House Bill 1754 Would Drastically Curtail Longstanding UC Law

Testimony by Sharon M. Dietrich, Managing Attorney
Community Legal Services, Inc.
August 9, 2011

My name is Sharon Dietrich. I am the managing attorney for employment and public benefits at Community Legal Services, Inc. (CLS) in Philadelphia. I have been practicing employment law at CLS since 1987 and have an extensive background in unemployment compensation (UC) issues. As do other legal aid lawyers around the state, I represent low wage and unemployed workers. Thank you for allowing me to speak with you today about House Bill 1754.

If enacted, HB 1754 would make the most significant changes to UC eligibility since the UC Law was enacted in 1936. The new definition of "willful misconduct" in Section 402(e)[1] would eliminate "willfulness" and disqualify people for negligence, essentially denying UC benefits to workers who make mistakes. The provision restricting eligibility for voluntary quits under Section 402(b)[2] to only those "attributable to employment" would eliminate numerous necessitous and compelling reasons for leaving one's job, including domestic violence, caretaking of family members, and medical restrictions.

UC is an insurance program that protects workers with strong work histories who "become unemployed through no fault of their own."[3] Pennsylvania should not undermine this safety net for workers by making such drastic changes to eligibility.

I. The "Willful" Should Not Be Taken Out of "Willful Misconduct"

A. Historical context and construction of the law

For the 75 years that Pennsylvania has had a UC program, fired workers have been disqualified from receiving benefits only if they committed "willful misconduct." Importantly, this term does not require that a worker have acted without fault. Instead, from an early date, our courts have construed disqualifying "willful misconduct" to mean "a disregard of standards of behavior which the employer has a right to expect of an employe[e]."[4]

Pennsylvania's requirement of "willfulness" for behavior to be disqualifying is in accord with the great majority of courts and state agencies, which arrived at a working definition

---

1 43 P.S. § 802(e) (Section 402(e)).

2 43 P.S. § 802(b) (Section 402(b)).

3 43 P.S. §752 (Section 3, the public policy declaration of the UC Law). This policy has been understood by the courts as "the keystone upon which the individual sections of the Act must be interpreted and construed." Penn Hills School Dist. v. UCBR, 437 A.2d 1213, 1215 (Pa. 1981).

4 Frumento v. UCBR, 351 A.2d 631, 634 (Pa. 1976)(quoting Moyer v. UCBR, 110 A.2d 753, 754 (Pa.Super. 1955)).

of misconduct very soon after the adoption of UC programs across the country in the late 1930s. The standard still most commonly used for misconduct was first articulated by the Wisconsin Supreme Court in the leading case of Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941):

> Misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct must be [1] an act of wanton or willful disregard of the employer's interest, [2] a deliberate violation of the employer's rules, [3] a disregard of standards of behavior which the employer has the right to expect of his employee, or [4] negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design**,** or [5] show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.[5]

Consequently, workers in Pennsylvania and elsewhere are not denied benefits solely because they did something wrong that caused them to be fired. They must have behaved willfully. Eliminating the requirement of willfulness would be a sea change from existing law.

Such a radical departure would alter Pennsylvania's employment law policy, which for decades has provided for a balance between the interests of employers and employees in the employment relationship. Employment has always been "at will," permitting an employer to fire a worker without cause so long as a specific law or contract is not being violated.[6] But the UC Law has provided subsistence benefits so that an unemployed worker is not left destitute while looking for another job, unless he has willfully violated objective standards of behavior.

Under the willful misconduct standard, there are many factual bases under which workers have been disqualified, including the following:

1) Violations of employer rules
2) Refusal to follow an employer's order
3) Absenteeism and tardiness
4) Theft
5) Fights
6) Drug or alcohol use and intoxication
7) Offensive language
8) Dishonesty or falsification
9) Sleeping on the job
10) Failure to maintain a license.

However, the law has recognized that many employee actions are not "willful" or intentional, despite being detrimental to the employer's interests. Most important, the

---

5 US Dept. of Labor, Comparison of State Unemployment Laws, (2010), p 5-11.

6 Henry v. Pittsburgh & Lake Erie Railroad Co., 21 A.2d 157 (Pa. 1891).

Pennsylvania Supreme Court has repeatedly reiterated that negligent acts are not "willful" unless the conduct was intentional.[7] Moreover, incompetence is not willful misconduct,[8] especially if the employee has worked to the "best of his ability."[9]

B. The proposed amendment to Section 402(e) should not be adopted as drafted

I do not oppose the proposed amendment in its entirety. To the extent that it codifies ineligibility for willful actions, such as violation of reasonable workplace rules, deliberate damage to the employer's property, or threatening a coworker with physical harm, that is consistent with the history and the intent of the UC Law.

However, I strongly object to removing the term "willful" from Section 402(e) and the inclusion of "an act of negligence which indicates substantial disregard for employer's interests" within the definition of disqualifying "misconduct." Disqualifying workers for negligence would unfairly deny benefits to vast numbers of people who did not intentionally underperform in their jobs, creating a big hole in the fabric of the UC program.

A case in which I provided representation demonstrates the unfairness of disqualifying workers who commit negligent acts. My client was a salesperson who was told that she must keep her store keys on her person at all times. During the heat of a busy spell with customers, she set her keys down on a counter, and they were taken. Yes, the employer had the right to fire her. But this sort of person, who tried but failed to perform her job as well as might have been hoped, should not be without UC benefits while she looked for another job.

Moreover, if the misconduct standard is to be redefined, the language should clearly indicate that an action that would otherwise be disqualifying will not do so if the worker had "good cause" for it. A "good cause" inquiry gets into the worker's state of mind, to determine whether the action was justifiable or reasonable under the circumstances.[10]

For example, suppose that a worker violates an employer's rules on calling in absenteeism prior to the shift. Suppose further that the worker's reason for doing so is that he was unable to call because he was hospitalized. He would not currently be denied benefits despite the work rule violation,[11] nor should he be. UC law is replete with such

---

[7] Myers v. UCBR, 625 A.2d 622 (Pa. 1993); Navickas v. UCBR, 787 A.2d 284 (Pa. 2001); Burger v. UCBR, 801 A.2d 487 (Pa. 2002); Grieb v. UCBR, 827 A.2d 422 (Pa. 2003). There are some decisions finding negligence to be disqualifying, but they are from the Pa. Commonwealth Court and are not consistent with the holdings of the Pa. Supreme Court.

[8] E.g. Ungard v. UCBR, 442 A.2d 16 (Pa. Commw. 1982).

[9] Radio Station WVCH v. UCBR, 430 A.2d 737 (Pa. Commw. 1981).

[10] Frumento, 351 A.2d at 634.

[11] Offset Paperback v. UCBR, 726 A.2d 1125 (Pa. Commw. 1999).

examples of good cause, without which applications of the disqualifications would be inequitable.[12]

II. Personal "Necessitous and Compelling" Reasons for Voluntary Quits Should Not Be Eliminated as Qualifying Bases for UC Benefits

A. Historical context and construction of the law

As with the statutory definition of "willful misconduct," a broad definition of "voluntary quit" that does not distinguish between the job-related reasons and non-job-related reasons goes back to the UC Law's enactment in 1936. The law was amended in 1942 to add a "good cause" limitation on voluntary quits, but the General Assembly did not at that time follow a minority of states that were requiring that voluntary quits be connected with the job.[13] Accordingly, one of the earliest and most prominent judicial decisions about Section 402(b) held that compelling personal reasons for quitting were not disqualifying.[14]

In 1953, Section 402(b) was amended to provide that "marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this act."[15] However, in 1978, this provision was determined to be unconstitutional, on the grounds that it had no rational relationship to a legitimate legislative purpose.[16] Subsequently, this language was eliminated from the UC Law in 1980,[17] and domestic and other personal reasons have provided "necessitous and compelling" reasons for quitting since that time.

Section 402(b) has been construed to provide eligibility in compelling circumstances for the following reasons for leaving work that would probably no longer would support eligibility if the "attributable to work" language were added:

1) To escape domestic violence
2) Where child care is unavailable
3) To comply with family responsibilities, especially care giving
4) To move with a spouse
5) Where the job can no longer be performed for health reasons not caused by the job
6) Where transportation in unavailable.

---

[12] Other examples of "good cause" include: absenteeism because of illness, Tri Corporations v. UCBR, 432 A.2d 1158 (Pa. Commw. 1981); refusing to drive a truck because of poor repairs by the company, McLean v. UCBR, 383 A.2d 533 (Pa. 1978); and defending oneself from a physical assault, Wolfe v. UCBR, 425 A.2d 1218 (Pa. Commw. 1981).

[13] Bliley Electric Co. v. UCBR, 45 A.2d 898, 902 (Pa. Super. 1946)(commonly known as the Sturdevant UC Case).

[14] Id.

[15] Act 1953-396.

[16] Wallace v. UCBR, 393 A.2d 43, 47 (Pa. Commw. 1978)(en banc).

[17] Act 1980-108.

Note that eligibility is not established solely because a worker is experiencing a personal problem; our law typically both looks to see that in a particular case, the reason is truly "necessitous and compelling" and that the worker has taken steps to try to maintain employment.[18]

- In a case where the court reversed the denial of benefits to a claimant who relocated to escape her abusive husband, it required the Unemployment Compensation Board of Review to consider whether the claimant could have reasonably pursued any alternatives to relocation.[19]

- Before quitting work because of lack of child care, a worker must investigate alternative child care arrangements in order to qualify for benefits.[20]

- In cases where an employee has left work to care for a sick or disabled family member, the courts have looked for evidence that the worker had "no real choice" and made "reasonable efforts to preserve employment."[21]

- The legal rules are particularly stringent in "following spouses" cases. Not only must the worker who is quitting show an economic hardship in maintaining two residences *or* that the move resulted in an insurmountable commuting problem;[22] the claimant also must show that *her spouse's* reasons for moving were circumstances beyond his control, rather than personal preference.[23] Claimants' proof in such following spouse cases regularly has been found wanting, resulting in the denial of benefits.[24] In one notable case, the court found that that the followed spouse had not established that he had tried hard enough to find work within the local area despite producing a file of 100 rejection letters, and a 300 mile commute was not found insurmountable.[25]

---

18 Stiffler v. UCBR, 438 A.2d 829 (1977).

19 Bacon v. UCBR, 491 A.2d 944 (Pa. Commw. 1985)

20 Truitt v. UCBR, 589 A.2d 208 (Pa. 1991).

21 Robinson v. UCBR, 532 A.2d 952 (Pa. Commw. 1987) (denial where claimant did not show no real choice and reasonable effort to maintain job); Renosky v. UCBR, 434 A.2d 887 (Pa. Commw. 1981) (denial where claimant did not explore alternatives to leaving job); Beachem v. UCBR, 760 A.2d 68 (Pa. Commw. 2000) (no choice except to move to another state to care for son with emotional and behavior problems); Wagner v. UCBR, 965 A.2d 323 (Pa. Commw. 2009) (claimant left job in Iraq to return to help fiancée with custody battle and sick child; claimant had spoken with manager about possible employment with the company in the U.S. and therefore made reasonable efforts to preserve employment).

22 Glen Mills Schools v. UCBR, 665 A.2d 561 (Pa. Commw. 1995).

23 Wheeler v. UCBR, 450 A.2d 775 (Pa. Commw. 1982)("The preservation of the family unit, though socially desirable, does not, in itself, give rise to necessitous and compelling reasons.").

24 For instance, moving because of poor economic conditions is not a good enough reason. Buffone v. UCBR, 534 A.2d 601 (Pa. Commw. 1987). Nor is merely accepting a better job in another location. Gaunt v. UCBR, 510 A.2d 895 (Pa. Commw. 1986). Moreover, the following spouse doctrine does not apply to cases where the claimant has quit to get married; no benefits are paid in such cases. Kurtz v. UCBR, 516 A.2d 410 (Pa. Commw. 1986).

25 Danenberg v. UCBR, 532 A.2d 507 (Pa. Commw. 1987).

- When a worker can no longer perform his job for medical reasons, the courts require him to communicate this inability to the employer, so that the employer has an opportunity to accommodate the health restriction by offering an alternative position.[26]

As these examples show, establishing eligibility for personal quits is hardly *pro forma*; it is a demanding undertaking.

Moreover, even if a worker qualifies for having met these standards, he will not be eligible for benefits unless he is also "able and available" for work[27] A person is "able and available" if "he is able to do some kind of work, and there is reasonable opportunity for securing such work in the vicinity in which he lives."[28] The "able and available" requirement is likely to be reinforced by the recent change in the law creating an "active search for suitable employment."[29]

Finally, it should be noted that the law places the burden of proof in Section 402(b) cases on the claimant.[30]

B. The proposed amendment to Section 402(b) should not be adopted

By providing benefits in these circumstances, Pennsylvania is in step with the majority of states that provide UC benefits to workers who quit for various non-work-related reasons. According to the US Department of Labor:

- 46 states provide benefits where a worker must quit because of illness;
- 36 states provide benefits to workers quitting because of domestic violence;
- 24 states provide benefits to workers leaving for family reasons; and
- 25 states provide benefits to workers relocating with a spouse.[31]

Compelling policy reasons support the provision of benefits in these circumstances. First, they provide a safety net for women in the labor market who feel immense pressure from their family responsibilities, which is a leading reason for female unemployment.[32] Second, providing benefits in such cases allows caretaking for Pennsylvania's elderly and children who require such care.

Finally, these cases comprise a small minority of claims, For instance, in my 24-year career in legal services, I have never personally encountered a claim filed by a person fleeing domestic violence.

---

26 Genetin v. UCBR, 451 A.2d 1353 (Pa. 1982); Fox v. UCBR, 522 A.2d 713 (Pa. Commw. 1987).

27 Sturdevant UC Case, 45 A.2d at 904.

28 Id. at 905.

29 43 P.S. § 801(b), established by Act 2011-6.

30 Taylor v. UCBR, 378 A.2d 829 (Pa. 1977).

31 US Dept. of Labor, Comparison of State Unemployment Laws, (2010), pp. 5-2 to 5-4.

32 Young-Hee Yoon, Roberta Spalter-Roth, and Marc Baldwin, "Unemployment Insurance: Barriers to Access for Woman and Part-Time Workers," National Commission for Employment Policy Research Report 95-06 (1995), pp 4-5.

III. Conclusion

Since the UC Law was enacted 75 years ago, the statutory definitions of "willful misconduct" and "voluntary quits" have served the Commonwealth well. Nothing about our workforce has changed such that we should cut back the scope of these definitions. To the contrary, societal forces such as the depth of our current recession and ongoing high unemployment rate, the expanded role of women in the workplace, and the growth of our elderly population requiring care make provision of UC benefits under these definitions more vital than ever.

The only significant change that can be argued to militate in favor of a statutory change is our huge UC trust fund debt. To be sure, changes must be made to address that problem. However, a solvency plan that pays down the debt still should be fair and consistent with the goals of the UC Law. We should not destroy one of our most needed safety net programs in order to save it.

Thank you for allowing me to speak on these issues.