

Incorporating Unemployment Compensation Law Into Your Practice

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Prefatory Matters

- “Unemployment Compensation Law” (43 P.S. §§ 751 – 918.10)
- Public Policy (43 P.S. §§ 752)
 - Economic insecurity due to unemployment is a serious menace
 - Involuntary unemployment and resulting indigency falls with “crushing force”
 - Calls for setting aside of financial reserves
 - Protect general welfare by exercise of police powers

Basic Principles

- Enacted to protect workers who suffer loss of income due to separation from employment through no fault of their own
- Liberally construed in favor of claimant
- Focus not on whether employer had right to terminate employee
- Focus on circumstances of separation from employment
- Claimant may be disqualified from receiving benefits when:
 - Commits willful misconduct (43 P.S. § 802(e));
 - Quits without necessitous and compelling cause (43 P.S. § 802(b)); or
 - Engages in activity which otherwise renders claimant unsuitable for work (43 P.S. § 752)

Claimant Eligibility Requirements (43 P.S. § 801)

- Separated from work or reduced to part-time due to lack of work
- Satisfy minimum base year earnings
 - Earn more than set amount in year preceding application for benefits (e.g., \$9,500 for calendar year 2016)
- Actively search for suitable employment, including:
 - Register with CareerLink within 30 days of applying for benefits
 - Post resume on CareerLink system
 - Apply for positions that offer employment and wages similar to prior employment within 45-minute commute
 - Active search not required if laid off for lack of work and employer advised of date claimant will return to work
- Made valid application for benefits
- Be able to work and available for suitable work
- Unemployed for waiting period of one week
 - Do not delay in filing application for benefits

Claimant Ineligible for Benefits (43 P.S. § 802)

- Fail to apply for suitable work or refuse to participate in reemployment services
- Fail to accept offer of suitable full-time work to pursue seasonal or part-time employment
- Voluntarily leave work without necessitous and compelling cause
- Received or is seeking UC benefits in another state
- Work stoppage due to labor dispute (other than lock-out)
- Discharge or suspension due to:
 - Willful misconduct; or
 - Failure to submit to and/or pass drug test pursuant to employer's established substance abuse policy
- Engage in self employment
- Separation for purpose of receiving pension, retirement pay, annuity, or similar periodic payments (i.e., must still be attached to work force)

Willful Misconduct

(43 P.S. § 802(e))

- In Elser v. UCBR, 967 A.2d 1064, 1069 n.7 (Pa. Commw. 2009), willful misconduct is defined as:
 - Wanton and willful disregard of employer's interest;
 - Deliberate violation of rules;
 - Disregard standards of behavior which employer can rightfully expect from employee; or
 - Negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for employer's interests or employee's duties and obligations
- Generally, negligent/unintentional conduct is not willful misconduct. To qualify as willful misconduct, negligence must be "... of such magnitude as to "indicat[e] an **intentional disregard**" of the employer's interest or the employee's duties." (Navickas v. UCBR, 787 A.2d 284, 289 (Pa. 2001))

Willful Misconduct (Cont'd.)

(43 P.S. § 802(e))

- Employer has burden (Navickas v. UCRB, 787 A.2d 284, 288 (Pa. 2001))
- Employee's conduct must directly reflect upon ability to perform assigned duties (Altemus v. UCBR, 681 A.2d 866, 869 (Pa. Commw. 1996))
- Surrounding circumstances must be considered
 - Good faith or reasonable conduct may be acceptable excuse for otherwise willful misconduct

Willful Misconduct – Violation of Employer Rule/Policy

- Employer has burden to show:
 - Existence of rule;
 - Claimant knew about rule;
 - Claimant violated rule; and, if applicable
 - Employer complied with disciplinary policy pertaining to rule
- If employer meets burden, burden shifts to claimant to show that:
 - Rule is unreasonable; or
 - Good cause exists for violating rule (County of Luzerne v. UCBR, 611 A.2d 1335 (Pa. Commw. 1992))

Willful Misconduct – Yes

- By misrepresenting whereabouts on expense reports, claimant knowingly disregarded employer's interests and violated the standard that employer had right to expect (Rossi v. UCBR, 676 A.2d 194, 199 (Pa. 1996))
- Claimant's violation of employer's privacy expectation constitutes disregard of standards of behavior employer has right to expect of employee (Schroeder v. UCBR, 846 A.2d 790, 793 (Pa. Commw. 2004))
- “[A]ccessing personal e-mail and non-work-related websites while being paid to work by the employer is contrary to the employer's interests” (Baldauf v. UCBR, 854 A.2d 689, 692 (Pa. Commw. 2004))
- Using employer's computer in manner that violates employer's policy can constitute willful misconduct, even if violation did not occur during work hours or at work (Burchell v. UCBR, 848 A.2d 1082, 1085 (Pa. Commw. 2004))

Willful Misconduct – No

- Entry into intersection while driving ambulance without yielding right-of-way was merely a negligent act resulting in an automobile accident (Finch v. UCBR, 692 A.2d 619 (Pa. Commw. 1997))
- Nurse's inadvertent mistake of failing to properly dilute antibiotic does not constitute willful misconduct (Navickas v. UCBR, 787 A.2d 284 (Pa. 2001))
- “[A]bsent any evidence linking claimant’s off-duty drug usage with her work performance, she could not be denied benefits on theory of willful misconduct” (Burger v. UCBR, 801 A.2d 487, 488 (Pa. 2002))

Disparate Treatment

- Claimant not disqualified from benefits where employer failed to terminate similarly situated co-workers for same willful misconduct and employer does not have proper reason for disparate treatment (Elec. Material Co. v. UCBR, 664 A.2d 1112 (Pa. Commw. 1995); and American Racing Equip. v. UCBR, 601 A.2d 480 (Pa. Commw. 1991))

Voluntary Quit – Necessitous and Compelling Cause (43 P.S. § 802(b))

- Ineligible for compensation for any week in which unemployment due to voluntarily leaving work without necessitous and compelling cause
- Claimant has burden (Martin v. UCBR, 749 A.2d 541 (Pa. Commw. 2000))
- Standard:
 - Circumstances existed which produced real and substantial pressure to terminate claimant's employment;
 - Like circumstances would compel reasonable person to act in same manner;
 - Claimant acted with ordinary common sense; and
 - Claimant made reasonable effort to preserve employment (Procito v. UCBR, 945 A.2d 261, 264 (Pa. Commw. 2008))

Voluntary Quit – Necessitous and Compelling Cause (Cont'd)

- Sexual harassment
 - Can be necessitous and compelling cause (Andrews v. UCBR, 698 A.2d 151 (Pa. Commw. 1997))
 - Claimant sexually harassed by immediate supervisor did not have necessitous and compelling cause to quit because she failed to report sexual harassment (Martin v. UCBR, 749 A.2d 541 (Pa. Commw. 2000))
- Hostile Work Environment
 - Can be necessitous and compelling cause
 - Claimant must first take all reasonable steps to preserve employment relationship, including informing supervisors about abuse (Porco v. UCBR, 828 A.2d 426 (Pa. Commw. 2003))
- Unsafe working conditions
 - Can be necessitous and compelling cause (Rapid Pallet v. UCBR, 707 A.2d 636 (Pa. Commw. 1998))

Necessitous and Compelling Cause – Medical Condition

- Medical condition that limits claimant's ability to perform work duties can be necessitous and compelling cause (St. Clair Hosp. v. UCBR, 2017 Pa. Commw. LEXIS 16 (Pa. Commw. Feb. 2, 2017))
 - UC Law not intended to provide health and disability benefits for ill employee who is not physically able and available for participation in work force
 - Therefore, must be able to work and available for suitable work
- Standard:
 - Existence of medical condition;
 - Inform employer of condition; and
 - Be able and available to work if reasonable accommodations can be made or other suitable work is offered

Voluntary Quit – Following a Spouse

- Two additional requirements:
 - Spouse moved for reasons beyond his/her control, and decision was reasonable and made in good faith; and
 - Couple would face economic hardship in maintaining two residences or move resulted in insurmountable commute (Procito v. UCBR, 945 A.2d 261, 264 (Pa. Commw. 2008))

Eligible for Benefits?

- Educators over summer break
 - **No (43 P.S. § 802.1(1))**
- Educator on sabbatical leave
 - **No (43 P.S. § 802.1(1))**
- Professional athletes during the off season
 - **No (43 P.S. § 802.2)**
 - **However, must be reasonable assurance that athlete will perform services next season**
- Aliens
 - **Yes, if claimant lawfully admitted for permanent residence or otherwise permanently residing in US under color of law (43 P.S. § 802.3(a))**
- Officers of a corporation deemed to be self-employed because of exercising a substantial degree of control over corporation
 - **Yes (43 P.S. § 802.4)**
- Seasonal workers in fruit and vegetable food processing
 - **No, for any week of unemployment occurring outside of normal seasonal period of operation (43 P.S. § 802.5(a))**
 - **Seasonal work timeframe cannot exceed 180 days in a calendar year**
- Incarcerated claimant
 - **No, for any weeks of unemployment during which claimant is incarcerated after a conviction (43 P.S. § 802.6)**
- Deceased claimant
 - **Yes, but only for accrued benefits due to deceased claimant; not for prospective benefits (43 P.S. § 803)**
 - **Paid to persons having interest in estate of deceased**

**Eligible for Benefits – Certain Employees of the Commonwealth
or Political Subdivision Thereof? (43 P.S. §§ 892, 911)**

- Elected officials
 - **No**
- Inmates of custodial or penal institutions who receive compensation for services rendered therein
 - **No**
- Members of a legislative body
 - **No**
- Members of judiciary of Commonwealth or political subdivision
 - **No**

Eligible for Benefits – Employees of Nonprofit Organizations?

- Includes a religious, charitable, educational, or other organization described in section 501(c)(3) of the Federal Internal Revenue Code of 1954 (43 P.S. § 901)
- Employees thereof are eligible for benefits (43 P.S. § 902)

Rate and Amount of Compensation (43 P.S. § 804)

- Determined by table in this section
- Weekly benefit rate computed based on greater of:
 - Claimant's highest quarterly wage; or
 - 50% of claimant's full-time weekly wage
- However, cannot exceed 2/3 of full-time weekly wage
 - Current maximum weekly benefit rate is \$573
- If weekly benefit rate is less than \$70, claimant is ineligible for benefits
- Entitled to additional \$5 per week for dependent spouse or child, and additional \$3 for one other dependent child (cannot exceed total of additional \$8)
- Generally, can receive benefits for maximum of 26 weeks

Application for Benefits (43 P.S. § 821)

- Application submitted by employee
- Responsive application submitted by employer
- Representative calls employee
- Representative calls employer
- Representative issues Notice of Determination
 - Findings of Fact
 - Conclusions of Law
- 15 calendar days to appeal

Appeal Hearing (43 P.S. § 822)

- Held before Referee
- Referee has power to issue subpoenas to attend and testify and to produce documents, upon request of party (43 P.S. § 826)
- Must afford parties a reasonable opportunity for a fair hearing
 - Parties can participate via telephone, without regard to distance of hearing location (43 P.S. § 825)
 - Hearing must be held within county in which employee regularly reports to work, unless parties and board agree to other suitable place (43 P.S. § 825.1)
 - Referee usually participates in questioning witnesses
- De novo review (43 P.S. § 823(b))

Appeal Hearing (Cont'd)

(43 P.S. § 822)

- Right to representation by attorney or “other representative” (43 P.S. § 774)
 - Claimant had right to have suspended attorney represent him at UC hearing (Powell v. UCBR, 2015 Pa. Commw. Lexis 483 (2015))
 - Non-lawyers representing parties in UC proceedings were not practicing law, therefore, 43 P.S. § 774 did not violate Pa. Const. Art. V, § 10 (Piunti v. UCBR, 933 A.2d 135 (Pa. Commw. 2007); Powell v. UCBR, 2015 Pa. Commw. Lexis 483 (2015))
- 15 calendar days to appeal from referee’s decision
 - Hearings are electronically recorded
 - Appeal triggers transcript to be prepared
 - Practice tip: Regardless of whether Appellant or Appellee, make written request for transcript at earliest opportunity

UC Board of Review (43 P.S. § 824)

- Must afford parties reasonable opportunity for fair hearing
 - Either party can request hearing before the UCBR, but rarely granted
 - Appeal generally decided on the briefs
- Referee's findings of fact and credibility determinations given deference
- Appeal limited to record made at hearing before referee
- UCBR has power to affirm, modify, or reverse referee's decision, or remand to referee and direct to take additional evidence
- Further appeal is to Commonwealth Court
 - Scope of review of UCBR's determination is whether "the adjudication violates the constitutional rights of the appellant, the adjudication is contrary to law, there is a violation of the Board's procedure, or a finding of fact necessary to the decision is not supported by substantial evidence" (Navickas, 787 A.2d at 288 (citing Myers v. UCBR, 625 A.2d 622, 624 (Pa. 1993)))
 - UCBR makes factual findings and determines credibility of witnesses, which will remain undisturbed on appeal unless not supported by substantial evidence of record as a whole (Curran v. UCBR, 752 A.2d 938, 940 (Pa. Commw. 2000))

Back Wage Awards or Overpayment Payment of Benefits

- If claimant initially denied benefits, but later obtains benefits on appeal, claimant entitled to back wage awards
- If claimant initially obtains benefits, but later denied benefits on appeal, claimant may or may not have to repay benefits
 - Fault Overpayment (43 P.S. § 874(a))
 - No Fault Overpayment (43 P.S. § 874(b))

Miscellaneous Matters

- Findings of fact and conclusions of law not binding in proceeding in another forum (43 P.S. § 829)
- No agreement to waive, release, or commute rights to benefits shall be valid (43 P.S. § 861)
- Neither party shall be charged fees of any kind in any proceeding under UC Act (43 P.S. § 862)
- Child support deducted and withheld from benefits and paid directly to appropriate State or local child support enforcement agency (43 P.S. § 863.1)
- Benefits subject to Federal income tax (43 P.S. § 863.2)