Eligibility for Unemployment Compensation: How Did the Employment Relationship End?

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11/20/13

Unemployment Compensation is intended to provide income to those who are unemployed through no fault of their own. The Claimant must be able and available for work and be willing to engage in a job search to find employment. A claimant is considered able to work if he can do sedentary work, even if an injury or medical condition would keep him from engaging in more active employment.

Procedure

A Claimant can either call a statewide toll-free number, or apply online. A Notice of Financial Determination is sent to both the Claimant and the Employer, indicating whether he has been paid sufficient wages to be eligible for benefits and indicating the employee's benefit rate.

A claims examiner issues a Notice of Determination based on information provided by the Employee and Employer. Either party may appeal within fifteen days and a hearing will be scheduled before a Referee. There is a Referee's office at the Grit Building in Williamsport, among other locations. Each party has a right to be represented by counsel, to offer witnesses and to cross-examine adverse witnesses. Each party is entitled to make an argument at the close of the hearing. If hearsay is properly objected to, it cannot be used to support a finding of fact. A witness' testimony can be taken by telephone by prior arrangement and for a good reason, such as the witness is not local.

The Referee will ask the Claimant a few preliminary questions, his job title, his first and last day worked for the employer, and his rate of pay. She will then ask if he was fired or if he quit. If he was fired, she will ask the employer to present his evidence of willful misconduct. If he quit, then the employee will be asked to present evidence of the necessitous and compelling reasons for leaving his employment.

One of the most frequent errors in my experience is the failure of the employer to present evidence from persons who have actually witnessed the relevant events. For example, an HR representative may send UC printouts of emails comprised of the responses of customers or other employees to her inquiries regarding the Claimant's behavior on the job. She will then appear at the hearing by phone from a distant location without having made arrangements for the appearance of any other witnesses. The emails are hearsay and, if objected to, will not be considered. Similarly, she will be precluded from testifying to what she has been told.

Further appeal lies to the Unemployment Compensation Board of Review (UCBR). I appeal by certified mail and ask the board to send me the transcript of testimony and a copy of the exhibits. I also ask for the opportunity to brief the case which is always granted. The Board has broad authority to make alternate findings, even on credibility, and can affirm, modify or reverse the Referee's determination based on evidence previously submitted or direct the taking of new evidence.

The Commonwealth Court has exclusive jurisdiction of appeals from final orders of the UCBR. Claimants do not have to pay a filing fee because they are given automatic *in forma pauperis* status and need not apply for it.

A Petition for Allowance of Appeal can be filed with the PA Supreme Court which will occasionally review a UC case.

Findings of fact made by the Board of Review are conclusive on appeal so long as they are supported by substantial evidence.

When the Claimant has been fired….

Case law in the 19th Century established the proposition that employment in Pennsylvania is presumed to be at-will, meaning the employer can terminate the employee for a good reason, a bad reason, or no reason at all. Union contracts are a major exception to this rule. They provide for a grievance procedure and termination only for good cause. Personal contracts, like those which a professional athlete has with his team, are another exception. The other major exception is civil rights legislation which limits discrimination based on race, age, etc.

In light of rising income inequality and waning union influence, perhaps the at-will rule should be reconsidered. See *Bauer v. Pottsville Area Emergency Medical Service, Inc.*, 2000 PA Super 252, 758 A.2d 1265, 1269, 1270 (2000). Accord *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 939-941 (Pa.Super.Ct. 2011), reargument denied (Aug. 11, 2011), appeal granted in part, 47 A.3d 1174 (Pa. 2012).

While an Employer can fire the employee for any reason or no reason at all, he will be entitled to unemployment compensation unless the employer can demonstrate that the employee is guilty of willful misconduct which resulted in his termination.

Willful misconduct is not defined in the statute. The appellate courts have defined it to include an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

Theft from the employer is an obvious example of willful misconduct. Many years ago I represented a woman who was a clerk at a convenience store. The company practice was to keep hoagies in a refrigerated display case for several days. The clerks were asked to discard sandwiches which had been in the display case for three days. The clerk in question was caught eating one of the three day old sandwiches, and discharged. The Referee found that under the circumstances her behavior could hardly be called theft and did not constitute willful misconduct.

Frequently an employer will let someone go because they just can't keep up or because they make mistakes. We always ask the Claimant at the hearing before the Referee whether she or he worked to the best of their ability. If the employee makes a good faith effort, the inability to do the job to the employer's satisfaction will not be willful misconduct.

Grieb v. UCBR, a 2003 case decided by the PA Supreme Court, involved a State College School District employee who worked as a part time health and physical education teacher. The school district had a Weapons Policy, which prohibited the possession of weapons on school property.

> Grieb explained that on the evening of September 14, 1999, she was in the process of moving to a new residence after losing her home in an eminent domain proceeding. She loaded her car with her personal belongings, which included books, lamps, clothing, CDs, and three unloaded shotguns. One shotgun was placed on the back seat of her car and the other two shotguns on the floor of her vehicle. Grieb said that she left these items in the car overnight because it was raining ***598** when she arrived at her new residence and she intended to unload the items before leaving for work the next morning. At approximately 6:00 a.m., the District unexpectedly called Grieb requesting that she fill-in for another teacher immediately even though she was not scheduled to work until 11:30 a.m. Grieb agreed to substitute teach and proceeded to school, forgetting that the three unloaded shotguns were in her car. Upon arriving on school property, Grieb parked her car in an area of the parking lot that was for staff members only and she locked the door after exiting the vehicle. At approximately 2:45 p.m., a custodian who parked beside Grieb's car noticed the weapons in the car and alerted the school administration. The District subsequently suspended Grieb without pay.

The Referee found that the teacher had violated the District's Weapons Policy by transporting three shotguns onto school property and was guilty of wilful misconduct.

> The Commonwealth Court held that Grieb violated the District's Weapons Policy by parking a car that contained three unloaded shotguns on school property. Furthermore, it determined that the explanation of Grieb that she forgot the unloaded shotguns were in the vehicle at the time she parked her car on school property did not establish good cause to violate the policy. The Commonwealth Court recognized that an unintentional, inadvertent violation of an employer's work rule does not constitute ****425*** willful misconduct. However, it determined that an exception to that general rule exists where the conduct of an employee "could jeopardize an employer's effective operations or place the public at risk." *Grieb v. Unemployment Compensation Board of Review*, 767 A.2d 1138, 1141

(Pa.Cmwlth.2001) (citing *United Refining Co. v. Unemployment Compensation Board of Review*, 661 A.2d 520 (Pa.Cmwlth.), *appeal denied*, 543 Pa. 721, 672 A.2d 312 (1995)).

The Supreme Court reversed and found for the employee, holding that negligence constitutes willful misconduct only where it is of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Furthermore, the court declined to adopt the public safety exception in the Commonwealth Court Opinion, saying that the General Assembly had created no such exception in the Act. *Grieb v. UCBR*, 573 PA 594, 827 A.2d 422 (2003).

Drug Testing

The willful misconduct section of the law is at 43 PS 802 (e). In 2002, the legislature added 802 (e.1), providing that an employee would be ineligible:

> (e.1) In which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement.

I had a case where the Employee was required to take a urine drug test because of a minor accident with a forklift. The HR manager asked another worker to drive the Employee to a local hospital where a urine sample was collected, placed in a single specimen bottle, and sent to a laboratory. It came back positive for marijuana; whereupon the Human Resources Manager fired the Employee citing the laboratory report as a violation of the Employer's Substance Abuse Policy, which is contained in the Employee Handbook.

This policy provides, in part, as follows:

> The Company's drug and alcohol testing procedures comply with applicable laws. Where there is no law or where such law does not provide specific procedures for drug or alcohol testing, the Company will use the Federal Procedures For Transportation Workplace Drug and Alcohol Testing Programs, 49 CFR Part 40, as a guide. These procedures ensure the integrity, confidentiality and reliability of the testing processes, safeguard the validity of the test results and ensure that these results are attributed to the correct employee. Further, these procedures minimize the impact upon the privacy and dignity of persons undergoing such tests to every extent feasible. Employees will receive a copy of the summary of the drug and alcohol testing procedures.

One of the regulations in Part 40, cited by the Employer in its Employee Handbook, 49 CFR 40.71, provides that all specimens "must be split specimen collections".

The Referee found, among other things, that under the circumstances, the employer did not follow their substance abuse policy by failing to have him provide a split sample and therefore he was not disqualified under this section. The split sample is meant to protect the employee against a false positive test result which sometimes occurs.

Voluntary Quit

When the employee quits his job he must show reason of a necessitous and compelling cause for leaving his employment. The burden is on the claimant. He must prove that he acted with ordinary common sense in quitting and made a reasonable effort to preserve the employment relationship. He must also show that he remains able and available for work.

Some reasons that qualify as necessitous and compelling:

Employees who accepted early retirement packages based on a legitimate fear they would be terminated if they did not accept the package.

Health Reasons: A medical problem can be reason of a necessitous and compelling cause. The employee must first tell the employer of his health problem so that the employer has the option of accommodating the medical problem. The employee must also be able to do some other work even though he cannot do his usual job. Medical records and reports, in addition to the claimant's own testimony are sufficient proof and the live testimony of a physician is unnecessary.

A parent who in spite of making every effort is unable to locate child care. Case by case determination.

A spouse who quits a job to follow a spouse, if the following spouse can show an economic hardship in maintaining two residences or that the move resulted in an insurmountable commuting problem.

Unreasonably dangerous working conditions.

Employer's refusal to pay the employee.

Physical or verbal abuse or the reasonable apprehension thereof by a supervisor. Sexual harassment. Does upper management know of the problem? Did the Claimant follow policy in the handbook?

Asking the employee to engage in illegal activities.

Employer has made substantial and unilateral changes in the terms and conditions of employment.

Recent Unemployment Compensation Cases
The Commonwealth Court
2012-2013

Solar Innovations, Inc. v. Unemployment Compensation Board of Review (UCBR), 933 CD 2011, 01/05/2012

The Claimant asked the Employer to reduce his hours to 30 per week to accommodate his on-line educational program and the Employer refused. As a result, the Claimant resigned and took a new job with Staffing Agency. This was full-time work but temporary, consisting of assignments lasting between one and six months. After completing one assignment, it could be followed by another full-time assignment; however, in this case, the Claimant was laid off by his new employer after one month due to lack of work.

In a voluntary termination case, the Claimant has the burden of proving that he left work for reasons of a necessitous and compelling nature, which requires a showing that a reasonable person who was trying to remain employed would have resigned under the circumstances.

The Board allowed benefits because precedent indicates that the receipt and acceptance of a firm offer of employment from another employer constitutes termination for cause of a necessitous and compelling nature. If the new job does not work out, the Employee is considered to be unemployed through no fault of his own.

A three judge panel reversed the Board. In her Decision J. Cohn Jubelirer held that the issue involved was one of first impression, whether one can leave a non-temporary job for a temporary one and remain eligible for benefits when the temporary job ends a month later. J. Pellegrini dissented. He would have affirmed the Board: "Given the fact that employment is typically 'at will', Claimant's situation is no different than if he had accepted a 'permanent' position with another employer but was laid off after only one month due to lack of work."

Risse v. UCBR, 1111 CD 2011, 01/12/12

Claimant was employed for approximately five years full-time as an account executive making $68,000 per year, when he was terminated in October 2009.

For many years the Claimant had had a sideline business doing writing, photography, consulting and script-writing known as Risse Marketing and Public Relations.

The Claimant was initially granted benefits which were suspended in October 2010, when he took a job providing consulting services to a Senate campaign. At the conclusion of this consulting work in November, 2010, he asked to have his unemployment benefits resumed; however, the UC Service Center declined to do so, finding him ineligible because he was self-employed. The statute provides

that “an employee who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity.” The Claimant has the burden of proof on this issue.

The Referee found him ineligible because his income from self-employment had doubled from 2009-2010, from $3720 in 2009 to $8000 in 2010, and the Board agreed.

J Pellegrini wrote the Opinion for the three Judge panel reversing the Board and allowing benefits. He said that in past cases the Court had focused on whether a claimant worked significantly more hours in his side line activity after he became unemployed indicating that he was transitioning the sideline activity time to full-time work. In this case the Claimant’s testimony indicated his sideline business activity had not changed.

J. Cohn Jubelirer wrote in concurrence in order to object to “transitioning” language which she saw as establishing a new legal standard. She reference the plain language of the statute, and cited earnings records in evidence from 2004 ($15,447) and 2006 ($9020), which the board had ignored, to show that the $3720 in 2009 was “the outlier, rather than the yardstick by which his sideline activity should be measured”. She also inferred from these figures that his work hours for his sideline activity were probably historically higher as well.

Middletown Township v. UCBR, 189 CD 2011, 03/21/12

Supervisors voted not to renew the Claimant’s contract as Township Manger. The Claimant continued to work until the contract expired. In the meantime the Township offered him a new contract in which it proposed to eliminate an automatic renewal provision, eliminate an automatic pay raise, eliminate a $500 car allowance and require the claimant to contribute toward medical benefits and revised the severance package. The Claimant provided a counteroffer which the employer rejected.

J. Brobson delivered the Opinion of the three judge panel which held that because the Claimant rejected the proposal of the Township which would have allowed him to remain employed, he is deemed to have voluntarily quit. He nonetheless was eligible for benefits because the imposition of a substantial unilateral change in the terms of employment constitutes reason of a necessitous and compelling cause for an employee to terminate his employment.

In his dissent, J. McCullough indicated that since the Township’s decision to terminate employment pre-dated the contract negotiations regarding future employment, he would have affirmed the decision of the Board and found the Manager eligible because the Township did not prove that his discharge was for willful misconduct.

Grand Sport Auto Body v. UCBR, 2009 CD 2011, 10/24/12

Practice Note: In representing a claimant in a willful misconduct case, the employer will often trot out a series of past problems, often long past problems, with the employee. In representing the employee, try to limit the effect of this by asking the employee what reason he was given for his termination. Focus on the incident which immediately preceded the termination. Was it, standing alone, willful misconduct? If not, then incidents from the past will usually not be sufficient for the employer to carry his burden of proof. Furthermore, an alleged incident of willful misconduct cannot be the basis for a denial of benefits if it is remote in time from discharge.

This case was decided by a full Commonwealth Court, with two Judges dissenting.

The Claimant had a long history of attendance and punctuality problems. However, his last absence was justified. The Employer had approved time off for the Claimant to get married in Mexico. The Claimant's flight from Mexico was overbooked. He had to rebook a later flight and was unable to return to work as scheduled. He informed the employer that he was stuck in Mexico. When he returned to work a day later, the employer discharged him.

The Majority found willful misconduct based on a pattern of habitual unexcused tardiness and absences, including 19 in a seven month period.

Judges Brobson and Pellegrini dissented, writing that but for the final incident, an absence for which he had a valid excuse, the claimant would not have been discharged. Therefore his unemployment was not caused by his string of past absences and tardiness, it occurred because of an incident that did not rise to the level of willful misconduct.

Quality Care Options v. UCBR, 58 CD 2012, 12/14/12

This case required a determination of whether the Claimant, who performed healthcare services to clients of Quality Care, did so as an employee or as an independent contractor. The statute provides that a Claimant is ineligible for benefits if he is engaged in self-employment. See *Risse v. UCBR*, above. The Court stated the law on making this determination as follows:

> The burden to overcome the "strong presumption" that a worker is an employee rests with the employer. *Kurbatov v. Dep't of Labor & Indus., Office of Unemployment Comp., Tax Servs.*, 29 A.3d 66, 69 (Pa.Cmwlth.2011). To prevail, an employer must prove: (i) the worker performed his job free from the employer's control and direction, and (ii) the worker, operating as an independent tradesman, professional or businessman, did or could perform the work for others, not just the employer. *Id.* "[T]his two-pronged test is conjunctive and both prongs must be satisfied in order for persons rendering services for wages to be considered independent contractors." *Id.* at 70 (quoting *Electrolux Corp. v. Dep't of Labor & Indus., Bureau of Employer Tax Operations*, 705 A.2d 1357, 1360 (Pa.Cmwlth.1998)).

Dillon v. UCBR, 786 CD 2012, 06/18/13

The Claimant, a pipe fitter and forklift operator, tested positive for alcohol (BAC .02%) in violation of the employer's substance abuse policy, and he was discharged as a result. The Board and the Commonwealth Court found him ineligible under Section 402(e.1) ("failure to …pass a drug test…."). The word alcohol does not appear in the statute. Judges Leadbetter and Brobson essentially said that alcohol is a drug and they found that excluding alcohol from this provision would lead to an unreasonable result.

Judge Friedman, dissenting, would also have denied benefits because the Claimant was guilty of willful misconduct based on the violation of the employer's work rule prohibiting a BAC in excess of .02%. She noted that consumption of alcohol is legal and it may be served at a company-sponsored party or at a lunch meeting with a client. Under 402(e), the issue is "willful misconduct" and a claimant is given the opportunity to prove the unreasonableness of the employer's policy or show good cause for his violation. Under 402(e.1), the only issue is whether or not the employee failed a drug test. For these reasons she would not have concluded that the phrase "failure to pass a drug test" included alcohol.