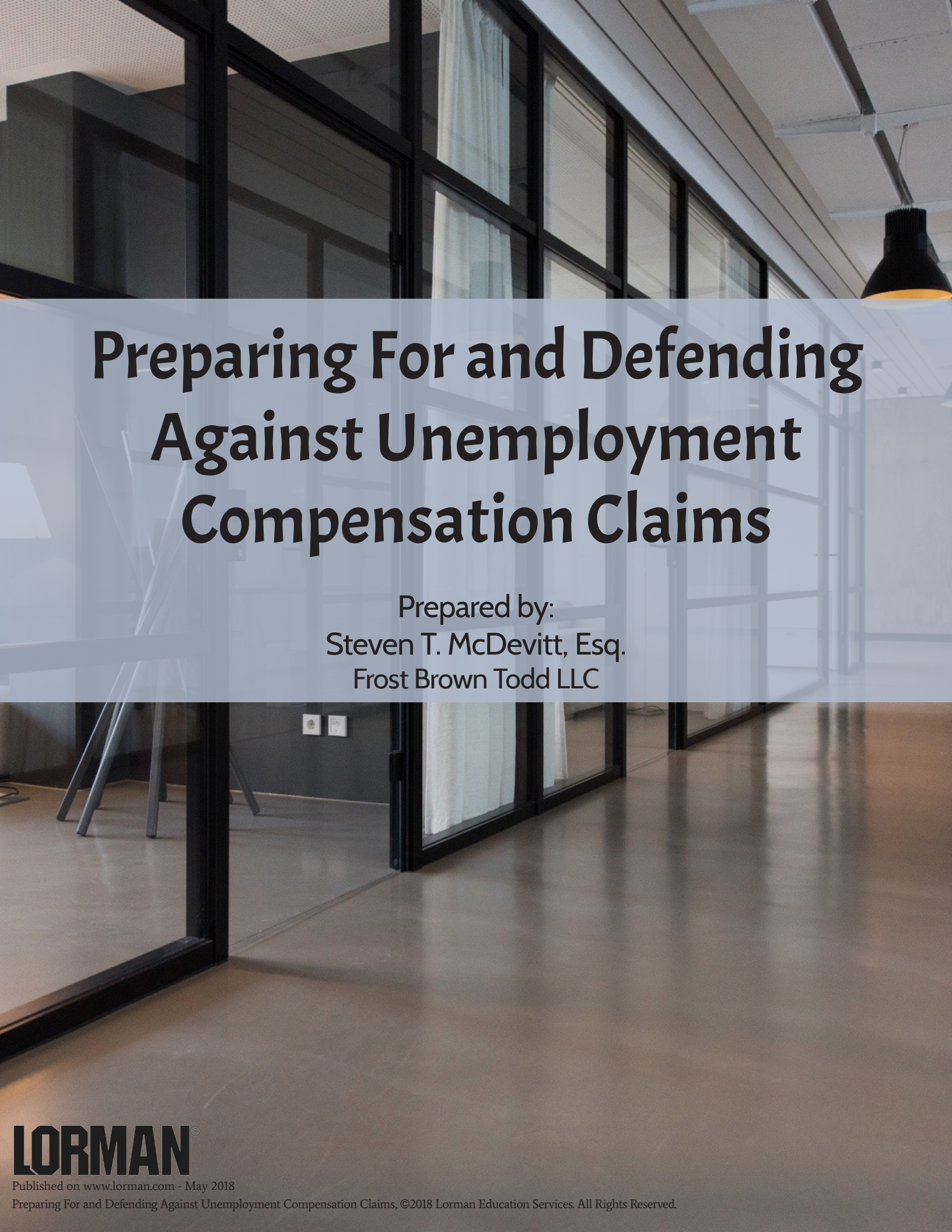

Preparing For and Defending Against Unemployment Compensation Claims

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Preparing For and Defending Against Unemployment Compensation Claims

INTRODUCTION

Most employers are required to make monetary contributions to their state's unemployment compensation fund. Those contribution funds, in turn, are pooled together with other employers' funds. That pooled fund is the source for unemployment compensation benefits paid to eligible displaced employees. The employer's contribution rate is based on the amount of wages (or earnings) it paid out in a given year. That contribution rate can fluctuate based on the amount of unemployment compensation benefits charged to its account.

The purpose of unemployment compensation is to provide substitute funds (for a certain period of time) to eligible employees who lost their job. Generally speaking, displaced employees will receive benefits when their employment separation is not their fault and they remain ready, willing, and able to work.

An application for unemployment compensation benefits triggers an administrative process that varies from state to state. Basically, the application will be reviewed by the "Director" or "Administrator" and he/she will render an initial decision. Either party can request reconsideration of that decision. The dissatisfied party then can request a "live" hearing (in person or by telephone in some cases) before a hearing officer where testimony and documentary evidence will be explored. Usually, the last step in the administrative process is an appeal to a Review Board – which will either affirm or reject the hearing officer's decision. That final administrative decision can be appealed in the appropriate state court.

Some employers view the granting of unemployment compensation benefits as a "cost of doing business." They believe the system is slanted to granting benefits so why bother fighting it. Presumably, those employers have unnecessarily high contribution rates. Those rates could be much lower if employers would engage in a series of "best practices" that will minimize their risk that an individual will receive unemployment compensation benefits. Another cost-saving by-product of those "best practices" is a concomitant reduction in the likelihood an employer will be faced with costly settlements or jury verdicts in an employment lawsuit filed by that same employee.

This handout, by design, is not a definitive review of each and every state's unique unemployment compensation system. You should consult your local attorney to answer any specific inquiry related to your particular state. That being said, the "best practices" referenced in this handout and during the presentation should assist employers in their never-ending quest to reduce unnecessary costs.

ELIGIBILITY STANDARDS

Each state has its own particular set of statutory eligibility criteria. Usually, the individual seeking benefits must prove: 1) he was employed; 2) his employment is not in an area excluded from unemployment compensation (e.g., certain licensed ministers); and 3) his unemployment has continued longer than the prescribed waiting period. Once that initial criteria

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has been met, the seminal question is whether his separation from employment, whether voluntary or involuntary, merits benefits. Again, as discussed in the next section, each state is different. Yet, the basic statutory nomenclature is whether the individual quit without just or good cause or was terminated for just or good cause.

CAUSE OR NO CAUSE: THAT IS THE QUESTION

1. Arizona

a. Disqualification standard

Arizona disqualifies individuals for unemployment benefits: (1) "[f]or the week in which the individual has left work voluntarily without good cause in connection with the employment" and (2) "[f]or the week in which the individual has been discharged for willful or negligent misconduct connected with the employment."[1] (emphasis added).

b. Standard of review

Generally, the employee carries the burden of proving eligibility for unemployment compensation.[2] But, where the employer has discharged the employee for work-related misconduct, the employer must prove the basis for the employee's discharge disqualifies the employee from receiving unemployment compensation.[3] If it is determined, however, the employee voluntarily left her employment without good cause, the burden then falls on the employee to prove "an excusable compelling reason or good cause for leaving."[4]

Additionally, Arizona courts interpret the statutory phrase "left work voluntarily" to mean the termination of the employer-employee relationship occurred as a result of the employee's intention, as opposed to an employee quitting involuntarily due to the employer's intention, or due to factors beyond the employee's control.[5] That an employee quits or resigns, however, is not dispositive in determining whether he is disqualified from receiving unemployment benefits.[6] It must be determined whether the employee quit or resigned voluntarily, because an involuntary quitting or resignation is equal to a discharge.[7]

c. Evidence

To determine the employee's eligibility to receive unemployment compensation, the Arizona Unemployment Tribunal and the Appeals Board "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in

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[1] Ariz. Rev. Stat. § 23-775.
[2] *Ross v. Arizona Dept. of Econ. Sec.*, 171 Ariz. 128, 829 P.2d 318 (Ct. App. 1991).
[3] *Id. See also Rios Moreno v. Ariz. Dept. of Econ. Sec.*, 178 Ariz. 365, 873 P.2d 703 (Ariz. App. 1994), *Munguia v. Dept. of Econ. Sec.*, 159 Ariz. 157, 765 P.2d 559 (Ariz. App. 1988).
[4] *Id.*
[5] *Pettypool v. Dept. of Econ. Sec.*, 161 Ariz. 167, 777 P.2d 230 (Ariz. App. 1989).
[6] *Id.*
[7] *Id.*

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the conduct of their affairs."[8] But, the tribunal and the appeals board may also exclude "incompetent, irrelevant, immaterial and unduly repetitious evidence."[9]

d. Caselaw

***Norwood v. Arizona Dept. of Economic Sec.*, 2013 WL 2296862 (Ariz. Ct. App. May 23, 2013).**

Claimant worked for a product testing laboratory. Her employer had a strict rule that all employees must start work by 8:00 a.m. If the lab techs were late setting up the lab by 8:00 a.m., it could negatively impact the workday schedule for other employees for the rest of the day. Claimant routinely clocked in by 8:00 a.m. She then would arrive at her lab and actually begin work several minutes later. She followed this schedule for 3-1/2 years without reprimand. After new management took over, the tardiness rule suddenly was strictly enforced. After two incidents, Claimant was fired.

The Court held that Claimant's work rule violation was not substantial enough to justify denying her unemployment benefits. Noting first that "misconduct justifying an employer in terminating and employee and misconduct disqualifying an employee from benefits are two distinct concepts," the Court held that only a "material or substantial breach of the employee's duties or obligations … which adversely affects a material or substantial interest of the employer" disqualifies a claimant from benefits. Here, the employer presented no evidence that Claimant showing up three minutes late on two occasions had a substantial adverse impact on its business. Even if it had presented such evidence, the fact the employer tolerated Claimant's slight tardiness for years weighed against it. By ignoring the issue for years, the tardiness probably did not actually impact the business.

***Bednorz v. Arizona Dept. of Economic Sec.*, 2011 WL 601275 (Ariz. Ct. App. Feb. 22, 2011).**

Claimant worked for a real estate property management company and was training to take over an accounts payable lead position due to another employee resigning. Claimant received multiple emails from a senior project manager detailing errors Claimant was making in her new role. One such email detailed 10 specific issues Claimant had in her new position. Claimant responded positively, received help from her supervisor to correct the problems, and believed she was doing her job correctly when she was terminated.

The Court held there was no record of willful or negligent misconduct to keep Claimant from receiving unemployment benefits. Though the employer testified that Claimant made more errors than the "ordinary person," it provided no written or verbal job description for the Claimant and did not establish that a person in the accounts payable lead position with Claimant's level of training would have performed at a different level after two months on the job. The employer also presented no evidence of any prior unsatisfactory work performance, which could be considered in evaluating misconduct.

[8] Ariz. Rev. Stat § 23-674(D).
[9] *Id.*

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2. California

a. Disqualification standard

California law states that "an individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work."[10] (emphasis added). An individual is presumed to have been discharged for reasons other than misconduct in connection with the employment and not to have voluntarily left the employment without good cause unless the employer has given contrary written notice to the Unemployment Department that sets forth facts sufficient to overcome the presumption.[11] The presumption is rebuttable.[12]

Additionally, an individual is presumed to have left her employment with good cause if the individual: (1) leaves pursuant to a compulsory retirement provision of a collective bargaining agreement to which the employer is a party; or (2) leaves to accompany one's spouse to a place from which it is impractical to commute.[13] Furthermore, an individual may be found to have left her most recent work with good cause if the director finds that the individual left her employment because of sexual harassment, but only if the individual had taken reasonable steps to preserve the working relationship prior to leaving.[14] But, upon a finding by the director that the harassment situation was "futile," then the employee is excused from the requirement of taking reasonable steps prior to leaving her employment.[15]

b. Standard of review

California courts determined the statutory requirement of "good cause" for voluntary termination of employment only requires the "cause" be adequate and that it be consistent with the purposes of the California Unemployment Insurance Code and other laws.[16] But, the determination as to whether undisputed facts establish an employee's voluntary leaving of employment without good cause is a conclusion of law and subject to judicial review.[17] Furthermore, good cause must be for such a cause as would "reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment."[18]

On the other hand, California courts associate the meaning of "employee misconduct" with conduct "evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to

[10] Cal.Un.Ins.Code § 1256.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Cal.Un.Ins.Code § 1256.5.
[15] *Id.*
[16] *Prescod v. Unempl. Ins. App. Bd.*, 57 Cal. App. 3d 29, 127 Cal. Rptr. 540 (1976).
[17] *Id.*
[18] *Sanchez v. Unempl. Ins. App. Bd.*, 36 Cal. 3d 575, 205 Cal. Rptr. 501 (Cal. 1984).

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manifest equal culpability, but not in mere inefficiency, unsatisfactory conduct, inadvertencies or ordinary negligence."[19]

c. Evidence

The California appeals board and its representatives and administrative law judges are "not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such a manner as to ascertain the substantial rights of the parties."[20]

d. Caselaw

***Irving v. California Unemployment Insurance Appeals Board*, 229 Cal. App. 4th 946, 177 Cal. Rptr. 3d 759 (Cal. Ct. App. 2014)**

Claimant worked as a truck driver for a local school district. Truck drivers were instructed on when to take their twenty-minute work breaks. Breaks were strictly enforced and not to exceed the twenty-minute time limit. Drivers were also not allowed to take breaks in the last hour of their shift. Claimant, on at least four occasions, took breaks within the last hour of his shift and for longer than the allowed twenty-minutes. On those four occasions, claimant falsified his timecards both as to the duration of the breaks and when they occurred. Claimant was terminated.

The Court affirmed the denial of Claimant's benefits. Claimant testified that during training the employer instructed him to take breaks whenever he could, even in the last hour of his shift, and that he should nevertheless fill out his timecards so that the breaks did not appear in the last hour. Claimant also testified that on several occasions he turned in timecards that reflected his actual break times even though he took the breaks in the last hour. Management told him to amend the cards to show breaks taken before the last hour of the shift so that the records would comply with government regulations regarding break time. The Court found that, although the employer instructed Claimant to falsify records regarding *when* breaks occurred, Claimant was never instructed to falsify records regarding the *duration* of his breaks. Therefore, Claimant was discharged for willful misconduct and was properly denied unemployment benefits.

***Robles v. Employment Development Dept.*, 207 Cal. App. 4th 1029, 144 Cal. Rptr. 3d 36 (Cal. Ct. App. 2012).**

Claimant worked for an environmental solutions company collecting food grease from restaurants and food outlets. Each year, the employer provided its employees a $150 shoe allowance to purchase safety shoes for work. Claimant, who had another good pair of shoes, had a friend in need and wanted to use his $150 allowance to purchase shoes for his friend. When he was informed he could not purchase the shoes for his friend, he obeyed his employer. Claimant

[19] *Lacy v. Unempl. Ins. App. Bd.*, 17 Cal. App. 3d 1128, 95 Cal. Rptr. 566 (Cal. App. 1971).
[20] Cal.Un.Ins.Code § 1952.

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had been aware of the company policy stating that the shoe allowances only were for employees. Claimant was discharged.

The Court went against previous rulings and granted the Claimant unemployment benefits. Although Claimant violated his employer's reasonable rule, he did so in good faith. It was not viewed as misconduct. Claimant knew his employer's rule and did not try to hide that he was trying to purchase the shoes for his friend. He also had shoes that would not jeopardize his safety. When his supervisor indicated he could not purchase the shoes for his friend, Claimant assured his supervisor he would comply. Claimant did comply and did not use the allowance for his friend. Additionally, the employer did not speak with investigators trying to determine if benefits should be awarded. It also did not submit facts regarding the Claimant's eligibility for benefits.

3. Florida

a. Disqualification standard

An individual is disqualified for benefits for the week in which the individual "has voluntarily left work without good cause attributable to his or her employing unit or in which the individual has been discharged by his or her employing unit for misconduct connected with his or her work, based on a finding by the Department of Economic Opportunity."[21] The term "work" represents any work, whether full-time, part-time, or temporary.[22] "Good cause" includes only that which would compel a reasonable employee to cease working or because of the illness or disability of the individual requiring separation from her work.[23]

b. Standard of review

In Florida, to determine whether an employee voluntarily left a job without good cause attributable to an employer, the inquiry must focus on "whether the circumstances behind the employee's departure would have impelled the average, able-minded, qualified worker to give up his employment."[24] Alternatively, to disqualify an employee from receiving unemployment compensation, the employer carries the burden of proving by substantial and competent evidence that an employee voluntarily left her job.[25]

c. Evidence

In Florida administrative proceedings, which include hearings before unemployment compensation appeals referees, hearsay evidence is admissible only for the purpose of explaining or enhancing other evidence.[26] Hearsay evidence is not sufficient, standing alone, to prove a

[21] Fla. Stat. § 443.101(1)(a) (emphasis added).
[22] *Id.*
[23] *Id.*
[24] *Marcelo v. Dept. of Lab. and Empl. Sec.*, 453 So. 2d 927, 929 (Fla. Dist. App. 1984).
[25] *Wood v. Unempl. App. Commn.*, 927 So. 2d 127 (Fla. Dist. App. 2006).
[26] *Yost v. Unempl. App. Commn.*, 848 So. 2d 1235, 1237 (Fla. Dist. App. 2003).

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material fact at issue, unless the hearsay evidence would be admissible over objection at a civil proceeding.[27]

d. Caselaw

***Ramirez v. Reemployment Assistance Appeals Comm'n*, --- So.3d ----, 2014 WL 471972 (Fla. Dist. Ct. App. 2014).**

Claimant, a housekeeper, discovered her father just had a serious stroke and might die. She asked permission to take a leave of absence to travel to the Dominican Republic to be with her father and her family. The employer refused a general leave of absence, but offered the Claimant FMLA leave. Rather than pursue FMLA leave, Claimant simply left to be with her family. Her father died less than a week later. Upon her return, Claimant was told she had abandoned her job. Claimant initially was denied benefits. The Court of Appeals reversed, finding there is a well-settled exception for "family emergencies." When an employee must leave for a bona fide family emergency, her absence cannot be labeled "misconduct" or a "quit." Because the employer discharged the employee without cause tied to misconduct, the Claimant is entitled to benefits.

***Hernandez v. Reemployment Assistance Appeals Comm'n*, 114 So.3d 407 (Fla. Dist. Ct. App. 2013).**

Claimant, a car mechanic, was fired for several poor performance incidents, including: (1) failing to properly check a drain plug causing a customer to need a new engine; (2) damaging the shocks on a customer's handicap-equipped vehicle; (3) breaking a wheel center on a customer vehicle; (4) and not finishing a tire repair job properly. The Court admitted that Claimant's incidents "involv[ed] poor judgment, inattention, [and] failure to perform in the workplace." Surprisingly, it also found they were "isolated incidents" not rising to the level of intentional disregard of an employer's interests or gross negligence that would justify denying unemployment compensation benefits.

***Bagenstos v. Florida Unemployment Appeals Comm'n*, 927 So. 2d 153 (Fla. Dist. Ct. App. 2006).**

Claimant, a nine-year employee, was terminated after a customer insisted Claimant was being a "smartass." Claimant responded by saying "If you want me to clock out, I'll take this out front with you."

The Court initially agreed Claimant knowingly violated the employer's written policy for resolving customer disputes was supported by competent substantial evidence. It then held the administrative referee failed to take into account the incident was a "provoked, isolated act of poor judgment by a longtime employee." Thus, the Court held Claimant's actions did not amount to misconduct and remanded the case for an award of benefits.

[27] *Id.*

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***Gomez v. Unemployment Appeals Comm'n*, 884 So.2d 1033, 29 Fla. L. Weekly D2274 (Fla. Dist. Ct. App. 2004).**

Claimant, employed by a collection agency, was issued a final warning on December 6, 2002 for using the internet for personal reasons during business hours in violation of his employer's policy. Claimant promised his employer that he would not use the internet for non-business purposes. The employer presented hearsay testimony that a computer-generated report, which was not introduced into evidence, showed that Claimant continued to access internet sites for non-business purposes over the next two weeks.

The Court reversed the final order of the Unemployment Appeals Commission. Because the employer only provided hearsay evidence of Claimant's misconduct, the employer did not have sufficient evidence to prove misconduct connected with work so as to deny unemployment compensation benefits.

4. Kentucky

a. Disqualification standard

Kentucky law states a worker is disqualified from receiving unemployment benefits for the duration of any period of unemployment with respect to which the worker has been discharged for misconduct or dishonesty connected with his most recent work, . . . but legitimate activity in connection with labor organization or failure to join a company union shall not be construed as misconduct."[28] "Discharged for misconduct" includes but is not limited to:

> separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work.[29]

The statutory list is not exhaustive and Kentucky law also applies a common law definition of misconduct: (1) "willful or wanton disregard of an employer's interests"; (2) "deliberate … disregard of standards of behavior which the employer has the right to expect of his employee," (3) "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the

[28] Ky. Rev. Stat. § 341.370(1)(a) (emphasis added).
[29] *Id.* at (6).

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employer's interests or of the employee's duties and obligations to his employer."[30] If the claimant engaged in conduct specified in the statutory list, it is *per se* misconduct. If not, the claimant may still be disqualified if the conduct meets the common law definition.[31]

Additionally, Kentucky law states a worker is disqualified from receiving unemployment benefits for the duration of any period of unemployment if the worker left his most recent suitable work voluntarily without good cause attributable to the employment.[32] But, Kentucky law also provides exceptions if a worker leaves a job voluntarily. An otherwise eligible individual will not be disqualified from receiving benefits for: (1) leaving work which is 100 road miles or more, as measured on a one way basis, from that individual's home to accept work which is less than 100 road miles from that individual's home; (2) accepting work which is a bona fide job offer with a reasonable expectation of continued employment; or (3) leaving work to accompany the individual's spouse to a different state when the spouse is reassigned by the military.[33]

b. Standard of review

Kentucky courts held that "good cause" for voluntarily leaving one's employment only exists in situations where the employee "is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment."[34] The principal inquiry in determining whether the employee left his employment for good cause must be based on "who caused the employee to quit."[35] On the other hand, regarding employee misconduct, "[a]n employer is entitled to the faithful and obedient service of his employee, and failure to render same may constitute misconduct by the employee…"[36] An employer carries the burden of proving misconduct.[37]

c. Evidence

During an appeals hearing, the claimant may present evidence "as may be pertinent and may question the opposite party and his witnesses."[38]

[30] *Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472, 474 (Ky. App. 1984).
[31] *See Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238, 247-48 (Ky. 2012).
[32] *Id.* at (1)(c).
[33] *Id.*
[34] *H & S Hardware v. Cecil*, 655 S.W.2d 38 (Ky. App. 1983).
[35] *Kentucky Unempl. Ins. Commn. v. Melvin's Grocery Store,* 696 S.W.2d 791 (Ky. App. 1985).
[36] *Shamrock Coal Co. v. Taylor*, 697 S.W.2d 952 (Ky. App. 1985).
[37] *Id.*
[38] 787 Ky. Admin. Regs. 1:110.

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d. Caselaw

***Kentucky Unemployment Comm'n v. Mackin*, 2014 WL 6685349 (Ky. Ct. App. Nov. 26, 2014).**

Claimant was asked by a co-worker to testify in court regarding the co-worker's work schedule and employment status. The testimony would prevent the co-worker's incarceration. Claimant was not authorized to testify as the employer's representative and did not inform employer of her intent to testify. Claimant created letterhead on her personal computer incorporating the employer's logo and used the letter as confirmation of the co-worker's employment. Claimant also signed a court order purporting to be an agent of the employer. Once the employer became aware of this activity Claimant was terminated.

The Court held that Claimant had engaged in common law misconduct and therefore was disqualified from receiving unemployment compensation. Although it was possible Claimant's actions were a good faith error in judgment, by signing the court order Claimant subjected her employer to potential liability for contempt. The falsified company letterhead also demonstrated a level of conscious deceitfulness beyond a good faith error in judgment.

***Kentucky Unemployment Comm'n v. Blakeman*, 2013 WL 2659938 (Ky. Ct. App. June 14, 2013).**

Claimant worked for an order fulfillment company. She injured her foot outside of work and was placed in a walking boot. Because open-toed shoes were prohibited at her job for safety reasons, she was placed on leave until she healed. To reduce future workplace injuries, her employer had a rule requiring any employee on leave for more than 30 days to pass a physical agility test before returning to work. After Claimant's injury healed, she tried to return to work, but failed the physical agility test twice over the course of two months. She was discharged because she was not able to return to work.

The Court granted Claimant unemployment benefits. Because she wanted to return to her job, but was simply unable to meet the physical requirements, she could not be considered to have voluntarily quit.

***Hall v. Kentucky Unemployment Ins. Comm'n*, 2009 WL 2633634 (Ky. Ct. App. Aug. 28, 2009).**

Claimant was a quality technician for a die casting company. He was discovered sleeping by a co-worker. His employer concluded Claimant was asleep in a chair with his arm folded under his head as a pillow. A co-worker tried to wake him several times without success. Claimant had to be physically shaken to be awakened.

Claimant argued his falling asleep was not willful, but was the result of a change in his work schedule. The Court disagreed. Claimant's act of stretching out with his arm folded under his head to make a pillow was an act conducive to falling asleep. His decision to put himself in

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such a position, and then falling asleep on the job, was not an action to accomplish his employer's purpose.

***Unemployment Ins. Comm'n v. Dye,* 731 S.W.2d 826 (Ky. Ct. App. 1987).**

Claimant, a union official, approached an assistant manager to discuss a problem between an employee and a member of management. The two had an argument. At one point in the argument, Claimant motioned to the manager with his middle finger and stated "up your ass." Claimant was terminated the next day.

The Court reversed an earlier ruling and denied Claimant benefits. In doing so, the Court stated it is reasonable for an employer to expect employees "to refrain from making obscene gestures or using vulgar language in a belligerent manner" when addressing the employer unless there is justifiable provocation. Thus, the definition of "misconduct" including "a disregard of standards of behavior which the employer has a right to expect of his employee" applied to Claimant's conduct.

A dissenting opinion argued that an isolated incident such as in Claimant's case, especially an incident involving a labor representative and management, should not deprive someone of unemployment benefits. The judge stated "If workmen, during labor disputes, could be terminated and deprived of unemployment benefits by reason of acts similar to those of [Claimant], then the labor movement would be short-lived in Kentucky."

5. Massachusetts

a. Disqualification standard

An individual is disqualified from receiving unemployment benefits during the period of unemployment where the individual left work: "(1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent; (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in willful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be a result of the employee's incompetence; or (3) because of conviction of a felony or misdemeanor."[39] An individual shall not be disqualified if it is established to the satisfaction of the commissioner that the reason for leaving work was due to sexual, racial, or other unreasonable harassment where the employer, its supervisory personnel, or agent knew or should have known of such harassment.[40] Furthermore, an individual who leaves work to accompany or join one's spouse or another person at a new location receives no unemployment benefits.[41]

[39] Mass. Gen. Laws ch. 151A § 25 (emphasis added).
[40] *Id.*
[41] *Id.*

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b. Standard of review

Employees carry the burden of proving the employee left work involuntarily with "good cause" attributable to the employer.[42] The employee must also show the employee took "reasonable steps" to maintain the employment, unless the facts indicate such steps would have been "futile or resulted in retaliation."[43] In substantiating "good cause," the employee must prove the employee left employment for good cause related to the employing unit or the motivating reason for leaving was of "urgent, compelling, and necessitous nature that would render his departure involuntary."[44]

In the event an employer discharges an employee, the employee's claim turns on whether the Massachusetts Legislature intended the compensation to be denied under the circumstances of the claim, rather than whether the employer had justification in discharging the employee.[45] Where the employer seeks to disqualify an employee from receiving unemployment benefits due to the employee's willful misconduct, the employer bears the burden.[46] But, disqualification for willful misconduct requires the employer to illustrate the conduct was deliberate and a willful disregard of the employer's interests, as well as the "critical factual issue of the employee's state of mind at the time of the misconduct."[47]

c. Evidence

The benefits claim procedure "shall be designed to ascertain the substantive rights of the parties involved, without regard to common law or statutory rules of evidence and other technical rules of procedure."[48]

d. Caselaw

***Dottin v. City of Cambridge*, 87 Mass. App. Ct. 1103, 24 N.E.3d 1060 (2015)**

Claimant, a cook at a local school, was terminated after she appeared under the influence of drugs or alcohol at work and repeatedly refused to submit to a drug or alcohol test. Claimant argued that she was having a "stress attack" on the day in question. She also argued that because of the "stress attack" she did not know that her employment contract required her to submit to a drug or alcohol test upon suspicion that she was under the influence.

The court affirmed the Department of Unemployment Assistance's denial of compensation benefits. The Department based its decision on testimony that on the day in question Claimant's speech was slurred, she was rambling incoherently, and waving her arms.

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[42] *Tri-County Youth Programs, Inc. v. Acting Dep. Dir. of the Div. of Empl. And Training*, 54 Mass. App. 405, 765 N.E.2d 810 (2002).
[43] *Id.*
[44] *Crane v. Commr. of Dept. of Empl. and Training*, 414 Mass. 658, 609 N.E.2d 476 (1993).
[45] *Garfield v. Dir. of Div. of Empl. Sec.*, 377 Mass. 94, 384 N.E.2d 642 (1979).
[46] *Quintal v. Commr. of the Dept. of Empl. and Training*, 418 Mass. 855, 641 N.E.2d 1338 (1994).
[47] *Commr. of the Dept. of Empl. and Training v. Dugan*, 428 Mass. 138, 697 N.E.2d 533 (1998).
[48] Mass. Gen. Laws ch. 151A § 38.

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The employees who found her in this state were trained in identifying individuals who were under the influence. The Department also heard testimony that the school principal on several occasions reinforced that failure to submit to a drug or alcohol test would result in termination. The principal even read the relevant provision in Claimant's employment contract. This testimony provided ample ground for the Department to determine Claimant's behavior was willful misconduct.

***Leung v. Director of Dept. of Unemployment Assistance*, 84 Mass. App. Ct. 1127, 1 N.E.3d 294 (2014).**

Claimant, a bank clerk, repeatedly created workplace disturbances by constantly discussing her religious beliefs and her hatred for communism. She openly called coworkers "workers of the devils" and "monsters" and distributed religious and anti-communist materials to them. Her behavior bothered and offended many coworkers. She was warned several times to stop her behavior and told she was violating work rules against discussing offensive or sensitive topics and other employer policies. When she failed to stop, she was fired. The Court upheld the denial of benefits—the employer's policies and expectations were reasonable, were clearly communicated to Claimant, and she failed to follow them.

***White v. Director of Division of Unemployment Assistance*, 84 Mass. App. Ct. 1104, 990 N.E.2d 563 (2013).**

Claimant, a truck driver, was required to maintain a valid commercial driver's license (CDL). During an annual review of all drivers' CDL licenses, his employer discovered Claimant's license had been suspended for too many driving infractions. Because the employer could not legally employ Claimant as a driver without a valid CDL, he was terminated. The Court held Claimant was *not* entitled to unemployment benefits because he left his job voluntarily. "An employee who creates his own disqualification and causes his termination from employment does so voluntarily for purposes of the statute, notwithstanding the employee's subjective desire to remain employed." Because Claimant's actions caused his license to be suspended, he "created his own disqualification and voluntarily made himself ineligible for further employment."

***McGonagle v. Commissioner of Div. of Unemployment Assistance*, 76 Mass. App. Ct. 1117, 922 N.E.2d 863 (2010).**

Claimant, a sixteen year employee, was the assistant superintendent/night and weekend supervisor of the Massachusetts Bay Transportation Authority. Surveillance established that on multiple occasions over the period of about a month, Claimant was not where he claimed to be on his tour of duty reports. Claimant listed he was riding the trains, visiting specific stations and train yards, and interviewing employees. However, he had been observed working for significant periods of time at a desk located in his friend's private real estate office. Claimant never reported his time at the real estate office to his employer.

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The Court upheld the denial of benefits. Claimant had previously complained to his supervisor about the employer's failure to provide him with the necessary tools to do his job. Additionally, his employer had increased his job duties and refused to allow him to return to his former position as promised. Although the Court saw these as mitigating factors, they did not justify Claimant's inclusion of false statements in his reports in violation of his employer's dishonesty rule.

6. Michigan

a. Disqualification standard

An individual is disqualified from receiving benefits if the individual "left work voluntarily without good cause attributable to the employer or employing unit."[49] Individuals absent from work for more than three consecutive days without contacting the employer are considered to have voluntarily left work without good cause.[50] Additionally, the individual is disqualified from receiving benefits if the individual was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.[51]

b. Standard of review

An individual who seeks to claim unemployment benefits carries the burden of proof to establish she left work involuntarily or for good cause that was attributable to the employer or employing unit.[52] Michigan courts interpret "good cause" to mean "a good reason, a substantial reason," a reason that "would cause a reasonable, average and otherwise qualified worker to give up their employment."[53] In the event an employer discharges an employee due to the employee's willful misconduct, the courts must consider all facts, in particular the degree of responsibility the employee owes to employer, as well as the hardship or trouble the employer incurred as a result of the employee's misconduct.[54] Misconduct in the context of unemployment compensation is "willful disregard of the employer's interest and a deliberate violation of standard of behavior which an employer has a right to expect of his employee."[55]

c. Evidence

The Michigan Supreme Court held the rules of evidence, including the application of the hearsay rule, govern unemployment compensation proceedings.[56]

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[49] Mich. Comp. Laws § 421.29 (1)(a) (emphasis added).
[50] *Id.*
[51] *Id.* at (1)(b).
[52] *Id.* at (1)(a).
[53] *Carswell v. Share House, Inc.*, 151 Mich. App. 392, 396-97, 390 N.W.2d 252 (1986).
[54] *Wickey v. App. Bd. of Mich. Empl. Sec. Commn*., 369 Mich. 487, 120 N.W.2d 181(1963).
[55] *Carter v. Michigan Employment Sec. Comm'n*, 364 Mich. 538, 542, 111 N.W.2d 817 (1961).
[56] *Miller v. F.W. Woolworth Co.*, 359 Mich. 342, 102 N.W.2d 728 (1960).

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d. Caselaw

***Duley v. Active Community Nursing LLC*, 2015 WL 302694 (Mich. Ct. App. Jan. 22, 2015)**

Claimant took maternity leave from her office manager position. At the conclusion of her maternity leave, Claimant approached her employer and proposed that she work from home in her office manager position three days a week. The employer rejected the proposal and told Claimant that they would keep the office manager position open for her if she would return to the office full time. If Claimant would not return to the office full-time the employer would create a part-time position that only required Claimant to come in to the office twice during the workweek. Claimant rejected the part-time position and resigned.

The Court held that Claimant left employment without good cause attributable to the employer. Claimant chose not to accept the work the employer offered as an accommodation. Although Claimant may have had a good personal reason for resigning, personal reasons do not equate with good cause under the statute.

***Sheppard v. Meijer Great Lakes Ltd.*, 2012 WL 6633993 (Mich. Ct. App. Dec. 20, 2012).**

Claimant requested a two-month leave of absence. She was told she would need manager approval. She claimed she requested the approval and thought it was granted. There, however, was no written approval. More than six weeks into Claimant's leave, her supervisor discovered there was no written approval. He assumed Claimant had voluntarily quit. He then officially terminated her from the Company.

The administrative agency and lower courts denied Claimant's unemployment benefits, accepting Meijer's assertion that she voluntarily quit for no apparent reason. The Court of Appeals reversed and granted Claimant unemployment benefits. Any time an employee requests a leave of absence, and the employer affirmatively terminates the employee during the leave of absence, the employee cannot be said to have voluntarily quit. There was no evidence Claimant quit and no evidence Meijer expected her to show up to work on any day that she failed to show up. The lack of evidence means Meijer did not overcome the presumption that Claimant was entitled to benefits.

***Philips-Johnson, Inc. v. Galilei*, 2010 WL 1874366 (Mich. Ct. App. May 11, 2010).**

Claimant was discharged for failing to appear for work in order to attend a divorce proceeding. She had requested the day off two months in advance. Her request had been denied. Claimant was the only employee in an insurance office and she was told no one was available to cover for her that day. It was also determined the divorce proceeding could have been rescheduled. Claimant, however, chose not to do so because she wanted her divorce to be final as soon as possible. Claimant was not advised she would lose her job if she failed to report to work that day. The employer eventually was able to find someone to cover for her.

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The Court allowed Claimant unemployment benefits. Even though permission was not granted for leave, Claimant was only absent for one day, she timely sought permission, she had a good reason for her absence, was not told that she would be terminated if she was absent, and the employer was able to cover for Claimant. Claimant's conduct was unsatisfactory, but not a willful or wanton disregard of her employer's interest.

7. New York

a. Disqualification standard

In New York, an individual is disqualified from receiving unemployment benefits after an individual's voluntary separation without good cause from employment. But, in determining what constitutes "good cause," voluntary separation from employment "shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance…"[57] A disqualification applies if the individual's voluntary separation from the employment results from the individual's marriage.[58] Furthermore, an individual is disqualified from receiving any days of unemployment if the individual lost the employment through misconduct in connection with his employment.[59]

b. Standard of review

"Good cause" is a question of fact for the Board and must be "firmly supported" by substantial evidence.[60] In determining whether an employee is eligible to receive unemployment compensation, an employee who failed to take reasonable steps in order to maintain employment is "deemed to have voluntarily resigned without good cause."[61] If an employer discharges an employee for misconduct, behavior that is "detrimental to the employer's interests" disqualifies the employee from receiving unemployment compensation.[62]

c. Evidence

At any unemployment compensation hearing, "evidence may be offered to support a determination, rule, or order or to prove that it is incorrect. The appeal board and referees, in hearings and appeals under any provision of this article, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties."[63]

[57] N.Y. Lab. Law § 593.
[58] *Id.*
[59] *Id.*
[60] *Miller v. Catherwood*, 30 A.D.2d 610, 290 N.Y.S.2d 244 (Ny. App. Div. 1968).
[61] *In re Claim of Illerbrun*, 246 A.D.2d 722, 667 N.Y.S.2d 491 (Ny. App. Div. 1998).
[62] *In re Claim of Fowler*, 242 A.D.2d 768, 661 N.Y.S.2d 851 (Ny. App. Div. 1997).
[63] Ny. Lab. Law § 622.

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d. Caselaw

***In re Jaiyesimi*, 114 A.D.3d 983, 979 N.Y.S.2d 720 (N.Y. App. Div. 2014).**

Claimant, a security guard, was employed for just over one year. He failed to report for a scheduled shift without notification. He was fired. The Court held Claimant was eligible for benefits. Although "a claimant's continued absence from work despite repeated warnings and failure to comply with an employer's policies regarding absences have been held to constitute disqualifying misconduct," there was only a single incident in this case. Claimant submitted evidence his absence was a simple error on his part about his work schedule. His behavior did not rise to the level of a disqualifying offense.

***In re Saunders*, 106 A.D. 3d 1317, 964 N.Y.S.2d 783 (N.Y. App. Div. 2013).**

Claimant was fired for making inappropriate sexual comments to coworkers. The New York Unemployment Insurance Commission denied him benefits because he was fired for misconduct. Claimant's next appeal was denied. Claimant appealed to the Unemployment Insurance Appeal Board. The Board reversed the ALJ's decision and granted Claimant benefits.

At the Board hearing, Claimant denied he ever made inappropriate sexual comments. The employer's primary witness was Claimant's co-worker. Her testimony was very vague. The Board decided she was not credible. The employer presented no other evidence to refute Claimant's general denial that he did anything wrong. The employer appealed to the Court, but New York courts cannot overturn the Board's factual determinations. Since the Board found Claimant did nothing wrong, the Court could not overturn that decision. Claimant received unemployment benefits.

***In re Alegria*, 107 A.D.3d 1290, 969 N.Y.S.2d 178 (N.Y. App. Div. 2013).**

Claimant was discovered sleeping during her shift. Her manager caught Claimant and videotaped her sleeping. After waking up, she was told she was being relieved of her duties and sent home. Claimant spoke with another manager over the phone and made threatening remarks. Claimant was denied benefits, since sleeping on the job and threatening coworkers or management previously have been found by New York courts to be disqualifying offenses.

***Herandez v. Commissioner of Labor*, 98 A.D.3d 1185, --- N.Y.S.2d ---- (N.Y. App. Div. 2012).**

Claimant had a verbal dispute with a co-worker that resulted in Claimant pushing the co-worker and throwing the co-worker's phone to the floor. The co-worker reported Claimant's conduct to the owner. The owner informed Claimant she could no longer work for the company. Claimant then threatened the owner with physical harm. The owner filed a police report.

The Court affirmed the denial of benefits. Although Claimant provided testimony contrary to the employer's regarding what happened with the altercation, both the co-worker and

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owner of the company testified Claimant assaulted the co-worker and threatened the owner. Credibility was resolved in the employer's favor.

***In re Petrov*, 96 A.D.3d 1339, 947 N.Y.S.2d 227 (N.Y. App. Div. 2012).**

The COO held a wire or strap around Claimant's neck in front of two co-workers. Claimant became upset at this action, packed her things, and left her job. She never returned.

The Court affirmed unemployment benefits for Claimant. Both Claimant and a co-worker testified that a strap or wire was placed around Claimant's neck without permission by the COO, which caused Claimant fear and emotional distress. Claimant had good cause to leave her employment.

8. Ohio

a. Disqualification standard

Ohio disqualifies individuals from receiving unemployment compensation for the duration of the individual's unemployment if the director finds that "the individual quit work without just cause or has been discharged for just cause in connection with the individual's work."[64] Similarly, Ohio disqualifies individuals from receiving unemployment compensation for any week the individual was laid off due to "misconduct in connection with the individual's work."[65]

b. Standard of review

In Ohio, an essential factor in proving a "just cause" termination is fault on the part of the employee.[66] But, "just cause" may not necessarily reach the level of misconduct.[67] "Just cause" refers to a justifiable reason for terminating an employee from the employee's perspective and must be based on the employee's conduct.[68] To determine just cause in an employment discharge situation, the Ohio standard used is "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act."[69] The determination depends on the facts of each case.[70]

On the other hand, the employee has the burden of proving entitlement to unemployment compensation benefits, including the existence of just cause for quitting work.[71] To determine whether an employee has "just cause" in quitting his employment, the employee's reasoning for quitting is held to the standard of whether an ordinarily intelligent person would find the

[64] O.R.C. § 4141.29(D)(2)(a) (emphasis added).
[65] O.R.C. § 4141.29(D)(1)(b) (emphasis added).
[66] *Tzangas, Plakas and Mannos v. Ohio Bureau of Empl. Serv.*, 73 Ohio St. 3d 694, 653 N.E.2d 1207 (1995).
[67] *Schienda v. Transp. Research Ctr.*, 17 Ohio App. 3d 119, 477 N.E.2d 675 (1984).
[68] *Morris v. Ohio Bureau of Empl. Serv.*, 90 Ohio App. 3d 295, 629 N.E.2d 35 (1993).
[69] *Mers v. Dispatch Printing Co.*, 39 Ohio App. 3d 99, 529 N.E.2d 958 (1988).
[70] *Id.*
[71] *Irvine v.Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587, 589 (1985).

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employee's reason for quitting to be a justifiable reason.[72] Particularly where the employee's reason for quitting her employment is related "in a substantial way with the ability to perform in an employment capacity," the employee is essentially "involuntarily" unemployed.[73]

c. Evidence

In connection with an unemployment compensation hearing and other proceedings, "[a]ll facts relevant to a fair and complete decision shall be received as directly and simply as possible."[74] Unemployment hearings and other proceedings are informal, and the review commission and hearing officers are not obligated "by common law or statutory rules of evidence or by technical or formal rules of procedure."

d. Caselaw

***Marietta Coal Co., Inc. v. Kirkbride*, 7th Dist. Belmont, 2014 WL 7339121 (Ohio Ct. App. Dec. 18, 2014)**

Claimant worked for the employer as a mechanic. The mechanic who Claimant replaced was eventually rehired and was given the benefit of driving the company truck and using company tools. As such, Claimant was required to drive his personal vehicle and use his personal tools in the course of his job duties. Claimant found this increase in costs prohibitive and raised his concerns with the employer. Claimant eventually quit his employment because of the added costs.

The Court held that Claimant quit *with* just cause and therefore was not disqualified from receiving unemployment compensation. There was no expectation at the time of hire that Claimant would have to use his personal vehicle and tools. When Claimant was hired he was told that he would drive to company facilities and pick-up a company truck that he was to use during the performance of his job duties. Claimant raised his concerns with his employer and gave the employer an opportunity to remedy the situation. When the employer did not do so, Claimant had just cause to quit work.

***Coles v. United Parcel Service*, 2013-Ohio-1428, 990 N.E.2d 1092 (Ohio App. 7th Dist. 2013).**

Employer had a policy prohibiting off-duty convictions for operating a vehicle while intoxicated (OVI). After a first offense, the employee could undergo rehabilitative alcohol counseling. A second offense mandated termination. Claimant was convicted of OVI several years prior and took leave to undergo alcohol counseling. He was convicted of a second OVI and was fired. His application for unemployment benefits was denied because his employer had just cause to fire him. The policy was set out in company rules. Claimant knew about it. The policy was related to the employer's business interests. The employer followed the policy. Therefore, Claimant was not entitled to benefits.

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[72] *Henize v. Giles*, 69 Ohio App. 3d 104, 590 N.E.2d 66 (1990).
[73] *Id.*
[74] OAC 4146-7-02.

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***Tzangas, Plakas & Mannos vs. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St. 3d 694, 653 N.E.2d 1207 (Ohio 1995).**

Claimant was discharged because she was unable to perform the required work. She continually made serious typing and proofreading errors requiring duplicative efforts. The employer made reasonable attempts to avoid discharging her, including issuing various reprimands. The lower court had upheld the granting of unemployment compensation benefits because it narrowly defined "fault" as a "willful or heedless disregard of duty or violation of [employer] instructions." The Ohio Supreme Court stated that the "Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. When an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament. Fault on the employee's part separates him from the Act's intent and the Act's protection. Thus, fault is essential to the unique chemistry of a just cause termination."

The Ohio Supreme Court rejected that irrational standard, ruling that "[t]o rule that way is to ignore that ability is relevant in the workplace. There is little practical difference between an employee who will not perform her job correctly and one who cannot perform her job correctly. In either case, the performance of the employee is deficient. That deficiency, which does not result from any outside economic factor, constitutes fault on the employee's behalf."

The Tzangas Court further reasoned that "[u]nsuitability for a position constitutes fault sufficient to support a just cause termination. An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work; (2) the employer made known its expectations of the employee at the time of hiring; (3) the expectations were reasonable; and (4) the requirements of the job did not change since the date of the original hiring for that particular position."

***C & W Tank Cleaning Co., Inc.*, 2012-Ohio-4186, 2012 WL 4044623 (Ohio App. Ct. Sept. 14, 2012).**

Claimant confronted a co-worker because Claimant believed the co-worker had spread rumors that Claimant was a "snitch." Claimant admitted to using profanity threatening to sue the co-worker. Witnesses reported Claimant told the other co-worker he was going to "kick his ass" and "get him." The employer terminated Claimant.

At an administrative hearing, Claimant stated that profanity was common in his workplace. He denied ever touching or physically threatening the other co-worker. The HR manager testified what she was told by the co-worker and several witnesses to the event – which contradicted Claimant's testimony.

The Court affirmed unemployment benefits because the employer's hearsay evidence was less credible than Claimant's testimony. Claimant's "termination for a common interpersonal dispute in the common language of the workplace was not for just cause."

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9. Pennsylvania

a. Disqualification standard

An individual is disqualified from receiving unemployment benefits for any week "in which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature."[75] Additionally, an individual is ineligible from receiving unemployment benefits for any week "in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work…"[76] Failure to take a drug test at the request of an employer also disqualifies an individual from receiving unemployment compensation.[77]

b. Standard of review

An employee who voluntarily terminates his employment carries the burden of proving that "necessitous and compelling reasons" prompted the decision to voluntarily leave one's employment.[78] "Cause of a necessitous and compelling nature" has been interpreted to mean a cause which results from "overpowering circumstances which produce both real and substantial pressure to terminate employment and which would compel a reasonable person to act in the same manner."[79] Additionally, the question as to whether the employee voluntarily quit his employment is a question of law.[80] The employee must establish that: (1) circumstances existed which produced real and substantial pressure to terminate employment; (2) like circumstances would compel a reasonable person to act in the same manner; (3) the employee acted with ordinary common sense; and (4) she made a reasonable effort to maintain employment.[81]

The Pennsylvania Supreme Court defined "willful misconduct" as a "deliberate violation of the employer's rules" and a "disregard of standards of behavior which the employer has a right to expect of an employee."[82] If the employee's conduct may be considered justifiable or reasonable under the circumstances, then it is not willful misconduct.[83]

c. Evidence

Hearsay evidence is generally admissible in the administrative setting.[84] But, "[i]n administering the standard for the admissibility, competency, and burden of showing competency of hearsay evidence in an administrative hearing, fairness must be the touchstone."[85]

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[75] Pa. Stat. Ann. tit. 43, § 802(b) (emphasis added).
[76] *Id.* at (e) (emphasis added).
[77] *Id*. at (e.1).
[78] *Fitzgerald v. Unempl. Comp. Bd. of Review*, 714 A.2d 1126 (Pa. Cmmw. Ct. 1998).
[79] *Uniontown Newsp., Inc. v. Unempl. Comp. Bd. of Review*, 558 A.2d 627 (Pa. Cmmw. Ct. 1989).
[80] *Chamoun v. Unempl. Comp. Bd. of Review*, 542 A.2d 207, 208 (Pa Cmmw. Ct. 1988).
[81] *Id.*
[82] *Rebel v. Unempl. Comp. Bd. of Review*, 555 Pa. 114, 117, 723 A.2d 156, 158 (1998).
[83] *Id.*
[84] *Unempl. Comp. Bd. of Review v. Ceja*, 493 Pa. 588, 611, 427 A.2d 631 (1981).
[85] *Id.*

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d. Caselaw

***Oyetayo v. Unemployment Compensation Bd. of Review*, 2015 WL 894238 (Pa. Commw. Ct. March 4, 2015)**

Claimant was warned for using work time to send personal emails from his company computer. Employer policy prohibited use of the employer's electronic equipment for personal business. After this warning, Claimant spent approximately ten minutes of his day sending personal emails to his wife. One email intended for Claimant's wife was inadvertently sent to the Chief Operating Officer, who disclosed the email to human resources. Human resources reviewed Claimant's email accounts and found a number of other personal emails sent during work time. Claimant was terminated.

The Court found that there was evidence sufficient to demonstrate that Claimant was terminated for misconduct. Although the employer's electronic equipment use policy allowed for *de minimis* personal use, the employer had disciplined Claimant in the past for his personal use of office equipment, including loud and long personal phone calls to his wife and using the office scanner in aid of his personal travel agency business. These disciplinary actions came in the form of friendly reminders, requests, and three written warnings. These disciplinary warnings were enough to put Claimant on notice that his past personal use of employer electronic equipment had exceeded the threshold and any subsequent use would not be considered *de minimis*. Because Claimant was put on notice, his subsequent personal use was willful.

***Walter v. Unemployment Compensation Bd. of Review*, 2014 WL 977696 (Pa. Commw. Ct. March 12, 2014).**

Claimant alleged the company's owner was constantly yelling and swearing at her and the other employees -- creating an abusive work environment. After the owner ignored several of Claimant's requests to stop the abusive language, Claimant quit. At the Review Board hearing, the owner did not deny using abusive language. He contended Claimant never told him his behavior bothered her or asked him to stop. The Review Board found the owner's testimony more credible and denied benefits.

On appeal the Court affirmed the denial of benefits. Under Pennsylvania law, the "necessitous and compelling cause" standard places a burden on all employees to take "all necessary and reasonable steps to preserve the employment relationship" before voluntarily quitting. Here, the evidence believed by the Review Board showed that Claimant did *not* take all necessary and reasonable steps to preserve the employment relationship—i.e., asking the owner to stop the abusive language. Because there is evidence supporting the Review Board's findings of fact, the Court cannot overturn those findings, and benefits must be denied.

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***Northeast Towing Services v. Unemployment Compensation Bd. of Review*, 2013 WL 3942056 (Commonwealth Ct. of Pa., Jan 9, 2013).**

Claimant, a tow truck driver, was arrested for possession of marijuana. The incident occurred when Claimant was off-duty. The employer fired Claimant for violating its drug and alcohol work policy and because the Pennsylvania State Police were an important customer of the employer. The employer's contract with the Police mandated that it could not have any employees who had been convicted of felonies.

Claimant was granted unemployment benefits. The Court found: (1) that employer's drug policy only prohibited drug use while at work and Claimant was arrested for drug possession while off duty; (2) Claimant's off-duty drug use did not affect his employer's business interests; and (3) the employer's contract with the Police prohibited having employees who had been convicted of felonies, but Claimant was never convicted of a felony. Therefore Claimant's grant of benefits was upheld.

***Brown v. Unemployment Compensation Board of Review*, 49 A.3d 933 (Pa. Commw. Ct. 2012).**

Claimant maintained batteries at a warehouse. Claimant admitted to posting two signs in the workplace using the word "moron." One stated "To the moron who can't read do not use this, do not use this battery," and the other stated "Not charging you moron." He testified to posting the signs to try to prevent his co-workers from attempting to use an inoperable battery, which could be hazardous. Claimant was terminated for improper conduct and violating the employer's policy against "threatening, intimidating or concerning fellow employees on the premises at anytime for any purpose."

The Court reversed the previous denial of benefits and allowed Claimant benefits. The employer's policies did not define what a threatening remark consists of and did not provide any examples. Calling a person a "moron" is rude, but does not convey an intention to inflict harm on a person or his property. It also was not language unexpected in a large warehouse. Claimant also testified that his supervisor called him a "jackass," the comment was reported to the employer, and the supervisor received no discipline.

***Downey v. Unemployment Comp. Bd. of Review*, 913 A.2d 351 (Pa. Commw. Ct. 2006).**

Claimant was terminated for his engagement in "activity inconsistent with his claimed physical limitations." Claimant sustained a work injury, returned to sedentary work, but stopped working because he claimed the light-duty work aggravated his symptoms.

An anonymous tip gave the employer a reason to believe Claimant had been performing heavy work around his house such as including climbing ladders, digging post holes, and using a sledgehammer. An investigation revealed he was indeed doing such heavy work. Shown the surveillance of Claimant performing work around his home, Claimant's physicians cleared him

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to return to work. He was discharged nearly three months later at the conclusion of the employer's investigation.

The Commonwealth Court affirmed an earlier denial of benefits. The evidence clearly established that while collecting total disability benefits and claiming he could not perform even sedentary work for the Postal Service, Claimant performed heavy work at home. Claimant knew he was expected to return to work when he was no longer totally disabled. These dishonest and misrepresentative actions were "a disregard of standards of behavior that an employer can rightfully expect from its employees such that [Claimant's] conduct rises to the level of willful misconduct" as a matter of law.

10. Texas

a. Disqualification standard

An individual is disqualified from receiving unemployment benefits if the individual was discharged for misconduct connected with the individual's last work.[86] Misconduct is defined as "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees."[87] An act in response to the unconscionable act of the employer or a supervisor does not constitute misconduct.[88]

An individual is also disqualified from receiving benefits if the individual left the individual's last work voluntarily without good cause connected with the individual's work.[89] This disqualification applies to individual's who leave work in connection with a spouse's relocation.[90] But, the benefit disqualification does not apply where the individual voluntarily left work due to (1) a medically verified illness of the individual or the individual's child; (2) injury; (3) disability; (4) pregnancy; (5) an involuntary separation pursuant to Section 207.046 (stating such involuntary separation must be urgent, compelling, and necessary so as to make the separation involuntary); or (6) a move from the area of the individual's employment due to such individual's spouse's military change of station.[91] The disqualification provision relating to an individual's sick minor child only applies if alternative care was unavailable to the child and the employer refused to allow the individual a reasonable amount of time off during the period of illness.[92]

[86] Tex. Lab. Code § 207.044.
[87] Tex. Lab. Code § 201.012.
[88] *Id.*
[89] Tex. Lab. Code § 207.045.
[90] *Id.*
[91] *Id.*
[92] *Id.*

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b. Standard of review

To disqualify an individual from receiving benefits due to misconduct, the employer does not have to prove intent on the part of the employee to violate a company policy or rule.[93] The employer must also prove that the misconduct was "connected with" the last employment. In relation to whether the misconduct occurred while the individual was on-duty or off-duty, the Texas Supreme Court held:

> The fact that one or more acts of employee misconduct occurred while the employee was on duty or occurred on the employer's premises may be sufficient, depending on the circumstances, to satisfy the "connected with" requirement, but neither is necessary. The adverse impact of an employee's misconduct on an employer will not always depend on whether the misconduct occurred while the employee was on-duty or off-duty or whether the misconduct occurred on or off the employer's premises.[94]

Beyond the statutory definition of "good cause," the Texas Workforce Commission further defined the meaning of "good cause" as a cause related to an individual's work that "would cause a person who is genuinely interested in retaining work to nevertheless leave the job."[95] But, "[c]onduct constituting good cause for termination does not necessarily correspond with conduct that would disqualify one from obtaining unemployment benefits."[96]

c. Evidence

The Texas Appeals Tribunal conducts all unemployment compensation hearings informally.[97] Hence, the parties to an appeal may present evidence that may be material and relevant as determined by an appeal tribunal.[98]

d. Caselaw

***Kaup v. Texas Workforce Comm'n*, 2014 WL 7335040 (Tex. Ct. App. Dec. 23, 2014).**

Claimant worked full-time as a security compliance officer for the employer. When he was hired, Claimant signed receipt of the employee handbook, which included a provision prohibiting secondary employment unless the employer formally approved the additional employment. On several occasions, Claimant's employer asked him if he reduce his hours to part-time. Claimant refused and continued to work full-time. The employer placed an anonymous advertisement for Claimant's position at the part-time level. The employer did this in case it was forced to hire a replacement because Claimant continued to resist part-time.

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[93] *See Mercer v. Ross*, 701 S.W.2d 830 (Tex. 1986)
[94] *Collingsworth Gen. Hosp. v. Hunnicutt,* 988 S.W.2d 706 (Texas 1998).
[95] *See Demarsh v. Tex. Workforce Commn.*, 2003 WL 22725507 at *3 (Tex. App. 2003).
[96] *Santillan v. Wal-Mart Stores, Inc.*, 203 S.W.3d 502 (Tex. App. 2006).
[97] Tex. Admin. Code tit. 40, § 815.16
[98] *Id.*

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Claimant replied to the advertisement and his resume indicated that he had current part-time employment relationships in addition to his time with the employer. Claimant was immediately terminated for violating the company handbook.

The court held that Claimant's unauthorized side employment constituted misconduct. The employer's policy was reasonable because it did not prohibit all side employment but only required that side employment be authorized. This fact also demonstrated that violation of the policy was in the ambit of the statutory definition of misconduct as violation of a policy adopted to ensure orderly work. The employer required authorization of side employment due to its concern for conflicts of interest.

***Lopez v. Texas Workforce Comm'n*, 2012 WL 4465197 (Tex. Ct. App. Sept. 27, 2012).**

Claimant alleged she was being mistreated and worked too hard and too long by her employer, including the denial of breaks. She also stated the overall working conditions were "intolerable." While employed, Claimant informed the director of operations she was being mistreated. The employer's investigation found otherwise. Claimant also alleged she was retaliated against after she complained of her treatment. She quit soon thereafter.

The employer submitted affidavits stating Claimant was not mistreated and it investigated her complaints and did not find any improper conduct. It also stated Claimant did not go through the employer's normal chain of command to complain of her mistreatment. She failed to contact any other management or HR personnel or utilize the employee hotline to report her alleged mistreatment.

The Court denied Claimant benefits. The employer provided a reasonable basis for determining that Claimant's working conditions were not intolerable. Claimant did not give the employer an adequate opportunity to address any mistreatment she incurred.

***Potts v. Texas Employment Comm'n*, 884 S.W.2d 879 (Tex. App. 1994).**

Claimant was terminated for repeatedly failing to follow company procedures for insuring orderly work and for misfiling requisitions. The employer orally warned Claimant, gave him a written warning, and suspended him for three days before terminating him. Claimant's failure to follow procedures caused his employer to incur overtime expenses.

The Court affirmed the denial holding that Claimant engaged in mismanagement and/or neglect that placed the employer's property in jeopardy. Claimant was counseled at least three times about his poor job performance. Claimant "would follow procedures for some time after a reprimand" which "showed he could do the work and was aware of its requirements." His procedures for filling requisitions were simple and his failure in following the procedures were evidence of neglect. This neglect caused his employer to incur extra expenses and qualified as misconduct as a matter of law.

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