AN UPHEAVAL IN UNEMPLOYMENT LAW - THE PRACTICAL ELIMINATION OF THE MISCONDUCT STANDARD.

By: Alan H. Schorr

On July 2, 2010, the Governor and Legislature, without holding any public or committee meetings, dramatically changed unemployment law in New Jersey, expanding the gross misconduct disqualification and eliminating, for all intents and purposes, the current standard for simple misconduct disqualification. The Governor proclaimed that this new law will save New Jersey between $150 and $175 million per year by eliminating otherwise eligible employees from receiving State unemployment benefits[1], but an examination of the law demonstrates that tens of thousands of employees involuntarily terminated from employment who would previously not receive any penalty at all for misconduct will now be completely disqualified from receiving benefits.

The original bill, S-1813, was an innocuous legislation, intended only to reduce unemployment taxes to employers for tax year 2011. The bill went through all the proper channels and public committee hearings and received bi-partisan support. The bill easily passed both houses in May, although curiously the record reflects 32 abstentions in the Assembly. But then Governor Christie issued a conditional veto, insisting that the reduction in unemployment taxes must be coupled with a reduction in unemployment benefits. The Governor proposed an intermediate tier of disqualification for "severe misconduct", carrying a penalty of complete disqualification. As set forth below, however, this new standard is not a middle tier at all. In fact, "severe misconduct" carries the same penalty as gross misconduct, and the standard actually sets a lower and broader threshold for disqualification than the current standard of regular or "simple" misconduct. This new law will likely result in the complete denial of benefits for tens of thousands of unemployed New Jersey workers who previously would have faced no disqualification at all.

Without further public notice or hearing, this upheaval in New Jersey unemployment law became law, with only 4 senators and 2 assembly members voting against the new law. It is unknown whether any of the Legislators took the time to consider the gravity and consequences of the new law that was passed at a time when this State faces record unemployment.

Prior to the passage of this bill, New Jersey had a two-tiered misconduct standard: "Misconduct directly connected with the work" ("simple misconduct"), which resulted in a penalty of six week's delay of initial payment of benefits[2], and "Gross misconduct", which

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[1]Governor Christie's Press Release, July 2, 2010. The Governor's press office calculated the $150 - $175 million savings to result from the annual total denial of benefits to approximately 34,000 workers at an average of $389 per week for an average of 20 weeks.

[2]The new law also increases the penalty for simple misconduct from six weeks to eight weeks, N.J.S.A. 43:21-5(b).

resulted in a total disqualification. The new law purports to insert an "intermediate" standard of "severe misconduct" which also carries the penalty of total disqualification, which means that it is not an intermediate penalty at all, since it carries the same penalty as gross misconduct. Furthermore, the standard for severe misconduct is actually lower and broader than the standard for simple misconduct, which means that any employee terminated for any kind of misconduct, including conduct that was not formerly considered misconduct at all, will now be totally disqualified from collecting unemployment benefits.

Prior to this bill being passed, the stated public policy underlying unemployment law favored providing assistance to unemployed citizens. The Supreme Court has repeatedly stressed that in passing the Compensation Act in 1936, the Legislature declared that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state [and] ... often falls with crushing force upon the unemployed worker and his family."[3] In essence, "the purpose of the Compensation Act is to provide some income for the worker earning nothing, because he is out of work through no fault or act of his own...."[4] To further the Act's remedial and beneficial purposes the Courts have recognized that "the [Act] is to be construed liberally in favor of allowance of benefits."[5]

Accordingly, over the years, Courts have required that a heightened standard be demonstrated before disqualifying employees accused of misconduct directly connected with the work. Last year the Appellate Division, in *Parks v. Board of Review*,[6] succinctly reviewed the last 50 years of misconduct jurisprudence:

> Our decisions have long-recognized that "misconduct" requiring a temporary disqualification from receiving unemployment compensation benefits must be more than simply inadequate job performance that provides good cause for discharge. "Misconduct within the meaning of [N.J.S.A. 43:21-5(b)] ... must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his 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

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[3]N.J.S.A. 43:21-2.

[4]Utley v. Board of Review, Dept. of Labor, 194 N.J. 534, 543 (2008); *quoting* Battaglia v. Bd. of Review, 14 N.J.Super. 24, 27 (App. Div. 1951); *see also* Yardville Supply Co. v. Bd. of Review, 114 N.J. 371, 375, 554 A.2d 1337 (1989).

[5]Utley, *supra*, 194 N.J. 534; Yardville Supply Co., *supra*, 114 N.J. at 374; see also Provident Inst. for Sav. v. Div. of Employment Sec., 32 N.J. 585, 590 (1960).

[6] 405 N.J. Super. 252, 253 (App. Div. 2009).

> employee's duties and obligations to the employer."[7] Thus, disqualification under N.J.S.A. 43:21-5(b) is warranted only when the employee's conduct that resulted in his or her discharge had "the ingredients of wilfulness, deliberateness and intention."[8]

The standard for gross misconduct, prompting the total disqualification of benefits, has always required a showing that the employee's conduct rose to the level of "the commission of an act punishable as a crime of the first, second, third or fourth degree under the New Jersey Code of Criminal Justice,'. [9] The new standard for total disqualification for "severe misconduct" encompasses gross misconduct and then widens the net to include all misconduct, and further widens the net to encompass behavior that formerly was not considered misconduct at all:

> For the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in this section, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct as defined in this section.[10]

An examination of the individual elements of the new severe misconduct standard reveals that the simple misconduct threshold has been eliminated. The new purportedly "intermediate" standard leaves no room for the simple misconduct standard, and is sometimes indistinguishable from the gross misconduct standard. In fact, some of these new elements of misconduct are incomprehensible. For example, "excessive use of intoxicants or drugs on work premises" seems to imply that drinking and taking drugs on work premises is acceptable, as long as it is not

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[7] Beaunit Mills, Inc. v. Bd. of Review, 43 N.J.Super. 172, 183, 128 A.2d 20 (App. Div. 1956) (*quoting* 48 Am.Jur. Soc. Sec., Unemployment Comp. § 38 at 541 (1943)), *certif. denied*, 23 N.J. 579, 130 A.2d 89 (1957).

[8] Demech v. Bd. of Review, 167 N.J.Super. 35, 38, 400 A.2d 502 (App. Div. 1979); *see also* Smith v. Bd. of Review, 281 N.J.Super. 426, 433-34, 658 A.2d 310 (App. Div. 1995).

[9] N.J.S. 43:21-5(b), *citing N.J. Code of Criminal Justice*, N.J.S.2C:1-1 et seq.;

[10] N.J.S. 43:21-5(b), as amended.

"excessive". The term "excessive" is not defined. But clearly, the use of any kind of illicit drugs on work premises would rise to the level of fourth level crime, which would constitute gross misconduct. Similarly, it is difficult to conceive of any kind of falsification of records, physical assaults and threats that would not rise to the level of gross misconduct.

On the other hand, several categories of employee behavior that did not formerly constitute misconduct at all, now require total disqualification. For example, New Jersey courts have consistently held that excessive absenteeism does not necessarily constitute misconduct unless it is willful or wanton. A recent example is *Park v. Board of Review*,[11] where the employee had been terminated for excessive absenteeism. The claimant was absent because her four-year-old niece had been dropped off at her doorstep the night before because the child's mother "was homeless and couldn't take care of her." The claimant had further testified that there was no one else available to take care of the child at that time and that she informed her employer before her shift began that she would be unable to come to work due to this family emergency. She had been warned twice before about her absenteeism, once because her asthmatic son was sick. The Appeal Tribunal had disqualified her from benefits holding that she had been warned prior about her absences, and then was absent again. But the Appellate Division reversed, holding that "Absences from work for such reasons do not constitute "deliberate violation[s] of the employer's rules, ... or ... an intentional and substantial disregard ... of the employee's duties and obligations to the employer."[12] Under the new standard, however, Ms. Parks would be completely disqualified from benefits since she was absent after receiving a warning, even though her absenteeism formerly did not even rise to the lowest level misconduct penalty.

The new severe misconduct standard can also be applied to employees who repeatedly demonstrate poor performance or are repeatedly negligent. A perfect example is the recent unpublished Board of Review case[13] wherein a claimant employed as a paint mixer was terminated for repeatedly making mistakes mixing the paint. He was not intentionally mixing the paint wrong, he just was not a good paint mixer. The Appeal Tribunal had disqualified him for misconduct because he had been previously warned about imprecise mixture of paint. But the Board of Review reversed, finding that the mistakes or poor performance are not willful acts, and therefore not misconduct. Under the new standard, however, this claimant could be disqualified from all benefits due to "repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer."

The final nail in the coffin of the simple misconduct standard is the catch-all at the end of the new amendment, which totally disqualifies employees who are terminated "where the

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[11] Parks, *supra*, 405 N.J. Super. at 253.

[12] *Id. at 256,* (*citing* Beaunit Mills, supra, 43 N.J. Super. at 183, 128 A.2d 20).

[13] In the Matter of Pasquale Gennello, Board of Review Docket # 252,525 (August 30, 2010)

behavior is malicious and deliberate but is not considered gross misconduct as defined in this section."[14] If the current standard for regular misconduct is "wanton or willful conduct" and severe misconduct is "malicious and deliberate", there does not appear to be even an inch of difference between the two. Is there any significant difference between deliberate conduct and willful conduct, or between malicious conduct and wanton conduct? In essence, the new standard for severe misconduct seems to have completely subsumed the standard of simple misconduct, and has significantly broadened its categories to disqualify as many people as possible.

Unless the Legislature acts to repeal this new law, passed without any public comment or debate, it will be up to the Department of Labor and the Courts to sort out the law's actual impact. The problem is that there are now two standards of public policy, the statute's longstanding policy to provide a safety net to as many unemployed New Jerseyans as possible, and the new stated public policy to deny benefits wherever possible. One thing is for certain, the unemployed workers of New Jersey who are denied benefits - the people who can least afford attorney's fees - will end up footing the bill for the legal challenges to the elimination of unemployment benefits to so many workers.

[14] N.J.S.A. 43:21-5(b).