

New York State Department of Labor
Unemployment Insurance Division
Adjudication Services Office

July, 2016

Interpretation Service
Misconduct
Violation of Company Rule

Warning not Needed in All Instances

There is no absolute requirement that a warning is required in all instances before conduct can be found to be misconduct when it can be established that the claimant was aware or should have been aware that his/her actions violate employer's policy or procedure.

A.B. 589,136

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits, effective October 12, 2015. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed January 25, 2016 (A.L.J. Case No. 115-08418), the Administrative Law Judge granted the claimant's application to reopen A.L.J. Case No. 115-08017, sustained, effective October 2, 2015, the employer's objection and overruled the initial determination.

The claimant appealed the Judge's decision to the Appeal Board, insofar as it sustained the employer's objection and overruled the initial determination of eligibility. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for approximately one year for a security company whose clients are government contractors in the aerospace, defense and intelligence industries. Within a few months of being hired, he was promoted from security guard to lieutenant, making him a shift supervisor on the third shift.

The claimant received the employer's handbook as part of his new hire introduction. The claimant signed an acknowledgement of his receipt of the employer's policies. One of the employer's policies stated:

Cameras: Employees must not take pictures while on duty unless required by Post Orders or when directed by your Supervisor or Manager. This applies to cell phone cameras and/or other photographic or video devices.

The employer's handbook also said that breach of confidence/misappropriation or misuse of confidential information will warrant discharge with no prior warning.

The claimant's assigned post was at a Department of Defense contractor. Because of "insider threats" posed by employees of contractors (such as Eric Snowden), all of the employer's employees receive an annual briefing dealing with the National Industrial Security program. Employees who do not receive this training are not permitted to work. The claimant received this training.

The claimant worked in an area where cameras were allowed. There was another area of the building, called the B2 area, where photography and personal cell phones were prohibited, and where access was permitted only to employees with secret clearances.

At some point, the claimant became concerned that a worker on the shift prior to his was leaving work early on a regular basis. The claimant reported the matter, and then become concerned that management was not acting on this information. Subsequently, the claimant heard rumors that certain employees were being questioned in a manner that made him suspect that an investigation was in fact underway.

One of the claimant's subordinates advised the claimant that he was cooperating with HR in an investigation into the employee. On September 30, 2015, the claimant took a picture of the client's computer screen showing the names of various guards and the times when they arrived and left. The picture showed the notebook where security staff wrote the times when they arrived and left and, right next to the notebook, the computer screen showing employees' arrival times. The information appearing on this particular computer monitor is not classified, but is for official use only.

The claimant took the picture because he was concerned that the client's computer system would crash—as it had done before—and the evidence of the departure times at issue would be lost. The claimant wanted to preserve this information before it was erased from the client's computer system.

On October 1, 2015, the claimant's subordinate advised the claimant that HR wanted the subordinate to obtain the picture and forward it to them. The claimant called HR to confirm this request. When he did not succeed at speaking with anyone that day, the claimant forwarded the picture to his subordinate as requested. In the absence of a response from HR, the claimant trusted his subordinate, as everything the subordinate told the claimant fit with what the claimant already knew or believed to be true.

By the end of the day, the picture was received by the client. On October 2, the client notified the employer. The employer investigated and determined that the claimant had in fact taken a picture of the client's data and then forwarded it to his subordinate for a supposed HR investigation. The claimant had never received any warnings for prior similar behavior.

From the employer's perspective, the claimant's actions damaged the employer's credibility with its client. The employer is in the business of protecting classified information, but the claimant took a picture of the client's proprietary information and forwarded it to another individual, if not others. In light of the claimant's training, the employer concluded that the claimant was intimately aware of the seriousness of his actions. Based on this final instance, the employer discharged the claimant.

OPINION: The credible evidence establishes that the employer discharged the claimant for taking a photograph of a client's proprietary information, without authorization and in violation of employer policy, and then forwarding it electronically to another employee. Significantly, the claimant was assigned to a defense contractor and was trained on the national security implications of his work. It is in this context that we must assess the claimant's contentions on appeal. We cannot accept the claimant's contention that he believed he was permitted to take a photograph of the client's data because the employer's policy recognizes that photography may be required by "Post Orders" or by a supervisor. Regardless of whether photography may be required in some circumstances, the employer's policy does not authorize employees to make unilateral decisions to photograph sensitive information. Whereas the claimant's photograph was taken at the direction of no one but himself, the photograph was taken in violation of policy.

Also unpersuasive is the claimant's contention that, regardless of any policy, photography was condoned at the claimant's work site. While there is testimony in the record indicating that the still pictures and even video were taken in the claimant's work area, and that the client's computers were somewhere in the pictures, there is no allegation that anyone other than the claimant ever took a picture specifically of the client's computer monitor and log book, for the purpose of capturing the client's data. The claimant's picture recorded the names of the site's security staff and the workers' arrival and departure times. At a secure facility, the compromise of this data could be potentially harmful in ways that are not comparable to any other photography the employer may have condoned.

Finally, the claimant argues that he had no prior warnings for similar behavior. We have previously held, however, that “there is no absolute requirement that a warning is required in all instances before conduct can be found to be misconduct” (see Appeal Board No. 582138A). The cases cited by the claimant, involving claimants fired for localized infractions including violations of time and attendance rules, are not comparable to the present circumstance, in which the claimant was discharged for compromising national security. Rather, the present claimant is analogous to airport security workers who are held to a higher standard of care because of the risks associated with their failure to provide such care (see Appeal Board No. 564048). In light of the nature of the claimant’s work and his training regarding his assignment to a defense contractor, we find that the claimant was on notice that his actions could jeopardize his employment, and his actions cannot be excused as an isolated instance of poor judgment. Accordingly, we conclude that the claimant lost his employment by reason of misconduct, and the claimant is disqualified from receiving benefits.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is sustained, effective October 2, 2015.

The initial determination, holding the claimant eligible to receive benefits, effective October 12, 2015, is overruled.

The claimant is denied benefits with respect to the issues decided herein.

COMMENTS

1. Further, the Appeal Board in A.B. 550,723A, ruled that even though the claimant contended that that her remark was an isolated instance of poor judgement, the employer’s policy provides for zero tolerance for harassment in the workplace. The claimant knew or should have known that even one violation would place her job in jeopardy. Therefore, the claimant’s conduct in making an offensive remark in violation of the employer’s policy rises to the level of misconduct.
2. In AB 563905, The claimant was discharged because he had taken two rolls of toilet paper without permission. Employee theft of employer’s property is misconduct and the monetary value of such property does not matter (See Appeal Board Nos. 558458 and 547362). The AB did not credit the claimant’s contention that he did not know that what he was doing was wrong and concluded that prior warning is not required to put the employee on notice that theft from the employer or its client can lead to discharge.

3. In AB 579231, the AB ruled that when a claimant deliberately accessed a patient's medical records for personal reason on multiple times is misconduct. The AB was not persuaded by the claimant's contention that she was not on notice that her conduct could place her job in jeopardy because the claimant acknowledged that she had completed training in the relevant employer's policy.
4. Further, The Court has ruled that in the Matter Jordan E. Tracey (145 A.D. 1218, 2016) an employee's dishonesty failure to comply with an employer's policy and procedures constitutes disqualifying misconduct.