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David R. Packard

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UNEMPLOYMENT WITHOUT FAULT: DISQUALIFICATIONS FOR UNEMPLOYMENT INSURANCE BENEFITS

DAVID R. PACKARD†

I. INTRODUCTION

EVERY STATE has enacted comprehensive unemployment insurance benefit programs covering almost every sector of the labor force.[1] Enacted in 1935 as part of the Social Security Act, these programs now play a vital role in maintaining the economic security of American workers. Unemployment compensation in the United States is a federally aided, state administered insurance program[2] which relies heavily on employer contributions.[3] While many aspects of unemployment insurance benefits vary from state to state,[4] the heart of the

† A.B., University of California at Berkeley, 1964; J.D., 1967. Member of the California and Maryland Bars.

1. Gradually, unemployment insurance programs have been expanded to cover additional classes of employees. The federal enabling legislation, Title III of the Social Security Act, 42 U.S.C. §§ 501 to 503 (1970), excluded all farm workers, domestic workers, self-employed persons, employees of non-profit organizations and casual employees of an employer or employing unit with less than eight workers. Coverage now typically includes some classes of agricultural workers, seasonal labor and employees of non-profit entities, regardless of the size of the unit. *See generally* T. BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE 1-18 (1962). *See also* Witte, *Development of Unemployment Compensation,* 55 YALE L.J. 21 (1945). Elective coverage provisions in the various statutes allow for inclusion of otherwise excluded employees. *See, e.g.,* CAL. UNEMP. INS. CODE §§ 701 *et seq.* (West Supp. 1971).

2. Assistance to eligible states, in the form of administrative grants, is authorized by section 302 of the Social Security Act, 42 U.S.C. § 502 (1970). State statutes expressly provide for receipt of federal grants and conform to all mandatory federal requirements. *See, e.g.,* CAL. UNEMP. INS. CODE § 451 (West 1956); MICH. STAT. ANN. § 17.511 (1968); N.Y. LABOR LAW § 536 (McKinney 1965); PA. STAT. tit. 43, § 767 (1964). Federal grant requirements concern the procedural or administrative aspects of state programs rather than their substantive parts. Eligibility conditions and disqualifications for benefits derive solely from state law.

3. Employer contributions are computed on the basis of a complex formula, taking into account, among other factors, the size of the work force and its "experience rating" or actuarial risk. Ineligible unemployment claimants are not counted against the employer in determining his experience rating. Since unemployment insurance taxes are a cost of doing business, the employer has a financial interest in contesting claims. *See generally* Arnold, *Experience Rating,* 55 YALE L.J. 218 (1945). Originally, the employee contributed to the insurance system by means of a wage deduction, but this feature has been eliminated. *See, e.g.,* CAL. UNEMP. INS. CODE § 976 (West Supp. 1971).

4. The amount and duration of benefits vary greatly from state to state. *See generally* T. BRODEN, *supra* note 1, at 312. According to Professor Broden, these differences cannot be explained in terms of cost of living or wage scale variances. They may, however, represent a state's unwillingness to risk losing industry by imposing on employers the additional taxes necessary to support increased benefits. Another variable among jurisdictions is the extent and duration of suspending unemployment benefits due to disqualification. Some states merely impose various waiting periods while others cancel all accrued benefits. *See* Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 YALE L.J. 147 (1945).

unemployment compensation system, and the rationale for its eligibility conditions, is that the worker must be unemployed through no fault of his own.[5] The concept of involuntary unemployment is an elusive one; the most common issues in the day to day administration and appeals of unemployment insurance claims involve eligibility conditions which are based on that concept. Those eligibility conditions involve: (1) whether the employee was discharged for willful misconduct; (2) whether the employee voluntarily quit his last employment without good cause; and (3) whether he is able and available for employment during the period of compensation. These eligibility conditions are found in some form in every state statutory program for unemployment insurance benefits.[6] The primary aid of unemployment insurance programs is almost universally accepted. It is succinctly put in a leading Pennsylvania case:

> This is a statute enacted to provide for the common good in an attempt to provide economic security for a time, through referred jobs in productive industry for the unemployed, without the stigma of poor relief, as a substitute for the dole or made–work. Its purpose is to prevent indigence due to involuntary unemployment through no fault of the employee.[7]

In this sense, unemployment insurance cannot be viewed in isolation, but must be seen as a part of a broader spectrum of social legislation, including workman's compensation, social security, public assistance and state disability insurance.[8] Benefits once granted are generally exempt from execution or attachment, apparently to effectuate the

5. Every state has enacted an unemployment insurance program that incorporates in some form the phrase "unemployed through no fault of his own." *See, e.g.,* CAL. UNEMP. INS. CODE § 100 (West 1956); MICH. STAT. ANN. § 17.531 (Supp. 1971); N.Y. LABOR LAW § 501 (McKinney 1965); PA. STAT. tit. 43, § 752 (1964).

6. *See, e.g.,* CAL. UNEMP. INS. CODE §§ 1256, 1257 (West Supp. 1971); MICH. STAT. ANN. § 17.531 (1968); N.Y. LABOR LAW § 593 (McKinney 1965); PA. STAT. tit. 43, § 802 (1964).

7. Barclay White Co. v. Unemployment Comp. Bd., 356 Pa. 43, 51, 50 A.2d 336, 341, *cert. denied,* 332 U.S. 761 (1947), *quoting* Seifing Unemp. Comp. Case, 159 Pa. Super. 94, 107–08, 46 A.2d 598, 739 (1946) (dissenting opinion). *See also* Portland Cement Co. v. Unemployment Ins. App. Bd., 178 Cal. App. 2d 263, 3 Cal. Rptr. 37 (1960).

Additional objectives of unemployment compensation include: (1) encouraging full and stable employment by means of financial incentives to employers, Bliley Elec. Co. v. Unemployment Comp. Bd., 158 Pa. Super. 548, 45 A.2d 898 (1946); (2) promoting conciliation and harmony in industrial labor relations, Douglas Aircraft Co. v. Unemployment Ins. App. Bd., 180 Cal. App. 2d 636, 643–48, 4 Cal. Rptr. 723, 729–31 (1960); and (3) rehabilitating and retraining for employment those unemployed who do not have or who have lost skills demanded by the labor market, *see, e.g.,* Human Resources Development Act of 1968, CAL. UNEMP. INS. CODE § 9000 *et seq.* (West Supp. 1971), which is administered in conjunction with the federal Manpower Development & Training Act of 1965, 42 U.S.C. § 2571 *et seq.* (1970).

8. *See generally* T. BRODEN, *supra* note 1; Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets,* 53 CALIF. L. REV. 207 (1965). *See* pp. 637–38 and accompanying notes *infra.*

legislative aim of alleviating economic suffering among those involuntarily unemployed.[9] Given the apparent liberal construction and interpretation of unemployment insurance law — founded in part upon the purpose of affording economic security to the unemployed[10] — it is surprising that the reported case law and administrative decisions usually involve cases denying benefits. This may reflect the failure of administrative agencies and courts to resolve doubtful cases in favor of the employee. The paradox can also be understood in light of the administrative procedure applicable to unemployment insurance claims, which is based upon the premise that unsophisticated and unrepresented claimants will be able to comprehend and fully present their cases.[11] In order to administer the unemployment insurance program, state departments of employment and their various branch offices are given statutory power and responsibility for the processing and initial determination of claims. Claim interviewers have the responsibility to gather all necessary evidence to decide the eligibility of a multitude of claimants.[12] The task becomes enormous when it is considered that the goal of alleviating economic hardship depends heavily on prompt, efficient and accurate administration.[13] Thus, administrative realities often help to shape the substantive rules of disqualification. For this

9. *See, e.g.*, CAL. UNEMP. INS. CODE § 100 (West 1956); N.Y. LABOR LAW § 595 (McKinney 1965); OHIO REV. CODE ANN. § 4141.32 (Page 1965); PA. STAT. tit. 43, § 863 (1964).

10. Because the unemployment compensation statute is remedial and aims to alleviate economic distress due to involuntary unemployment, it should be construed liberally to achieve these goals. Garcia v. Industrial Accident Comm'n, 41 Cal. 2d 689, 693, 263 P.2d 8, 10–11 (1953), *cited in* Portland Cement Co. v. Unemployment Ins. App. Bd., 178 Cal. App. 2d 263, 270, 3 Cal. Rptr. 37, 41 (1960). *See also* Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 107 (1961); American Steel & Wire Co. v. Unemployment Comp. Bd., 161 Pa. Super. 622, 56 A.2d 288 (1948).

11. The adjudication of benefit claims is not an adversary proceeding. However, the employer is usually represented by himself, or in his absence, by the department. The department's duty to investigate and contest doubtful claims, initially or on appeal, flows from its statutory responsibility to protect the insurance fund from ineligibles. *See* Miller v. F. W. Woolworth Co., 359 Mich. 342, 102 N.W.2d 728 (1960); Krause v. A. M. Karaghensian, Inc., 13 N.J. 446, 455, 100 A.2d 277, 286 (1953); Stanley Mfg. Co. v. Unemployment Comp. Bd., 208 Pa. Super. 291, 222 A.2d 468 (1966).

12. *See, e.g.*, CAL. UNEMP. INS. CODE §§ 1326 to 1328 (West Supp. 1971); N.Y. LABOR LAW § 597 (McKinney 1965). Following the determination regarding eligibility, the employer and employee receive written notice of the decision, which becomes final unless a prompt appeal is made in writing requesting a hearing to present evidence to a referee or examiner. If an employer appeals from a notice upholding the claim, state statutes often provide for withholding actual payment from the employee until the referee affirms the award of benefits. *See, e.g.*, CAL. UNEMP. INS. CODE § 1335 (West 1956); N.Y. LABOR LAW § 598 (McKinney 1965); PA. STAT. tit. 43, § 821 (1964). The enforcement of these provisions is now barred by the recent decision of the United States Supreme Court in Department of Human Resources v. Java, 402 U.S. 121 (1971), which found them in conflict with the mandatory provisions of 42 U.S.C. § 503(a)(1) (1970) (requiring payment of benefits "when due").

13. Department of Human Resources v. Java, 402 U.S. 121, 130–33 (1971).

reason, procedural law is covered in this article, although the focus is on substantive law.

The purpose of this article is to analyze the current, major issues of disqualification on the basis of legislative intent and purposes of unemployment compensation. The following discussion will center on the two major areas of ineligibility: (1) voluntary leaving without good cause; and (2) willful misconduct. In conjunction with both topics, the concept of "constructive quitting" will also be examined. The subjects of unemployment arising out of labor disputes and disqualifications for refusal of suitable employment are omitted.[14]

II. VOLUNTARY LEAVING WITHOUT GOOD CAUSE

An unemployed claimant who voluntarily leaves his last job is ineligible for unemployment insurance benefits unless he can establish that he had good cause for leaving.[15] The threshold question, then, in deciding the claim is whether the employee left the job or was discharged by the employer. Voluntary leaving and misconduct are complementary sides of the same coin in which the ultimate issue is the same: whether the employee reasonably could have acted to avoid unemployment. Logically, no distinction in analysis or result should flow from the rather difficult process of classification. However, procedural and substantive rules do differ depending on whether the separation is classified as a discharge or a quit, and it is often quite difficult to make such a distinction. For example, the employee who walks off the job after being berated by the boss and given an ultimatum about his work can be considered as leaving or being fired, depending upon one's point of view. The resolution of this initial issue depends upon the factual circumstances at the time of separation from employment.[16]

14. Labor disputes and trade dispute disqualifications are covered in the following articles: Feldman, *The Garden of Live Flowers: Terminating the Trade Dispute Disqualification Under the California Unemployment Insurance Act*, 27 So. CALIF. L. REV. 3 (1953); Riesenfeld, *supra* note 8, at 218-22. Refusal of suitable employment as a disqualification is discussed in Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134 (1945); Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286 (1955).

15. *See, e.g.*, CAL. UNEMP. INS. CODE § 1256 (West 1956); MICH. STAT. ANN. § 17.531 (1968); N.Y. LABOR LAW § 593 (McKinney 1965); PA. STAT. tit. 43, § 802 (1964).

16. *See, e.g.*, White v. Unemployment Comp. Bd., 200 Pa. Super. 357, 188 A.2d 759 (1963). In this case, the court found that the claimant was fired and did not quit when he walked off the job after the boss scolded him and said "there is the door." *See also* Yellow Cab Co. v. Unemployment Ins. App. Bd., 194 Cal. App. 2d 343, 15 Cal. Rptr. 425 (1961); *In re* Eddie Jones, California Precedent Dec. No. 106, *compiled in* CALIF. INDEX — DIGEST OF PRECEDENT DECISIONS 78 (Aug. 1971). In the latter case, a majority held that a seaman was discharged for misconduct based on insubordination even though he remained on board for one week after the incident and left under the mandatory terms of a collective bargaining agreement. A minority of the Appeals Board found that the immediate circumstances and the time of leaving were involuntary and not subject to disqualification. According to the minority,

In most cases, the employer will seek to establish, and benefit from, a finding that the employee quit the job, whereas the employee will seek to establish a finding of discharge by the employer. The reason for such positions lies in the fact that all states impose the difficult burden of proving scienter on the employer in misconduct cases.[17] In order to disqualify a claimant on the basis of misconduct, some evidence of knowing or reckless conduct by the employee either in his job or his job related activities must be shown.[18] In contrast, in the voluntary quit situation, the employee's state of mind is generally not at issue so long as the leaving itself is volitional. The theoretical divergence of these concepts may be less critical in those jurisdictions which apply to a firing the doctrines of "constructive quit," "provocation of discharge" or "abandonment of employment."[19] The rationale behind these concepts is that an employee who brings on his own unemployment should not have the benefit of the same substantive and procedural advantages afforded a claimant whose employer asserts that the discharge was for misconduct. In some cases, however, these concepts have been misapplied or expanded to dilute the element of scienter in cases of discharge for misconduct. It should be noted that these doctrines have evolved without statutory basis in most states and generally have come about through administrative rules.

Once the separation has been termed a voluntary leaving on the basis of circumstances surrounding the departure, the "good cause" exception must be explored. In cases of voluntary quitting, the employee has the burden of establishing that his leaving was with good cause.[20] In addition, cases of voluntary leaving do not have the same

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retention of the employee aboard the ship after the incident condoned the alleged misconduct.

17. Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 339 P.2d 947 (1959); *cf.* Rasmussen v. Gem State Packing, 83 Idaho 198, 360 P.2d 90 (1961) (placing the burden of proof on employees to establish their eligibility, including establishing good cause for leaving).

18. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941), *cited in* Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 724, 339 P.2d 947, 950–51 (1959).

19. This concept of "constructive quitting" or "provocation of discharge" appears strongest in New York. *See* Monahan v. Catherwood, 27 App. Div. 2d 781, 277 N.Y.S.2d 229 (1967). *See* pp. 652–53 and accompanying notes *infra*. California has applied the concept in at least one appellate case and in several benefit decisions. Sherman–Bertram, Inc. v. Department of Emp., 202 Cal. App. 2d 733, 21 Cal. Rptr. 130 (1962).

20. The difficulty of proving good cause for a voluntary leaving is stated, somewhat whimsically, by the Pennsylvania supreme court:

> "[G]ood cause" as used in the Act is obviously meant such a cause as justifies an employee's voluntarily leaving the ranks of the employed . . . . For example, if an employee was compelled to work in a position where his life was constantly menaced by a heavy object over his head which was suspended from the ceiling by a palpably inadequate or defective chain, he could successfully plead "good cause" for voluntarily leaving his employment. The same would be true if he was compelled to work under inexcusable conditions which were palpably

procedural advantages as cases of discharge for misconduct.[21] In some states, presumptions are applied to help resolve the issue of whether an employee left his job or was fired.[22] A controlling factor often involves appraising the objective manifestations of the employee's intent at the time of separation; that is, whether his actions are consistent with a real desire to continue working.[23] Thus, if an employee leaves

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detrimental to his health, such as working in a mine or a factory where the supply of fresh air was obviously insufficient to sustain life.

Sun Shipbldg. & Dry Dock Co. v. Unemployment Comp. Bd., 358 Pa. 224, 228, 56 A.2d 254, 258 (1948). An exception, California's rule, different from the majority of states, places the burden of proof on the employer in both misconduct and voluntary quit cases. Yellow Cab Co. v. Unemployment Ins. App. Bd., 194 Cal. App. 2d 343, 15 Cal. Rptr. 425 (1961). In order to disqualify an employee who is discharged, the employer must establish willful misconduct connected with the job. *See, e.g.,* Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 339 P.2d 947 (1959).

21. One major procedural disadvantage involves a somewhat more limited judicial review of a disqualification based on voluntary leaving, as opposed to misconduct. The reviewing court will usually show great deference to the fact findings and expertise of the administrative agency. *See, e.g.,* Weinberger v. Catherwood, 22 App. Div. 2d 995, 254 N.Y.S.2d 878 (1964). In California, however, provisions for trial de novo allow the court to make independent determinations of factual issues. Thomas v. Employment Security Comm'n, 39 Cal. 2d 501, 247 P.2d 561 (1952).

Secondly, unlike voluntary leaving situations, if the issue involves a discharge for willful misconduct, the administrative agency and the reviewing court may require some competent evidence to establish misconduct. Huddleston v. Brown, 124 So. 2d 225 (La. Ct. App. 1960) ("legal, competent and sufficient proof"); Philadelphia Transp. Co. v. Unemployment Comp. Bd., 191 Pa. Super. 91, 155 A.2d 377 (1959) (affirming the Board's refusal to uphold a finding of misconduct based on hearsay written notes of anonymous investigators for a transit company that observed violations of company fare rules). *See also* Paulsen v. Catherwood, 27 App. Div. 2d 493, 280 N.Y.S.2d 491 (1967); *cf.* Redner v. Workman's Comp. App. Bd., 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971). In *Redner,* the court disapproved of the admission of non-disablement motion pictures taken furtively by investigators. Normally, any relevant evidence may be offered at such hearings, as the usual technical rules of evidence are not applied. Rather, the hearings are conducted in such a manner as to ascertain the substantial rights of the parties, admitting almost any relevant evidence. *See, e.g.,* CAL. UNEMP. INS. CODE § 1952 (West Supp. 1971); N.Y. LABOR LAW § 622 (McKinney 1965).

22. *See, e.g.,* CAL. UNEMP. INS. CODE § 1030(c) (West Supp. 1971). The cited section provides for a rebuttable presumption of leaving without good cause where an employee leaves the job or is absent without notifying the employer of the reasons therefor. It apparently overrules the decision in Yellow Cab Co. v. Unemployment Ins. App. Bd., 194 Cal. App. 2d 343, 15 Cal. Rptr. 425 (1961). The *Yellow Cab Co.* court held that unexplained absence from work was, under the circumstances, a voluntary quit and that the employer did not sustain the burden of proving that the employee left without good cause. The court refused to accept a presumption of lack of good cause from unexplained absence.

Other states have, by judicial interpretation, inferred a voluntary quit without good cause from unexplained absence from work without notice to the employer. *E.g.,* Williams v. Catherwood, 21 App. Div. 2d 886, 278 N.Y.S.2d 4 (1967); Maltese v. Unemployment Comp. Bd., 190 Pa. Super. 123, 152 A.2d 773 (1959).

23. Bodinson Mfg. Co. v. Employment Comm'n, 17 Cal. 2d 321, 109 P.2d 935 (1941), *cited in* Yellow Cab Co. v. Unemployment Ins. App. Bd., 194 Cal. App. 2d 343, 15 Cal. Rptr. 425 (1961). *See also* Warner Co. v. Unemployment Comp. Bd., 396 Pa. 545, 153 A.2d 906 (1959). In *Warner,* the court awarded benefits to an employee who was forced to retire under compulsory provisions of a collective bargaining contract. Another prevalent issue of volition in leaving the job concerns termination of employment of pregnant female workers who are required to leave under such conditions by the employment contract. Generally, if the employee is able and willing to work, and leaves solely because of the contract, benefits will be allowed. *See* Douglas Aircraft Co. v. Unemployment Ins. App. Bd., 180 Cal. App. 2d 636, 4 Cal. Rptr. 723 (1960); Myerson v. Board of Rev., 43 N.J. Super. 196, 128

the job, but his employer forced him to go, his claim must be analyzed as a discharge rather than an involuntary leaving. By the same token, if an employer discharges an employee, but the surrounding circumstances indicate that the voluntary conduct of the employee forced or provoked the firing, then the claim is usually analyzed under the doctrine of "constructive quit" or "provocation of discharge."[24]

The notion of voluntary quitting without good cause involves two levels of volition: (1) the immediate circumstances of leaving must reflect a subjective intent of the employee to terminate; and (2) the act of leaving must be an exercise of free will and not the product of other compelling reasons or pressures forcing him to leave. It is the second level of the volition that concerns the ultimate issue of whether or not the employee has quit for good cause.

The general standard of good cause involves a strict test of the employee's good faith in leaving the job and the substantiality of the circumstances and pressures which overcome his desire to stay. In *Portland Cement Co. v. Unemployment Insurance Appeals Board*,[25] the court described the test as follows:

> Of course, "good cause" and "personal reasons" are flexible phrases. . . . Reducing them to a fixed, definite and rigid standard, if desirable, is necessarily difficult, if not impossible. However, in whatever context they appear, they connote, as minimum requirements, real circumstances, subtantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.[26]

This standard apparently represents a minority view, for in most states good cause must involve the pressures or circumstances of the job itself.[27] Personal or extraneous reasons, compelling though they may

A.2d 15 (1957); Smith v. Unemployment Comp. Bd., 396 Pa. 557, 154 A.2d 492 (1959), *citing* Warner Co. v. Unemployment Comp. Bd., 396 Pa. 545, 153 A.2d 906 (1959). *Contra*, Bergseth v. Zinsmaster Baking Co., 252 Minn. 63, 89 N.W.2d 172 (1958) (holding that an employee who automatically retired from her employment pursuant to the terms of a collective bargaining agreement was not entitled to receive unemployment benefits). The volitional element of the original contract negotiation in a collective bargaining agreement is generally deemed too remote and limited to effect a waiver of important rights. Douglas Aircraft Co. v. Unemployment Ins. App. Bd., 180 Cal. App. 2d 636, 646–48, 4 Cal. Rptr. 723, 729–31 (1960). In Employment Security Comm'n v. Appeal Bd., 356 Mich. 665, 97 N.W.2d 784 (1959), the court held that an employee did not voluntarily leave the job when he was convicted and imprisoned as a result of driving offenses.

24. *See* pp. 653–54 *infra*.

25. 178 Cal. App. 2d 263, 3 Cal. Rptr. 37 (1960).

26. *Id.* at 272–73, 3 Cal. Rptr. at 43, *citing* Bliley Elec. Co. v. Unemployment Comp. Bd., 158 Pa. Super. 548, 45 A.2d 898 (1946). A similar standard is quoted in Department of Indus. Rel. v. Mann, 35 Ala. App. 505, 510, 50 So. 2d 780, 784 (1950).

27. *See, e.g.*, MICH. STAT. ANN. § 17.531 (Supp. 1971). The cited section qualifies a claimant who "[h]as left his work voluntarily without good cause attributable to his employer . . . ."

be, are usually disqualifying.[28] Moreover, some practical differences exist between the two views; for example, while all jurisdictions permit the award of unemployment compensation if the working conditions caused the illness which compelled the employee to leave the job,[29] the majority, unlike the minority, would exclude benefits from claimants unable to work due to mental or physical health problems aggravated, although not caused, by working conditions.[30]

Most claimants who voluntarily leave their job probably do so for work-related and not personal reasons. What then are the working conditions which will afford good cause for leaving? Exploitation of employees, either in the form of unsafe and unhealthy facilities or in the form of depressed wages, is universally considered to be a compelling reason for quitting.[31] Such practices conflict with the purposes of the unemployment compensation system which seek to encourage enlightened employment practices and to protect workers from unsafe or unhealthy facilities.[32] Charging the reserve account of such em-

28. *See, e.g.,* N.Y. LABOR LAW § 593(b) (McKinney 1965), which expressly disqualifies an employee who loses employment due to marriage or relocation in another area with his or her spouse. *See also* OHIO REV. CODE ANN. § 4141.29 (D)(2)(C) (disqualifying an employee who quit for marital, parental, or other domestic obligations); Hargrove v. Brown, 247 La. 689, 174 So. 2d 120 (1965); Sheffield v. Heard, 92 So. 2d 295 (La. Ct. App. 1957). *Contra,* Berry, Whitson & Berry v. Division of Emp. Security, 21 N.J. 73, 120 A.2d 742 (1956). Early Pennsylvania cases suggested that an employee who left the job to relocate with her husband or to get married had good cause for voluntarily leaving. Department of Labor & Indus. v. Unemployment Comp. Bd., 154 Pa. Super. 250, 35 A.2d 739 (1944). However, section 802 (PA. STAT. tit. 43, § 802 (1964)) was amended in 1953 to disqualify persons leaving jobs due to marital or domestic circumstances. Watson v. Unemployment Comp. Bd., 176 Pa. Super. 490, 109 A.2d 215 (1955). If the jurisdiction does not demand that good cause be work-connected, then compelling family circumstances may be good cause for leaving. Lauria v. Catherwood, 18 App. Div. 2d 848, 236 N.Y.S.2d 168, *amended on other grounds,* 18 App. Div. 2d 1047, 238 N.Y.S.2d 920 (1963). *But cf.* CAL. UNEMP. INS. CODE § 1264 (West 1956), which bars benefits to a claimant who leaves to get married or relocate with his or her spouse, unless such person is the sole or major support of the family.

29. The payment of benefits is not actually allowed until the claimant is available and able to do suitable work. *E.g.,* CAL. UNEMP. INS. CODE § 1253(c) (West Supp. 1971); MICH. STAT. ANN. § 17.531 (Supp. 1971); N.Y. LABOR LAW § 591(2) (McKinney 1965). A supplemental program of state disability benefits usually fills the gap until the claimant recovers and is eligible for unemployment. *See, e.g.,* CAL. UNEMP. INS. CODE § 2607 (West 1956). Of course, work-connected injury or illness may be the subject of an additional claim under the workmen's compensation laws. Benefits paid by the unemployment insurance system or state disability fund pending the workmen's compensation claim will be priority liens on any award. *See, e.g.,* CAL. LABOR CODE § 4903 (West Supp. 1971); Garcia v. Industrial Accident Comm'n, 41 Cal. 2d 689, 263 P.2d 8 (1953).

30. *See, e.g.,* West Point Mfg. Co. v. Keith, 35 Ala. App. 414, 47 So. 2d 594 (1950). There, benefits were not allowed to an employee who left a job that aggravated a pre-existing glandular condition but did not cause the disability. The minority view is expressed in Sledzianowski v. Unemployment Comp. Bd., 168 Pa. Super. 37, 76 A.2d 666 (1950), where the court held that the claimant's refusal of an offer of employment was with good cause in view of his previous medical history.

31. Robertson v. Brown, 139 So. 2d 226 (La. Ct. App. 1962) (reduction of wage from $60.00 to $37.69 weekly gave claimant good cause for leaving).

32. Many statutes bar the suspension of benefits for refusal to accept work at wages, hours or conditions substantially lower than the prevailing ones. *See, e.g.,*

ployers punishes those practices and deters future violations. Before leaving the job, however, the employee has a legal duty to call the defects to the employer's attention and to permit him to remedy them.[33] Moreover, minor health or safety violations and difficult job conditions are not compelling reasons for leaving.[34]

The determination of whether low wages constitute good cause for leaving employment varies from state to state. If the wage is materially lower than the prevailing wage for that work in the community, most jurisdictions do not disqualify the claimant.[35] Union scale is not generally taken as the prevailing wage rate. If low wages reach the point of labor exploitation, of course, every state recognizes the worker's eligibility for benefits if he leaves the job. A related question is whether a reduction of wages or worsening of working conditions after the worker has been on the job will constitute good cause. The prevailing rule is that a reduction in wages must be substantial in order to constitute good cause for voluntary leaving.[36] While this principle is universally accepted, its practical application varies considerably. Thus, in a California case,[37] a waitress whose wages were reduced by 25 per cent was not disqualified for leaving, while in a Pennsylvania case,[38] a worker whose wages were reduced 46 cents per hour from $2.12 to $1.68 was disqualified for leaving without good cause. Apart from wage reductions, other economic pressures related to the job may be considered cause for leaving. Where an employee had his entire wages garnished for two weeks to pay back taxes on a low-paying job, he was qualified for benefits even though he voluntarily left the job.[39] If working conditions other than wages

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CAL. UNEMP. INS. CODE § 1259(b) (West 1956); MICH. STAT. ANN. §§ 17.531(6), 17.531(7) (Supp. 1971); N.Y. LABOR LAW § 593(2)(d) (McKinney 1965); WIS. STAT. ANN. § 108.04(9) (1957).

33. Kansky v. Catherwood, 27 App. Div. 2d 887, 277 N.Y.S.2d 777 (1967).

34. *See* Department of Indus. Rel. v. Mann, 35 Ala. App. 505, 50 So. 2d 780 (1950), wherein work conditions involving "petty irritations" were held not to be good cause for leaving.

35. *See* note 32 *supra;* T. BRODEN, *supra* note 1, at 443.

36. Alabama Textile Prod. Corp. v. Rodgers, 38 Ala. App. 206, 82 So. 2d 267 (1955); Bunny's Waffle Shop, Inc. v. Employment Comm'n, 24 Cal. 2d 735, 151 P.2d 224 (1944); McGinnis v. Moreau, 149 So. 2d 188 (La. 1963); Martin v. Unemployment Comp. Bd., 196 Pa. Super. 293, 175 A.2d 116 (1961).

37. Bunny's Waffle Shop, Inc. v. Employment Comm'n, 24 Cal. 2d 735, 151 P.2d 224 (1944).

38. Martin v. Unemployment Comp. Bd., 196 Pa. Super. 293, 175 A.2d 116 (1961). *See also* Fegely Unemployment Comp. Case, 192 Pa. Super. 141, 159 A.2d 574 (1960) (claimant disqualified when he refused a different job in the company at a reduction in hourly wages from $2.39 to $1.89). *In re* Anderson, 39 Wash. 2d 356, 235 P.2d 303 (1951) (held that a 12 per cent pay reduction was not good cause for leaving).

39. Jones v. Catherwood, 19 App. Div. 2d 330, 242 N.Y.S.2d 1004 (1963), *aff'd mem.*, 14 N.Y.2d 558, 198 N.E.2d 40, 248 N.Y.S.2d 652 (1964); *cf.* Larson v. Employment Security Comm'n, 2 Mich. App. 540, 140 N.W.2d 777 (1966). In *Larson,* the court held that a claimant who, under economic duress, signed a settlement

deteriorate, then again the employee must establish that they are material and try to mediate his grievance with the employer before leaving.[40] Sometimes unemployment results from the employee's inability or incapacity to do the job, as where he engages in conduct leading to license suspension or incarceration.[41] While these issues usually arise in misconduct cases, they also come up in voluntary leaving cases as well.[42] Although a few Michigan cases find good cause or that the leaving was involuntary in these circumstances,[43] an award of benefits is rare, even if the violations leading to the license suspension or incarceration were negligent acts.[44] Thus, even if the immediate circumstances of leaving are involuntary, such as missing work due to incarceration or license suspension, a disqualification for "voluntary leaving" results because of the element of volition in the drinking, driving or other act just prior to the involuntary condition. If the factor of volition is remote in time and causation, then logically the leaving should be deemed involuntary and not disqualifying.

III. MISCONDUCT

While the issues of volition and good cause are difficult ones, the most mysterious area of unemployment insurance lies in the meaning of "willful misconduct." A disqualification based on willful misconduct is a universal feature of the unemployment insurance scheme. One who brings about his own unemployment, by circumstances under his control, becomes voluntarily unemployed or unemployed by his

agreement providing for termination of his employment did not voluntarily leave his work without good cause. For a discussion of the application of misconduct disqualifications to employees whose wages are garnished, *see* p. 647 and accompanying notes *infra*.

40. Bunny's Waffle Shop, Inc. v. Employment Comm'n, 24 Cal. 2d 735, 151 P.2d 224 (1944). An example of immaterial changes in working conditions is illustrated by a New York case where a taxi driver left his job when told to drive an automatic shift cab after forty years of driving a standard shift. Fitzsimmons v. Catherwood, 10 App. Div. 2d 738, 197 N.Y.S.2d 498 (1960).

41. *See* pp. 650–52 and accompanying notes *infra*.

42. Employment Security Comm'n v. Appeal Bd., 356 Mich. 665, 97 N.W.2d 784 (1959) (absence due to incarceration); Echols v. Employment Security Comm'n, 4 Mich. App. 173, 144 N.W.2d 666 (1966) (taxi driver unemployed as a result of a license suspension denied compensation); Donahue v. Catherwood, 33 App. Div. 2d 848, 305 N.Y.S.2d 828 (1969) (license suspension due to refusal to take blood test for alcohol held to be leaving employment without good cause).

43. Sullivan v. Appeal Bd., 358 Mich. 338, 100 N.W.2d 713 (1960) (claimant missed work due to incarceration following conviction for drunkenness); Employment Security Comm'n v. Appeal Bd., 356 Mich. 665, 97 N.W.2d 784 (1959) (awarding benefits to a claimant who missed work for fifteen days during incarceration for driving without a license). The Michigan statute now provides a specific disqualification for claimants who lose their jobs as a result of convictions, unless they are given "day parole" or sentenced to less than ten days for a traffic offense. MICH. STAT. ANN. § 17.531(1)(f) (Supp. 1971).

44. *See, e.g.*, Echols v. Employment Security Comm'n, 4 Mich. App. 173, 144 N.W.2d 666 (1966); Donahue v. Catherwood, 33 App. Div. 2d 848, 305 N.Y.S.2d 827 (1969).

own fault. The general thrust of the disqualification has been stated in the case of *Maywood Glass Co. v. Stewart*:[45]

> [T]he term "misconduct" . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.[46]

The four elements of willful misconduct are: (1) a material duty owed by the claimant to the employer; (2) a substantial breach of that duty; (3) such breach being a willful or wanton disregard of that duty; and (4) a disregard of the employer's interests.[47] Despite this statement and other attempts to clarify its meaning, "willful misconduct" is almost inherently vague and imprecise. The most troublesome aspect is the application of the scienter element, since direct proof of malice or ill-will is rarely available. As a result, administrative agencies and reviewing courts permit indirect and circumstantial evidence and allow a presumption of scienter in various cases.[48] Employers have attempted to aid in ascertaining misconduct to some extent by adopting company rules governing the employment relationship and evidencing material duties owed by employees.[49] By applying the doctrines of "constructive quit" and "provocation of discharge," the issues

45. 170 Cal. App. 2d 719, 339 P.2d 947 (1959), *citing* Boynton Cab Co. v. Neubeck, 237 Wis. 249, 253, 296 N.W. 636, 640 (1941). The court in *Maywood Glass Co.* upheld an allowance of benefits to an employee discharged for having packed defective glassware. For a similar interpretation of willful misconduct, *see* Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 907 (1961).

46. 170 Cal. App. 2d at 724, 339 P.2d at 950–51.

47. Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 724, 339 P.2d 947, 950–51 (1959); Sewell v. Sharp, 102 So. 2d 259, 261 (La. Ct. App. 1958); Boynton Cab Co. v. Neubeck, 237 Wis. 249, 253, 296 N.W. 636, 640 (1941). The issue of misconduct does not test the reasonableness of discharging the employee. Reed v. Employment Security Comm'n, 364 Mich. 395, 397, 110 N.W.2d 907, 908 (1961).

48. Stout v. Department of Emp., 172 Cal. App. 2d 666, 342 P.2d 918 (1959) (circumstantial evidence of disloyalty); Phillips v. Appeal Bd., 373 Mich. 210, 128 N.W.2d 527 (1964) (inferring willfulness from several acts of bad driving causing license revocation); Rivera v. Catherwood, 28 App. Div. 2d 1036, 283 N.Y.S.2d 676 (1967) (permitting use of circumstantial evidence and double-hearsay to prove employee's conduct of illegal activities on business premises).

49. *See, e.g.*, Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 907 (1961) (company rule against successive wage garnishments); Glassmith v. Catherwood, 27 App. Div. 2d 584, 275 N.Y.S.2d 411 (1966) (company rule against conversing with cashier).

of willful misconduct have sometimes been avoided. Finally, where intent or willfulness are unclear, a continued pattern of poor conduct or rule violations may be adequate proof.[50] Despite the ambiguities of meaning and application, some guidelines have evolved. Poor workmanship or job performance reflecting carelessness or negligence,[51] inability to do the job[52] or lack of judgment do not disqualify the claimant. On the other hand, deliberate falsifications of employment information or job records,[53] repeated and deliberate violations of employers' instructions after warning,[54] excessive tardiness after warning[55] and drunkenness or drinking on the job[56] are deemed to be willful misconduct. Insubordinate conduct or disloyalty by the employee, especially after warning, disqualifies him for benefits,[57] although benefits may be allowed if the refusal is attributable to reasonable fears of compliance or a nervous or mental condition.[58] Beyond these limited areas of relative certainty, willful misconduct eludes precise meaning.

50. Miller v. F. W. Woolworth Co., 359 Mich. 342, 102 N.W.2d 728 (1960); Lewis v. Catherwood, 25 App. Div. 2d 473, 265 N.Y.S.2d 997 (1966) (applying concept of "provocation of discharge" to repeated refusals to heed employer's instructions); Sabatelli v. Unemployment Comp. Bd., 168 Pa. Super. 85, 76 A.2d 654 (1950) (disqualifying claimant for repeated improper fare registrations as bus driver even in the absence of fraud or harm to the employer).

51. Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 339 P.2d 947 (1959); Yellow Cab Co. v. Stewart, 111 So. 2d 142 (La. Ct. App. 1959); Wickey v. Appeal Bd., 369 Mich. 487, 120 N.W.2d 181 (1963); McClain, Inc. v. Unemployment Comp. Bd., 170 Pa. Super. 119, 84 A.2d 521 (1951) (oyster shucker who damaged only oysters with irregular, hard to open configurations was not disqualified).

52. Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 339 P.2d 947 (1959).

53. Sackner Prods., Inc. v. Employment Security Comm'n, 8 Mich. App. 81, 153 N.W.2d 674 (1967); Mirra v. Catherwood, 31 App. Div. 2d 703, 295 N.Y.S.2d 775 (1968). Disqualification or temporary suspension of benefits occurs if a claimant willfully falsifies his application or registration in order to qualify for benefits. *See, e.g.*, CAL. UNEMP. INS. CODE § 1257 (West 1956); N.Y. LABOR LAW § 594 (McKinney Supp. 1971); PA. STAT. tit. 43, § 871 (1964).

54. Sewell v. Sharp, 102 So. 2d 259 (La. Ct. App. 1958); Carter v. Employment Security Comm'n, 364 Mich. 538, 111 N.W.2d 817 (1961); Arcicovich v. Catherwood, 31 App. Div. 2d 581, 294 N.Y.S.2d 951 (1968). Where the instruction or order is unreasonable, a few states do not consider disobedience to be misconduct.

55. Chapman v. Division of Emp. Security, 104 So. 2d 201 (La. Ct. App. 1958); Becker v. Unemployment Comp. Bd., 198 Pa. Super. 184, 181 A.2d 869 (1962).

56. Green v. Brown, 136 So. 2d 147 (La. Ct. App. 1962); Fahy v. Catherwood, 29 App. Div. 2d 712, 286 N.Y.S.2d 57 (1968). Unless probative and competent evidence of intoxication on the job is presented, a finding of misconduct by intoxication will not be made. Paulsen v. Catherwood, 27 App. Div. 2d 493, 280 N.Y.S.2d 491 (1967); General Elec. Co. v. Unemployment Comp. Bd., 160 Pa. Super. 636, 53 A.2d 819 (1947). No cases have been decided where the intoxicated employee asserts alcoholism, an illness, as a defense negating volition. *Cf.* Powell v. Texas, 392 U.S. 514 (1968). In Adams v. Unemployment Comp. Bd., 186 Pa. Super. 417, 142 A.2d 207 (1958), an award was upheld where the employee was hospitalized with delirium tremens because the Board had found that his discharge was for illness and not for drinking during working hours.

57. Stout v. Department of Emp., 172 Cal. App. 2d 666, 342 P.2d 918 (1959); Williams v. Lakeland Convalescent Center, Inc., 4 Mich. App. 477, 145 N.W.2d 272 (1966); Cohen v. Catherwood, 25 App. Div. 2d 906, 269 N.Y.S.2d 541 (1966).

58. Osojnick v. Review Bd., 129 Ind. App. 545, 158 N.E.2d 656 (1959) (employee disputed work order, became ill and went home); First State Bank v. Keegan, 366 Mich. 544, 115 N.W.2d 375 (1962) (nervous condition); Sledzianowski v. Unemployment Comp. Bd., 168 Pa. Super. 37, 76 A.2d 666 (1950) (refusal of allergic employee

The biggest category of misconduct cases involves applicants who are discharged for violating a company rule or order. Violation of a company rule does not constitute misconduct unless at least two essential elements are met: (1) the rule must embody a material duty owed to the employer in connection with the job; and (2) the violation must be intentional, deliberate or with conscious indifference to the consequences.[59] A prime example of a rule not qualifying under the first criterion is a company policy against wage garnishments.[60] While wage garnishments are obviously related to the job and involve a degree of wrongdoing, the subject of the rule does not directly concern the employment.[61] Moreover, such a rule wrongly presumes the ability of the employee to control and avoid financial distress. Lack of a sufficient nexus between the rule and employment is, however, quite rare;[62] so long as the employer can demonstrate some need for the rule in his business, a deliberate violation will be disqualifying.[63] A

to spray paint). In these cases, the employee must establish that the refusal is based on a real physical or mental threat from compliance. Otherwise, the refusal constitutes insubordination. Carter v. Employment Security Comm'n, 364 Mich. 538, 111 N.W.2d 817 (1961). Unless the claimant supports his refusal with strong medical evidence, he will be disqualified.

59. Yellow Cab. Co. v. Stewart, 111 So. 2d 142 (La. Ct. App. 1959); Wickey v. Appeal Bd., 369 Mich. 487, 120 N.W.2d 181 (1963); Philadelphia Transp. Co. v. Unemployment Comp. Bd., 186 Pa. Super. 142, 141 A.2d 410 (1958); Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941).

60. Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 907 (1961) (overruling numerous prior cases). The treatment of wage garnishment as misconduct has undoubtedly been altered by the enactment of the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1970), limiting the amount of wages subject to garnishment and barring discharge from employment by reason of garnishment for a single indebtedness. 15 U.S.C. §§ 1673, 1674 (1970). An even more obvious example of a non-qualifying and job-unrelated rule is a good credit condition of employment. Such rules are termed "rules of employment selection," as opposed to rules measuring job performance. Kempfer, *supra* note 4, at 163–64. On the other hand, an employee who leaves the job rather than submit to repeated wage garnishments by creditors leaves without good cause. Vayne v. Department of Emp., 200 Cal. App. 2d 517, 19 Cal. Rptr. 329 (1962).

61. Reed v. Employment Security Comm'n, 364 Mich. 395, 397–98, 110 N.W.2d 907, 908 (1961).

62. Dress and personal appearance rules illustrate this point. Almost any business operation will have needs related to such rules. In a "long-hair" case, *In re* Stephen Shelton, California Precedent Dec. No. 87, *compiled in* CALIF. INDEX — DIGEST OF PRECEDENT DECISIONS 79 (Aug. 1971), now on appeal, employees working on the guided tours at Paul Masson Vineyards refused to obey detailed company rules governing hair length, moustaches and sideburns. The Appeals Board disqualified them on the basis that the employer has a right to demand reasonable grooming standards necessary to its business and that any incidental deprivation of constitutional rights is justified. A minority of the Board dissented, stating that relinquishment of constitutional rights of privacy may not be made a condition to receipt of unemployment benefits. In support of its position, the minority cited Sherbert v. Verner, 374 U.S. 398 (1963) (refusal of a Seventh Day Adventist to accept Saturday employment not disqualifying) and Svrek v. Unemployment Ins. Bd., 54 Cal. 2d 519, 354 P.2d 625, 7 Cal. Rptr. 97 (1960) (holding that applicant had good cause to refuse the civil service job offered to him because it involved a loyalty oath to which applicant had a sincere conscientious objection).

63. Rules which operate as conditions of employment and are unrelated to actual job performance have been labelled "rules of selection" and "rules of suitability." Kempfer, *supra* note 4, at 163–65. However, such rules may also relate to the

second, and more forceful limitation on employment orders or rules as a ground for misconduct is that they be reasonable.[64] Disobedience of a rule or an order which imposes unreasonable burdens on the employee is not misconduct. However, once the importance of the duty embodied in a rule has been established, further inquiry into the relative reasonableness of that duty will not be made. A final restriction on the promulgation and enforcement of company rules on misconduct relating to their materiality relates to "dead letter" rules. Disuse and lack of enforcement generally bar any reliance on rule violations in unemployment hearings, even if the employee is aware of the rule and its content.[65] Since one aim of the unemployment insurance program is to protect the reasonable expectations of the employee and his employer, and since lack of enforcement suggests both an expectation of the employee that the rule will not be enforced and an attitude of the employer regarding the rule or its infraction as unimportant, the breach may be looked upon as innocent, making disqualification unjust.

However, even if the materiality of the rule and the duty are established, it must be shown that the breach of the rule is deliberate. The proper handling of fares or cash is probably an exception to this rule.[66] Apparently, the importance of the duty owed to the employer justifies the emasculation of the elements of willfulness or intent to violate a rule which requires the proper handling of fares and cash. Thus, even innocent or minor breaches may be punished by disallow-

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operation of the business. Thus, an employee's off-the-job moral conduct can affect the reputation and goodwill of the business. A few instances of ultra vires rules have been reported in which the employer sought to regulate the private affairs of his employees. One commentator has suggested that even an intentional violation of a company rule unrelated to actual job performance cannot be grounds for misconduct. The problem is that few rules, if any, will be considered as such. Kempfer, *supra* note 4, at 164.

64. Lacy v. Unemployment Ins. App. Bd., 17 Cal. App. 3d 1128, 95 Cal. Rptr. 566 (1971) (upholding trial court's determination that benefits should be awarded to demoted employee who refused to train her replacement on the ground that the refusal was reasonable). CAL. LABOR CODE § 2856 (West Supp. 1971) requires employees to obey all orders of their employer unless compliance would impose new and unreasonable burdens upon the employees.

65. Earp v. Department of Commerce Indus. Rel. Comm'n, 241 So. 2d 422 (Fla. Ct. App. 1970) (violation of unenforced policy regarding warehouse purchases held not disqualifying). *Compare* Monahan v. Catherwood, 27 App. Div. 2d 781, 277 N.Y.S.2d 229 (1967) (disqualifying a worker for violation of time card rule that everyone else ignored).

66. Glassmith v. Catherwood, 27 App. Div. 2d 584, 275 N.Y.S.2d 411 (1966) (disregard for company rule prohibiting talking with cashier disqualified claimant from benefits); Coschi v. Unemployment Comp. Bd., 186 Pa. Super. 154, 141 A.2d 416 (1958); Sabatelli v. Unemployment Comp. Bd., 168 Pa. Super. 85, 76 A.2d 654 (1950). *Contra,* Spaulding v. Industrial Comm'n, 154 So. 2d 334 (Fla. Ct. App. 1963).

ing benefits.[67] Obviously, however, this exception deviates from the legislative intent of the misconduct disqualification. Aside from this exception, most misconduct violations require a showing of some willful or deliberate action on the part of the employee. While the requisite intent does not require that the employee either intended to injure the employer or had some other specific intent, it does require more than the mere voluntary commission of a wrongful act.[68] The wrongful act must be knowingly committed or must be done under circumstances showing wanton disregard or indifference to the employer's interests. If the conduct consists of breaching a company rule or order, then it must be knowingly done.[69] Thus, if the employee did not know about the employer's instruction[70] or if the company policy is unclear and vague,[71] a conclusion of misconduct cannot be predicated on disobedience of the company rule.

Despite the fact that, theoretically, breach of a duty owed to the employer should be tested by the same principles of misconduct, including scienter, whether or not that duty is incorporated into a company policy or order, both Pennsylvania and California,[72] and other states sometimes require a lesser type of knowing conduct in cases involving company rule violations.[73] The dilution of the scienter requirement in these jurisdictions has been justly criticized:

67. Glassmith v. Catherwood, 27 App. Div. 2d 584, 275 N.Y.S.2d 411 (1966); Coschi v. Unemployment Comp. Bd., 186 Pa. Super. 154, 141 A.2d 416 (1958).

68. *See generally* T. BRODEN, *supra* note 1, at 469–70.

69. Spaulding v. Industrial Comm'n, 154 So. 2d 334 (Fla. Ct. App. 1963) (evidence of inadvertent failure to ring cash sale promptly, in violation of company rule, is not disqualifying); Sosa v. Catherwood, 32 App. Div. 2d 864, 301 N.Y.S.2d 299 (1969); Atlantic Freight Lines, Inc. v. Unemployment Comp. Bd., 188 Pa. Super. 185, 146 A.2d 367 (1958); *In re* Wilson, CCH Pov. L. REP. ¶ 12,994, at 12,816 (employee not guilty of misconduct unless he has actual knowledge of the rule).

70. Spencer v. Catherwood, 30 App. Div. 2d 986, 294 N.Y.S.2d 91 (1968); Atlantic Freight Lines, Inc. v. Unemployment Comp. Bd., 188 Pa. Super. 185, 146 A.2d 367 (1958).

71. Earp v. Department of Commerce Indus. Rel. Comm'n, 241 So. 2d 422 (Fla. Ct. App. 1970); Andrews v. Catherwood, 29 App. Div. 2d 807, 286 N.Y.S.2d 870 (1968).

72. Both Pennsylvania and California have on occasion substituted constructive notice for actual knowledge in company rule violation cases. *See* Coschi v. Unemployment Comp. Bd., 168 Pa. Super. 154, 141 A.2d 416 (1958); *In re* Frances Gatler, California Precedent Dec. No. 108, *compiled in* CALIF. INDEX — DIGEST OF PRECEDENT DECISIONS 79 (Aug. 1971). However, actual notice is sometimes demanded. Atlantic Freight Lines, Inc. v. Unemployment Comp. Bd., 188 Pa. Super. 185, 146 A.2d 367 (1958).

73. *Compare* Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941) (allowing benefits to a cab driver who was discharged for having numerous accidents), *with* Checker Cab Co. v. Industrial Comm'n, 242 Wis. 429, 8 N.W.2d 286 (1943) (disqualifying claimant for negligent driving and violations of a company rule). In *Checker Cab Co.*, the court upheld a finding of misconduct even though the circumstances immediately surrounding the separation did not establish misconduct. In so doing, the court relied on the series of incidents over a substantial period of time which evidenced disregard for the employer's interests. In the absence of such cumulative acts, the single act of the employee precipitating his firing would not be considered misconduct. *See* Kempfer, *supra* note 4, at 161.

> Misconduct is conduct that is wrong. Plaintiff's conduct here involved was the incurring of an indebtedness and failure to discharge it. By some standards it may have been wrong. Whether or not, for the purpose of cases like this, it was disqualifying misconduct depends on the legislative intent and meaning of the statute and not merely on the promulgation of a company rule against garnishments. Garnishment of plaintiff's wages may well have been a nuisance to defendant company. Many acts of an employee might meet with the displeasure or disapproval of an employer and be prohibited by rule by him. Breach of such rule might, in a sense, be considered misconduct warranting discharge from employment. Unless the rule and its violation bear some reasonable application and relation to the employee's task, can the breach be said to be misconduct within the disqualifying language . . . of the statute? The purpose of the act is to benefit unemployed in financial straits, not to penalize them for being in that condition. We do not believe that the language of the statute discloses or its purpose permits reading into it a legislative intent to stamp the conduct here involved as misconduct within the meaning [of the act].[74]

A second dilution of the scienter requirement and a further basis for criticizing judicial reasoning has been the tendency of some jurisdictions to balance the importance of the duty to the employer against the degree of deliberation or intent required to commit a breach.[75] Similarly, inordinate expense or delay to the employer resulting from an otherwise inadvertent breach of duty has been relied on for an inference of deliberate misconduct.[76] Such dilutions of the key element of misconduct violate basic legislative policy. This error, however, is certainly not confined to cases involving company rules.[77] For example, in Michigan, the negligent loss of a driver's license, needed in the claimant's employment, as a result of traffic tickets or accidents has been interpreted as misconduct.[78] Since even the most careful drivers

74. Reed v. Employment Security Comm'n, 364 Mich. 395, 398, 110 N.W.2d 907, 908 (1961).

75. Wickey v. Appeal Bd., 369 Mich. 487, 120 N.W.2d 181 (1963) (ship's fireman who "missed the boat" through inadvertence and poor judgment and had essential duties aboard ship held guilty of misconduct); Bell v. Appeal Bd., 359 Mich. 649, 103 N.W.2d 584 (1960). *See* Sherman Bertram, Inc. v. Department of Emp., 202 Cal. App. 2d 733, 21 Cal. Rptr. 130 (1962).

76. France v. Unemployment Comp. Bd., 205 Pa. Super. 505, 211 A.2d 85 (1965).

77. Sherman Bertram, Inc. v. Department of Emp., 202 Cal. App. 2d 733, 21 Cal. Rptr. 130 (1962).

78. Echols v. Employment Security Comm'n, 4 Mich. App. 173, 144 N.W.2d 666 (1966) (loss of license due to "points" considered a voluntary quit without good cause); Phillips v. Appeal Bd., 373 Mich. 210, 128 N.W.2d 527 (1964) (revocation of taxi driver's license held to be misconduct in connection with his work). Other states take a different view. *See, e.g.*, Yellow Cab Co. v. Stewart, 111 So. 2d 142 (La. Ct. App. 1959) (traffic accidents not misconduct).

have some tickets and accidents as a normal incident of such employment, it is difficult to comprehend how such occurrences can establish a wanton or willful breach of duty, unless independent evidence established the requisite degree of intent. The dilution of the element of scienter is most obvious in states that recognize the doctrine of "constructive quitting," which infers an intention or willingness to leave employment from more remote deliberate activity unconnected with the job.

The disqualification on the basis that the employee was discharged for the commission of a crime most forcefully illustrates this point even if the doctrine of "constructive quitting" is not applied. The criminal activity of an employee in connection with his job disqualifies him from receiving benefits.[79] Proof of criminal activity related to the job does not depend on a conviction, and a finding of criminal misconduct may be reached without any legally competent evidence.[80] But, at least in close cases, some courts have been reluctant to find criminal misconduct.[81] One state follows the outcome of criminal proceedings in its unemployment determinations.[82] Of course, alleged criminal activity can result in disqualification even if it is unrelated to the job. The very fact of incarceration following arrest or conviction often causes loss of employment. Although no direct duty to the employer has been violated, the duty to be on the job may be breached as an incident to the arrest or conviction. While it is illogical to equate the commission of a crime with a deliberate or conscious indifference to employment, some courts have made this leap.[83] In some cases,

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79. Rivera v. Catherwood, 28 App. Div. 2d 1036, 283 N.Y.S.2d 676 (1967) (employees selling narcotics on employment premises and bookmaking during working hours); Thorne v. Unemployment Comp. Bd., 167 Pa. Super. 572, 76 A.2d 485 (1950) (assault and battery on a superior). The New York statute disqualifies a claimant for twelve months following conviction for a felony on the job, even if the job was not his last employment. N.Y. LABOR LAW § 593(4) (McKinney 1965). MICH. STAT. ANN. § 17.531(f) (Supp. 1971) disqualifies a claimant who loses his job by reason of absence from work as a result of a conviction and jail sentence unless the sentence is for less than ten days, or the defendant is allowed "day parole." Apparently, the crime is disqualifying even if it is unrelated to the job.

80. Rivera v. Catherwood, 28 App. Div. 2d 1036, 283 N.Y.S.2d 676 (1967). *See* note 48 *supra.*

81. *See, e.g.,* Berner v. Unemployment Comp. Bd., 211 Pa. Super. 318, 236 A.2d 840 (1967).

82. UTAH CODE ANN. § 35-4-5(b)(2) (Supp. 1971) postpones the unemployment hearing until after the criminal proceedings are concluded.

83. In Sherman Bertram, Inc. v. Department of Emp., 202 Cal. App. 2d 733, 21 Cal. Rptr. 130 (1962), the court stated:

> Here claimant's unemployment was the result of his own fault — his own wilful and felonious act in leaving the scene of an accident in which he was involved without complying with the provisions of section 20001 [formerly § 480] of the Vehicle Code. To say that claimant's wilful criminal act was not his

the facts of the crime may show such an indifference to or wanton disregard for employment. But, in other cases the crime itself suggests lack of deliberation from which to infer deliberate or conscious indifference toward employment obligations. Leaving the scene of an accident is certainly a crime, but it may lack the necessary degree of intent for job-connected misconduct. Everyone who commits a crime is at fault and may need to be punished for it. But the unemployment insurance system is ill-suited and unintended for the task. Perhaps, in this area, disqualification is imposed for reasons of public acceptance and morality at the expense of legislative or social policy.[84]

A further erosion of misconduct principles has been achieved by the widespread acceptance of the "constructive quit" doctrine. Voluntary conduct by an employee which he reasonably knows or should know will precipitate loss of employment is called "constructive quitting."[85] In New York, under the rubric of "provocation of discharge," the concept has been extensively used.[86] Once the precipitating conduct has been identified and considered as voluntary, the only remaining issue concerns the nexus or foreseeability of the resulting discharge. Obviously, the doctrine as applied dilutes the basic element of malice, intent, or at the very least, conscious indifference to losing employment. Secondly, the doctrine attempts to make misconduct unrelated to the job a disqualification.[87] Further, the role of a reviewing court in a

fault and was not the cause of his unemployment is pure sophistry. To reward claimant in such circumstances by awarding him unemployment compensation is to reward him for idleness caused by his wilful violation of the law — and at the expense of his employer who had nothing whatever to do with it.

Id. at 736, 21 Cal. Rptr. at 132. *See also* Alexander v. Employment Security Comm'n, 4 Mich. App. 378, 144 N.W.2d 852 (1966).

84. Kempfer, *supra* note 4, at 150, 163–65. Of course, public indignation can become the legislative will, as Michigan's history reveals. In two Michigan cases benefits were awarded to claimants who had lost their jobs due to conviction and confinement in jail for short periods. Sullivan v. Appeal Bd., 358 Mich. 338, 100 N.W.2d 713 (1960); Employment Security Comm'n v. Appeal Bd., 356 Mich. 665, 97 N.W.2d 784 (1959). The courts rejected the doctrine of constructive leaving and found that the leaving was involuntary. The legislature then amended the statute to bar payment of benefits to a claimant who lost his job due to incarceration following a conviction unless the sentence was less than ten days or "day parole" was granted. MICH. STAT. ANN. § 17.531(f) (Supp. 1971). *See* Alexander v. Employment Security Comm'n, 4 Mich. App. 378, 144 N.W.2d 850 (1966).

85. Sherman Bertram, Inc. v. Department of Emp., 202 Cal. App. 2d 733, 21 Cal. Rptr. 130 (1960).

86. Fishbein v. Catherwood, 28 App. Div. 2d 1059, 283 N.Y.S.2d 837 (1967) (a false statement made to third party was construed as a "voluntary quit" by "provoking" the discharge); Monahan v. Catherwood, 27 App. Div. 2d 781, 277 N.Y.S.2d 229 (1967) (truck driver who did not punch out at end of work, in violation of company rule, "voluntarily" left his job without good cause by "provoking" his discharge).

87. Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 907 (1961). In *Reed,* an employee was discharged pursuant to a company rule which prohibited wage garnishments twice within a nine month period. The Michigan court held that the employee could not be denied unemployment compensation on

case of "provocation of discharge" or "constructive quit" is less active than in misconduct cases.[88] For these reasons, the doctrine has been criticized:

> Signing a settlement agreement under the circumstances in which Paul A. Larson found himself does not equate with leaving work voluntarily.
>
> Likewise, it cannot be called "constructive" voluntary leaving. The Supreme Court has consistently rejected "constructive disqualification" and though the circumstances in those cases may have been different, the theory was the same . . . . This holding was echoed in Thomas v. Employment Security Commission . . . and amplified by the statement, "It is not the proper function of the court to amend the statute to broaden or extend the disqualifications fixed, in plain language, by the legislature. Whether one in claimant's situation ought to be disqualified is a question of policy for the legislature, not a judicial question to be determined by the court."[89]

The rejection of the "constructive quit" theory does not guarantee either liberal application of the law or complete adherence to the requirement of intent or willfulness of the misconduct. In one of the leading Michigan cases[90] rejecting the notion of "constructive quit," denial of benefits was still upheld on the ground of misconduct. The court found a willful or wanton disregard of duty because the employee literally missed the boat which depended on him as its fireman. The importance or materiality of the duty apparently gave rise to a presumption of willful misconduct because of the breach. On the whole, however, rejection of the "constructive quit" doctrine promotes clearer policy analysis of the disqualification issue.[91]

IV. CONCLUSION

In applying disqualifications for voluntary leaving and misconduct, an effort is being made to find objective standards and proof in place of the apparent ambiguity and subjective tests of present statutes. In the process, courts and administrative agencies sometimes invent doc-

grounds of misconduct since under the applicable statute misconduct was expressly limited to misconduct connected with the employee's work. Here, there was no such connection.

88. Monahan v. Catherwood, 27 App. Div. 2d 781, 277 N.Y.S.2d 229 (1967).

89. Larson v. Employment Security Comm'n, 2 Mich. App. 540, 545–46, 140 N.W.2d 777, 780 (1966) (citations omitted) ("voluntary" signing of settlement terminating employment did not constitute voluntary leaving and the "constructive quit" doctrine was again rejected).

90. Wickey v. Appeal Bd., 369 Mich. 487, 120 N.W.2d 181 (1963).

91. Reed v. Employment Security Comm'n, 364 Mich. 395, 110 N.W.2d 907 (1961). *See* note 87 *supra*.

trines, presumptions and rules which ignore or exceed the legislative intent. The necessity for such inventiveness flows from the practical difficulty of processing and deciding numerous claims promptly, and from the dual role of the various administrative agencies to assist the unemployed in a time of need, yet to protect a limited fund from ineligible claimants so that an employer's reserve account is not unfairly charged. While the difficulty may not be desirable, it is one commonly found in the area of administrative law. The solution lies not in greater procedural formality, but rather in a return to the legislative intent and in demanding a minimum quantum of competent evidence before disallowing a claim. The main purpose of the legislative scheme, the integrity of the system itself and fairness to the unsophisticated claimant will thus be better served.