

Employee Misconduct May Bar Unemployment Compensation

by Darren Feider

In a recent decision, *Smith v. Employment Security Department*, 2010 WL 774963 (March 9, 2010), a Washington Appellate Court barred an ex-employee from receiving unemployment benefits because he had engaged in disqualifying misconduct. Generally, a terminated employee may recover unemployment compensation unless he or she engaged in disqualifying misconduct. The burden is on the company, not on the ex-employee, to establish disqualifying misconduct. In *Smith*, the employee was a senior program manager for the county and had secretly recorded conversations with coworkers and the public for over three years. He claimed that he did that because he feared retaliatory harassment by his supervisors after he allegedly refused to sign a false affidavit for the county and because he had supported a coworker's sexual harassment claim. He also claimed that he recorded conversations because his supervisor had physically threatened him. He used an unsophisticated recording device which he placed in his pocket resulting in the recording random conversations – in the office, in company owned vehicles, in local businesses, and in private citizens' homes.

Near the end of his county employment, the employee filed an internal whistleblower complaint and filed a retaliation complaint with the Equal Employment Opportunity Commission. He also notified the county that he had recordings containing incriminating statements by his supervisors saved to his laptop. The county requested return of his laptop and warned him not to remove anything from it. Before returning it, the employee removed the recordings and related software. The county fired the employee for insubordination. The employee sought unemployment benefits, which were initially granted. The county challenged the award and, at the subsequent unemployment compensation hearing, the employee presented evidence that he was unaware of any county policy against secret recordings and obtained a concession from the county that it was not sure whether such a policy was published or whether the employee had attended county training that discussed the prohibition of recording of conversations. The hearing judge affirmed the initial decision granting unemployment benefits. The county appealed to the Commissioner, who rejected the decision and denied benefits.

The employee appealed the rejection on benefits (and continued with his other complaints against the county). The *Smith* court, however, affirmed. The *Smith* court found that disqualifying misconduct includes conduct in which an employee violates a work rule. If there is a reasonable rule that the employee knew or should have known of its existence, and the employee is terminated for violating such rule, that is reason enough to deny unemployment benefits. Although the employee here claimed to not be aware of the rule against secret recordings, the *Smith* court was unmoved, noting that the county had trained its employees on the rule and, at the worst, the employee should have known of the existence of the rule. Even if the employee had an argument that he was unaware of the “no-secret recording” rule, the *Smith* court found disqualifying misconduct can involve carelessness or negligence to such a degree to show an intention or substantial disregard of an employer's interest. Recording of coworkers and members of the public without their knowledge and consent was in disregard to the county's interest, and as such, it could damage the county's reputation.

More importantly, Washington law prohibits the recording of private conversations without mutual consent. It is a misdemeanor and can result in civil penalties. The *Smith* court found that the recording of coworkers and members of the public without their consent was disqualifying misconduct because he had engaged in deliberate acts that are illegal and violation of the law. The *Smith* court also found that the removal of the electronic files and software from the employee's laptop was disqualifying insubordinate conduct after he had been directed not to remove any files. The employee's claim that removing an electronic recording program did not violate the instruction not to remove files was disingenuous. The word "program" versus "file" was a difference without a distinction, and removing the program and deleting the recordings could subject the county to liability under a public record request. In responding to the employee's claim that he was actually terminated for whistleblowing activities, the *Smith* court held that such issue was not before it and not relevant to the decision of whether or not he was entitled to unemployment compensation.

The take away from *Smith* is that employees who engage in misconduct may not be eligible for unemployment compensation (though employers may have to challenge decisions granting benefits at several levels to get such a result). To increase the odds of success, companies should consider having published policies on what constitutes "misconduct," and train their employees, to avoid a claim of ignorance. *Smith* demonstrates that courts will not ignore bad faith conduct such as secret recordings even in the face of allegations of retaliation and discrimination. Benefits will not be granted for those who violate the law. *Smith* should also serve as a lesson for those who intend to threaten others with secret recordings. Nonetheless, *Smith* makes clear that eligibility for unemployment benefits is unrelated to employee claims for wrongful termination or retaliation.