Received 8/5/09

August 4, 2009

Ms. Cheryl Atkinson
Administrator
Office of Workforce Security
200 Constitution Avenue NW
Room S-4231
Washington, D.C. 20210

Dear Ms. Atkinson:

Pursuant to Section 2003(a) of Public Law 111-5 and corresponding UIPL 14-09 and UIPL 14-09, change 1, Illinois submits this application for your certification that we are in compliance with Sections 903(f)(3)(B) and (D) of the Social Security Act (SSA) and thus eligible for our remaining share of UI modernization incentive funds. As you will recall, Illinois has previously been certified as in compliance with Section 903(f)(2). Illinois expects to use the incentive funds primarily if not exclusively for the payment of unemployment benefits, to improve unemployment trust fund solvency, but may use some for administrative costs as authorized by federal law.

Illinois complies with Sections 903(f)(3)(B) and (D) by virtue of a combination of the changes that Public Act 96-30 made to Sections 401 and 601of Illinois' Unemployment Insurance Act (UIA), *see,* Exhibit A, and the manner in which portions of the UIA not altered by that Public Act have been construed.

In Section 401 of the UIA, as amended by Public Act 96-30, Illinois provides for a minimum dependent's allowance of $15 per week for a dependent spouse and the lesser of 50% of the claimant's weekly benefit amount or $50 per week for one or more dependent children, thus meeting the requirements of Section 903(f)(3)(D).

Section 601B(1) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(ii) of the SSA with regard to situations where the claimant has left work to care for an ill or disabled member of his or her immediate family.

Section 601B(6) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(i) of the SSA with regard to situations where the claimant has left work because of domestic violence.

Pat Quinn, Governor
Maureen T. O'Donnell, Director

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Our language for the domestic violence exception does continue to require that the claimant provide notice to the employer of the reason why he or she has left work. Although Section 903(f)(3)(B)(i) does not expressly include a notice requirement, we respectfully submit that it does not prohibit such a requirement. As a practical matter, given the extraordinary confidentiality requirements that Section 601B(6) imposed even prior to Public Act 96-30, without some notice from the claimant, the employer might not be aware of the reason for the claimant's departure. Moreover, the expectation is that, with notice of the circumstances, the employer will be less likely to protest the claim. Public Act 96-30 expressly eliminated the requirement that the notice be written. Moreover, a prior Department legal opinion concluded that notice did not necessarily have to be provided before the separation and went on to conclude notice would be unnecessary if the employer was already aware of the reason for the claimant's separation. *See,* Exhibit B. Accordingly, while Section 601B(6) reads somewhat differently than Section 903(f)(3)(B)(i), Illinois submits it is at least as beneficial to claimants as the federal language.

Section 601B(7) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(iii)of the SSA.

Even before the enactment of PA 96-30, a claimant discharged due to a "compelling family reason," as defined in Section 903(f)(3)(B), was not subject to the state's misconduct disqualification. That remains the case.

UIPL 14-09, Q&A III-10, notes that state laws which define misconduct as a "willful and wanton disregard of the employer's interests" will generally satisfy the condition that claimants discharged for compelling family reasons cannot be subject to the state's misconduct disqualification. We understand that *Boynton Cab Co. v. Neubeck*, 296 N.W. 636 (1941) is considered the leading case with respect to the meaning of the term misconduct in the unemployment insurance context. Under *Boynton's* willful-and-wanton standard, misconduct can include 1) "deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee," or 2) "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 employer's interests or of the employee's duties and obligations to his employer." *See,* 296 N.W.2d at 640.

Section 602 of the UIA defines "misconduct" as "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." Conduct that would be considered misconduct under *Boynton* would not necessarily constitute misconduct under Section 602.

On its face, Illinois' requirement of deliberate and willful conduct sets at least as high a bar regarding mental state as *Boynton's* requirement of deliberate conduct. As opposed to the *Boynton* standard, however, Section 602 expressly rejects the argument that carelessness or negligence alone should be equated with willful and deliberate conduct. S*ee, Messer & Stilp, Ltd. v. Department of Employment Security, et al*., 2009 WL 1685239 (Ill. App. 1 Dist.); *Wrobel v. IDES,* 344 Ill. App.3d 533 (2003), *attached as Exhibits C and D*..

A reasonable employer rule governing the performance of work for purposes of Section 602 seems tantamount to "standards of behavior which the employer has the right to expect of his employee." *See, e.g., Ray v. Board of Review,* 244 Ill.App.3d 233 (1993), *attached as Exhibit E* .

Section 602's requirement that the conduct must have harmed the employer or been repeated after a warning establishes an additional hurdle that the *Boynton* standard does not expressly contemplate. Even the willful and deliberate violation of a reasonable employer rule governing the performance of work will not constitute misconduct absent harm to the employer or repetition despite prior warnings.

Administrative precedent cases in Illinois have consistently held that an absence for a compelling family reason does not constitute willful and deliberate misconduct. Some recent examples are attached. In Case No. 09-5483 (6/5/09), *see,* Exhibit F, Illinois' Employment Security Board of Review held a claimant's absence to accompany her minor child at a doctor's appointment did not rise to the level of deliberate and willful misconduct. In Case No. 09-3501 (5/11/09), *see,* Exhibit G, the Board held that the claimant's absence due to the need to care for her ill mother was not a deliberate violation of the employer's rules. In Case No. 09-7323 (7/24/09), *see,* Exhibit H, the Board held a claimant's absence due to "compelling family circumstances" (in that case, the need to care for a sick mother) was not willful and deliberate misconduct.

Moreover, the Board decisions have not been limited to the circumstances contemplated in Section 903(f)(3)(B). In Case No. 08-8408 (9/19/08), *see,* Exhibit I, the Board found that the claimant's absence due to personal marital problems was not established to be a deliberate and willful disregard of the employer's interests.

There are apparently no published appellate court decisions in Illinois that have specifically applied Section 602 to a discharge for a compelling family reason. However, given the perceived similarity of Pennsylvania's and Illinois' unemployment insurance laws in some respects, Illinois courts have looked to Pennsylvania case law for guidance. *See, Messer & Stilp, Ltd., supra.* Doing so regarding discharges for compelling family reasons will support the conclusions reached in the administrative precedent cases. For example, in *Steth, Inc. v. Unemployment Compensation Board of Review*, 742 A.2d 251 ((1999), *attached as* Exhibit J, the court found the claimant had not committed willful misconduct where she missed work for a day in order to accompany a child in her care to the funeral of the child's grandmother and to comfort the child following the funeral.

Finally, the legislative history of P.A. 96-30 makes it clear that the Illinois General Assembly's intent was to meet the conditions for qualifying for the full amount of incentive funding potentially available to the state. *See,* excerpts from legislative testimony and debate, attached as Exhibit K. The fact that the General Assembly did not consider it necessary to amend Section 602 reinforces the idea, as evidenced by the administrative precedents, that the misconduct disqualification was not intended to apply to discharges for compelling family reasons, as defined in Section 903(f)(3)(B).

The foregoing represents the opinion of the Illinois Department of Employment Security's Office of Legal Counsel, and this application is being distributed among agency staff, to advise them of that position.

This is to certify that Public Act 96-30's changes to Sections 401 and 601 of the UIA are currently in effect, the new minimum dependent's allowance in Section 401 will apply to benefit years beginning on or after January 1, 2010, Section 602 of the UIA remains in effect, and none of the provisions discussed here is subject to discontinuation under any circumstances other than repeal by the legislature. I further certify that this application is submitted in good faith, with the intention of providing benefits to unemployed workers who meet the eligibility provisions on which this application is based.

Should you have any questions or require additional information, please contact Joe Mueller, the Department's legal counsel, at 217-785-5069 or Joseph.Mueller@illinois.gov.

Sincerely,

Maureen T. O'Donnell
Director

AN ACT concerning employment.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Unemployment Insurance Trust Fund Financing Act is amended by changing Section 4 as follows:

(30 ILCS 440/4)

Sec. 4. Authority to Issue Revenue Bonds.

A. The Department shall have the continuing power to borrow money for the purpose of carrying out the following:

1. To reduce or avoid the need to borrow or obtain a federal advance under Section 1201, et seq., of the Social Security Act (42 U.S.C. Section 1321), as amended, or any similar federal law; or

2. To refinance a previous advance received by the Department with respect to the payment of Benefits; or

3. To refinance, purchase, redeem, refund, advance refund or defease (including, any combination of the foregoing) any outstanding Bonds issued pursuant to this Act; or

4. To fund a surplus in Illinois' account in the Unemployment Trust Fund of the United States Treasury.

Paragraphs 1, 2 and 4 are inoperative on and after January 1, 2013 ~~2010~~.

B. As evidence of the obligation of the Department to repay money borrowed for the purposes set forth in Section 4A above, the Department may issue and dispose of its interest bearing revenue Bonds and may also, from time-to-time, issue and dispose of its interest bearing revenue Bonds to purchase, redeem, refund, advance refund or defease (including, any combination of the foregoing) any Bonds at maturity or pursuant to redemption provisions or at any time before maturity. The Director, in consultation with the Department's Employment Security Advisory Board, shall have the power to direct that the Bonds be issued. Bonds may be issued in one or more series and under terms and conditions as needed in furtherance of the purposes of this Act. The Illinois Finance Authority shall provide any technical, legal, or administrative services if and when requested by the Director and the Employment Security Advisory Board with regard to the issuance of Bonds. Such Bonds shall be issued in the name of the State of Illinois for the benefit of the Department and shall be executed by the Director. In case any Director whose signature appears on any Bond ceases (after attaching his or her signature) to hold that office, her or his signature shall nevertheless be valid and effective for all purposes.

C. No Bonds shall be issued without the Director's written certification that, based upon a reasonable financial analysis, the issuance of Bonds is reasonably expected to:

(i) Result in a savings to the State as compared to

the cost of borrowing or obtaining an advance under Section 1201, et seq., Social Security Act (42 U.S.C. Section 1321), as amended, or any similar federal law;

(ii) Result in terms which are advantageous to the State through refunding, advance refunding or other similar restructuring of outstanding Bonds; or

(iii) Allow the State to avoid an anticipated deficiency in the State's account in the Unemployment Trust Fund of the United States Treasury by funding a surplus in the State's account in the Unemployment Trust Fund of the United States Treasury.

D. All such Bonds shall be payable from Fund Building Receipts. Bonds may also be paid from (i) to the extent allowable by law, from monies in the State's account in the Unemployment Trust Fund of the United States Treasury; and (ii) to the extent allowable by law, a federal advance under Section 1201, et seq., of the Social Security Act (42 U.S.C. Section 1321); and (iii) proceeds of Bonds and receipts from related credit and exchange agreements to the extent allowed by this Act and applicable legal requirements.

E. The maximum principal amount of the Bonds, when combined with the outstanding principal of all other Bonds issued pursuant to this Act, shall not at any time exceed $1,400,000,000, excluding all of the outstanding principal of any other Bonds issued pursuant to this Act for which payment has been irrevocably provided by refunding or other manner of

defeasance. It is the intent of this Act that the outstanding Bond authorization limits provided for in this Section 4E shall be revolving in nature, such that the amount of Bonds outstanding that are not refunded or otherwise defeased shall be included in determining the maximum amount of Bonds authorized to be issued pursuant to the Act.

F. Such Bonds and refunding Bonds issued pursuant to this Act may bear such date or dates, may mature at such time or times not exceeding 10 years from their respective dates of issuance, and may bear interest at such rate or rates not exceeding the maximum rate authorized by the Bond Authorization Act, as amended and in effect at the time of the issuance of the Bonds.

G. The Department may enter into a Credit Agreement pertaining to the issuance of the Bonds, upon terms which are not inconsistent with this Act and any other laws, provided that the term of such Credit Agreement shall not exceed the term of the Bonds, plus any time period necessary to cure any defaults under such Credit Agreement.

H. Interest earnings paid to holders of the Bonds shall not be exempt from income taxes imposed by the State.

I. While any Bond Obligations are outstanding or anticipated to come due as a result of Bonds expected to be issued in either or both of the 2 immediately succeeding calendar quarters, the Department shall collect and deposit Fund Building Receipts into the Master Bond Fund in an amount

necessary to satisfy the Required Fund Building Receipts Amount prior to expending Fund Building Receipts for any other purpose. The Required Fund Building Receipts Amount shall be that amount necessary to ensure the marketability of the Bonds, which shall be specified in the Bond Sale Order executed by the Director in connection with the issuance of the Bonds.

J. Holders of the Bonds shall have a first and priority claim on all Fund Building Receipts in the Master Bond Fund in parity with all other holders of the Bonds, provided that such claim may be subordinated to the provider of any Credit Agreement for any of the Bonds.

K. To the extent that Fund Building Receipts in the Master Bond Fund are not otherwise needed to satisfy the requirements of this Act and the instruments authorizing the issuance of the Bonds, such monies shall be used by the Department, in such amounts as determined by the Director to do any one or a combination of the following:

1. To purchase, refinance, redeem, refund, advance refund or defease (or any combination of the foregoing) outstanding Bonds, to the extent such action is legally available and does not impair the tax exempt status of any of the Bonds which are, in fact, exempt from Federal income taxation; or

2. As a deposit in the State's account in the Unemployment Trust Fund of the United States Treasury; or

3. As a deposit into the Special Programs Fund provided

for under Section 2107 of the Unemployment Insurance Act.

L. The Director shall determine the method of sale, type of bond, bond form, redemption provisions and other terms of the Bonds that, in the Director's judgment, best achieve the purposes of this Act and effect the borrowing at the lowest practicable cost, provided that those determinations are not inconsistent with this Act or other applicable legal requirements. Those determinations shall be set forth in a document entitled "Bond Sale Order" acceptable, in form and substance, to the attorney or attorneys acting as bond counsel for the Bonds in connection with the rendering of opinions necessary for the issuance of the Bonds and executed by the Director.

(Source: P.A. 93-634, eff. 1-1-04; 94-1083, eff. 1-19-07.)

Section 10. The Unemployment Insurance Act is amended by changing Sections 401, 409, and 601 as follows:

(820 ILCS 405/401) (from Ch. 48, par. 401)

Sec. 401. Weekly Benefit Amount - Dependents' Allowances.

A. With respect to any week beginning prior to April 24, 1983, an individual's weekly benefit amount shall be an amount equal to the weekly benefit amount as defined in this Act as in effect on November 30, 1982.

B. 1. With respect to any week beginning on or after April 24, 1983 and before January 3, 1988, an individual's weekly

benefit amount shall be 48% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; provided, however, that the weekly benefit amount cannot exceed the maximum weekly benefit amount, and cannot be less than 15% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar. However, the weekly benefit amount for an individual who has established a benefit year beginning before April 24, 1983, shall be determined, for weeks beginning on or after April 24, 1983 claimed with respect to that benefit year, as provided under this Act as in effect on November 30, 1982. With respect to any week beginning on or after January 3, 1988 and before January 1, 1993, an individual's weekly benefit amount shall be 49% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; provided, however, that the weekly benefit amount cannot exceed the maximum weekly benefit amount, and cannot be less than $51. With respect to any week beginning on or after January 3, 1993 and during a benefit year beginning before January 4, 2004, an individual's weekly benefit amount shall be 49.5% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; provided, however, that the weekly benefit amount cannot exceed the maximum weekly benefit amount and cannot be less than $51. With respect to any benefit year beginning on or after January 4, 2004 and before January 6, 2008, an individual's weekly benefit

amount shall be 48% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; provided, however, that the weekly benefit amount cannot exceed the maximum weekly benefit amount and cannot be less than $51. With respect to any benefit year beginning on or after January 6, 2008, an individual's weekly benefit amount shall be 47% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; provided, however, that the weekly benefit amount cannot exceed the maximum weekly benefit amount and cannot be less than $51.

2. For the purposes of this subsection:

With respect to any week beginning on or after April 24, 1983, an individual's "prior average weekly wage" means the total wages for insured work paid to that individual during the 2 calendar quarters of his base period in which such total wages were highest, divided by 26. If the quotient is not already a multiple of one dollar, it shall be rounded to the nearest dollar; however if the quotient is equally near 2 multiples of one dollar, it shall be rounded to the higher multiple of one dollar.

"Determination date" means June 1, 1982, December 1, 1982 and December 1 of each succeeding calendar year thereafter. However, if as of June 30, 1982, or any June 30 thereafter, the net amount standing to the credit of this State's account in the unemployment trust fund (less all outstanding advances to

that account, including advances pursuant to Title XII of the federal Social Security Act) is greater than $100,000,000, "determination date" shall mean December 1 of that year and June 1 of the succeeding year. Notwithstanding the preceding sentence, for the purposes of this Act only, there shall be no June 1 determination date in any year after 1986.

"Determination period" means, with respect to each June 1 determination date, the 12 consecutive calendar months ending on the immediately preceding December 31 and, with respect to each December 1 determination date, the 12 consecutive calendar months ending on the immediately preceding June 30.

"Benefit period" means the 12 consecutive calendar month period beginning on the first day of the first calendar month immediately following a determination date, except that, with respect to any calendar year in which there is a June 1 determination date, "benefit period" shall mean the 6 consecutive calendar month period beginning on the first day of the first calendar month immediately following the preceding December 1 determination date and the 6 consecutive calendar month period beginning on the first day of the first calendar month immediately following the June 1 determination date. Notwithstanding the foregoing sentence, the 6 calendar months beginning January 1, 1982 and ending June 30, 1982 shall be deemed a benefit period with respect to which the determination date shall be June 1, 1981.

"Gross wages" means all the wages paid to individuals

during the determination period immediately preceding a determination date for insured work, and reported to the Director by employers prior to the first day of the third calendar month preceding that date.

"Covered employment" for any calendar month means the total number of individuals, as determined by the Director, engaged in insured work at mid-month.

"Average monthly covered employment" means one-twelfth of the sum of the covered employment for the 12 months of a determination period.

"Statewide average annual wage" means the quotient, obtained by dividing gross wages by average monthly covered employment for the same determination period, rounded (if not already a multiple of one cent) to the nearest cent.

"Statewide average weekly wage" means the quotient, obtained by dividing the statewide average annual wage by 52, rounded (if not already a multiple of one cent) to the nearest cent. Notwithstanding any provisions of this Section to the contrary, the statewide average weekly wage for the benefit period beginning July 1, 1982 and ending December 31, 1982 shall be the statewide average weekly wage in effect for the immediately preceding benefit period plus one-half of the result obtained by subtracting the statewide average weekly wage for the immediately preceding benefit period from the statewide average weekly wage for the benefit period beginning July 1, 1982 and ending December 31, 1982 as such statewide

average weekly wage would have been determined but for the provisions of this paragraph. Notwithstanding any provisions of this Section to the contrary, the statewide average weekly wage for the benefit period beginning April 24, 1983 and ending January 31, 1984 shall be $321 and for the benefit period beginning February 1, 1984 and ending December 31, 1986 shall be $335, and for the benefit period beginning January 1, 1987, and ending December 31, 1987, shall be $350, except that for an individual who has established a benefit year beginning before April 24, 1983, the statewide average weekly wage used in determining benefits, for any week beginning on or after April 24, 1983, claimed with respect to that benefit year, shall be $334.80, except that, for the purpose of determining the minimum weekly benefit amount under subsection B(1) for the benefit period beginning January 1, 1987, and ending December 31, 1987, the statewide average weekly wage shall be $335; for the benefit periods January 1, 1988 through December 31, 1988, January 1, 1989 through December 31, 1989, and January 1, 1990 through December 31, 1990, the statewide average weekly wage shall be $359, $381, and $406, respectively. Notwithstanding the preceding sentences of this paragraph, for the benefit period of calendar year 1991, the statewide average weekly wage shall be $406 plus (or minus) an amount equal to the percentage change in the statewide average weekly wage, as computed in accordance with the preceding sentences of this paragraph, between the benefit periods of calendar years 1989 and 1990,

multiplied by $406; and, for the benefit periods of calendar years 1992 through 2003 and calendar year 2005 and each calendar year thereafter, the statewide average weekly wage, shall be the statewide average weekly wage, as determined in accordance with this sentence, for the immediately preceding benefit period plus (or minus) an amount equal to the percentage change in the statewide average weekly wage, as computed in accordance with the preceding sentences of this paragraph, between the 2 immediately preceding benefit periods, multiplied by the statewide average weekly wage, as determined in accordance with this sentence, for the immediately preceding benefit period. However, for purposes of the Workers' Compensation Act, the statewide average weekly wage will be computed using June 1 and December 1 determination dates of each calendar year and such determination shall not be subject to the limitation of $321, $335, $350, $359, $381, $406 or the statewide average weekly wage as computed in accordance with the preceding sentence of this paragraph.

With respect to any week beginning on or after April 24, 1983 and before January 3, 1988, "maximum weekly benefit amount" means 48% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the nearest dollar, provided however, that the maximum weekly benefit amount for an individual who has established a benefit year beginning before April 24, 1983, shall be determined, for weeks beginning on or after April 24, 1983 claimed with respect to

that benefit year, as provided under this Act as amended and in effect on November 30, 1982, except that the statewide average weekly wage used in such determination shall be $334.80.

With respect to any week beginning after January 2, 1988 and before January 1, 1993, "maximum weekly benefit amount" with respect to each week beginning within a benefit period means 49% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any week beginning on or after January 3, 1993 and during a benefit year beginning before January 4, 2004, "maximum weekly benefit amount" with respect to each week beginning within a benefit period means 49.5% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any benefit year beginning on or after January 4, 2004 and before January 6, 2008, "maximum weekly benefit amount" with respect to each week beginning within a benefit period means 48% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any benefit year beginning on or after January 6, 2008, "maximum weekly benefit amount" with respect to each week beginning within a benefit period means 47% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

C. With respect to any week beginning on or after April 24,

1983 and before January 3, 1988, an individual to whom benefits are payable with respect to any week shall, in addition to such benefits, be paid, with respect to such week, as follows: in the case of an individual with a nonworking spouse, 7% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the higher dollar; provided, that the total amount payable to the individual with respect to a week shall not exceed 55% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the nearest dollar; and in the case of an individual with a dependent child or dependent children, 14.4% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the higher dollar; provided, that the total amount payable to the individual with respect to a week shall not exceed 62.4% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar with respect to the benefit period beginning January 1, 1987 and ending December 31, 1987, and otherwise to the nearest dollar. However, for an individual with a nonworking spouse or with a dependent child or children who has established a benefit year beginning before April 24, 1983, the amount of additional benefits payable on account of the nonworking spouse or dependent child or children shall be determined, for weeks beginning on or after April 24, 1983 claimed with respect to that benefit year, as provided under this Act as in effect on November 30, 1982, except that the statewide average weekly

wage used in such determination shall be $334.80.

With respect to any week beginning on or after January 2, 1988 and before January 1, 1991 and any week beginning on or after January 1, 1992, and before January 1, 1993, an individual to whom benefits are payable with respect to any week shall, in addition to those benefits, be paid, with respect to such week, as follows: in the case of an individual with a nonworking spouse, 8% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided, that the total amount payable to the individual with respect to a week shall not exceed 57% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and in the case of an individual with a dependent child or dependent children, 15% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided that the total amount payable to the individual with respect to a week shall not exceed 64% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any week beginning on or after January 1, 1991 and before January 1, 1992, an individual to whom benefits are payable with respect to any week shall, in addition to the benefits, be paid, with respect to such week, as follows: in the case of an individual with a nonworking spouse, 8.3% of his prior average weekly wage, rounded (if not already a multiple

of one dollar) to the next higher dollar, provided, that the total amount payable to the individual with respect to a week shall not exceed 57.3% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and in the case of an individual with a dependent child or dependent children, 15.3% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided that the total amount payable to the individual with respect to a week shall not exceed 64.3% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any week beginning on or after January 3, 1993, during a benefit year beginning before January 4, 2004, an individual to whom benefits are payable with respect to any week shall, in addition to those benefits, be paid, with respect to such week, as follows: in the case of an individual with a nonworking spouse, 9% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided, that the total amount payable to the individual with respect to a week shall not exceed 58.5% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and in the case of an individual with a dependent child or dependent children, 16% of his prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar,

provided that the total amount payable to the individual with respect to a week shall not exceed 65.5% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any benefit year beginning on or after January 4, 2004 and before January 6, 2008, an individual to whom benefits are payable with respect to any week shall, in addition to those benefits, be paid, with respect to such week, as follows: in the case of an individual with a nonworking spouse, 9% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided, that the total amount payable to the individual with respect to a week shall not exceed 57% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and in the case of an individual with a dependent child or dependent children, 17.2% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided that the total amount payable to the individual with respect to a week shall not exceed 65.2% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to any benefit year beginning on or after January 6, 2008 and before January 1, 2010, an individual to whom benefits are payable with respect to any week shall, in addition to those benefits, be paid, with respect to such week,

as follows: in the case of an individual with a nonworking spouse, 9% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided, that the total amount payable to the individual with respect to a week shall not exceed 56% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and ~~with respect to any benefit year beginning before January 1, 2010,~~ in the case of an individual with a dependent child or dependent children, 18.2% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, provided that the total amount payable to the individual with respect to a week shall not exceed 65.2% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar.

The additional amount paid pursuant to this subsection in the case of an individual with a dependent child or dependent children shall be referred to as the "dependent child allowance", and the percentage rate by which an individual's prior average weekly wage is multiplied pursuant to this subsection to calculate the dependent child allowance shall be referred to as the "dependent child allowance rate".

With respect to any benefit year beginning on or after January 1, 2010, an individual to whom benefits are payable with respect to any week shall, in addition to those benefits, be paid, with respect to such week, as follows: in the case of

an individual with a nonworking spouse, the greater of (i) 9% of his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, or (ii) $15, provided that the total amount payable to the individual with respect to a week shall not exceed 56% of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar; and in the case of an individual with a dependent child or dependent children, the greater of (i) the product of the dependent child allowance rate multiplied by his or her prior average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar, or (ii) the lesser of $50 or 50% of his or her weekly benefit amount, rounded (if not already a multiple of one dollar) to the next higher dollar, provided that the total amount payable to the individual with respect to a week shall not exceed the product of the statewide average weekly wage multiplied by the sum of 47% plus the dependent child allowance rate, rounded (if not already a multiple of one dollar) to the next higher dollar.

With respect to each benefit year beginning ~~in a calendar year~~ after calendar year 2009, the ~~percentage rate used to calculate the~~ dependent child allowance rate shall be the sum of the allowance adjustment applicable pursuant to Section 1400.1 to the calendar year in which the benefit year begins, plus ~~the percentage rate used to calculate~~ the dependent child allowance rate with respect to each benefit year beginning in

the immediately preceding calendar year, except as otherwise provided in this subsection , provided that the total amount payable to the individual with respect to a week beginning in such benefit year shall not exceed the product of the statewide average weekly wage, rounded (if not already a multiple of one dollar) to the next higher dollar and the sum of 47% plus the percentage rate used to calculate the individual's dependent child allowance. The Notwithstanding any provision to the contrary, the percentage rate used to calculate the dependent child allowance rate with respect to each any benefit year beginning in calendar year on or after January 1, 2010, shall not be less than 17.3% or greater than 18.2%. The dependent child allowance rate with respect to each benefit year beginning in calendar year 2011 shall be reduced by 0.2% absolute below the rate it would otherwise have been pursuant to this subsection and, with respect to each benefit year beginning after calendar year 2010, except as otherwise provided, shall not be less than 17.1% or greater than 18.0%. Unless, as a result of this sentence, the agreement between the Federal Government and State regarding the Federal Additional Compensation program established under Section 2002 of the American Recovery and Reinvestment Act, or a successor program, would not apply or would cease to apply, the dependent child allowance rate with respect to each benefit year beginning in calendar year 2012 shall be reduced by 0.1% absolute below the rate it would otherwise have been pursuant to this subsection

and, with respect to each benefit year beginning after calendar year 2011, shall not be less than 17.0% or greater than 17.9%.

For the purposes of this subsection:

"Dependent" means a child or a nonworking spouse.

"Child" means a natural child, stepchild, or adopted child of an individual claiming benefits under this Act or a child who is in the custody of any such individual by court order, for whom the individual is supplying and, for at least 90 consecutive days (or for the duration of the parental relationship if it has existed for less than 90 days) immediately preceding any week with respect to which the individual has filed a claim, has supplied more than one-half the cost of support, or has supplied at least 1/4 of the cost of support if the individual and the other parent, together, are supplying and, during the aforesaid period, have supplied more than one-half the cost of support, and are, and were during the aforesaid period, members of the same household; and who, on the first day of such week (a) is under 18 years of age, or (b) is, and has been during the immediately preceding 90 days, unable to work because of illness or other disability: provided, that no person who has been determined to be a child of an individual who has been allowed benefits with respect to a week in the individual's benefit year shall be deemed to be a child of the other parent, and no other person shall be determined to be a child of such other parent, during the remainder of that benefit year.

"Nonworking spouse" means the lawful husband or wife of an individual claiming benefits under this Act, for whom more than one-half the cost of support has been supplied by the individual for at least 90 consecutive days (or for the duration of the marital relationship if it has existed for less than 90 days) immediately preceding any week with respect to which the individual has filed a claim, but only if the nonworking spouse is currently ineligible to receive benefits under this Act by reason of the provisions of Section 500E.

An individual who was obligated by law to provide for the support of a child or of a nonworking spouse for the aforesaid period of 90 consecutive days, but was prevented by illness or injury from doing so, shall be deemed to have provided more than one-half the cost of supporting the child or nonworking spouse for that period.

(Source: P.A. 93-634, eff. 1-1-04.)

(820 ILCS 405/409) (from Ch. 48, par. 409)

Sec. 409. Extended Benefits.

A. For the purposes of this Section:

1. "Extended benefit period" means a period which begins with the third week after a week for which there is a State "on" indicator; and ends with either of the following weeks, whichever occurs later: (1) the third week after the first week for which there is a State "off" indicator, or (2) the thirteenth consecutive week of such

period. No extended benefit period shall begin by reason of a State "on" indicator before the fourteenth week following the end of a prior extended benefit period.

2. There is a "State 'on' indicator" for a week if (a) the Director determines, in accordance with the regulations of the United States Secretary of Labor or other appropriate Federal agency, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (not seasonally adjusted) in this State ~~(a) equaled or exceeded 4% and equaled or exceeded 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, or (b) equaled or exceeded 5%; for weeks beginning after September 25, 1982~~ (1) equaled or exceeded 5% and equaled or exceeded 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar years, or (2) equaled or exceeded 6 percent, or (b) the United States Secretary of Labor determines that (1) the average rate of total unemployment in this State (seasonally adjusted) for the period consisting of the most recent 3 months for which data for all states are published before the close of such week equals or exceeds 6.5%, and (2) the average rate of total unemployment in this State (seasonally adjusted) for the 3-month period referred to in (1) equals or exceeds 110% of such average rate for either (or both) of the

corresponding 3-month periods ending in the 2 preceding calendar years. Clause (b) of this paragraph shall only apply to weeks beginning on or after February 22, 2009, through the week ending 3 weeks prior to the last week for which federal sharing is provided as authorized by Section 2005(a) of Public Law 111-5 and is inoperative as of the end of the last week for which federal sharing is provided as authorized by Section 2005(a) of Public Law 111-5.

3. There is a "State 'off' indicator" for a week if there is not a State 'on' indicator for the week pursuant to paragraph 2 the Director determines, in accordance with the regulations of the United States Secretary of Labor or other appropriate Federal agency, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (not seasonally adjusted) in this State (a) was less than 5% and was less than 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar years, or (b) was less than 4%; and for weeks beginning after September 25, 1982, (1) was less than 6% and less than 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar years, or (2) was less than 5%.

4. "Rate of insured unemployment", for the purpose of paragraph paragraphs 2 and 3, means the percentage derived by dividing (a) the average weekly number of individuals

filing claims for "regular benefits" in this State for weeks of unemployment with respect to the most recent 13 consecutive week period, as determined by the Director on the basis of his reports to the United States Secretary of Labor or other appropriate Federal agency, by (b) the average monthly employment covered under this Act for the first four of the most recent six completed calendar quarters ending before the close of such 13-week period.

5. "Regular benefits" means benefits, other than extended benefits and additional benefits, payable to an individual (including dependents' allowances) under this Act or under any other State unemployment compensation law (including benefits payable to Federal civilian employees and ex-servicemen pursuant to 5 U.S.C. chapter 85).

6. "Extended benefits" means benefits (including benefits payable to Federal civilian employees and ex-servicemen pursuant to 5 U.S.C. chapter 85) payable to an individual under the provisions of this Section for weeks which begin in his eligibility period.

7. "Additional benefits" means benefits totally financed by a State and payable to exhaustees (as defined in subsection C) by reason of conditions of high unemployment or by reason of other specified factors. If an individual is eligible to receive extended benefits under the provisions of this Section and is eligible to receive additional benefits with respect to the same week under the

law of another State, he may elect to claim either extended benefits or additional benefits with respect to the week.

8. "Eligibility period" means the period consisting of the weeks in an individual's benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period. An individual's eligibility period shall also include such other weeks as federal law may allow.

9. Notwithstanding any other provision to the contrary ~~of the provisions of Sections 1404, 1405B, and 1501~~, no employer shall be liable for payments in lieu of contributions pursuant to Section 1404, ~~and wages shall not become benefit wages,~~ by reason of the payment of extended benefits which are wholly reimbursed to this State by the Federal Government or would have been wholly reimbursed to this State by the Federal Government if the employer had paid all of the claimant's wages during the applicable base period. ~~With respect to extended benefits, paid prior to July 1, 1989, wages shall become benefit wages under Section 1501 only when an individual is first paid such benefits with respect to his eligibility period which are not wholly reimbursed to this State by the Federal Government.~~ Extended benefits ~~, paid on or after July 1, 1989,~~ shall not become benefit charges under Section 1501.1 if they are wholly reimbursed to this State by the Federal

Government or would have been wholly reimbursed to this State by the Federal Government if the employer had paid all of the claimant's wages during the applicable base period. For purposes of this paragraph, extended benefits will be considered to be wholly reimbursed by the Federal Government notwithstanding the operation of Section 204(a)(2)(D) of the Federal-State Extended Unemployment Compensation Act of 1970 ~~only when any individual is paid such benefits with respect to his eligibility period which are not wholly reimbursed by the Federal Government~~.

B. An individual shall be eligible to receive extended benefits pursuant to this Section for any week which begins in his eligibility period if, with respect to such week (1) he has been paid wages for insured work during his base period equal to at least 1 1/2 times the wages paid in that calendar quarter of his base period in which such wages were highest~~, provided that this provision applies only with respect to weeks beginning after September 25, 1982~~; (2) he has met the requirements of Section 500E of this Act; (3) he is an exhaustee; and (4) except when the result would be inconsistent with the provisions of this Section, he has satisfied the requirements of this Act for the receipt of regular benefits.

C. An individual is an exhaustee with respect to a week which begins in his eligibility period if:

1. Prior to such week (a) he has received, with respect to his current benefit year that includes such week, the

maximum total amount of benefits to which he was entitled under the provisions of Section 403B, and all of the regular benefits (including dependents' allowances) to which he had entitlement (if any) on the basis of wages or employment under any other State unemployment compensation law; or (b) he has received all the regular benefits available to him with respect to his current benefit year that includes such week, under this Act and under any other State unemployment compensation law, after a cancellation of some or all of his wage credits or the partial or total reduction of his regular benefit rights; or (c) his benefit year terminated, and he cannot meet the qualifying wage requirements of Section 500E of this Act or the qualifying wage or employment requirements of any other State unemployment compensation law to establish a new benefit year which would include such week or, having established a new benefit year that includes such week, he is ineligible for regular benefits by reason of Section 607 of this Act or a like provision of any other State unemployment compensation law; and

2. For such week (a) he has no right to benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, or such other Federal laws as are specified in regulations of the United States Secretary of Labor or other appropriate Federal agency; and (b) he has not received and is not seeking benefits under the

unemployment compensation law of Canada, except that if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, this clause shall not apply.

3. For the purposes of clauses (a) and (b) of paragraph 1 of this subsection, an individual shall be deemed to have received, with respect to his current benefit year, the maximum total amount of benefits to which he was entitled or all of the regular benefits to which he had entitlement, or all of the regular benefits available to him, as the case may be, even though (a) as a result of a pending reconsideration or appeal with respect to the "finding" defined in Section 701, or of a pending appeal with respect to wages or employment or both under any other State unemployment compensation law, he may subsequently be determined to be entitled to more regular benefits; or (b) by reason of a seasonality provision in a State unemployment compensation law which establishes the weeks of the year for which regular benefits may be paid to individuals on the basis of wages in seasonal employment he may be entitled to regular benefits for future weeks but such benefits are not payable with respect to the week for which he is claiming extended benefits, provided that he is otherwise an exhaustee under the provisions of this subsection with respect to his rights to regular benefits, under such seasonality provision, during the portion of the

year in which that week occurs; or (c) having established a benefit year, no regular benefits are payable to him with respect to such year because his wage credits were cancelled or his rights to regular benefits were totally reduced by reason of the application of a disqualification provision of a State unemployment compensation law.

D. 1. The provisions of Section 607 and the waiting period requirements of Section 500D shall not be applicable to any week with respect to which benefits are otherwise payable under this Section.

2. An individual shall not cease to be an exhaustee with respect to any week solely because he meets the qualifying wage requirements of Section 500E for a part of such week.

~~3. For the purposes of this Section, the "base period" referred to in Sections 601 and 602 shall be the base period with respect to the benefit year in which the individual's eligibility period begins.~~

E. With respect to any week which begins in his eligibility period, an exhaustee's "weekly extended benefit amount" shall be the same as his weekly benefit amount during his benefit year which includes such week or, if such week is not in a benefit year, during his applicable benefit year, as defined in regulations issued by the United States Secretary of Labor or other appropriate Federal agency. If the exhaustee had more than one weekly benefit amount during his benefit year, his

weekly extended benefit amount with respect to such week shall be the latest of such weekly benefit amounts.

F. 1. An eligible exhaustee shall be entitled, during any eligibility period, to a maximum total amount of extended benefits equal to the lesser of the following amounts:

a. ~~1.~~ Fifty percent of the maximum total amount of benefits to which he was entitled under Section 403B during his applicable benefit year; ~~or~~

b. ~~2.~~ Thirteen times his weekly extended benefit amount as determined under subsection E; or ~~.~~

c. Thirty-nine times his or her average weekly extended benefit amount, reduced by the regular benefits (not including any dependents' allowances) paid to him or her during such benefit year.

2. An eligible exhaustee shall be entitled, during a "high unemployment period", to a maximum total amount of extended benefits equal to the lesser of the following amounts:

a. Eighty percent of the maximum total amount of benefits to which he or she was entitled under Section 403B during his or her applicable benefit year;

b. Twenty times his or her weekly extended benefit amount as determined under subsection E; or

c. Forty-six times his or her average weekly extended benefit amount, reduced by the regular benefits (not including any dependents' allowances) paid to him or her during such benefit year.

For purposes of this paragraph, the term "high unemployment period" means any period during which (i) clause (b) of paragraph (2) of subsection A is operative and (ii) an extended benefit period would be in effect if clause (b) of paragraph (2) of subsection A of this Section were applied by substituting "8%" for "6.5%".

3. Notwithstanding paragraphs ~~subparagraphs~~ 1 and 2 of this subsection F, and if the benefit year of an individual ends within an extended benefit period, the remaining balance of extended benefits that the individual would, but for this subsection F, be otherwise entitled to receive in that extended benefit period, for weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances as defined in the federal Trade Act of 1974 within that benefit year multiplied by his weekly benefit amount for extended benefits.

G. 1. A claims adjudicator shall examine the first claim filed by an individual with respect to his eligibility period and, on the basis of the information in his possession, shall make an "extended benefits finding". Such finding shall state whether or not the individual has met the requirement of subsection B(1), is an exhaustee and, if he is, his weekly extended benefit amount and the maximum total amount of extended benefits to which he is

entitled. The claims adjudicator shall promptly notify the individual of his "extended benefits finding", and shall promptly notify the individual's most recent employing unit~~, with respect to benefit years beginning on or after July 1, 1989~~ and the individual's last employer (referred to in Section 1502.1) that the individual has filed a claim for extended benefits. The claims adjudicator may reconsider his "extended benefits finding" at any time within one year after the close of the individual's eligibility period, and shall promptly notify the individual of such reconsidered finding. All of the provisions of this Act applicable to reviews from findings or reconsidered findings made pursuant to Sections 701 and 703 which are not inconsistent with the provisions of this subsection shall be applicable to reviews from extended benefits findings and reconsidered extended benefits findings.

2. If, pursuant to the reconsideration or appeal with respect to a "finding", referred to in paragraph 3 of subsection C, an exhaustee is found to be entitled to more regular benefits and, by reason thereof, is entitled to more extended benefits, the claims adjudicator shall make a reconsidered extended benefits finding and shall promptly notify the exhaustee thereof.

H. Whenever an extended benefit period is to begin in this State because there is a State "on" indicator, or whenever an

extended benefit period is to end in this State because there is a State "off" indicator, the Director shall make an appropriate public announcement.

I. Computations required by the provisions of paragraph 4 ~~6~~ of subsection A shall be made by the Director in accordance with regulations prescribed by the United States Secretary of Labor, or other appropriate Federal agency.

J. 1. Interstate Benefit Payment Plan means the plan approved by the Interstate Conference of Employment Security Agencies under which benefits shall be payable to unemployed individuals absent from the state (or states) in which benefit credits have been accumulated.

2. An individual who commutes from his state of residence to work in another state and continues to reside in such state of residence while filing his claim for unemployment insurance under this Section of the Act shall not be considered filing a claim under the Interstate Benefit Payment Plan so long as he files his claim in and continues to report to the employment office under the regulations applicable to intrastate claimants in the state in which he was so employed.

3. "State" when used in this subsection includes States of the United States of America, the District of Columbia, Puerto Rico and the Virgin Islands. For purposes of this subsection, the term "state" shall also be construed to include Canada.

4. Notwithstanding any other provision of this Act, ~~effective with weeks beginning on or after June 1, 1981~~ an individual shall be eligible for a maximum of 2 weeks of benefits payable under this Section after he files his initial claim for extended benefits in an extended benefit period, as defined in paragraph 1 of subsection A, under the Interstate Benefit Payment Plan unless there also exists an extended benefit period, as defined in paragraph 1 of subsection A, in the state where such claim is filed. Such maximum eligibility shall continue as long as the individual continues to file his claim under the Interstate Benefit Payment Plan, notwithstanding that the individual moves to another state where an extended benefit period exists and files for weeks prior to his initial Interstate claim in that state.

5. To assure full tax credit to the employers of this state against the tax imposed by the Federal Unemployment Tax Act, the Director shall take any action or issue any regulations necessary in the administration of this subsection to insure that its provisions are so interpreted and applied as to meet the requirements of such Federal Act as interpreted by the United States Secretary of Labor or other appropriate Federal agency.

K. 1. Notwithstanding any other provisions of this Act, an individual shall be ineligible for the payment of extended benefits for any week of unemployment in his eligibility

period if the Director finds that during such period:

a. he failed to accept any offer of suitable work (as defined in paragraph 3 below) or failed to apply for any suitable work to which he was referred by the Director; or

b. he failed to actively engage in seeking work as prescribed under paragraph 5 below.

2. Any individual who has been found ineligible for extended benefits by reason of the provisions of paragraph 1 of this subsection shall be denied benefits beginning with the first day of the week in which such failure has occurred and until he has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned remuneration equal to at least 4 times his weekly benefit amount.

3. For purposes of this subsection only, the term "suitable work" means, with respect to any individual, any work which is within such individual's capabilities, provided, however, that the gross average weekly remuneration payable for the work ~~must exceed the sum of~~:

a. must exceed the sum of (i) the individual's extended weekly benefit amount as determined under subsection E above plus (ii) ~~b.~~ the amount, if any, of supplemental unemployment benefits (as defined in Section 501(c)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and

further,

b. is ~~c. pays wages~~ not less than the higher of --

(i) the minimum wage provided by Section 6 (a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption; or

(ii) the applicable state or local minimum wage;

c. ~~d.~~ provided, however, that no individual shall be denied extended benefits for failure to accept an offer of or apply for any job which meets the definition of suitability as described above if:

(i) the position was not offered to such individual in writing or was not listed with the employment service;

(ii) such failure could not result in a denial of benefits under the definition of suitable work for regular benefits claimants in Section 603 to the extent that the criteria of suitability in that Section are not inconsistent with the provisions of this paragraph 3;

(iii) the individual furnishes satisfactory evidence to the Director that his prospects for obtaining work in his customary occupation within a reasonably short period are good. If such evidence is deemed satisfactory for this purpose, the determination of whether any work is suitable

with respect to such individual shall be made in accordance with the definition of suitable work for regular benefits in Section 603 without regard to the definition specified by this paragraph.

4. Notwithstanding the provisions of paragraph 3 to the contrary, no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions required by Section 3304(a)(5) of the Internal Revenue Code of 1954 and set forth herein under Section 603 of this Act.

5. For the purposes of subparagraph b of paragraph 1, an individual shall be treated as actively engaged in seeking work during any week if --

a. the individual has engaged in a systematic and sustained effort to obtain work during such week, and

b. the individual furnishes tangible evidence that he has engaged in such effort during such week.

6. The employment service shall refer any individual entitled to extended benefits under this Act to any suitable work which meets the criteria prescribed in paragraph 3.

7. Notwithstanding any other provision of this Act, an individual shall not be eligible to receive extended benefits, otherwise payable under this Section, with respect to any week of unemployment in his eligibility period if such individual has been held ineligible for

benefits under the provisions of Sections 601, 602 or 603 of this Act until such individual had requalified for such benefits by returning to employment and satisfying the monetary requalification provision by earning at least his weekly benefit amount.

~~8. This subsection shall be effective for weeks beginning on or after March 31, 1981, and before March 7, 1993, and for weeks beginning on or after January 1, 1995.~~

L. The Governor may, if federal law so allows, elect, in writing, to pay individuals, otherwise eligible for extended benefits pursuant to this Section, any other federally funded unemployment benefits, including but not limited to benefits payable pursuant to the federal Supplemental Appropriations Act, 2008, as amended, prior to paying them benefits under this Section.

M. The provisions of this Section, as revised by this amendatory Act of the 96th General Assembly, are retroactive to February 22, 2009. The provisions of this amendatory Act of the 96th General Assembly with regard to subsection L and paragraph 8 of subsection A clarify authority already provided.

(Source: P.A. 86-3; 87-1266.)

(820 ILCS 405/601) (from Ch. 48, par. 431)

Sec. 601. Voluntary leaving.

A. An individual shall be ineligible for benefits for the week in which he or she has left work voluntarily without good

cause attributable to the employing unit and, thereafter, until he or she has become reemployed and has had earnings equal to or in excess of his or her current weekly benefit amount in each of four calendar weeks which are either for services in employment, or have been or will be reported pursuant to the provisions of the Federal Insurance Contributions Act by each employing unit for which such services are performed and which submits a statement certifying to that fact.

B. The provisions of this Section shall not apply to an individual who has left work voluntarily:

1. Because he or she is deemed physically unable to perform his or her work by a licensed and practicing physician, or because the individual's ~~or has left work voluntarily upon the advice of a licensed and practicing physician that~~ assistance is necessary for the purpose of caring for his or her spouse, child, or parent who, according to a licensed and practicing physician or as otherwise reasonably verified, is in poor physical or mental health or is mentally or physically disabled and the employer is unable to accommodate the individual's need to provide such assistance ~~will not allow him to perform the usual and customary duties of his employment, and he has notified the employing unit of the reasons for his absence~~;

2. To accept other bona fide work and, after such acceptance, the individual is either not unemployed in each of 2 weeks, or earns remuneration for such work equal to at

least twice his or her current weekly benefit amount;

3. In lieu of accepting a transfer to other work offered to the individual by the employing unit under the terms of a collective bargaining agreement or pursuant to an established employer plan, program, or policy, if the acceptance of such other work by the individual would require the separation from that work of another individual currently performing it;

4. Solely because of the sexual harassment of the individual by another employee. Sexual harassment means (1) unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication which is made a term or condition of the employment or (2) the employee's submission to or rejection of such conduct or communication which is the basis for decisions affecting employment, or (3) when such conduct or communication has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment and the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action;

5. Which he or she had accepted after separation from other work, and the work which he or she left voluntarily would be deemed unsuitable under the provisions of Section 603;

6. (a) Because the individual left work due to verified ~~circumstances resulting from the individual being a victim of~~ domestic violence as defined in Section 103 of the Illinois Domestic Violence Act of 1986 where the domestic violence caused the individual to reasonably believe that his or her continued employment would jeopardize his or her safety or the safety of his or her spouse, minor child, or parent ~~; and provided, such individual has made reasonable efforts to preserve the employment.~~

~~For the purposes of this paragraph 6, the individual shall be treated as being a victim of domestic violence~~ if the individual provides the following:

(i) ~~written~~ notice to the employing unit of the reason for the individual's voluntarily leaving; and

(ii) to the Department provides:

(A) an order of protection or other documentation of equitable relief issued by a court of competent jurisdiction; or

(B) a police report or criminal charges documenting the domestic violence; or

(C) medical documentation of the domestic violence; or

(D) evidence of domestic violence from a member of the clergy, attorney, counselor, social worker, health worker or domestic violence shelter worker.

(b) If the individual does not meet the provisions of subparagraph (a), the individual shall be held to have voluntarily terminated employment for the purpose of determining the individual's eligibility for benefits pursuant to subsection A.

(c) Notwithstanding any other provision to the contrary, evidence of domestic violence experienced by an individual, or his or her spouse, minor child, or parent, including the individual's statement and corroborating evidence, shall not be disclosed by the Department unless consent for disclosure is given by the individual.

7. Because, due to a change in location of employment of the individual's spouse, the individual left work to accompany his or her spouse to a place from which it is impractical to commute or because the individual left employment to accompany a spouse who has been reassigned from one military assignment to another. The employer's account, however, shall not be charged for any benefits paid out to the individual who leaves work under a circumstance described in this paragraph ~~to accompany a spouse reassigned from one military assignment to another~~.

C. Within 90 days of the effective date of this amendatory Act of the 96th General Assembly, the Department shall promulgate rules, pursuant to the Illinois Administrative Procedure Act and consistent with Section 903(f)(3)(B) of the Social Security Act, to clarify and provide guidance regarding

eligibility and the prevention of fraud.

(Source: P.A. 95-736, eff. 7-16-08.)

Section 99. Effective date. This Act takes effect upon becoming law.

Exhibit B

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY
MEMORANDUM

TO: Carolyn Vanek

FROM: Joe Mueller

SUBJECT: Notice Requirement in Section 601B6

DATE: September 22, 2004

Background

The claimant seeks to avail herself of Section 601B6. The claimant had been hospitalized as a result of physical injuries sustained from a domestic assault against her. Shortly after her release, the county sheriff's office notified her that the assailant - her husband - would soon be released from jail and advised her to leave town. She followed that advice, which also entailed quitting her job. Prior to quitting, she failed to provide the employer with written notification of the reason for her action.

Issues

Does 601B6 require the claimant to provide written notification to the employer prior to the separation? Does 601B6 require some form of written notification in all situations?

Section 601B6

The provisions of [Section 601A] shall not apply to an individual who has left work voluntarily...

6. (a) Because the individual left work due to circumstances resulting from the individual being a victim of domestic violence as defined in Section 103 of the Illinois Domestic Violence Act of 1986; and provided, such individual has made reasonable efforts to preserve the employment.

For the purposes of this paragraph 6, the individual shall be treated as being a victim of domestic violence if the individual provides the following:

(i) written notice to the employing unit of the reason for the individual's voluntarily leaving; and

(ii) to the Department provides:

(A) an order of protection or other documentation of equitable relief issued by a court of competent jurisdiction; or

(B) a police report or criminal charges documenting the domestic violence; or

(C) medical documentation of the domestic violence; or

(D) evidence of domestic violence from a counselor, social worker, health worker or domestic violence shelter worker.

(b) If the individual does not meet the provisions of subparagraph (a), the individual shall be held to have voluntarily terminated employment for the purpose of determining the individual's eligibility for benefits pursuant to subsection A.
(c) Notwithstanding any other provision to the contrary, evidence of domestic violence experienced by an individual, including the individual's statement and corroborating evidence, shall not be disclosed by the Department unless consent for disclosure is given by the individual.

Opinion

There are no cases or precedent decisions construing 601B6. However, there is precedent regarding 601B1, which excepts a claimant from 601A for physician-corroborated reasons related to the health of the claimant or certain family members of the claimant and, like 601B6, requires that the claimant notify the employer of the reasons for his/her absence. The Department has construed 601B1 as requiring notice prior to the separation.

In ABR-85-5358/11-27-85, Digest of Adjudication Precedents, VL 235.25, the employer had a policy of placing employees on light duty if they had verified medical problems. The claimant did not present the employer with any verification of her injury and instead applied for retirement. The Board linked 601B1's notice requirement to whether the claimant had made a reasonable effort to remain employed. Specifically, the Board found the purpose of the notice requirement was to afford the employer an opportunity to make a reasonable accommodation and concluded that, where the claimant chose to forego the opportunity for a reasonable accommodation, she was not unemployed for lack of suitable work; she did not make a reasonable effort to remain employed.

However, 601B6, unlike 601B1, expressly provides, in addition to the notice requirement, that the individual must make a reasonable effort to preserve his/her employment. The General Assembly is presumed, whenever possible, not to have intended legislative language to be duplicative or superfluous (see *Zimmerman v. North American Signal Co.*, 704 F2d 347 (CA 7, 1983); *Niven v. Siqueria*, 94 Ill.Dec. 60, 487 N.E.2d 937, 109 Ill.2d 357 (1985)). Accordingly, it can reasonably be argued that, because it expressly stated both the notice and reasonable-effort requirements in 601B6, the General Assembly did not necessarily regard the provision of notice as a measure of the claimant's effort to remain employed, for purposes of the domestic violence exception.

It seems altogether plausible that the purpose of 601B6's notification requirement is just to ensure the employer is aware of the claimant's intent to separate from the job and has some idea why the claimant is leaving. Given the provision's extraordinary confidentiality requirements, the Department might not be able to tell the employer much at all. If the purpose of 601B6's notice requirement is not the same as the purpose of 601B1's, it follows that the timing of the 601B6 notice might not be as critical as the timing of the 601B1 notice.

Under certain circumstances, it seems the failure to provide the written 601B6 notice prior to separation might be evidence that the claimant was not making a reasonable effort to remain employed. However, in situations like the one that prompted your inquiry, where the claimant's life might literally be on the line, it seems reasonable to expect that, before fleeing town, the claimant might not always take a moment to craft a written notice to the employer, explaining the circumstances. If, in those situations, we took the position that pre-separation notice was a categorical prerequisite to a claimant's relying on 601B6, we would essentially be saying the employer's right to know what was going on as soon as possible outweighed the claimant's safety concerns – a potentially difficult position to defend. The safer tack seems to be that the 601B6 notice requirement must be satisfied as of the point the determination issues.

As for what it takes to satisfy the requirement, where it was clear the employer was already aware of the claimant's reason for leaving, it would seem defensible to deem the notice requirement as satisfied even absent any written notice to the employer. As a practical matter, it is not clear what purpose would be served by insisting on written notice in that situation. The courts generally presume the legislature did not intend to require a meaningless act. See, *Downstate Tax Purchaser Assoc. v. Bean*, 234 Ill.App.3d 741, 743 (1992).

Even with regard to 601B1, the Board has held that, notwithstanding the absence of a physician's statement regarding the claimant's condition, the physician's corroboration could be inferred where the claimant left work due to the imminent birth of the child she was carrying and the employer was clearly aware of the circumstances. See 85-BRD-05427/7-18-85 and ABR-85-3401/10-3-85, Digest of Adjudication Precedents, VL 235.4.

In conclusion, before paying benefits under 601B6, the Department will need to be able to conclude 1) either that the employer was already aware of the circumstances or that the claimant has provided the requisite written notice and 2) that, under the circumstances, the claimant made a reasonable effort to remain employed. It should always be remembered that the Act is to be construed liberally in favor of awarding benefits. *Wrobel v. IDES*, 344 Ill.App.3d 533, 536, 279 Ill.Dec. 737, 801 N.E.2d 29 (2003); *Flex v. DOL*, 125 Ill.App.3d 1021, 1024, 81 Ill.Dec. 248, 466 N.E.2d 1050 (1984).

Only the Westlaw citation is currently available.

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Appellate Court of Illinois,
First District, Fifth Division.
MESSER & STILP, LTD., a Professional Corporation, Plaintiff-Appellant,
v.
The DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; James P. Sledge, Director of the Illinois Department of Employment Security; Board of Review, an Administrative Agency of the State of Illinois, and its Members Individually, J. Hunt Bonan, Stanley L. Drassler, Jr., William J. Nolan, and Tracy McGonigle, Employee, Defendants-Appellees.
No. 1-08-1761.

June 12, 2009.

Appeal from the Circuit Court of Cook County. 07 L 50739, Alexander P. White, Judge Presiding.

Justice TOOMIN delivered the opinion of the court:

*1 The question before us is whether an attorney's termination for unsatisfactory performance meets the standard of willful misconduct required to deny unemployment insurance benefits. No reported Illinois case has answered the question. Plaintiff, Messer & Stilp, Ltd., appeals from the circuit court's judgment affirming the administrative decision of the Board of Review of the Illinois Department of Employment Security granting an attorney's claim for benefits under the Illinois Unemployment Insurance Act (820 ILCS 465/100 *et seq.* (West 2006)). Messer & Stilp contends that (1) the Board erred in rejecting the argument that in determining an attorney's entitlement to benefits, the prevailing misconduct standard should be abandoned in favor of a higher standard of negligence or incompetence; and (2) the Board improperly determined that claimant's conduct did not constitute willful or deliberate misconduct. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

Claimant is an attorney licensed to practice law in the State of Illinois since 1993. She was employed as an associate attorney at Messer & Stilp, Ltd., from May 30, 2006, until her termination on September 8, 2006. Claimant's discharge was based on her alleged failure to follow the firm's rules concerning the handling of cases and for repeated problems in handling lease negotiations.

Following her discharge, claimant applied for unemployment insurance benefits before the local office of the Illinois Department of Employment Security (IDES). The IDES claim form reflected the reason for separation was "lack of work." Messer & Stilp filed a timely protest asserting that claimant had been terminated for cause; that her repeated failure to follow directions placed the well being of the firm's clients in jeopardy and constituted misconduct. However, on December 16, 2006, the IDES adjudicator found that claimant was discharged because she was unable to meet the employer's standards or job requirements. The adjudicator further determined that she was eligible for benefits because "the claimant's action which resulted in her discharge was not deliberate and willful."Eligibility covered each week during the period from September 24 through October 7, 2006, and thereafter, provided she continued to meet the eligibility requirements of the Illinois Unemployment Insurance Act (the Act).

Messer & Stilp sought further review before the IDES appeals division. On February 5, 2007, the matter proceeded to telephonic hearing before a hearing officer who received testimony and relevant exhibits.

The evidence adduced before the referee reflected

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that on May 11, 2006, Messer & Stilp extended an offer of employment to claimant. At that time, claimant was a senior associate at a downtown firm, where she had practiced since 2003 in the areas of commercial litigation, real estate, and insurance coverage. As reflected in the offer, Messer & Stilp served primarily, but not exclusively, as a captive law firm for clients involved in diverse practice areas of real estate management, building services, debt collection, and manufacturing.

***2** Claimant began working at Messer & Stilp on May 30, 2006, subject to a 90-day probationary period. During this period she was to be reviewed informally to discuss her strengths and any areas needing improvement. Upon commencing employment, claimant was given a copy of the firm's practice and policy memorandum directing all attorneys and staff to: (1) contact the client at least once every 30 days; (2) send the client copies of all "final" work product; (3) send all court documents and significant correspondence to a partner for review prior to filing or sending; and (4) follow or establish deadlines for all tasks and report back as to compliance.

On August 29, 2006, claimant received her 90-day review from the firm. The e-mail transmitted by Thomas Stilp, a partner, stated in part:

> "As we have approached the probationary review point, your performance is mixed. Although you appear willing to take on work, the work efficiency (or turn around) is not quick. A review of your hours reflects that although your time is near the target minimum of 150 hours, an occasional push in that direction would probably increase turn around time on some projects.
>
> The quality of work is not what we would have expected with someone at your level of experience. Sometimes, there does not appear to be much 'advocacy' in your negotiation of leases favoring the landlord. Where a term is not able to be modified for the landlord, you should provide a context so we understand the relative importance of the term for the potential tenant. For example, if the tenant has 10 items to negotiate, and one is very important, we should know that information before having to respond to the tenant. Instead, we get terms piecemeal and over several days. Sometimes you can control these issues, sometimes you cannot, but we don't have a sense you have directed the tenant on negotiations. You should require a tenant to state all requested modifications, and rank in order of importance, before taking any final terms to the 'ownership' for approval, rejection or modification."

Additionally, Stilp testified concerning a series of what he termed as recurring incidents evincing claimant's repeated failure to follow the firm's rules. For example, on August 24, 2006, he complained that in a lease negotiation claimant had failed to review the broker proposals while preparing the lease and had not properly negotiated certain terms. On August 31, claimant was informed that she was neglecting the projects assigned to her and on September 2, Stilp noted discrepancies in a gross lease that he was raising for the third time. The next day he criticized claimant's failure to follow up in pending litigation by moving for a discovery cut-off date and preparing a motion for summary judgment as they had discussed. Although Stilp volunteered that they had made a real effort to insure that claimant followed the firm's procedures, in his opinion her deliberate disregard for the rules constituted willful misconduct.

***3** Claimant testified that she was working to the best of her ability. She admitted that she had made some typographical and administrative mistakes on documents that were later brought to her attention. On September 5, 2006, claimant was informed that her employment at Messer & Stilp was being terminated. In a meeting with the partners she was told that it just was not working out. Messer told her that he had other associates that were making a lot less money than she was and he liked their product better. On September 8, 2006, in an exit interview, Stilp told claimant that there was not going to be any more lease work because he thought they were going to be selling the building, but that she should keep in touch with him because the work load might change.

On February 9, 2007, the referee set aside the determination of the local office and found claimant disqualified for unemployment benefits. Although the referee acknowledged that persons discharged for incapacity, inadvertence, negligence or inability to

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perform assigned tasks should still receive unemployment benefits, he concluded that the preponderance of the evidence in claimant's case established that her conduct constituted the type of misconduct contemplated under section 602(A) of the Act. The referee reasoned:

"In this case, the claimant's position involved an area of expertise in which the claimant represented that she had. The parties involved are professionals and should be held to a higher standard that is the nature of the profession and expected in the industry. The claimant was hired to perform her duties in an expert and professional manner. Here, the employer presented evidence in part, that the claimant failed to file court proceedings in a timely manner as well as evidence that the claimant failed to properly draft terms of a lease agreement. This created ambiguities in the lease."

Additionally, the referee determined that the claimant's noted deficiencies resulted in harm to the law firm:

"The employer demonstrated the harm it incurred when fees were requested by a tenant from delays caused by the claimant in the negotiations of certain space. The claimant did not perform her job up to the standards of her profession or as the employer expected as part of her working agreement when hired. The record did demonstrate that the employer suffered harm in having to correct the claimant's work and of potential liability it may have incurred as a result of the claimant's actions."

In turn, claimant appealed the referee's decision to the Board of Review (the Board). In its decision, entered June 29, 2007, the Board essentially adopted the findings of the referee, agreeing that the evidence established that claimant was less than a satisfactory employee whose professional standards did not meet the more rigorous standards of her employer. Under those circumstances, the employer was entitled to dispense with claimant's services and exercised that right accordingly.

***4** The Board nonetheless recognized that the business decision to terminate employment based on unsatisfactory performance did not equate to the standard of misconduct required to deny unemployment benefits:

"[T]he threshold issue in every discharge for misconduct case, and the burden of proof that is born by the employer, is to prove by a preponderance of competent evidence that the claimant's conduct, which gave rise to her discharge, was both 'deliberate and willful', i.e., 'intentional'. And this the employer has failed to do. The claimant's work was careless, it was negligent, it was substandard-all true. But the employer has failed to prove by a preponderance of the competent evidence that the claimant was deliberately and willfully failing to perform her job in a satisfactory manner, or more specifically, that the claimant was intentionally doing a bad job."

Accordingly, the Board rejected the referee's analysis and conclusion that simply because claimant is an attorney a different set of standards applies in proving misconduct:

"It is apparent from the Referee's conclusion, that he abandoned the deliberate and willful standard set forth in Section 602A [*sic*] of the Illinois Unemployment Insurance Act (the 'Act'), and the established case law, in favor of a higher standard which applies specifically to attorneys. There is no such attorney exemption in the Act, that the Board is aware of. There are and always will be, attorneys who make mistakes while drafting legal documents. Attorneys who fail to turn in satisfactory work product. Attorneys who forget deadlines. Attorneys who are careless, or negligent, or inexperienced, or lazy, or who cut corners are a fact of life. No one can seriously argue that simply because an individual is an attorney, a different standard of conduct applies to them under the Act."

The Board concluded that the preponderance of competent evidence taken at the referees hearing did not establish that claimant's conduct, giving rise to her discharge, rose to the level of misconduct contemplated under Section 602(A) of the Act.

Thereafter, contending that the Board's decision was erroneous as a matter of law, Messer & Stilp sought review of the decision in the circuit court pursuant to

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the Administrative Review Law, (735 ILCS 5/3-101 *et seq.* (West 2006)). However, the court affirmed the decision of the Board on June 2, 2008, finding that it was neither against the manifest weight of the evidence nor contrary to law nor clearly erroneous.

This appeal followed.

ANALYSIS

On appeal from a decision granting unemployment compensation benefits, it is the duty of this court to review the decision of the Board, rather than the circuit court. *Richardson Brothers v. Board of Review of the Department of Employment Security,* 198 Ill.App.3d 422, 428-29, 555 N.E.2d 1126, 1130 (1990). Under the Administrative Review Law, the scope of judicial review extends to all questions of law and fact presented by the record before the court. 735 ILCS 5/3-110 (West 2006). The applicable standard of review, which determines the degree of deference given to the agency's decision, depends upon whether the question presented is one of fact, one of law, or a mixed question of law and fact. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 204-05, 692 N.E.2d 295, 302 (1998).

***5** We are mindful that an administrative agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct. 735 ILCS 5/3-110 (West 2006). In examining the agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of the agency. *City of Belvidere,* 181 Ill.2d at 204, 692 N.E.2d at 302. Instead, our review is limited to ascertain whether such findings of fact are against the manifest weight of the evidence. Factual findings are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *City of Belvidere,* 181 Ill.2d at 204, 692 N.E.2d at 302.

In the case *sub judice,* however, the facts are not in dispute. Messer & Stilp acknowledges that it did not challenge the facts before the trial court, and is in complete agreement with the factual findings of the Board. Thus, the initial question before us is not whether the Board's findings of fact were against the manifest weight of the evidence. Rather, the first issue, whether the Board's rejection of a higher standard for disqualifying misconduct for attorneys seeking unemployment benefits, requires interpretation of Section 602(A) of the Act (820 ILCS 405/602(A) (2006)). This is a question of law, which we review *de novo. International Union of Operating Engineers Local 148 v. Department of Employment Security,* 215 Ill.2d 37, 62, 828 N.E.2d 1104, 1119 (2005).

The second issue calls for a determination of whether the Board properly concluded that claimant's work performance did not constitute misconduct under the prevailing standards. The question of whether claimant's conduct warrants a finding of misconduct presents a mixed question of law and fact. A mixed question is one involving an examination of the legal effect of a given set of facts. *City of Belvidere,* 181 Ill.2d at 205, 692 N.E.2d at 302. Stated another way, a mixed question of law and fact is one " 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or * * * whether the rule of law as applied to the established facts is or is not violated.' " *American Federation of State, County & Municipal Employees Council 31 v. Illinois State Labor Relations Board, State Panel,* 216 Ill.2d 569, 577, 839 N.E.2d 479, 485 (2005), quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n. 19, 72 L.Ed.2d 66, 80 n. 19, 102 S.Ct. 1781, 1790 n. 19 (1982).

Agency decisions that present a mixed question of law and fact are reviewed under the "clearly erroneous" standard. *City of Belvidere,* 181 Ill.2d at 205, 692 N.E.2d at 302. Under that standard, courts of review give somewhat less deference to the agency than we would if the decision related solely to a question of fact, because the decision is based on fact finding that is inseparable from the application of law to fact. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security,* 201 Ill.2d 351, 369, 776 N.E.2d 166, 177 (2002). An agency's decision will be deemed clearly erroneous only where the reviewing court is left with the " 'definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc. v. Department of Employment Security,* 198 Ill.2d 380, 393, 763 N.E.2d 272, 280-81 (2001), quoting *United States v. United States Gypsum Co.,* 333 U .S. 364, 395, 92 L.Ed. 746, 766, 68 S.Ct. 525, 542(1948).

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*6 The Illinois Unemployment Insurance Act (820 ILCS 405/100 *et seq.* (West 2006)) was enacted to benefit persons who become unemployed through no fault of their own. *Jenkins v. Department of Employment Security,* 346 Ill.App.3d 408, 411, 805 N.E.2d 363, 366 (2004). While unemployment insurance benefits are a conditional right and the burden of establishing eligibility rests with the claimant, the Act must be liberally interpreted to favor the awarding of benefits. *Adams v. Ward,* 206 Ill.App.3d 719, 723, 565 N.E.2d 53, 56 (1990). However, we nonetheless recognize that the legislation was not meant to provide benefits to employees discharged for their own misdeeds. *Moss v. Department of Employment Security,* 357 Ill.App.3d 980, 985, 830 N.E.2d 663, 668 (2005).

Individuals who are discharged for misconduct are ineligible to receive unemployment benefits under the Act. *Livingston v. Department of Employment Security,* 375 Ill.App.3d 710, 716, 873 N.E.2d 444, 457 (2007). In *Manning v. Department of Employment Security,* 365 Ill.App.3d 553, 557, 850 N.E.2d 244, 248 (2006), we observed that three elements must be proven to establish disqualifying misconduct under the Act: (1) that there was a "deliberate and willful" violation of a rule or policy; (2) that the rule or policy of the employing unit was reasonable; and (3) that the violation either has harmed the employer or was repeated by the employee despite previous warnings.

In the case at bar, Messer & Stilp faults the Board's conclusion that in determining misconduct claimant should be held to the same standard as any other claimant under the Act. On the contrary, plaintiff asserts that claimant should be held to a higher standard in performance of her professional duties and responsibilities because attorneys are bound by numerous rules and ethical requirements that do not govern the employment practices of nonprofessional workers. Because the bar is raised for attorneys, Messer & Stilp submits that claimant should be held to a higher standard in determining whether misconduct has indeed occurred.

Although Messer & Stilp's argument is no doubt novel, it is nonetheless bereft of any authoritative support, statutory or decisional. Instead, plaintiff contends that because the practice of law is regulated by the Rules of Professional Conduct, the supreme court rules and the Illinois Supreme Court's own set of professional standards, a higher burden is imposed on attorneys than, for example, "common factory workers" or salespersons. Accordingly, plaintiff maintains that attorney negligence should be considered the equivalent of willful or deliberate misconduct under section 602(A) of the Act.

Messer & Stilp's argument presents a question of statutory interpretation. We are mindful that the fundamental canon of statutory construction is to ascertain and give effect to the intention of the legislature. *Varelis v. Northwestern Memorial Hospital,* 167 Ill.2d 449, 454, 657 N.E.2d 997, 999 (1995). Normally, the language employed by the legislature is the best indication of legislative intent. *Kirwan v. Welch,* 133 Ill.2d 163, 165, 549 N.E.2d 348 (1989). Accordingly, when the plain language of the statute is clear and unambiguous, the legislative intent that is discernable from the language must prevail. *Land v. Board of Education,* 202 Ill.2d 414, 421-22, 781 N.E.2d 249, 254 (2002). Moreover, courts should not, under the guise of statutory construction, add requirements or impose limitations that are inconsistent with the plain meaning of the enactment. *People ex rel. LeGout v. Decker,* 146 Ill.2d 389, 394, 586 N.E.2d 1257, 1259 (1992).

*7 Applying these principles to the case at hand, we discern nothing in the plain language of section 602(A) to indicate that the legislature intended to differentiate between the misconduct standard governing the various categories of professions or occupations regulated by the Act. The statute unequivocally applies equally to all employees across the board; there are no exceptions in the Act based upon the nature or type of employment or the designation or position of the employee. Nor are we at liberty to depart from the plain language of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.

Moreover, our research has failed to reveal any Illinois precedent differentiating the misconduct standard in the manner urged by plaintiff. However, given that we have previously determined that the

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Pennsylvania unemployment benefits statute is similar to ours, we may seek guidance from Pennsylvania law. See *Popoff v. Department of Labor,* 144 Ill.App.3d 575, 578, 494 N.E.2d 1266, 1268 (1986) (Illinois reviewing courts, having determined that Pennsylvania's unemployment statute is similar to the Illinois entitlement, have relied upon Pennsylvania jurisprudence in adjudicating "voluntary leaving" under this section of the Act). Hence, we find instructive the teaching of *Navickas v. Unemployment Compensation Review Board,* 567 Pa. 298, 787 A.2d 284 (2001), where a staff nurse was denied unemployment benefits following termination for failing to properly dilute an antibiotic before administering it to a patient. In reinstating benefits, the Pennsylvania Supreme Court reasoned that the lower court's adoption of an *ad hoc* higher standard of care for health care workers would permit any act of negligence or inadvertance to be deemed willful misconduct. Rejecting that view, the court held:

"The [c]ourts are not authorized to dilute [the] standard premised upon perceived special needs of various occupations or employees. Any such request, being in essence a question of policy, is more properly directed to the General Assembly." *Navickas,* 567 Pa. at 309, 787 A.2d at 291.

Earlier, an identical result obtained in *Norman Ashton Klinger & Associates v. Commonwealth,* 127 Pa. Commw. 293, 561 A.2d 841 (1989), where, as in the case *sub judice,* the attorney claimant was terminated after several months of employment for "many errors." Finding that termination should not disqualify the claimant from unemployment benefits, the court reasoned:

' "Mere incompetence, incapacity or inexperience causing poor work performance, will not support a discharge for willful misconduct." ' [Citation.] *Norman,* 127 Pa. Commw. at 297, 561 A.2d at 843.

Other states employ the willful misconduct standard in disqualifying claims for unemployment benefits. *In the Matter of Marten,* 255 A.D.2d 638, 680 N.Y.S.2d 28 (N.Y.App.Div.1998), claimant nursing home supervisor failed to assess an elderly resident's complaints of pain, told co-workers that she believed the resident was faking the reported pain and not to provide any medication or call the resident's doctor. The resident, who suffered from coronary artery disease, died several hours later of acute heart failure. In affirming the denial of benefits, the reviewing court applied the prevailing New York standard:

***8** "In order for a claimant's conduct to rise to the level of disqualifying misconduct for unemployment insurance purposes, the misconduct must either be detrimental to the employer's interests or a violation of a reasonable work condition. * * * Mere negligence or carelessness, although sufficient for termination, is not enough to disqualify a person from receiving unemployment insurance benefits." *Marten,* 255 A.D.2d at 638, 680 N.Y.S.2d at 28-29.

Conversely, in *Brewington v. Administrator of the Office of Employment Security,* 497 So.2d 418, 419 (La.App.1986), a nurse's failure to precisely follow hospital rules with regard to medication orders due to heavy workload and pressing duties did not constitute intentional or deliberate wrongdoing so as to disqualify her from unemployment benefits.

In Massachusetts, denial of unemployment benefits, which originally required both "deliberate misconduct" and "wilful disregard" of the employer's interest, was later modified to include a " 'knowing violation of a reasonable * * * rule or policy of the employer, provided such violation is not shown to be as a result of the employee's incompetence.' " *Still v. Commissioner of Employment & Training,* 423 Mass. 805, 810-11 n. 1, 672 N.E.2d 105, 110-11 n. 1 (1996). Similarly, in *Roberts v. Holland & Knight LLP,* 728 So.2d 327 (Fla.App.1999), the claimant, although cognizant of his employer's conflict of interest policy, was terminated after attempting to pursue a business relationship with the Miami Herald, a client of the firm. Disqualification of benefits was upheld upon a determination of misconduct based upon the claimant's disregard of standards of behavior that the employer had the right to expect from its employee. *Roberts,* 728 So.2d at 328.

However, a number of other jurisdictions additionally employ a stringent carelessness or negligent standard of disqualification, where it is of such degree that it manifests equal culpability, wrongful intent or evil

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design, or to show an intentional disregard of the employer's interests or of the employee's duties to his employer. Amador v. Unemployment Insurance Appeals Board, 35 Cal.3d 671, 678, 677 P.2d 224, 227, 200 Cal.Rptr. 298, 301 (1984) (histotechnician's refusal to perform grosscutting of tissue samples upon belief the procedure exceeded her capabilities did not evince culpability or bad faith necessary to evoke the disqualification of unemployment insurance benefits).

The foregoing standard was also applied in Yost v. Unemployment Appeals Comm'n, 848 So.2d 1235, 1238 (Fla.App.2003). In *Yost*, although a social worker's inability and incapacity to properly manage his caseload was a proper basis for termination, his conduct did not manifest culpability or evil design required to warrant qualification of unemployment compensation benefits. See also Yoldash v. Review Board of the Indiana Employment Security Division, 438 N.E.2d 310, 314 (Ind.App.1982) (outburst of abusive and offensive language directed to superiors constituted disqualifying misconduct, thereby rendering employee ineligible for unemployment compensation benefits); Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993) (truck driver's refusal to undergo treatment for alcoholism constituted insubordination justifying denial of unemployment benefits); Parks v. Employment Security Comm'n, 427 Mich. 224, 236, 398 N.W.2d 275, 281 (1986) (city employee's termination for violation of residency requirement amounted to conduct showing a disregard of her employer's interest thereby disqualifying the employee for unemployment benefits); Kemper County School District v. Mississippi Employment Security Commission, 832 So.2d 548, 550 (Miss.2002) (food service managers's termination for failure to follow employer's policies and procedures did not manifest an intentional and wanton disregard of the school district's interest sufficient to evoke denial of unemployment benefits); Eastex Packaging Co. v. Department of Industry, Labor & Human Relations, 89 Wis.2d 739, 753, 279 N.W.2d 248, 254 (1979) (employee's disregard of instruction, resulting in accidental damage to machinery was an isolated act of carelessness that did not justify denial of benefits under employee misconduct standard); *Aspen Ridge Law Offices, P.C v. Wyoming Department of Employment*, 2006 WY 125, ¶ 15, 143 P.3d 911, ¶ 15 (Wyo.2006) (legal secretary's failure to timely review relevant court files and prepare of requested affidavit was an isolated instance of ordinary negligence that did not constitute disqualifying misconduct).

*9 We are further mindful that our legislature has expressly rejected the argument that carelessness or negligence alone should be equated with willful and deliberate misconduct. Plaintiff's argument harkens back to a day when either willful or wanton conduct or carelessness or negligence could constitute misconduct under the Act. Jackson v. Board of Review of the Department of Labor, 105 Ill.2d 501, 511-12, 475 N.E.2d 879, 885 (1985). However, the present definition of "misconduct," which was added to section 602(A) (Pub. Act 85-956, eff. January 1, 1988), contained no reference to carelessness or negligence. "Deliberate" and "willful" misconduct is required. See Siler v. Department of Employment Security, 192 Ill.App.3d 971, 975, 549 N.E.2d 760, 763 (1989) ("This indicated that the legislature intended that persons discharged for incapacity, inadvertence, negligence or inability to perform assigned tasks should receive unemployment benefits").

Accordingly, we decline Messer & Stilp's invitation to depart from the plain language of the statute in the manner suggested. We find that the Board properly rejected the argument that an attorney's negligent acts should be equated with willful and deliberate misconduct. The Board's finding that claimant should be held to the same standard as any other claimant in determining whether misconduct occurred is in conformance with the present requirements of the law.

We next consider whether the Board properly determined that claimant's work performance did not warrant for discharge for willful misconduct. Preliminary to that consideration, however, we must first address the Board's contention that Messer & Stilp forfeited this argument because it failed to raise the issue in the circuit court. Support for the forfeiture claim reposes in Messer & Stilp's complaint for administrative review and, specifically, the allegation that the "Boards's finding that defendant is not held to standards of professional practice is clearly erroneous as a matter of law. Notably, Messer & Stilp did not allege that the Board's finding of negligence rather than willfulness was contrary to the manifest weight of the

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evidence or that its application of facts to law was clearly erroneous. Rather, in its argument before the circuit court, Messer & Stilp resolutely defined the issue, "There's really one question for review here, and that is whether if a claimant is an attorney does a different set of standards apply in proving misconduct * * *." Nor did Messer & Stilp argue that, based on the evidence, the statutory standard of willful misconduct had indeed been satisfied. The Board's forfeiture argument finds additional support in the circuit court's judgment: "The decision of the Board is affirmed as it is neither against the manifest weight of the evidence nor contrary to law nor clearly erroneous."Tellingly, the notice of appeal simply asserts that the decision should be reversed as "contrary to the law."

***10** We find merit in the Board's contention that nowhere in the administrative review proceedings did Messer & Stilp allege or argue that claimant engaged in willful misconduct. The issue is therefore forfeited and cannot be raised for the first time before this court. See *Rispoli v. Police Board,* 188 Ill.App.3d 622, 634-635, 544 N.E.2d 1063, 1071-72 (1989); *Smith v. Ashley,* 29 Ill.App.3d 932, 332 N.E.2d 143 (1975).

Even assuming the bar of forfeiture did not prevail, we do not perceive that Messer & Stilp's position is meaningfully improved. As noted, in determining whether the Board correctly determined that claimant did not commit willful misconduct, our inquiry involves a mixed question of law and fact. We must therefore determine whether the facts support the Board's findings and conclusions, which rejected any willful or deliberate violation of plaintiff's policies or rules. See *AFM Messenger Service,* 198 Ill.2d at 392, 763 N.E.2d at 280.

Messer & Stilp's claim of willful misconduct is bottomed on the firm's practice and policy memorandum claimant was given upon commencement of her employment. The memorandum states that it was the responsibility of all employees to meet deadlines for all tasks and report back as to compliance. In testimony before the referee, Mr. Stilp complained primarily about claimant's deficiencies in drafting a lease and that she had also neglected her assigned projects. As evidence of claimant's failings, Stilp pointed to a September 2, 2006, e-mail noting that claimant, for the third time, had failed to correct a typographical error on a lease which left an ambiguity as to the rent term According to Stilp, this third offense evinced repeated violations of the firm's work rules which justified her termination for misconduct.

At the referee's hearing, in response to the accusation that she had mishandled the lease, claimant testified that she had inherited the job from another attorney in the office. She explained that the lease was approximately 36 pages in length, including schedules, and required many changes and corrections. Although claimant acknowledged that she had inadvertently missed the error concerning the rental term, she denied that she acted intentionally.

Messer & Stilp further maintains that claimant was also required to adhere to the Rules of Professional Conduct, which serve as guideposts for the practice of law. Although this principle is universally recognized, plaintiff failed to identify the particular rule or standard implicated or favor us with the manner in which claimant violated its salutary proscriptions.

In its administrative decision, the Board recognized that claimant's "work was careless, it was negligent, it was substandard-all true."However, the Board correctly rejected the referee's abandonment of the deliberate and willful standard set forth in section 602(A) of the Act, and the established case law, in favor of a higher standard that applies specifically to attorneys.

***11** We concur in the Board's conclusion that the business decision to terminate employment based on unacceptable performance does not equate to the standard of misconduct required to deny unemployment benefits. The employer must prove by a preponderance of the competent evidence that the claimant was deliberately and willfully failing to perform her job in a satisfactory manner. Manifestly, carelessness and poor performance can certainly justify termination; yet, standing along they "do not make an employee ineligible for [unemployment benefits]" *Wrobel v. Department of Employment Security,* 344 Ill.App.3d 533, 537, 801 N.E.2d 29, 34 (2003) citing *Zuaznabar v. Board of Review of the Department of Employment Security,* 257 Ill.App.3d 354, 359, 628

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N.E.2d 986, 990 (1993) (To disqualify an employee from receiving unemployment benefits, "an employer must satisfy a higher burden than merely proving that an employee should have been rightly discharged"). The Board correctly determined that Messer & Stilp has failed to meet that burden here.

CONCLUSION

For the foregoing reasons, we find that Messer & Stilp has failed to demonstrate that the Board's decision granting claimant unemployment benefits was clearly erroneous or deficient as a matter of law. Accordingly, we affirm the judgment of the circuit court upholding the decision of the Board.

Affirmed.

TULLY and O'MARA FROSSARD, JJ., concur.
Ill.App. 1 Dist.,2009.
Messer & Stilp, Ltd. v. Department of Employment Sec.
--- N.E.2d ----, 2009 WL 1685239 (Ill.App. 1 Dist.)

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Appellate Court of Illinois,
First District, Second Division.
Phillip WROBEL, Plaintiff-Appellant,
v.
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, et al., Defendants-Appellees.
No. 1-02-2739.

Nov. 18, 2003.

Background: Former employee brought action for administrative review of decision of the Board of Review of the Department of Employment Security, sustaining denial of unemployment benefits. The Circuit Court, Cook County, Thomas R. Chiola, J., affirmed the Board's decision. Former employee appealed.

Holding: The Appellate Court, Wolfson, J., held that former employee's absences and tardiness were not "misconduct" disqualifying him from receiving unemployment benefits.

Reversed.

West Headnotes

[1] Unemployment Compensation 392T 78

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)

Former employee's absences and tardiness were not "misconduct" disqualifying him from receiving unemployment benefits under the Unemployment Insurance Act; Department of Employment Security Board of Review did not find, and there was nothing in record to suggest, that employee chose to sleep beyond time he would need to in order to get up and make it to work, or call in, on time, and factual findings surrounding incident of employee oversleeping did not suggest willful and deliberate disregard of employer rule by employee. S.H.A. 820 ILCS 405/100 et seq.

[2] Unemployment Compensation 392T 286

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(B) Hearing
392Tk285 Questions of Fact; Credibility Determinations
392Tk286 k. In General. Most Cited Cases
(Formerly 356Ak614)

Unemployment Compensation 392T 478

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk478 k. Presumptions and Inferences, in General. Most Cited Cases
(Formerly 356Ak655)

Department of Employment Security Board of Review is the trier of fact in cases involving claims for unemployment compensation, and its conclusions of fact are considered as prima facie true and correct.

[3] Unemployment Compensation 392T 488

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk488 k. Weight of Evidence. Most Cited Cases
(Formerly 356Ak665)

An appellate court will disturb factual findings of the Department of Employment Security Board of Review only when they are against the manifest weight of the evidence.

[4] Unemployment Compensation 392T

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491(1)

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk491 Questions of Law; Errors of Law
392Tk491(1) k. In General. Most Cited Cases
(Formerly 356Ak666)
An appellate court owes no deference to conclusions of law of the Department of Employment Security Board of Review.

[5] Unemployment Compensation 392T 491(1)

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk491 Questions of Law; Errors of Law
392Tk491(1) k. In General. Most Cited Cases
(Formerly 356Ak682)
An appellate court will reverse decisions of the Department of Employment Security Board of Review when they are based on misinterpretations or misapplications of the law.

[6] Unemployment Compensation 392T 493(5)

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk493 Particular Cases and Issues
392Tk493(5) k. Fault or Misconduct. Most Cited Cases
(Formerly 356Ak671)
Whether an employee's conduct amounted to misconduct under the Unemployment Insurance Act is a question of law, reviewed de novo. S.H.A. 820 ILCS 405/100 et seq.

[7] Unemployment Compensation 392T 5

392T Unemployment Compensation
392TI In General
392Tk3 Constitutional and Statutory Provisions
392Tk5 k. Purpose and Intent of Provisions. Most Cited Cases
(Formerly 356Ak251)
Benefits provided by the Unemployment Insurance Act are meant to alleviate economic hardship occasioned by involuntary unemployment. S.H.A. 820 ILCS 405/100 et seq.

[8] Unemployment Compensation 392T 6(3)

392T Unemployment Compensation
392TI In General
392Tk3 Constitutional and Statutory Provisions
392Tk6 Construction of Statutes
392Tk6(2) Liberal or Strict Construction
392Tk6(3) k. In General. Most Cited Cases
(Formerly 356Ak280)
The Unemployment Insurance Act should be liberally construed to favor awarding of benefits. S.H.A. 820 ILCS 405/100 et seq.

[9] Unemployment Compensation 392T 65

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak388.1)
The Unemployment Insurance Act was not meant to provide benefits if an employee was discharged for his own misdeeds. S.H.A. 820 ILCS 405/100 et seq.

[10] Unemployment Compensation 392T 70

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk67 Violation of Rules, Disobedience, or Insubordination in General
392Tk70 k. Reasonableness of Rule, Policy, or Request. Most Cited Cases
(Formerly 356Ak394)

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Each element set forth in statute defining misconduct must be proved to establish misconduct rendering a former employee ineligible for unemployment benefits: employee's willful and deliberate violation of rule, reasonableness of rule, and harm to employer or commission of act after receiving a warning or instruction. S.H.A. 820 ILCS 405/602, subd. A.

[11] Unemployment Compensation 392T ⚷74

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk74 k. Inefficiency, Incompetency, or Unsatisfactory Performance in General. Most Cited Cases
(Formerly 356Ak389)

Carelessness and poor performance can certainly justify termination; however, carelessness and poor performance alone do not make employee ineligible for benefits of the Unemployment Insurance Act. S.H.A. 820 ILCS 405/100 et seq.

[12] Unemployment Compensation 392T ⚷65

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak388.1)

Unemployment Compensation 392T ⚷69

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk67 Violation of Rules, Disobedience, or Insubordination in General
392Tk69 k. Knowledge of Rule or Policy. Most Cited Cases
(Formerly 356Ak394)

Willful and deliberate employee conduct is required to preclude unemployment benefits under the Unemployment Insurance Act; willful conduct is a conscious act made in violation of company rules, when employee knows it is against rules. S.H.A. 820 ILCS 405/100 et seq.

[13] Unemployment Compensation 392T ⚷78

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)

An appellate court will refuse to infer that an employee willfully and deliberately violated an employer's attendance policy, so as to preclude unemployment benefits under the Unemployment Insurance Act, based on the number of infractions alone. S.H.A. 820 ILCS 405/100 et seq.

****31 *534 ***739** Alicia L. Aiken, Legal Assistance Foundation of Metropolitan Chicago, Chicago, for Appellant.

Lisa Madigan, Attorney General, Gary Feinerman, Solicitor General, and Mary Patricia Kerns, Assistant Attorney General, Chicago, for Appellees.

Justice WOLFSON, delivered the opinion of the court:

Plaintiff Philip Wrobel was a pressman for the Chicago Tribune ("Tribune") for 17 years, until his firing on September 27, 2001. After his termination, plaintiff applied for benefits under the Unemployment Insurance Act ("Act"). 820 ILCS 405/100 *et seq.* (West 2002) However, the Illinois Department of Employment Security ("IDES") denied his claim, agreeing with the Tribune that plaintiff was terminated due to misconduct connected with his work. 820 ILCS 405/602(A) (West 2002). Plaintiff continued to pursue benefits and requested a hearing before a referee. The referee affirmed IDES' denial of benefits. Plaintiff appealed the referee's decision to IDES' Board of Review ("Board"). The Board adopted the factual findings and legal reasoning of the referee and sustained her decision. Plaintiff then filed a complaint for administrative review of the Board's decision in the circuit court. The circuit court affirmed the Board's decision and plaintiff then appealed to this court. Plaintiff contends that his actions were not misconduct because the rule he violated was unreasonable, and because any rule violation he committed was not done willfully and deliberately. We reverse.

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Plaintiff's hearing took place via a telephone conference call on November 15, 2001. Plaintiff, two of plaintiff's supervisors, and a Tribune human resources representative testified. The following facts were elicited at plaintiff's hearing.

Plaintiff's shift started at 6 a.m. In the event he was going to be absent or late, he was supposed to call a supervisor by 5 a.m.

***535** The Tribune had an attendance policy providing for various levels of discipline based on the number of attendance infractions. The Tribune gave its employees written copies of the policy on more ****32 ***740** than one occasion. Under the policy, attendance infractions would be measured in revolving 12-month periods; so, an infraction would not be counted against an employee after 12 months from that infraction. Failing to call in an absence or late arrival, or calling in late, counted as two infractions.

After one late call, late arrival, or absence, an employee would receive counseling. After two, an employee would receive a verbal warning. After three, the employee would receive a written warning. After a fourth, an employee would receive a second written warning. After a fifth, the employee would be suspended for three days. And finally, in the event of a sixth, an employee would be terminated. The Tribune retained the right to accelerate the disciplinary schedule if a supervisor saw fit to do so.

Plaintiff had attendance issues. On March 25, 1999, he had an unexcused absence, followed by two late arrivals to work on June 17 and September 23, 1999. At that point he received a written warning from the Tribune. Plaintiff had another unexcused absence on November 18, 1999, and then called in sick after 5 a.m. on March 16, 2000, leading to his second written warning. Plaintiff received a three day suspension from the Tribune after another unexcused absence on June 25, 2000. As of March 23, 2001, some of plaintiff's earlier infractions were over a year old, and no longer counted against him. So, when he failed to call in before 5 a.m. that day, he only received another written warning. On April 28, 2001, plaintiff called his supervisor after his shift was to have begun to inform him that he had overslept. On May 2, the Tribune informed plaintiff that another infraction could lead to the loss of his job. When plaintiff called in at 5:50 a.m. to tell his supervisor that he would be late on September 27, 2001, the Tribune decided to fire him.

The referee focused the testimony around the September 27, 2001 incident. Plaintiff testified that he called in late because he overslept. He explained that his electric clock-radio failed to sound that morning as a result of a power outage overnight. His back up, wind-up clock also failed to go off because he forgot to set it the night before. Plaintiff admitted that the electric clock's power could have been backed up with batteries, but that he never put any in. Plaintiff testified that he explained why he had overslept to his supervisors, and both supervisors acknowledged hearing about the malfunctioning alarm clock.

The only testimony regarding the circumstances of plaintiff's other attendance infractions was about his late arrival on April 28, 2001. ***536** Plaintiff indicated that his electric clock-radio also failed to sound on that morning, although he did not know why. One of the supervisors remembered plaintiff giving that explanation at the time.

The referee found plaintiff's explanation as to why he called in late on September 27 credible. However, the referee concluded that "the circumstances that caused his final attendance violation were within his ability to control or avoid." Because he did not take steps to ensure that his alarm clocks would go off, even in the event of a power failure, the referee determined that plaintiff's discharge was for misconduct.

[1][2][3][4][5][6] The Board is the trier of fact, and its conclusions of fact are considered as *prima facie* true and correct. *Greenlaw v. Department of Employment Security,* 299 Ill.App.3d 446, 448, 233 Ill.Dec. 532, 701 N.E.2d 175 (1998). We will disturb the factual findings of the board only when ****33 ***741** they are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 204, 229 Ill.Dec. 522, 692 N.E.2d 295 (1998). However, we owe no deference to the Board's conclusions of law. *Katten Muchin and Zavis v. Department of Employment Security,* 279 Ill.App.3d 794, 799, 216 Ill.Dec. 443, 665

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N.E.2d 503 (1996). We will reverse the Board's decisions when they are based on misinterpretations or misapplications of the law. *Katten Muchin and Zavis,* 279 Ill.App.3d at 799, 216 Ill.Dec. 443, 665 N.E.2d 503. Whether an employee's conduct amounted to misconduct under the Act is a question of law, reviewed *de novo. Grigoleit Co. v. Department of Employment Security,* 282 Ill.App.3d 64, 71, 218 Ill.Dec. 374, 669 N.E.2d 105 (1996); see also *London v. Department of Employment Security,* 177 Ill.App.3d 276, 279, 126 Ill.Dec. 609, 532 N.E.2d 294 (1988) (Board's determination that claimant fired for tardiness was a legal conclusion). We will therefore review the Board's determination that plaintiff's absences and tardiness amounted to misconduct *de novo.*

[7][8][9] The benefits provided by the Unemployment Insurance Act are meant to "alleviate the economic hardship occasioned by involuntary unemployment." *Siler v. Department of Employment Security,* 192 Ill.App.3d 971, 974, 140 Ill.Dec. 109, 549 N.E.2d 760 (1989). The Act should be liberally construed to favor the awarding of benefits. *Lachenmyer v. Didrickson,* 263 Ill.App.3d 382, 388, 200 Ill.Dec. 902, 636 N.E.2d 93 (1994). However, the Act was not meant to provide benefits if an employee was discharged for his own misdeeds. *Siler,* 192 Ill.App.3d at 974, 140 Ill.Dec. 109, 549 N.E.2d 760.

[10] To be guilty of misconduct that would preclude benefits, the employee must deliberately and willfully violate a "reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the ***537** employing unit." 820 ILCS 405/602(A) (West 2002). Each element must be proved to establish misconduct: the employee's willful and deliberate violation of the rule, the reasonableness of the rule, and the harm to the employer or commission of the act after receiving a warning or instruction. *Caterpillar, Inc. v. Department of Employment Security,* 313 Ill.App.3d 645, 653, 246 Ill.Dec. 472, 730 N.E.2d 497 (2000).

The Act's present definition of misconduct, enacted in 1988, replaced a common law definition that considered "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 employer's interests or of the employee's duties and obligations to his employer" as misconduct. *Jackson v. Board of Review,* 105 Ill.2d 501, 511-512, 86 Ill.Dec. 500, 475 N.E.2d 879 (1985) (setting forth the old standard). We determined that the omission of negligence from the Act's new definition was not an accident. *Siler,* 192 Ill.App.3d at 975, 140 Ill.Dec. 109, 549 N.E.2d 760 ("The legislature left out of the new definition of 'misconduct' any mention of carelessness or negligence of any degree. This indicated that the legislature intended that persons discharged for incapacity, inadvertence, negligence or inability to perform assigned tasks should receive unemployment benefits."); *Washington v. Board of Review,* 211 Ill.App.3d 663, 669, 156 Ill.Dec. 90, 570 N.E.2d 566 (1991)(*Jackson* standard rejected in light of 1988 amendment). We concluded that the present Act "limits misconduct to ****34 ***742** those acts that are intentional." *Washington,* 211 Ill.App.3d at 669, 156 Ill.Dec. 90, 570 N.E.2d 566.

Reviewing the record, and accepting the Board's findings of fact as true, we cannot conclude that plaintiff willfully and deliberately violated the Tribune's rules. In faulting plaintiff for not taking better care to ensure that at least one of his alarm clocks would go off so he could make it to work on time, the Board addressed plaintiff's negligence, as opposed to any intentional conduct. For example, the Board noted that plaintiff forgot to set his wind-up, back up clock. One does not typically forget to do something intentionally; forgetting is a matter of carelessness.

[11] Carelessness and poor performance can certainly justify termination. *Loveland Management Corp. v. Board of Review,* 166 Ill.App.3d 698, 702, 117 Ill.Dec. 719, 520 N.E.2d 1070 (1988) (failure to complete assigned duties and to follow instructions justified termination). However, carelessness and poor performance alone do not make an employee ineligible for the Act's benefits. *Zuaznabar v. Board of Review,* 257 Ill.App.3d 354, 359, 195 Ill.Dec. 522, 628 N.E.2d 986 (1993) (to disqualify an employee from receiving unemployment benefits "an employer

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must satisfy a higher burden than merely proving that an employee ***538** should have been rightly discharged."); Siler, 192 Ill.App.3d at 975, 140 Ill.Dec. 109, 549 N.E.2d 760 ("Merely not 'following correct procedures' or disregarding 'the employer's requirements as to safety and sanitation' " did not amount to misconduct); Loveland, 166 Ill.App.3d at 702, 117 Ill.Dec. 719, 520 N.E.2d 1070 (poor performance alone was not misconduct).

[12] Willful and deliberate employee conduct is now required to preclude unemployment benefits. Willful conduct is a conscious act made in violation of company rules, when the employee knows it is against the rules. Lachenmyer, 263 Ill.App.3d at 389, 200 Ill.Dec. 902, 636 N.E.2d 93 ("Willful behavior stems from employee awareness of a company rule that is disregarded by the employee."). The facts in *Lachenmyer* serve as a good example of what is meant by willful and deliberate conduct. In that case, the employee willfully violated his employer's explicit instruction to not make hostile physical contact with his coworkers and broke employer rules when he chose to throw a folder at his supervisor.

On the other hand, cases such as *London* and Wright v. Department of Labor, 166 Ill.App.3d 438, 441, 116 Ill.Dec. 839, 519 N.E.2d 1054 (1987) demonstrate what is not meant by willful and deliberate conduct. In London, 177 Ill.App.3d at 280, 126 Ill.Dec. 609, 532 N.E.2d 294, the plaintiff testified that she left home early enough to get to work, but that she became snared in unusual traffic congestion and road construction. We held that her resulting tardiness that day could not have been deliberate under the Act. Likewise, in Wright, 166 Ill.App.3d at 441, 116 Ill.Dec. 839, 519 N.E.2d 1054, when the plaintiff was late for work as a result of her car failing to start and a bus arriving late, we concluded that she was not late deliberately. We made our decision in these two cases knowing that there were things the plaintiffs could have done to lessen the likelihood of their tardiness, such as the *Wright* plaintiff better maintaining her car, or the *London* plaintiff leaving home earlier in anticipation of bad traffic. Our decisions in these two cases further acknowledge that an employee must consciously choose to break the employer's rules, or in this context, consciously choose to be late, in order to be ineligible for unemployment benefits.

****35 ***743** Here, however, we have no conscious acts by plaintiff, rather, we have an unconscious act: he overslept. The Board did not find, and there is nothing in the record to suggest, that plaintiff chose to sleep beyond the time he would need to in order to get up and make it to work, or call in, on time. *Compare* Washington, 211 Ill.App.3d at 667, 156 Ill.Dec. 90, 570 N.E.2d 566 (employee falling asleep for 30 minutes in executive board meeting not misconduct when nothing indicated that plaintiff "purposely 'took a nap' ").

Relying on Jackson, 105 Ill.2d at 511-12, 86 Ill.Dec. 500, 475 N.E.2d 879, and ***539**Bochenek v. Department of Employment Security, 169 Ill.App.3d 507, 121 Ill.Dec. 586, 525 N.E.2d 893 (1988), the Board asks us to infer deliberate and willful conduct on the part of the plaintiff. The Board claims that plaintiff was not fired based on his last infraction alone, and that plaintiff's infractions "recurred with sufficient frequency to demonstrate a willful violation." The Board's argument is problematic for two reasons.

First, the Board's inconsistent position as compared with that of its referee presents a problem as the Board stated it adopted the factual findings and legal reasoning of the referee *in toto* in its decision. While it is true that misconduct can be determined by looking at a series of incidents, as opposed to one "triggering" incident, Katten Muchin and Zavis, 279 Ill.App.3d at 799, 216 Ill.Dec. 443, 665 N.E.2d 503, the referee focused exclusively on plaintiff's late call in on September 27, 2001. As mentioned before, her factual findings surrounding that incident do not suggest a willful and deliberate disregard of an employer rule by plaintiff.

[13] Second, the Board's argument falters because the Board admits that some of plaintiff's other attendance infractions could also have resulted from negligence. For all the record reveals, all of plaintiff's past infractions could have been the result of negligence. The record gives no indication as to the circumstances of any of the other infractions by plaintiff, save for his oversleeping on April 28, 2001, when his clock failed to sound again. As we have before, we will refuse to infer that an employee willfully and deliberately vio-

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lated an employer's attendance policy based on the number of infractions alone. *London,* 177 Ill.App.3d at 281, 126 Ill.Dec. 609, 532 N.E.2d 294; *Wright,* 166 Ill.App.3d at 441, 116 Ill.Dec. 839, 519 N.E.2d 1054. The circumstances of each violation are legally significant and must be known to label a pattern of absence or tardiness as misconduct. Thus, in *Wright,* 166 Ill.App.3d at 441, 116 Ill.Dec. 839, 519 N.E.2d 1054, we held that when there was "no information about how tardy plaintiff was or whether she had a reasonable excuse for her tardiness" we could not determine that her pattern of tardiness amounted to misconduct.

Because we know so little about plaintiff's other tardiness and absences, we cannot conclude that he willfully and deliberately missed or was late for work. Therefore, we cannot say that he engaged in misconduct under the Act. We reverse the decision of the Board.

Reversed.

BURKE, and GARCIA, JJ., concur.
Ill.App. 1 Dist.,2003.
Wrobel v. Illinois Dept. of Employment Sec.
344 Ill.App.3d 533, 801 N.E.2d 29, 279 Ill.Dec. 737

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C

Appellate Court of Illinois,
First District, Second Division.

Earl RAY, Plaintiff-Appellee,
v.
DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW, Illinois Department of Security, and Director, Illinois Department of Employment Security, Defendants-Appellants (Chicago Etching, Defendant).
No. 1-91-1580.

March 23, 1993.

The Board of Review Department of Employment Security determined that former employee was ineligible to receive unemployment benefits on ground that discharge for misappropriating employer's property was for misconduct. Former employee sought judicial review. The Circuit Court, Cook County, Randye A. Kogan, J., reversed and Board appealed. The Appellate Court, Hartman, J., held that: (1) policy that employee should not steal from employer was implicit in employment relationship, and (2) employer was harmed by misappropriation.

Reversed.

West Headnotes

[1] Administrative Law and Procedure 15A 793

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak793 k. Weight of Evidence. Most Cited Cases

Duty of reviewing court on administrative review is to determine whether findings and decision of agency are against manifest weight of evidence.

[2] Administrative Law and Procedure 15A 749

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak749 k. Presumptions. Most Cited Cases

When reviewing court is conducting an administrative review, factual findings and conclusions are held to be prima facie true and correct. Ill.Rev.Stat.1989, ch. 110, ¶ 3-110.

[3] Unemployment Compensation 392T 6(3)

392T Unemployment Compensation
392TI In General
392Tk3 Constitutional and Statutory Provisions
392Tk6 Construction of Statutes
392Tk6(2) Liberal or Strict Construction
392Tk6(3) k. In General. Most Cited Cases
(Formerly 356Ak280)

Unemployment Insurance Act is to be liberally interpreted in order to protect individuals from severe economic insecurity arising from involuntary unemployment. Ill.Rev.Stat.1989, ch. 48, ¶ 432A.

[4] Unemployment Compensation 392T 70

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk67 Violation of Rules, Disobedience, or Insubordination in General
392Tk70 k. Reasonableness of Rule, Policy, or Request. Most Cited Cases
(Formerly 356Ak394)

Unemployment Insurance Act requires that disqualifying misconduct be in violation of reasonable rule or

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policy of employer. Ill.Rev.Stat.1989, ch. 48, ¶ 432A.

[5] Unemployment Compensation 392T ⚷83

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk82 Dishonest or Criminal Acts
392Tk83 k. In General. Most Cited Cases
(Formerly 356Ak392)

Misappropriating employer's property was misconduct which disqualified employee from benefits under Unemployment Insurance Act, even though employer had no express policy prohibiting employees from taking company property for permanent personal use, where understanding that employees do not steal from employers is implicit in employment relationship, employee's deliberate actions established that employee knew of policy against taking company property for personal use, and misappropriation harmed employer by reducing inventory and increasing costs. Ill.Rev.Stat.1989, ch. 48, ¶ 432A.

***233 **196 ***62** Roland W. Burris, Atty. Gen., and Rosalyn B. Kaplan, Sol. Gen., Chicago (Claudia E. Sainsot, of counsel), for defendants appellants.

Legal Assistance Foundation of Chicago, Chicago (Timothy Huizenga and Tammy J. Lenzy, of counsel), for plaintiff-appellee.

Justice HARTMAN delivered the opinion of the court:

Plaintiff Earl Ray filed a complaint to obtain administrative review of a decision ****197 ***63** of the Board of Review of the Department of Employment Security (board) that he was ineligible to receive unemployment benefits because he was discharged for misconduct, *i.e.,* misappropriating his employer's property. The circuit court of Cook ***234** County found that the board erred and reversed. The board appeals from that decision.

Plaintiff was employed in the maintenance department of Chicago Etching from November 1986 until he was terminated on August 18, 1989. His application for unemployment benefits was allowed by the claims adjudicator. Chicago Etching then appealed and a hearing was conducted before a hearing referee on November 13, 1989.

At the hearing, Don Adams testified that he was a Wells Fargo employee working in an undercover capacity at Chicago Etching from June 12, 1989 to August 4, 1989. According to Adams, he posed as a trainee under plaintiff, and observed plaintiff taking property from Chicago Etching on eight occasions, specifically June 20, 22, 23 and 27 and July 10, 13, 26 and 27, 1989. Adams testified that plaintiff picked up items in the maintenance department after his supervisor left. When asked what he observed plaintiff taking on these occasions, Adams responded:

> "I have listed here screws, nuts and bolts. Spray paint uh, there was one can of uh, material that was used to stop pipes from sweating. He picked that up. There was also a report of a battery from a car, which Mr. Ray told me that he had picked himself."

Adams added that plaintiff would place the items in his locker before the employees changed their clothes. Plaintiff would subsequently remove the items from his locker and walk out carrying them.

Adams testified that nuts and bolts were taken on June 20, 22 and 27, 1989. He further testified that the first time plaintiff took items from his employer in Adams' presence, he told Adams to take anything that he wanted.

Laura Jeziorski, an employee of Wells Fargo, testified that she supervised Adams in his undercover investigation at Chicago Etching and that he reported to her over the telephone almost every day. Further, she reviewed his written reports. Jeziorski testified that Wells Fargo policy directed its investigator to refrain from questioning the actions of employees during the course of an investigation. Further, Wells Fargo requests that the employer refrain from intervening during the course of an investigation.

Bert Johanson, personnel manager for Chicago Etching, testified that no criminal or civil charges were filed against plaintiff.

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Plaintiff testified that he never stole anything from his employer and that he was unaware of any theft or pilfering problems at Chicago Etching. In addition, plaintiff stated that he did not recall any memorandum or bulletin from the company concerning pilfering.

***235** Plaintiff first learned that he was accused of theft when he was discharged. Plaintiff admitted that he borrowed a battery when his car would not start, but he asserted that his boss told him to take it and keep it until he bought a new battery. Plaintiff further testified that a different supervisor told him to take a gallon of floor soap.

The referee found that plaintiff was ineligible for benefits because plaintiff was discharged for misconduct. He found that the employer was experiencing a series of thefts and that Adams witnessed defendant committing eight separate acts of theft and further found that Adams described plaintiff's actions in removing the property and the specific property removed on each occasion. The referee concluded that plaintiff misappropriated his employer's property in violation of a reasonable rule or policy of his employer. The referee's decision was affirmed by the board.

The circuit court reversed the determination of the board. Specifically, the court found that the employer failed to demonstrate that it had a policy against lending and the evidence further failed to establish that the employer was harmed.

****198 ***64** [1][2] The duty of the reviewing court on administrative review is to determine whether the findings and decision of the agency are against the manifest weight of the evidence. (*Sheff v. Board of Review, Illinois, Department of Labor* (1984), 128 Ill.App.3d 347, 83 Ill.Dec. 624, 470 N.E.2d 1044.) Further, factual findings and conclusions are held to be *prima facie* true and correct. (Ill.Rev.Stat.1989, ch. 110, par. 3-110 (now 735 ILCS 5/3-110 (West 1992)).) However, "the same deference is not accorded with respect to legal questions such as the erroneous construction of a statute." *London v. Department of Employment Security* (1988), 177 Ill.App.3d 276, 279, 126 Ill.Dec. 609, 532 N.E.2d 294.

Thus, we must determine if the evidence justified the circuit court's reversal of the board's determination that plaintiff was discharged for misconduct.

[3] In the instant case, the board found that plaintiff was ineligible for unemployment compensation based upon the finding that he was discharged for misconduct. Section 602A of the Unemployment Insurance Act (Act) defines misconduct as:

"the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." (Ill.Rev.Stat.1989, ch. 48, par. 432A (now 820 ILCS 405/602A (West 1992)).)

***236** Further, the Act is to be liberally interpreted in order to protect individuals from severe economic insecurity arising from involuntary unemployment. *Lipman v. Board of Review of the Department of Labor* (1984), 123 Ill.App.3d 176, 78 Ill.Dec. 679, 462 N.E.2d 798.

[4][5] The statute requires that the disqualifying misconduct be in violation of a reasonable rule or policy of the employer. Further, there is no mandate in section 602A that such misconduct be in violation of a written rule. While there was no direct evidence that the company had an express policy prohibiting employees from taking company property for permanent personal use without permission, we find that any employer would obviously have such a policy unless a contrary policy is clearly presented. (See *Meeks v. Illinois Department of Employment Security* (1990), 208 Ill.App.3d 579, 153 Ill.Dec. 523, 567 N.E.2d 481.) Implicit in the employment relationship is the understanding that employees do not steal from employers. Plaintiff's claim that his employer had no policy against taking items without permission is further belied by plaintiff's testimony that he could take items with permission and the fact that the employer had hired a Wells Fargo investigator, who reported that items were taken by plaintiff. In addi-

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tion, plaintiff's actions in taking the items after his supervisor left the department, placing them in his locker until the end of the work day and then taking them with him, reveal that plaintiff's actions in taking his employer's property were deliberate and further support plaintiff's knowledge of a policy against taking company property for personal use.

It must also be established that the employer was harmed by plaintiff's conduct. Plaintiff's actions in taking these items and in telling Adams that he could take anything he wanted clearly affect the employer's inventory of materials and costs. Thus, the determination of the circuit court was manifestly erroneous.

Based upon the preceding, the judgment of the circuit court is reversed.

Reversed.

McCORMICK, P.J., and SCARIANO, J., concur.
Ill.App. 1 Dist.,1993.
Ray v. Department of Employment Sec. Bd. of Review
244 Ill.App.3d 233, 614 N.E.2d 196, 185 Ill.Dec. 62

END OF DOCUMENT

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Exhibit F

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

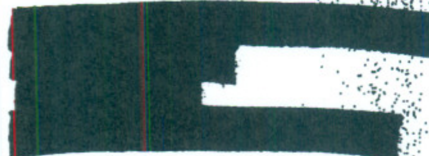
BOARD OF REVIEW

BOARD DOCKET NO. ABR-09-5483

LOCAL OFFICE: 022

CLAIMANT: (RESPONDENT)

EMPLOYER: (APPELLANT)



OFFICE USE NO. 526

RDS DOCKET NO. AR-9002814A

REF IDENT. NO. 544

SOC. SEC. NO.

TYPE OF APPEAL:

MC-15.2 Misconduct

ISSUE AND BENEFIT PERIOD:

01 11/09/2008 - 11/22/2008

DECISION

This is an appeal by the employer from a Referee's decision dated March 17, 2009, which set aside the claims adjudicator's determination and held that the claimant was discharged for reasons other than misconduct connected with work and is not subject to disqualification under Section 602A of the Illinois Unemployment Insurance Act.

We have reviewed the record of the evidence in this matter, including the transcript of the testimony submitted at the hearing conducted by telephone on March 16, 2009, at which the claimant appeared. The employer did not appear at the hearing. The employer indicated the failure to appear occurred because their first hand witness was out of town.

The interests of justice require that, whenever possible, appeals be decided on the merits. Thus, if a party has missed a hearing with good cause, for reasons outside its control and through circumstances that could not have been foreseen and avoided, and then makes a timely request to be heard, another hearing should be granted. When, however, a party does not avail itself of the opportunity for a hearing, and does not show any acceptable reason for the failure to do so, we must decide the matter solely on the existing record.

We find that the employer in the instant case did not have good cause for failing to appear at the scheduled hearing.

On the basis of the existing record, we find that the decision of the Referee was well-founded and supported by the facts and the law. We, therefore, incorporate it as part of our decision.

The decision of the Referee is AFFIRMED.

q:\pdoxapps\bor\DOCS\09-5483.DNH

BOARD OF REVIEW

J. Hunt Bonan

J. HUNT BONAN, Chairman

Stanley L. Drassler, Jr.

STANLEY L. DRASSLER, JR.
Member

William J. Nolan

WILLIAM J. NOLAN
Member

Constantine Zografopoulos

CONSTANTINE M. ZOGRAFOPOULOS
Member

Elwood Flowers Sr.

ELWOOD FLOWERS, SR.
Member

Dated and Mailed on JUN 05 2009 at Chicago, Illinois

NOTICE OF RIGHTS FOR FURTHER REVIEW BY THE COURTS

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If you are aggrieved by this decision and want to appeal, you must file a complaint for administrative review and have summons issued in circuit court **within 35 days** from the above mailing date.

You may only file your complaint in the circuit court of the county in which you reside or in which your principal place of business is located. If you neither reside nor have a place of business within Illinois, then you must file your complaint in the Circuit Court of Cook County.

Legal references:

- **Illinois Unemployment Insurance Act, 820 Illinois Compiled Statutes 405/1100**
- **Administrative Review Law, 735 Illinois Compiled Statutes 5/3-101 et seq.**

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY
APPEALS DIVISION
DECISION

APPEAL DOCKET AR-9002814A

LOCAL OFFICE: [illegible]

CLAIMANT:

[redacted]

EMPLOYER: (APPELLANT)

[redacted]

SOCIAL SECURITY NUMBER:	[redacted]	DATE OF HEARING:	[illegible] 16, 2009
DATE OF APPEAL:	January 05, 2009	PLACE OF HEARING:	Chicago
DATE OF REOPEN:	February 23, 2009	DATE OF MAILING:	[illegible] 17, 2009

APPEARANCES/ISSUES/EMPLOYER STATUS: The claimant appeared and testified on [illegible], 2009; the employer did not appear. The employer appeared at a hearing and testified on February 06, 2009; the claimant did not appear at that hearing. The issues are: Did the claimant voluntarily leave work without good cause attributable to the employer under Section 601A of the Illinois Unemployment Insurance Act? Was the claimant discharged for misconduct connected with work as defined in Section 602A of the Illinois Unemployment Insurance Act? The employer is a party to this appeal.

FINDINGS OF FACT: The claimant last worked for the above employer from 02-24-08 through [illegible]-08 as a server earning $4.65 per hour, plus tips. The claimant called on 09-29-08 in advance of her shift to let the general manager know that she had a doctor's appointment for her minor age son and that she would not be in. The general manager asked her to call some servers to see if they could cover her shift. She left several messages for servers, but was unable to speak with any servers directly. She called and left a message to that effect for the general manager. When she next reported to work, she was advised by [redacted] that she was fired. She called several times to the general manager, but her calls were not returned. She denied quitting or abandoning the job.

CONCLUSION: Section 601A of "The Unemployment Insurance Act" provides, in part, that an individual shall be ineligible for benefits for the weeks in which he has left work voluntarily without good cause attributable to the employing unit and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks.

Section 601A is not applicable. The claimant testified persuasively that she was discharged and that she did not quit or abandon the job.

Section 602A of "The Unemployment Insurance Act" provides, in part, that an individual shall be ineligible for benefits for the weeks in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks. The term "misconduct" means the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.

The claimant was off work on 09-29-08 to take her son to the doctor. She notified the employer in advance of the start of the shift. She was unable to arrange a replacement and she left messages for the company to that effect. She was off due to circumstances beyond her control. For this, she was discharged. This does not rise to the level of deliberate and wilful misconduct connected with the work. Accordingly, no disqualification is imposed under Section 602A of the Act.

DECISION: The determination of the Local Office is AFFIRMED. No disqualification [illegible] under Section 602A of the Act. Section 601A is [illegible].

DLW:

DORIS L. [illegible], Hearings Referee

RIGHT OF FURTHER APPEAL: This decision will become final unless WRITTEN NOTICE of [illegible] the decision is filed within thirty days from the date of mailing shown above. The notice of appeal may be filed at [illegible] Employment Security office where the appeal is filed, with the Board of Review at 33 S. State, Chicago, Illinois 60603, or by FAX at [illegible]-2573.

[illegible] 90CS90028[illegible]A1.PF

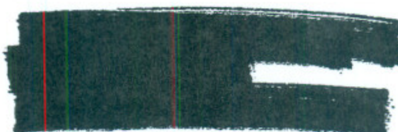
Exhibit G

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

BOARD OF REVIEW

BOARD DOCKET NO. ABR-09-3501 **LOCAL OFFICE:** 010

CLAIMANT: (APPELLANT) **EMPLOYER:** (RESPONDENT)



OFFICE USE NO. 607

RDS DOCKET NO. AR-9006568A

REF IDENT. NO. 532

SOC. SEC. NO.

TYPE OF APPEAL:

MC-15.05 Misconduct
VL-135.05 Voluntary Leaving

ISSUE AND BENEFIT PERIOD:

03 12/21/2008 - 01/03/2009
05 12/21/2008 - 01/03/2009

DECISION

This is an appeal by the claimant from a Referee's decision dated February 25, 2009, which set aside the claims adjudicator's determination and held that the claimant voluntarily left work without good cause attributable to the employer and is subject to a disqualification of benefits from December 21, 2008, and thereafter until the claimant requalifies for benefits under Section 601A of the Illinois Unemployment Insurance Act. The employer is a party to these proceedings.

We have reviewed the record of the evidence in this matter, including the transcript of the testimony submitted at the hearing conducted by telephone on February 24, 2009, at which both parties appeared. The record adequately sets forth the evidence so that no further evidentiary proceedings are deemed necessary.

We have considered the arguments presented by the claimant in accordance with Section 2720.315 of the Benefit Rules.

We have considered the employer's response to the claimant's appeal and argument to the Board of Review in accordance with Section 2720.315 of the Benefit Rules. In their response the employer included additional evidence in the form of a signed statement from one of their employees, a document dated June 26, 2006 relating to the claimant's job duties and work rules, an apprentice

report card dated December 14, 2008, and a list of dates along with available and actual hours worked.

Section 2720.315(b) of the Benefit Rules requires that the party requesting to submit additional evidence must certify that a copy of the request was sent to the opposing party and "must include: A) A summary of the evidence to be introduced; and B) An explanation showing that the requesting party, for reasons not its fault and outside its control, was unable to introduce the evidence at the hearing before the Referee."

The employer has failed to set forth a summary of the evidence to be introduced as well as an explanation showing that the failure to introduce the evidence at the hearing before the Referee was for reasons not its fault and outside its control as required under Section 2720.315(b) of the Benefit Rules.

With respect to the signed statement of the employer's witness, the employer could have had him testify at the time of the hearing yet failed to do so. Therefore, such additional evidence was not considered by us in connection with this appeal. However, the employer's testimony at the hearing relating to the same subject of the documents was considered as evidence and reviewed.

The record discloses that the claimant was employed as a full-time apprentice plumber. The claimant's position was part of a Federal Department of Labor Bureau of Apprentice and Training sanctioned program run by the contractors and union of Local 130. She was hired by the employer in June of 2006. The claimant last performed work and earned wages on December 18, 2008. The claimant was discharged on the premise that her attendance, grades and performance were not meeting the employer's standards. The claimant was in her third year of a five year apprenticeship program. Failure to complete the program would jeopardize the apprentice provisional license which the claimant held with the City of Chicago.

The claimant was the primary care taker for her ill mother which caused her to incur absences. The claimant had made the employer aware of her family situation. The claimant received progress reports and had never been placed on academic probation with respect to her grades. The claimant received raises which were also linked to attendance and grades. The program required the claimant to maintain a 2.0 grade point average. The claimant had always maintained a 3.0 average. However, in the claimant's final six months of employment her grade point average for that time period was 2.14 which was the lowest she had ever received. Although the claimant's grade point average was sufficient to keep her out of academic probation with respect to the apprentice program, the employer expected its employees to maintain a 2.50 average. There was no evidence presented that the claimant was discharged due to losing her apprentice provisional license. Any loss of that license would have occurred after the claimant was discharged by the employer and no longer involved in the apprentice plumber program.

The foregoing facts indicate a distinction must be made as to whether this separation from employment was a voluntary leaving or a discharge. There are instances in which an employer cannot

retain a worker in its employ because the worker has failed to meet a legal requirement for continued employment. Even though the employer does not have the option to retain the worker, the resulting separation is generally considered a discharge as opposed to a voluntary leaving, unless it is established that it was contemplated in the working agreement and was within the control of the affected worker to satisfy the legal condition for continued employment. *Digest of Adjudication Precedents, MC 135.3, ABR-85-756/6-25-85.* When an occupational license, a tool of an individual's trade, is within his control to obtain and maintain, a work separation that occurs as a result of not obtaining or maintaining that licence is a voluntary leaving (constructive quit), not a discharge. *Horton v. Department of Employment Security*, 335 Ill.App.3d 537, 781 N.E.2d 545 (1st Dist. 2002).

In the instant case, the claimant was required to have a grade point average above 2.0 before being put on probation. The claimant had not lost the required license. The employer did have the option to retain the worker. The Referee incorrectly decided this case as a loss of license case under Section 601A of the Act, as the claimant was not separated from employment due to her failure to obtain or maintain the license. Accordingly, this employment separation is to be reviewed under the provisions of Section 602A of the Illinois Unemployment Insurance Act.

The issue presented by this appeal is whether the claimant was discharged for misconduct connected with work under Section 602 of the Act.

The primary purpose of the Illinois Unemployment Insurance Act is to provide benefits to individuals who are involuntarily unemployed due to a lack of suitable work and for no other reason. Accordingly, the Act disqualifies from benefits an individual who is discharged for misconduct connected with the work. In such cases, the individual is not involuntarily unemployed due to a lack of suitable work.

The term "misconduct" means the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit. Further, the language of Section 602A of the Act indicates that it was the intention of the legislature that individuals discharged for negligence, inadvertence, incapacity or inability to follow directions should receive unemployment compensation. *Siler v. Illinois Department of Employment Security*, 192 Ill.App.3d 971, 549 N.E.2d 760 (1st Dist., 1989).

In this case the claimant worked to the best of her ability but was unable to meet the standards required by the employer. Although the employer may well have been justified in discharging the claimant, it was not shown that the claimant's drop in grade point average was the result of her wilful refusal to follow instructions. The claimant credibly testified that she had informed the employer of her family situation which caused her absences from work. There was no evidence adduced to support a conclusion that the claimant acted in a deliberate manner to violate the employer's rules.

Accordingly, we conclude that the claimant was discharged for reasons other than misconduct

connected with work and is not subject to disqualification under Section 602A of the Act.

The decision of the Referee is REVERSED.

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BOARD OF REVIEW

J. Hunt Bonan

J. HUNT BONAN, Chairman

Stanley L. Drassler Jr.

STANLEY L. DRASSLER, JR.
Member

William J. Nolan

WILLIAM J. NOLAN
Member

Constantine Zografopoulos

CONSTANTINE M. ZOGRAFOPOULOS
Member

Elwood Flowers Sr.

ELWOOD FLOWERS, SR.
Member

Dated and Mailed on MAY 1 1 2009 at Chicago, Illinois

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You may only file your complaint in the circuit court of the county in which you reside or in which your principal place of business is located. If you neither reside nor have a place of business within Illinois, then you must file your complaint in the Circuit Court of Cook County.

Legal references:

- **Illinois Unemployment Insurance Act, 820 Illinois Compiled Statutes 405/1100**
- **Administrative Review Law, 735 Illinois Compiled Statutes 5/3-101 *et seq.***

Exhibit H

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

BOARD OF REVIEW

BOARD DOCKET NO. ABR-09-7323

LOCAL OFFICE: 084

CLAIMANT: (RESPONDENT)

EMPLOYER: (APPELLANT)

OFFICE USE NO. 111

TYPE OF APPEAL:

RDS DOCKET NO. AR-9024105A

MC-15 Misconduct

REF IDENT. NO. 537

ISSUE AND BENEFIT PERIOD:

SOC. SEC. NO.

01 02/22/2009 - 03/07/2009

DECISION

This is an appeal by the employer from a Referee's decision dated May 18, 2009, which affirmed the claims adjudicator's determination and held that the claimant voluntarily left work without good cause attributable to the employer but is exempt from disqualification under Section 601(B)1 of the Illinois Unemployment Insurance Act. The employer is a party to these proceedings.

We have reviewed the record of the evidence in this matter, including the transcript of the testimony submitted at the hearing conducted by telephone on May 15, 2009, at which both parties appeared. The record adequately sets forth the evidence so that no further evidentiary proceedings are deemed necessary.

The record discloses that the claimant was employed by the employer for about four years as a machine operator. During the last year of her tenure with the employer, the claimant's attendance was spotty due to personal illnesses and the illness of the claimant's mother. The claimant testified that the employer was well aware of her mother's illness and her need to care for her mother. According to the claimant, she began calling off of work on January 9, 2009 because her mother was ill and she needed to be home to care for her mother. She testified that she called every day and spoke to the receptionist, Cindy, and her supervisor, Kevin.

According to the employer's witness, the claimant failed to report to work nor did the claimant call in to report her absences beginning on January 9, 2009 and thereafter until January 30, 2009 when the employer sent the claimant a letter notifying her that she was discharged for missing

work for three weeks without calling the employer. The employer's witness admitted that the employer had contacted someone at the claimant's home who told them that the claimant was caring for her sick mother.

The issue presented by this appeal is whether the claimant was discharged for misconduct connected with work under Section 602 of the Illinois Unemployment Insurance Act.

The primary purpose of the Illinois Unemployment Insurance Act is to provide benefits to individuals who are involuntarily unemployed due to a lack of suitable work and for no other reason. Accordingly, the Act disqualifies from benefits an individual who is discharged for misconduct connected with the work. In such cases, the individual is not involuntarily unemployed due to a lack of suitable work.

In the present case, the claimant was absent from work due to compelling family circumstances, the need to care for her sick mother. Under such circumstances, it cannot be said that the claimant's absences from work were willful and deliberate as those terms are used in Section 602 of the Act. Additionally, we find the claimant's testimony that she properly reported her absences to be credible.

Accordingly, we conclude that the claimant was discharged for reasons other than misconduct connected with work and is not subject to disqualification under Section 602A of the Act.

Section 601B(1) of the Act is not applicable in this matter.

The decision of the Referee is MODIFIED, accordingly.

BOARD OF REVIEW

J. HUNT BONAN, Chairman

STANLEY L. DRASSLER, JR.
Member

WILLIAM J. NOLAN
Member

CONSTANTINE M. ZOGRAFOPOULOS
Member

ELWOOD FLOWERS, SR.
Member

Dated and Mailed on __________________ at Chicago, Illinois.

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You may only file your complaint in the circuit court of the county in which you reside or in which your principal place of business is located. If you neither reside nor have a place of business within Illinois, then you must file your complaint in the Circuit Court of Cook County.

Legal references:

- **Illinois Unemployment Insurance Act, 820 Illinois Compiled Statutes 405/1100**
- **Administrative Review Law, 735 Illinois Compiled Statutes 5/3-101 *et seq.***

Exhibit I

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

BOARD OF REVIEW

BOARD DOCKET NO. ABR-08-8408 **LOCAL OFFICE:** 011

CLAIMANT: (RESPONDENT) **EMPLOYER:** (APPELLANT)

OFFICE USE NO. 407

RDS DOCKET NO. AR-8027250A

REF IDENT. NO. 522

SOC. SEC. NO.

TYPE OF APPEAL:

MC-15.05 Misconduct

ISSUE AND BENEFIT PERIOD:

01 11/11/2007 - 11/24/2007

DECISION

This is an appeal by the employer from a Referee's decision dated July 22, 2008, which affirmed the claims adjudicator's determination and held the claimant was discharged for reasons other than misconduct connected with work and is not subject to disqualification under Section 602A of the Illinois Unemployment Insurance Act. The employer is a party to these proceedings.

We have reviewed the record of the evidence in this matter, including the transcript of the testimony submitted at the hearing conducted by telephone on July 21, 2008, at which both parties appeared. The record adequately sets forth the evidence so that no further evidentiary proceedings are deemed necessary.

The record discloses that the Referee's decision is supported by the record and the law. We, therefore, specifically incorporate the facts in the Referee's decision as a part of our decision, however, we correct the second sentence to reflect that the claimant's testimony that he called to inform his supervisor that he would be late. We further correct the last sentence of the Referee's facts to reflect the claimant's testimony acknowledging that he did receive verbal warnings with respect to his attendance. The claimant's credible testimony that he had informed his supervisor that he was having marital issues which resulted in his attendance infractions was not disputed by the employer.

Accordingly, after a review of the record, including the testimony and the evidence presented

before the Referee and the records of the Department of Employment Security, and due deliberation having been had thereon, we find that the Referee's decision is supported by the record and the law.

The decision of the Referee is AFFIRMED.

q:\pdoxapps\bor\DOCS\08-8408.SFF

BOARD OF REVIEW

J. Hunt Bonan

J. HUNT BONAN, Chairman

Stanley L. Drassler Jr.

STANLEY L. DRASSLER, JR.
Member

William J. Nolan

WILLIAM J. NOLAN
Member

Constantine Zografopoulos

CONSTANTINE M. ZOGRAFOPOULOS
Member

Elwood Flowers Sr.

ELWOOD FLOWERS, SR.
Member

Dated and Mailed on SEP 1 9 2008 at Chicago, Illinois

NOTICE OF RIGHTS FOR FURTHER REVIEW BY THE COURTS

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Legal references:

- **Illinois Unemployment Insurance Act, 820 Illinois Compiled Statutes 405/1100**
- **Administrative Review Law, 735 Illinois Compiled Statutes 5/3-101 *et seq.***

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY
APPEALS DIVISION
DECISION

APPEAL DOCKET AR-8027250A

LOCAL OFFICE: 011

CLAIMANT:

EMPLOYER: (APPELLANT)

SOCIAL SECURITY NUMBER:
DATE OF APPEAL: May 01,2008
DATE OF RECONSIDERATION: June 24,2008

DATE OF HEARING: July 21, 2008
PLACE OF HEARING: Chicago
DATE OF MAILING: July 22, 2008

APPEARANCES/ISSUES/EMPLOYER STATUS: The claimant and the employer appeared and testified at the hearing. The employer was represented by a service company. The issue is: Was the claimant discharged for misconduct connected with work as defined in Section 602A of the Illinois Unemployment Insurance Act? The employer is a party to this appeal.

FINDINGS OF FACT: The Claimant was employed as a detailer for about a year, until his discharge November 7, 2008. According to employer's testifying witness, employer discharged the claimant for excessive absences, and two days when he was tardy, on November 6 and 7th. Claimant had personal marital problems, and called his supervisor each of those mornings before the start of his shift that he was not able to make it to work. He received no prior warnings for absenteeism.

CONCLUSION: Section 602A of "The Unemployment Insurance Act" provides, in part, that an individual shall be ineligible for benefits for the weeks in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks. The term "misconduct" means the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.

The employer has established the business reason for the discharge. However, it has not been established by a preponderance of the evidence that claimant's last absence was deliberate and willful disregard of employer's interests. Therefore it has not been established that the discharge was for misconduct under Section 602 A of the Act.

DECISION: The determination of the Local Office is AFFIRMED. No disqualification is imposed under Section 602A of the Act.

BMH BEVERLY M HELM, Administrative Law Judge (Hearings Referee) 522

RIGHT OF FURTHER APPEAL: This decision will become final, unless WRITTEN NOTICE of appeal from the decision is filed within thirty days from the date of mailing shown above. The notice of appeal must be filed at the local unemployment insurance office where the claim is filed, with the Board of Review at 33 S. State, Chicago, Illinois 60603, or by FAX at 312-793-2373.

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DECISION: The determination of the Local Office is AFFIRMED. No disqualification is imposed under Section 602A of the Act. Section 601A is not applicable.

DLW

DORIS L. WHALUM, Hearings Referee

RIGHT OF FURTHER APPEAL: This decision will become final, unless WRITTEN NOTICE of appeal from the decision is filed within thirty days from the date of mailing shown above. The notice of appeal must be filed at the local unemployment insurance office where the claim is filed, with the Board of Review at 33 S. State, Chicago, Illinois 60603, or by FAX at 312-793-2373.

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C

Commonwealth Court of Pennsylvania.
STETH, INC., t/a Darby's Pub, Petitioner,
v.
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Respondent.
Submitted on Briefs Sept. 3, 1999.
Decided Dec. 8, 1999.

Employer appealed from an order of the Unemployment Compensation Board of Review (UCBR), No. B-378592, reversing a referee's decision to deny unemployment compensation benefits to claimant. The Commonwealth Court, No. 1392 C.D. 1999, Friedman, J., held that it was reasonable for claimant to accompany six-year-old child, who was in claimant's care, to the funeral of that child's grandmother and to care for and comfort the child that day in her distress, and thus, claimant had good cause for her absence from work for unemployment compensation purposes.

Affirmed.

West Headnotes

[1] Unemployment Compensation 392T 65

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak388.1)
For unemployment compensation purposes, "willful misconduct" is behavior evidencing the wanton and willful disregard of an employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from an employee, or negligence which manifests culpability, wrongful intent, evil design or intentional disregard for the employer's interest or the employee's duties or obligations. 43 P.S. § 802(e).

[2] Unemployment Compensation 392T

377(1)

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) Evidence in General
392Tk372 Burden of Proof
392Tk377 Fault or Misconduct
392Tk377(1) k. In General. Most Cited Cases
(Formerly 356Ak566)
Employer bears the burden of proving that claimant's behavior constituted willful misconduct so as to disqualify claimant from receiving unemployment compensation benefits. 43 P.S. § 802(e).

[3] Unemployment Compensation 392T 78

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)
Absenteeism, although a legitimate basis for discharge, does not constitute willful misconduct so as to disqualify claimant from receiving unemployment benefits. 43 P.S. § 802(e).

[4] Unemployment Compensation 392T 78

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)

Unemployment Compensation 392T 377(2)

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) Evidence in General
392Tk372 Burden of Proof

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392Tk377 Fault or Misconduct
392Tk377(2) k. Violation of Work Rules, Disobedience, or Insubordination. Most Cited Cases
(Formerly 356Ak566)
Even if excessive, absenteeism, where justified or properly reported according to company policy, does not disqualify claimant from receiving unemployment compensation benefits; however, burden is upon the claimant to prove good cause for his absences.

[5] Unemployment Compensation 392T ⚿383

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) Evidence in General
392Tk381 Admissibility
392Tk383 k. Relevancy in General. Most Cited Cases
(Formerly 356Ak571.1)
Because Unemployment Compensation Board of Review (UCBR) specifically found that claimant was terminated because of her absence on particular day to attend funeral and not because of prior absences or the manner in which she reported off, claimant's prior absences and alleged violation of the call-out procedure were irrelevant to the determination of whether she had good cause for being absent on that particular day for unemployment compensation purposes.

[6] Unemployment Compensation 392T ⚿78

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)
It was reasonable for claimant to accompany six-year-old child, who was in claimant's care, to the funeral of that child's grandmother and to care for and comfort the child that day in her distress, and thus, claimant had good cause for her absence from work for unemployment compensation purposes; fact that claimant was not the child's biological mother was inconsequential as claimant was the child's primary caregiver.

***252** Simon B. John, Uniontown, for petitioner.

Randall S. Brandes, Harrisburg, for respondent.

Before COLINS, J., FRIEDMAN, J., and McCLOSKEY, Senior Judge.

FRIEDMAN, Judge.

Steth, Inc., t/a Darby's Pub (Employer), appeals from an order of the Unemployment Compensation Board of Review (UCBR) reversing a referee's decision to deny unemployment compensation benefits to Margaret Madden (Claimant) on the basis that she was dismissed from her employment with Employer for willful misconduct under section 402(e) of the Pennsylvania Unemployment Compensation Law (Law).[FN1]

> FN1. Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended,* 43 P.S. § 802(e). That section provides that an employee will be ineligible for unemployment compensation 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...."

On January 20, 1999, Employer dismissed Claimant from her employment as a dishwasher/cook. Upon her dismissal, Claimant applied for unemployment compensation benefits, which the local job office denied. Claimant appealed, and a hearing was held before a referee.

At the hearing, Barbara Orgovan testified that she took over ownership of Employer in July of 1998.[FN2] Orgovan stated that, although somewhat disappointed with Claimant's work performance, she initially was pleased with Claimant's attendance and promptness. However, Orgovan testified that Claimant began a pattern of absenteeism and tardiness, prompting her to place Claimant on probation for a period of thirty workdays, commencing on November 30, 1998.[FN3] On the last day of Claimant's probation, January 17, 1999, Claimant phoned Employer and informed the bartender that Claimant would be unable to work the

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next day, January 18, 1999. Orgovan testified that she called Claimant on January 20, 1999, and told her not to return to work.

> FN2. Claimant had been employed under the previous owner since December 10, 1996, and Claimant's employment continued after the change of ownership. (UCBR's Findings of Fact, No. 2.)

> FN3. During this probationary period, Claimant was absent five days and tardy four times. (UCBR's Findings of Fact, No. 7.)

Claimant, testifying on her own behalf, stated that she reported off on January 17, 1999 because her "daughter's" grandmother had died and her funeral was the next day. Claimant stated that her "daughter" was actually her six-year-old cousin whom Claimant was in the process of adopting. Although the funeral began at 11 a.m. and Claimant's shift did not start until 6 p.m., Claimant testified that she needed the day off because her "daughter" was upset and Claimant needed to be with her.

Following the hearing, the referee denied benefits, concluding that Claimant was dismissed for willful misconduct. ***253** Claimant then appealed to the UCBR. The UCBR found that Claimant was terminated based on her absence on January 18, 1999. (UCBR's Findings of Fact, No. 14.) However, the UCBR also determined that a "family relationship" existed between Claimant and her "daughter," making it reasonable for Claimant to report off for the purpose of being with her "daughter" on the day that her "daughter's" grandmother was buried. (UCBR's Decision at 3.) Thus, the UCBR concluded that Claimant had good cause for her absence on January 18, 1999 and reversed the decision of the referee. (UCBR's Decision at 3.) Employer now appeals to this court.[FN4]

> FN4. Our scope of review is limited to a determination of whether constitutional rights have been violated, an error of law has been committed or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704.

[1][2][3][4] Initially we recognize that willful misconduct is behavior evidencing the wanton and willful disregard of an employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from an employee, negligence which manifests culpability, wrongful intent, evil design or intentional disregard for the employer's interest or the employee's duties or obligations. *Broadus v. Unemployment Compensation Board of Review*, 721 A.2d 70 (Pa.Cmwlth.1998). The employer bears the burden of proving that the employee's behavior constituted willful misconduct. *Broadus; Penn Photomounts, Inc. v. Unemployment Compensation Board of Review*, 53 Pa.Cmwlth. 407, 417 A.2d 1311 (1980). Absenteeism, although a legitimate basis for discharge, does not constitute willful misconduct; even if excessive, absenteeism, where justified or properly reported according to company policy,[FN5] does not disqualify a claimant from receiving unemployment compensation benefits. *Penn Photomounts*. However, the burden is upon the claimant to prove good cause for the claimant's absences. *McKeesport Hospital v. Unemployment Compensation Board of Review*, 155 Pa.Cmwlth. 267, 625 A.2d 112 (1993).

> FN5. Employer argues that Claimant was required to report off directly to Orgovan, and therefore, Claimant violated this work rule by reporting off to the bartender. However, insofar as the UCBR found that Claimant was fired, not for violating Employer's call-out procedure, but rather for her absence on January 18, 1999, (UCBR's Findings of Fact, No. 14.), a finding not challenged by Employer, this argument is irrelevant. In any event, the UCBR found that Claimant reported off in the same manner before without Employer advising her to do so differently. (UCBR's Decision at 3.)

[5][6] Employer argues that the UCBR erred in concluding that Claimant had good cause for her absence on January 18, 1999. However, the basis of Employer's argument is that Claimant had a history of absenteeism and tardiness and that Claimant failed to follow the proper call-out procedure when reporting

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off on January 17, 1999. The UCBR specifically found that Claimant was terminated because of her absence on January 18, 1999, not because of prior absences or the manner in which she reported off. Therefore, Employer confuses the issue. Claimant's prior absences and alleged violation of the call-out procedure are irrelevant to a determination of whether Claimant had good cause for being absent on January 18, 1999, the only issue before this court. On that score, we agree with the UCBR that it was reasonable for Claimant to remain home to be with her "daughter" to comfort her on the day her grandmother was buried. Employer maintains that it was not reasonable because she was not really her "daughter." FN6 However, the fact that ***254** Claimant was not the child's biological mother is inconsequential. Claimant was the child's primary caregiver, and, for the purposes of receiving unemployment compensation, we see no reason to draw a distinction between a biological familial relationship and a primary caregiver relationship. The evidence shows that Claimant was absent on January 18, 1999 in order to accompany the six-year-old child in her care to the funeral of that child's grandmother and to care for and comfort the child that day in her distress. Therefore, Claimant had good cause for her absence on January 18, 1999.

FN6. The UCBR determined that the relationship between Claimant and her "daughter" is one of family. (UCBR's Decision at 3; R.R. at 59a.) Employer argues that this determination is not supported by the evidence. However, in light of the record and the above discussion, we disagree.

Accordingly, we affirm.

ORDER

AND NOW, this 8th day of December, 1999, the order of the Unemployment Compensation Board of Review, dated April 29, 1999, is affirmed.

Pa.Cmwlth.,1999.
Steth, Inc. v. Unemployment Compensation Bd. of Review
742 A.2d 251

END OF DOCUMENT

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Exhibit K

Legislative History – SB 1350
Excerpts from Committee Testimony & Floor Debate

House Labor Committee – May 29, 2009

***

Representative Lang: Thank you. Amendment number 1 becomes the bill. This becomes the agreement for the new plan for unemployment insurance in Illinois. The federal government when they passed their stimulus package also added some unemployment benefits for the state. We will recoup $2 [sic] million dollars from the federal government for the UI Trust Fund. To do this we had to follow some guidelines regarding modernization of our system. They gave us 4 choices, we had to pick 2 of the 4, and after negotiations of both business and labor, the amendment before you is agreed. I have both Tim Drea representing labor, and Dave Vite, representing business who were intimately involved in negotiations and I would like to thank them for their hard work in this effort, as well as Representative Mautino and they would just like to tell you it is agreed so you know Mr. Chairman.

****

House Floor Debate on Amendment Number 1, May 29, 2009

***

Representative Lang: Thank you Mr. Speaker. Ladies and Gentleman, uh, Senate Bill 1350, and the floor Amendment to it, are the agreed measures for unemployment insurance. As you know, we've been working with an agreed bill process on this for a long period of time. The agreed process broke down and it was necessary to reinstate it and over the last several days, members from all 4 caucuses, particularly Representative Mautino and I worked very hard with the business and labor to put this agreed bill together. With this agreed bill, the state will receive $200 million dollars for the UI Trust Fund from the federal government. Additionally, we will modernize our system at no additional costs to employers. We will get several seven extra weeks of benefits for the people of Illinois. This is a good agreed bill and we ask for your votes.

****

House Floor Debate on Third Reading of the Bill – May 29, 2009

***

Representative Black: Thank you very much Mr. Speaker, will the Sponsor yield?

Speaker: He indicates he will.

Representative Black: Representative, the $200 million dollars of additional federal stimulus dollars that you're going to capture with this bill, I couldn't hear, is the $200 million dollars going to go into the kinds of infrastructure improvements in the system or will it be used to expand weekly benefits?

Representative Lang: It will be the latter sir. It goes into the Trust Fund so that benefits can continue to be paid out.

Representative Black: But does it expand benefits exponentially or just keep the current level?

Representative Lang: It expands the weeks of benefits plus with the modernization there are two small little new benefits that I can go through if you wish. The federal government under what they call modernization sent us four options to modernize our UI program and we had to pick two. Part of the negotiations between business and labor was to make sure they pick two they agreed to.

****

Senate Floor Debate – May 30, 2009

***

Secretary: I move to concur with the House in the adoption of their Amendment Number 1 of SB 1350 signed by Senator Forby.

Senator Forby: Thank you. I concur with Senate bill, with the Amendment. What the Amendment does, it is Unemployment Insurance, where we get $200 million dollars in federal money. We get people 7 weeks of unemployment. This is a bill that everybody is for, including the laborers, the business group, and the Chamber of Commerce. I ask for an aye vote.

President: Any discussion? Senator Dahl.

Senator Dahl: To the bill Mr. President.

President: Right ahead Senator Dahl.

Senator Dahl: Thank you. I stand in support of SB 1350. This is an agreed to bill, that has been worked out between labor and the business community. This legislation will secure federal dollars for the Unemployment Trust Fund, which will help our workers, and while at the same time, it will not be a negative impact on business.

****