



Fired for “Misconduct.” Is the Employee Entitled to Unemployment Benefits?

by Jillian Barron

Many employers assume that if they fire an employee for what they consider misconduct, the employee will not be entitled to unemployment benefits. As the Washington Court of Appeals has explained in three recent cases, that may not be the case: it depends on the circumstances.

"Misconduct" Defined. Washington statutes governing unemployment benefits provide that an employee is disqualified from benefits if he or she "has been discharged or suspended for misconduct connected with his or her work" Misconduct is defined to include willful, wanton, or deliberate disregard for the employer's rights and interests, as well as carelessness or negligence of such a degree that it reflects intentional or substantial disregard of the employer's interest. The courts have held that willful disregard exists where the employee: (1) is aware of the employer's interest; (2) knows or should know that certain conduct jeopardizes that interest; and (3) nonetheless intentionally performs the act, willfully disregarding its consequences.

The unemployment statutes provide that certain acts are inherently considered misconduct because they "signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." Among those *per se* acts of misconduct are: (1) insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer; and (2) violation of a company rule if the rule is reasonable and the claimant knew or should have known of the existence of the rule.

Statutory "misconduct" specifically *excludes*: (1) general inefficiency or poor performance; (2) isolated instances of inadvertence or ordinary negligence; and (3) good faith errors in judgment or discretion.

Recent Case Law. So how do these rules play out in practice? In one of the recent cases, the employee refused to follow the employer's directions, while in another the employee violated a company rule; yet the court reached opposite results based on its view of the reasonableness of the employers' directions and rule, and the nature of the employees' respective reasoning. In the third case, the employee's conduct was found to be unconnected to her work and therefore not grounds for denying benefits.

In *Kirby v. Employment Security Department ("ESD")* (Mar. 2014), the employee, Dorothy Thomas, worked as a security officer for Puget Sound Security ("PSS"), and was posted to a UPS warehouse. Thomas was required to write up any observed safety hazards, criminal activities, or unprofessional conduct. She wrote a number of reports of such activity, including an employee's plan to possibly steal merchandise (which was followed by repeated thefts of the goods in question), employees carrying pocket knives and other weapons in violation of UPS policy, and drug activity. UPS supervisors and her own PSS supervisor effectively told her to ignore the conduct, and her supervisor did not share her reports with upper PSS management. Frustrated at the lack of response, Thomas finally called UPS' reporting hotline. The UPS site supervisor complained to PSS management about Thomas going outside her reporting chain and asked that she no longer work at the warehouse. In follow up, and unaware that Thomas had submitted detailed reports on the activities involved, PSS's CEO twice directed her to immediately write up a report of what she had witnessed. Thomas, likewise unaware her reports had not been shared, refused his requests, fearing the report would be used against her. She later offered to write a report but was terminated. ESD determined that Thomas was entitled to benefits, and PSS appealed. The appeals court found the evidence supported ESD's conclusion that Thomas' refusal to write a report when directed by the CEO resulted from her confusion and apprehension, rather than a deliberate or willful refusal to comply or an intent to harm PSS. Additionally, the court agreed that under the circumstances, the CEO's order to write a report immediately, without providing guidance as what to include or allowing Thomas to refer to the reports she had written earlier, was unreasonable. The court affirmed ESD's decision to grant benefits.

By contrast, in *Kopp v. ESD*, the appeals court determined that ESD properly denied Kopp benefits for violation of a company rule. Kopp's employer had a safety rule requiring that a fire, regardless of size, must be reported to the employee's supervisor. One night Kopp observed an eight-inch square of smoke and glowing embers on the ground. She told her coworker about it, then resumed work in the belief she had put the fire out with some water. She did not inform her supervisor. The fire was actually not out, however, and was later extinguished by the fire department. Kopp was discharged for violating the company's rule requiring employees to report a fire to their supervisor. She acknowledged she knew about the rule, and that it was reasonable. Nonetheless, she argued, among other things, that her failure to report was ordinary negligence or the result of a good faith error in judgment. The appeals court disagreed. Pointing to Kopp's statement that her failure to report the fire to her supervisor was "a poor *decision*," the court concluded she had not acted out of confusion or inadvertence but had intentionally disregarded and violated a reasonable company rule. Therefore her discharge was based on disqualifying misconduct.

The third case, *Kirby v. ESD* (Dec. 2014) addressed whether an employee's arguably inappropriate off-duty conduct barred her receipt of benefits. Sarah Black, a Puget Sound Security Patrol ("PSSP") officer assigned to Tacoma Public Utilities ("TPU") routinely interacted with police officers as part of her job. While at home, Black posted a message on Facebook to the effect that she did not care about police officers being shot; if they stopped messing with people, she said, people would probably stop shooting them. Black's Facebook settings only allowed certain "friends" to see her postings. One of those individuals, a TPU worker, reported her comment, which got back to Black's supervisors. PSSP discharged Black. It then challenged ESD's finding of no disqualifying misconduct on her part. The appeals court affirmed ESD's decision on three primary grounds. First, the court concluded that Black's comment did not have a nexus with her work, because it was made at home, was only accessible to a limited number of people, and was a personal expression of opinion that did not refer to TPU or PSSP. Second, PSSP did not have rules regarding employees' use of social media, so Black's conduct did not violate a contracted-for code of behavior. Finally, inasmuch as Black did not refer to TPU or PSSP, or direct her comment to them, there was no intentional or substantial disregard of her employer's interests. Although no one disputed PSSP's right to fire Black based on her comment, the comment did not disqualify her from benefits.

Take-Aways. These cases illustrate that whether unemployment benefits will be denied based on an employee's perceived misconduct will be determined in the light of all the circumstances. At the same time, the cases point to an element within employers' control that can help establish that misconduct is disqualifying: a set of reasonable written rules and policies that are provided to employees, clearly delineating both required and prohibited conduct. If employees knowingly violate those rules without justification, they are likely to be denied benefits.

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