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## MISCONDUCT

The applicable provision of the Act governing disqualification for misconduct is as follows:

*Section 2-406. An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission. Disqualification under this section shall continue for the full period of unemployment next ensuing after he has been discharged for misconduct connected with his work and until such individual has become reemployed and has earned wages equal to or in excess of ten times his weekly benefit amount.*

### *Definition*

Oklahoma's definition of "misconduct" was officially established in *Tynes v. Uniroyal Tire Co.*, 679 P2d 1310 (Okla App 1984), wherein the court adopted the language used in *Arizona Dept. of Economic Security v. Magma Copper Co.*, 125 Ariz 389, 609 P 1089 (Ariz App 1980) (quoting *Boynnton Cab Co. v. Neubeck*, 237 Wis. 249, 296 NW636,640 (1941)). In *Tynes* misconduct was defined as:

*...conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.*

The Supreme Court subsequently affirmed this definition of misconduct in *Vester v. Board of Review of Oklahoma Employment Sec. Com'n.*, 697 P2d 533 (Okla. 1985). In its decision the Court went further to explain that any definition of misconduct which requires only an act or course of conduct detrimental of the employer's best interest and does not contain the element of willfulness or culpable negligence is contrary to the expressed purpose and intent of the Act and is erroneous as *a matter of law*. It must be understood that while we realize that an employer might have good reason to discharge an employee who does not measure up due to ability or ordinary negligence, absent a finding of willfulness or culpable negligence, there is no misconduct for purposes of disqualification under the Act.

## **BURDEN OF PROOF**

As the employer is the party with the most knowledge of any alleged misconduct, the employer bears the burden to prove the charge of misconduct by a preponderance of the evidence. Preponderance of the evidence has been defined to mean that, after weighing all the evidence, the fact-finder determines it is “more likely than not” that the misconduct occurred.

## MISCONDUCT

*Vester v. Board of Review of OESC, 697 P2d 533 (Okla. 1985)*

**History:** The Board of Review determined that the employee was discharged for misconduct and was disqualified for unemployment benefits. The District Court of Noble County affirmed. The Supreme Court reversed and remanded.

**Facts:**

1. Claimant had numerous absences and did not challenge the attendance record submitted by the employer. She was counseled about her attendance problem and was given an opportunity to correct the problem. Her work was satisfactory.
2. Claimant always called to report her absences. Her absences were caused mainly by health problems. She did provide medical statements on many of the absences.

**Issue:** Is a history of excessive absenteeism misconduct, even if those absences may have been for health reasons?

**History:**

1. Adoption for purpose of determining qualification for unemployment benefits of definition of misconduct which definition requires only act or course of conduct detrimental to employer's best interest, without element of willfulness or culpable negligence, was contrary to express purpose and intent of State Employment Security Act, and was erroneous as a matter of law;
2. Evidence supported finding of appeals tribunal referee of Commission that employee had given notice of her absences, that absences were mainly the result of health problems, and that employee had presented documentation as to that fact so that Supreme Court was bound to accept that statement as fact; and,
3. Finding of fact of referee precluded conclusion that employee had to be disqualified for unemployment benefits due to discharged for job-related misconduct.

**Note:** Case includes discussion and definition of misconduct, and has extensive cites from other jurisdictions.

## MISCONDUCT

*Tynes v. Uniroyal Tire Company, and OESC, 679 P2d 1310 (Okla. App. 1984)*

**History:** The Board of Review affirmed the decision of the hearing officer to deny benefits because claimant had failed to comply with employer's attendance policy and was guilty of misconduct. The District Court, Carter County, affirmed. Court of Appeals, Division No. 1 reversed and remanded; released for publication.

**Facts:**

1. Claimant was hired as an oiler. At the time of her firing, she was a general mechanic.
2. Claimant testified she had missed work due to illness on at least one occasion. She had also been absent because she was caring for her terminally ill mother. Her last tardy was due to a required court appearance.

**Issue:** Was claimant's accumulation of tardies and absences, in excess of those allowed by the employer, an act of misconduct?

**Holding:** Disqualifying claimant from unemployment compensation on grounds of misconduct for having exceeded employer's allowable number of "tardies/early leaves": without examining reasons for absences was error. Reversed and remanded to the OESC Board of Review for a new evidentiary hearing to determine whether claimant was guilty of misconduct under the guidelines set forth.

## MISCONDUCT

*Arkle v. Independent School District No. One of Tulsa County, 784 P2d 91 (Okla.App.1989)*

- History: Board of Review denied benefits; District Court of Tulsa County permitted aware of benefits; Court of Appeals, Div. No. 3, affirmed and released for publication.
- Facts:
1. Claimant, appellee, was employed in the transportation department as a lot crewman.
  2. One of his job duties was to substitute as a school bus driver. Oklahoma law requires that all school bus drivers obtain a certificate issued by the Oklahoma State Department of Education prior to their employment.
  3. Before a certificate will be issued, the driver must take and pass an annual physical examination; persons who do not obtain a certificate cannot be employed as school bus drivers.
  4. Claimant knew of his scheduled physical examination at least two weeks in advance. Claimant's understanding was the physical examination and drug screening test did not need to be done at a certain time, as long as they were done prior to his returning to work in September.
  5. Approximately one week before his scheduled physical examination, claimant notified his supervisor he would be out of town on the date of his physical examination, and he would have his private doctor perform the physical. Claimant went out of state to visit his ill mother.
  6. On his return, claimant was instructed to go to his own doctor for the required tests prior to returning to work on September 2<sup>nd</sup> or 3<sup>rd</sup>.
  7. Claimant then discovered he was ill and needed to be hospitalized. He was admitted to the hospital suffering from chronic hepatitis. His doctor notified employer in writing that claimant would be confined for approximately thirty days. Claimant did not instruct his doctor to send the results of his physical examination or drug screening to employer.
- Issue: Was employee's failure to timely send results of physical examination and drug screening to employer an act of misconduct; did employee's illness and the illness of his mother mitigate his failure to timely respond?

Holding: Court of Appeals determined that an error of law was committed by the Appeal Tribunal and the Review Board; they found claimant's acts to be willful misconduct. They did not apply the proper legal test of willful misconduct, or if they did, they made a clearly erroneous legal conclusion. As a matter of law, the trial court had the duty to correct the incorrect legal conclusions of the appeal tribunal and the review board and order the payment of unemployment benefits to claimant. The trial court did so, and the Court of Appeals affirmed.

## MISCONDUCT

*Stagner v. Board of Rev of OESC, 792 P2d 94 (Okla. App. 1990)*

**History:** Board of Review denied claim; claimant appealed; District Court, Kay County, affirmed; claimant appealed; court of Appeals, Div. No. 3, affirmed and released for publication.

**Facts:**

1. Claimant was employed as a dental hygienist for approximately ten years and was paid on a commission basis.
2. Employer installed a time clock and required claimant and others to clock in and out. Claimant did not use the time clock after April 1987.
3. Employer terminated claimant for failure to use the time clock in October 1987.

**Issue:** Is an employee's refusal to follow an employer's reasonable work rules and requests, especially with regard to accurate recording of time spent on the job, a sufficient showing of misconduct?

**Holding:** The Court stated that the question of whether there has been sufficient "misconduct" from benefits presents a question of fact on which the Board of Review's determination is conclusive if supported by any of the evidence introduced. The Court found no reversible error of law and that the findings of fact were supported by sufficient evidence. Affirmed.



History: Board of Review denied benefits, claimant appealed; District Court of Oklahoma County affirmed; claimant appealed; Court of Appeals, Div. No. 3, reversed and remanded with directions; released for publication.

- Facts:
1. Claimant was employed by the City of Oklahoma City as a crew supervisor for the City Street Department.
  2. He took leave to have surgery for a condition which was not employment related.
  3. The period from July 3, 1985, until after July 23, 1985, was leave with pay. After July 23, 1985, however, he was placed on leave without pay status.
  4. He was told to submit a physician's statement, either releasing him to return to work full-time, or estimating the total time required for his recovery.
  5. Claimant presented a statement which released him on a restricted basis, and employer's representative advised him this would be unacceptable.
  6. Claimant was informed light duty work was available only to employees whose illnesses were employment related.
  7. Claimant's supervisor advised him on August 21, 1985, he must submit the physician's statement by August 22, 1985, or he would be terminated.
  8. He attempted to obtain the required statement, but learned his physician was on vacation until September 1985.
  9. Claimant's employment was terminated on August 23, 1985.

Issue: Was claimant's failure to submit a physician's statement, and the fact that he filed for social security disability, enough to constitute misconduct?

Holding: Claimant was not guilty of disqualifying "misconduct", either in failure, despite attempts, to submit requested physician's statement or in inability to perform his work; reversed and remanded with directions to enter an order allowing benefits.

NOTE: There was evidence at the hearing before the Appeal Tribunal that indicated the employer took the position that claimant quit his employment; the Court of Appeals determined that the evidence supported the argument that claimant was terminated.

## MISCONDUCT

*Vogle v. OESC, 817 P2d 268 (Okla. App. 1991)*

**History:** Board of Review denied benefits; claimant appealed; District Court, Oklahoma County, affirmed the denial; claimant appealed; Court of Appeals, Div. No. 3, reversed and reinstated the decision of Appeal Tribunal awarding benefits; released for publication.

**Facts:**

1. Claimant was a beauty advisor in the cosmetics department. Employees were encouraged to take discontinued perfume testers for their own use.
2. Approval must first have been obtained from the store manager or immediate supervisor, then an approval slip was taken to customer service.
3. Customer service was to verify the approval and issue a claim slip to the employee.
4. At the end of the day the employee turned in the claim slip and took the merchandise home. The merchandise was also taken past a security guard who provided an additional checkpoint. One day claimant inadvertently omitted the first step in the process. Another employee also failed to get approval, but was not terminated.
5. Claimant had always obtained approval on previous occasions. This was the only time claimant failed to obtain approval. Claimant returned the testers as soon as she learned there was a problem.

**Issue:** Does mere violation of a work rule meet the definition of misconduct?

**Holding:** An isolated infraction of a work rule not detrimental to the employer's interest is not misconduct within the meaning of the Act and is not sufficient to deny unemployment benefits.

**NOTE:** The court stated, "...the conduct of (claimant) may have been inadvertence or ordinary negligence, and may have been grounds for dismissal, but it does not constitute the type of conduct described in *Vester* or *Tynes* which would divest her right to unemployment benefits. Mere violation of a work rule, although it may justify a discharge, does not necessarily constitute misconduct for the denial of benefits. 81 C.J.S. Social Security Section 224 (1977). Claimant's conduct was not willful or intentional. It was a mistake..."

## MISCONDUCT

*Nordam v. Board of Review of OESC, 925 P2d 556 (Okla. 1996)*

**History:** Board of Review affirmed award of benefits; employer appealed. District Court affirmed award; employer appealed and in an unpublished opinion, the Court of Appeals affirmed; on grant of certiorari, the Supreme Court affirmed the award of benefits.

**Facts:**

1. Claimant was presented with a written memorandum regarding her work performance by a supervisor; the memo was a statement entitled “notice of probation” that declared she was a tardy employee who did not do any work in the office. Employer offered no testimony or documentary evidence to support this allegation.
2. Claimant told the supervisor “she didn’t have to take this” and began to leave the supervisor’s office.
3. The supervisor then fired claimant.

**Issue:** What is the correct standard to be employed by the reviewing court when reviewing a decision of the Oklahoma Employment Security Commission?

**Holding:**

1. Correct standard of review of Board of Review’s decision was whether the record supported the Board’s conclusion that claimant’s actions did not constitute misconduct, and,
2. Evidence supported finding that claimant did not engage in misconduct when she apparently became upset and left the meeting with the supervisor.

FIRST PLACE v OESC, BD OF REV, AND MCKNIGHT, Case No, 102,663 (Okla Ct Civ App, Div 1, 9-15-06)

**Hsitory:** The employer appealed the Commission's Determination allowing the claimant and finding no willful misconduct. The Appeal Tribunal and Board of Review affirmed. The claimant was awarded benefits. The District court found that the findings were supported by the evidence and that there was no error in law.

**Facts:** The claimant was discharged for tardiness. She was hired to work the 6 a.m. to 2 p.m. shift. The employer changed her schedule temporarily to 7 a.m. to 3 p.m. to accommodate her childcare needs, but reverted back to the original schedule without informing the claimant. The claimant was unable to find daycare at 5:15 a.m. when she had to leave for work and was late as a result. The claimant was not warned or given deadline to resolve the daycare and tardiness problem.

**Issue:** Did tardiness due to unavailability of childcare constitute willful misconduct under *Vester*.

What is the standard of review for findings of the Board of Review.

**Holding:** Affirmed. The Court of Appeals cited *Vester* in determining that the claimant's tardiness was not unexplained, unjustified or unreported and therefore did not constitute willful misconduct. The decision of the Board of Review may not be overturned so long as there is competent evidence in the record to support its finding and there is no error in law.

**Reasoning:** There was competent evidence in the record to support the findings of the Board of Review and the law was properly applied. The employer was aware of the claimant's daycare problem and that she had tried to resolve it. The employer did not discipline the claimant or warn her that her job was in jeopardy; nor did they give her a deadline to correct the problem.

Cross Reference: Procedure

## MISCONDUCT

*Kakkanatt v. OESC, Bd of Rev, et al, Case No. 103,305, Okla. Ct. Civ. App. (2-8-02)*

**History:** The Board of Review found that the claimant was discharged due to willful misconduct connected to the work and disqualified her for benefits. The District Court affirmed. The Court of Civil Appeals reversed and remanded to find the claimant was not discharged for willful misconduct connected to the work.

**Facts:** 1. The claimant worked for the Oklahoma Department of Mental Health and Substance Abuse Services as a registered nurse. At the time of her termination she worked at the Oklahoma County Crisis Center and was the only registered nurse on her unit assigned to the night shift.

2. The claimant checked the blood sugar levels of four diabetic patients and prepared insulin injections based upon the individual results. She called for a specific patient to step forward to receive an injection. Another patient with a different name stepped forward instead to receive the injection. The claimant did not check the patient's wristband to confirm the patient's identity, which resulted in the claimant giving the injection to the wrong patient. The claimant discovered the error and gave the correct injection to the intended patient, then monitored the patient who was given the wrong injection. Neither patient required additional treatment.

3. The claimant reported the error, but was discharged for failing to verify the patient's identity before providing care.

**Issue:** Should health professionals be held to a higher legal standard than ordinary negligence because of the potential health risk to the patient resulting from their carelessness?

**Holding:**

1. The Supreme Court has refined the definition of misconduct as held in *Vester*, by holding that an element of deliberate behavior must exist to establish misconduct sufficient to deny benefits. See *Farm Fresh Dairy Inc v. Blackburn, 1992 OK 148, 841 P2d 1150*.

2. Ordinary negligence in isolated instances is not willful misconduct.

3. The misconduct standard considers both the employee's state of mind at the time of the incident as well as the nature of the incident. A single isolated instance of ordinary work-related negligence is not disqualifying, although repeated instances of ordinary negligence may be disqualifying. *See Johnson v. Employment Security Dept*, 64 Wash App 311, 824 P2d 505 (1988).

4. The Employment Security Act does not provide for a more stringent legal standard to be applied to health care professionals or any other identifiable class of employees simply because of the potential risk to others from their ordinary negligence.