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ABSENTEEISM

One of the most common reasons for a disqualifying discharge is excessive and chronic absenteeism, which has been consistently held to be misconduct when the absences are without justifiable cause, timely notification to the employer and without permission of the employer.

Many employers have instituted point system attendance policies to enable them to deal more uniformly with employees. Many of these are no-fault policies, in which the mere accumulation of points (similar to demerits) determines the employee's ability to remain employed. In these no-fault policies, no distinction is made between not showing up for work and an absence due to illness. Some policies allow exceptions for illness and other personal emergencies, in which case an employee would not lose his job because of illness. Most require the employee to furnish a doctor's note or proof of illness. Some policies are a composite of both, in which illness is excused to the extent that only one day of a multiple day's absence due to illness is charged against the employee. While employers do have the right to enact their own attendance policies, they may not legislate for the Commission, which is governed by the Act. See *Tynes*. Again, the purpose and objective of the Act must be considered. Unemployment compensation is to be provided for employees who are separated through no fault of their own. Illness of the employee falls into that category. It is reasonable for an employer to require proof of that illness. However, while absence due to illness may justify an employer in discharging an employee, such absence does not amount to willful misconduct precluding payment of unemployment. See *Vester v. Board of Review of Oklahoma Employment Sec.Com'n.*, 697 P2d 533 (Okla. 1985). Further, it has been consistently held by the Commission that even if the employee has accumulated points, if the final absence is justified thereby placing the employee over the point limit, then the employee has not been discharged for willful misconduct. Also, any point system which charges points against an employee for an absence due to illness even with a doctor's note and which points can accumulate to cause an employee's separation is contrary to the purpose and objective of the act and does not come within the definition of misconduct as outlined in *Vester*. While employers may find point system policies make it easier to administer their absenteeism policy, they will also find that violation of those policies alone will not be binding on the Commission in adjudicating misconduct.

ABSENTEEISM

Company Attendance Policy

Primary case law: *Tynes v. Uniroyal Tire Co. et al.*, 679 P2d 1310 (Okla. App. 1984)

90 AT 4805 BR

Facts: Claimant failed to follow the company attendance policy by not calling in to report that he would be absent. He also failed to submit a medical statement to support his absence as required by the company policy.

Held: Claimant's actions were a willful disregard of the employer's interests.

Result: Benefits denied.

89 AT 2478 BR

Facts: Claimant was discharged for excessive absences as per the company attendance policy. The claimant notified the employer and produced a doctor's statement every time he was absent. The only time he was reprimanded was when he had transportation problems.

Held: It may be company policy, but personal illness is not misconduct.

Result: Benefits allowed.

81 BR 1998

Facts: Claimant had a medical problem that required surgery and two weeks off from work. She was terminated by the employer because they believed the two weeks off to be unfair to other employees.

Held: A medical problem is not an act of misconduct. Discharge was not for misconduct.

Result: Benefits allowed.

SEE ALSO: Excessive Absences, 96 AT 5113 BR; 89 AT 2524 BR; Personal Illness, 99 AT 00155 BR, 97 AT 1809 BR, 96 AT 6572 BR, 95 AT 7952 BR; Family Illness, 96 AT 3050 BR

ABSENTEEISM

Excessive Absences

89 AT 2524 BR

Facts: Claimant experienced a period of excess absenteeism and tardiness but explained or reported each occurrence to her employer. Claimant had sufficient reason for her absences and there is no evidence that the absences and tardies were within her control.

Held: As the absences were not within claimant's control, there is no willful misconduct.

Result: Benefits allowed.

89 AT 03644

Facts: Claimant was discharged for absence without notice. When the employer asked claimant's wife, she advised the employer that the claimant was in jail. Claimant made no attempt to notify his employer. Claimant had a history of attendance problems and had been previously suspended for the same. He had been treated under the employer's drug treatment program twice, the maximum allowed.

Held: Excessive absences are misconduct, especially after the claimant has received counseling and discipline for same by the employer.

Result: Benefits denied.

89 AT 7270 BR

Facts: Claimant had previously worked for the employer and had a problem with absenteeism at that time. Claimant was discharged for chronic absenteeism. All absences were unexplained or unjustified.

Held: Chronic unjustified absences are misconduct.

Result: Benefits denied.

81 BR 50

Facts: Claimant was absent on the Monday before payday on seven occasions and was absent on a Thursday before payday on one occasion. He was not paid for those days, but there were other absences for which he was paid. He was discharged for excessive absenteeism. Claimant testified that he was ill and his daughter had called in for him.

Held: Absenteeism may constitute misconduct when an employee is absent repeatedly and on numerous occasions so that, even though the absences may appear to be justified and even though the absences are reported to the employer, the entire course of his attendance demonstrates and leads to the conclusion that the employee is following a course of conduct that is detrimental to the employer. Claimant was consistently and habitually absent on Mondays and his contention that he was either sick or had car trouble those days is difficult to accept. Claimant's attendance record was very poor, to say the least, and his consistent failure to report to work on Mondays clearly constitutes misconduct connected with the work itself.

Result: Benefits denied.

Cross-reference: Attendance policy, 89 AT 2478 BR; Tardiness, 89 AT 6382 BR; Personal/Family Illness, 99 AT 0065 BR

ABSENTEEISM

Failure to Report to Work

00 AT 02248 BR

Facts: Claimant was discharged for failure to report to work or call in according to the company policy. Claimant had been provided a copy of the employee handbook. The absences were caused by the family being in a car accident and their car breaking down. The claimant had tried to call the employer but the employer's phone did not accept collect calls. The Appeal Tribunal found misconduct and denied benefits.

Held: The Board of Review on appeal found that there was no willful disregard of the employer's interest and therefore, no misconduct.

Result: Benefits allowed.

97 AT 7298 BR

Facts: Claimant was a food service supervisor at a corrections facility. The facility experienced flooding problems affecting the electrical and water purification systems. Claimant recommended an emergency food preparation program, which was denied. Claimant requested to be put on administrative leave. When he returned upon request, the unit manager informed the claimant that the food preparation area was safe for inmates. Claimant requested documentation as proof. The request was denied and claimant was told to return to work or be fired. Claimant refused to return and was discharged.

Held: As a food service supervisor, claimant's request for documentation was not unreasonable. No misconduct was shown.

Result: Benefits allowed.

90 AT 05579 BR

Facts: Claimant failed to report or call in on a scheduled workday. Claimant was ill and did not have a phone. Claimant admitted her error.

Held: This was an isolated offense. No willful misconduct was established.

Result: Benefits allowed.

97 AT 5330 BR

Facts: Claimant experienced problems with his car and was unable to drive it to work. He left work early on Thursday and did not work on Friday or the following Monday. When the claimant called in on Monday, he was told if he did not report to work on Tuesday, he would be discharged. Claimant did not show for work and was discharged.

Held: Claimant's actions in not arranging transportation to work showed a disregard of the employer's interests. Misconduct was established.

Result: Benefits denied.

90 AT 03503 BR

Facts: A new manager advised the claimant that employees would have to work some night shifts. Claimant, who had a good employment record, informed the manager that her husband did not wish her to work nights. The manager agreed to schedule the claimant around the night shifts, but claimant found out at the last minute that she was scheduled to work a Sunday night right after her second job. Claimant called the manager and told him she could not work that night, whereupon she was discharged.

Held: This was an isolated incident; no misconduct shown.

Result: Benefits allowed.

80 AT 6665; 80 BR 1366

Facts: Claimant was discharged for failure to attend a mandatory meeting of which she had been notified well in advance. Claimant felt that the meeting was not important and would not benefit her.

Held: Intentional failure to attend the mandatory meeting was misconduct.

Result: Benefits denied.

89 AT 9112 BR

Facts: Claimant was discharged after not reporting for work on a day that he was scheduled to work. Claimant had worked the same schedule for twelve years, so he knew what days he was to work. He had been given sufficient warning about missing work when he was scheduled.

Held: Claimant's actions were willful misconduct.

Result: Benefits denied.

81 AT 3677; 81 BR 1256

Facts: Claimant was on an approved medical leave until a certain date. To extend her leave, claimant was required to get paperwork from her doctor to the employer. After the leave expired, claimant contacted her doctor and was assured that the required paperwork had been mailed. However, her employer informed her that it had not been received. Claimant made no further effort to follow up. Claimant was terminated for failure to return from leave.

Held: Failure to report from leave or to properly insure that the leave was extended was misconduct.

Result: Benefits denied.

93 AT 04763 BR

Facts: Claimant failed to report to work at the proper time following a three-day suspension for not working his scheduled shifts. Claimant knew the employer's policy since he had been there two years.

Held: Misconduct established.

Result: Benefits denied.

Cross-references: Family illness, 96 AT 3050 BR; Personal illness, 96 AT 7944 BR, 96 AT 6572 BR; Without notice, 95 AT 5896 BR; On the job injury, 96 AT 8427 BR

ABSENTEEISM

Family Illness

99 AT 0065 BR

Facts: Claimant worked as a mechanic. He is a single parent with custody of three children all under the age of eight. In 1998, the claimant was absent from work for 49 days. Claimant was absent fifteen days for an appendectomy. The majority of the absences were due to illness of the children. Claimant properly notified the employer regarding the absences. In September 1998, claimant called in saying his daughter was sick, he needed to take her to the hospital, and he would be absent all day. Claimant reported to work the next day and was discharged. Claimant requested to be allowed to work part-time, but the employer replied that he could not use a part-time worker.

Held: Claimant's excessive absences do not measure to misconduct. All absences were properly reported. Absences due to illness of a close family member are not misconduct.

Result: Benefits allowed.

97 AT 5340 BR

Facts: Claimant was up all night with a child who had a fever. The next morning claimant over-slept and called her employer at 6:58 a.m. advising that she would not be in for the 7:00 a.m. shift. The employer claimed that the claimant had been previously warned about tardiness, but offered only hearsay testimony to support it.

Held: Claimant had no control over the illness of her child. There was no showing of willful misconduct.

Result: Benefits allowed.

96 AT 3050 BR

Facts: Claimant was aware of the employer's policy requiring employees to call in two hours before the start of their shift if they were going to be absent and also to call in every day of their absence. Claimant worked December 23rd, but went home because her eyes were hurting. On December 24th, she called her supervisor to advise that she would not be in because her daughter had chicken pox. She did not advise that she would not be in on December 25th. Claimant's husband was to have called in for her on December 25th, but was advised that claimant must call in for herself. Claimant returned to work on December 26th, but was terminated.

Held: Claimant did not take the steps necessary to retain her employment.

Result: Benefits denied.

81 BR 1804

Facts: Claimant took his pregnant wife to the hospital one night and due to complications was there until the next day. Claimant did not report to work and failed to call his employer. He was discharged.

Held: Generally, willful failure to notify the employer is misconduct, but emergency situations require exceptions. Claimant's failure to notify the employer was not willful misconduct.

Result: Benefits allowed.

Cross-reference: Improper request for leave, 97 AT 3624 BR; Without notice, 90 AT 7556 BR.

ABSENTEEISM

Personal Illness

Primary case law: *Vester v. Board of Review of OESC*, 697 P2d 533 (Okla. 1985)
Smith v. OESC, 803 P2d 1174 (Okla. App. 1990)

Other case law:

OESC and Board of Review of OESC v. Love, No. 93, 493 (Civ.App., Div.4, 3-28-00)

Facts: Claimant was described as a good worker. He did not have a telephone and was seven miles from the nearest pay phone. The employer knew this. One weekend claimant's leg was pierced by a piece of wood. When his leg began to swell, the claimant called his supervisor to advise what had happened. Claimant went into surgery and did not call his employer the following day. The next day his friend called the employer. The claimant returned to work the subsequent day with a doctor's note excusing him from work until the following week. Claimant was terminated for job abandonment. The Commission, Appeal Tribunal and Board of Review all denied benefits. The case was appealed to District Court.

Held: The Commission did not properly apply the law. The claimant's failure to notify his supervisor was ordinary negligence in an isolated instance.

Result: Benefits allowed.

Harris v. OESC, et al., No. 62, 713 (Okla.Civ.App., Div. 2, 1/21/86)

Facts: Claimant missed work due to alcoholism. Claimant argued that alcoholism is an illness, and therefore his absences should be excused.

Held: Alcoholism may be an illness, but it can be controlled. Willful misconduct shown due to excessive absenteeism was not approved by the supervisor.

Result: Benefits denied.

ABSENTEEISM

Case Applications

00 AT 2151 BR

Facts: Claimant was discharged because he did not call in to report his absence on November 3rd. Claimant was diagnosed with degenerative arthritis and was given medication by his doctor. On November 3rd claimant was scheduled to arrive at work at 7 a.m. A friend called the claimant and then arrived at claimant's home to find claimant so ill that he could not hold up his head. Claimant was taken to the hospital on November 4th and was released on November 5th.

Held: Claimant's failure to call in was not willful misconduct. He was very ill and unable to call.

Result: Benefits allowed.

90-07459 AT

Facts: Claimant was absent from work for medical reasons. She made an appointment with her dentist to treat two abscessed teeth. Claimant was discharged for not reporting to work. The employer asserted that if claimant had taken care of her teeth, she would not have missed work.

Held: There is no evidence of willful misconduct. Claimant's reason for absence was medical.

Result: Benefits allowed.

97 AT 1809 BR

Facts: Claimant was ill and off work for 45 days because of a cyst on her foot. After the first doctor's appointment she told the personnel department she might be off work for an extended period. She was given a form to request medical leave. She did not do so. Claimant was not allowed light duty since the injury was not work-related and not covered by workmen's compensation. The employer again requested a medical leave form from the claimant and a doctor's note. Claimant did not bring in either item and was discharged.

Held: Refusal to complete the form was a violation of the standard of behavior which an employer has the right to expect from an employee. Misconduct was shown.

Result: Benefits denied.

96 AT 6572 BR

Facts: Claimant sustained a non work-related injury. She returned to work one night but left. She then brought in two releases from her doctor for light duty until March 14th, then for full duty on March 25th. Claimant asked about sick leave, but her supervisor said she needed to talk to the store manager. She said she would return the following week, but she did not contact her employer again until one month later.

Held: Claimant exhibited disregard for her obligations to her employer. Misconduct established.

Result: Benefits denied.

96 AT 7944 BR

Facts: Claimant was given a leave of absence for surgery for thyroid cancer. She was to return to work the fourth day after surgery. Claimant was to bring in more documentation after her surgery. Claimant advised the employer that she would notify the employer when she was released to return to work. The day after surgery claimant's boyfriend went to get her check. Neither he nor claimant's daughter, who worked at the same place, were asked about the claimant's condition. Claimant was discharged for job abandonment.

Held: Claimant's length of leave of absence was decided without knowing when claimant would be able to return. It was not logical to expect that claimant would be able to speak with her employer immediately after surgery. Claimant had worked for the employer for years and the employer had some responsibility to check on claimant's welfare. No misconduct was shown.

Result: Benefits allowed.

90 AT 5843 BR

Facts: Claimant went on temporary approved maternity leave. The employer said it would hold claimant's position for six weeks. Claimant informed the employer she was ready to return to work. The employer informed claimant that she had been replaced.

Held: There is no evidence of misconduct on claimant's part. Claimant was discharged.

Result: Benefits allowed.

89 AT 6792 BR

Facts: Claimant was discharged for excessive tardiness and absenteeism. The majority of absences were due to illness and were reported to the employer.

Held: While the employer may have had a valid business reason, misconduct has not been established.

Result: Benefits allowed.

99 AT 00155 BR

Facts: The claimant worked as a general laborer. Claimant was injured at work in August 1997. The claimant, her attorney and the employer agreed upon a specific physician for treatment of her injury. The doctor released the claimant April 1998 with maximum medical improvement. Claimant was given a permanent impairment rating in May 1998. Claimant continued to experience discomfort from the injury. Claimant went to two chiropractors who restricted her from work. Claimant called in daily and took the doctor's slip to the human resources office. Claimant returned to work and was discharged for exceeding the maximum number of points allowed under the company attendance policy, as her absence was not approved by the human resources manager.

Held: Claimant had a valid medical reason for her absence from work. It was properly reported and did not constitute misconduct.

Result: Benefits allowed.

95 AT 7952 BR

Facts: Claimant was receiving treatment for a job related injury. She had been released for light duty while wearing a cast. When the cast was removed she told the doctor she did not feel she should return to work. The doctor would not write an excuse and claimant went to a doctor of her own choosing to obtain a note. The employer expected claimant to return to work since they had received a release from the other doctor. When the claimant did not return, the employer contacted the claimant to inform her that she was expected at work and if she missed further consecutive scheduled work days without calling in, she would be terminated. The claimant failed to call in each day to report her absence. When claimant did not return she was discharged.

Held: Claimant failed to follow employer's attendance policy. Misconduct shown.

Result: Benefits denied.

94 AT 1270 BR

Facts: After completing a double shift claimant went home and then called her supervisor advising that she was ill and would not be able to work the next day. The supervisor advised her she must find her own replacement. Claimant called seven or eight other employees and no one was available. The claimant called the supervisor again and told her that she was unable to find a replacement. The supervisor told her that if she could not find a replacement, she would have to come on in and work. Claimant continued to try without success so she called the nursing home again, but the supervisor was unavailable. She talked instead to a nurse's aide. Claimant told the aide that she could not find a replacement so she guessed she would just have to quit. The claimant did not report on the next scheduled day because she was still sick. When she returned several days later, she had been removed from the schedule.

Held: The supervisor should not have expected the claimant to report to work when she was ill. Claimant fulfilled her responsibility to the employer when she called in to report that she would be unable to come to work because of illness. Claimant's statement to the other nurse aide that she guessed she would have to quit was made in response to her supervisor's statement that she would be required to come into work if she could not find her own replacement. An employer cannot expect an employee to report to work when ill. No misconduct.

Result: Benefits allowed.

90 AT 8387 BR

Facts: Claimant was permanently replaced on her job while she was under a physician's care and unable to perform her normal duties. No work was available when she was released and was involuntarily separated from her work.

Held: Claimant was separated from work but not for any misconduct on her part.

Result: Benefits allowed.

90 AT 3 BR

Facts: Claimant could not work in the furnace area due to a health problem. He reported this to a supervisor who told claimant to report to the personnel department. The supervisor told personnel that claimant had quit. Personnel recorded claimant as a dismissal. No effort was made to investigate the validity of claimant's health claim

Held: Claimant was discharged but not for willful misconduct.

Result: Benefits allowed.

86 AT 1606 BR

Facts: Claimant was discharged for excessive absences which she claimed were for illness. The employer requested a doctor's note after four absences in three months. Claimant did not provide a note.

Held: Claimant failed to comply with employer's reasonable rule. Misconduct established.

Result: Benefits denied.

83 AT 15913

Facts: Claimant was discharged while on medical leave for failing to keep the employer informed as to her health status and whether and when she would be able to return to work.

Held: It was reasonable for the employer to expect to be kept informed. Misconduct found.

Result: Benefits denied.

82 AT 4213

Facts: Claimant was discharged for excessive absenteeism caused by migraines for which she was under a doctor's care. She complied with the employer's reporting rules.

Held: Migraines are an illness. No misconduct found.

Result: Benefits allowed.

Cross references: Improper Request for Leave, 89 AT 3029; Company Attendance Policy, 89 AT 2478 BR.

ABSENTEEISM

Improper Request for Leave

97 AT 3624 BR

Facts: Claimant was discharged when she took extended leave to care for her grandchild. There is no doubt that claimant wanted to return to work but she did not request time off or leave of absence. She just advised the personnel department that she would be gone indefinitely.

Held: Claimant had an obligation to the employer to be on the job or to request some type of leave. Misconduct shown.

Result: Benefits denied.

89 AT 3029

Facts: Claimant called the employer after work saying that he was drinking and wanted the next day off. The employer denied the request. Claimant called again later and said he was going to be ill and would not be in.

Held: It is obvious what claimant's intentions were. Misconduct established.

Result: Benefits denied.

80 AT 4159; 80 BR 1031

Facts: Claimant had asked and been given permission to take the four days off prior to Christmas. Claimant called and informed the manager that she would not be in on the fifth day as well as she was leaving early. This left the employer shorthanded.

Held: Misconduct shown.

Result: Benefits denied.

Cross-reference: Personal illness: 96 AT 7944 BR

ABSENTEEISM

Lack of Transportation

97 AT 0734 BR

Facts: Claimant was returning from Tulsa when his car broke down. As he was unfamiliar with Oklahoma City, he stayed with his car overnight and then called the employer the next morning. His supervisor was not there and claimant was told to contact him that night. Claimant went to work and was discharged.

Held: Claimant's absence was due to a situation beyond his control. There is no misconduct shown.

Result: Benefits allowed.

97 AT 5330 BR

Facts: Claimant experienced problems with his car. He left work early on Thursday and did not report to work on Friday or the following Monday. When the claimant called to advise that he would not be at work on Monday, he was told that if he did not report to work on Tuesday he would be fired. Claimant did not report and was fired.

Held: Transportation to and from work is the employee's responsibility. Claimant's action in not securing transportation to work showed disregard for the employer's best interests.

Result: Benefits denied.

90 AT 1371 BR- R

Facts: Claimant had no transportation to work and refused his employer's offer of using a company vehicle.

Held: It is claimant's responsibility to be at work when scheduled and to provide transportation. Misconduct shown.

Result: Benefits denied.

Cross-reference:

ABSENTEEISM

On the Job Injury

96 AT 8427 BR

Facts: Claimant was injured on the job. He worked half days until released by his doctor to work full days. Claimant said he was still hurt and continued to work half days. The employer called the doctor and was informed that the claimant could work full days as long as he was seated 50% of the time. The employer told the claimant to work full days. Claimant stopped going to work. He missed three days of work, worked one day, and then missed two more days. Claimant returned to work and was discharged.

Held: Claimant's refusal to work full time in accordance with the doctor's release was a deliberate violation of the expected standard of behavior to which an employer is entitled. Misconduct has been established.

Result: Benefits denied.

96 AT 8824 UCFE BR

Facts: Claimant worked for the employer one year and received good performance reviews for the two months before she was discharged. She was injured on the job. All incidents that the employer cited as reasons for claimant's discharge occurred after the injury, and was not substantiated by corroborating testimony.

Held: It was difficult to believe that an employee with good attendance and performance would suddenly start calling in absent and ignoring direct orders. Misconduct not proven.

Result: Benefits allowed.

83 BR 427

Facts: Claimant refused to go back to work after three physicians found him able to return to work.

Held: Failure to return to work after a doctor's release is willful misconduct.

Result: Benefits denied.

Cross-reference:

ABSENTEEISM

Tardiness

Case law:

Moore v. Dorsett Education Systems, C-75-710 (Okla. Co. D. Ct)

Facts: Claimant states she was discharged for poor job performance. The employer states she was also discharged for excessive tardiness and absenteeism.

Held: Repeated tardiness and absenteeism is misconduct. It is a failure to abide by reasonable rules of employment.

Result: Benefits denied.

Hall v. Bd of Review of OESC, OESC and Oberlin Color Press, No. 78,250 (Okla. Civ. App., Div. 1, 12-22-92) Not for Publication

Facts: Claimant was discharged for excessive tardiness and absenteeism. In the last five months of employment all but one in four documented instances was due to her alarm clock

Held: Claimant's repeated inattention to the requirement that she be at work on time measured to misconduct. Note: Claimant appealed to the Court of Appeals where the appeal was denied.

Result: Benefits denied.

ABSENTEEISM

99 AT 1572 BR

Facts: Claimant was employed as an operations clerk. She was discharged for tardiness, absenteeism and failure to properly notify the employer. Claimant had received a written warning for tardiness in August 1998. She was given two written warnings in September. Claimant was tardy for three days during the third week of October, and was absent due to illness on October 22 and 23rd. She did not contact her employer until 11 a.m. on the 22nd and not until the end of the shift on the 23rd. She was then discharged.

Held: Claimant knew her job was in jeopardy and her actions showed a willful disregard for the interests of her employer. Failure to properly notify the employer is misconduct.

Result: Benefits denied.

97 AT 3451 BR

Facts: Claimant was discharged for excessive tardiness and alleged rudeness to customers. Claimant was counseled several times by the employer. There were times that the employer had to open the business due to claimant's tardiness.

Held: Repeated tardiness is a willful disregard of the employer's interests and the employee's duties. Misconduct shown.

Result: Benefits denied.

89 AT 6382 BR

Facts: Claimant was discharged for excessive absenteeism and tardiness. He was never advised his job was in jeopardy. The employer's representative had no record of the times or dates on which claimant was allegedly tardy or absent.

Held: There is a failure of proof. No evidence of misconduct.

Result: Benefits allowed.

80 BR 909

Facts: Claimant was late to work on several occasions. The employer informed the claimant that his contract would not be renewed, but he would be allowed to work to the end of the term (six more weeks).

Held: The employer condoned the claimant's tardiness by allowing him to continue working. The employer did not prove misconduct.

Result: Benefits allowed.

80 BR UCX 266

Facts: Claimant was late to work one day because his car broke down. He called his supervisor to report that he would be late.

Held: A single act of absenteeism or tardiness is not sufficient grounds for discharge. Claimant was not guilty of misconduct.

Result: Benefits allowed.

ABSENTEEISM

Without Notice

97 AT 4914 BR

Facts: Claimant left work fifteen minutes early one day because someone upset her. She was first advised that she would be written up for going home early. Two weeks later, claimant was fired for job abandonment.

Held: Leaving early one day is not sufficient to establish misconduct.

Result: Benefits allowed.

95 AT 5896 BR

Facts: Claimant used profanity toward his immediate supervisor during a staff meeting. Claimant left the meeting without authorization and was absent the following day without contacting the employer. Claimant was placed on medical leave and was asked for documentation. The employer made the request three times without response.

Held: Claimant's actions were insubordinate and showed willful misconduct. Absence without notice is misconduct.

Result: Benefits denied.

90 AT 8674 BR

Facts: Claimant requested time off for his vacation. He states he later got permission to leave a day early but did not put it on the company calendar where time off requests were placed. The day before departure claimant was working on a difficult assignment that he was unable to complete. He asked for help but none came and he thought the problem was solved. When the supervisor learned that claimant was gone one day early and the problem was not solved. Claimant was discharged.

Held: Claimant made an effort to solve the problem and did have permission to leave. No evidence of willful misconduct.

Result: Benefits allowed.

90 AT 7556 BR

Facts: Claimant was discharged after she took three days off during the employer's busiest time without permission. Claimant was absent the first day for personal business and her work was caught up. She called twice to see if she was needed. Claimant was absent the second day for an appointment she made for her children, after having worked eight hours. Claimant left early the third day because her son had an ear infection. She had scheduled a doctor's appointment for him.

Held: The claimant missed work one day, but had already done her work. She did check on two occasions to see if they needed her help. On the next occurrence, the claimant had an appointment and had already worked eight hours that day. She received her first warning at that time. The only occurrence after that warning was the day she had to go get medical attention for her son. No one was in the office to ask permission until the very last minute and she was already late. She may not have used good judgment in not telling the supervisor of her departure, however, her actions did not measure to misconduct.

Result: Benefits allowed.

Cross-reference: Excessive, 89 AT 03644

ABSENTEEISM

Procedure (Burden of Proof)

97 AT 06122 BR

Facts: Claimant was considered to have abandoned his job due to his failure to call and report to work for three consecutive workdays. Claimant did call the employer on two occasions during his absence and his immediate supervisor was notified prior to his absences.

Held: The employer did not meet the burden of proof. No misconduct shown.

Result: Benefits allowed.

96 AT 5113 BR

Facts: Claimant was discharged for substandard work and excessive absences. Claimant did not pick up the trash on the weekend as he was supposed to. Claimant had only used two of five sick days for the year. At claimant's last evaluation he was ranked good or excellent on all points except appearance. There were no specific incidents cited that would amount to misconduct.

Held: The evaluation indicated that the employer was happy with claimant's performance. No misconduct shown.

Result: Benefits allowed.

89 AT 6382 BR

Facts: The employer had no record of the times and dates that claimant was allegedly tardy or absent.

Held: The employer has failed to meet his burden of proof.

Result: Benefits allowed.

Cross-reference: Tardiness, 80 BR 206, 80 BR 909, 90 AT 4547 BR; Improper Request for Leave, 90 AT 8739 BR.

ACCIDENTS

Accidents happen, as the saying goes. The Commission, in determining whether there is misconduct, will look to the cause of the accident. If the accident was caused by recurring or extreme negligence or carelessness, and if the employee could have prevented the accident, the Commission has repeatedly found evidence of willful misconduct. If the accident occurred as a result of willful or negligent behavior, that the employee had been previously cautioned against, then willful misconduct is found. The mere occurrence of an accident without the evidence of recurring or extreme negligence, carelessness or willfulness is not sufficient to show misconduct.

ACCIDENTS

90 AT 8580 BR

Facts: Claimant was discharged for negligence resulting in a serious accident causing injury. The claimant could have prevented the accident, which was caused by his own negligence.

Held: Misconduct shown.

Result: Benefits denied.

90 AT 7483 BR

Facts: Claimant swerved to miss an animal and hit a pole. He was discharged because the accident happened in a company vehicle and the insurance company would not insure him.

Held: Misconduct was not established because the accident was not the driver's fault. Claimant did not lose his license and could have continued to work.

Result: Benefits allowed.

90 AT 6907 BR

Facts: Claimant was aware of the employer's policy to dismiss drivers involved in three chargeable accidents involving negligence. Claimant's first accident damaged his cargo when he struck an overhead object. Claimant knew the clearance. The second accident damaged a shipment of glass because claimant did not properly cover the freight and it became wet. The third accident occurred when claimant struck a car while making a right turn. Claimant did not take any photos of the accident and did not get the name of the car's driver.

Held: Each accident involved driver negligence. Misconduct was shown.

Result: Benefits denied.

ALCOHOL AND DRUGS/DRUG TESTING

Generally, use of alcohol or drugs while on the job is misconduct. This includes the actual intake of foreign substances while on duty as well as arriving to work under the influence of alcohol or drugs. An employer has the right to maintain an alcohol and drug-free workplace. An employer has a legitimate interest in the safety of its employees and customers. An impaired employee constitutes a danger to others, especially if the employee operates a vehicle or machinery as a part of his job. Use of alcohol while off-duty, which results in arrest or incarceration, may be misconduct if the job is one of public trust or interest. Refusal to comply with company policy regarding rehabilitation after discovery of a problem is considered willful misconduct.

Due to the increased use of drug and alcohol testing by employers, a number of questions have arisen regarding the application of the Act. Effective in 1993, the legislature added a section to the Act specifically to deal with discharge for refusal to undergo a test or for a positive test result. The applicable section is as follows:

Section 2-406A. An employee discharged on the basis of a refusal to undergo drug or alcohol testing or a confirmed positive drug or alcohol test conducted in accordance with the provisions of the Standards for Workplace Drug and Alcohol Testing Act shall be considered to have been discharged for misconduct and shall be disqualified for benefits pursuant to the provisions of Section 2-406 of Title 40 of the Oklahoma Statutes.

Any case law preceding the Drug Testing Act and this Section should be carefully examined as it may no longer be applicable.

Before benefits are denied for failing a drug test, it must be shown that proper testing and confirmation procedures are followed. The Commission follows the Drug and Alcohol Testing Rules and Standards for Workplace Drug and Alcohol Testing Act.

(<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=40+0Sd+551>.) Employers must comply with the provisions of this Act if they test for drugs and alcohol.

Refusal to take a drug test will be disqualifying if the employer has probable cause to request a drug test of an employee or if the employer has a random testing policy and has followed the requirements of the testing policy. Probable cause may be established by observing the employee's demeanor or appearance or by the occurrence of an accident. Otherwise, the employer does not have the right to regulate the employee's personal activities except as to its residual effect on the workplace or the employee's performance, or in the case of public employees, the effect on the public image.

ALCOHOL AND DRUGS

Drug and Alcohol Testing

Primary Case Law:

Uniroyal Goodrich Tire Co v. OESC, 887 P2d 1380 (Okla. Civ. App., Div. 3, 8-30-94)

Facts: The employer conducted random drug test. Claimant tested positive and was discharged. The evidence concerning the test was not presented by the employer until the appeal to the Board of Review.

Held: New evidence presented on appeal to the Board of Review was not admissible. The employer did not prove the case with proper evidence.

Result: Benefits allowed.

Farm Fresh Dairy, Inc. v. Blackburn, 841 P2d 1150 (Okla 1992)

Facts: Claimant worked for the employer as a delivery driver. He signed a form agreeing to random tests. Claimant tested positive for marijuana and was fired.

Held: Supreme Court reversed findings of lower authorities and held that the employer did not have to establish that claimant acted strangely.

Result: Benefits denied.

ALCOHOL AND DRUGS

Case application - Drug Testing

05-AT-06599-BR

Facts: The claimant was discharged due to a positive drug test. The Hearing Officer found that the employer did not comply with the Standards for Workplace Drug and Alcohol Testing Act because: their drug policy was not posted in a conspicuous employee access area; the claimant was not given a copy of the policy; and, the employer had not provided the chain of custody evidence at the time of the hearing. The employer provided a chain of custody document with its appeal to the Board of Review.

Held: The claimant was not legally tested since the employer did not meet the requirements of the Act. The Rules for the Administration of the Oklahoma Employment Security Act require that if at the original Appeal Tribunal hearing any documents, exhibits, testimony or evidence was or could have been in the possession of the propounding party but they failed to introduce it at the hearing and it was not included in the documents provided to the Tribunal, then it shall not be considered by the Board of Review. Therefore, the Board of Review may not consider the chain of custody document. Further, the chain of custody document presented to the Board of Review would fail to meet the requirements because the “received at lab” signature block was blank.

Result: Benefits allowed.

05-AT-06734-BR

Facts: The employer requested that the appellate hearing be reopened because they intended to have their Medical Review Officer testify at the hearing, but he was unable to do so because of a conflict in-patient scheduling. The decision of the Hearing Officer was based on the finding that the employer did not comply with the requirements of the Standards for Workplace Drug and Alcohol Testing Act for failure to give thirty days notice to the claimant of the drug and alcohol testing policy, even though the claimant signed an acknowledgment of the policy twenty-one days prior to the random drug test. The employer’s policy also did not meet the other requirements of the Act.

Held: The appearance of the Medical Review Officer would have no effect on the finding that the employer was out of compliance. Since the employer was out of compliance, the employer had no legal right to test the claimant and the claimant may not be found discharged for misconduct.

Result: Benefits allowed.

05-AT-03343-BR

Facts: The claimant was discharged for failing a drug test. The claimant was aware of the employer's drug and alcohol testing policy; however, the policy did not comply with the Standards for Workplace Drug and Alcohol Testing Act because it does not specify which employees are subject to testing; the substances to be tested, including brand or common names and the chemical names of any drug or its metabolite to be tested; the testing methods and collection procedures to be used; the rights of employees to explain test results confidentially; the rights of employees to obtain all information and records related to their tests; confidentiality requirements; or available appeal procedures, remedies or sanctions.

Held: Since the policy was out of compliance, the employer had no legal right to test the claimant; therefore, the test results cannot be used to establish misconduct.

Result: Benefits allowed.

05-AT-04128-BR

Facts: The claimant was discharged for testing positive on a drug screen. The law requires that the employer must prove up its case by showing the tests, the results and that appropriate evidence handling and testing procedures were followed. The employer did not provide the test results or the chain of custody evidence. The employer's policy also does not comply with the Standards for Workplace Drug and Alcohol Testing Act because it does not specify the substances, which may be tested for, including brand or common names and the chemical names of any drugs or metabolites to be tested for.

Held: Since the employer's policy did not meet the requirements of the Act, the employer had no legal right to test the claimant. A test given under such circumstances cannot be used to find the claimant was discharged for willful misconduct.

Result: Benefits allowed.

03-AT-8935-BR

Facts: The employer requested a new hearing in order to present evidence of chain of custody, which the employer did not present at the time of the hearing before the Appeal Tribunal. The Notice of Hearing mailed to the employer for that hearing informed the employer that they would need to prove up their case by showing the drug testing results and that appropriate evidence handling and testing procedures had been followed.

Held: The employer had plenty of time to obtain this information prior to the appellate hearing. No new or proper evidence has been submitted and no new hearing will be allowed.

Result: Decision of the Appeal Tribunal is affirmed. Benefits allowed.

Cross-reference: Procedure – Evidence

05-AT-01631-BR

Facts: The claimant was discharged for failing a drug test administered because he had an accident on the job, which involved property damage. At the hearing the employer did not produce the following required items in order to establish compliance with the Standards for Workplace Drug and Alcohol Testing Act and the OESC Rules as listed in the Notice of Hearing: a lab report from the testing facility showing a positive test result; a complete chain of custody document; and a medical review officer's certification of proper testing standards and procedures. The employer did send a more complete copy of the chain of custody document with their appeal to the Board of Review. The employer did not present any evidence of a reason to believe the accident was due to the claimant's use of drugs.

Held: Rule 240:15-3-3(c) prohibits the Board of Review from considering any documents that were or could have been in the possession of the propounding party at the time of the Appeal Tribunal hearing, but which were not presented at that hearing. The Standards require that an employer must have reasonable suspicion that the accident occurred as a direct result of the use of drugs or alcohol. The employer did not present sufficient evidence to find willful misconduct.

Result: Benefits allowed.

Cross-reference: Procedure- Evidence

00-AT-4013-BR

Facts: The claimant was discharged for misconduct connected with the work because he tampered with a urine specimen he gave for a random drug test. When confronted with the medical officer's finding that the specimen had been adulterated, the claimant admitted to smoking marijuana and tampering with the urine specimen.

Held: The requirements of Section 2-406A do not apply in this case since the claimant was not discharged on the basis of a refusal to undergo testing or for a confirmed positive drug or alcohol test.

Result: Benefits disallowed.

00-AT-8619-BR

Facts: The claimant reported to the employer that her leg was numb and asked to go to the doctor. She had a previous on-the-job injury two years earlier and felt that the numbness was related to that previous injury. The employer made an appointment for her and told her that the doctor would also administer a drug test in accordance with the employer's accident policy. The claimant tested positive for amphetamine and methamphetamine. The employer presented proof that they followed all the testing requirements of the Standards for Workplace Drug and Alcohol Testing Act. The employer represented that the employer's accident policy provides that any employee who has an on-the-job injury that requires medical attention greater than first aid be tested for drugs. The Hearing Officer found that the employer's reason for testing did not fall under any of the allowable categories under which employees may be tested under that Act. The Standards provide that an employer may test for drugs for applicants, reasonable suspicion, post-accident, random testing, scheduled periodic testing and post-rehabilitation only.

Held: The claimant was tested for drugs when she alleged an on-the-job injury was causing numbness in her leg. The Standards allow for drug-testing post-accident. Since the claimant alleged her ailment was a result of this previous accident, the post-accident provision applies.

Result: Benefits denied.

98 AT 07570

Facts: Claimant was employed as a climber-trimmer and was discharged for refusing to undergo a drug test. Claimant was injured on the job October 1997 and reinjured on April 1998. Both accidents were reported. On July 16, 1998, the claimant advised the employer he would need to take the next day off to see his doctor regarding a previous injury. That notice was interpreted as a report of a new injury and claimant was requested to take a drug test. Claimant refused.

Held: The employer's drug policy provides for post-accident testing within 32 hours of the accident. No accident was reported on July 16, 1998. Claimant did not violate company policy and there was, therefore, no misconduct.

Result: Benefits allowed.

97 AT 1168 BR

Facts: Claimant was discharged for failing a random drug test. Claimant said the policy was unfair because she was not allowed assistance. Company policy allows for abuse assistance with no termination if the employee asks for help; it does not help employees who violate the rules first, then ask for help. Claimant admitted that the positive test was accurate.

Held: Being under the influence while at work is a violation of the employer's policy. Misconduct found.

Result: Benefits denied.

97 AT 5122 BR

Facts: Claimant applied for a full-time position with the employer. Claimant was required to take a drug test. He tested positive for marijuana and was terminated in accordance with the employer's drug testing policy which states that testing positive for drugs is a terminable offense. Claimant did not deny drug use.

Held: Claimant was discharged for misconduct connected to work.

Result: Benefits denied.

95 AT 2242 BR

Facts: Claimant was a truck driver covered by Department of Transportation rules concerning drug testing, which state that a motor carrier shall use random selection and request driver be tested for drugs. The Oklahoma Standards for Drug and Alcohol Testing Act exempt testing required by federal law from the provisions of said Act. Claimant was discharged for testing positive for marijuana. The testing was done by a NIDA certified lab and the results were reported by a medical review officer. The chain of custody documents were complete.

Held: Misconduct shown.

Result: Benefits denied.

Cross-reference: Use of Drugs While Off-Duty, 89 AT 1651 BR

ALCOHOL AND DRUGS

Intoxication on the Job

90 AT 9325 BR

Facts: A hospital security officer notified claimant's supervisor that claimant had reported to work drunk. The supervisor confirmed that claimant appeared drunk and smelled of alcohol. Claimant had a drinking problem and had entered a treatment facility at the employer's request. He was told if he had further alcohol problems, he would be fired.

Held: Misconduct shown.

Result: Benefits denied.

90 AT 8804 BR

Facts: Claimant was driving a company vehicle making deliveries. The employer could not reach the claimant by radio and sent another driver to find him. When claimant returned, his behavior and breath indicated he was intoxicated. Claimant said he drank the night before.

Held: Claimant's behavior indicated intoxication. Reporting to work and driving in this condition was misconduct.

Result: Benefits denied.

89 AT 3236 UCFE

Facts: Claimant worked at the Air Force Base. He was stopped at the entrance when he smelled of alcohol. He failed a breathalyzer test and also was driving with a suspended license. His license to drive on base was revoked.

Held: Claimant was guilty of willful misconduct.

Result: Benefits denied.

89 AT 3106 BR

Facts: Claimant had previously been discharged for testing positive for drugs. He was allowed to return after signing a strict agreement regarding drug use. Claimant was discharged when his behavior indicated intoxication. Claimant failed a drug test.

Held: Claimant failed to abide by the terms of the agreement and was obviously impaired. Failure to abide by the rehire agreement even without the observation of impairment was misconduct by itself.

Result: Benefits denied.

87 AT 2903 BR

Facts: Claimant was employed as a foreman of bridge construction. The Superintendent had received reports that claimant bought beer during working hours. The employer investigated and discharged claimant.

Held: The employer had no direct evidence that claimant committed the act, only the hearsay testimony of three coworkers. The lower authorities found no proof of misconduct. The case was appealed to District Court, then remanded to the Board of Review, which took additional testimony, which showed that claimant drank before coming to work and while at work. Misconduct found. Claimant was around heavy machinery and his alcohol use could put him and co-workers in danger.

Result: Benefits denied.

Cross-reference:

ALCOHOL AND DRUGS

Treatment for Use

Case Law:

Shawnee Milling Co. v. Bd of Rev et al., C-87-165 (Pott. Co. D Ct. 9-2-87)

Facts: Claimant took medical leave to enter drug rehabilitation. When the employer found out, the claimant was discharged. There was no evidence of poor performance or impairment or use at work.

Held: The employer did not meet the burden of proof. No misconduct found.

Result: Benefits allowed.

Case Application:

90 AT 09144 BR

Facts: Claimant received a DUI and went into the alcohol abuse program with the employer's permission. When claimant returned to work, the employer learned that the claimant had been convicted of DUI, a felony. The City's rules required that claimant be discharged for being convicted of a felony.

Held: Claimant took steps to correct his problems and was allowed by the employer to enter treatment. No misconduct found.

Result: Benefits allowed.

90 AT 9265 BR

Facts: Claimant was hospitalized for thirty days for alcohol treatment. Her father notified the employer and she was discharged. The employer said that if claimant had called, she would not have been fired.

Held: Claimant was hospitalized, and she gave notice. No misconduct found.

Result: Benefits allowed.

85 AT 9470 BR

Facts: Claimant reported to work intoxicated and was found sleeping on the job. He used abusive and foul language and was insubordinate. The employer sent him to treatment and told him he must follow the program or be discharged. Claimant was dismissed from treatment for lack of cooperation.

Held: Claimant was discharged for misconduct.

Result: Benefits denied.

Cross-reference:

ALCOHOL AND DRUGS

Use of Alcohol or Drugs on the Job

93 AT 2695 BR

Facts: Claimant was in a position of authority and was aware that the company policy concerning use of alcohol on the employer's premises had been violated. The claimant did not report the violation to management.

Held: Claimant's failure to report the violation was a disregard of the duties and obligation owed to his employer and measured to misconduct.

Result: Benefits denied.

90 AT 8627 BR

Facts: Claimant was discharged for drinking on the job, which he admitted, but asserted that it had been allowed previously by his employer. Posted company policy forbid it.

Held: Claimant was aware that he violated company policy. Misconduct shown.

Result: Benefits denied.

90 AT 7357 BR

Facts: The employer investigated a report that claimant was drinking on the job. The claimant was located in an unauthorized area next to a bottle of wine. The employer smelled alcohol on his breath. Claimant was discharged.

Held: Claimant's behavior was inappropriate in the workplace. Misconduct shown.

Result: Benefits denied.

89 AT 5175 BR

Facts: Claimant was discharged for using and encouraging other employees to use cocaine on the job. The claimant had recently made mistakes on the job. Claimant had been previously warned. A witness confirmed that claimant had offered drugs to coworkers on the job.

Held: The burden of proof was met of drug use during working hours.

Result: Benefits denied.

89 AT 3226 BR

Facts: Claimant admitted drinking beer for lunch at the employer's place of business. Claimant stated he only drank at lunch, which was his own time. The employer was allowing the claimant to sleep on the premises until he could make other arrangements. Claimant drove a company vehicle and met in person with customers.

Held: Claimant was a salaried employee, so he was compensated for lunch-time. Misconduct shown.

Result: Benefits denied.

Cross-reference:

ALCOHOL AND DRUGS

Use of Alcohol/Drugs When Off Duty

Case Law:

Ariza v. Family Clinic of Drumright et al., C-86-529 (Creek Co. D. Ct. 2-9-87)

Facts: Claimant was a clinic nurse and attempted suicide by overdosing on prescription drugs. She entered psychiatric care. She was discharged.

Held: There was no finding of misconduct.

Result: Benefits allowed.

Shawnee Milling Co. v. OESC & Witt, C-87-165 (Pottawatomie Co. Dist. Ct. 9-2-87)

Facts: Claimant used marijuana while off-duty.

Held: Off duty acts may be misconduct if they adversely affect the employee's ability to perform his job duties. In this case, no evidence was presented to show that claimant's work performance was affected by his off duty use of marijuana.

Result: Benefits allowed.

Cross-reference: See also Treatment for Use

Case applications:

95 AT 4765 BR

Facts: Claimant was fired for failure to notify the employer within five days of an arrest/conviction related to drug charges as per company policy. The employer did not find out about the arrest until right before the claimant was discharged. The claimant says she never read the policy as outlined in the employee's handbook.

Held: Because the claimant had previously counseled with her employer regarding admitted substance abuse problems and because she admitted to telling her lawyer to call the employer to tell of her arrest, she knowingly violated the employer's drug policy. Misconduct shown.

Result: Benefits denied.

89 AT 2269 BR

Facts: Claimant was a club manager and was discharged for drinking on the job and for disruptive behavior. She had been reprimanded, but she denied drinking after the reprimand. She did drink after her shift while performing work duties. The employer had no first hand knowledge of the incident.

Held: Whether on or off the clock, performance of duties in the capacity of a representative of the business while drinking is misconduct.

Result: Benefits denied.

87 AT 5907 R BR

Facts: Claimant was discharged after he came to the employer's place of business after he had been drinking. He stopped by the employer's office to talk with the night dispatcher. The day dispatcher was there with her daughters. The claimant began kidding around with the daughters and engaging in rather boisterous behavior. At one point, he used an obscenity when addressing the younger daughter and at another, he rocked the chair in which the older daughter was sitting so forcefully that she had to put her hand on the floor in order to keep from toppling over. After it was reported to the yard manager, the claimant apologized to the day dispatcher. When it was reported to the employer, the claimant was discharged.

Held: Claimant acknowledged drinking prior to entering the workplace and acting inappropriately. Misconduct shown.

Result: Benefits denied.

87 AT 3446 BR

Facts: Claimant was a police department employee and was issued a police ID badge which he used to try to get into a closed club. He was denied and the police were called. Claimant left but was found nearby under the influence of alcohol. He was discharged.

Held: A police employee is held to a higher standard of conduct. His behavior was unacceptable and connected to work through his attempt to gain an advantage through the use of the ID badge.

Result: Benefits denied.

86 AT 10668 BR

Facts: Claimant was an off duty police officer. He was in a traffic accident and had been drinking. He was arrested, then discharged.

Held: Mere arrest is not misconduct.

Result: Benefits allowed.

81 AT 551; 81 BR 337

Facts: Claimant went to his foreman's home while off duty in an intoxicated condition and began cursing, yelling and making threats. The police had to be called to remove the claimant from the premises.

Held: Misconduct shown. Even though it occurred off duty, inappropriate acts directed toward the employer at any location are misconduct.

Result: Benefits denied.

Cross-reference:

ARREST AND/OR INCARCERATION

It is generally accepted that when an employee is arrested and incarcerated for an extended period, exceeding 2 - 3 days, it is willful misconduct, even if the arrest and incarceration have nothing to do with the employee's work. An employer cannot be expected to keep a position indefinitely. Although there has been some application to the contrary, the fact that the employee may not have actually been convicted of the crime has no bearing in the issue of discharge for absenteeism due to arrest. Note that the discharge is actually for absenteeism in this case, or even for absence without notice, not for a crime or suspicion of crime. Discharge for criminal acts are covered elsewhere in this manual. Some cases turn on the basis of notice. Most employers require the employee to call in to report an absence, not allowing for notice from spouses or other parties. However, when an employer has actual notice regardless from whom provided that an employee is absent due to arrest that is considered adequate notice for the purposes of the Act. This takes in to consideration the fact that inmates of jails do not have the freedom to call the employer daily, and they will usually use their one phone call to phone relatives or an attorney. Notice or not, the employer is not required to hold the job open for the incarcerated employee. There may be times when an arrest and subsequent incarceration would severely injure the employer, as in crimes of moral turpitude, or crimes committed by an employee in a sensitive position. Even though those acts themselves had nothing to do with the employer, they may result in disqualification for benefits. Those cases are covered under the sections dealing with illegal or immoral acts and incarceration.

ARREST

Arrest

90 AT 109 BR

Facts: Claimant was arrested and jailed for thirty days. Two days after his arrest his mom called the employer to advise that claimant would be in jail for an unknown length of time. After a week when the release date was still unknown, the employer advised claimant's mom that the job would be held open until the end of the week. Claimant was not released until two weeks later.

Held: Claimant's extended absence was not justified; misconduct found.

Result: Benefits denied.

90 AT 9404 BR

Facts: Claimant was a nurse assistant and was arrested for distribution of drugs. She was placed on suspension without pay pending outcome of her legal case. She filed a claim for benefits. Claimant was found guilty and sentenced. Claimant was then discharged.

Held: Claimant was discharged when she was placed on suspension without pay. There was no proof of misconduct at the time of suspension.

Result: Benefits allowed.

90 AT 8329 BR

Facts: Claimant was discharged after failing to notify his employer while in jail for seven days. His uncle did notify the employer.

Held: By themselves, arrest and incarceration are not misconduct. Notice was given. However, misconduct is found because the jail stay was more than two to three days.

Result: Benefits denied.

90 AT 7576 BR

Facts: The employer learned that claimant was being investigated by the OSBI regarding some equipment being used outside the employer's place of business without authorization. The District Attorney filed charges. The claimant offered to resign but felt it was under duress. The charges were later dropped.

Held: Claimant was discharged without evidence of misconduct. The burden of proof was not met. Mere arrest is not misconduct.

Result: Benefits allowed.

Cross-reference: