

DISQUALIFICATIONS FROM UNEMPLOYMENT BENEFITS IN NORTH DAKOTA

You work with your employees to improve their performance. Through a combination of formal training, instruction, encouragement, cajoling, and disciplinary action, you provide feedback on performance expectations and deficiencies. Despite your best efforts, sometimes you have to discharge employees when bad performance continues. When you let someone go for poor performance, will she be eligible for unemployment benefits?

The North Dakota Supreme Court recently addressed the issue of when bad performance actually constitutes “misconduct” and disqualifies an employee from receiving unemployment benefits under North Dakota law. Read on to learn more about how and when to challenge unemployment benefits on the basis of misconduct.

The long and short of it

Wanda Gottus began work in January 2008 as a cashier for Service Oil, Inc., doing business as Stamart. Her duties included attending store shelves, performing light cleaning, and operating a cash register for customer purchases. Although her job appeared to be straightforward, Gottus amassed an impressive disciplinary history while working for Stamart. Between her hire in 2008 and her termination in August 2010, Stamart documented 16 instances in which her performance didn't meet its expectations.

According to written warnings, Gottus was cited for failing to give cash advances to drivers, standing idle, having nonwork-related conversations with customers, and leaving a roll of change unattended on the counter. However, most of her work deficiencies and written warnings focused on her being either “long” or “short” on her cash register. A Stamart manager testified that being long or short on a cash register occurs when a customer isn't given the correct change for a purchase. As a result, there is too much or too little money in the register at the end of the shift.

Gottus was repeatedly long or short on her cash register while working for Stamart. There was no suggestion that she was taking money for herself, but she continued to have difficulties balancing her cash register at the end of her shifts. Stamart issued her numerous warnings about her work performance, including the quality of her work and her difficulty balancing her cash register. Finally, in August 2010, Stamart terminated her employment for poor job performance.

Gottus applied for unemployment benefits from Job Service North Dakota (JSND) and was awarded benefits. Stamart appealed the decision, and a telephone hearing was held. Following the hearing, Gottus was denied benefits based on misconduct, which disqualifies an employee under North Dakota law. She appealed the denial of benefits to the district court.

INSIDE ...
Financial Insight
From the CEO
HR Conference

continued on Page 2

“Really, I’m just incompetent.”

In North Dakota, an individual who is discharged for misconduct is ineligible to receive unemployment benefits. In her appeal to the district court, Gottus argued that her job performance was merely “unsatisfactory” and didn’t constitute misconduct.

In North Dakota, misconduct that disqualifies an employee from receiving benefits usually consists of intentional misbehavior. The North Dakota Supreme Court has stated that misconduct typically consists of “deliberate violations or disregard of standards of behavior” that an employer has a right to expect of its employees. Mere “inefficiency,” “failure in good performance as the result of inability or incapacity,” “ordinary negligence,” and “good [-] faith errors” are not enough to establish misconduct. In other words, an employee who is merely incapable of performing her job duties or commits isolated errors isn’t disqualified from receiving benefits based on misconduct.

...misconduct typically consists of “deliberate violations or disregard of standards of behavior” ...

However, misconduct may be established by “carelessness or negligence” that is sufficient to establish “an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.” In an unemployment proceeding, the employer bears the burden of establishing that a discharged employee’s conduct amounted to misconduct. According to the Supreme Court, “Conduct that is grounds for dismissal does not necessarily preclude the employee from receiving unemployment benefits.”

In this case, the JSND referee took particular note of evidence indicating that each time Gottus was disciplined for being long or short on her register, her work performance would improve for a brief period of time. According to the referee, the temporary improvements in her job performance demonstrated that she was capable of performing her job competently. As a result, her failure to do so after numerous warnings demonstrated the type of “carelessness or negligence” that showed an “intentional and substantial disregard of the employer’s interest” and disqualified her from receiving benefits.

The North Dakota Supreme Court upheld the referee’s determination that Gottus’ repeated failure in her job performance after demonstrating she was capable of performing the job constituted disqualifying misconduct. As a result, she was denied unemployment benefits. *Gottus v. Job Service North Dakota, 2011, ND 204.*

Practical pointers

This case presents a basic refresher on disqualification for unemployment benefits based on “misconduct” under state law. Although most employers know that an employee who quits generally isn’t entitled to unemployment benefits, much confusion exists over the “misconduct” disqualification standard. This case illustrates that misconduct isn’t limited to intentional acts of gross misconduct (e.g. theft) but may include failure to competently perform job duties after repeated warnings. Follow these pointers to maximize your chances of scoring big at your next JSND appeal:

- **Document, document, document.** Starnart was successful on appeal because it adequately documented the employee’s file, including the repeated warnings she received and her improved performance for a brief time following each warning.

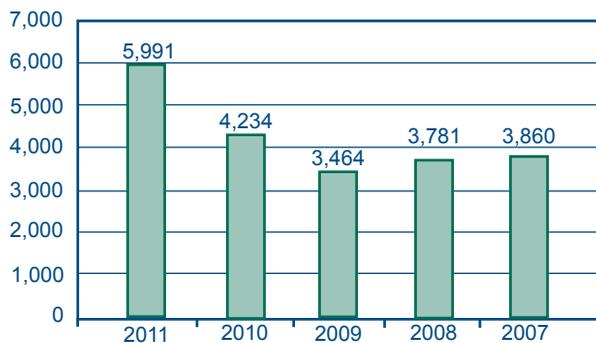
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- **Communicate expectations.** In addition to documenting an employee's repeated disregard of written warnings, it's important to communicate the rules and your performance expectations in the first place. Expectations for improved performance should be repeated in subsequent disciplinary notices.
- **Repetition is key.** Although an isolated incident of severe misconduct such as theft may be sufficient to disqualify an employee from receiving unemployment benefits, "isolated instances" typically won't be enough. Your best chance of disqualification occurs when you have documented that an employee was repeatedly warned about her behavior or job performance but continued the bad performance.
- **Present your best case.** When responding to an initial claim from JSND, provide all relevant policies, disciplinary documentation, and any other material that supports your case. If your case is appealed, make sure the employee's supervisor, HR, and others who were directly involved in any incidents and the decision to terminate are available to testify in all appeal hearings.
- **Be cautious in contesting unemployment benefits.** We've said before that not every claim for unemployment benefits should be contested. We've seen a number of cases in which claims of disability discrimination, harassment, and retaliation are raised for the first time in JSND hearings. In questionable cases, consider whether simply allowing the employee to receive unemployment benefits might be your least risky strategy.

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FINANCIAL INSIGHTS

LOSSES PAID (in thousands)



This graph represents losses paid by NDIRF over the past 5 years, including payments made to adjusters and attorneys assisting in the claims settlement process. The nearly \$6 million of losses paid in 2011 is the most paid in a single year in NDIRF's history. ■

FROM THE CEO

The NDIRF will be paying out a conferment of benefits to its members in 2012 for the 18th straight time. The payment, authorized by your Board of Directors last December, will be in the neighborhood of \$2 million (we don't yet have all of the information needed for an exact amount) and, as usual, should be in the mail by early April.

Good as it is, this news could be even better but for the information you see in the column immediately to the left, showing paid losses at their highest amount ever in 2011. Coupled with nearly \$6.5 million in incurred loss and a thrilling but ultimately sideways tour for the financial markets last year, the 2011 conferment of benefits (paid in 2012) will be about 30% lower than last year's payment. NDIRF always cautions members to resist the temptation to budget a conferment of benefits payment but, for those members who may have yielded, please take note of the difference year-over-year.

To a significant degree, we could have predicted the claim loss issues just by taking notice of the severe weather pattern of 2011 – there is usually a correlation – but we also saw an increase in driver-error claims, adding insult to injury. In the next issue of the Participant we will be providing some tips on employing safe drivers and, of course, our defensive driver training remains available, free of charge, to NDIRF members. ■

HR All Star - Get in the Game
2nd HR Conference for Local Governments
April 25 - 26, 2012
Ramkota, Bismarck, ND

April 25, 2012

- 8:30a Pre-conference Session - Overview of Human Resource Reference Guide
- 9:00 Registration
- 10:00 Welcome
- 10:15 Keynote Address by Dale Brown: *We are All in This Together*
- 11:45 Lunch
- 1:00p Breakout Sessions A-D
- 3:15 Break
- 3:30 Plenary Session - *Work Place Violence (panel presentation)*
- 4:45 TAILGATING social hour - Trivia with Wild Inspire
- Evening on your own

April 26, 2012

- 7:30a Continental breakfast by organizations
- 8:15 Breakout Sessions A-D
- 11:00 Closing Session: *Keeping Everything Legal* – Lisa Edison Smith, Vogel Law Firm
- 12:30 Closing Luncheon

Breakout Sessions

- A. Recruitment - Transition/Succession Planning - Presenter: Harriet McCaul
- B. Compensation - Pay Administration Philosophy and Practices – Presenter: Jim Fox
- C. Employment Management - Performance Management - Presenter: Tanya Weiler
- D. Public Processes - Hot topics in HR (Panel)
 Veterans' Preference Changes - Presenter: Lonnie Wangen
 I-9 and Other HR Audits - Presenter: Chuck Klein
 Wage and Hour Issues - Presenter: Tony Weiler, ND Labor Cmmr

Mark
CALENDAR

May 2012

- 1: NDLC Regional Meetings, NW Region, New Town
- 2: NE Region, Minto
- 3: SE Region, Oakes
- 8: SC Region, Lincoln
- 8: NDIRF Annual Meeting Ramkota Inn, Bismarck
- 8: NDIRF Board of Directors Meeting NDIRF offices, Bismarck
- 9: NDLC Regional Meetings, NC Region, Garrison
- 10: SW Region, Beach



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