing it, was employed as a "money room technician." Her duties included collecting money, distributing money to cashiers and performing banking transactions. Working the 3:30 PM to midnight shift, claimant would sit in the money room for hours at a time with nothing to do, causing her to become drowsy. She requested additional work to help keep her awake, but was provided with only two small assignments. After being found sleeping in the money room on 4 occasions, Heeney was terminated pursuant to a work rule that proscribes sleeping on duty.

Heeney's application for unemployment compensation benefits was denied by the local service center on the basis that she had engaged in willful misconduct. The Unemployment Compensation Board of Review relied on claimant's testimony to determine that, because she suffered from a medical condition that caused her to fall asleep, her doing so did not constitute willful misconduct.

The Commonwealth Court agreed. Physical illness can constitute good cause for a claimant's noncompliance with an employer's directive. Moreover, the Court noted that Heeney recognized her problem and attempted to address it by requesting more work. She attempted to resolve her drowsiness problem in a responsible manner that protected the employer's interests. Consequently, clamant did not engage in willful misconduct.

The Court's opinion is published at *Philadelphia Parking Authority v. UCBR, 1 A.3d 965 (Pa. Cmwlth. 2010).* To request a copy, send an email to uc@trc-law.com.

PROOF OF VIOLATION OF SUBSTANCE ABUSE POLICY

Pursuant to Section 402(e.1) of the Unemployment Compensation Law, an employer is required to demonstrate (1) that it had an established substance abuse policy and (2) that the claimant violated that policy. If an employer meets its initial burden, a claimant will be rendered ineligible for benefits unless the claimant is able to demonstrate that the employer's substance abuse policy is in violation of the law or a collective bargaining agreement (CBA).

Kevin Greer appealed the denial of his claim on the basis that his drug test results could not be considered by the Unemployment Compensation Board of Review because his employer failed to offer any testimony regarding the chain of custody for the samples taken from him. The Commonwealth Court agreed that a chain of custody must be proven before drug test results may be entered into evidence; however, in Mr. Greer's case, such proof was not necessary.

The Court noted that introducing drug test results into

evidence is not the sole means by which an employer can demonstrate a claimant violated its substance abuse policy. Violation of such a policy may also be established by a claimant's own admission that he or she violated the policy. Further, a claimant's failure to deny testing positive for drugs when confronted with test results by the employer may constitute an admission by silence.

In Mr. Greer's case, when his employer met with him to discuss his termination for violation of the substance abuse policy, not only did he fail to deny testing positive for drugs, but he also admitted to having a drug and alcohol problem and that he was seeking treatment. He also admitted before the Referee that he had ingested cocaine approximately one week prior to the date of the drug test.

The Commonwealth Court's decision affirming the denial of benefits may be found at *Kelvin Greer v. UCBR, 4 A.3d 733 (Pa.Cmwlth. 2010).* A copy will also be provided upon request to uc@trc-law.com.

POSSIBLE LAYOFF OF CO-WORKERS NOT "NECESSITOUS AND COMPELLING REASON" TO QUIT

If an individual's unemployment is due to "voluntarily leaving work without cause of necessitous and compelling nature," then that individual is ineligible for benefits under Section 402(b) of the Unemployment Compensation Law. What constitutes a "necessitous and compelling reason" has been the subject of much litigation.

Lloyd Smithies worked for Saint Goblin Ceramics & Plastics for over 43 years. In April 2009, employer offered an early retirement package to Smithies and 4 other senior employees in order to implement a workforce reduction. Employer's plan was to offer the package to its 5 most senior employees and then move down the seniority list until 5 employees accepted the package.

Smithies accepted the package knowing that continuing work would have been available to her as a high seniority employee. Nevertheless, she believed that if she continued working, then the 5 employees with the least seniority would have been laid off.

Because continuing work was available to Smithies, her application for unemployment compensation benefits was denied under Section 402(b) of the Law. Claimant appealed, arguing that her acceptance of the voluntary retirement package was not a voluntary quit because if she did not accept the package, another employee would have been furloughed. The Commonwealth Court did not agree.

"Necessitous and compelling cause" occurs under circumstances where there is a real and substantial pressure to terminate one's employment that would compel a reasonable person to do so. Here, claimant was not told by employer that *she* would be laid off or terminated if she did not accept early retirement. To the contrary, she knew that her employment would have continued.

To read the full opinion of the Court go to *Lloyd Smithies v. UCBR, 8 A.3d 1027 (Pa.Cmwlth. 2010),* or request a copy at uc@trc-law.com.

ENTITLEMENT TO UC BENEFITS MAY NOT BE WAIVED

Section 701 of the Unemployment Compensation Law states that: "No agreement by an employee to waive, release, or commute his rights to compensation, or any other rights under this act, shall be valid."

Rudolph Seneca was employed as a salesman by Pitt Chemical and Sanitary Supply. Upon his hire, Seneca signed a contract agreeing to meet certain sales quotas. Despite working to the best of his ability, Seneca failed to meet his sales quotas in 2009. Consequently, he was discharged.

In appealing the award of benefits to Seneca, employer argued that, given his agreement to meet the sales quotas and given his failure to do so, Seneca's actions were the legal equivalent of willful misconduct such that he should not be entitled to benefits. The Court was not persuaded, noting that it is the Law that determines a claimant's eligibility for unemployment compensation, not the employer.

A copy of the Court's succinct opinion, published at *Pitt Chemical and Sanitary Supply Company, Inc. v. UCBR, 9 A.3d 274 (Pa.Cmwlth. 2010),* may be requested at uc@trc-law.com.

DISCHARGE FOR CONDUCT OUTSIDE THE WORKPLACE??

Must an employer, who discharges an employee for conduct that: 1) occurred outside the workplace, 2) violated the employer's no-drug work rule, and 3) violated a last chance agreement signed by the employee, also prove that the conduct in question directly affected the employee's workplace performance before benefits will be denied to the employee?

The Commonwealth Court recently addressed this issue in the case of *Troy Maskerines v. UCBR, ___ A.2d ___, 2011 WL 6159 (Pa.Cmwlth. 2011).* When an employee is fired for off-premises conduct, the employer may or may not bear the burden of proving that the off-premises conduct had a direct impact on the claimant's work performance.

Where an employer seeks to deny a discharged employee unemployment compensation benefits *pursuant to Section 3* of the Unemployment Compensation Law, the employer does bear the burden of showing that the alleged misconduct directly affected the employee's ability to perform his or her duties.

Where, however, the employer had a work rule addressing the alleged misconduct, and the employer seeks to deny the discharged employee unemployment compensation benefits for a work rule violation *pursuant to Section 402(e)*, the employer need only prove that the work rule existed and that the employee violated it.

The mere fact that the conduct occurred off-premises does not, in and of itself, determine what burden the employer bears in seeking to deny the employee unemployment compensation. For a complete copy of the Court's opinion, send an email request to: uc@trc-law.com.

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ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.