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RULE ADOPTIONS

LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF UNEMPLOYMENT INSURANCE

47 N.J.R. 1009(a)

Adopted Amendments: *N.J.A.C. 12:17-2.1, 9.1, 9.2, 10.1, 10.3* through *10.9* and *21.2*

Adopted Repeal: *N.J.A.C. 12:17-10.2*

Claims Adjudication - Voluntarily Leaving Work and Misconduct

Proposed: August 18, 2014, at *46 N.J.R. 1796(a)*.

Adopted: April 16, 2015, by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: April 17, 2015, as R.2015 d.079, **with non-substantial changes** not requiring additional public notice or comment (see *N.J.A.C. 1:30-6.3*).

Authority: *N.J.S.A. 43:21-7g*.

Effective Date: May 18, 2015.

Expiration Date: December 10, 2015.

Summary of Hearing Officer's Recommendations and Agency's Response:

A public hearing regarding the proposed amendments and repeal was held on September 5, 2014, at the Department of Labor and Workforce Development. David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony. One individual testified at the public hearing. Written comments were also submitted directly to the Office of Legal and Regulatory Services. After reviewing the testimony and written comments, the hearing officer recommended that the Department proceed with the amendments and repeal with non-substantial changes not requiring additional public notice or comment (see *N.J.A.C. 1:30-6.3*). The record of the public hearing may be reviewed by contacting David Fish, Executive Director, Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals.

1. Alan H. Schorr, Esq., Alan H. Schorr & Associates, P.C., Cherry Hill, New Jersey (on behalf of himself and the National Employment Lawyers Association - New Jersey, "a non-profit association of approximately 145 attorneys who devote more than half of their practice to representing employees in employment law matters").

2. Keith Talbot, Esq. and Sarah Hymowitz, Esq., Legal Services of New Jersey, Edison, New Jersey.

3. Charles Wowkanech, President, and Laurel Brennan, Secretary-Treasurer, New Jersey AFL-CIO, Trenton, New Jersey.

4. Barbara Sachau (comment submitted via email; no physical address provided).

1. COMMENT: Mr. Schorr asserts that the proposed regulatory definition of the term, "simple misconduct," would "remove the requirement of maliciousness from the definition of 'misconduct' and replace it with 'negligence,'" which Mr. Schorr maintains, "is an inappropriate standard for a statute that intends to disqualify individuals who act deliberately and maliciously," adding, "[t]he Legislature, in enacting the recent 'severe misconduct' standard, did not indicate in any way that the agency should lower the current standard of misconduct to include negligence in its definition."

Mr. Schorr maintains that under the Department's proposed definition of the term "simple misconduct," employees like Joan Silver, the appellant in *Silver v. Board of Review, 430 N.J. Super. 44 (App. Div. 2013),* "who repeatedly violate a policy, even by mistake, but do not intend to harm anyone, could be denied the safety net of unemployment," adding, "[t]he Appellate Division in *Silver* was very clear that such an interpretation would be unacceptable." On this point, Mr. Schorr concludes, "[a]ccordingly, the requirement of malicious action should not [page=1010] be removed from the definition of misconduct," adding, "[o]ur courts have made that point clearly and repeatedly, and the Agency should not ignore the Court's statutory interpretation." As to the Department's explanation within the August 18, 2014 notice of proposal, by reference to the explanation contained within its earlier November 2010 notice of proposal, that the definition for the term "simple misconduct" contained therein is taken verbatim from the seminal decision in *Beaunit Mills v. Division of Emp. Sec., 43 N.J. Super. 172 (App. Div. 1956),* gleaned by that court from the encyclopedia of United States law, American Jurisprudence, Mr. Schorr remarks:

The mention of "negligence" in this archaic reference book bore no relation whatsoever to the matter that was at hand in the case itself. Hence, the inclusion of the word "negligence" is purely dicta, and bears no legal significance in the case itself. The inclusion of "negligence" cannot possibly square with a regulation that requires deliberate, willful, and malicious intent in order to merit a disqualification. A negligent act is the exact opposite of a willful act.

Further relative to the mention of "negligence" within the proposed definition of the term "simple misconduct," Mr. Schorr asserts that "our Supreme Court specifically distinguished between 'willful and wanton misconduct' and negligence," citing the decisions in *McLaughlin v. Rova Farms, Inc. 56 N.J. 288, 305 (1970),* where plaintiff brought suit against the owner of a resort to recover money damages for personal injuries suffered when he dove from a platform into the resort's lake; *Tessler & Son v. Sonitrol Sec. Sys., 203 N.J. Super. 477, 484 (App. Div. 1985),* where plaintiff, operator of an auto body shop, sued the installer of a burglar alarm system for money damages after an undetected break-in, charging breach of contract, negligence, and "gross and wanton negligence"; and *Carlson v. Trans Union, LLC, 261 F.Supp. 2d 663, 665 (N.D. Tex. 2003),* where plaintiff brought suit against a credit reporting service for having reported inaccurate information on plaintiff's credit report and for having unreasonably failed to correct that information after notification from plaintiff that he had a dispute regarding its correctness.

Finally, relative to the Department's adoption of the definition for "simple misconduct" announced in *Beaunit Mills, supra.,* Mr. Schorr asserts the following:

Most directly relevant to this discussion is that the Department's reliance on *Beaunit Mills* for justifying insertion of a new negligence standard was expressly rejected by the Appellate Division in *Silver*. The *Silver* court correctly pointed out that the *Beaunit Mills* court, immediately after citing the Am. Jur. passage, stated, "Thus, disqualification under *N.J.S.A. 43:21-5(b)* is warranted only when the employee's conduct that resulted in his or her discharge had 'ingredients of willfulness, deliberateness and intention.'" *Silver* at 52.

Mr. Schorr maintains that, "the courts have clearly ruled that it would be a legal error to disqualify claimants for acts of negligence, and that reliance upon the *Am. Jur.* passage in *Beaunit Mills* is erroneous," adding, "[t]o the extent that the mention of negligence in *Beaunit Mills* was ever good law, it has been expressly rejected and overruled." In conclusion, on the issue of the definition of "simple misconduct," Mr. Schorr suggests that the Department should "leave the current definition of 'misconduct' in its current form and then distinguish the types of conduct by degree."

Regarding the proposed definition of the term "severe misconduct," Mr. Schorr states that, "[b]ased on the language of the statute, the proposed definition of severe misconduct is appropriate, so long as it does not include the proposed definition of 'misconduct' which includes the inappropriate negligence language."

Regarding the proposed definition of the term "malicious," Mr. Schorr states the following:

The proposed definition of "malicioius" includes an intent to cause any degree of injury or harm. Thus, such a definition would include the very type of "minor peccadillos" that our courts and the Department have repeatedly sought to exclude. For example, telling one's boss good-naturedly that his tie is ugly, or that a supervisor's dress makes her look heavy, is certainly an action that is intended to insult or injure one's feelings, even if in a joking manner. Yet, without any qualification in the regulation, claimants could find themselves disqualified because the regulation imposes no degree. We propose that the word "substantial" be inserted between the phrases "intent to cause" and "injury or harm." By making that clarification, there would be no misunderstanding that malicious actions would require an intent to cause substantial harm or injury, and not a minor peccadillo.

Regarding the proposed definition of the term "gross misconduct," Mr. Schorr states the following:

The proposed definitions of simple misconduct and severe misconduct both make clear that the actions, first and foremost, must constitute misconduct. Included in that definition is that "misconduct" must be connected with one's work. Perhaps this was just a drafting oversight. We propose that the definition of "gross misconduct" be left as is, except that it specify that it is an act of "misconduct." The concern is that if an employee gets in a bar fight over the weekend, completely unconnected with the work, and is charged with a fourth degree assault, or a fourth degree possession of a CDS offense, that person could be disqualified for gross misconduct, even though it was neither connected to the work nor that there was substantial evidence that the conduct adversely impacts the employer or the individual's ability to perform his or her job duties.

RESPONSE: With regard to Mr. Schorr's heavy reliance in support of his opposition to the Department's definition of the term "simple misconduct" on the opinion in *Silver, supra,* within the *Silver* opinion itself the court explained that it was constrained in its analysis by the then existing agency definition for the term "misconduct," which appeared within *N.J.A.C. 12:17-10.2(a).* That is, the court stated that, "[b]ecause *N.J.A.C. 12:17-10.2(a)* is the agency's own rule, it constitutes the controlling authority for disposition of claims based on misconduct," adding, "[u]ntil any new definition is promulgated by rule, the definition contained in the present version of *N.J.A.C. 12:17-10.2(a)* controls, except to the extent it is superseded by the 2010 amendment of the statute." Thus, when the court required that Ms. Silver's conduct be both "intentional" and "malicious" in order to be considered "misconduct" it did so because *N.J.A.C. 12:17-10.2(a) then* required that for an act to constitute misconduct, it must be "improper, intentional, connected with one's work, malicious *and* within the individual's control, and [be] either a deliberate violation of the employer's rules or a disregard of standards of behavior which the employer has the right to expect of an employee." (emphasis added) In so finding, the court observed that the test for "simple misconduct" (then "misconduct") contained within the Department's then existing rule was "more stringent than the *Am. Jur*. passage quote in *Beaunit Mills [v. Division of Emp. Sec., supra]*." As explained in multiple notices of proposal published by the Department, the first of which appeared in the New Jersey Register in October 2009, this circumstance, identified by the court in *Silver* (that is, the now acknowledged material difference between the then existing regulatory definition of "misconduct" and the case law definition of "misconduct") is precisely what had originally prompted the Department to propose a new definition for the term "simple misconduct" (then "misconduct), so as to ensure consistency between the regulatory definition of "simple misconduct" (then "misconduct") and the definition for "misconduct" announced by the court in *Beaunit Mills, supra.* That is, as explained in both the October 2009 notice of proposal and the August 2014 notice of proposal, it had never been the Department's intent to modify through rulemaking the definition of "simple misconduct" (then "misconduct") contained within the *Beaunit Mills* opinion, so as require that an act be both deliberate *and* malicious in order to be considered "simple misconduct" (then "misconduct"). (emphasis added) Rather, it had been the Department's intent to paraphrase in rule the standard utilized by the court in *Beaunit Mills* and its progeny, which, as observed by the court in *Silver*, draws the critical distinction between intentional and deliberate (not malicious) conduct on the one hand and negligent or inadvertent conduct on the other (with the caveat that "negligence in such a degree or recurrence as to manifest culpability, wrongful intent, or evil design" would, indeed, constitute misconduct).

Mr. Schorr also asserts that "our courts" have "clearly and repeatedly" made the point that "the requirement of malicious action should not be removed from the definition of misconduct." That is simply not true. The *Silver* opinion contains a comprehensive discussion of the case law in New Jersey, starting with the opinion in *Beaunit Mills, supra,* relative to what constitutes "misconduct" (now "simple misconduct") within the context of administration of the Unem-

ployment Compensation Law. [page=1011] Following is a list of post-*Beaunit Mills* reported decisions discussed by the *Silver* court:

Demech v. Board of Review, 167 N.J. Super. 35 (App. Div. 1979). In this case, according to the *Silver* court, "[c]iting *Beaunit Mills*, we [the Appellate Division] explained that '[j]udicial attempts to imbue the term ["misconduct"] with substantive meaning have . . . insisted upon the ingredients of *willfulness, deliberateness and intention* if an employee's act is to qualify as misconduct'" (emphasis added).

Smith v. Board of Review, 281 N.J. Super. 426 (App. Div. 1995). In this case, according to the *Silver* court, the majority, "applying the *Beaunit Mills* standard, held that the record supported the Board's finding of a *deliberate* refusal to comply with the employer's work rules" (emphasis added).

Parks v. Board of Review, 405 N.J. Super. 252 (App. Div. 2009). In *Parks*, according to the *Silver* court, "[w]e [the Appellate Division] again emphasized the need for *deliberate or intentional conduct* [in order to constitute misconduct], this time for an employee who was fired because of excessive absenteeism, based on four absences" (emphasis added). The *Silver* court added, regarding the holding of the Appellate Division in *Parks*, that after quoting the *Am. Jur*. passage and citing *Beaunit Mills*, the court stated: "Thus, disqualification under *N.J.S.A. 43:21-5(b)* is warranted only when the employee's conduct that resulted in his or her discharge had 'the ingredients of *willfulness, deliberateness and intention*.' (quoting *Demech, supra.)* (emphasis added).

Borowinski v. Board of Review, 346 N.J. Super. 242 (App. Div. 2001) and *Broderick v. Board of Review, 133 N.J. Super. 30 (App. Div. 1975).* In each of these cases, according to the *Silver* court, "*intentional* acts of insubordination were deemed to constitute misconduct" (emphasis added).

The *Silver* court's discussion of each of these decisions is absent any mention whatsoever of maliciousness as a precondition to a finding of misconduct. Add to that, several known unreported post-*Beaunit Mills*, pre-*Silver*, decisions of the Appellate Division in *Smith v. Board of Review (2006 N.J. Super. Unpub. LEXIS 2476); Gonzalez v. Board of Review, and Goodway Car Wash, Inc. (2008 N.J. Super. Unpub. LEXIS 1410); Turner v. Board of Review and Motivated Security Services, Inc. (2009 N.J. Super. Unpub. LEXIS 1723);* and *Brundage v. Board of Review and CPL* (*Laurelton Village*) LLC (Docket No. A-3563-09T1). In each of these unpublished Appellate Division decisions the court, as in the above-discussed published opinions, followed the holding in *Beaunit Mills* and cited the definition for "misconduct" contained therein. As with the published opinions discussed above, in none of the unpublished opinions is maliciousness mentioned as a precondition to a finding of misconduct. In fact, to the Department's knowledge, the first time that any court in New Jersey had ever included maliciousness as a precondition to a finding of misconduct was when the Appellate Division issued its opinion in *Silver* and, in that instance, as explained in detail above, the court did so based primarily, if not entirely, on the definition of the term "misconduct" which appeared at that time within *N.J.A.C. 12:17-10.2(a)*; a definition, which the court stated would be the controlling authority "*until any new definition is promulgated by rule*" (emphasis added). Incidentally, a Shepard's(R) search of the *Beaunit Mills* opinion (the *Beaunit Mills* opinion which contains the verbatim definition of "misconduct" which the Department is adopting through this rulemaking as its definition of "simple misconduct") conducted at the time of this rulemaking revealed a positive history of 25 opinions, each of which followed the holding in *Beaunit Mills*. The same Shepard's(R) search revealed no negative history; which is to say, the *Beaunit Mills* opinion is good law.

As mentioned above, in support of his assertion that the Department's inclusion, pursuant to the holding in *Beaunit Mills*, of "negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design" within the definition of "simple misconduct" is inconsistent with case law distinguishing between "wilful and wanton misconduct" and "negligence," Mr. Schorr cites the holdings in *McLaughlin v. Rova Farms, Inc. 56 N.J. 288, 305 (1970),* where plaintiff brought suit against the owner of a resort to recover money damages for personal injuries suffered when he dove from a platform into the resort's lake; *Tessler & Son v. Sonitrol Sec. Sys., 203 N.J. Super. 477, 484 (App. Div. 1985),* where plaintiff, operator of an auto body shop, sued the installer of a burglar alarm system for money damages after an undetected break-in, charging breach of contract, negligence and "gross and wanton negligence"; and, *Carlson v. Trans Union, LLC, 261 F.Supp. 2d 663, 665 (N.D. Tex. 2003),* where plaintiff brought suit against a credit reporting service for having reported inaccurate information on plaintiff's credit report and for having unreasonably failed to correct that information after notification from plaintiff that he had a dispute regarding its correctness. These three decisions have nothing whatsoever to do with the term "misconduct" as it is used within the Unemployment Compensation Law. By contrast, the published court opinions cited by the court in *Silver*, starting with *Beaunit Mills*, and including *Demech v. Board of Review, supra; Parks v. Board of Review, supra; Borowinski v. Board of Review, supra;* and *Broderick v. Board of Review, supra;* as well as the unpublished opinions cited by the Department above, including *Gonza-*

lez v. Board of Review, and Goodway Car Wash, Inc., supra; Turner v. Board of Review and Motivated Security Services, Inc., supra; Brundage v. Board of Review and CPL (Laurelton Village) LLC, supra; and *Smith v. Board of Review, supra*; each directly addresses the definition of "misconduct" (now "simple misconduct") within the context of the Unemployment Compensation Law and each utilizes the test for misconduct announced in *Beaunit Mills*, which does not require maliciousness as a precondition to a finding of "misconduct" (now "simple misconduct"). It is this line of cases, directly on point and consistent in its interpretation of the Unemployment Compensation Law, with which the Department now seeks to ensure consistency in rulemaking.

Relative to the Department's proposed definition of the term "malicious," namely, when an act is done with the intent to cause injury or harm to another or others or when an act is substantially certain to cause injury or harm to another or others, Mr. Shorr suggests that the word "substantial" be inserted between the phrases "intent to cause" and "injury or harm." He explains that "by making that clarification, there would be no misunderstanding that malicious actions would require intent to cause substantial harm or injury, and not a minor peccadillo." The Department believes that the proposed definition of the term "malicious" is appropriate. Furthermore, the Department believes that introducing the word "substantial" between the phrases "intent to cause" and "injury or harm" would achieve the opposite of clarification; that is, it would cause unnecessary confusion. If one acts with the intent to cause injury or harm to another or others or where an act is substantially certain to cause injury or harm to another or others, he or she has acted with malice; plain and simple.

As to Mr. Schorr's comment regarding the definition of the term "gross misconduct," he is incorrect if he believes that there is some additional requirement for a gross misconduct disqualification beyond having been discharged because of the commission of an act punishable as a crime of the first, second, third, or fourth degree under the "New Jersey Code of Criminal Justice," *N.J.S.A. 2C:1-1* et seq. The definition for the term "gross misconduct" that appears in the rule is taken directly from the statute; specifically, *N.J.S.A. 43:21-5(b)*, which states in pertinent part, "If the discharge was for gross misconduct connected with the work because of the commission of an act punishable as a crime of the first, second, third or fourth degree under the "New Jersey Code of Criminal Justice," *N.J.S.A. 2C:1-1* et seq., the individual shall be disqualified ..." In other words, under the statute, an act is considered "gross misconduct connected with the work" if the individual was discharged because of the commission of an act punishable as a crime of the first, second, third, or fourth degree under the "New Jersey Code of Criminal Justice, *N.J.S.A. 2C:1-1* et seq.

2. COMMENT: Keith Talbot and Sarah Hymowitz, of Legal Services of New Jersey (hereafter, "Legal Services") take issue with the Department's definition for the term "simple misconduct." Legal Services asserts, as does Mr. Schorr, that the definition of simple misconduct "should remain the same and retain the requirement of maliciousness."

Regarding the need to distinguish between the terms "simple misconduct" and "severe misconduct," Legal Services suggests that the Department make "multiple acts of simple misconduct a requirement of severe misconduct." In support of this suggestion, Legal Services states the following:

[page=1012] A regulatory requirement of repeated acts of simple misconduct to justify a severe misconduct disqualification is supported by the severe misconduct statute. Both "repeated violations of an employer's rule or policy" and "repeated lateness or absences after a written warning by an employer" explicitly require proof of repeated acts of simple misconduct. The example of "falsification of records" does not explicitly require proof of repetition, but to not require proof of more than one act of "falsification of records" would lead to disproportionately punitive results ... To ensure that the penalty is proportionate to the act of misconduct, an isolated falsification of an employer's record, which could well be unintentional but careless, should be penalized as an act of simple misconduct. Only if the worker repeats the act of misconduct should he be completely disqualified from benefits for severe misconduct.

Similarly, "physical assault or threats that do not constitute gross misconduct" or "theft of company property" would have to be relatively minor in order to not constitute gross misconduct (for example, simple assault, shoplifting property of value less than $ 200.00). In such cases, a complete disqualification from unemployment benefits for a one-time infraction would be disproportionate to the severity of the act. Accordingly, proportionality can only be ensured by a requirement of repeated acts of simple misconduct.

Instances of "misuse of benefits," "misuse of sick time," and "abuse of leave" would similarly have a disproportionately punitive impact on claimants if they resulted in complete disqualifications from benefits for isolated incidents . . . The use of repetitive violations is also appropriate with regard to excessive use of intoxicants on the work premises. Under the New Jersey Law Against Discrimination, alcoholism and addiction have been considered disabilities that invoke reasonable accommodation considerations. In these instances, reasonable accommodation would often entail giving the worker an opportunity to treat and overcome the addictive illness. Since the employment rights of workers

require multiple violations under reasonable accommodation standards, it is also appropriate to require multiple violations in this instance to justify a severe misconduct disqualification.

Finally, Legal Services maintains that certain amendments contained within the August 2014 notice of proposal "introduce a new concept into the definition of misconduct which focuses on the 'employer's interest,'" which it maintains, "could be interpreted to impinge on concerted activity of workers protected by the National Labor Relations Act."

RESPONSE: Regarding the objection of Legal Services to the Department's verbatim adoption of the *Beaunit Mills* definition of "misconduct" as the regulatory definition for the term "simple misconduct," and its related assertion that the Department should include "maliciousness" as a precondition to a finding of "simple misconduct," the Department would refer the commenter to the Response to Comment 1 above.

Regarding Legal Services' suggestion that the Department distinguish between the terms "simple misconduct" and "severe misconduct," by making multiple acts of simple misconduct a requirement of severe misconduct, by Legal Services' own account (as stated in their comment), this approach would be inconsistent with the 2010 amendments to the Unemployment Compensation Law. That is, as observed by Legal Services, there are multiple "examples" of severe misconduct which are included within the law, which do not require the commission of multiple acts. In fact, the vast majority of "examples" of severe misconduct contained within the law do not require multiple acts in order to constitute severe misconduct (for example, "falsification of records," "physical assault or threats that do not constitute gross misconduct," "misuse of benefits," "misuse of sick time," "abuse of leave," and "theft of company property"). By contrast, the approach taken by the Department to distinguish between "simple misconduct" and "severe misconduct" is consistent with the 2010 amendments to the Unemployment Compensation Law, while also remaining true to the holding in *Beaunit Mills* and its progeny (described in detail in the Response to Comment 1 above).

Finally, in response to the concern expressed by Legal Services that the Department's proposed definition of the term "simple misconduct" could be "interpreted to impinge on concerted activity of workers protected by the National Labor Relations Act," the following will be added on adoption to the definition of the term, "simple misconduct:" "Nothing contained within this definition should be construed to interfere with the exercise of rights protected under the National Labor Relations Act or the New Jersey Employer-Employee Relations Act."

3. COMMENT: The comments of Charles Wowkanech and Laurel Brennan, of the New Jersey State AFL-CIO (hereafter "AFL-CIO") are substantially similar to those of Legal Services. Specifically, the AFL-CIO takes issue with the Department's definition of the term "simple misconduct," and by extension it also takes issue with the Department's definition of the term "severe misconduct," based on their assertion that the definition for "simple misconduct" has been "significantly broadened ... which invites interpretations that would have a severe negative effect upon workers seeking unemployment insurance compensation because the ability to disqualify them would be enhanced under these new regulations." The AFL-CIO also expresses concern about the impact of the definition of "simple misconduct" on union activity, stating "we are concerned with the language regarding 'misconduct' that concerns 'wanton and willful disregard of the employer's interest' or to 'show an intentional and substantial disregard of an employer's interest'...We are concerned this language may be used to thwart or intervene with employees efforts to unionize or conduct activities to promote higher wages and better benefits which appears to be in conflict with the 'employer's interest.'"

RESPONSE: The Department refers the AFL-CIO to the responses to comments 1 and 2, which, taken together, are responsive of the comments submitted by the AFL-CIO.

4. COMMENT: Ms. Sachau's comments follow in their entirety:

ALL MISCONDUCT PENALTIES SHOULD BE INCREASED. NONE SHOULD BE DECREASED AT ANY TIME. GETTING TO WORK AND BEING THERE IS AN IMPORTANT PART OF THE EMPLOYER COUNTING ON HIS EMPLOYEES. THIS COMMENT IS FOR THE PUBLIC RECORD.

RESPONSE: The changes to periods of disqualification that are contained within the amendments are expressly dictated by P.L. 2010, c. 37, from which the Department has no discretion to deviate.

The following individual testified at the September 5, 2014, public hearing.

1. Carolyne S. Kalson, Esq., Brick, New Jersey.

COMMENT: The testimony of Ms. Kalson was substantially similar to the written comments submitted by Mr. Schorr.

RESPONSE: The Department refers Ms. Kalson to the Response to Comment 1 above, which is responsive of the comments submitted by Ms. Kalson.

Federal Standards Statement

The adopted amendments and repeal do not exceed standards or requirements imposed by Federal law. Specifically, the adopted amendments and repeal are not inconsistent with the Federal Unemployment Tax Act, *26 U.S.C. §§ 3301* et seq. Consequently, no Federal standards analysis is required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***):

SUBCHAPTER 2. DEFINITIONS

12:17-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

. . .

"Connected with the work" means not only misconduct that occurs in the course of employment during working hours, but includes any conduct that occurs outside of working hours or off the employer's premises where there is substantial evidence that the conduct adversely impacts the employer or the individual's ability to perform the duties of his or her job.

. . .

"Gross misconduct" means an act punishable as a crime of the first, second, third, or fourth degree under the New Jersey Code of Criminal Justice, *N.J.S.A. 2C:1-1* et seq.

. . .

[page=1013] "Malicious" means when an act is done with the intent to cause injury or harm to another or others or when an act is substantially certain to cause injury or harm to another or others.

. . .

"Misconduct" means simple misconduct, severe misconduct, or gross misconduct.

. . .

"Severe misconduct" means an act which (1) constitutes "simple misconduct," as that term is defined in this section; (2) is both deliberate and malicious; and (3) is not "gross misconduct."

1. Pursuant to *N.J.S.A. 43:21-5*, as amended by P.L. 2010, c. 37, such acts of "severe misconduct" shall include, but not necessarily be limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute "gross misconduct," misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, or theft of time; except that in order for any such act to constitute "severe misconduct," it must also (1) constitute "simple misconduct"; and (2) be both deliberate and malicious.

"Simple misconduct" means an act which is neither "severe misconduct" nor "gross misconduct" and which is an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior that the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. ***Nothing contained within this***

definition should be construed to interfere with the exercise of rights protected under the National Labor Relations Act or the New Jersey Employer-Employee Relations Act.*

. . .

SUBCHAPTER 9. CLAIM ADJUDICATION--VOLUNTARILY LEAVING WORK

12:17-9.1 Disqualification for voluntarily leaving--general principals

(a) An individual shall be disqualified for benefits for the week in which he or she has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works eight weeks in employment, which may include employment for the Federal government, and has earned in employment at least 10 times the individual's weekly benefit rate, as determined in each case. See *N.J.S.A. 43:21-5(a)*.

(b)-(e) (No change.)

12:17-9.2 Voluntarily leaving secondary part-time employment

(a) A worker, who is employed by two or more employers, one of which is full-time work and the other(s) part-time work, who is separated from the full-time employment and becomes eligible for benefits, and subsequently voluntarily leaves the part-time employment, shall be subject to a partial disqualification for voluntarily leaving the part-time employment. An individual may avoid partial disqualification if he or she can establish good cause attributable to such work as defined in *N.J.A.C. 12:17-9.1(b)*. The partial disqualification amount is determined by dividing the total part-time earnings during the eight-week period immediately preceding the week in which the separation occurred by the total number of weeks the individual worked in that part-time employment during the eight-week period. The partial earnings amount is then deducted from the partial weekly benefit amount. The partial disqualification shall remain in effect until the individual becomes reemployed and works eight weeks in employment, which may include employment for the Federal government, and he or she has earned in employment 10 times the individual's weekly benefit rate, as determined in each case.

1.-2. (No change.)

(b) (No change.)

SUBCHAPTER 10. CLAIMS ADJUDICATION--MISCONDUCT CONNECTED WITH THE WORK

12:17-10.1 Disqualification for misconduct connected with the work--general principles

(a) An individual shall be disqualified for benefits for the week in which the individual has been suspended or discharged for simple misconduct connected with the work, and for the seven weeks that immediately follow that week. (See *N.J.S.A. 43:21-5(b)*)

(b) An individual shall be disqualified for benefits for the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the Federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case.

(c) (No change in text.)

(d) If the individual's discharge was for gross misconduct connected with the work because he or she committed an act punishable as a crime of the first, second, third, or fourth degree under the New Jersey Code of Criminal Justice, *N.J.S.A. 2C:1-1* et seq., the individual shall be disqualified for benefits for the week in which he or she was discharged and for each week thereafter until the individual becomes reemployed and works eight weeks in employment and has earned at least 10 times the individual's weekly benefit rate. The individual will have no benefit rights based upon wages from that employer for services rendered prior to the day upon which he or she was discharged.

(e) (No change in text.)

(f) To sustain disqualification under this section, the burden of proof is on the employer to show through written documentation that the employee's actions constitute misconduct. However, in the case of gross misconduct, the following apply:

1. Where an employer provides sufficient evidence to establish that a claimant was discharged for gross misconduct connected with the work, prosecution or conviction shall not be required to sustain that the claimant has engaged in gross misconduct.

2. If an individual has been convicted of a crime of the first, second, third, or fourth degree under the New Jersey Code of Criminal Justice, *N.J.S.A. 2C:1-1* et seq., in a court of competent jurisdiction, such conviction shall be conclusive as to a finding of gross misconduct.

12:17-10.2 Discharge or suspension for unauthorized absence

(a) An individual shall be disqualified for benefits for simple misconduct connected with the work, if he or she did not have good cause for being absent from work, or failed without justification to take steps necessary to notify the employer of the absence and the reason therefor.

(b)-(c) (No change.)

12:17-10.3 Discharge or suspension for tardiness

(a) Tardiness shall constitute simple misconduct if it was:

1.-2. (No change.)

12:17-10.4 Discharge or suspension for falsification of application or other records

An individual shall be considered to have committed an act of simple misconduct when it is established that he or she falsified an employment application or other records required by the employer, or omitted information which created a material misrepresentation of his or her qualifications or suitability for the job.

12:17-10.5 Discharge or suspension for insubordination or violation of an employer's rule

(a) An individual shall be considered to have been discharged for an act of simple misconduct where it is established that he or she has committed an act of "simple misconduct" and met one of the following:

1.-3. (No change.)

12:17-10.6 Discharge or suspension for unsatisfactory work performance

An individual's discharge for failure to meet the employer's standard(s) relating to quantity or quality of work shall not be considered simple misconduct, unless it is established that he or she deliberately [page=1014] performed below the standard(s), in a manner that is consistent with "simple misconduct," and that the standard(s) was reasonable.

12:17-10.7 Discharge or suspension for failure to observe safety standards

Where an individual has violated a reasonable safety standard imposed by the employer, such violation shall constitute an act of simple misconduct if the violation is consistent with the definition of "simple misconduct."

12:17-10.8 Failing or refusing to take an employer drug test

(a) Where a drug-free workplace and/or drug testing is a prerequisite of employment, an employee who tests positive for illegal drugs on a bona fide drug test of the employer or refuses to provide a test sample for the employer violates a condition of employment. If separated from employment for this reason, the employee shall be disqualified for benefits for simple misconduct connected with such work.

(b) (No change.)

SUBCHAPTER 21. RELIEF FROM BENEFIT CHARGES

12:17-21.2 Reasons for separation

(a) A base year employer may obtain relief from the charges for benefits paid to a former employee if the claimant was separated from his or her work with such employer due to any of the following reasons:

1. (No change.)

2. The claimant was discharged for willful misconduct connected with the work;

3.-6. (No change.)