

# Data Theft Was Not Necessarily “Gross Misconduct” That Would Preclude COBRA Coverage

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[Johnson v. City of Kewanee, 2023 WL 8091963 \(C.D. Ill. 2023\)](#)

Two city employees—a married couple—were terminated for allegedly stealing data and deleting over 55,000 files from the city’s computer system. Following their termination, they sued the city, claiming that the city failed to provide them with COBRA election notices. The city asked the court to rule in its favor without a trial, arguing that it did not have to provide election notices because the employees had been terminated for gross misconduct. (As background, the list of COBRA triggering events includes termination of a covered employee’s employment for any reason other than the employee’s “gross misconduct,” which is not defined in the statute or regulations.)

Explaining that determining what constitutes gross misconduct demands a case-by-case analysis, the court concluded that the facts and circumstances of this case—and the applicability of COBRA’s gross misconduct exception—must be determined at trial. The court acknowledged that prior case law has established that criminal theft indisputably constitutes gross misconduct but noted that the former employees had not admitted to stealing the data and the city had not offered admissible evidence proving the employees’ actions. Furthermore, the court said it was “unconvinced” that the taking and deleting of city files necessarily constitutes gross misconduct as a matter of law. The court denied the city’s motion for judgment without a trial and set a date for further proceedings.

**EBIA Comment:** When an employee is terminated for gross misconduct, the employee and any covered dependents lose the right to elect COBRA coverage, and the employer is not required to provide an election notice. Thus, the stakes are high for both employees and employers. Because gross misconduct terminations tend to involve disputed facts, there is an increased risk of a court challenge, and the factual disputes often preclude either side from obtaining judgment without a costly trial. At trial, an employer that is wrong about gross misconduct can face not only an award of retroactive COBRA coverage but also an imposition of penalties of up to \$110 per day for failure to provide the required election notice. Given this uncertainty, employers should generally avoid denying COBRA coverage on account of gross misconduct except in situations involving flagrant and outrageous conduct that clearly constitutes a substantial and willful disregard of the employer’s interests. Even then, legal counsel and any insurer should be involved in the decision. For more information, see EBIA’s COBRA manual at Section VII.B.5 (“Gross Misconduct Exception”).

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