

New Case Provides Important Guidance on “Substantial Fault” and Eligibility for Unemployment Compensation

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The Wisconsin Court of Appeals issued a decision on February 2, 2017 that offers employers guidance regarding the circumstances under which an employee will be disqualified from unemployment compensation because the employee was terminated for substantial fault connected to the employee’s work. The case, *Easterling v. LIRC*, No. 2016AP190 (Wis. Ct. App. Feb. 2, 2017), clarifies the distinction between inadvertent errors in job performance and substantial fault. This clarification will provide helpful guidance for employers when evaluating the potential unemployment compensation consequences of termination decisions that are based on an employee’s failure to properly perform job duties.

Defining Substantial Fault

The substantial fault standard was established in 2013 and was expected to diminish the number of former employees qualifying for unemployment compensation. The new substantial fault standard was added to the statute in addition to a new statutory definition of misconduct (codifying the judicial definition of misconduct as it had evolved over the years). Substantial fault is considered after it is determined that the employee was not terminated for misconduct.

An employee who is terminated for misconduct or substantial fault is not eligible for unemployment compensation in most situations. Substantial fault includes acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employer. However, substantial fault does not include: (1) one or more minor infractions of rules unless repeated by the employee after a warning; (2) *one or more inadvertent errors*; or (3) any failure of the employee to perform work because of insufficient skill, ability, or equipment. Wis. Stat. § 108.04(5g) (emphasis added).

What is an Inadvertent Error?

There is a narrow distinction between an omission by the employee over which he or she exercised reasonable control and an inadvertent error.

In *Easterling*, the employer operated a transportation service for individuals with special needs. The company created an explicit wheelchair safety policy requiring the driver to secure any passenger in a wheelchair prior to transport. If an employee fails to follow the policy, the employee can be immediately terminated. Easterling failed to properly secure a wheelchair in accordance with the policy, and an elderly passenger’s wheelchair tipped over. Easterling was terminated.

The Court of Appeals ruled that Easterling committed an inadvertent error in failing to secure the passenger's wheelchair and, therefore, was not terminated for substantial fault. Easterling positioned the wheelchair properly and applied the brakes but forgot to secure the floor straps. The evidence showed that Easterling was overwhelmed as she assisted four other passengers while rushing because her van was parked in a busy crosswalk. Failing to secure the wheelchair was not an affirmative choice by the employee—Easterling simply forgot to take the final step to secure the floor straps. Therefore, her act was an inadvertent error, even though Easterling admitted to violating the wheelchair safety policy.

The *Easterling* decision therefore indicates that in evaluating whether a terminated employee might be disqualified from eligibility for unemployment benefits under the substantial fault standard, an employer will need to focus on the circumstances surrounding the conduct that led to the termination, not simply whether the employee violated the employer's policies. Even if there has been a clear violation of an express policy, it will be necessary to consider the underlying reasons for the violation to determine whether it rises to the level of substantial fault. One important consideration will be whether there is any indication that the employee's actions were due to the employee's intentional disregard for the employer's policies, as opposed to an inadvertent or accidental failure to comply. In addition, the employer will need to focus on what was happening at the time of the conduct at issue. As *Easterling* demonstrates, even if an employee knew of the policy at issue and recognizes and admits to a policy violation after the fact, there still may be an open question of whether substantial fault exists.

The Uncertainty of Substantial Fault

As *Easterling* shows, courts are still determining the precise contours of the substantial fault standard. The Wisconsin Supreme Court, in *Operton v. LIRC*, will soon issue a decision discussing whether a series of failures to follow a policy evolved beyond inadvertence into substantial fault—the Court of Appeals held that they did not.

Although unemployment eligibility does not often dictate termination decisions, employers may want to assess whether an employee would be eligible for unemployment compensation before making a decision to terminate employment. Employers who desire to maintain their unemployment compensation costs at a reasonable level must be cognizant of whether their former employees will qualify for compensation upon termination. As with any situation where an employer is going to contest unemployment eligibility, the employer must be well prepared with documentation and clearly articulated facts to support its position.

Substantial fault might lessen the burden of unemployment compensation on employers. However, not all acts and omissions by employees qualify as substantial fault. We are certain to see the substantial fault standard evolve as further cases make their way through the Labor and Industry Review Commission and courts.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.