received 6/26/09

New York State Department of Labor
David Paterson, *Governor*
M. Patricia Smith, *Commissioner*

June 24, 2009

Ms. Cheryl Atkinson, Administrator
Office of Workforce Security
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room S-4231
Washington, DC 20210

Re: New York State Application for remaining two-thirds of the UI Modernization Funding

Dear Ms. Atkinson:

The New York State Department of Labor would like to apply for the remaining two-thirds of the Unemployment Compensation Modernization Incentive Payments authorized in Section 2003(a) of Public Law 111-5, as per guidance document UIPL 14-09.

Sections 593(1) and 596(5) of the New York State Labor Law, as amended by Chapter 35 of the Laws of 2009, respectively contain provisions relating to eligibility for benefits for individuals who voluntarily quit employment due to compelling family reasons or who are only able to seek part-time work. These provisions, which became effective upon enactment into law, conform with guidelines established by the United States Department of Labor to qualify states for UI Modernization funding contained in the American Recovery and Reinvestment Act of 2009. A copy of the legislation is attached. I certify that the sections of law discussed above are currently in effect. I also certify that the statutory provisions set forth above are permanent, not subject to sunset, and may only be amended or repealed through an act passed by the New York State Legislature and signed into law by Governor David A. Paterson. We intend that all of the funds will be used for payments of unemployment compensation for claimants.

To further satisfy requirements listed on page 11 of UIPL 14-09 relating to verification of domestic violence, Mr. Robert Johnston from your Division of Legislation reviewed our internal guidance and case documentation and indicated that he did not identify any issues.

I certify that this application is being submitted in good faith with the intention of providing benefits to unemployed workers who meet the eligibility provisions on which the application is based.

If you have any questions regarding the attached, please contact John Gorevich at (518) 485-7970.

Sincerely,

Roger Bailie

Attachment

Director of Finance
Phone: (518) 457-2647 Fax: (518) 457-7550
Roger.Bailie@labor.state.ny.us

Administrative Finance Bureau
W. Averell Harriman State Office Campus
Building 12, Room 516 Albany, NY 12240

§ 593. Disqualification for benefits. 1. Voluntary separation; separation for a compelling family reason. (a) No days of total unemployment shall be deemed to occur after a claimant's voluntary separation without good cause from employment until he or she has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate. In addition to other circumstances that may be found to constitute good cause, including a compelling family reason as set forth in paragraph (b) of this subdivision, voluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section or if the claimant, pursuant to an option provided under a collective bargaining agreement or written employer plan which permits waiver of his right to retain the employment when there is a temporary layoff because of lack of work, has elected to be separated for a temporary period and the employer has consented thereto.

(b) A claimant shall not be disqualified from receiving benefits for separation from employment due to any compelling family reason. For purposes of this paragraph, the term "compelling family reason" shall include, but not be limited to, separations related to any of the following:

(i) domestic violence, verified by reasonable and confidential documentation which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family.

(ii) the illness or disability of a member of the individual's immediate family. For the purposes of this subparagraph:

(A) The term "illness" means a verified illness which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave (paid or otherwise).

(B) The term "disability" means a verified disability which necessitates the care of the disabled person for a period of time longer than the employer is willing to grant leave (paid or otherwise). "Disability" encompasses all types of disability, including: (1) mental and physical disability; (2) permanent and temporary disabilities; and (3) partial and total disabilities.

(iii) the need for the individual to accompany such individual's spouse (A) to a place from which it is impractical for such individual to commute and (B) due to a change in location of the spouse's employment.

(c) A disqualification as provided in this subdivision shall also apply after a claimant's voluntary separation from employment if such voluntary separation was due to claimant's marriage.

2. Refusal of employment. No days of total unemployment shall be deemed to occur beginning with the day on which a claimant, without good cause, refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employment not subject to this article, until he has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate. Except that claimants who are not subject to a recall date or who do not obtain employment through a union hiring hall and who are still unemployed after receiving thirteen weeks of benefits shall be required to accept any employment proffered that such claimants are capable of performing, provided that such employment would result in a wage not less than eighty percent of such claimant's high calendar quarter wages received in the base period and not substantially less than the prevailing wage for similar work in the locality as provided

for in paragraph (d) of this subdivision. No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if:

(a) a refusal to accept employment which would interfere with a claimant's right to join or retain membership in any labor organization or otherwise interfere with or violate the terms of a collective bargaining agreement shall be with good cause;

(b) there is a strike, lockout, or other industrial controversy in the establishment in which the employment is offered; or

(c) the employment is at an unreasonable distance from his residence, or travel to and from the place of employment involves expense substantially greater than that required in his former employment unless the expense be provided for; or

(d) the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions; or

(e) the claimant is seeking part-time work as provided in subdivision five of section five hundred ninety-six of this title and the offer of employment is not comparable to his or her part-time work as defined in such subdivision.

3. Misconduct. No days of total unemployment shall be deemed to occur after a claimant lost employment through misconduct in connection with his or her employment until he or she has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate.

4. Criminal acts. No days of total unemployment shall be deemed to occur during a period of twelve months after a claimant loses employment as a result of an act constituting a felony in connection with such employment, provided the claimant is duly convicted thereof or has signed a statement admitting that he or she has committed such an act. Determinations regarding a benefit claim may be reviewed at any time. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith. In addition, remuneration paid to the claimant by the affected employer prior to the claimant's loss of employment due to such criminal act may not be utilized for the purpose of establishing entitlement to a subsequent, valid original claim. The provisions of this subdivision shall apply even if the employment lost as a result of such act is not the claimant's last employment prior to the filing of his or her claim.

5. Terms of disqualification. A disqualification pursuant to the provisions of this section shall not be confined to a single benefit year.

§ 596. Claim filing, registration, and reporting. 1. Claim filing and certification to unemployment. A claimant shall file a claim for benefits at the local state employment office serving the area in which he was last employed or in which he resides within such time and in such manner as the commissioner shall prescribe. He shall disclose whether he owes child support obligations, as hereafter defined. If a claimant making such disclosure is eligible for benefits, the commissioner shall notify the state or local child support enforcement agency, as hereafter defined, that the claimant is eligible.

A claimant shall correctly report any days of employment and any compensation he received for such employment, including employments not subject to this article, and the days on which he was totally unemployed and shall make such reports in accordance with such regulations as the commissioner shall prescribe.

2. Child support obligations. (a) The term "child support obligations" means obligations enforced pursuant to an approved plan under section four hundred fifty-four of the federal social security act. The term "state or local child support enforcement agency" means any agency of the state or a political subdivision thereof operating pursuant to such a plan.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold child support obligations from benefits payable to a claimant (including amounts payable by the commissioner pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment) in the amount specified by the claimant, the amount determined pursuant to an agreement between the claimant and the state or local child support enforcement agency submitted to the commissioner, or the amount required to be deducted and withheld through legal process, whichever amount is the greatest. Such amount shall be paid to the appropriate state or local child support enforcement agency, and shall be treated for all purposes as if paid to the claimant as benefits and paid by the claimant to such agency in satisfaction of the claimant's child support obligations. Each such agency shall reimburse the commissioner for the administrative costs attributable to child support obligations being enforced by the commissioner.

3. Uncollected overissuance of food stamps. (a) The term "uncollected overissuance of food stamps" has the meaning prescribed in section thirteen (c)(1) of the federal food stamp act of 1977. The term "appropriate state food stamp agency" means any agency of the state or a political subdivision thereof enforcing the collection of such overissuance.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold uncollected over issuances of food stamps from benefits payable to a claimant pursuant to section thirteen (c)(3) of the federal food stamp act of 1977; provided, however, that no agreement pursuant to this section shall reduce benefits by an amount in excess of the greater of ten percent of the weekly benefit amount or ten dollars, unless claimant specifically requests, in writing, to reduce benefits by a greater amount. Any amount deducted and withheld under this subdivision shall be paid to the appropriate state food stamp agency, and shall be treated for all purposes as if paid to the claimant as benefits and as if paid by the claimant to such agency in satisfaction of claimant's over issuance of food stamps coupons. To the extent permitted by federal law, the procedures for correcting overpayments shall be designed to minimize adverse impact on the claimant, and to the extent possible, avoid undue hardship.

(c) Each such agency shall reimburse the commissioner for the administrative costs incurred under this subdivision in a manner consistent with a memorandum of understanding as approved by the director of the division of the budget. Such reimbursement shall be consistent with federal law and regulations.

4. Registration and reporting for work. A claimant shall register as totally unemployed at a local state employment office serving the area in which he was last employed or in which he resides in accordance with such regulations as the commissioner shall prescribe. After so registering, such claimant shall report for work at the same local state employment office or otherwise give notice of the continuance of his unemployment as often and in such manner as the commissioner shall prescribe.

5. Part time work. Notwithstanding any other provisions of this article, a claimant who for reasons personal to himself or herself is unable or unwilling to work full time and who customarily worked less than the full time prevailing in his or her place of employment for a majority of the weeks worked during the applicable base period, shall not be denied unemployment insurance solely because the claimant is only seeking part time work. For purposes of this subdivision, "seeking part time work" shall mean the claimant is willing to work for a number of hours per week that are comparable to the claimant's part time work during the majority of time in the base period.

6. An individual filing a new claim for unemployment benefits shall, at the time of filing such claim, be advised that:

(a)(1) Unemployment benefits are subject to federal, state and local income tax;

(2) Requirements exist pertaining to estimated tax payments;

(3) The individual may elect to have federal and/or state income tax deducted and withheld from the individual's payment of unemployment benefits at the amount specified under the federal internal revenue code (26 U.S.C.A. 3402(p)(2)) and/or the state income tax withholding tax schedules as specified under the tax law and relevant regulations; and

(4) The individual shall be permitted to change a previously elected withholding status.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold federal and/or state income tax from benefits payable to an individual if such individual elects such withholding. Amounts deducted and withheld from unemployment benefits shall remain in the unemployment trust fund until transferred to the appropriate taxing authority as a payment of income tax.

(c) The commissioner shall follow all procedures specified by the United States department of labor, the federal internal revenue service, the state department of labor and the state department of taxation and finance pertaining to the deducting and withholding of income tax authorized under this subdivision.

(d) Amounts shall be deducted and withheld under this subdivision only after amounts are deducted and withheld for any overpayment of unemployment benefits, child support obligations, food stamp over issuances or any other amounts required to be deducted and withheld under this article.

DOMESTIC VIOLENCE

It has been ten years since the prior publication of the Review Letter discussing the issue of separation from employment resulting from circumstances involving domestic violence. There have been changes to the NYS UI Law and Penal Law since then, which bear on adjudicating these claims. Case law has also continued to develop, helping to refine our understanding of the application of the legislative changes to these cases. This publication replaces Review Letter 2-96, which should be removed.
By passing Labor Law § 593(1)(a), which provides that domestic violence may be good cause for a voluntary separation from work, New York State made a commitment to ensuring that working individuals who must leave a job because of domestic violence have the economic security they need to separate from an abuser. It remains the Department of Labor's policy to provide continued sensitivity to victims of domestic violence, while conducting appropriate fact-finding necessary to establish the basis for correct determinations in benefit claims.

DEFINITION

Domestic violence permeates the lives and compromises the safety of thousands of workers in New York State each day, with tragic, destructive, and often fatal results. Domestic violence occurs within a wide spectrum of relationships, including married and formerly married couples, same-sex couples, couples with children in common, and couples who live together or have lived together.

Domestic violence is generally defined as a pattern of coercive tactics which can include physical, psychological, sexual, economic and emotional abuse perpetrated by one person against a family or household member, with the goal of establishing and maintaining power and control over the victim. It is not a private matter. In addition to exacting a tremendous toll from the individuals it directly affects, domestic violence often spills over into the workplace, compromising the safety of both victims and co-workers and resulting in lost productivity, increased health care costs, increased absenteeism, and increased employee turnover.

VOLUNTARY LEAVING OF EMPLOYMENT

The most common issue raised in unemployment benefit claims involving domestic violence is voluntary leaving of employment, often resulting from relocation of claimant's residence.
Labor Law § 593.1 (a) states: "A voluntary separation may also be deemed for good cause if it occurred as a consequence of circumstances directly resulting from the claimant being a victim of domestic violence".
As discussed below, benefits have been granted in a variety of circumstances in which domestic violence caused a separation from employment. These include cases in which violence or harassment has occurred at the workplace as well as cases in which, as a result of violence at home or at work, an individual chooses to relocate to protect herself and her family.

FACT FINDING

When a victim of domestic violence has lost employment as a result of domestic violence circumstances, whether through a voluntary quit or a discharge, claims adjudicators must be aware of the particularly sensitive nature of the details involved, and the difficulty some victims of domestic violence may have in disclosing information or in gathering evidence. Many incidents of domestic violence go unreported to the police; victims do not always seek medical treatment for injuries caused by domestic violence. Fact finding may be complicated by the victim's need to keep information confidential out of concerns for continuing safety.
While no single factor is determinative, these questions may help determine whether the claimant is in fact a victim of domestic violence and whether the separation was a result of the violence.
*What evidence is there that claimant or another family member was a victim of domestic violence?
*Was a police report filed? (Request a copy) If not, why not?
*Did claimant seek medical care? If not, why not?

*Where did the assault/abuse occur; at the workplace, at home, at some other location? More than one location?
*Did the domestic violence occur on more than one occasion? What was the most recent incident?
*If the claimant has separated from the abuser, determine whether there have been any further attempt by the abuser to harass or assault claimant? If yes, where and when?
*Was the employer aware of the problem; can the employer or another witness corroborate that the claimant is a victim of domestic violence?
*Was an Order of Protection sought? If not, why not? Was it granted; if yes, when? What are its provisions? (Request a copy from the claimant)
While an Order of Protection against an abuser can serve as one form of corroboration of domestic violence, a recent Appeal Board decision illustrates an important point about evaluating a claimant's failure to seek an order of protection: "Such a document clearly provides no guarantee of continued safety from an individual with a proven history of violence and intimidation". (AB 529594A)
Failure to seek an Order of Protection before quitting to relocate does not subject claimant to a disqualification from benefits when other evidence establishes that the claimant acted from genuine fear for her/his own personal safety or the safety of children. As previously recognized by the Appeal Board, an Order of Protection discourages an attack; it does not prevent an attack (AB 448376).

RELOCATION OUT OF THE AREA

If claimant's leaving of employment resulted from a decision to relocate out of the area, additional considerations arise.
*Was the claimant's decision to move out of the area based on one or more of these factors:
-fear of remaining in proximity to the abuser,
-loss of, or inability to afford prior residence
-other financial constraints due to change in family income (loss of child care, e.g.)
- returning to the proximity of other family members
-requirement of personal care (medical, psychological) by family member
-specific recommendation by law enforcement or other professional.

THREATS, HARASSMENT, AND/OR ATTACKS AT THE WORKPLACE

According to The Office *for the Prevention of Domestic Violence, a NYS agency, 74% of working battered women are harassed by their abusive partners on the job, frequently resulting in absence from work, lateness, leaving early, and loss of employment.*
Threats by domestic abusers may take the form of repeated harassing contact at work, or stalking at or near the workplace, even after a victim has left the home that was shared with the abuser. Whether the contact is in person or by repeated phone calls, the intent is to bully or intimidate. Such conduct would also raise a reasonable fear for personal safety.
Additionally, in some situations, violence or harassment at work may begin or increase after an individual may have left the abuser and moved to a location not known to the abuser; at this point harassment at work may increase.
In a recent case, a claimant quit her job after having been repeatedly stalked at her place of employment by her violent abusive ex-husband. She had been divorced from him for ten years, during which there had been no contact because he did not know where she relocated. She notified the police of his malingering; she tried to alter her work schedule, but still observed him in the vicinity of her employment. She quit to relocate out of state, the Appeal Board found that this was with good cause (AB 530403).
Prior case law supports the principle that a claimant who has a genuine and reasonable fear for personal safety may have good cause to quit employment, if claimant has been assaulted at the workplace (AB 420,231).

In another case, claimant was separated from her husband for two years. He continued to threaten her life at her job site and at her home, in spite of two protective orders obtained from the court. The Appeal Board held that claimant's leaving was with good cause (AB 404,527).
In another case, claimant had an affair with a co-worker, and they had a child. The relationship then ended. The co-worker harassed claimant on and off the job and physically attacked him. Claimant filed a police report and advised the employer, who tried to keep the co-worker away from claimant. The co-worker continued the harassment, threats, and violent incidents. Claimant resigned after a request for transfer was denied. He relocated to another state. The Appeal Board held this to be a voluntary quit with good cause. (AB 446,920)

DOMESTIC VIOLENCE AT HOME BUT NOT AT THE WORKPLACE

Where claimant has been a victim of a crime that occurred off the job, at or near home, the decision to relocate to an area beyond commuting distance is not automatically good cause for quitting continuing employment (Matter of Ollinger, 176 AD 2d 433; AB 425,175).
However, in a more recent case involving domestic violence, the Appellate Division's ruling reversed the Appeal Board's decision that the claimant must establish that she took steps both to preserve her employment prior to quitting and to seek other housing locally. In this case, the claimant who was pregnant had been subjected to actions of her husband in which he would yell, scream, curse, bang on the walls on a daily basis, and she was in fear for herself and her five year old son. Her husband had visited her at her place of employment but not threatened her there. The claimant, who was suffering from poor weight gain and sleeplessness, made a plan to relocate out of the area, in order to be closer to her family. Her obstetrician supported this decision. She filed for divorce, left New York and relocated to a women's shelter in another state, closer to her sister. She took no steps to safeguard her employment. The Court ruled that the record establishes that the claimant's voluntary separation occurred as a consequence of circumstances directly resulting from the claimant being a victim of domestic violence, and found the claimant eligible. (Matter of Loney, 287 AD 2d 846)
This ruling supports the analysis that when a victim of domestic violence has a genuine fear for personal safety, and her abuser has been able to track her to her place of employment, it is reasonable for her to make a decision to relocate out of the area, without seeking to protect that employment.
Likewise, in a case where the claimant was threatened with assault at the workplace by her abusive spouse, she had cause to quit (AB 366,368). Claimant had frequently been beaten by her husband despite calls to, and in the presence of, the police. Her husband had threatened to come to the workplace, and had done so when claimant worked for a prior employer. Claimant was urged by a counselor to relocate out of the area, given the ineffectiveness of police.

ATTEMPTS TO RETAIN EMPLOYMENT

Domestic violence is different from many other kinds of crime because the victim is not a stranger to the abuser, and may have had no reasonable option to protect herself or her children other than relocating out of the area. Leaving one's home but not one's job may not be adequate to provide sufficient distance from an abuser to safeguard oneself from future threats or violence. In many instances, no attempt to safeguard employment may have been made; in many cases involving domestic violence, failure to make such efforts does not bar eligibility for benefits. For example, in the Loney case discussed above, after being beaten by her husband, the claimant filed for divorce and moved to a different state where she would be closer to her sister. Although she made no efforts to safeguard her employment, the Court ruled that the record established that the claimant's voluntary separation occurred as a consequence of circumstances directly resulting from the claimant being a victim of domestic violence, and found the claimant eligible.
In another case, several months before the last day worked, claimant left her husband who had physically abused her. She obtained an Order of Protection. Subsequently, she had the order withdrawn and moved back in with her husband. He resumed the abuse, and began to appear at the workplace and abuse the claimant there. Claimant requested a leave of absence to try to resolve the problem, but was denied. Where a claimant has made a reasonable attempt to safeguard the employment by requesting a leave of absence in order to resolve problems resulting from domestic violence, her decision to quit in order to relocate out of the area

when the leave request was denied, was with good cause (AB 446,316).
In many instances, no attempt to safeguard employment may have been made; in many cases involving domestic violence, such steps would not have been reasonable. A victim of domestic violence, who fears for her own safety or the safety of her children, may have been counseled by police or other law enforcement or by victim services providers to leave the locality. No request for a leave of absence would have been reasonable if claimant had no intention to remain in the area.
Claimant's ability to take these reasonable steps is, in itself, a factor to consider as well; evidence from claimant's physician, therapist or counselor, or shelter workers or victim services providers could be relevant on this point. Statements or letters from a victim's lawyer or clergy member, or hospital records might be provided to establish the circumstances within which claimant acted.
While the actions of a claimant who quits employment are appropriately evaluated against a standard of "what a reasonable person would have done," it should not be ignored that claimant may have had to take immediate steps to address a crisis. The experience of domestic violence can be characterized as a crisis. The specific details about claimant's physical and psychological well being are relevant. In limited circumstances, there may be a potential for a transfer to another location with the same employer. In those instances, it is appropriate to determine whether the claimant requested such a transfer. If not, why not? Was there a concern about whether the employer would safeguard this information, or would this have allowed the perpetrator a source of information as to the victim's whereabouts?

ABSENCE FROM WORK AND LATENESS

It is also evident that loss of employment due to circumstances arising from domestic violence takes the form of discharge by the employer, due to chronic or prolonged absences or lateness. Absence or lateness may be due to seeking medical help or counseling, looking for emergency housing, or obtaining legal help or going to court.
The basic considerations in these cases are:
*Was the absence or lateness due to circumstances directly attributable to the abuse, or other compelling circumstances?
*Did claimant communicate with the employer? If not, why not?
The Appeal Board and the Court have long held that a discharge from employment based on circumstances beyond the claimant's control is not disqualifying. If the claimant was absent because of injury or inability to work, which can be verified through medical report, the remaining consideration is whether the claimant notified the employer. Since a worker may have rights to job protection under the Family Medical Leave Act, timely notification to the employer is an important consideration.
New York State Penal Law was amended to make it illegal to punish or fire an individual who is a victim of a crime for taking off time to appear in court as a witness, to consult with a district attorney, or to obtain an Order of Protection. The employer can require the individual to provide proof that she/he was in court. (New York Penal Law §215.14).
A claimant who fails to contact the employer when absent for even a short time, may be subject to disqualification, if claimant does not have a compelling reason for failing to call or failing to arrange to have the employer notified. If the claimant has a specific reason for failing to communicate with the employer, it should be evaluated in its context: for example, was claimant advised not to do so, because of a failure by the employer to keep information about the claimant's whereabouts confidential?

Availability for work

The issue of temporary unavailability for work may be evident in claims filed by victims of domestic violence; personal circumstances may or may not have been resolved to the point that the claimant is ready, willing and able to seek and accept new employment. It may become evident that a period of unavailability has ended by the time the other issues are adjudicated. It may be determined that the claimant is presently unavailable; it would be appropriate to advise the claimant to pursue the claim when the reason for unavailability has been resolved.

SUMMARY

Case law and statutes continue to evolve, to address the complexities of this issue, and the Department of Labor will continue to monitor our handling of the Unemployment Insurance claims that arise.
Separation from employment cases resulting from circumstances involving domestic violence require careful and compassionate fact finding to determine eligibility for benefits. In general, numerous factors must be considered to evaluate whether claimant had a genuine and reasonable fear for personal safety or the safety of other family members, and whether any steps were possible to resolve the personal circumstances and to safeguard employment.
Care should be take to the extent possible to maintain confidentiality about the claimant's particular circumstances. Specific details obtained from the claimant or representative regarding domestic violence should not be disclosed to the other parties.
Following the text of this Review Letter is a list of resources for further information on the topic of Domestic Violence.
Unusual cases or complex issues of this nature may be referred through normal supervisory channels to the Interpretation and Central Services Unit of the Adjudication Services Office NYC.

Sources of information regarding Domestic Violence include:

New York State Office for the Prevention of Domestic Violence
80 Wolf Road
Albany, NY 12205
Phone - (518) 457-5800

Their publication, "Finding Safety and Support" can be accessed:
http://www.opdv.state.ny.us/about_dv/fss/contents.html

American Bar Association Commission on Domestic Violence
http://www.abanet.org/domviol/workviolence.html

New York State Coalition Against Domestic Violence: 1-800-942-6906, www.nyscadv.org

Related links: http://www.nyscadv.org/relatedlinksdomestic.htm

County by county resource list: **http://www.nyscadv.org/directory.htm**
National Domestic Violence Hotline: http://www.ndvh.org/
1-800-799-SAFE (7233) or TTY 1-800-787-3224.

State by state listing of Domestic Violence Resources: http://www.pcadv.org/relatedsites.html#State%20DV

New York City Domestic Violence Hotline: 1-800-621-HOPE (1-800-621-4673) www.safehorizon.org.

Legal Momentum: (212) 925-6635.
http://www.legalmomentum.org/legalmomentum/issues/violenceagainstwomen/

Legal Services for New York City: www.lsny.org, (212) 431-7200.

MFY Legal Services, Workplace Justice Project: http://www.mfy.org/workplace.shtml (212) 417-3838

§ 593. Disqualification for benefits. 1. Voluntary separation; separation for a compelling family reason. (a) No days of total unemployment shall be deemed to occur after a claimant's voluntary separation without good cause from employment until he or she has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate. In addition to other circumstances that may be found to constitute good cause, including a compelling family reason as set forth in paragraph (b) of this subdivision, voluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section or if the claimant, pursuant to an option provided under a collective bargaining agreement or written employer plan which permits waiver of his right to retain the employment when there is a temporary layoff because of lack of work, has elected to be separated for a temporary period and the employer has consented thereto.

(b) A claimant shall not be disqualified from receiving benefits for separation from employment due to any compelling family reason. For purposes of this paragraph, the term "compelling family reason" shall include, but not be limited to, separations related to any of the following:

(i) domestic violence, verified by reasonable and confidential documentation which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family.

(ii) the illness or disability of a member of the individual's immediate family. For the purposes of this subparagraph:

(A) The term "illness" means a verified illness which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave (paid or otherwise).

(B) The term "disability" means a verified disability which necessitates the care of the disabled person for a period of time longer than the employer is willing to grant leave (paid or otherwise). "Disability" encompasses all types of disability, including: (1) mental and physical disability; (2) permanent and temporary disabilities; and (3) partial and total disabilities.

(iii) the need for the individual to accompany such individual's spouse (A) to a place from which it is impractical for such individual to commute and (B) due to a change in location of the spouse's employment.

(c) A disqualification as provided in this subdivision shall also apply after a claimant's voluntary separation from employment if such voluntary separation was due to claimant's marriage.

2. Refusal of employment. No days of total unemployment shall be deemed to occur beginning with the day on which a claimant, without good cause, refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employment not subject to this article, until he has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate. Except that claimants who are not subject to a recall date or who do not obtain employment through a union hiring hall and who are still unemployed after receiving thirteen weeks of benefits shall be required to accept any employment proffered that such claimants are capable of performing, provided that such employment would result in a wage not less than eighty percent of such claimant's high calendar quarter wages received in the base period and not substantially less than the prevailing wage for similar work in the locality as provided

for in paragraph (d) of this subdivision. No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if:

(a) a refusal to accept employment which would interfere with a claimant's right to join or retain membership in any labor organization or otherwise interfere with or violate the terms of a collective bargaining agreement shall be with good cause;

(b) there is a strike, lockout, or other industrial controversy in the establishment in which the employment is offered; or

(c) the employment is at an unreasonable distance from his residence, or travel to and from the place of employment involves expense substantially greater than that required in his former employment unless the expense be provided for; or

(d) the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions; or

(e) the claimant is seeking part-time work as provided in subdivision five of section five hundred ninety-six of this title and the offer of employment is not comparable to his or her part-time work as defined in such subdivision.

3. Misconduct. No days of total unemployment shall be deemed to occur after a claimant lost employment through misconduct in connection with his or her employment until he or she has subsequently worked in employment and earned remuneration at least equal to five times his or her weekly benefit rate.

4. Criminal acts. No days of total unemployment shall be deemed to occur during a period of twelve months after a claimant loses employment as a result of an act constituting a felony in connection with such employment, provided the claimant is duly convicted thereof or has signed a statement admitting that he or she has committed such an act. Determinations regarding a benefit claim may be reviewed at any time. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith. In addition, remuneration paid to the claimant by the affected employer prior to the claimant's loss of employment due to such criminal act may not be utilized for the purpose of establishing entitlement to a subsequent, valid original claim. The provisions of this subdivision shall apply even if the employment lost as a result of such act is not the claimant's last employment prior to the filing of his or her claim.

5. Terms of disqualification. A disqualification pursuant to the provisions of this section shall not be confined to a single benefit year.

§ 596. Claim filing, registration, and reporting. 1. Claim filing and certification to unemployment. A claimant shall file a claim for benefits at the local state employment office serving the area in which he was last employed or in which he resides within such time and in such manner as the commissioner shall prescribe. He shall disclose whether he owes child support obligations, as hereafter defined. If a claimant making such disclosure is eligible for benefits, the commissioner shall notify the state or local child support enforcement agency, as hereafter defined, that the claimant is eligible.

A claimant shall correctly report any days of employment and any compensation he received for such employment, including employments not subject to this article, and the days on which he was totally unemployed and shall make such reports in accordance with such regulations as the commissioner shall prescribe.

2. Child support obligations. (a) The term "child support obligations" means obligations enforced pursuant to an approved plan under section four hundred fifty-four of the federal social security act. The term "state or local child support enforcement agency" means any agency of the state or a political subdivision thereof operating pursuant to such a plan.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold child support obligations from benefits payable to a claimant (including amounts payable by the commissioner pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment) in the amount specified by the claimant, the amount determined pursuant to an agreement between the claimant and the state or local child support enforcement agency submitted to the commissioner, or the amount required to be deducted and withheld through legal process, whichever amount is the greatest. Such amount shall be paid to the appropriate state or local child support enforcement agency, and shall be treated for all purposes as if paid to the claimant as benefits and paid by the claimant to such agency in satisfaction of the claimant's child support obligations. Each such agency shall reimburse the commissioner for the administrative costs attributable to child support obligations being enforced by the commissioner.

3. Uncollected overissuance of food stamps. (a) The term "uncollected overissuance of food stamps" has the meaning prescribed in section thirteen (c)(1) of the federal food stamp act of 1977. The term "appropriate state food stamp agency" means any agency of the state or a political subdivision thereof enforcing the collection of such overissuance.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold uncollected over issuances of food stamps from benefits payable to a claimant pursuant to section thirteen (c)(3) of the federal food stamp act of 1977; provided, however, that no agreement pursuant to this section shall reduce benefits by an amount in excess of the greater of ten percent of the weekly benefit amount or ten dollars, unless claimant specifically requests, in writing, to reduce benefits by a greater amount. Any amount deducted and withheld under this subdivision shall be paid to the appropriate state food stamp agency, and shall be treated for all purposes as if paid to the claimant as benefits and as if paid by the claimant to such agency in satisfaction of claimant's over issuance of food stamps coupons. To the extent permitted by federal law, the procedures for correcting overpayments shall be designed to minimize adverse impact on the claimant, and to the extent possible, avoid undue hardship.

(c) Each such agency shall reimburse the commissioner for the administrative costs incurred under this subdivision in a manner consistent with a memorandum of understanding as approved by the director of the division of the budget. Such reimbursement shall be consistent with federal law and regulations.

4. Registration and reporting for work. A claimant shall register as totally unemployed at a local state employment office serving the area in which he was last employed or in which he resides in accordance with such regulations as the commissioner shall prescribe. After so registering, such claimant shall report for work at the same local state employment office or otherwise give notice of the continuance of his unemployment as often and in such manner as the commissioner shall prescribe.

5. Part time work. Notwithstanding any other provisions of this article, a claimant who for reasons personal to himself or herself is unable or unwilling to work full time and who customarily worked less than the full time prevailing in his or her place of employment for a majority of the weeks worked during the applicable base period, shall not be denied unemployment insurance solely because the claimant is only seeking part time work. For purposes of this subdivision, "seeking part time work" shall mean the claimant is willing to work for a number of hours per week that are comparable to the claimant's part time work during the majority of time in the base period.

6. An individual filing a new claim for unemployment benefits shall, at the time of filing such claim, be advised that:

(a)(1) Unemployment benefits are subject to federal, state and local income tax;

(2) Requirements exist pertaining to estimated tax payments;

(3) The individual may elect to have federal and/or state income tax deducted and withheld from the individual's payment of unemployment benefits at the amount specified under the federal internal revenue code (26 U.S.C.A. 3402(p)(2)) and/or the state income tax withholding tax schedules as specified under the tax law and relevant regulations; and

(4) The individual shall be permitted to change a previously elected withholding status.

(b) Notwithstanding the provisions of section five hundred ninety-five of this article, the commissioner shall deduct and withhold federal and/or state income tax from benefits payable to an individual if such individual elects such withholding. Amounts deducted and withheld from unemployment benefits shall remain in the unemployment trust fund until transferred to the appropriate taxing authority as a payment of income tax.

(c) The commissioner shall follow all procedures specified by the United States department of labor, the federal internal revenue service, the state department of labor and the state department of taxation and finance pertaining to the deducting and withholding of income tax authorized under this subdivision.

(d) Amounts shall be deducted and withheld under this subdivision only after amounts are deducted and withheld for any overpayment of unemployment benefits, child support obligations, food stamp over issuances or any other amounts required to be deducted and withheld under this article.

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION

REVIEW LETTER

ADJUDICATION SERVICES OFFICE | INTERPRETATION SECTION

Review Letter 2-84
January 16, 1984

ATTENDANCE RELATED SEPARATION ISSUES

I. INTRODUCTION

One of the most common separation issues a claims examiner is likely to face is the discharge for attendance related violations. These include absence from work, tardiness and failure to notify the employer when absent. This Review Letter is intended to guide the examiner in the resolution of these separation issues and to establish generally applicable principles through the use of Appeal Board and court decisions. Although not all-inclusive, it is a discussion of commonly encountered situations. As most absenteeism cases involve the discharge of an employee for violation of an attendance rule, the majority of the cases discussed are misconduct issues. Absence constituting job abandonment (voluntary separation) is treated separately in Section VIII.

II. GENERAL CONSIDERATIONS

A. Precipitating Incident.

1. In resolving separation issues, claims personnel must determine why the claimant lost employment. In most cases this means establishing the precipitating incident which is often described as "the straw that broke the camel's back".

   The precipitating incident is the occurrence which was the immediate cause of the employer's decision to terminate the employment relationship. In attempting to determine the precipitating incident in separation cases, it is essential at the outset of the claims process to establish, usually through the employer, two key factors:

   1. When the decision was made to discharge and
   2. What specific incident caused that decision to be made

Once the reason for discharge has been narrowed down to the particular incident which directly prompted the employer to terminate the employee, and all the facts surrounding that incident have been obtained, the claims examiner must then consider whether or not the claimant's actions rose to the level of misconduct.

2. One frequently encountered situation is that the "last incident" prior to discharge is not always the precipitating incident. What need be established is which incident resulted in discharge:

   Claimant C.Y. had received oral and written warnings about punctuality. Nevertheless, she was late on several occasions prior to February 24. From February 24 through February 26, she was absent due to illness. She was discharged for tardiness the following week when the manager responsible for hiring and firing returned from vacation.

   The Appeal Board sustained a misconduct determination, finding "nothing in the record to indicate that claimant's intervening illness was a factor in the decision to discharge her." (A.B. 334,794)

3. A delay in discharge following the precipitating incident may occur for a number of reasons. For example, in government agencies or large corporations, grievance mechanisms may become operative. Other employers may not discharge an employee until a final approval has been made by a personnel department or company executive. Legitimate delays such as these do not mitigate the effect of the claimant's action (i.e. lateness, absence, etc.) which prompted the employer's decision to terminate. However, a considerable delay between the "last incident" and termination, which the employer cannot reasonably explain, may be an indication that the employer did not consider the offense so serious as to warrant immediate dismissal. This, in turn, will raise a question as to whether or not the precipitating incident rises to the level of misconduct. An inordinate delay between offense and discharge may also indicate that the true "last incident" has not been correctly identified and that some other or additional factor prompted the employer's decision to discharge.
4. On occasion the precipitating occurrence is not a single circumstance but an accumulation of incidents. This occurs when the employer, dissatisfied with an employee's attendance and/or punctuality, places the employee on probation, warning the employee that the number of violations will be reviewed at the end of the period. Under these conditions, all attendance

violations during the probationary period are to be considered in evaluating the precipitating "incident":

Claimant A.B. worked as a probationary office aide for a municipality. Her probationary period had been extended three times because of her poor attendance. The claimant was discharged after being late thirteen times after being given a final warning.

The Appeal Board found "The credible evidence establishes that the claimant was warned, in writing, on four different occasions about her poor attendance and that many of claimant's latenesses thereafter were due to oversleeping. Accordingly, we conclude that claimant's continued poor attendance was due to circumstances within her control and constituted misconduct in connection with her employment." (A.B. 330,990)

When the local office is faced with a mixed bag of attendance violations during a probationary period, a high percentage should be for compelling reasons if the claimant is to be found eligible for benefits. Verification of reasons for all absences during a lengthy probation is desirable but may not be possible because of time restrictions. Nevertheless, verification of at least some of the absences should be attempted to get a feel for the claimant's overall efforts toward protecting job status.

B. Exceptions To The Precipitating Incident Requirement:

1. By and large, identifying the reason for discharge is synonymous with identifying the precipitating incident. Nevertheless there are occasions when disqualifications are appropriate even in the absence of any identifiable final incident:

Claimant, a bookkeeper, was frequently late to work and had been warned on several occasions. She reported late almost everyday in the last two weeks of employment.

In the Appeal Board's opinion, "That the employer may have delayed discharging claimant, in the hope that her punctuality would improve, does not constitute condonation of her failure to arrive at work on time. There were no compelling reasons for her latenesses." "(A.B. 320,654)

C. Warnings

A claimant discharged because of a poor attendance record, but unaware that such conduct would lead to dismissal, generally will not be subject to disqualification. Such

awareness may be generated in several ways. Some employers may have formal attendance rules which are distributed to all employees. Others may rely on verbal warnings given to individual employees as needed. Still others may have a formal series of written warnings which culminate in a "final notice"." The form such warnings take is not critical so long as it can be established that the claimant should have been aware that (s)he was following a course of conduct which might lead to discharge. However, dates of such warnings may be relevant since a person would be expected to be more cautious about taking time off after being put on notice.

Claimant A.M. was given a final warning on June 12 because of latenesses occurring earlier in the month. Although not late or absent thereafter, he was terminated on June 26 because, according to the employer, his attendance record was poor and had failed to improve.

The Appeal Board overruled the local office determination stating: "...it is significant that after the last warning the claimant's attendance record showed no absences or latenesses. Under these circumstances…claimant's actions did not constitute misconduct..." (A.B. 330,384)

D. Compelling v. Non-Compelling Reason

The proverb "absence makes the heart grow fonder" does not pertain to the employment relationship. In fact, there, the saying "out of sight, out of mind" may be more appropriate. Thus, in resolving attendance related separation issues, the reasons for the employee's absence/lateness must be examined to distinguish between those of a "compelling" or "non-compelling" nature. A compelling reason for the precipitating absence/lateness is, of course, non-disqualifying.

But, what is compelling? For unemployment insurance purposes "compelling" encompasses more than an absolute need. It includes those reasons of such recognized importance that most individuals would act as the claimant did, even at the risk of losing employment. It is largely a test of the claimant's reasonableness.

An absence/lateness reason which is beyond the claimant's control is clearly compelling: The claimant can do nothing to avoid the incident (e.g. serious accident). At the other end of the spectrum are the reasons which are clearly non-compelling (e.g. "Went to a ball game." "Didn't feel like working."). In between are an infinite number of reasons which, somehow or other, must be assigned to one category (compelling) or the other (non-compelling).

A truly compelling precipitating incident will negate the disqualifying effects of a prior poor attendance record. 1/

However, a claimant warned about an extremely poor attendance record may be given less credence with respect to the explanation offered for the last attendance violation than a claimant with a good attendance record. 2/ In one case the Appeal Board dismissed out of hand claimant's allegation of illness as the cause of the last absence, noting twice in its opinion that claimant's frequent absences on Saturdays. (A.B. 343,667).

III. 1/ See case discussed in Section IV A Traffic Delays

IV. 2/ See Section VII Credibility for further discussion

V. ABSENCE

A. Illness: Personal and Family

1. If the claimant was discharged as a result of absence due to illness, the separation is generally non-disqualifying. Clearly, inability to work because of illness is beyond the claimant's control:

Claimant S.C., discharged for excessive absence, was absent January 18 and 21 because of a toothache on January 18, and pain from a tooth extraction performed on January 19.

The Appeal Board held: "…claimant's absences from work were caused by illness. This is not misconduct." (A.B. 334,158)

2. When evaluating the eligibility of a claimant suffering from recurring or chronic illness during employment, another factor to be considered is where (s)he has taken reasonable steps to minimize the number of absences other than those compelled by the illness itself? 3/

3/ Alcoholism, a form of chronic illness often encountered in an absence related discharge, is treated at length in Field Memorandum 6-82. Local offices should refer to that publication for a discussion of that problem.

Claimant R.M. had a chronic back condition for which she was under the care of a doctor and a physiotherapist. She arranged for physiotherapy during non-working hours but her doctor had no evening or weekend hours. She was discharged for excessive absences caused by doctor appointments.

The Appeal Board found there was no misconduct: "The employer does not dispute that claimant had a medical problem and that, on most occasions, claimant notified the supervisors, in advance, if she had an appointment which would conflict with her work schedule. Claimant attempted to schedule her appointments so as not to interfere with her work, but was unable to do so to the satisfaction of the

employer… Accordingly, she was not subject to any disqualification." (A.B. 334,481)

A contrast for the example above is that of the claimant who suffers from a chronic illness but fails to minimize absences:

Claimant D.D. established that during his employment he suffered from an illness (not specified in the decision). However, he did not establish that the illness would render him unable to follow routine treatment recommendations. On October 25, he requested that the employer put him on leave without pay whenever he could not work a full day because of illness, in effect setting his own work hours. His request was denied. Thereupon, claimant was absent from work until November 5, at which time he was discharged.

The Appellate Division upheld a disqualification, adopting the Board's finding that, "While claimant appears to be suffering from an illness, he has made no reasonable effort to pursue a course of treatment. An employer is entitled to expect reasonable and prompt attendance from an employee… Claimant's conduct, therefore, was contrary to the best interest of the employer. It did rise to the level of misconduct…". (Matter of DeCherro, 83 A.D. 2d 709)

Absence due to chronic illness raises the issues of availability and capability. In such cases, claims examiners must also evaluate the claimant's eligibility with respect to these issues.

3. When family illness is the reason for absence, the compelling nature of the absence is determined not by the illness itself, but rather by the need for the claimant's care or presence:

Claimant T.E., whose request for Election Day off to coincide with her husband's day off was denied, took the day off anyway. She later alleged that she had made plans to take her mother for treatment on that day.

In rejecting the claimant's contentions, the Appeal Board held, "…while she alleges that she had to help her mother, she testified that she does not drive and she only went because her husband, who does drive, was off." (A.B. 330,771)

4. In general, a claimant absent due to illness is under no obligation to provide medical substantiation unless the employer has promulgated a specific rule to that regard. Thus, the claimant's failure to see a

doctor during a short absence, and subsequent inability to produce a doctor's note, is not necessarily disqualifying. "An individual with a minor illness would not ordinarily be expected to see a physician." (A.B. 325,386)

However, if a claimant knows the employer's rules require a medical verification, compliance may be required.

When hired, claimant D.B. signed and agreed to a list of employer rules and regulations, including the requirement that absences of three or more consecutive days due to illness of three or more consecutive days be verified with a medical statement. On August 26, claimant received a written warning about his attendance. From September 5 to September 12 he was absent, allegedly due to illness. His supervisor called claimant on September 8, leaving a reminder about the need for a medical note. When claimant reported to work on September 18 without a note he was discharged.

The Appeal Board found claimant was correctly disqualified for misconduct. "He gave no valid reason for failing to submit medical proof of his alleged illness. Under the circumstances, claimant's conduct was detrimental to the employer's legitimate interest, and was in violation of the employer's reasonable rule." (A.B. 339,644)

5. Failure to comply with the employer's reasonable requirement for medical documentation is not always disqualifying. Factors to consider are the nature of the illness, length of absence, prior attendance record, employee warnings and the employer's need for verification.

Claimant J.C. suffered a heart attack and was visited in the hospital by a representative of the employer. He signed medical releases to collect disability benefits from the employer's insurance carrier. Subsequently, he was discharged for failing to provide medical verification of illness.

The Appeal Board found no basis for misconduct: "The employer was aware of claimant's condition when he was hospitalized and while he was receiving disability benefits. Claimant's condition was verified by the insurance carrier as the agent of the employer. No medical reports from claimant's doctors sent directly to the employer were needed to establish that claimant could not go back to work. The employer's demands for such reports were unreasonable because it already had such adequate

information through its agent, the insurance company." (A.B. 317,278)

6. To determine whether a claimant is subject to disqualification for failing to fully comply with an employer's request for medical documentation, the nature of the request and the degree of compliance must be examined.

Claimant D.P. was hospitalized for an emotional illness. Upon return to work he presented a psychiatric clearance. At the employer's insistence, claimant produced two more psychiatric opinions confirming the first, but refused to obtain a fourth opinion.

Overruling a determination of voluntary separation, the Appeal Board found, "…claimant provided more than adequate substantiation that he was fit to return to his job duties."

A different conclusion was reached in the case below:

Claimant C.V., unhappy with her supervisor, took an unauthorized leave of absence. She supplied the employer with medical documentation from a pediatrician indicating that she was suffering from anxiety reaction, secondary to emotional stress at place of employment." Rather than submit to a psychiatric evaluation scheduled and paid for by the employer, claimant quit.

After determining that she had no compelling reason for refusing to submit to the psychiatric examination, the Appeal Board sustained a determination of voluntary leaving without good cause and noted: "Furthermore, the medical evidence submitted by claimant concerning the necessity for her to leave her employment is not convincing. The diagnosis that claimant was suffering from a psychological disorder was not made by a psychiatrist or psychologist, but by a pediatrician. This doctor's opinion…was clearly based upon claimant's subjective and unsubstantiated reports about the conditions of her employment." (A.B. 336,472)

B. Incarceration:

1. When a claimant who commits a crime outside the course of employment is incarcerated, absence from work after warning is disqualifying. (A.B. 199,344; A-750-1782) Although it may appear that absence in such cases is beyond the claimant's control (one does not usually enter jail voluntarily), the Appeal Board has reasoned differently:

Claimant T.E. was on warning for excessive absenteeism. On December 7, his last day of work, he was arrested for firing a gun through the wall of a bar. He was incarcerated through January 2 because he could not raise bail bond, and thereafter pled guilty to reckless endangerment. When he returned to work on January 3, his employer had already discharged him for his absence.

The Appeal Board found that "The claimant's last absence resulted from his own delinquency and, therefore, cannot be considered beyond his control under the Law. The claimant's non-compliance with the employer's work schedule constituted misconduct." (A.B. 312,143A)

2. A conviction for any crime, no matter how minor, is conclusive evidence that the claimant committed the act resulting in incarceration. Similarly, if the claimant pled guilty, even to a lesser charge, "the claimant is subject to the criminal penalties and to whatever effect that may have on his employment: (A.B. 323,831). However, a claimant acquitted in a criminal case may be subject to a misconduct disqualification nevertheless. The standards for determining guilt in a criminal case are substantially greater than those required for unemployment insurance determinations of misconduct (Matter of Colello, No. 76-443 App. Div., 3rd Dept., Dec 2, 1976, unreported).

   If no judgment has been rendered by the time an initial determination is to be made, the claims examiner should question the claimant regarding the extent of his/her participation, if any, in the acts alleged. This is necessary even if the claimant pled not guilty since that plea may have been entered for reasons not related to the claimant's guilt or innocence. If the claimant admits the act, the absence is volitional and may be disqualifying. If the claimant pled not guilty (verify with the appropriate authorities) and signs a statement denying any involvement in the crime, and there is no convincing independent evidence of guilt available, there should be no disqualification. The criminal case should be followed up for disposition, and a redetermination made if warranted.

3. Prior warnings about attendance are generally necessary for a short absence to constitute misconduct. In the case of an incarcerated claimant absent from work for half a day, misconduct was upheld only upon a finding that "He had been warned that he would lose his job if his conduct off the job prevented him from reporting to work on time." (A.B. 221,215) However, incarceration for a lengthy or

indefinite period may not require a warning about attendance:

Claimant D.P., sentenced to jail for up to a year, asked his employer to hold his job open for him. The employer refused. Upon release seven months later, claimant reapplied for his job but was not rehired.

Finding the claimant subject to disqualification for misconduct, the Appeal Board reasoned: "…the claimant was discharged, after beginning his sentence, since he could not report to work while imprisoned. The jail sentence made it 'impossible,' not merely impractical or inconvenient, for the employer to continue the employment relationship." (A.B. 323,831)

C. Loss of Transportation

Another common reason for employee absence is loss of transportation to work.

1. Where the claimant has limited means of getting to work, and that means becomes unavailable for reasons beyond the claimant's control, discharge for absence from work is not disqualifying:

   Claimant C.O., from a rural area, was absent because his truck broke down. He had no alternative means of going to work.

   In overruling a disqualification for misconduct, the Appeal Board stated:

   "The discharge was precipitated by claimant's last absence, which was caused by the break down of his own vehicle, his only means of transportation… Claimant's last absence was the result of circumstances beyond his control." (A.B. 320,419)

2. Where reasonable alternative means of transportation are available, the claimant's failure to use them is disqualifying. Absence in such a case is neither beyond the claimant's control nor reasonable:

   Claimant L.G., previously warned about absence, did not report to work on June 25 and 26 because of car trouble. Alternative means of transportation were available.

   In affirming a misconduct disqualification, the Appeal Board held, "Although he had a series of problems with his car, the claimant continued to rely on his automobile as the sole means of transportation to work. He made no attempts to obtain alternate

transportation or to use public transportation in order to get to work. Accordingly, we conclude the claimant's last absence from work was for personal and non-compelling reasons..." (A.B. 314,071)

3. Sudden, unexpected loss of usual transportation, even if alternative means are available, will likely result in the claimant being late for work. Because, from the employer's viewpoint, lateness is usually preferable to absence, a reasonable employee will make an effort to get to work:

Claimant had only two means of getting to work, riding with an undependable co-worker or riding a public bus which would get him to work late. The claimant had been warned about excessive absenteeism but not about tardiness because the employer was aware of his transportation problems. On the morning of October 26, claimant's co-worker did not show up. Rather than take public transportation, claimant called the employer to say his ride did not appear and he would be absent. Claimant did not feel like working that day.

The Appeal Board found: "The claimant could have taken the public bus and arrived to work late, which the employer would not have objected to, but chose instead not to go in at all. His unnecessary absence on October 26, 1981 after two written warnings was misconduct…" (A.B. 330,539)

VI. LATENESS/EARLY DEPARTURE

As with absence, a lateness precipitating a dismissal may also be for a compelling reason and non-disqualifying. Some of the more common reasons for tardiness are discussed below.

A. Transit Delay

1. Tardiness caused solely by an unforeseeable delay in public transportation is not disqualifying:

Claimant G.D. was put on final warning for lateness, usually the result of transit delays. Thereafter, he began leaving home earlier. When he was again late January 19, 20 and 22 due to transit delays, he was discharged.

The Appeal Board found no misconduct, noting "…his last three latenesses which precipitated his discharge were due to circumstances beyond his control, that is, transit delays. Claimant's position that there were extensive transit delays on the last three days was substantiated by verification from the New York Transit Authority." (A.B. 332,783)

2. The case above suggests that two factors must be present for the claimant's tardiness to be non-disqualifying:
   a. The transit delay should be verified. Most public transportation systems will provide, upon telephone inquiry, the length of any delay and the time at which it occurred.
   b. The transit delay must have been unforeseeable. An employee on warning for lateness should anticipate some delays, but need not anticipate delays on a truly extended duration. Compare the following case with the case above:

Claimant C.D., on warning for excessive lateness, was late for work five times in his last three weeks of work. He attributed his lateness to train delays.

Finding the claimant correctly disqualified for misconduct, the Appeal Board stated, "…claimant made no effort to overcome the foreseeable subway delays that he encountered, by leaving for work earlier. The claimant's continued and excessive lateness which was within his power to avoid, violated an implied condition of employment and thus constituted misconduct in connection therewith." (A.B. 311,838)

B. Traffic Delay

Like the public transit commuter, the claimant using private transportation must leave for work early enough to compensate for normal traffic delays. Similarly, delay that is unforeseeable and unexpected will not be disqualifying. In a case of a final lateness caused by flooding on the claimant's usual route to work, the Appeal Board found there was no misconduct, despite claimant's history of tardiness and a final warning. (A.B. 341,969)

C. Car Trouble

Prompt attendance being a requirement of the job, the claimant who uses a privately owned vehicle to go to work must keep it in good working order to comply with the requirement (cf. Matter of Kudysch, 72 A.D. 2d 901; A-750-1894).

The majority of cases with which the claims examiner deals concern unexpected and unforeseeable car trouble, such as a flat tire or failure to start on an extremely cold morning. Such circumstances are beyond the claimant's control, and consequently, non-disqualifying. Whenever possible, delays caused by mechanical problems should be substantiated through towing bills, mechanic's bills, receipts for parts, etc. As with public transportation or traffic related delays, habitual lateness due to car trouble can result in disqualification:

Claimant G.H. was discharged for being late 42 times during the 69 days of his employment. The automobile which he used to get to work was in disrepair and frequently broke down.

The Appeal Board found that "Although the plant manager was aware of claimant's problems with his vehicle, the credible evidence establishes that claimant was warned repeatedly that he must report to work on time. It was claimant's obligation to either repair his car permanently or to find other means of transportation…" (A.B. 302,427)

D. Oversleeping

When a claimant is on warning for attendance violations, lateness due to oversleeping is usually disqualifying. However, oversleeping due to the use of a prescription medicine which, unknown to the claimant, causes extreme drowsiness is non-disqualifying. Oversleeping caused by consumption of a non-prescription drug or alcohol is generally disqualifying unless the claimant is an addict or alcoholic. 4/

4/See Field Memorandum 6-82.

E. Early Departure

1. The rules with respect to a claimant who leaves work early are substantially the same as for any other absence from work, with one significant exception: Since a supervisor is likely to be nearby, the claimant should seek permission to leave, or at least give notice of leaving to the employer:

   Claimant J.V. was on notice for poor attendance. His work hours were 8:30 a.m. to 4:30 p.m. he failed to return to work after his break. He informed no one of his leaving nor did he obtain permission to leave. Claimant left because drinking coffee caused him heartburn and he went to a drug store to purchase an antacid.

   The Appeal Board upheld the disqualification finding, "The discomfort he experienced was minor in nature and was not so severe as to relieve him of the responsibility of obtaining authorization to leave work early." (A.B. 336,294)

2. Even if the claimant has a compelling reason to leave, such as personal illness or family emergency, the claimant must still give notice of his departure. Any means reasonably designed to give the employer notice will suffice:

   Claimant C.B. became ill shortly after reporting to work. Procedure requires that he notify his immediate supervisor and the personnel office when leaving

early. Not being able to locate his supervisor, he informed two co-workers that he was leaving. He called personnel as soon as he got home.

The Appeal Board overruled the employer's objection to claimant's eligibility stating, "We conclude that, under the circumstances, claimant substantially complied with the procedure set forth by the employer concerning leaving early." (A.B. 314,939)

3. If the claimant's reason for leaving early is purely personal, mere notice to the employer will not suffice where permission to leave is required but has been denied:

Claimant, a stationary engineer, was required by the employer to take his meal breaks in the building where he worked because it was necessary to have an engineer on the premises at all times. He was paid time and a half for remaining at his post during his meal period. Despite this agreement, on September 13, claimant left the building during his meal break to obtain food. The employer warned the claimant he was violating the rule. October 27, claimant again left the premises to take his meal break and was discharged as a result.

In reinstating a determination of misconduct, the Appellate Division stated, "Responsible for monitoring the building's fire detection equipment, it was entirely reasonable for the employer to insist upon his availability should an emergency arise." (Matter of Cruz, 79 A.D. 2d 1081, aff'd 55 N.Y. 2d 918)

VII. FAILURE TO CALL/FALSE REASON

A. Failure to Call

1. In determining the precipitating incident, care must be exercised in distinguishing whether a claimant has been discharged for an absence itself or for failure to properly notify the employer of the absence. A claimant discharged for failure to properly notify the employer of an absence is subject to disqualification despite the fact that the absence itself was for a compelling reason.

Claimant W.G. informed her supervisor that she would be hospitalized on Monday and Tuesday, April 12 and 13, and that she would return on Wednesday, April 14. However, she did not return to work on either April 14, 15 or 16 because she felt discomfort from the medical treatment. She did not call or notify her employer on any of the latter three days, although she knew she was required to do so.

The Appeal Board sustained a disqualification for misconduct. "While she had a compelling reason to be absent on the 14th, 15th and 16th, she had no compelling reason for her failure to contact her supervisor… Her failure to contact the supervisor constitutes misconduct…" (A.B. 337,612)

In a similar case the Appeal Board reiterated its longstanding position that when a claimant has been warned about absenteeism it is not necessary that he "…be warned that failure to call in, when absent, can lead to discharge. An employee has a duty to inform his employer in a timely manner of the reason for an absence (A.B. 193,120). He is responsible to get this information to the employer." (A.B. 333,783)

Thus a claimant discharged for failing to notify the employer of an absence must demonstrate compelling reasons for the absence itself and also for the failure to notify the employer of an absence must demonstrate compelling reasons for the absence itself and also for the failure to call.

2. An employer may require its employees to call at a specific time (e.g., an hour before the start of a shift) in order to secure a replacement or to know what staff is available that day. In such cases, the claimant should make reasonable attempts to comply:

Claimant, a porter, was aware of the employer's requirement that he call in any absence at least two hours before his 6:00 p.m. shift. On September 24, claimant was ill and at a doctor's office in the afternoon. He did not inform the employer of his absence until after 5:00 p.m. that day. Ill again the next day he did not call until after 5:00 p.m.

The Appeal Board sustained a determination of misconduct: "…claimant was discharged because he failed to adhere to the employer's call-in rule. Significantly…he had been specifically warned about the call-in rule. The fact that the claimant was ill on the days in question does not excuse his failure to make sure that the employer was properly informed of his absences." (A.B. 341,691)

3. It should be recognized that a compelling absence may occur so suddenly that the claimant is unable to make a timely call to the employer:

Prior warnings had been given to claimant T.S. about his failure to call in absences at least one hour before the start of his 7:00 a.m. shift. On August 21, at 6:45 a.m., claimant twisted his ankle on the way to work. He was not able to get to a phone until

7:20 a.m., at which time he called the employer. Thereupon he went to a hospital for treatment of a sprained leg and torn ligaments. He was discharged for failing to properly report his intended absence.

The Appeal Board found no misconduct on claimant's part. "The nature and extent of his injury made it impossible for claimant to communicate with the employer before 7:20 a.m. It is particularly significant that the injury itself occurred 45 minutes after the 6:00 a.m. deadline for reporting intended absences. Under the circumstances, we must conclude that claimant's failure to timely notify the employer of his absence was due solely to events beyond his control." (A.B. 282,707)

4. The claimant who is unable to meet the call-in deadline is required to notify the employer as soon thereafter as is reasonably possible:

Claimant H.H. worked a shift beginning at 4:00 p.m. She was aware of the employer's requirement that she call in absences by 11:00 a.m. On November 28, she became ill at about noon and took some medication which could cause drowsiness. She asked a friend to call her at 2 p.m. The friend neglected to call, and claimant, who had fallen asleep, did not wake until 4:30 p.m. She called her employer at that time.

The Appeal Board sustained a disqualification for misconduct, finding claimant "… did not become ill until after 11:00 a.m. on the day in question and thus could not comply with the call-in notice required in the case of usual absences. However, knowing she was still on probation because of her attendance record, claimant did not act reasonably to protect her job. Her choice not to call the employer at noon and to rely on her girlfriend to awaken her if she fell asleep after taking pain-killing medication, was not the action of a prudent and reasonable person, in these circumstances." (A.B. 264,151)

5. Sometimes the claimant who fails to notify the employer of an absence will receive a call asking if (s)he intends to report to work, and if not, why not? The employer's call to the claimant does not remedy the claimant's failure to provide notification. (A.B. 334,124)

6. A common explanation for failure to notify the employer of an absence is the claimant's allegation that (s)he asked a relative or friend to call and that person neglected to do so. This will not excuse claimant's failure:

Claimant S.L. was absent from work for ten days in order to visit his seriously ill father out of state. He asked his girlfriend to call his employer and explain his absence. She forgot to do so. He was discharged because of his absence without notifying the employer.

The Appeal Board disagreed with "the judge's conclusion that the claimant's failure to notify his employer should be excused because he had made a good faith effort to contact his employer by asking a friend to do so. The failure of his chosen agent to notify the employer is attributable to him and it constitutes misconduct on his part…". (A.B. 323,434; A-750-1910)

The nature of the relationship between the claimant and the chosen agent does not in any way alter the result. Misconduct was upheld in various cases involving a claimant's parent, grandparent, child, spouse, uncle, aunt, neighbor and attorney.

7. Frequently cases are seen in which a claimant overstays a vacation or leave of absence. Regardless of the reason for the claimant's extension of time, the employer may rightfully expect to hear from the claimant at least as early as the date the claimant is due back to work, if not sooner.

Claimant M.W., who was due back from vacation on August 31, did not return until September 8 because his child became ill. He did not contact the employer during the period although he was in contact with his wife in New York and was aware of the requirement to contact the employer during absence.

The Appeal Board noted that claimant's supervisor testified "neither claimant nor anyone on his behalf contacted him prior to September 8 to report claimant's absence… Accordingly, we find that claimant lost his employment through misconduct….". (A.B. 331,006)

B. <u>False Reason For Absence</u>

Providing the employer with a false reason for absence is misconduct. As in failure to call, it is separate offense from the absence. The obligation to inform the employer of the true reason for absence is so vital to the relationship of trust between the employer and employee that a misconduct disqualification is warranted even if the claimant had no prior attendance problems:

Claimant S.R. called in sick on two successive workdays. She was not in fact, ill; rather, she accompanied a friend

to the friend's pre-arranged hospitalization in another city.

The Appeal Board found, "Her absence was for a personal and non-compelling reason. Furthermore, she gave the employer false reason for her absences, intentionally to deceive him. It is immaterial that previously the claimant was never absent during her employment. Her absences, for personal, non-compelling reasons, compounded by deliberate falsehoods concerning the reasons therefor are misconduct." (A.B. 327,176)

VIII. EMPLOYER RULES AND REGULATIONS

A. Reasonableness of Rules

1. An employer has a right to require on time and regular attendance from its employees, and, to this end, may make rules as necessary. If the rules are reasonable, compliance is expected.

   Rules limiting the number of absences or latenesses allowed are normally reasonable. Also reasonable are rules requiring the claimant to call in an absence at a specified time and to speak to a specified person or office.

2. Unreasonable employer rules are occasionally encountered and are usually easy to detect. An example is the case in which the employer required a claimant to obtain a fourth medical opinion before returning to work. 5/ In another case the Board found an employer's requirement that the claimant call in an absence which had previously been approved to be unreasonable.

   5/ Appeal Board case 340,860 discussed on Page 9

3. Employers sometimes establish special rules for specific employees with poor attendance records:

   Claimant F.B. was required to verify all of his absences because he had apparently given a false reason for a four-day absence. Subsequently, from July 26 to August 2, he was absent, allegedly due to illness, but did not seek medical attention. He was discharged for failure to provide medical documentation.

   The Appeal Board sustained a disqualification for misconduct. It found the employer's requirement "was reasonable, in view of claimant's prior actions. Claimant was aware that such failure would result in his termination, yet he did not obtain medical documentation of his illness." (A.B. 339,838)

4. Prior penalties or disciplinary suspensions are sufficient notice of what is expected of the claimant. Thus, a claimant who overstayed his lunch break by an hour was held to be on warning for this sort of conduct (and consequently, subject to disqualification) when three years earlier he received a 20-day suspension from work for similar conduct. (A.B. 335,040)

B. Attempts to Comply

1. After establishing that an employer's rule is reasonable, the claims examiner must ascertain if the claimant attempted to comply with the rule, and how reasonable that attempt was:

. Claimant A.D., on warning for violation of the employer's call-in rule, was absent on June 21 because of a flat tire. He was discharged for not calling in until five hours after his shift started.

The Appeal Board concluded that, "He did not act as a reasonably prudent person should to protect his employment… Even if, as claimant testified, the employer's line was busy on three occasions…claimant should have continued to call. We conclude that a claimant lost his employment through misconduct…". (A.B. 341,263)

a. Claimant J.H. was mugged on August 27 and suffered injuries to his arm, legs, and eyes. He received emergency treatment in a hospital. On August 28, his daughter met with the plant manager, informed him claimant would be out a few days, and gave him a copy of the hospital report. Thereafter, claimant was terminated, pursuant to a union contract provision, for absence of an additional five days without calling in. Claimant had no phone, and because of leg injuries was unable to get to a phone.

In this case the Appeal Board found, "claimant made certain that his employer was informed of the seriousness of his condition, and that he would be out for several days. While perhaps he should have made a further attempt to contact the employer during the period he was absent, we note that he has no telephone and was suffering from a leg injury. Under the circumstances, his failure to attempt to keep the employer further apprised of his situation…cannot be said to be misconduct…" (A.B. 328,917)

2. If a claimant intends to be absent or late at a future date, (s)he has an obligation to inform the

employer at the earliest moment and to seek permission for the absence:

Claimant L.C. was aware of his employer's rule requiring advance permission for absence. On October 28, he had a dental appointment and reported to work late. He notified his supervisor of the appointment by leaving a note on the supervisor's desk the day before, after the supervisor had left for the day.

The Appeal Board noted, "If claimant could leave a note on the subject, then he could have requested permission through the proper channels. It was a violation of the employer's rule, of which he was aware, and constituted misconduct…" (A.B. 330,535)

C. Isolated Incident

1. In the law of torts (civil wrongs) there is a well-known adage that "every dog is entitled to its first bite." This means that (in most states, not New York) a dog owner is not liable to the person injured by the dog unless the dog has bitten someone previously, thereby putting the owner on notice as to the viciousness of the animal.

Unemployment insurance case law has an analogous doctrine in the single, isolated incident rule: A claimant discharged for a single, isolated violation of a known employer attendance requirement may not be guilty of misconduct:

Claimant, a masseuse, was employed by a concessionaire at a hotel. She was absent one day when she was expected to work and was discharged the following day because of her unexcused absence.

The Appellate Division held that, "In the present case the finding of misconduct was based on a single unexcused absence. There was no evidence presented that claimant was absent on other days when she was required to work, nor is there any evidence of a warning being given claimant concerning absences. No policy or rule of the employer requiring notification in advance of absence was adduced. In our opinion, this one isolated instance of an unexcused absence does not constitute misconduct…". (Matter of Ramsey, 63 A.D.2d 1061)

Also found eligible for benefits were claimants who lost employment as a result of a single, isolated incident of absence because…the claimant forgot his work schedule (A.B. 315,360), was late due to oversleeping (A.B. 315,113) and left a work station ten minutes early (A.B. 321,992)

It should be noted, though, that any prior warnings about attendance, even if of a general nature, remove the claimant from the benefit of the isolated incident rule.

2. As one might expect, there is an exception to the rule, in which the claimant is subject to disqualification. A claimant who is solely or significantly responsible for a particular department or whose attendance is essential to the employer's operation may be subject to disqualification for an isolated instance of absence and failure to call:

Claimant M.D., employed by a supermarket, was one of only two appetizing department clerks. He arranged to work the morning shift on Sunday, July 12, but did not appear nor did he call.

Distinguishing Matter of Ramsey (Page 24), the Appeal Board stated, "The claimant in Ramsey was a masseuse who worked in a large resort hotel and obviously had must less responsibility than claimant had in the present case. The claimant herein was one of only two appetizing department clerks. His failure to report to work on the date in question, of necessity, could result, and did result, in the only other clerk having to work both shifts". (A.B. 327,326)

IX. CREDIBILITY

As Oscar Wilde once observed, "Truth is rarely pure and never simple." Therefore, it is not surprising that one of the more difficult problems facing a claims examiner in resolving separation issues is testing the credibility of the parties. In the area of attendance related discharges, evaluating credibility is more difficult because often only the claimant knows the reason for the absence or lateness. This section explores means of evaluating credibility.

A. Verification

1. Proper interviewing technique requires that the credibility of any individual with exclusive knowledge of necessary facts be tested. The best means of certifying a statement is through independent sources outside the control of either the claimant or the employer. For example, the Weather Bureau would be able to provide information tending to confirm a claimant's statement that an absence was caused by heavy snow. Other forms of independent verification frequently available and which the claims examiner should utilize include traffic and transit reports, police reports, medical documentation, and repair bills. The following case illustrates the importance of independent

verification in evaluating the credibility of claimant's explanation for the last absence/lateness.

Claimant W.J. had been absent 27 times between January 1, 1981 and September 18, 1981 when he was discharged. He had been on written warning for excessive absenteeism. He insisted that his last absence was compelled by his girlfriend's hospitalization. He was discharged at 10:56 a.m. on September 18.

The Appellate Division sustained the disqualification for misconduct, noting, "The record is clear that claimant did not take his girlfriend to the hospital on September 17, 1981 but at 3:50 p.m. on September 18, 1981, some five hours after he had been notified at 10:56 a.m. that his employment had been terminated." (Matter of Johnson, 89 A.D. 2d 1050)

2. On occasion, the employer may have evidence tending to support or refute the claimant's statement. A typical example is the employer's possession of a signed acknowledgement of warning, refuting the claimant's contention that (s)he was never warned. Note also the following example:

Claimant C.B. was absent 13 times in four months and had been warned. He was discharged. Claimant contended he was totally dependent upon a particular co-worker to get to work, and that his absences were caused by the co-worker's absences.

Unpersuaded, the Appeal Board sustained a disqualification for misconduct. "We reject such contention in light of the employer's attendance records showing the claimant reported to work on many occasions that the co-worker did not report to work." (A.B. 337,675)

B. Inconsistent Statements

1. Occasionally a statement will be self-contradictory or otherwise incredible. The Appeal Board recently rejected a claimant's contention "that she failed to contact the employer on each day of her absence because she was too emotionally distressed, in view of her testimony that she would have complied with the rule if she had known she would be discharged for its violation." (A.B. 334,024)

At times, it is the employer's statement that proves to be incredible. For example, the Appeal Board rejected an employer's allegation of misconduct and found a claimant eligible for benefits, in part because despite the employer's contention of discharge for latenesses, the claimant had been told

he would not be dismissed if he agreed to drop an earlier union grievance against the employer. (A.B. 341,468)

2. There is a rule of evidence that statements made by a party at a time (s)he has no reason to believe they will be used adversely may be given more weight than subsequent inconsistent statements or testimony, even if given under oath.

This principle applies to unemployment insurance cases. For example, a claimant's statement to the local office that his last lateness was caused by a family medical emergency might be viewed with skepticism if he had told the employer at the time of his dismissal that he had been late because he overslept. Similarly, at the hearing or appeal level, statements made by the claimant or employer which conflict with those given to the local office before their effect was known may be found less credible (Cf. Matter of Jensen, 49 A.D. 2d 794). For this reason, it is of the utmost importance for the claims examiner to obtain precise, detailed and complete statements from all parties.

C. Patterns of Absence

1. When a claimant alleges an absence was due to illness or other compelling reason but cannot provide documentation, the claims examiner should look to the claimant's attendance history to see if there is a pattern of absence: for example, absence on Fridays or Mondays, the day following pay day, or as leave time accumulates. If a precipitating absence falls within a pattern, it should be scrutinized carefully. While the claims examiner should not automatically exclude the possibility that the claimant did have a compelling reason for the last absence, a precipitating absence falling within a pattern of absences is strongly suggestive of non-compelling, and thus disqualifying, reason for absence. The following cases are illustrative:

. Claimant, a security guard, worked for a hospital. She had been discharged for absenteeism, but rehired with a warning that her attendance would be closely monitored. Thereafter, claimant was absent three times, all on Sundays. She requested Monday, February 14, 1983 as a day off, then failed to report to work on Sunday, February 13.

The Appeal Board rejected the administrative law judge's conclusion that claimant's last absence was an "honest mistake", finding "...she was fully aware that she was required to work on Sunday, February 13, 1983. Her failure to

report to work on Sunday, February 13, 1983 was contrary to the employer's interests… Therefore, we find that claimant's employment came to an end due to misconduct in connection therewith." (A.B. 346,644)

a. Claimant H.D., on warning for poor attendance, was absent three consecutive Mondays prior to his discharge. On the last Monday, the absence precipitating his discharge, he was required to be in Family Court to contest a support action. He called his employer in the morning to notify it that he would be late and again, later on, that he would not be in at all. He was in court all day.

   The Appeal Board found that, "Though his attendance record may have been poor, his last absence was for a compelling reason. Accordingly, claimant did not lose his employment through misconduct…". (A.B. 331,708)

X. ABANDONMENT OF JOB: VOLUNTARY SEPARATION

1. A bothersome side issue often found in absence-related separation is the question of which disqualification, voluntary quit or misconduct, is appropriate when a claimant becomes separated from employment because of a substantial absence without proper notification to the employer. Did the claimant quit, or was the claimant discharged as a result of the absence? Any difficulty in resolving this problem is substantially diminished by the application of a simple rule: Impose both disqualifications, misconduct and voluntary separation, one as an alternative to the other.

   Because neither an administrative law judge nor the Appeal Board may issue initial determinations, both determinations must be issued to insure a decision on misconduct and voluntary leaving. If only one determination is issued and it proves incorrect on appeal, the administrative law judge or appeal Board must overrule it and cannot issue the alternative in its place (Matter of Pepitone, 78 A.D. 2d 563).

2. In deciding which of the two determinations is primary and which is alternative, the claims examiner should look to the claimant's intent. If the claimant made an attempt to keep the job during an absence, or attempted to return to work following an absence, there was no intent to abandon the job and the primary determination is misconduct.

   On the other hand, if the claimant reported to the employer for the sole purpose of picking up his paycheck, the intent was to leave and the primary issue is voluntary separation.

Claimant R.P. was given a final warning not to bother reporting to work anymore if he were absent again. On June 8, he was absent because of car trouble. He neither called the employer nor attempted to get to work by other means of transportation. He reported to the employer on June 10 for the sole purpose of picking up his last paycheck.

The Appeal Board sustained a disqualification for voluntary separation finding "He made no attempt to get to work or to protect his employment on the occasion of his last absence, and only returned to the employer's establishment on June 10, 1982 to collect his pay check… In view of the aforesaid, it is unnecessary to rule on the alternate initial determination of misconduct." (A.B. 338,089)

On the contrary, if the claimant, intending to work, reported to the employer's premises after an unauthorized absence, was handed his paycheck and discharged, the primary determination is misconduct:

Claimant S.K. was absent from January 8 to January 11, because he was ill. Although he was required to call in his absence, he deemed it unnecessary. He reported to work on January 12, at which time was given his final paycheck and discharged.

The Appeal Board overruled a disqualification for voluntary separation but sustained the alternative determination of misconduct. "Claimant did not intend to abandon his employment or resign and was ready to work on January 12, 1982. We find the employer's actions on January 12 to be a discharge. Accordingly, the claimant's separation from employment was involuntary and there is no basis for the initial determination disqualifying the claimant from receiving benefits because he voluntarily left his employment without good cause… Under the circumstances, we find that the claimant's conduct constitutes misconduct…". (A.B.334,338)

CONCLUSION

Difficulty in the resolution of attendance related separation issues will be substantially reduced if certain fundamental principles are borne in mind:

1. It is always necessary to identify the precipitating incident leading to discharge. Generally, this will be the final attendance related violation prior to the employer's decision to discharge the claimant. However, in exceptional cases it may be an accumulation of incidents, especially if occurring during a predesignated probation period.

2. Absence or tardiness after warning is misconduct, unless the claimant had a compelling reason to be absent or late.

3. A discharge for failing to comply with an employer's reasonable rule is disqualifying, unless the claimant demonstrates a compelling reason for the failure.

4. Whenever possible, claimant and employer allegations should be verified with records (e.g. mechanic's bill, copy of warning) or through disinterested sources (e.g. transit authority). However, a claimant is not expected to produce a doctor's note for a minor illness or short duration unless (s)he has been specifically warned by the employer that one is required.

5. If the facts of the case do not clearly establish whether the claimant abandoned employment or was discharged for misconduct, alternative determinations of voluntary separation and misconduct must be issued.

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

Field Memorandum 5-87
September 21, 1987

I. Section 593.1(b) of the UI Law has been amended effective July 27, 1981. This amendment results in the repeal of the disqualification for voluntary leaving of employment to follow one's spouse to another locality. The pertinent section of the Law as amended, reads as follows:

> "A disqualification as provided in this subsection shall also apply after a claimant's voluntary separation from his last employment prior to the filing of his claim if such voluntary separation was due to claimant's marriage."
>
> In addition, it is provided that-
>
> "This act shall take effect immediately and the provisions of this act shall be effective in pending determinations of whether good cause existed for voluntary separation from employment."

II. The purpose of this amendment is to place those claimants who voluntarily leave their employment to follow their spouses to another locality, on equal footing with all other claimants who voluntarily quit their jobs. This would allow them to demonstrate that they had good cause to leave.

> (A) To determine whether a claimant has good cause to leave employment to remain part of the marital unit it is necessary to determine whether the spouse who initiated the move had a compelling reason for doing so. Obviously, leaving because of a transfer of job location or to take new employment constitutes a compelling reason. Likewise, a move to a different location because climate or other considerations are essential to the health of the spouse is another example of a compelling reason. Moves occasioned by the health of a child are already considered good cause for both spouses. (A.B. 94,068a and Matter of Russo, 18 AD 2nd 846 reported in the Interpretation Service Index under 1645-6).
>
> It should be noted that the test of compelling reason must be applied to the reason for the move and not to the spouse's reason for leaving employment. Thus a claimant who quits a job to follow a spouse who retired to permanently withdraw from the labor market and move to another locale because of a personal preference for spending his/her retirement there, quits without good cause. Although the spouse who retired quit with good cause, the reason for the move is personal and non compelling.
>
> (B) Even if the claimant's move is clearly attributable to following his/her spouse, local office would still be obliged to determine if claimant's reason for leaving employment is with good cause. Quitting because of a move that extends

claimant's travel time is with good cause only if the resultant travel time is unreasonable for claimant's locality. We would also have to determine, where appropriate, whether claimant could have requested a transfer to, a different location closer to his/her new home.

(C) It is significant that the disqualification for voluntary separation due to marriage remains in the statute. Many marriages involve the relocation of one partner to the domicile of the new spouse. In these circumstances, the disqualification for voluntary separation due to marriage would apply. A claimant would only be said to have followed a spouse if claimant moved from a domicile and terminated employment after the marriage.

(D) In order to resolve the factual problems in these cases, detailed fact finding may be required. In all cases it is recommended that claims personnel obtain the other spouse's Social Security number and determine if that spouse filed a claim, the details regarding that spouse's separation. Proof of the spouse's new employment, medical condition or other reason for moving may be requested as appropriate.

In addition, if a difference in last names gives rise to a question of whether in fact the alleged spouses are legally married, proof of marriage may be required.

III. The new provisions of Law apply to determinations that were pending on July 27, 1987, the date the Governor signed the legislation. A determination is considered "pending" until it has been finally adjudicated. If the claimant was disqualified for voluntary leaving to follow a spouse, prior to this amendment and an Administrative Law Judge decision is pending following a timely hearing request, or claimant makes a timely hearing request, then the determination should be considered in light of the above. Should cases come to local office attention, where Appeal Board or Court decisions are pending on this issue, please inform the Interpretation Section of Adjudication Services Office. If claimant's hearing request or appeal is untimely, then the determination is considered final and not pending.

IV. The following examples illustrate the principles discussed above:

Example 1: Bill and Martha are married and live in Rochester, New York. Bill worked as a nurse at a Rochester hospital. Martha worked for a Rochester employer and is transferred to its Dallas, Texas headquarters. Bill quit his job moved to Dallas with Martha and filed for Unemployment Insurance benefits.

Bill would be eligible for benefits. He quit his job to move with his spouse. This is good cause to relocate.

Example 2: Jack and Jill, a married couple, lived in New York City while she attended college. Jack was working for a New York City company. Upon Jill's graduation she obtained employment in New York City. Jill became pregnant and

she and Jack discussed the question of where to raise their child. They decided that they would prefer to raise their child in Syracuse, the community where they both grew up. For this reason, they both quit their jobs moved to Syracuse and filed for benefits.

In this case, both claimants should be disqualified for voluntary leaving of employment without good cause. Their decision to relocate was mutual. Their reason for leaving - personal preference for a particular community - does not constitute good cause.

Example 3: A married couple, Sue and Bob; live in Buffalo and were employed by a large department store. Sue applied to Julliard Institute in New York City to study music and upon her acceptance left her employment. Bob also quit in order to live with Sue in New York City. Both filed claims for benefits.

Because the reason the marital unit moved, attendance at a school, does not constitute a compelling reason for quitting employment, both claimants would be held to have quit without good cause.

Example 4: John and Mary lived in Elmira, New York. John worked for a nationwide company and was promoted to a job as regional manager in Albany, New York. Mary worked for a utility with offices throughout New York State. Mary quit her job to move to Albany to join John. Had she asked her employer, they would have offered her a position at the same job level in their Albany office. She did not so inquire. Mary filed for benefits.

Although there was a compelling reason for moving the marital unit -John's promotion and transfer- Mary did not have good cause to quit. She could have requested a transfer and failed to do so. Since one would have been granted, her failure to take prudent and reasonable steps to protect her job results in voluntary leaving without good cause.

Example 5: Juan and Natavidad are to be married on Saturday, June 6. Juan lived and worked in New York City. Natavidad lived in Chicago. After their marriage, Juan planned to move to Chicago. He quit his job Friday, June 5. He had two weeks vacation due him which he had requested for Monday, June 8 through Sunday, June 21. Juan then moved to Chicago and filed for benefits.

Juan is disqualified for voluntary leaving of employment due to marriage. He had no intention of continuing his employment after marriage and performed no services after marriage. The fact that he received a paid vacation period subsequent to his leaving does not affect this conclusion.

Example 6: Phil and Marlo, are engaged to be married on Saturday, June 6. Phil lived in Chicago and Marlo in New York City. It was their plan that each would continue their employment in the cities where they lived and spend weekends and

holidays together. After six months Marlo concluded this was not working out. She quit her job to move to Chicago to live with Phil and filed for benefits.

Marlo would be eligible. It was her intention to, and in fact she did, work after her marriage. Her subsequent leaving of employment was to maintain the marital relationship. This is good cause.

V. Complex questions regarding this issue tray be referred through normal supervisory channels to the Interpretation Section of Adjudication Services Office (212) 352-6850.

A-750-2003

Index 1645A-2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July, 1989

INTERPRETATION SERVICE-BENEFIT CLAIMS
VOLUNTARV SEPARATION
FOLLOWING SPOUSE

FOLLOWING SPOUSE-MEDICAL REASON

Quitting a job to move with a family unit to another area is with good cause provided the relocation is for a compelling medical reason. There is no requirement that the relocating claimant be rendering personal care to the member of the family unit.

A.B. 382, 5774A

FINDINGS OF FACT: Claimant was employed as an air-conditioning mechanic by the employer for approximately 22 years. He is married. His wife suffers from asthma, diabetes, arthritis, and a chronic hernia, even after surgery. She was advised by her doctor to relocate to a warmer climate as the cold aggravated her conditions. Claimant and his wife decided to move to Puerto Rico for her health. The claimant resigned from his job effective March 13, 1986 in order to relocate to Puerto Rico with his wife. Effective July 27, 1987, Section 593.1(b) of the Unemployment Insurance Law was amended, repealing that portion of the statute which provided for automatic statutory disqualification for voluntary leaving employment to follow a spouse to another locality. This amendment was to take effect immediately and was to be "effective in pending determinations." The claimant's appeal to the Board was filed July 29, 1987.

OPINION: The credible evidence establishes that the claimant's wife suffered from a variety of serious ailments and was advised by her doctor to relocate to a warmer climate. The claimant left his job to go with his wife to Puerto Rico based on this advice.

The record establishes that the claimant's case was pending resolution at the time Section 593.1(b) of the Law was repelled. Therefore, we conclude, at this time, that her case must be decided under the Law as amended and presently in effect, as the Law was to be effective in pending determinations. Accordingly, we conclude that the claimant is not subject to disqualification for voluntary leaving of employment to follow his spouse to another locality, as presently there is no such statutory disqualification, such statute having been repealed by amendment to the Law.

In view of the foregoing, it is necessary for the Board to rule on the remaining issue of whether claimant had good cause to leave his employment. The purpose of the amendment repealing the automatic, statutory disqualification was to give claimants, who leave their jobs to follow their spouse to another locality, an opportunity to make a showing of good cause for so leaving. See: 210 Session, Laws of New York, Memo. of N.Y.S. Department of Labor, Chapter 418, Page A-897 (McKinneys, Reg. Sess., 1987). Accordingly, the Board must review the reasons claimant has for relocating to an area that requires leaving his employment to determine if good cause exist for such leaving. The Board concludes that the claimant's leaving employment to relocate to Puerto Rico with his family for his wife's health, on the advice of her doctor, was with good cause. The prior requirement that a relocating claimant had to be going to render personal care to his/her spouse need no longer be met. It must only be shown that the spouse's medical reasons for relocating are compelling and supported by the record. To the extent that prior Appeal Board decisions have reached contrary results, we will no longer follow them. Accordingly, we conclude that the claimant is not subject to disqualification.

DECISION: The initial determinations of the Out-of-State Resident Office are overruled.

The decision of the administrative law judge is reversed.

COMMENTS

1. Section 1645 headed "Following Spouse" (Section 593.1(b)(2) and the rules reported therein should be removed from the Interpretation Service Index, as they reflect case law established under the section of law repealed effective July 27, 1987. A new Section 1645, headed "Following Spouse", should be established and this rule numbered 1645-1.

2. In this decision, the Appeal Board has arrived at a test to determine "good cause" similar to that suggested in Field Memorandum 5-87. Having determined, based or credible and reasonable medical evidence, that the claimant's spouse or any other member of the family had a compelling medical reason to relocate, the Board reasoned that this alone gave claimant good cause to quit.

3. The extension of this rule to other family members is consistent with the rule previously reported as A-750-1549.

A-750-1549

Index No. 1645A-8

NEW YORK STATE DEPARTMENT OF LABOR
Unemployment Insurance Division
Adjudication Services Office

June 8, 1961

Interpretation Service-Benefit Claims
VOLUNTARY LEAVING OF EMPLOYMENT
Following Spouse

Appeal Board Case Number 78,484-61

FOLLOWING SPOUSE: COMPELLING REASON, QUESTION OF -- ILLNESS OF CHILD

If a claimant quits his job in order to move to the locality to which his wife had gone because of the child's illness, he is not subject to the disqualification under the "following spouse" provision of the law, even if his quitting for this reason occurs several months after his wife and child had moved, since his leaving was due to compelling circumstances, other than merely following his spouse, in that the well being of his ill child required his physical presence.

Referee's Decision: The initial determination of the Out-of-State Resident Office disqualifying claimant from receiving benefits effective July 20, 1960, on the ground that he voluntarily left his employment to follow his spouse to another locality is overruled.

Appealed By: Industrial Commissioner

Findings of Fact: We have reviewed the evidence adduced at the hearing before the referee and find that such evidence supports the following findings of fact made by the referee:

Claimant, a counterman, filed effective July 25, 1960. By initial determination effective July 20 he was disqualified for voluntary leaving of employment in order to follow his spouse to another locality. Claimant resided with his wife and three children, aged five, four and four months, in New York City. In 1959, claimant's four year old son became seriously ill. He was hospitalized for 20 days. The physician advised that this son be removed to a warm climate for cure. Claimant thereupon sent the child with his wife and the other children to Puerto Rico. He remained in New York City. After several months in Puerto Rico claimant's wife reported that the ill son had improved. Claimant thereupon decided to make a permanent home in Puerto Rico and quit his job in order to move there.

Appeal Board Opinion and Decision: We agree with the referee's conclusion that the disqualification imposed by section 593.1(b) does not apply, because claimant did not voluntarily leave his job to follow his spouse to another locality. In Appeal Board, 79,951-61A we pointed out that, if the proof indicates that the leaving of employment is due to compelling circumstances which constitute good cause within the purview of Section 593.1(a) of the Law, the disqualification provided for in Section 593.1(b) does not apply merely because, as a consequence of the leaving, the claimant joins his spouse. Our aforesaid decision in Appeal Board, 79,951-61A is hereby incorporated herein by reference. We find that in the instant case claimant's voluntary separation from his employment was due to compelling circumstances in that the well being of his child required his physical presence in Puerto Rico. He therefore left his employment with good cause within Section 593.1(a) of the Law and the disqualification provided for in Section 593.1(b) is inapplicable. The initial determination of the Out-of-State Resident Office disqualifying claimant from receiving benefits effective July 20, 1960, on the ground that he voluntarily left his employment to follow his spouse to another locality is overruled. The decision of the referee is affirmed. (May 26, 1961)

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In the Matter of the Claim of Esther H. Kuhns, Appellant. Commissioner of Labor, Respondent.

96743

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

16 A.D.3d 826*; *790 N.Y.S.2d 750*; *2005 N.Y. App. Div. LEXIS 2426

March 10, 2005, Decided
March 10, 2005, Entered

HEADNOTES

[***1] Unemployment Insurance--Benefits--Disqualification.--Senior machine operator who left her job to care for her husband after he was discharged from hospital was disqualified from receiving benefits because she voluntarily left her employment without good cause.

COUNSEL: Esther H. Kuhns, Palmyra, appellant Pro se.

Eliot Spitzer, Attorney General, New York City (Bessie Bazile of counsel), for respondent.

JUDGES: Crew III, J.P., Peters, Spain, Rose and Kane, JJ., concur.

OPINION

[*827] [**750] Appeal from a decision of the Unemployment Insurance Appeal Board, filed August 4, 2004, which ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause.

[**751] Claimant, a senior machine operator, left her job in December 2003 to care for her husband after he was discharged from the hospital. Her employer explained to claimant the option of taking family medical leave, but she nevertheless chose to quit her job. When she inquired about returning to her job the following March, she was informed that it was not available. The Unemployment Insurance Appeal Board denied her application for unemployment insurance benefits on the ground that she voluntarily left her employment without good cause. Claimant [***2] now appeals.

We affirm. We note that, absent a medically compelling reason, an employee who leaves employment to care for a sick relative will be considered to have voluntarily left his or her employment without good cause (*see e.g. Matter of Munoz [Commissioner of Labor], 301 AD2d 1014, 754 NYS2d 704 [2003]*; *Matter of Perrotta [Hudacs], 207 AD2d 934, 616 NYS2d 561 [1994]*; *Matter of Pinto [Manufacturers Hanover Trust--Hudacs], 187 AD2d 902, 590 NYS2d 331 [1992]*). Here, there is no evidence that claimant was advised by her husband's physician that she needed to stop working to care for him. Claimant conceded that, although she was told that someone would need to attend to her husband upon his discharge from the hospital, she was unaware of the duration or extent of the care needed. Finally, claimant elected to quit her job rather than accept a medical leave offered by her employer. Under these circumstances, we conclude that substantial evidence supports the Board's decision that claimant voluntarily left her employment without good cause (*see Matter of Pinto [Manufacturers Hanover Trust--Hudacs], supra at 903*).

Crew III, J.P., Peters, [***3] Spain, Rose and Kane, JJ., concur. Ordered that the decision is affirmed, without costs.

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[*1] In the Matter of the Claim of Eusebio Soler, Appellant. Commissioner of Labor, Respondent.

98261

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2005 NY Slip Op 9385*; *24 A.D.3d 936*; *805 N.Y.S.2d 448*; *2005 N.Y. App. Div. LEXIS 13824

December 8, 2005, Decided
December 8, 2005, Entered

HEADNOTES

Unemployment Insurance--Benefits--Disqualification.--Claimant, who decided to relocate to Puerto Rico in order to care for his ailing mother and left his employment without notifying or thereafter contacting employer, was disqualified from receiving benefits because he voluntarily left his employment without good cause.

COUNSEL: Eusebio Soler, San Antonio, Puerto Rico, appellant Pro se.

Eliot Spitzer, Attorney General, New York City (Bessie Bazile of counsel), for respondent.

JUDGES: Before: Cardona, P.J., Crew III, Peters, Carpinello and Kane, JJ. Cardona, P.J., Crew III, Peters, Carpinello and Kane, JJ., concur.

OPINION

[**936] [***449] Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 28, 2004, which ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause.

In April 2004, claimant visited his mother in Puerto Rico, at which time he learned that she had been diagnosed with lung cancer a year earlier. Shortly after returning to his job at a [**937] printing company, claimant decided to relocate to Puerto Rico in order to care for his ailing mother. Claimant left his employment without notifying or thereafter contacting the employer. Substantial evidence supports the decision of the Unemployment Insurance Appeal Board finding that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause. The record is void of any evidence that his relocation was medically necessary for the care of his mother (*see Matter of Lugo [Commissioner of Labor], 294 AD2d 689, 741 NYS2d 611 [2002]*; *Matter of Carrasquillo [Commissioner of Labor], 250 AD2d 910, 672 NYS2d 513 [1998]*). Moreover, by neglecting to inform the employer of his departure or inquire about a leave of absence, claimant failed to take reasonable steps to protect his employment (*see Matter of Nunez [Commissioner of Labor], 20 AD3d 848, 798 NYS2d 805 [2005]*; *Matter of Uemura [Lenge Rest.--Commissioner of Labor], 308 AD2d 632, 764 NYS2d 213 [2003]*). Accordingly, the Board's decision will not be disturbed.

Cardona, P.J., Crew III, Peters, Carpinello and Kane, JJ., concur. [*2] Ordered that the decision is affirmed, without costs.

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In the Matter of Jo Ryder, Appellant. Louis L. Levine, as Industrial Commissioner, Respondent

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Third Department

45 A.D.2d 905*; *357 N.Y.S.2d 725*; *1974 N.Y. App. Div. LEXIS 4384

July 18, 1974

DISPOSITION: [***1] Decision reversed, with costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings.

JUDGES: Herlihy, P. J., Staley, Jr., Greenblott, Cooke and Kane, JJ., concur.

OPINION

[*905] [**725] Appeal from a decision of the Unemployment Insurance Appeal Board, filed February 7, 1974, which disqualified claimant from receiving benefits on the ground that she was not available for employment. Claimant had worked for the employer for approximately one and one-half years until September 7, 1973, when she went to Arkansas to [**726] care for her ill, aged mother. Claimant submitted medical evidence that her presence in Arkansas to personally provide her mother with physical care was required, and the board affirmed a finding of the referee that claimant's voluntary leaving of employment was not without good cause. However, it was also found that the "doctor attested that it was necessary for claimant to be with her mother at all times", and the referee was of the opinion, which the board affirmed, that "the record indicates that it was necessary for claimant to render full-time personal care for her aged mother." Our review of the record indicates [***2] that this finding and opinion are not supported by substantial evidence, and the decision of the board must be reversed. Respondent in its brief candidly admits that a statement in the transcript of claimant's hearing before the referee to the effect that she "can't do these things" (presumably, attend her mother) "and be available to work also" is incorrect, and that claimant actually stated "I can do those things and be available for work also." Nevertheless, respondent would have us affirm the board's decision solely upon the basis of a statement by the mother's doctor that "someone must do her cooking as well as all housework and it is necessary for someone to be with her." The doctor did not state that the mother required claimant's presence at all times, and this court can take judicial notice of the number of people who are employed full time and also find time to do cooking, housework, and take care of families. In the absence of any further evidence that claimant's mother's needs were such as to require claimant's full-time attendance, the present record was inadequate to support an inference that claimant was unavailable for employment. Since it appears that claimant will [***3] be able to furnish further medical evidence supporting her contention that her mother does not require claimant's full-time care, we feel it appropriate to remit this case to the board for the taking of further proof on the issue of availability for employment.

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