

Criminal Charges & the UC Process

By Margaret M. Hock, Esquire

Willful misconduct in the workplace may rise to the level of criminal conduct, resulting in an arrest, criminal charges and, oftentimes, discharge from employment. If the former employee then files a claim for UC benefits, the employer must still establish that the claimant engaged in willful misconduct, which has been defined as:

- 1) An act of wanton or willful disregard of the employer's interests;
- 2) A deliberate violation of the employer's rules;
- 3) A disregard of standards of behavior which the employer has a right to expect of an employee; or,
- 4) Negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer.¹

The employer may easily meet its burden of proof if the claimant has been convicted of the criminal charges arising out of that same conduct.

Unfortunately, the criminal justice system does not move as swiftly as the UC process. While the UCBR may defer a decision on the UC appeal until a disposition is rendered in the criminal action, it rarely does so. As such, the employer must still present evidence and testimony of witnesses with firsthand knowledge of the alleged misconduct.

The employer must be fully prepared to present its case despite the pending criminal proceeding.

Situations also arise in which an employee is discharged as a result of non-work-related criminal charges. Under these circumstances, the employer is often unfamiliar with and has no firsthand knowledge as to the facts and circumstances resulting in the claimant's arrest. How then does an employer defeat the claimant's claim for UC benefits? Section 3 of the UC Law is used to disqualify claimants for non-work-related misconduct which: (1) is inconsistent with acceptable standards of behavior and (2) which directly affects the claimant's ability to perform his assigned duties.²

For example, in the case of Hawkins v. UCBR,³ the claimant, who worked as a corrections officer for the Clearfield County Prison, was charged with welfare fraud. He and his wife signed an application for welfare benefits without making required disclosure of the wife's stock ownership or dividend income. The claimant testified that he signed the application with the understanding that his wife would determine how to report income from her stock holdings; however, his wife apparently ne-

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APPELLATE CASE LAW REVIEW

Paula A. Serrano v. Unemployment Compensation Board of Review, No. 665 C.D. 2016, No. 898 C.D. 2016, Filed October 31, 2016.

Ms. Serrano voluntarily quit her position as an operations manager at Lifeline Medical Services. The UC Service Center found her ineligible for benefits under §402(b) of the UC Law inasmuch as she failed to meet her burden of proof to show a necessitous and compelling reason for quitting. Ms. Serrano appealed and a Referee conducted an evidentiary hearing.

During the hearing, Ms. Serrano testified that she had ongoing issues with the dispatch supervisor. She resigned in August 2015, reporting to her superiors that the dispatch supervisor created an intolerable work environment through sexual harassment and his use of racial slurs. Lifeline convinced her to return to work, promising that she would not have to interact with the dispatch supervisor. She testified that, nevertheless, the incidents of sexual harassment and racial slurs continued and that she reported these incidents to the Chief Operations Officer. On January 22, 2016, after there was confusion regarding scheduling in an email chain, Lifeline directed Ms. Serrano to speak with the dispatch supervisor directly. She refused and informed Lifeline that she quit.

Lifeline presented testimony from its Chief Operations Officer, who stated that after Ms. Serrano returned to work, she made no additional complaints about the dispatch supervisor. Additionally, the Chief Operation Officer testified that she would regularly request Ms. Serrano's assessment of the situation with the dispatch supervisor and Ms. Serrano would always respond that they were fine.

The Referee determined that Ms. Serrano voluntarily terminated her employment and failed to show cause of a necessitous and compelling nature for doing so. The Unemployment Compensation Board of Review affirmed.

On appeal to the Commonwealth Court, Ms. Serrano argued that the Referee and Board erred in finding that, after returning to work, she did not report additional complaints about the dis-

patch supervisor. Additionally, she argued that she did provide a necessitous and compelling reason to quit: "sexual harassment, racism, bias on religion and sexual orientation."

The Court did not agree.

The Court noted that, in unemployment compensation cases, the Board is the ultimate finder of fact. Questions of credibility and the resolution of evidentiary conflict are within the sound discretion of the Board and are not subject to re-evaluation on judicial review. Here, Ms. Serrano points to her own testimony that she reported additional incidents of harassment after she returned to work in August 2015; however, the Chief Operations Officer testified that no further complaints had been filed. Given the testimony of the Chief Operations Officer, which the Referee found credible, the Court concluded that substantial evidence existed to support the finding that claimant did not report further incidents of harassment after returning to work.

Regarding Ms. Serrano's argument that she had cause of a necessitous and compelling nature for leaving work, the Court noted that this was a question of law, subject to the Court's review. To establish cause of a necessitous and compelling nature, a claimant must establish that (1) circumstances existed that produced real and substantial pressure to terminate employment, (2) like circumstances would compel a reasonable person to act in the same manner, (3) the claimant acted with ordinary common sense, and (4) the claimant made a reasonable effort to preserve his employment.

Here, the Referee and the Board focused their analysis on Ms. Serrano's failure to report additional incidents after returning to work before she quit in January 2016. Such was error. Ms. Serrano satisfied the notification requirement by bringing her complaints to her supervisors in August 2015, when she initially decided to quit. This notice afforded Lifeline the opportunity to rectify the situation. Ms. Serrano was not required to endure the alleged abusive behavior indefinitely, or to afford Lifeline more than one opportunity to address the alleged harassment.

As such, the Referee and the Board erred because the failure to notify Lifeline of the continuing harassment after she returned to work was not the fatal flaw in Ms. Serrano's claim.

Nevertheless, the Court affirmed the denial of benefits inasmuch as Ms. Serrano was unable to demonstrate the third requirement of a necessitous and compelling reason for her voluntary quit, i.e., that she acted with common sense. The Chief Operations Officer regularly inquired as to the state of the situation with the dispatch supervisor and Ms. Serrano always responded that "they were fine." Ms. Serrano now maintains that she continued to have a conflict with the dispatch supervisor, thus rendering her responses to the Chief Operations Officer that "they were fine" to be untruthful. Ms. Serrano's knowing misrepresentation of the conflict is distinct from merely failing to report the harassment a second time. Ms. Serrano did not act with common sense, because she misrepresented the employment situation to Lifeline. As such, she failed to demonstrate a necessitous and compelling reason for her voluntary quit. Hence, pursuant to §402 (b) of the UC Law, she is ineligible for benefits.

Accordingly, the order of the UCBR was affirmed.

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glected to follow through. They were both originally charged with a felony violation, but pursuant to a plea agreement, claimant pled guilty to a third degree misdemeanor and paid restitution of \$14,696.70. The claimant testified that he felt he had no choice but to enter the plea. UC benefits were denied. The prison warden testified that the claimant was responsible for the care, custody and control of inmates, distribution of their mail, collection of inmate funds and the deposit of those funds into a deposit box. The warden also testified that honesty and integrity are important characteristics for the corrections officer position. Because of claimant's guilty plea, the warden believed that he could no longer trust

the claimant to perform his duties, particularly the handling of the inmates' money. Moreover, the warden learned of the claimant's conviction from an inmate; as a result, the warden determined that knowledge of the claimant's conviction among the inmates would have an adverse impact on his ability to perform his job. Thus, the Commonwealth Court determined that there was substantial evidence of record demonstrating that the claimant's conduct was incompatible with his job responsibilities and directly reflected upon his ability to perform his assigned duties. Consequently, given the claimant's guilty plea and the warden's testimony, the employer satisfied the two-prong test set forth above, thereby rendering the claimant ineligible for benefits under Section 3 of the UC Law.

But, in the case of Green v. UCBR,⁴ a contrary result occurred. In that case, the claimant, a Supervisor of Environmental Support at a hospital, was suspended after the hospital received a report that Green had been charged with a crime in a non-work-related incident. An investigation revealed that Green had been charged with 5 crimes: involuntary deviate sexual intercourse with a person under age 16, aggravated indecent assault of a person less than age 13, indecent assault of a person less than age 16, endangering the welfare of children and corruption of minors. The hospital dismissed Green before any disposition of the criminal charges had been reached. Green filed for UC benefits, which were granted by the Referee. The hospital appealed and the UCBR held the case stayed until the criminal charges were resolved. A later factual hearing revealed that all but one of the charges against Green had been dismissed. Green pled *nolo contendere* to the one remaining charge, endangering the welfare of children. Although evidence of the claim-

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ant's plea of *nolo contendere* was offered, the hospital presented no testimony to establish that the conviction directly reflected upon Green's ability to perform his assigned duties. No testimony was offered to establish the degree of trust placed in Green by his employer, and no reasons were offered as to why the conviction would impact Green's ability to perform his job. Consequently, benefits were allowed.

The bottom line is that the Court will evaluate a claim for UC benefits under Section 3 of the Law by considering the following:

- 1) Is the conduct at issue inconsistent with acceptable standards of behavior;
- 2) What is the specific nature of the offense committed by the claimant;
- 3) Does the claimant's job require any special degree of trust on the part of the employer; and,
- 4) Are there any other circumstances

which may particularly affect the claimant's ability to do his job, including whether the crime occurred on or off the employer's premises, and whether or not it involved any of employer's other workers or clients.

It is the employer's burden to present the evidence to establish the existence of these factors through competent evidence and, to the extent possible, through testimony from witnesses with firsthand knowledge of the facts of the incident, as well as through testimony from a competent witness who can explain the ramifications and impact of the claimant's criminal activity on his or her continued employment.

¹See e.g., Grieb v. UCBR, 573 Pa. 594, 827 A.2d 422 (2003)

²See e.g., Burger v. UCBR, 569 Pa. 139, 801 A.2d 487 (2002).

³Hawkins v. UCBR, 695 A.2d 963 (Pa. Cmwlth. 1997).

⁴Green v. UCBR, 2011 Pa. Commw. Unpub. LEXIS 560; 2011 WL 10858410

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