



## WISCONSIN APPELLATE COURT DISQUALIFIES SUBSTANCE ABUSERS FROM UNEMPLOYMENT BENEFITS

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A Wisconsin appellate court has denied unemployment benefits to an employee who was terminated after failing a random drug test. The case, MacNeil v. Labor & Industry Review Commission (1/19/12 Wis. Ct. App.), represents a significant victory for employers and another tool for curbing substance abuse in the workplace. The following describes the impact of the MacNeil decision and summarizes other tools available to HR professionals in the effort to maintain a drug-free workplace.

### **Impact of MacNeil on Unemployment Benefit Eligibility.**

In MacNeil, an employee was subject to random drug and alcohol testing under the employer's substance abuse policy. The employee tested positive for marijuana and was terminated. The employee filed for unemployment benefits, which the employer opposed.

The employee argued that he should be eligible for unemployment on several grounds. First, he claimed that the employer's substance abuse policy did not specifically prohibit off duty drug use. Since there was no evidence that the marijuana was used on Company premises or during work hours, the employee contended that the policy was not violated. Second, the employee argued that, despite having some indication of marijuana in his bloodstream, he was not "impaired" and, therefore, was safely performing his job. There was no objective evidence that his work performance was unsatisfactory at the time he was selected for the random testing. Finally, he argued that even if he tested positive for marijuana, his off duty drug use did not rise to the level of a "willful and substantial disregard" of a fundamental expectation of his employer and, therefore, did not constitute "gross misconduct" under the unemployment rules. He argued that, since his use was not connected to work, the fact that marijuana remained in his bloodstream was simply "negligent" at best. He claimed he did not intend to violate his employer's policy and believed that the drug had left his body before he reported to work.

The Court of Appeals was not persuaded by any of the employee's arguments. First, the Court declared that even though the policy did not specifically mention "off duty" drug use, the policy stated that the goal was to maintain a workplace that was "free from the influence of drug and alcohol abuse." The Court held that this language was sufficient to alert employees that it was a violation to have illegal drugs in their bloodstream while working. Second, the Court held that the employer had the right to determine what constitutes "impairment" for purposes of its policy, and that by establishing the levels of drugs or alcohol in the bloodstream considered to be a "positive" test result, the employer adequately defined "impairment" for its workforce. Third, the Court held that by knowingly ingesting the illegal drug with the knowledge of his employer's policy and the knowledge that the drugs could remain in his bloodstream, the employee engaged in a "willful and substantial disregard" of his employer's legitimate expectations, and, therefore, committed "gross misconduct" sufficient to disqualify him from unemployment benefits.

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By rejecting the employee's clever arguments, the MacNeil court significantly enhanced Wisconsin employers' ability to deter substance abuse in the workplace, as well as reducing their exposure to unemployment benefits for abusers. HR professionals should incorporate the MacNeil decision into their personnel policies and practices. Personnel manuals should warn employees that violations of the substance abuse policy will be used as grounds to deny unemployment, and HR professionals should consistently object to unemployment benefits to those who violate the policy.

In addition, despite the broad interpretation of the employer's policy in MacNeil, it is still necessary to have a "reasonable" policy in order to successfully oppose unemployment benefits. A "reasonable" policy must: 1) clearly identify the prohibitions, 2) clearly describe the punishment associated with any violation, 3) provide safeguards to ensure that the testing is valid, and 4) establish that the employee was aware of and understood the policy (generally through use of a signed acknowledgment form).

### **Denying COBRA Benefits Upon Violation of a Substance Abuse Policy.**

Another option to deter and punish workplace substance abuse is the denial of COBRA benefits. Under the federal COBRA rules, employees who are terminated are entitled to maintain their medical benefits for themselves and their dependents for up to 18 months (or longer if they qualify as "disabled"). However, if the employee is terminated for "gross misconduct," then the employee and their dependents can be disqualified from COBRA benefits.

In some circumstances the violation of a substance abuse policy could be considered "gross misconduct." However, care should be taken before this option is exercised. The definition of "gross misconduct" under the COBRA rules is not the same as the definition of "gross misconduct" in the unemployment laws. Most cases interpreting the COBRA "gross misconduct" standard have held that it requires an elevated level of deliberate action, often requiring perceptible harm to the employer. Some of the factors used by the courts include: 1) whether the conduct was illegal, 2) whether the conduct was actually disruptive or harmful to the employer's business or the workplace, 3) whether the conduct was a first offense, 4) whether the conduct was condoned or tolerated by the employer; and 5) whether there are mitigating circumstances in relation to the violation.

The failure of a random drug screen, without more, could be insufficient to disqualify an employee from COBRA benefits. However, flagrant drug use in the workplace, use which results in an accident with harm to an employee or damage to property, or engaging in sales of unlawful drugs during work hours or in the workplace has a much better chance of satisfying the "gross misconduct" test.

Once again, HR professionals should take advantage of this deterrent by warning employees about the possible disqualification for COBRA continuation and should evaluate COBRA disqualification as a punishment for serious substance abuse infractions in the workplace.

### **Reducing Worker's Compensation Benefits Upon Violation of a Substance Abuse Policy.**

A third deterrent available to HR professionals is the ability to reduce an employee's entitlement to worker's compensation benefits due to certain violations of a substance abuse policy.

First, under Wisconsin Statute 102.58, an employee's entitlement to worker's compensation benefits can be reduced by 15% (up to a maximum of \$15,000) when the accident is caused by the employee's

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intoxication or use of a controlled substance. In order to establish proof necessary to qualify for this reduction, employers should adopt policies which require an immediate drug and alcohol test by any employee injured in the workplace or during work hours. Delays in obtaining a test will generally destroy any opportunity of securing the reduction. Front line supervisors should be trained on the rule so they can immediately take action, in conjunction with first aid and medical treatment, to ensure that a drug and alcohol screen is obtained.

Second, under Wisconsin Statute 102.43(9)(c), which is a recent amendment to the worker's compensation statutes, an employee may be disqualified from receiving any temporary disability benefits if they violate a "written and regularly enforced" drug policy. The violation must occur after the employee suffers a work-related injury or illness and is in the healing period and available to perform restricted work. To take advantage of this policy, employers must have a written policy and must "regularly" (and consistently) enforce it. The policy should explain when drug tests may be required, and supervisors should be trained on detecting possible signs of substance abuse, particularly when employees are returning from absences.

### **Summary.**

As evidenced in the MacNeil decision, there are a number of tools available to HR professionals to deter and punish violations of a substance abuse policy, over and above the threat of discipline and termination. Most of these options contain similar requirements. First, the Company should adopt a clearly written, up-to-date substance abuse policy which contains the necessary provisions described above. Second, employees should be repeatedly warned, within the written policy, of the potential consequences of violations of the substance abuse rules, including possible denials of unemployment, disqualification of COBRA eligibility, and reduction of worker's compensation benefits. Third, both employees and supervisors should receive training on the provisions of the substance abuse policy. Fourth, documentation of the employee's receipt of the policy should be obtained and preserved in the employee's permanent personnel file. Finally, administration of the policy should be consistent to ensure that employees understand the consequences, to avoid claims of "singling out" employees, and to bolster the rights provided to employers under the above laws.

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