Chapter 8: Discharge, suspension, and conviction

Section 1. Discharge..3
A. Statute 3
B. General principles 3
1. Burden of persuasion; standard of proof 3
2. Claimant's state of mind; mitigation 3
3. Incompetence..5
C. Knowing violation of a reasonable and uniformly enforced rule or policy.......... 5
1. Introduction.. 5
2. Concepts.. 7
D. Fact-finding: knowing violation 8
E. Deliberate misconduct in willful disregard of the employer's interest 10
1. Introduction.. 10
2. Concepts.. 11
F. Fact-finding: Misconduct 11
1. General principles 11
2. Common reasons for discharge: knowing violation or deliberate misconduct 12
3. Attendance (absenteeism and tardiness).. 12
4. Swearing or profane language 13
5. Health and safety standards 14
6. Sleeping on the job.. 14
7. Business image 16
8. Money, property, and equipment 17
9. Falsification of information.. 17
10. Job Performance 18
11. Competing (or preparing to compete) with the former employer 18
12. Insubordination 20
13. Altercations in the workplace 20
14. Alcohol and drug use 21
Section 2. Suspensions for workplace violations 33
A. Statute and regulations 33
1. Statute.. 33
2. Regulations.. 33

B. Principles 33
C. Circumstances and policies 34
1. Suspensions during layoffs 34
2. Discharge after suspension 34
Section 3. Suspensions of public employees following indictment 35
A. Circumstances and Policies 35
1. Change from suspension to discharge due to a conviction 35
2. Exclusion of wages from suspending public employer following indictment 35
3. Use of wages from suspending employer after indictment; no conviction .. 36
Section 4. Convictions 37
A. Statute 37
B. Definitions 37
1. Felony or misdemeanor 37
2. Conviction 37
C. Principles 37
Appendix: Employee rights under Massachusetts law 39
A. Rights related to wages 39
B. Right to time off 39
C. Rights related to conditions of work 39
D. Rights related to health and family 39
E. Rights related to protection against discrimination 40
F. Rights related to political freedom and privacy 41
G. Rights related to protection from retaliation 41

Section 1. Discharge

A. Statute

G. L. c. 151A, § 25(e)(2)

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—
>
> ***
>
> (e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and has earned an amount equivalent to or in excess of 8 times the individual's weekly benefit amount after the individual has left work … (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in willful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence….

B. General principles

A claimant is discharged when the employer terminates the employment relationship. In discharge cases, the employer has the burden of proof.

Initial fact-finding in discharge cases should not be concerned with whether the determination ultimately will be made under the knowing violation or deliberate and willful misconduct branch of § 25(e)(2). Regardless of how the claimant and the employer characterize the separation, the adjudicator must determine the actual reason. If a claimant may be disqualified under both branches of § 25(e)(2), the adjudicator should choose the standard that better fits the facts.

1. Burden of persuasion; standard of proof

The burden of persuasion (proof) is on the employer.

The standard of proof is proof by a preponderance of the evidence. See Chapter 1-Adjudicator responsibilities.

2. Claimant's state of mind; mitigation

Knowing violation: To find a "knowing violation," the employer must establish that the claimant intended to violate the rule or policy. "An act is done 'knowingly' if it is the product of conscious design, intent or plan that it be done,

and is done with awareness of probable consequences."[1] Consequently, "a discharged employee is not disqualified unless it can be shown that the employee, at the time of the act, was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy."[2]

Deliberate misconduct and willful disregard: The Supreme Judicial Court holds that "[d]eliberate misconduct in willful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest."[3] "The apparent purpose of § 25(e)(2)," the court explains, "is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect."[4] For an employer to establish a disqualification under this branch of § 25(e)(2), the employer must show both 'deliberate misconduct' and 'willful disregard' of the employer's interest, and the employee's state of mind at the time of the misconduct is an issue for both parts. [5]

Conduct is deliberate if the claimant intended to do it. Conduct contrary to the employer's interest that results from the claimant's lack of qualifications for the job or from a good faith lapse in judgment is not disqualifying under § 25(e)(2).[6]

In determining whether the claimant's conduct was in "willful disregard" of the employer's interest, the three main considerations are (1) the worker's knowledge of the employer's expectation, (2) the reasonableness of that expectation, and (3) the presence of any mitigating factors.[7]

Mitigating Circumstances: A claimant must show that mitigating circumstances influenced his behavior to such an extent that his actions were not in willful disregard of the employer's interest. Mitigating circumstances may be events over which a claimant had no control, or they may involve instances whereby a claimant acted or omitted to act in a particular way because he or she had no alternative course of action. For example, if a claimant is absent from work without notifying his employer because he was involved in a serious car accident or suffered a heart attack, this would constitute a mitigating circumstance. However, if a claimant has been late for work on previous occasions, and is subsequently late for work because of a transportation problem, this will not

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[1] *Still*, 423 Mass. 805, 812 (1996) (internal quotation marks, brackets, and citation omitted).

[2] *Id.* at 813.

[3] *Goodridge v. Director of the Division of Employment Security*, 375 Mass.434, 436 (1978).

[4] *Garfield*, *v. Director of the Division of Employment Security*, 377 Mass. 94, 97 (1979).

[5] *Still*, 423 Mass. at 810.

[6] *Garfield*, 377 Mass. at 97.

[7] *Still*, 423 Mass. at 810–11.

likely constitute a mitigating circumstance, especially if the claimant could have made alternate transportation arrangements.

Burden of proof: Because the claimant's state of mind is an essential, statutory element for disqualification under § 25(e)(2), the employer has the burden to establish that the claimant indeed had the state of mind required for disqualification. If the claimant offers evidence suggesting mitigating circumstances tending to negate a disqualifying state of mind, the employer must be given the opportunity for rebuttal or to demonstrate that the alleged facts are not mitigating.

3. Incompetence

The statute contains an exception to disqualification for rule or policy violations "shown to be as a result of the employee's incompetence."[8]

If such failure to comply with a rule or policy is not due to any lack of effort on the part of the claimant, or the claimant was otherwise incapable of complying with the rule or policy due to a lack of ability, the claimant is not disqualified.

(Similarly, if the claimant's work or on-the-job performance is not satisfactory to the employer, but there is no *deliberate* lack of effort on the part of the claimant to conform with the employer's requirements, then the claimant is not subject to disqualification for deliberate misconduct.)

In some circumstances, a claimant's incompetence may be due to a temporary factor (such as stress attributable to family illness causing loss of concentration), even though the claimant has the inherent ability to perform the job when not influenced by such temporary factor.

C. Knowing violation of a reasonable and uniformly enforced rule or policy

1. Introduction

If an employer alleges that it discharged the claimant for a knowing violation of a reasonable and uniformly enforced rule or policy, the employer must prove that:

- the claimant intentionally engaged in conduct (either action or inaction not caused by incompetence) that violated a rule or policy of the employer;
- the claimant was aware of engaging in the conduct;
- the claimant, while engaging in the conduct, was aware that the conduct violated a rule or policy of the employer; and

[8] G. L. c. 151A, § 25(e)(2).

- the violated rule or policy was both reasonable and uniformly enforced.

To serve as a basis for disqualification under § 25(e)(2) "rules [and policies] must be reasonable in themselves and must not produce unreasonable results when measured against the objective circumstances surrounding their violation."[9] Additionally, a rule or policy must be lawful and not conflict with any right of the claimant under some law or agreement with the employer.

The adjudicator must consider the circumstances at the time of the violation to determine whether the employer has established that the claimant:

- knew what he or she was doing;
- knew that the conduct violated an employer rule or policy; and
- intentionally did it anyway.

If, at the time of the alleged violation, the claimant was under extreme stress, fatigue, or provocation, the adjudicator may conclude that the claimant did not intend to violate the rule. For example, if a claimant violated an employer's policy against using abusive language in response to provocation or while under extreme stress, the adjudicator reasonably might conclude that the claimant's act did not involve the necessary level of intent.[10] Similarly, in some cases, extreme stress or fatigue may lead a claimant to forget, and thus fail to follow, an employer rule or policy. Such temporary factors could cause a claimant to be incompetent at the time of the rule or policy violation and thus not subject to disqualification.

On the other hand, even though the circumstances surrounding the final act may have involved provocation or extreme stress, if the claimant had a history of previous violations and warnings for the same or similar conduct, then the adjudicator reasonably might conclude that the final act was not "spontaneous" but rather was done intentionally.[11] But the mere presence or absence of a prior history of rule violations is not controlling. Rather, evidence of a prior history of rule violations is simply an additional factor that may tend to show whether the act that violated the rule was done spontaneously or intentionally.

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[9] St. 1993, c. 263, § 18.

[10] *See Still,* 423 Mass. 805.

[11] *See Gupta v. Deputy Director of the Division of Employment and Training*, 62 Mass. Appeals Court 579 (2004).

2. Concepts

a. Reasonable rule

The Legislature has made clear “that “rules [and policies] must be reasonable in themselves and must not produce unreasonable results when measured against the objective circumstances surrounding their violation.”[12] The employer has the burden of proving that the claimant actually violated a rule or policy and that the rule or policy was reasonable both in itself and as applied to the claimant.[13] For a rule or policy to be found reasonable, therefore, the employer must establish that it is:

- reasonable in itself and in light of the particular employer’s permissible interests and expectations of its employees; and
- reasonably applied in the particular circumstances. (For example: a bank with a rule forbidding tellers from giving money to unauthorized persons discharged a teller for giving money to a bank robber at gun point. The rule would not be reasonably applied in these particular circumstances, and the teller should not be disqualified under § 25(e)(2).)

The claimant must be given an opportunity to show that the application of the rule or policy was unreasonable under the circumstances. If the claimant attempts to do so, the employer must be given the opportunity to disprove the alleged facts on which the claimant relies, to show that it reasonably applied the rule or policy in the circumstances alleged, or both.

A rule that is contrary to state or federal law, or that violates some legal right of the claimant, is unreasonable. A discharge for violating such an unlawful rule or policy, therefore, is not disqualifying under § 25(e)(2), even if the claimant did not know of the specific legal provisions or their applicability and did not inform the employer of the reason for refusing to follow the rule or policy.[14] (For a selection of state laws creating potentially-applicable employee rights, see Appendix at the end of this chapter.)

b. Uniformly enforced rule

To support a disqualification, a rule or policy also must be uniformly enforced. The employer must establish that it treats all employees subject to the rule the same way. If the rule or policy incorporates a progressive system of discipline, the employer must establish that it follows the system uniformly.

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[12] *See* St. 1993, c. 263, § 18.

[13] *Cantres v. Director of the Division of Employment Security*, 396 Mass. 226, 231 (1985).

[14] *See Kinch v. Director of the Div. of Employment Security*, 24 Mass. Appeals Court 79 (1987).

If a claimant alleges that the rule or policy was not uniformly enforced, the adjudicator must give the employer an opportunity for rebuttal, which might include business records. For a business record to be considered, four conditions must apply: (1) the entry in the business record was made in good faith; (2) in the regular course of business; (3) before the claimant filed for UI benefits; and (4) it was the usual course of business to make the entry at the time of the event recorded or within a reasonable time thereafter.

If a rule or policy allows the employer discretion in enforcing or applying the rule or policy, the employer will not be able to establish that the rule or policy was uniformly enforced.[15] (Then the adjudicator will need to determine whether the employer can establish that the claimant was discharged for deliberate misconduct.)

That a rule or policy has never before been enforced does not necessarily mean that the rule was not uniformly enforced. The claimant may be the first employee to have violated the rule.

D. Fact-finding: knowing violation

In deciding whether to disqualify a claimant under § 25(e)(2) for a knowing violation of a uniform and reasonably enforced policy, the following questions may need to be addressed either initially or through custom fact-finding. For a more detailed discussion of fact-finding, see Chapter 1 – Adjudicator responsibilities.

Did the claimant engage in the alleged conduct?

- What was the alleged act or omission that led to the discharge? What is the claimant accused of doing or failing to do?
- Can the employer establish, or does the claimant admit, that the claimant did or failed to do the thing for which the claimant was discharged?

Was there a rule or policy?

- What did it say?

Was the rule or policy uniformly enforced?

- Are the disciplinary consequences for violating a rule or policy left to the employer's discretion?

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[15] *See New England Wooden Ware Corp. v. Commissioner of the Department of Employment and Training*, 61 Mass. Appeals Court 532, 533-534 (2004).

- Has the employer applied the rule or policy to the claimant or to others in the past?
    - If not, why?
    - If so, how?
- If the claimant alleges that the rule or policy has not been uniformly enforced, what supporting information does the claimant offer? What is the employer's rebuttal? (The claimant's or employer's own statement, if credible, is sufficient.)

Was the employer's rule or policy reasonable?

- Did the rule or policy further a legitimate employer interest, such as the employer's public image, workplace health and safety concerns, prohibiting conduct reasonably thought to adversely affect sales, profits, costs of doing business, or employee relations?
- Was the rule or policy required by, or was it contrary to, federal, state, or local law?
- If the claimant violated a rule or policy that is found to be reasonable in itself, are there particular circumstances that make application of the rule or policy unreasonable in this instance?
- Under the particular circumstances involved, could the claimant reasonably have been expected to adhere to the rule or policy?

Did the claimant know about the employer's rule or policy?

- Was the rule or policy made known to the claimant? If so, how?
    - Was the rule or policy posted at a place likely to be observed by employees?
    - Did the claimant learn of the rule or policy at a training or orientation session?
    - Did the employer explain the employer's rule or policy to the claimant?
    - Did the claimant receive a document that contained the employer's rule or policy?
    - Did the claimant acknowledge, either in writing or orally, having been made aware of the rule or policy? If so, how?

- Did the claimant understand the rule or policy?
  - Was the rule or policy communicated to the claimant in a language understood by the claimant?
- Was the rule or policy clear and unambiguous? Were prior warnings issued to the claimant? Was any disciplinary action taken for previous violations of the rule or policy?

Was the violation “knowing”?

- Did the claimant intend to act, or not act, in a way that violated the rule or policy?
- Did the claimant violate the rule or policy after learning about it?
- Was the claimant aware of the rule or policy at the time of the violation?
- Was the claimant aware that the conduct or inaction violated the rule or policy?
- Did the claimant act without thinking, for example, in response to a provocation or a sudden, unexpected event?
- Was the violation a result of the claimant’s incompetence?

E. Deliberate misconduct in willful disregard of the employer’s interest

1. Introduction

To disqualify a claimant under this branch of § 25(e)(2), the employer must show both that the claimant engaged in “deliberate misconduct” and that this was in “willful disregard” of the employer’s interest. The claimant’s state of mind at the time of the act or omission is an issue for both parts of the analysis: the claimant must have acted intentionally while aware that the conduct was contrary to the employer’s interest.

2. Concepts

a. Deliberate misconduct

Deliberate misconduct is "intentional conduct or inaction which the employee knew was contrary to the employer's interest."[16]

b. Willful disregard of the employer's interest

Conclusions of "willful disregard" must rest on acts of the employee that "adversely affect the employer's interests."[17] The two main considerations in determining whether such conduct is in willful disregard of the employer's interest are the claimant's knowledge of the employer's expectation and the reasonableness of that expectation. Because the claimant's state of mind is a factor in determining whether the claimant's conduct was deliberate and willful, the adjudicator must consider whether any mitigating factors establish that the claimant did not have the state of mind required for disqualification.

F. Fact-finding: Misconduct

1. General principles

When a claimant has been discharged for alleged deliberate misconduct, information on the following issues may need to be obtained.

Did the claimant commit the alleged misconduct? If so, did the claimant act deliberately?

- What was the act or failure to act that allegedly led to the discharge?
- Did the claimant act or fail to act as alleged?
- If so, was the claimant's conduct deliberate?
  - did the claimant intend the act or failure to act?
  - did the act or failure to act result from the claimant's incompetence or inability to satisfy the employer's expectation?

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[16] *Goodridge*, 375 Mass. at 436.

[17] *Garfield,* 377 Mass. at 99.

If the claimant acted deliberately, did the claimant also act in willful disregard of the employer's interest?

- What was the employer's expectation?
- At the time in question, did the claimant know of the employer's expectation?
  - How did the claimant learn of the employer's expectation?
- Was the claimant's conduct so obviously wrong that no prior notice from the employer was required for the claimant to be aware that it constituted misconduct, for example, theft, unprovoked assault, etc.?
- Why did the claimant act contrary to the employer's expectation?
  - Did the claimant believe that the conduct at issue would help, or have no impact on, the employer's interest?
- If the claimant had been warned, did any action or inaction by the employer, such as a failure consistently to follow through on such warnings, lead the claimant to believe that that the conduct at issue did not violate the employer's expectation?
- Did the claimant know whether other employees had, or had not, been warned, dismissed, or suspended for the same or similar conduct?

2. Common reasons for discharge: knowing violation or deliberate misconduct

The following sections discuss several common types of conduct that may lead to an employee being discharged. The conduct may violate a rule or policy of the employer. It may constitute deliberate misconduct.

The questions for consideration listed below are specific to the type of conduct being discussed and are in addition to the general questions listed above for alleged violations of a rule or policy or alleged deliberate misconduct.

3. Attendance (absenteeism and tardiness)

- What was the date of the final incident?
- If there is an attendance policy, does it outline progressive discipline for absences or tardiness?
  - If so, what are the progressive steps?

- How many absences or tardiness can occur before the employee is disciplined?
- Does the employer excuse absences for any reasons?
  - If so, what are the reasons that the employer would excuse an absence?
- What was the nature of this last incident? Why was the claimant absent or tardy on that occasion?
- What is the procedure for giving notice when an employee is going to be late or absent?
  - Did the claimant comply with this procedure?
  - Was the claimant discharged for not complying with this procedure?
- How many times had the claimant been absent or tardy in the past?
  - Why had the claimant been absent or tardy in the past?
- Had the claimant received discipline for previous absences or tardiness, such as warnings or suspensions?
- Had the claimant been given a "last chance" or "final warning"?
- Were there medical reasons for the absences or tardiness?
- If the claimant alleges that the absences or tardiness resulted from circumstances beyond the claimant's control, what, if any, steps did the claimant take to resolve the situation?

Example: A claimant was discharged after exceeding the number of absences that the employer allowed. The claimant establishes, however, that the final absence was due to the claimant's need to pick up an ill child from school and care for the child. Since the claimant's absence was due to circumstances beyond the claimant's control, the claimant is not subject to disqualification under § 25(e)(2).

4. Swearing or profane language

- What did the claimant say?
- To whom did the claimant say it?
- Was the profanity directed at a patient, customer or client, or a co-worker, supervisor, or subordinate?

- Who else was present when this statement was made?
- Who heard the statement?
- Where were the people who heard the statement located relative to the claimant?
- Was swearing or profanity tolerated in the workplace?
- Has the claimant presented any mitigating circumstances (stress, fatigue, provocation)?

Example 1: A claimant was discharged after swearing at a patient. The claimant was at the end of a double shift and the patient swore first at the claimant. The claimant had never previously sworn at a patient. If the adjudicator determines that, because of one or more of these circumstances, the conduct was spontaneous and unplanned, then the claimant should not be disqualified.

Example 2: A claimant was discharged for using rude language with a customer. The claimant had a prior history of using rude language with customers and had been warned about it. There were no unusual or mitigating circumstances surrounding the final act, such as extreme stress, fatigue, or provocation. The claimant will be disqualified.

5. Health and safety standards

- What was the rule or standard?
- How did it relate to health or safety?
- How might the employer be adversely affected by an employee's not following the rule or standard?
- Who was responsible for enforcing the rule or standard?
- Had the claimant been trained on how to comply with the rule or standard?

Example: A claimant who worked in food preparation was discharged for refusing to wear a hairnet because he believed it interfered with his personal style. The employer's requirement that the claimant wear a hairnet protected the employer's legitimate interest in maintaining a sanitary food preparation environment. The claimant is subject to disqualification under § 25(e)(2).

6. Sleeping on the job

- What were the circumstances under which the claimant fell asleep (where, when)?

- Did the nature of the claimant’s job make it particularly important that the claimant remain alert and awake? What were the consequences or potential consequences of the claimant sleeping on the job?
- Did the claimant take any steps to try to stay awake?
- Were there prior incidents?
- Were there serious personal, medical, or other circumstances that caused the claimant to be more tired than unusual?

Example 1: The claimant, a custodian who worked the night shift for 15 years without any disciplinary incidents, was seen sleeping at his desk and was warned that if it happened again, he would be discharged. His sleeping on the job did not endanger himself or others. Less than a month later, his supervisor again saw him asleep at his desk, and he was discharged. At the time, the claimant was going through a divorce, and was living with his elderly parents, who were both seriously ill. His mother was in the hospital in intensive care, and his father was at home with a terminal illness, and the claimant alternately visited his mother in the hospital and cared for his father at home, which did not leave him sufficient time to sleep during the day. The claimant’s serious personal problems caused him to be unusually fatigued. These are such mitigating factors as to prevent his sleeping on the job from being considered deliberate misconduct in willful disregard of the employer’s interest, or a knowing violation of a rule or policy.

Example 2: The claimant, a nurse, was responsible for providing in-home overnight care for a child with a severe disability. The child needed a ventilator to breathe and the claimant’s job was to monitor the child’s condition via video from a separate room, which contained a couch. If the claimant saw that there was a problem with the child’s ventilator, she could provide assistance such as suctioning or clearing out the breathing tube; otherwise, an alarm would sound. The employer’s handbook listed “sleeping on the job” as a serious violation that would result in immediate termination. The child’s father provided the claimant with a blanket and pillow to make her more comfortable. The child’s mother twice observed the claimant sleeping on the job, but the claimant promised it wouldn’t happen again and the mother did not immediately report it to the employer. When the mother later informed the employer of the incidents, the employer discharged the claimant. The claimant admittedly knew about the rule, understood its importance, and did not present evidence of mitigating circumstances. Given the importance of the claimant’s staying alert and awake on the job, she had a duty to take measures to stay alert and awake, or to call in a replacement if she was overly tired. The claimant was disqualified from receiving benefits under § 25(e)(2).

7. Business image

- What is the business purpose of the rule or expectation? How does it promote or protect the employer's business image?
- How would the employer be adversely affected by non-compliance with the rule or expectation?
- Did the rule or expectation violate some law or some right of the claimant?
- Did the claimant have a valid reason for failing to comply with the rule?
    - If so, did the claimant seek an exception from the employer?

Example 1: The claimant, a food service worker, is informed after hire that she cannot wear any head covering under or over the hat that is part of the employer's required uniform. The claimant responded that she wears a head scarf for religious reasons and that her previous employer allowed her to wear the scarf under the visor that was part of that employer's uniform. The manager asked his supervisor whether an exception can be made for the claimant to accommodate her religious beliefs. The claimant was told that there are no exceptions. The claimant, who nevertheless reported to work wearing a head scarf under the employer's required hat, was sent home and then discharged. The employer states that it strictly enforces its policy on uniforms because it wants to maintain a consistent business image. The claimant states that wearing the employer's hat over her head scarf does maintain the employer's business image. Unless the employer establishes that the claimant's failure to remove her head scarf was **not** the result of a sincerely-held religious belief, the adjudicator must weigh the employer's interest in maintaining a "consistent business image" against the claimant's right to freely exercise her religion. In this example, it is unlikely that the claimant's conduct was disqualifying under § 25(e)(2).

Example 2: The claimant, a teacher's aide working in a child care center, was discharged after the owner received some photographs of the claimant in various states of undress, along with a note that read, "Just thought you should know what your staff is up to." The photographs were "selfies" taken by the claimant <u>while at work</u>; some in the restroom used by staff and some in the children's restroom. The owner discharged the claimant because the claimant's conduct would harm the school's image and upset parents if they learned of the photographs. The school's mission is to provide a safe, supportive space for children to learn and grow. If the employer establishes that the claimant's conduct harmed, or unreasonably put at risk of harm, the employer's image as a safe, supportive space for children to learn and grow, then the claimant should be disqualified under § 25(e)(2).

8. Money, property, and equipment

- What procedures were in place to secure the employer's money or property?
- Did the employer lose money, property, or equipment as a result of the claimant's act or omission?
  - Did the claimant's conduct contribute to, or increase the likelihood of, the loss?
  - What was lost? What was its value?
  - Had the employee been trained in procedures to prevent such losses?

Example 1: A claimant worked at a bank in a position that required handling cash and recording cash transactions. The claimant was discharged for failing to review and verify the records of cash transactions at the end of a shift. The claimant was aware of the requirement to review and verify the records, and the failure was not due to inability or incompetence. The claimant is disqualified.

Example 2: A claimant, who had been issued a company laptop, was discharged after the laptop was stolen on the commuter train while the claimant was not paying attention. Greater attention by the claimant could have prevented the theft of the laptop, but the claimant's inattention was not deliberate and does not demonstrate the intent required by § 25(e)(2), so the claimant is not subject to disqualification.

9. Falsification of information

- What information did the claimant allegedly falsify? For example, was it a job application, time sheet, or other business-related document?
- If the claimant provided information in response to a request:
  - Was the request unambiguous as to what information needed to be provided?
  - What was the purpose for requesting the information?
  - Is there any law related to requesting the particular information?[18]

Example 1: A claimant was asked to submit an employment and educational history with start and end dates for the employer's personnel records. The claimant knew that the employer expected these records to be accurate. Due to a faulty memory, the claimant inadvertently misstated periods of previous employment. The

[18] See Appendix at the end of this chapter for a list of employee rights under Massachusetts law.

claimant was therefore not “consciously aware” of the error. The claimant is not subject to disqualification under § 25(e)(2). The inaccuracy in this example was attributed to a mistake of fact. When a work history date is off by a matter of months, it may be reasonable to conclude that the mistake was inadvertent. But adjudicators must use their judgment in evaluating the facts of each situation. If a misrepresentation seems unlikely to be a mistake, for example, a claimant’s resume lists degrees that the claimant has not actually earned, then the adjudicator would be justified in concluding that the claimant was “consciously aware” that the information was false.

Example 2: A claimant was required to submit timesheets reflecting the time the claimant arrived at and left work. The timesheets were used to prepare payroll records and paychecks. The claimant arrived at work between 9:30 a.m. and 9:45 a.m. each morning, but filled in 9:00 a.m. as the arrival time on the timesheet. The employer established that the claimant was aware that the recorded arrival time was earlier than the actual arrival time. The claimant is subject to disqualification under § 25(e)(2).

10. Job Performance

Poor job performance is generally not disqualifying, unless the employer can establish a deliberate lack of effort on the part of the claimant.

- What was the job performance standard that the employer expected the claimant to meet?
- Did the claimant’s performance meet the standard?
- Who observed the claimant’s job performance, and how was it evaluated?
- If the claimant’s performance was substandard, did this result from:
    - the claimant’s lack of competence to meet standard?
    - the claimant’s deliberate lack of effort?
    - some other cause?
- Had the claimant met the job performance standard in the past?
- Did the claimant’s actions interfere with another employee’s performance?

11. Competing (or preparing to compete) with the former employer

Whether a claimant who was discharged for competing or preparing to compete with the employer should be disqualified under § 25(e)(2) largely depends upon whether the claimant had agreed not to compete with the employer. **Because of the**

specialized expertise needed to evaluate non-competition agreements, after fact-finding is completed, if it is determined that there was a non-competition agreement, the issue should be forwarded to the UI Policy and Performance Department for a determination.

When the employer alleges that the claimant was discharged for violating a written or oral non-compete agreement, the employer must present evidence that the agreement was reasonable and enforceable, and that the claimant in fact violated it. Massachusetts law sets forth the legal requirements for an enforceable non-compete agreement.[19] The adjudicator should send the employer a custom fact-finding questionnaire asking the employer to provide a legal argument similar to what the employer would use in court to enforce the agreement, and evidence to support the existence of, reasonableness of, and claimant's agreement to and understanding of the agreement. If the employer does not respond, the employer has not met its burden. If the employer sends the requested information, the adjudicator should allow the claimant to respond. The issue is then ready for forwarding to the UI Policy and Performance Department.

If the facts show that there was no non-competition agreement between the claimant and employer, the separation should be treated like any other discharge. The employer may be able to meet its burden if it can establish that the claimant engaged in disqualifying conduct such as misuse of the employer's time or equipment.

- Was there an agreement not to compete?
- If so, what did the agreement include?
- Did the claimant violate the agreement? How?
- Did the claimant know, or should the claimant have known, that their actions would violate the agreement?

Example: A claimant was discharged when the employer learned that the claimant was planning to engage in the same type of business. The claimant's plans, however, had not interfered with the performance of the claimant's duties, nor had they involved solicitation of the employer's customers. The claimant at the time of hire had not agreed to refrain from establishing a competing business. The claimant's actions prior to separation had not resulted in any loss or damage to the employing unit (although they might later); therefore, the conduct is not disqualifying misconduct under § 25(e)(2).

[19] G. L. c. 149, § 24L.

12. Insubordination

If an employer alleges that a claimant engaged in insubordination, the employer should be asked to specify the alleged act or omission. After obtaining rebuttal from the claimant, the adjudicator should analyze the issue using the deliberate misconduct or knowing violation standard, as appropriate. Although an employer may have a rule against insubordination, because insubordination is a vague term, if the term "insubordination" is not reasonably defined in the rule, the actual conduct has to be evaluated without regard to the label that the employer has placed on it. Also, a claimant who refuses an order to do something that would have violated law or public policy should not be disqualified for insubordination.

- What did the claimant do or fail to do that the employer considered insubordinate?
- Had the claimant been given a direct order?
  - Was the order reasonable and lawful?
  - Why didn't the claimant comply with the order?
  - Would following the order have posed a risk to the claimant's health or safety, or to the health or safety of others?
  - Would following the order have violated the claimant's sincerely-held religious or moral beliefs?

Example: A claimant is discharged because of deliberate refusal, without good cause, to perform work as directed or to perform an assigned task. The employer discharges the claimant for "insubordination." The employer either did not have a specific rule about insubordination, or it did but the rule did not define insubordination adequately (for example, "insubordination is any violation of a rule or any failure to perform job duties"). The claimant would therefore not be subject to disqualification for a rule violation. However, if the facts establish that the claimant knew of the employer's expectations and that the demands of the employer were reasonable in the circumstances, the claimant would be subject to disqualification for deliberate misconduct.

13. Altercations in the workplace

- What happened?
- Who else was involved in the altercation with the claimant?
  - Was anyone else disciplined? Why or why not?
- Who initiated the altercation?

- Who observed the altercation?
- Were there previous similar events?
  - If so, how were they handled?
- Who reported the altercation to the employer?
- What were the words spoken between those involved?
- Were there any injuries?
- Were criminal charges filed?

Example 1: One day after work, the claimant hears that a co-worker has been spreading rumors about the claimant's personal life. The next day at work, the claimant sought out and struck the co-worker, and was discharged. Because of the passage of time, this misconduct cannot reasonably be said to have been spontaneous and unplanned; it was obviously intentional. This discharge is for deliberate misconduct in willful disregard of the employer's interest and is subject to disqualification.

Example 2: The same facts as in Example 1, except that the claimant learned of the rumors just before striking the co-worker. Additional fact-finding is needed to determine the claimant's state of mind.

14. Alcohol and drug use

An employer may reasonably prohibit employees from using, possessing, or being under the influence of alcohol, marijuana,[20] or any illegal drug while on the employer's premises, during work hours. Benefits will be denied if the employer establishes that the claimant violated such expectations, rules, or policies.[21]

If the employer establishes that the claimant was discharged for drug use at work, or drunkenness at work,[22] then it is not necessary for the employer to have a written policy explicitly prohibiting this conduct in order for the claimant to be disqualified; the claimant's discharge was for deliberate misconduct.

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[20] If the claimant was discharged for possession of an ounce or less of marijuana, in violation of the employer's reasonable and uniformly enforced rule, then the claimant would be disqualified on the basis of the rule violation, not on the basis of possessing an ounce or less of marijuana. See discussion, below, of G. L. c. 94C, § 32L, which states that "possession of one ounce or less of marihuana shall not provide a basis to deny an offender … any form of public financial assistance including unemployment benefits."

[21] There are limited exceptions for individuals who are alcoholics.

[22] With limited exceptions for individuals who are alcoholics.

a. Alcohol

An employer may reasonably prohibit employees from possessing, using, or being under the influence of alcohol while on the employer's premises or during working hours. This prohibition may be part of a rule or policy of the employer, or it may be the employer's expectation. If an employer establishes that it dismissed a claimant who is not addicted to alcohol for violating such a rule, policy, or expectation, the claimant should be denied benefits under § 25(e)(2).

If the claimant is an alcoholic, additional fact-finding and analysis must be conducted based on the principles discussed below.

- **Alcoholism**

A claimant whose conduct results from alcoholism—a compulsion to drink—does not act with the intent required under either the deliberate misconduct standard or the knowing violation of a rule or policy standard, unless the employer proves that the claimant "deliberately and willfully refused to accept help in controlling" the alcoholism.[23] Unless this exception applies, a claimant discharged, for example, for excessive absenteeism or poor job performance resulting from alcoholism should not be disqualified under § 25(e)(2). But a claimant discharged for more serious conduct such as fighting or being under the influence of alcohol on the job will be disqualified, whether or not the claimant's alcoholism is believed to have played a role in the conduct.

If a claimant is not disqualified because the separation was related to the claimant's addiction to alcohol, the separation should be considered a voluntary quit for urgent, compelling, and necessitous reasons, so that the employer, if contributory, is relieved of charges.

Note: if a claimant is separated for reasons related to the loss of a driver's license due to an arrest for driving under the influence, adjudicate the separation as a voluntary quit. See Chapter 7- Voluntary leaving.

b. Marijuana

(1) Possession versus "under the influence"

If the claimant was discharged for possession of less than an ounce of marijuana at work (including possession in the sense of having tested positive[24]) and the employer does not have an explicit policy prohibiting

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[23] *Shepherd v. Director of the Division of Employment Security*, 399 Mass. 737, 740 (1987).

[24] The law defines "possession of one ounce or less of marihuana" to include "possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails, or other tissue or fluid of the

possession of marijuana at work, and the employer did not establish that the claimant had used the marijuana or was under the influence of marijuana at work, then the claimant should not be disqualified. This is because G. L. c. 94C, § 32L decriminalized possession of one ounce or less of marijuana and specifically states that "possession of one ounce or less of marihuana shall not provide a basis to deny an offender … any form of public financial assistance including unemployment benefits." If the employer did have a reasonable and uniformly enforced rule prohibiting the possession of any amount of marijuana on the employer's premises, and the employer establishes that the claimant was discharged for possession of a small amount of marijuana (less than an ounce) in the workplace, then the claimant would be disqualified on the basis of the rule violation, not on the basis of possessing an ounce or less of marijuana.

The decriminalization law did not "repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken **while under the influence of marihuana**" so if an employer establishes that the claimant was discharged for using or having been **under the influence** of marijuana at work, then the claimant will be disqualified. Also, possession of more than an ounce of marijuana remains a crime and is disqualifying, so if the claimant if found to be in possession of **more than an ounce of marijuana** in the workplace, the claimant will be disqualified.

(2) Positive drug test for marijuana

A drug test that is positive for marijuana is not enough, by itself, to establish that a claimant used or was under the influence of marijuana at work, because an individual can test positive for marijuana days or even weeks after last having used it. Similarly, a pre-employment drug test that is positive for marijuana cannot establish a basis for disqualification.[25] Although an employer may choose to discharge a claimant solely on the basis of having tested positive for marijuana, a claimant cannot be disqualified from UI benefits solely on the basis of having tested positive for marijuana, because G. L. c. 94C, § 32L specifically prohibits it. (There is an exception to this general rule for individuals who work in safety-sensitive positions such as police officers, truck drivers, firefighters, as discussed below.)

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human body." G. L. c. 94C, § 32L. In other words, possession includes having marijuana or its metabolites in one's system, which would cause a positive drug test. Since G. L. c. 94C, § 32L says "possession of one ounce or less of marihuana shall not provide a basis to deny … unemployment benefits" we cannot disqualify claimants based solely on a drug test that is positive for marijuana.

[25] *Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training*, 422 Mass. 1007 (1996).

But a drug test that is positive for marijuana, combined with substantial and credible evidence that the claimant used or was under the influence of marijuana while at work, would provide a basis for disqualification. If the claimant tested positive for marijuana as a result of a post-accident drug test, and the claimant caused the accident, the claimant will be disqualified unless the claimant establishes an alternative explanation for the accident and that there was no causal connection between the positive drug test and the accident.

Example 1: While operating a forklift in the employer's warehouse, the claimant dropped 1500 lbs. of materials that were being moved from the loading dock and caused considerable damage to the materials being moved as well as the shelving it was being moved to. The employer's policy states all employees involved in an accident at work must submit to a post-accident drug test. The claimant tested positive for marijuana and the employer discharged the claimant for violation of a company rule prohibiting the operation of machinery while under the influence of drugs or alcohol. In this case the claimant would be found ineligible for benefits, unless the claimant established an alternate explanation for the accident and that there was no causal connection between the positive drug test and the accident.

(3) Fact-finding

As in all discharge cases, the burden is on the employer to establish by substantial and credible evidence that, among other things, the claimant actually engaged in the conduct that caused the discharge. See Chapter 1-Adjudicator Responsibilities. If the claimant denies using or being under the influence of marijuana at work, to determine whether the employer established that the claimant did engage in the disqualifying conduct, the fact-finder may consider:

- Did someone see the claimant using marijuana? Where? When? What exactly did they see?

- Did someone detect the odor of marijuana on the claimant, or in an area that the claimant had recently visited?

- Did the claimant show signs of being under the influence of marijuana at work? (Short-term effects of using marijuana include: sleepiness; difficulty keeping track of time; impaired or reduced short-term memory; reduced ability to perform tasks requiring concentration and coordination, such as driving a car; increased heart rate; bloodshot

eyes; dry mouth and throat; decreased social inhibitions; paranoia; hallucinations.[26])

- Did the claimant's job performance or judgment change?
- Did the claimant provide a credible alternate explanation?

Just like any other relevant fact that is disputed by the parties, the adjudicator must look at all of the information in the record and decide which party's assertion is more likely accurate.

Example 2: The claimant worked for the employer, a landscaping company, as a member of a three-person work crew. One day, the supervisor visited the crew at a worksite and found them sharing a "joint" during their lunch break; he discharged all three. The claimant is disqualified, regardless of whether the employer had a specific rule about marijuana, because the claimant was using marijuana at a worksite. Although the claimant was on break at the time, he used marijuana under circumstances where he knew or reasonably should have known that a) his conduct created a significant risk that his job performance or judgment could be affected, or b) his conduct might create a risk during working hours to his safety and to the safety of other people and property.

Example 3: The employer had a reasonable and uniformly enforced policy against using or possessing marijuana at work. While driving the company van, the claimant was rear-ended by another driver, and was subject to a post-accident drug test. The claimant tested positive for marijuana. The claimant admitted having smoked marijuana several weeks earlier at a party and insisted that he had not used marijuana since that time. The employer did not present evidence to show that the claimant was impaired by marijuana at the time of the accident or at any other time while at work. The claimant is not subject to disqualification under § 25(e)(2) because the claimant's positive drug test result, by itself, does not establish that the policy was violated.

c. Illegal drugs other than marijuana

Because use of an illegal drug can never be legal, addiction to an illegal drug, unlike alcoholism, can never be a mitigating state-of-mind factor

[26] Possible short-term health effects of marijuana use, at https://www.ncsacw.samhsa.gov/files/TrainingPackage/MOD2/PhysicalandPsychEffectsSubstanceUse.pdf (last visited 10/25/2019)

under § 25(e)(2). But a positive drug test result is not alone sufficient to establish a violation of the employer's drug policy.[27]

Example: The claimant, who was suffering a relapse of a previously-controlled addiction to heroin and Oxycontin, stole materials valued at about $1,000 from the employer's storage shed to obtain funds to purchase more illegal drugs. The claimant was disqualified under § 25(e)(2) for deliberate misconduct in willful disregard of the employer's interest. The claimant's addiction was not a mitigating factor affecting the claimant's state of mind. This is because to treat drug addiction as a mitigating factor would amount to a conclusion that the claimant's crime of theft could be excused by another course of criminal conduct: the illegal use of a drug.

d. Occupations in which all drug use reasonably may be forbidden

(1) Police and other public safety officers

"Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."[28] Because they are charged with enforcing the law, work under dangerous conditions, and carry firearms, police may be disciplined or terminated for any illegal drug use, and be disqualified from receiving UI benefits. The same principles apply to other public safety officers, such as firefighters and emergency medical technicians. **Cases involving public safety officers should be referred to UI Policy and Performance.**

Example: A police officer, who was suspended after testing positive for cocaine, was terminated for smoking marijuana (prior to legalization) during the suspension. The claimant was properly disqualified under the knowing violation branch of § 25(e)(2).[29]

(2) Truck drivers

Truck drivers and other drivers of commercial motor vehicles are subject to federal laws designed to help prevent accidents and injuries resulting

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[27] *Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training*, 422 Mass. 1007 (1996).

[28] *Attorney Gen. v. McHatton*, 428 Mass. 790, 794 (1999), *quoting Police Comm'r of Boston v. Civil Serv. Comm'n*, 22 Mass. App. Ctg. 364, 371 (1986).

[29] *City of Boston v. Deputy Director of the Division of Employment and Training*, 59 Mass. App. Ct. 225 (2003).

from the misuse of alcohol or use of controlled substances.[30] To maintain a commercial driver's license (CDL), drivers are subject to rules about drug and alcohol testing, which are designed to protect public safety while also protecting the privacy rights of drivers. Commercial drivers may be subject to testing before they are hired;[31] randomly,[32] based on reasonable suspicion,[33] or post-accident[34] while employed; before returning to duty after having failed a test;[35] and after returning to duty (follow-up testing).[36] Testing for controlled substances is performed on samples of urine,[37] but testing for alcohol may also be performed on saliva or breath.[38]

Where an employer establishes that the claimant was employed as a truck driver subject to U.S. Department of Transportation (USDOT) regulations and has been discharged in accordance with those regulations for illegal drug use, benefits will be denied. If a claimant was terminated due to the loss of a license that the claimant needed for work, the separation may be considered a voluntary quit. See *Chapter 6- Separations*.

Under the federal regulations:

- A driver who refuses to submit to a required drug or alcohol test[39] must not be returned to a safety-sensitive position.[40]

- Samples may only be taken for testing by trained, authorized collectors[41] at a collection site meeting federal standards[42] using an approved collection kit,[43] and following approved collection procedures to ensure the integrity of samples.[44]

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[30] 49 C.F.R. § 382.101

[31] 49 C.F.R. § 382.301

[32] 49 C.F.R. § 382.305

[33] 49 C.F.R. § 382.307

[34] 49 C.F.R. § 382.303

[35] 49 C.F.R. § 382.309; 49 C.F.R. § 40, Sub-part O.

[36] 49 C.F.R. § 382.311; 49 C.F.R. § 40, Sub-part O

[37] 49 C.F.R. § 40 Sub-parts C-F.

[38] 49 C.F.R. § 40 Sub-parts K-N.

[39] 49 C.F.R. § 40.191

[40] 49 C.F.R. § 382.211

[41] 49 C.F.R. § 40.31

[42] 49 C.F.R. § 40.41

[43] 49 C.F.R. § 40.49

[44] 49 C.F.R. § 40.43

- Samples must be properly split (split samples, or split specimens) so that a positive test of one sample can be verified with the other sample if requested.[45]

- The "chain of custody" of each sample must be documented.[46] Samples must be sent following proper procedures to certified testing labs.[47]

- The testing lab must follow certain testing procedures when testing the samples[48] and may only test for the presence of five named classes of drugs: (1) Marijuana metabolites, (2) Cocaine metabolites, (3) Amphetamines, (4) Opiate metabolites, and (5) Phencyclidine (PCP).[49] The laboratory must also test the sample to make sure that it was not diluted or otherwise adulterated.[50]

- If a sample is found to be not negative for one of the listed classes of drugs, or is found to have been adulterated, a confirmatory test is run on the same sample.[51]

- A Medical Review Officer (MRO) must notify the employee of the non-negative test and evaluate any evidence offered of a legitimate medical explanation for the test result.[52] If the MRO finds that there was no legitimate medical reason for the non-negative result, the MRO must offer the employee the chance to have the split specimen tested.[53]

- A driver who has been found to have violated USDOT regulations related to drugs and alcohol may not return to duty in any safety-sensitive position for any employer until and unless the driver has completed an evaluation, referral, and education/treatment process performed by an approved substance abuse professional.[54]

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[45] 49 C.F.R. § 40.71

[46] 49 C.F.R. § 40.73

[47] 49 C.F.R. § 40.81

[48] 49 C.F.R. § 40.83

[49] 49 C.F.R. § 40.85

[50] 49 C.F.R. §§ 40.91, 40.93

[51] 49 C.F.R. § 40.87

[52] 49 C.F.R. § 40.145

[53] 49 C.F.R. § 40.153

[54] 49 C.F.R. § 40.285

e. Drug and alcohol testing

(1) Fact Finding

When a claimant has been discharged for failing a drug or alcohol test, further fact finding is needed because “[a] positive drug test result is not alone sufficient to establish a violation of the employer’s drug policy.”[55]

To meet its burden under § 25(e)(2), the employer must establish that it had a valid reason for requiring the test, that the test itself was conducted in a way that ensures the reliability of the test result, and that, unless the claimant was in one of the safety-sensitive positions listed above, there was some link between the results of the test and the claimant’s work, such as evidence of impairment at work.

To determine whether a claimant is disqualified based on a discharge related to a failed drug or alcohol test, the following factors must be considered:

- Was there a valid reason for requiring the test?
    - Random testing is presumed to be unreasonable, unless the claimant works in a safety-sensitive position or is subject to a Collective Bargaining Agreement (CBA) that provides for random drug and alcohol tests.
    - If the test was not random, the parameters for requiring the claimant to submit to the test must have been reasonable, uniformly applied, and previously communicated to the claimant.

[55] *Thomas O’Connor & Co., Inc. v. Commissioner of Employment and Training (No. 1).* 422 Mass. 1007, 1007 (1996).

For example, if the test was ordered based on reasonable suspicion, what was the basis for suspicion?

  - Was the test reliable? If an employer establishes that its testing protocol meets or exceeds the USDOT requirements discussed in the preceding section, the test is presumed to be reliable.
  - Was there evidence of use, possession, or impairment at work?

(2) Basis of allegations or reason for testing

- Was there any evidence of impairment at work or relating to work?
- Did the claimant admit to using, possessing, or being under the influence at work?
- Were there any previous incidents in which the claimant had used, possessed, or been under the influence of drugs or alcohol at work?
- If the claimant was tested, was the claimant tested because of the claimant's behavior or an accident, or was the claimant selected for random testing?
- If the claimant was selected for random testing, how was the claimant selected?
  - Does the claimant perform safety-sensitive work that would justify random testing?
  - Safety-sensitive work is work in which employees present a safety threat to themselves or others if they perform the work while impaired, such as:
    - ✓ Operating a motor vehicle;[56]
    - ✓ Grinding tools;[57] or
    - ✓ Operating heavy machinery.
- If the claimant was not selected for random testing, what were the facts that lead to the claimant being tested? Was the claimant suspected of being under the influence of alcohol or drugs in the workplace based on specific, contemporaneous, articulable

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[56] See *Webster v. Motorola*, 418 Mass. 425, 432-33 (1994).

[57] See *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 393 (1994).

observations concerning the claimant's appearance, behavior, speech or body odors?[58]

(3) Test and chain of custody

The employer has the burden of establishing that the drug-testing protocol supports a finding that the test results are accurate. The following factors should be considered in determining the weight to be given the test results.

- What was the protocol for taking the specimen?
- Was the protocol followed? If not, how and why did actual practice depart from the protocol?
- Was the collector someone other than the immediate supervisor of the donor?
- Was a collector trained by a qualified trainer?
- Was a trained observer of the same gender as the donor used?
- Did the donor observe the specimen being poured into the specimen bottles and initial the seal on each bottle?
- Who processed the specimen?
- What laboratory tested the specimen?
- Was the laboratory certified by the Substance Abuse and Mental Health Services Administration?
- What was the chain of custody for the specimen?
- Did the chain of custody form contain the employer's name, the donor's name and an identification, specimen identification number, date and time of collection, and the name and address of the certified laboratory where the specimen will be tested?
- Did each entity that had custody of the samples sign the form and indicate when they were received, when they were transferred, and to whom they were transferred?
- Did the testing laboratory sign for the specimens when received?

[58] 49 C.F.R. § 382.307

- If the test results form is separate from the chain of custody form, did all identifying information on both forms match?
- Was a split specimen obtained from the claimant?
- Did the employee have an opportunity to have the split sample tested?
- If the results of the test were positive, was the claimant given an opportunity for a second test?
- Were the test results given in numbers (such as nanograms per milliliter) rather than simply in pass/fail terms?
- Who received the results of the test?
- Were the results shared with the claimant?

Section 2. Suspensions for workplace violations

A. Statute and regulations

1. Statute

G. L. c. 151A, § 25(f) - Applies to both public and non-public employees

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—

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(f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

2. Regulations

430 Code Mass. Regs. § 4.04(4)

(4) A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit[,] that such suspension was for a fixed period of time as provided in such rules or regulations[,]and that a claimant has the right to return to his employment with the employing unit if work is available at the end of the period of suspension.

B. Principles

Section 25(f) only applies if (1) the suspension is disciplinary (as opposed to a suspension pending investigation), and (2) the violated rule or regulation was "established." To be established, the rule or regulation must have been "generally known to all employees" and either "published or established by custom." Also, the suspension must have been for a fixed period, and the claimant must have been entitled to return to work if work is available at the end of the suspension. If the suspension is indefinite, or if claimant does not have a right to return to work at its end, then the matter must be determined under §§ 29(a) and 1(r). Suspensions that

are of indefinite duration do not fall under § 25(f). Regardless of the length of the suspension, the disqualification from receiving benefits may not exceed 10 weeks.

Sometimes an employer will suspend an individual indefinitely for purposes of investigation rather than discipline. Because the suspension is not for purposes of discipline, § 25(f) does not apply. Because the employer is not alleging conduct warranting disqualification under § 25(e)(2), the individual, if otherwise eligible, should be approved for benefits under § 29(a) and § 1(r) as an imposed leave of absence.

The period of disqualification begins with the first day of suspension, not the effective date of the claim. For example, if a claimant is suspended for three months for violation of an established rule, and files a claim for benefits in the eighth week of the suspension, the claimant would be subject to disqualification for weeks eight, nine, and ten. In this case, the claim would be approved for weeks eleven, twelve, and thirteen (week thirteen is the end of the three month suspension). The adjudicator should set up a return to work issue at the flag level with a start date of the expected return to work date. Payment will automatically stop as of the return to work date. If the claimant does not return to work and tries to collect benefits, staff should reopen the claim and send a lack of work notification to the employer.

C. Circumstances and policies

1. Suspensions during layoffs

A claimant is suspended as discipline for violating an established workplace rule or policy during an indefinite period of layoff due to lack of work. Because there was no work available to the claimant, the claimant is not subject to disqualification under § 25(f). Note that if there is no recall date, a separation has occurred. If a claimant is suspended as discipline during a lay-off of fixed duration, § 25(f) does not apply until the recall date.

2. Discharge after suspension

After a period of suspension, a claimant is discharged by the employing unit. Create a discharge issue, effective the week of the discharge.

Section 3. Suspensions of public employees following indictment

Two statutes outside G. L. c. 151A prohibit suspended state (G. L. c. 30) and local (G. L. c. 268A) employees under indictment for misconduct in office from receiving "any compensation or salary,"[59] which the Supreme Judicial Court has held that includes unemployment insurance benefits.[60] (An indictment is the formal written accusation of a crime, made by a grand jury, for trial in the Superior Court.) Such individuals may, however, be entitled to benefits in the event of a non-disqualifying separation from other employment. But wages from such individuals' public employment may not be used to qualify for, or in the calculation of, benefits. **Whenever such an issue is identified, it should be sent to UI Policy and Performance.**

A. Circumstances and Policies

1. Change from suspension to discharge due to a conviction

Following a suspension because of an indictment, a public employee was discharged because of a conviction. The separation should be analyzed under § 25(e)(3). (See below.)

2. Exclusion of wages from suspending public employer following indictment

A public employee is indefinitely suspended from work, which is the only base period employment, pending an investigation for misconduct in office. The individual files a claim for benefits, which, because the claimant hasn't been indicted, must be approved, if the individual is otherwise eligible, under § 29(a) and § 1(r) as an imposed leave of absence. If the claimant subsequently is indicted by a grand jury, the status changes and the issue must be resolved under either c. 30 or c. 268A. The exclusion of wages and any loss of benefits would be effective the week in which the indictment occurs.

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[59] G. L. c. 30, § 59 (permitting the suspension from office of any "officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court" while "under indictment for misconduct in such office or employment" and prohibiting the receipt of "any compensation or salary during the period of such suspension"); G. L. c. 268A, § 25 (same, as applied to any "officer or employee of a county, city, town, or district, howsoever formed, including, but not limited to, regional school districts and regional planning districts, or of any department, board, commission or agency thereof").

Note that both statutes provide for reinstatement and payment of backpay and benefits, if the criminal proceedings terminate without a finding or verdict of guilty on any of the charges of the indictment.

[60] *Springfield vs. Director of the Division of Employment Security,* 398 Mass. 786, 790 (1986).

3. Use of wages from suspending employer after indictment; no conviction

A public employee is indicted and suspended for misconduct in office. The indictment terminates without a finding or verdict of guilty on any of the charges of the indictment. In such circumstances, both statutes provide for reinstatement and payment of backpay and benefits. If the employer does not offer work to the employee, the suspension has become a discharge, which must be determined under § 25(e)(2). All wages involving employment with this employer may be used to establish a claim, if the claimant is otherwise eligible. The period of time the back pay award is applied to may be disqualifying. See Chapter 9 - Total and partial unemployment - for more information about back pay.

Section 4. Convictions

A. Statute

G. L. c. 151A, § 25(e)(3)

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—

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(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and has earned an amount equivalent to or in excess of 8 times the individual's weekly benefit amount after the individual has left work … (3) because of conviction of a felony or misdemeanor.

B. Definitions

1. Felony or misdemeanor

G. L. c. 274, §1 defines the terms 'felony' and 'misdemeanor':

Felony - A crime punishable by death or imprisonment in the state prison

Misdemeanor - All other crimes

2. Conviction

The Supreme Judicial Court has interpreted the word "conviction" to mean a verdict of guilty by a jury, a finding of guilt by a judge after trial, or an admission or confession in open court by the accused. There must be a judgment and sentence of the court upon such verdict or confession of guilt with an imposition of sentence being the final judgment in a criminal case. When a case is continued without a finding after an admission to sufficient facts or a plea of nolo contendere or no contest, there is no conviction.

C. Principles

Section 25(e)(3) disqualifies a claimant who leaves work "because of conviction of a felony or misdemeanor[.]" It applies only when the separation results directly from such a conviction, and not because of any action by either the claimant or the employer occurring prior to the conviction. Nor does it matter whether the crime or misdemeanor of which the claimant was convicted was work-related.

If the separation occurred prior to the conviction, see Chapter 6 - Separations, for when disqualification as a voluntary quit may be appropriate under §

25(e)(1), if the claimant failed to notify the employer of the claimant's inability to report to work.

A disqualification under § 25(e)(3) also may be imposed even if the employer discharged the claimant not because of the conviction, but because the employer needed the work to be done. Similarly, a disqualification may be imposed under § 25(e)(1) when a claimant fails to notify the employer of an incarceration pending trial and thus of an inability to report for work.

The fact that a claimant is not convicted, and so is not disqualifiable under § 25(e)(3), does not automatically mean that the claimant is entitled to benefits. It must be determined under the preponderance of the evidence standard whether the claimant engaged in the alleged conduct and, if so, whether it is disqualifiable under § 25(e)(1) or (e)(2). Note that there is no inconsistence between a claimant being found not guilty of a crime and being disqualified for the same alleged conduct, because the standards of proof are different.

Appendix: Employee rights under Massachusetts law

A. Rights related to wages

Employees have the right to:

- meal breaks (one 30 minute meal break for those working more than 6 hours in one calendar day) under G. L. c. 149, § 100;
- equal pay for comparable work, without discrimination on the basis of gender in the payment of wages or salary under G. L. c. 149, § 105A;
- the protection of a minimum wage under G. L. c. 151, § 1 et. seq.;
- overtime pay under G. L. c. 151, §§ 1A and 1B; and
- weekly (or bi-weekly) payment of wages under G. L. c. 149, § 148.

B. Right to time off

Employees have the right to have one day off in every seven under G. L. c. 149, §§ 30 and 48.

C. Rights related to conditions of work

Employees have the right to:

- a workplace which is safe under G. L. c. 149;
- suitable seating under G. L. c. 149, § 103;
- a copy of the employee's personnel record within 5 business days of submission of a written request for such copy to the employer, and other rights related to personnel files under G. L. c. 149, § 52C; and
- protection from sexual harassment under G. L. c. 151B, § 4(16A).

D. Rights related to health and family

Employees have the right to:

- eligibility for family and medical leave under G. L. c. 149, § 52D;
- coverage for workplace injuries under G. L. c. 152;
- eligibility for parental leave under G. L. c. 151B, § 4.11A, c. 149, § 105D;

- unpaid leave of up to 15 days in any 12 month period for employees impacted by domestic violence or other types of abuse who work for employers with 50 or more employees (and retaliation against employees taking such leave is prohibited) under G. L. c. 149, § 52E;

- earned sick time with job protection to care for the employee's or the employee's family's health, or for employees dealing with domestic violence, under the Massachusetts Earned Sick Time law, G. L. c. 149, § 148C;

- protection from employment discrimination on the basis of pregnancy and pregnancy-related conditions such as lactation, and the right to accommodations for such employees, under the Massachusetts Pregnant Workers Fairness Act, G. L. c. 151B, § 4; and

- under the Small Necessities Leave Act, G. L. c. 149, § 52D(b):

  "An eligible employee shall be entitled to a total of 24 hours of leave during any 12-month period, in addition to leave available under the federal [Family and Medical Leave Act], to:

  (1) participate in a child's school activities, such as parent-teacher conferences or interviewing for a new school;

  (2) accompany the son or daughter of the employee to routine medical or dental appointments; and

  (3) accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services."

E. Rights related to protection against discrimination

Employers may not discriminate against employees on the basis of:

- race, color, religious creed, national origin or sex under G. L. c. 151B, § 4(1);
- gender identity and sexual orientation, G. L. c. 151B, § 4(1);
- religious practice under G. L. c. 151B, § 4(1A) (see section for conditions and exceptions);
- ancestry and genetics under G. L. c. 151B, § 19(a)(1);
- handicap, and individuals with a handicap have a right to a reasonable accommodation under G. L. c. 151B, § 4(16);
- age under G. L. c. 151B §§ 4(1B) and (1C);

- service in uniformed military or National Guard under G. L. c. 151B, § 4(1D); and
- a refusal to provide information to the employer regarding admission "to any public or private facility for the care and treatment of mentally ill persons" under G. L. c. 151B, § 9A (see section for exceptions and conditions).

F. Rights related to political freedom and privacy

Employees have a right to:

- bargain collectively under G. L. c. 150A;
- be free from pressure to cast a vote for or against a particular candidate or issue under G. L. c. 56, § 33; and
- be free from taking a lie detector test for an employer under G. L. c. 149, § 19B.

Employers are prohibited from:

- seeking information or making an employment decision based upon "(i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information" under G. L. c. 151B, § 4(9) (but see § 4(9 ½) for exceptions); and
- requesting or requiring that an individual indicate on an initial application form whether the individual has a criminal record or provide a copy of the individual's CORI (Criminal Offender Record Information) except under specified circumstances, under the CORI Reform Law, G. L. c. 6, § 172.

G. Rights related to protection against retaliation

Employers are prohibited from:

- retaliation for asserting a legal right under G. L. c. 149, § 52E (domestic abuse leave); and
- retaliation for asserting a legal right under § 148A (wage and hour law); and

- retaliation for asserting a legal right under G. L. c. 151B, § 4 (discrimination).