



Wisconsin Supreme Court Clarifies Substantial Fault Standard for Unemployment Benefits

Eligibility for unemployment benefits is rarely the driving force behind a school district's decision to terminate an employee. However, unlike in the private sector where employers pay a payroll tax to cover these benefits, school districts reimburse the state for the entirety of their former employees' unemployment benefits. As a result, school districts take a direct hit to their budget when employees receive benefits, so it is important that districts have an understanding of benefit eligibility.

Eligibility for Unemployment Benefits

Since the state amended its unemployment law in 2013, there has been a three-step analysis to use when determining whether a terminated employee is eligible for unemployment benefits. First, determine if the employee committed misconduct under any of the enumerated bases of misconduct specified in the law (i.e., violation of a known substance abuse policy, theft, harassment, or violence, among others). Second, determine if the employee violated the general standard for misconduct—one or more actions or conduct evincing willful or wanton disregard of the employer's interests. Finally, determine if the employee engaged in conduct that qualifies as substantial fault.

The Operton Case

On May 4, 2017, the Wisconsin Supreme Court ruled that an employee who committed eight cash-handling errors over the course of 80,000 transactions committed "one or more inadvertent errors" and therefore was not discharged due to substantial fault. *Operton v. LIRC*, 2017 WI 46. Operton worked for Walgreens from July 17, 2012 to March 24, 2014 as a checkout clerk. Operton handled more than 100 cash-handling transactions a day during the course of her employment. After her eighth cash-handling error, Walgreens terminated her.

Interpreting "Substantial Fault"

"Substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
2. One or more inadvertent errors made by the employee.
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

Wis. Stat. § 108.04(5g).

The Court explained that Wisconsin has a strong public policy in favor of compensating the unemployed. The burden is on the employer to show that the employee was terminated due to substantial fault. When determining if an employee is disqualified from benefits due to substantial fault, it is necessary to individually examine each of the three enumerated exceptions to substantial fault provided in the statute.

In *Operton*, the question was whether Operton's cash-handling errors constituted "inadvertent errors." The Court looked to the dictionary definition of "inadvertence," which was "an accidental oversight; the result of carelessness." While an employer's warning might be relevant in determining whether an employee's error was inadvertent, warnings by the employer are not dispositive as to inadvertence. The Court held that multiple inadvertent errors, even

if the employee was warned about the errors, do not necessarily constitute substantial fault.

However, the Court concluded, as a matter of law, that eight accidental or careless errors were “inadvertent errors” when they were made over the course of 80,000 cash-handling transactions during a 21-month period. The Court left open whether there was a point at which a number of errors that seem inadvertent in isolation cease to be inadvertent when viewed in their totality. The length of time between the errors supported the Court’s conclusion—Operton went months without making a cash-handling error. Additionally, Operton violated a slightly different cash-handling rule each time she made a mistake. The Court concluded that this was precisely the type of conduct that the legislature intended to exempt from the definition of substantial fault.

What Level of Deference Should Courts Afford to LIRC?

One of the questions that the Supreme Court considered in its decision was the level of deference the Court owed to the Labor and Industry Review Commission (LIRC) (the state agency that hears appeals of unemployment and discrimination determinations made by the Department of Workforce Development (DWD), as well as appeals of worker’s compensation determinations). Three justices, in a concurring opinion, expressed a willingness to overhaul dramatically Wisconsin courts’ approach to agency deference. This would have wide-reaching consequences in a number of areas of the law, including employment law. However, the lead opinion in this case sidestepped the issue of deference, reserving that question for another day. The lead opinion explained that regardless of the level of deference afforded to LIRC’s decision in this case, the outcome would be the same. Nevertheless, the Court might reconsider the issue of deference if one more justice agrees to take up the issue in a future case.

Considerations for School District Employers

School districts should follow the three-part approach outlined above when considering whether an employee might qualify for unemployment benefits after termination. Operton should serve as a caution to school districts; multiple inadvertent errors committed by an employee over a few months likely do not constitute substantial fault. The Court’s conclusion in Operton is consistent with an earlier Wisconsin Court of Appeals decision *Easterling v. LIRC*, 2017 WI App. 18. In that case, the Court of Appeals ruled that a single instance where a bus driver failed to secure a passenger’s wheelchair using the floor straps was an inadvertent error and not an affirmative choice by the employee. For more information on Easterling, see Boardman & Clark’s [HR Heads-Up from March 2017](#).

On the surface, it might have appeared that the “substantial fault” standard would considerably limit the amount of unemployment benefits provided to terminated employees. However, this has not proven to be the case. Wisconsin courts are interpreting substantial fault more narrowly, consistent with Wisconsin’s public policy in favor of providing unemployment benefits. School districts should continue to monitor the evolution of the “substantial fault” standard as future cases proceed through LIRC and the courts.

Going forward, school districts should carefully consider the circumstances surrounding any termination to determine the likelihood that an employee might be eligible for unemployment benefits. An investigation of the circumstances surrounding the employee’s termination is essential if a school district is preparing to challenge an employee’s application for benefits. The district should be prepared to present evidence to DWD in support of its position. As part of that investigation, school districts should look for any evidence that the employee was acting with intentional disregard of the district’s policies rather than accidentally failing to comply.

■ Brian P. Goodman	(608) 283-1722	■ Eileen A. Brownlee	(608) 822-3251	■ Richard F. Verstegen	(608) 286-7233
■ Michael J. Julka	(608) 286-7238	■ Douglas E. Witte	(608) 283-7529	■ M. Tess O’Brien-Heinzen	(608) 283-1798
■ JoAnn M. Hart	(608) 286-7162	■ Steven C. Zach	(608) 283-1736	■ James K. Ruhly	(608) 283-1738

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