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Commonsense Misconduct Not so "Common": Illinois Supreme Court Significantly Narrows Use of Commonsense Rationale in Employee Dismissal Cases for Misconduct under the Unemployment Insurance Act

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In the absence of a rule prohibiting specific conduct, employers can no longer rely merely on what one would deem "commonsense" to deny unemployment benefits. In *Petrovic v. Department of Employment Security*, the Illinois Supreme Court narrowed application of the "commonsense exception" to the rule that employers must show an employee willfully and deliberately violated a reasonable rule or policy of which he had notice, to deny unemployment benefits.

In *Petrovic* an employee applied for unemployment insurance benefits after being terminated for requesting a bottle of champagne and an upgrade for a passenger despite the fact that no rule or policy prohibited her from doing so. The Department of Employment Security denied her request, and the Board of Review affirmed that determination. Significantly, the Board alluded to the commonsense exception in denying her request.

Under appellate precedent, the commonsense exception applied where there is a "commonsense realization that certain conduct intentionally and substantially disregards an employer's interest" or where the employee's conduct violated a certain standard of behavior rather than a prescribed rule or policy.

The Illinois Supreme Court determined the Unemployment Insurance Act excludes only those employees who "intentionally commit conduct which they know is likely to result in their termination" from receiving unemployment benefits. Consequently, an employer must demonstrate the existence of a rule and prove that the discharged employee was notified of the rule. Because there was no evidence in the record of a reasonable rule or policy of which the employee was aware, the Supreme Court authorized Petrovic benefits.

Note, despite significantly narrowing the exception, the Supreme Court agreed the rule or policy need not be written or formalized if the misconduct is illegal—*i.e.*, theft, assault, sexual harassment, or a civil rights violation—or would constitute a *prima facie* intentional tort.

Employers wishing to challenge a former employee's claim for unemployment insurance benefits should be prepared to demonstrate the employee was aware her conduct was forbidden, either through earlier warnings or discipline advising continued violations will result in discharge, or through a policy that clearly expresses the same.

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