LIRC Confronts Recent Changes to Wisconsin Unemployment Insurance Misconduct Standard

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Introduction

The Unemployment Insurance Division has begun implementing changes to Wisconsin's Unemployment Insurance law which were passed last summer as part of 2013 Wisconsin Act 20 (Act 20). The Act 20 changes first applied with respect to Unemployment Insurance (UI) determinations issued on or after January 5, 2014 and Appeal Tribunal decisions and decisions by the Labor and Industry Review Commission (LIRC or Commission) that arose from determinations appealed by filing a hearing request on or after that date.[1]

The Act 20 changes cover three important areas of common dispute with regard to claims for UI by former employees—misconduct, substantial fault, and the voluntary quit exceptions—and are important for at least two reasons. First, from a business perspective, these changes provide business clients and their counsel greater ability to challenge employee claims for UI benefits and, in doing so, protect employer reserve account balances and prevent future UI tax increases. Second, these changes represent a dramatic injection of legislative "common sense" into the UI system.

This Article focuses only on the Commission's recent decisions applying the specifically-defined misconduct provisions implemented by the Act 20 changes[2] and provides useful advice for practitioners when advising business clients.

Overview of Decisions Addressing the New Misconduct Standard

Only a handful of decisions have appeared on the Commission's website, with only a small portion of those decisions addressing the Act 20 changes. However, as a result of this Author's use of Wisconsin's Open Records Law,[3] this Article is able to provide greater insight into, and analysis of, the first two months of Commission cases arising under the Act 20 changes.

Act 20 revised the commonly-cited definition of "misconduct" by defining specific employee conduct that, if proven, establishes misconduct. Employees determined to have engaged in the defined conduct which forms the basis for their termination are at a disadvantage when pursuing UI claims, putting the employer in a better position to defeat the claim and protect their reserve account. The following cases highlight the Commission's application of several of the misconduct provisions.[4]

A. Violation of Employer's Substance Abuse Policy

An employee's violation of an employer's reasonable substance abuse policy concerning the use of alcoholic beverages, use of controlled substances, or use of controlled substance analogs may constitute misconduct in certain cases. However, the DWD-approved testing methodology and forms must be used to ensure that the results of a drug test can reliably be used as evidence.[5]

The Commission has applied the substance abuse disqualification provision in a number of cases. First, in *Scott P. Susor v. Outlook Group Corp*, the Commission found misconduct where the employee, who was aware of the employer's drug testing policy, admitted he attempted to deceive the employer by providing synthetic urine. The Commission rejected the employee's contentions that "the employer should not have notified the employee the day before his drug test […] because it caused him to worry that he might test positive," that "[t]his worry led him to procure fake urine for the test," and that he should have been allowed to provide a real sample to the employer.[6] Second, in *Kristen M. Krueger v. Group Realty Coop*, the Commission found misconduct where the employee was terminated after she gave a co-worker one of her medications, a Schedule IV controlled substance, in violation of federal law and the employer's code of conduct.[7]

By contrast, the Commission declined to find misconduct in *Ellen M. Edwards v. Seek Career/ Staffing Inc*, where the employer failed to show that the employee's conduct violated its policy, did not present any first-hand evidence or competent testimony the employee was "smelling of alcohol," and its policy prohibiting alcohol consumption "in the hours preceding" work was not clear despite the fact that the employee knew of the policy and admitted alcohol use prior to work.[8]

B. Theft

Theft of an employer's property, services, or money and other conduct including intentional or negligent conduct by an employee that causes substantial damage to the employer's property is also specifically defined as misconduct.[9] Provided the theft was against the employer's policy and the employee was aware of the policy and intended to deprive the employer of the property, the employee's argument that the amount of the theft was not substantial will not prevail.

In *Carmen E. Dufour v. Sweet House of Madness LLC*, the Commission found that the employee was properly disqualified from receiving benefits where the employee was aware of the employer's written policy prohibiting unauthorized possession of bakery items without permission from a manager and the employee admitted taking the items without permission. The Commission held that "[t]he competent evidence established that the employee intended to permanently deprive the employer of its product without permission."[10] In *Nathaniel W. Provost v. Auto Parts-Power Sports Inc.*, the Commission determined that the employee was discharged for misconduct after the employee, who had received a fish finder along with a boat on a customer trade-in, sold the "new" fish finder to a co-worker who subsequently reported it to the employer.[11] In terms of the level of proof required to establish application of this provision, the Commission held that "the employer must prove theft by clear and convincing evidence [which] can be satisfied through the presentation of circumstantial evidence."[12]

By contrast, in *Richard S. Ahler v. Ashley Furniture Industries Inc.*, the Commission declined to find misconduct in a case involving the employee's production of non-conforming parts on a machine with which he was not familiar because the employer did not present evidence that substantial damage to the employer resulted from the employee's actions, signaling that the key issue in future cases will be the definition of "substantial."[13]

C. Harassment

An employee terminated for one or more threats or acts of harassment, assault, or other physical violence instigated at the employer's workplace is guilty of misconduct.[14] In *Robert F. Rezek v. Triangle Distributing Co. Inc.*,[15] the Commission found misconduct where the employee choked a co-worker during an argument and admitted swearing during two separate meetings. Likewise, in *Kevin A. Barnes-Anderson v. International Infiniti LLC*, the Commission found misconduct where the employee was discharged after swearing at his supervisor multiple times before threatening him with "If you touch me again, I'm going to knock you the fuck out." The Commission declined to find that the foregoing threat was justified after the

supervisor had pulled on the employee's arm to get his attention.[16]

D. Absenteeism

An employee's absenteeism on more than two (2) occasions within the 120 days before the date of termination or excessive tardiness in violation of the employer's policy may form the basis for a finding of misconduct.[17] The key elements of proof include the policy, the employer's reasonable construction and application of the policy, and violation notice(s) to the employee. Also, it always helps to document and establish that the absenteeism and/or tardiness had an impact upon the employer's operation in terms of production, level of service, or a downward shift in other operational measures applicable to the employer.

In *Jaime Romero v. Cargill Meat Solutions Corp*., the Commission found the employee was discharged for misconduct where the employee's attendance failures due to transportation issues should have been remedied.[18] In *Tara M. Blake v. Potawatomi Bingo Casino*, the Commission rejected the employee's appeal because her attendance failures in five of the prior six months failed to show any attempt to improve and the termination was preceded by a verbal warning and three final written warnings.[19] In *Tina M. Loomis v. The Christian Home & Rehabilitation*, the Commission found misconduct because the three warnings the employee received within a year of discharge "placed the employee on notice that her attendance record placed her continued employment in jeopardy." As the only nurse on the night shift, the attendance violations and failure to provide adequate notice of absences and tardiness substantially interfered with the employer's ability to run its operation and to find a replacement.[20]

By contrast, in *David A. Davis v. Woodman's Food Market Inc*., the Commission determined that the employee was not discharged for misconduct because the employer's attendance policy did not count points against the employee in the manner the employer argued, which included an absence with notice for a doctor's appointment, and found that the employee "was not absent more than two times and his tardiness was not so excessive as to be misconduct."[21]

E. Falsifying Records

Falsifying the employer's business records, unless directed by the employer, can form the basis for a finding of employee misconduct.[22] In *Travis W. Hibbard v. Regional Enterprises for Adults and Children*, the Commission affirmed misconduct where the employer established that the employee falsified his timecard by reporting he worked during a three-hour period where three employees testified at hearing that they did not see the employee or any evidence that he was at work.[23] Similarly, in *Floyd A. Nickel v. Aldrich Chemical Co.*, the Commission found misconduct where the employee falsified his application for tuition reimbursement by intentionally withholding information regarding his receipt of federal financial aid.[24]

Conclusion

The first batch of Act 20 cases highlights several themes. As a result of the Act 20 changes defining misconduct, it is likely the Commission and ALJs will become focused on issues of underlying proof. It is incumbent upon business clients and their counsel to present non-hearsay evidence at hearing in order to obtain a misconduct finding. For example, first-hand witnesses who heard a harassing comment that led to the termination should be prepared to, and present to, testify, especially in cases where the harassing statement is denied.[25] In addition, an employee's terminal positive drug test must be submitted on the DWD-approved forms in order to ensure that test results will not be disregarded as hearsay. Counsel should be well-prepared to confront and argue any possible hearsay issues that may arise and consider that the hearsay exception for admissions by a party opponent should always be used where an employee has admitted the underlying conduct to the employer.[26]

Second, more broadly, factual background information relating to policy importance, implementation and enforcement, internal

investigations, and termination procedures may come under more scrutiny. As the Commission shifts away from its legal function defining misconduct, it is possible the Commission may delve more into factual matters and take a greater role in being the ultimate finder of fact.

Finally, it is incumbent upon counsel to assist business clients in interpreting the Act 20 changes when preparing the best defenses possible to UI claims. Perhaps most importantly, in cases where other employment claims are ongoing or anticipated, a hearing may be the first opportunity following the termination for a potential claimant (and opposing counsel) to size up the strength of the employer's defense. Presenting a strong, credible defense in terms of the applicable facts and the new Act 20 misconduct standard may go a long way toward discouraging the employee's filing or continuation of post-employment litigation.

Daniel Finerty (dfinerty@lindner-marsack.com) concentrates his practice on representing and counseling private and public sector clients and Native American tribes in labor and employment litigation, counseling and compliance matters in front of administrative agencies, federal, state, and tribal courts, and in labor arbitration. Dan prides himself on achieving his clients' most important goals through his strong written and verbal advocacy as well as his skilled negotiation to cost-effectively resolve claims.

Dan has developed a niche practice defending long-term care providers and other healthcare employers from discrimination, harassment, and retaliation claims including unique Wisconsin claims arising under the Health Care Worker Protection act, unreasonable refusal to rehire worker's compensation claims, unemployment insurance claims and coverage disputes, in labor arbitration and other labor and employment litigation disputes both during and following the end of the employment relationship. He recognizes that, when post-employment disputes arise, experienced, knowledgeable expertise is required and that his clients see value in both a complete "win" against a litigious employee as well as a successful, cost-effective resolution of a contentious matter.

In particular, Dan provides particular expertise to his clients challenging unemployment insurance claims by current and former employees, successfully defending hundreds of benefit claims, aggressively advocating on behalf of clients in Appeal Tribunal hearings, on appeals to the Labor and Industry Review Commission and all the way up to the Wisconsin Court of Appeals. More specifically, an unemployment insurance hearing may be the first place a client and a litigious former employee will see and speak with each other. Dan puts his particular expertise to work to efficiently prepare and successfully present his client's strongest defenses at an Appeal Tribunal hearing, sometimes on less than the 6-day notice timeline required by DWD regulations.

References

1 *Carmen E. DeFour v. Sweet House of Madness, LLC*, UI Hearing No. 14600226MW (LIRC, Mar. 18, 2014) (citing 2013 Wis. Act 20, § 9351 (1q) and (2q)). The *Sweet House* decision, which can be found on LIRC's website at http://dwd.wisconsin.gov/lirc/ucdecsns/3997.htm (last visited, June 2, 2014), provided the first look at the Commission's interpretation of the Act 20 changes as they applied in termination cases and, for that reason, should be reviewed by practitioners.

2 The provisions that specifically define misconduct can be found in Wis. Stat. §§ 108.04(5)(a) – (5)(g).

3 This Article will discuss and analyze cases that may not be found on the Commission's website. Should any readers wish to obtain copies of these decisions, e-mail the author at dfinerty@lindner-marsack.com. Please use the subject line "WDC UI Article – Request for LIRC case" and specify the case name or misconduct provision in which there is an interest.

4 As of the time of this writing, the Commission had not issued any decisions interpreting the two provisions contained at Wis. Stat. §§ 108.04(5)(c), (5)(g).

5 Wis. Stat. § 108.04(5)(a).

6 *Scott M. Susor v. Outlook Group Corp*., UI Hearing no. 14400213AP (LIRC, Mar. 31, 2014).

7 *Kristen M. Krueger v. Group Realty Coop.*, UI Hearing No. 1400050MD (LIRC, May 13, 2014). Note this case does not specifically cite to Wis. Stat. § 108.04(5)(a) due to its brevity, but logically can be classified as such a case.

8 *Ellen M. Edwards v. Seek Career/Staffing Inc.*, UI Hearing No. 14400884AP (LIRC, May 16, 2014).

9 Wis. Stat. § 108.04(5)(b).

10 *Carmen E. Dufour v. Sweet House of Madness LLC*, UI Hearing No. 14600226MW (LIRC, Mar. 18, 2014).

11 *Nathaniel W. Provost v. Auto Parts-Power Sports Inc.*, UI Hearing No. 14400093AP (LIRC, Apr. 30, 2014).

12 *Id*. (citing cases).

13 *Richard S. Ahler v. Ashley Furniture Industries Inc.*, UI Hearing No. 14200042EC (LIRC, Apr. 16, 2014).

14 Wis. Stat. § 108.04(5)(d).

15 *Robert F. Rezek v. Triangle Distributing Co.*, UI Hearing No. 14400431AP (LIRC, May 2, 2014).

16 *Kevin A. Barnes-Anderson v. International Infiniti LLC*, UI Hearing No. 14400362 (LIRC, Apr. 30, 2014).

17 Wis. Stat. § 108.04(5)(e). This provision replaced the former absenteeism/tardiness misconduct provision at Wis. Stat. § 108.04(5g).

18 *Jaime Romero v. Cargill Meat Solutions Corp.*, UI Hearing No. 14601020MW (LIRC, Apr. 30, 2014).

19 *Tara M. Blake v. Potawatomi Bingo Casino*, UI Hearing No. 14600675MW (LIRC, Apr. 16, 2014).

20 *Tina M. Loomis v. The Christian Home & Rehabilitation*, UI Hearing No. 14400242AP (LIRC, Apr. 15, 2014).

21 *David A. Davis v. Woodman's Food Market Inc.*, UI Hearing No. 14200520EC (LIRC, Apr. 18, 2014).

22 Wis. Stat. § 108.04(5)(f). In some falsification cases, counsel should also assert the theft disqualification, such as time-card falsification cases where employees have "stolen time" resulting in compensation for time not worked. *See supra* n.10.

23 *Travis W. Hibbard v. Regional Enterprises for Adults and Children*, UI Hearing No. 14200329EC (LIRC, Apr. 4, 2014).

24 *Floyd A. Nickel v. Aldrich Chemical Co.*, UI Hearing No. 14600025MW (LIRC, Mar. 21, 2014).

25 Because first-hand testimony and evidence is preferred by ALJs and the Commission, the hearsay exception allowing presentation of business records by a custodian should only be used as a last resort. *See* Wis. Stat. § 908.03(4).

26 Wis. Stat. § 908.045(4).