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Pennsylvania Unemployment Compensation Newsletter

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

"House Arrest" is not necessarily "Incarceration" under UC Law

Section 402.6 of the Unemployment Compensation Law provides:

> *An employe shall not be eligible for payment of unemployment compensation benefits for any weeks of unemployment during which the employe is incarcerated after a conviction.*

Because an individual may be "incarcerated" in an institution other than a county or state correctional facility, the Supreme Court recently addressed the issue of whether the legislature intended the automatic disqualification provision to apply to individuals who, following a conviction, have been sentenced to home confinement with work release in the case of Charles Chamberlain v. UCBR, No. 76 MAP 2014, Decided April 27, 2015.

In so doing, the Court noted that there is no evidence to suggest that §402.6 was intended to disqualify claimants who were not incarcerated in a prison or an alternative institutional setting. Pennsylvania's criminal justice system is premised upon graduated punishment dependent upon the severity of the crime, and, generally, a defendant sentenced to house arrest with work release has committed a less serious offense than an individual incarcerated in a prison. Considering the remedial purposes underlying the UC Law, the Supreme Court held that §402.6's preclusion of benefits does not apply to claimants on house arrest.

The Court emphasized that it was not holding that all claimants on house arrest are eligible for unemployment compensation benefits. The claimant must still be "able and available for work." The Court merely ruled that house arrest does not constitute "incarceration" for purposes of the disqualification provision set forth in §402.6 of the UC Law.

APPELLATE CASE LAW REVIEW

Gbenga A. Oyetayo v. Unemployment Compensation Board of Review, No. 393 C.D. 2014, Filed March 4, 2015.

The Referee reversed the Service Center's Determination and found claimant ineligible for unemployment compensation under §402(e) because: (i) employer had a policy permitting personal use of its electronic resources only if *de minimus* in nature and reasonable under the totality of circumstances; (ii) claimant was aware of said policy; and (iii) claimant misused employer's equipment, spending excessive work time with non-work related communications, despite repeated written warnings. The Unemployment Compensation Board of Review affirmed.

The Commonwealth Court noted that, in unemployment cases, the initial burden of proving willful misconduct lies with the employer. Willful misconduct includes: (i) wanton and willful disregard of employer's interests; (ii) a deliberate violation of the employer's rules; (iii) a disregard of the standards of behavior that the employer rightfully can expect from its employees; and (iv) negligence that manifests culpability, wrongful intent or evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations. Where a violation of the employer's work rule is alleged to be the basis for termination of employment, the employer must show that the rule existed, that it was reasonable,

that claimant was aware of the rule and had violated it. The burden then shifts to the claimant to show good cause for his conduct.

Here, claimant argued that two personal e-mails between his last written warning on February 1, 2013 and his last work day on May 31, 2013 should have fallen within the *de minimus* exception built into employer's policy. Claimant also argued that the *de minimis* exception was vague, and did not provide him with sufficient notice of what constituted a violation of that rule.

The Court disagreed. Employer had advised claimant that his prior personal use of its resources had exceeded what was allowed and any future use would be seen as a violation of its rules. The Court noted that claimant's conduct was not merely negligent but was instead intentional and deliberate. The Court also stated that disqualifying willful misconduct is warranted in cases where, as here, the employee has been warned and/or reprimanded for prior similar conduct. Accordingly, because claimant knowingly violated employer's work rule and did not put forward any argument that he had good cause for doing so, the Court held that the UCBR did not err in finding claimant ineligible for benefits due to willful misconduct.

Barbara L. Wise v. Unemployment Compensation Board of Review, No. 727 C.D. 2014, Filed March 25, 2015.

Generally, voluntary termination of employment renders an employee ineligible for unemployment compensation benefits under §402(b) of the Law. There is an exception where the employee resigns for cause of a necessitous and compelling reason. A claimant who asserts that he or she had a necessitous and compelling reason for quitting his or her job bears the burden of proof. The Pennsylvania Supreme Court has defined "necessitous and compelling" as follows:

[I]t can be said that "good cause" for voluntarily leaving one's employment (i.e., that cause which is necessitous and compelling) results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.

In this case, claimant argued that she resigned for health-related reasons following a work-injury. To establish health problems as a compelling reason to quit, the claimant must offer competent evidence of the health problems, show that the employer was informed of the health problems and that the claimant was available for and able to perform suitable work. The evidence credited by the Unemployment Compensation Board of Review, was that employer offered claimant a desk job that would have complied with her restrictions and, as such, claimant could not prove that her resignation was for compelling health reasons.

Next, clamant argued that she resigned due to a change in her job classification, which she characterized as a substantial unilateral change in the terms of her employment that justified her resignation. The Court noted that, where a demotion is justified, it does not constitute a necessitous and compelling reason to voluntarily quit. Here, claimant failed to obtain her CNA certification which was required by law in order for claimant to keep her position. As such, employer justifiably demoted her to a PRN employee.

The denial of benefits to claimant was affirmed.

Frederick J. Sydnor v. Unemployment Compensation Board of Review, No. 1908 C.D. 2014, Filed April 10, 2015.

Mr. Sydnor executed a sales representative agreement with 20/20 Communications which designated him as a "direct seller" for federal tax purposes. He went door-to-door selling consumer products and was paid solely on commission. Because he was unable to perform his outside field work for a period of time due to inclement weather, he applied for unemployment compensation benefits. He was found by the Department to be financially ineligible under §404 of the Law because he did not earn eligible wages because of his status as a "direct seller."

Mr. Sydnor appealed, but the Commonwealth Court affirmed the denial of benefits. The Court explained that, under §401 of the Law, a claimant is financially eligible for unemployment compensation if he or she has been paid wages for *employment* as required by §404(c) of the Law and has earned at least 49.5% of his or her base year wages in one or more quarters other than the highest quarter in his or her base year. "Wages" are "all remuneration … paid by an *employer* to an individual with respect to his *employment.* "Employment" is "all personal service performed for remuneration by an individual under any contract of hire. There are various exceptions to "employment," one of which is if an individual is a "direct seller.'

To be a "direct seller," (1) substantially all the remuneration whether or not paid in cash for the performance of the services must be directly related to sales or other output, and (2) the services must be performed pursuant to a written contract which provides that the person will not be treated as an employee for Federal tax purposes.

Both conditions were met here such that the denial of benefits was affirmed.

Mark E. Rothstein v. Unemployment Compensation Board of Review, No. 875 C.D. 2014, Filed February 11, 2015, Reported April 29, 2015.

Mark Rothstein worked as a Service Technician for Verizon Pennsylvania, Inc., and his job responsibilities required him to enter the homes of Verizon customers. Verizon had an established policy regarding employee off-the-job misconduct that could impair work performance or impact the company's reputation or business interests. Employees were required to report any criminal arrest pending final resolution or conviction. Rothstein was arrested and charged with misdemeanor summary offenses of stalking, harassment, and indecent exposure, but did not report his arrest to Verizon on the advice of his union representative. Verizon did not learn of Rothstein's arrest and subsequent conviction of indecent exposure until an employee read a newspaper article detailing Rothstein's conviction. Rothstein was discharged for failing to report his arrest and subsequent discharge.

Rothstein was denied unemployment compensation benefits under §402(e) of the law. The referee and UCBR determined that he had committed disqualifying willful misconduct. The Commonwealth Court agreed. Rothstein argued that he had established good cause for failing to report his arrest inasmuch as he did so on the explicit advice of his union representative. In rejecting that argument, the Court noted that, while Verizon employees may seek the advice of the union on personnel matters, the policy put the responsibility to report relevant off-the-job misconduct on the individual employee. Violating that policy by following poor advice from the union does not relieve an employee of the consequence of his violation, nor provide just cause for the violation.

The denial of benefits was affirmed.

Elizabeth Paolucci v. Unemployment Compensation Board of Review, No. 1130 C.D. 2015, Filed June 19, 2015.

What happens when a disabled employee's assertion of her rights under the Workers' Compensation Act is construed by her employer as violating the standards of behavior it can reasonably expect of its employees? The Commonwealth Court addressed this issue in June 2015 and concluded that, where an employee is on workers' compensation disability, the determination of whether her employer's expectations for her behavior are reasonable is governed by the standards of the Workers' Compensation Act.

Paolucci suffered a work-related concussion on July 17, 2010 when shelving collapsed on her head. Her treating physicians did not release her to return to work; however, an independent medical examiner opined that, in December of 2010, she was fully recovered and capable of returning to her pre-injury position, without restrictions. The employer made several attempts to contact Paolucci about returning to work. Paolucci's attorney responded that all communications should be directed to him and that Paolucci disputed the opinion of the IME physician. Employer then instituted a petition to terminate, modify or suspend her workers' compensation benefits.

On August 4, 2011, employer discharged Paolucci without written or oral explanation. On September 22, 2011, the parties resolved the workers' compensation claim. On October 9, 2011, Paolucci applied for unemployment compensation benefits.

The UC Service Center denied benefits because she had not been released to return to work by her physicians. Paolucci appealed and, following two hearings before a Referee, benefits were granted. The Referee found as fact that, based on Paolucci's deposition taken on July 11, 2011 during the workers' compensation proceedings, she was capable of some form of work as of that date.

The UCBR reversed, concluding that, since she was capable of some form of work on July 11, 2011, Paolucci did not meet a reasonable expectation of her employer inasmuch as she failed to appear for work on July 12, 2011. The UCBR found that her failure to appear for work at that time rose to the level of willful misconduct.

In a lengthy decision, the Commonwealth Court disagreed. The Court noted that the Workers' Compensation Act governs the reasonable expectations of an employer with respect to an employee receiving workers' compensation benefits. That Act does not require an employee receiving compensation to report a recovery from the work injury. Rather, §311.1(d) of the WC Act allows an employer to request a claimant to report on the state of her physical capabilities. It is the employer's duty to seek that information, not the claimant's duty to volunteer it. The employer must also provide the claimant with the necessary forms to provide the requested information. Here, there was no evidence that employer ever requested Paolucci to verify her physical condition in accordance with the WC Act.

Moreover, when an employer receives information that the claimant is capable of some type of work, the employer has the burden of showing that work within the claimant's limitations is actually available to the claimant. Here, Paolucci related during her deposition that she believed herself to be capable of light duty work. It then became employer's duty to respond with a job offer. It did not do so.

Consequently, benefits were awarded.

Appi Alla v. Unemployment Compensation Board of Review, No. 2118 C.D. 2014, Filed June 25, 2015.

Alla was employed by Edinboro University from February 1991 until July 2013. He filed an application for unemployment compensation benefits with an effective date of June 29, 2014, establishing a base year period of the first through fourth quarters of 2013. His base year wages were as follows:

1st quarter—$17,462
2nd quarter—$22,555
3rd quarter—$20,985
4th quarter—$0

Additionally, upon his separation in the third quarter, Alla received a payout of accrued sick, annual and personal leave in the amount of $30,728.

The UC Service Center determined Alla to be financially ineligible for benefits because he did not receive at least 49.5% of his wages outside the calendar quarter in which he received his highest wages. The Notice of Determination reflected that Alla's highest earning quarter in his base year was the third quarter, in which he received $51,713 in wages.

Alla appealed, arguing that the $51,713 figure inappropriately included $30,728 for accrued vacation and sick leave that he earned over time, beginning in 1991. The Referee, UCBR and Commonwealth Court did not agree. The payment of accrued benefits was made in consideration for personal services rendered with respect to Alla's employment. As such, it is properly considered wages under section 4(x) of the Law. Moreover, in accordance with 34 Pa. Code §61.3(a), the payment of the lump sum is properly assignable to the 3rd quarter when the payment was issued. That section provides:

(a) Date of payment.

(1) General rule—Wages are considered paid on the date when the employer actually pays them.

(2) Delayed payment of wages—For purposes of benefits, if payment of wages is delayed, the wages are considered paid on the date when the employer generally pays amounts definitely assignable to a payroll record.

Here, Alla did not contend that employer's payout of his accrued leave upon his separation deviated from employer's customary practice. Thus, claimant did not establish an exception to the general rule above set forth and the payout in the third quarter of $30,728 was properly characterized as wages and properly included in the quarter in which it was paid. As a result, Alla did not earn at least 49.5% of his earnings outside his highest quarter for the qualifying base year. Thus, he was financially ineligible for unemployment compensation benefits §§401(a) and 404 of the Law.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.