House Bill 1014 Would Undermine Longstanding UC Law

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My name is Sharon Dietrich. I am the Litigation Director at Community Legal Services, Inc. (CLS) in Philadelphia. I have been practicing employment law at CLS since 1987 and have an extensive background in unemployment compensation (UC) issues. As do other legal aid lawyers around the state, I represent low wage and unemployed workers. Thank you for allowing me to speak with you today about House Bill 1014.

If enacted, HB 1014 would make significant changes to UC eligibility, undermining public policies that Pennsylvania has supported for decades. The provision restricting eligibility for voluntary quits under Section 402(b)[1] to those "attributable to employment" would eliminate numerous necessitous and compelling reasons for leaving one's job, including loss of child care or transportation, caretaking of family members, and the worker's own medical restrictions. The provision disqualifying people for negligence would essentially deny UC benefits to workers who make mistakes. For the first time, fired Pennsylvanians would be denied benefits for reasons not amounting to "willful misconduct."

UC is an insurance program that protects workers with strong work histories who "become unemployed through no fault of their own."[2] Pennsylvania should not undermine this safety net for workers by making such significant changes to eligibility, particularly after having made $2.345 billion in eligibility and benefit cuts between 2013 and 2019.[3]

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

A. Historical context and construction of the law

The Pennsylvania UC Law has a broad definition of "voluntary quit" that does not distinguish between the job-related reasons and non-job-related reasons. This definition goes back to the law's enactment in 1936. The law was amended in 1942 to add a "good cause" limitation on voluntary quits, but the General Assembly did not at that time follow a minority of states that were requiring that voluntary quits be connected with the job.[4]

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1 43 P.S. § 802(b) (Section 402(b)).

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

3 Act 6 of 2011; Act 60 of 2012.

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

Accordingly, one of the earliest and most prominent judicial decisions about Section 402(b) held that compelling personal reasons for quitting were not disqualifying.[5]

In 1953, Section 402(b) was amended to provide that "marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this act."[6] However, in 1978, this provision was determined to be unconstitutional, on the grounds that it had no rational relationship to a legitimate legislative purpose.[7] Subsequently, this language was eliminated from the UC Law in 1980,[8] and domestic and other personal reasons have provided "necessitous and compelling" reasons for quitting since that time. ***Broad elimination of domestic and personal reasons could render the UC Law subject to the same constitutional infirmity found by the en banc Commonwealth Court in 1978.***

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

1) Where child care is unavailable;
2) To comply with family responsibilities, especially care giving;
3) To move with a spouse (except for military families, as provided in the bill);
4) Where the job can no longer be performed for health reasons not caused by the job; and
5) Where transportation in unavailable.

Note that current eligibility is not established solely because a worker is experiencing a personal problem; our law typically both looks to see that in a particular case, the reason is truly "necessitous and compelling" and that the worker has taken steps to try to maintain employment.[9] The following are examples.

- Before quitting work because of lack of child care, a worker must investigate alternative child care arrangements in order to qualify for benefits.[10]

- In cases where an employee has left work to care for a sick or disabled family member, the courts have looked for evidence that the worker had "no real choice" and made "reasonable efforts to preserve employment."[11]

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5 Id.

6 Act 1953-396.

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

8 Act 1980-108.

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

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

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

- The legal rules are particularly stringent in "following spouses" cases. Not only must the worker who is quitting show an economic hardship in maintaining two residences *or* that the move resulted in an insurmountable commuting problem;[12] the claimant also must show that *her spouse's* reasons for moving were circumstances beyond his control, rather than personal preference.[13] Claimants' proof in such following spouse cases regularly has been found wanting, resulting in the denial of benefits.[14] In one notable case, the court found that that the followed spouse had not established that he had tried hard enough to find work within the local area despite producing a file of 100 rejection letters, and a 300 mile commute was not found insurmountable.[15]

- When a worker can no longer perform his job for medical reasons, the courts require him to communicate this inability to the employer, so that the employer has an opportunity to accommodate the health restriction by offering an alternative position.[16] A recent decision requires an employee with medical restrictions to participate in a collaborative process initiated by the employer to identify a potential alternative position, as part of his duty to take all reasonable and necessary steps to preserve employment.[17]

As these examples show, establishing eligibility for personal quits is hardly *pro forma*; it is a demanding undertaking that considers each case on its own merits. Only those who have truly taken steps to maintain employment remain eligible for benefits.

Moreover, even if a worker qualifies for having met these standards, he will not be eligible for benefits unless he is also "able and available" for work[18] A person is "able and available" if "he is able to do some kind of work, and there is reasonable opportunity for securing such work in the vicinity in which he lives."[19] The "able and available" requirement has been reinforced by the 2011 change in the law requiring an "active search for suitable employment."[20] In other words, the claimant must show that they have an obligation that interferes with their current employment, but that they are still available to work elsewhere.

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

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

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

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

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

17 St. Clair Hospital v. UCBR, 154 A.3d 401, 407 (Pa. Commw. 2017)(*en banc*).

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

19 Id. at 905.

20 43 P.S. § 801(b), established by Act 2011-6.

Finally, it should be noted that the law places the burden of proof in Section 402(b) cases on the claimant.[21]

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

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

- 32 states provide benefits where a worker must quit because of illness;
- 23 states provide benefits to workers leaving for family reasons; and
- 20 states provide benefits to workers relocating with a spouse.[22]

Compelling policy reasons support the provision of benefits in these circumstances. First, they provide a safety net for women in the labor market who feel immense pressure from their family responsibilities, which is a leading reason for female unemployment.[23] Second, providing benefits in such cases allows caretaking for Pennsylvania's elderly and children who require such care. Finally, these cases comprise a small minority of claims.

The amendment explicitly permits a person who quits because of danger from domestic violence to qualify for UC benefits, as she could under current law. However, domestic violence survivor advocates may oppose the verification language of the amendment. It requires documentation "and any type of evidence that reasonably proves domestic violence." It is not clear whether this language permits self-attestation, which is often necessary because of the lack of documentary evidence or witnesses in many domestic violence situations.

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

A. Historical context and construction of the law

For the 80+ years that Pennsylvania has had a UC program, fired workers have been disqualified from receiving benefits only if they committed "willful misconduct." Importantly, this term does not require that a worker have acted without fault. Instead, from an early date, our courts have construed disqualifying "willful misconduct" to mean "a disregard of standards of behavior which the employer has a right to expect of an employe[e]."[24]

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[21] Taylor v. UCBR, 378 A.2d 829 (Pa. 1977).

[22] US Dept. of Labor, Comparison of State Unemployment Laws, (2017), pp. 5-_ to 5-_.

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

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

Pennsylvania's requirement of "willfulness" for behavior to be disqualifying is in accord with the great majority of courts and state agencies, which arrived at a working definition of misconduct very soon after the adoption of UC programs across the country in the late 1930s.[25] Consequently, workers in Pennsylvania and elsewhere are not denied benefits solely because they did something wrong that caused them to be fired. They must have behaved willfully.

The UC Law has recognized that many employee actions are not "willful" or intentional, despite being detrimental to the employer's interests. Most important, the Pennsylvania Supreme Court has repeatedly reiterated that negligent acts are not "willful" unless the conduct was intentional.[26]

This bill would disqualify unemployed workers for "acts of negligence which indicate substantial disregard for the employer's interests." Proposed 402(e.2)(5). The clear intent is to change the negligence standard that has been repeatedly articulated by the Supreme Court as requiring intent. If unintentional negligence were disqualifying, as proposed in this bill, it would be the first time since the statute was promulgated in 1936 that non-willful conduct would be disqualifying, marking a critical change from existing law. It can be anticipated that employers would routinely seek to disqualify discharged workers who made mistakes, and the protection provided to unemployed workers by the UC Law would be substantially weakened.

Such a significant departure would alter Pennsylvania's employment law policy, which for decades has provided for a balance between the interests of employers and employees in the employment relationship. Employment has always been "at will," permitting an employer to fire a worker without cause so long as a specific law or contract is not being violated.[27] But the UC Law has provided subsistence benefits so that an unemployed worker is not left destitute while looking for another job, unless he has willfully violated objective standards of behavior.

B. Proposed Section 402(e.2) should not be adopted as drafted

I do not oppose proposed Section 402(e.2) in its entirety. To the extent that it codifies ineligibility for willful actions, such as willful violation of reasonable workplace rules, deliberate damage to the employer's property, or intentional threatening a coworker with physical harm, that is consistent with the history and the intent of the UC Law.

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[25] US Dept. of Labor, Comparison of State Unemployment Laws, (2010), p 5-12.

[26] *E.g.*, Grieb v. UCBR, 827 A.2d 422, 426 (Pa. 2003) (As a matter of law, a claimant's inadvertent violation of an employer's policy does not rise to the level of willful misconduct) ; Myers v. UCBR, 625 A.2d 622, 624 (1993) ("an employer cannot demonstrate willful misconduct by 'merely showing that an employee committed a negligent act, but instead must present evidence indicating that the conduct was of an intentional and deliberate nature.'"); *see also* Navickas v. UCBR, 787 A.2d 284 (Pa. 2001); Burger v. UCBR, 801 A.2d 487 (Pa. 2002). There are some decisions finding negligence to be disqualifying, but they are from the Pa. Commonwealth Court and are not consistent with the holdings of the Pa. Supreme Court.

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

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

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

Moreover, Section 402(e.2) should incorporate the willfulness standard embedded in Section 402(e). Although the courts have determined most of the conduct enumerated in the proposed section to be disqualifying, they have still required the behavior to have been willful and intentional. For instance, a disqualifying "threat" has been defined as "a communication that conveys an 'intent to inflict harm or loss on another or on another's property.'"[28]

Finally, Section 402(e.2) should clearly indicate that an action that would otherwise be disqualifying will not do so if the worker had "good cause" for it. A "good cause" inquiry gets into the worker's state of mind, to determine whether the action was justifiable or reasonable under the circumstances.[29]

For example, suppose that a worker violates an employer's rules on calling in absenteeism prior to the shift. Suppose further that the worker's reason for doing so is that he was unable to call because he was incapacitated in a hospital. He would not currently be denied benefits despite the work rule violation,[30] nor should he be. UC law is replete with such examples of good cause, without which applications of the disqualifications would be inequitable.[31]

Proposed Section 402(e.2) currently recognizes that two of the enumerated bases for disqualification can be overcome by good cause (absence from work on two or more occasions with "[f]ailure to provide good cause," and failure to maintain a valid license or certificate "for reasons beyond the control of the employe"). Thus, a court might

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[28] Aversa v. UCBR, 52 A.3d 565, 571 (Pa. Commw. Ct. 2012). *See also* Johns v. UCBR, 87 A.3d 1006, 1010 (Pa. Commw. Ct. 2014) (if intent is not proven, then the words of the statement itself must objectively establish a threat).

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

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

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

construe the section to mean that good cause does not apply to the other enumerated bases. "Good cause" should be explicitly incorporated into the entire section.

III. Conclusion

Since the UC Law was enacted more than 80 years ago, the statutory definitions of "willful misconduct" and "voluntary quits" have served the Commonwealth well. Nothing about our workforce has changed such that we should cut back the scope of these definitions. To the contrary, societal forces such as the expanded role of women in the workplace and the growth of our elderly population requiring care make provision of UC benefits under these definitions more vital than ever.

Thank you for allowing me to speak on these issues.