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I. Introduction

In 1936, the Pennsylvania Legislature, in response to federal incentives[1] and the economic uncertainties of the Great Depression, enacted an unemployment compensation law, the general purpose of which is to grant unemployment compensation to unemployed persons.[2] Section 3, the Declaration of Public Policy, of the Unemployment Compensation Law clearly manifests a legislative intent to pay unemployment compensation *only* to those who are "unemployed through no fault of their own."[3]

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1. These federal incentives were in Title IX of the Social Security Act of 1935, 42 U.S.C. § 1101 (1976). For a brief review of the federal incentives, *see* Haggart, *Unemployment Compensation During Labor Disputes,* 37 NEB. L. REV. 668, 668-74 (1958); for a brief review of the draft bills prepared by the Committee on Economic Security, *see* Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U. CHI. L. REV. 294, 295 (1950).

2. The Unemployment Compensation Law of 1936, Pub. L. No. 2897 (1937), PA. STAT. ANN. tit. 43, § 752 (Purdon 1964).

3. Section 3 states as follows:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivision in the form of poor relief assistance. Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employees during periods when they become unemployed through no fault of their own. The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with

In establishing qualifying and eligibility[4] standards, the legislature frequently has amended the Unemployment Compensation Law.[5] These amendments reflect legislative and societal policy and attitudes about the nature of unemployment compensation. For example, Governor Scranton in 1964 proposed numerous amendments to the law, and these amendments were characterized as part of a "reform" bill[6] or as part of a "ripper" bill[7] depending upon philosophical considerations.[8] Similarly, the 1980 amendments to the Unemployment Compensation Law caused partisan divisions in the

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respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Id.

4. Section 401 of the Law, PA. STAT. ANN. tit. 43, § 801 (Purdon 1964 and Supp. 1983) is entitled "Qualifications Required to Secure Compensation." The qualification which has produced the most litigation under Section 401 is Section 401(d) which requires a claimant to be "able to work and available for suitable work."

Section 402 of the Law is entitled "Ineligibility for Compensation." *Id.* § 802. The eligibility requirements which have produced the most litigation are Section 402(b), "voluntarily leaving work without cause of necessitous and compelling nature," Section 402(d), the labor dispute section, *see* Reuben and Schuckers, *The Labor Dispute Disqualification of the Pennsylvania Unemployment Compensation Law,* 50 TEMP. L.Q. 211 (1977)) and Section 402(e), "discharge or temporary suspension from work for willful misconduct connected with his work."

5. Sections 401 and 402 of the law have been amended over 20 times during the past 45 years. None of these amendments resulted in the division, turmoil and bitterness which accompanied the 1964 amendments to the Unemployment Compensation Law.

6. *See* Governor Scranton's Message to the Joint Session of the Legislature, which convened on February 11, 1964. 1964 LEGISLATIVE JOURNAL-SENATE, Special Session, 3-6, HOUSE, 4-6. The most articulate legislative speech in favor of the 1964 amendments was delivered by Representative K. B. Lee, the Republican majority leader, who denied that the bill was a "ripper" bill. 1964 LEGISLATIVE JOURNAL-HOUSE, Special Session, 63-66.

7. The most articulate legislative speech opposing the 1964 amendments was delivered by Representative H. Fineman of Philadelphia who characterized the bill as "ruination" and as a "ripper" bill. 1964 LEGISLATIVE JOURNAL-HOUSE, Special Session, 75-85.

8. At the heart of these philosophical considerations is the question whether the payment of unemployment compensation is a disincentive to work. In the legislative debates of 1964, Senator Hawbaker of Franklin County stated:

> The people who are unemployed today, because of changes in a local scene, are going to have to borrow a page from their gallant ancestors and strike out on their own. Of course, we are going to help them with a fine unemployment compensation program. However, we cannot enact legislation that would inhibit initiative, to the extent that people are not encouraged to strike out on their own.

1964 LEGISLATIVE JOURNAL-SENATE, Special Seseion, 121. Senator Staisey, Allegheny County, presented the argument, *inter alia,* that unemployment compensation is an integral part of a support system under the Social Security Act and that this support system is not a disincentive to work. 1964 LEGISLATIVE JOURNAL-SENATE, Special Session, 103-110.

One commentator addressed the issue as follows: "[T]he price of social security is continual watchfulness that it should not be permitted to weaken that incentive [to find paid employment]. Part of that watchfulness must be in the form of civic education that teaches the citizen's duty to cooperate in making a productive society." *See* R. ALTMAN, AVAILABILITY FOR WORK: A STUDY IN UNEMPLOYMENT COMPENSATION 19 (1950). *But see* Feldstein, *Unemployment Compensation: Adverse Incentives and Distributional Anomalies,* 27 NAT'L TAX J. 231, 243 (1974) in which the author argues that "the current system of unemployment compensation entails very strong adverse incentives" and that the adverse incentives could be reduced by "including unemployment compensation in taxable income."

legislature.[9] Such debates and clashing views about amendments to the Unemployment Compensation Law are foreseeable and undoubtedly will recur in the future.

Although the legislature frequently has amended the qualifying and eligibility standards of the Unemployment Compensation Law, the Legislature has never amended Section 3. Section 3, however, has been reviewed increasingly by the courts and has become a subject of judicial dispute. This dispute, like the legislative debates, involves philosophical considerations about the nature of unemployment compensation.

Section 3 traditionally has been used by the courts as an interpretive provision.[10] This use is consistent with the principle of statutory construction that "the preamble of a statute may be considered in the construction thereof."[11]

In the past twenty years, however, the courts have used Section 3 as more than an interpretive section. In 1965, in the *Lybarger Unemployment Compensation Case,*[12] which involved a collective bargaining agreement that included a "Share the Work" plan, the Pennsylvania Supreme Court stated that Section 3 "is not merely a perfunctory preface but is, rather, the keystone upon which the entire Act rests."[13] In 1975, the Pennsylvania Commonwealth Court in *Budzanoski v. Unemployment Compensation Board of Review*[14] and in *Ostrander v. Unemployment Compensation Board of Review*[15] utilized Section 3 as a substantive section while reviewing unemployment caused by off-duty behavior.

New circumstances of the 1960s and 1970s, totally unforeseen in 1936, caused the courts' use of Section 3 to expand to more than an interpretive use.[16] The unforeseen circumstance of the 1960s was the

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9. The partisan division was particularly evident in the House of Representatives; one member, Representative Spencer (Republican, Tioga County), who had been a member of the House in 1964, noted "a little bit of a sense of *deja vu*" when considering the 1980 amendments to the Unemployment Compensation Law. 1980 LEGISLATIVE JOURNAL-HOUSE 2035.

10. *See, e.g.,* Penn Hills School District v. Unemployment Compensation Board of Review, 496 Pa. 620, 437 A.2d 1213 (1981); Gianfelice Unemployment Compensation Case, 396 Pa. 545, 153 A.2d 906 (1959); Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 45 A.2d 898 (1946).

11. *See* 1 PA. CONS. STAT. ANN. § 1924 (Purdon Supp. 1983).

12. 418 Pa. 471, 211 A.2d 463 (1965).

13. *Id.* at 476, 211 A.2d at 466.

14. 21 Pa. Commw. 535, 346 A.2d 864 (1975).

15. 21 Pa. Commw. 583, 347 A.2d 351 (1975).

16. *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395, 400-01 (1950) in which the author stated:

> increasingly as a statute gains in age — its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it,* but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. A "dangerous weapon" statute of 1840

development of a "Share the Work" plan which was part of a collective bargaining agreement and which involved "planned unemployment." The unforeseen circumstance of the 1970s was the arrival of assertive, litigious claimants who were more demanding of the unemployment compensation system and were more willing to assert their rights within that system.[17]

II. Section 3 and "Share the Work" Plans

One of the most complex unemployment compensation problems in Pennsylvania arises when the employer and the employee's collective bargaining agent enter into a contract which raises the question whether the employee's subsequent unemployment, pursuant to the collective bargaining agreement, is through no fault of his own. This problem has been analyzed within the context of the voluntary-involuntary distinction of Section 402(b) of the Law,[18] the availability-for-suitable-work requirement of Section 401(d) of the Law[19] and the "no fault of their own" provision of Section 3 of the Law.[20]

In the leading case, *Gianfelice Unemployment Compensation Case,*[21] the Pennsylvania Supreme Court reversed the superior court[22] and granted benefits to the claimant, Gianfelice, who had

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can include tommy guns, tear gas or atomic bombs. "Vehicle," in a statute of 1840 can properly be read, when sense so suggests, to include an automobile, or a hydroplane that lacks wheels. But for all that, the sound quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the light of the unforeseen.

17. Most claimants who challenged the use of Section 3 as a substantive section in the 1970s were represented by attorneys from Legal Services. These attorneys usually relied upon the principle of statutory construction that a preamble can be utilized as an interpretive section and upon the analysis, best summarized by Judge Reno as follows:

> The Unemployment Compenation Law is remedial, humanitarian legislation of vast import. Its benefits sections must be liberally and broadly construed. It is primarily intended for the benefit of unemployed workers. Consequently, the cardinal principle under which the act is administered is that an employe in covered employment can be denied its benefits only by explicit language in the act which clearly and plainly excludes him. Presumably, an unemployed worker in a covered employment is entitled to benefits, and loses them only when he falls under the condemnation of a disqualifying provision of the act, fairly, liberally and broadly interpreted.

Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 559-60, 45 A.2d 898, 904 (1946). *See also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,* 3 VAND. L. REV. 395 (1950) for the proposition that for every canon of statutory construction there is an opposite and equal canon of statutory construction. For example, Llewellyn cited the canon, "a statute cannot go beyond its text," beside the canon "to effect its purpose a statute may be implemented beyond its text." *Id.* at 401. Similarly, he cited the canon, "preambles do not expand scope," beside the canon, "preambles may be consulted to determine rationale, and thus the true construction of terms." *Id.* at 403.

18. PA. STAT. ANN. tit. 43, § 802(b) (Purdon Supp. 1983).

19. *Id.* § 801(b).

20. *Id.* § 752.

21. 396 Pa. 545, 153 A.2d 906 (1959).

22. 186 Pa. Super. 186, 142 A.2d 739 (1958). Before 1970, unemployment compensation cases were appealed from the Pennsylvania Unemployment Compensation Board of Review to the Pennsylvania Superior Court and then, upon an application for *allocatur,* to the Penn-

been retired at age 68 pursuant to a collective bargaining agreement but who "personally wished to continue in his work."[23] The supreme court enunciated the following much-cited test:

> This is one reason why the collective bargaining agreement should not control in determining the eligibility of a retired employee for unemployment compensation; *rather, the factual matrix at the time of separation should govern* . . . . Viewed in this light, the questions here become simply (1) did Gianfelice cease working voluntarily as a matter of fact, and (2) was Gianfelice available for work thereafter? Since the answers on the record are (1) no and (2) yes, Gianfelice is entitled to benefits.[24]

The supreme court determined that the claimant involuntarily was unemployed[25] and that the claimant was available for suitable work[26] and thus granted benefits to the claimant. The court supported its decision by reference to Section 3 and included in its decision making process an analysis of the voluntary-involuntary distinction, an analysis of the availability-for-suitable-work requirement and an analysis of the public policy that is fundamental to unemployment compensation, "to alleviate the hardships attendant upon unemployment" by compensating those who are unemployed "through no fault of their own."[27]

The supreme court, after analyzing Section 701[28] of the Unemployment Compensation Law and several federal court decisions, continued: "Where a statute of the Commonwealth expresses a public policy designed to alleviate a condition of possible distress among the public or a segment thereof and *explicitly proscribes waiver of the benefits of the act,* no private agreement, however valid between the parties, can operate as such a waiver."[29] Thus, the supreme court in

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sylvania Supreme Court. Jurisdiction over appeals was transferred from the superior court to the Pennsylvania Commonwealth Court by the Appellate Court Jurisdiction Act of 1970, with the right of appeal to the Pennsylvania Supreme Court by petition remaining unchanged. *See* 42 PA. CONS. STAT. ANN. § 763 (Purdon 1981).

23. 396 Pa. at 548-49, 153 A.2d at 908.

24. *Id.* at 552, 153 A.2d at 909-10.

25. PA. STAT. ANN. tit. 43, § 802(b) (Purdon Supp. 1983).

26. *Id.* § 801(b).

27. "The Unemployment Compensation Law was enacted to alleviate the hardships attendant upon unemployment. . . . It is a remedial statute designed to provide support for workers who are unemployed *except for those disqualified* by one of the specific provisions *of § 402.*" 396 Pa. at 552, 153 A.2d at 910 (emphasis supplied).

28. PA. STAT. ANN. tit. 43, § 861 (Purdon 1964) which states as follows: "No agreement by an employe to waive, release, or commute his rights to compensation, or any other rights under this act, shall be valid."

29. 396 Pa. at 554, 153 A.2d at 911. The supreme court in dictum also stated that the parties cannot agree to allow an employee-claimant to receive unemployment compensation: "The opposite principle—that employer and employee cannot agree that the latter receive benefits when the law precludes such benefits—has been stated with finality by the Superior Court." *Id.*

The supreme court cited Gagliardi Unemployment Compensation Case, 186 Pa. Super. 142, 141 A.2d 410 (1958), for this proposition. Therein the superior court outlined a problem which has occasionally risen in unemployment compensation cases, an agreement between the parties which provides for the payment of unemployment compensation to an employee-

Gianfelice seemingly answered the question whether parties contractually could alter an employee-claimant's eligibility for unemployment compensation: the answer was that they could not.

Six years later, the Pennsylvania Supreme Court had the opportunity to reevaluate its position and to reconsider the legislature's declaration of public policy in Section 3 of the Unemployment Compensation Law. In *Lybarger Unemployment Compensation Case,*[30] an employee-claimant was unemployed from early October 1961 to January 1, 1962, because his collective bargaining agreement required the layoff of employees whose gross income equalled $5000 for the year.[31] The employee-claimant reached the $5000 wage limitation in early October, 1961 and was laid off pursuant to the collective bargaining agreement. The supreme court affirmed a denial of unemployment compensation benefits to the employee-claimant.

The court specifically utilized Section 402(b) of the Law,[32] the voluntary quit section, to deny benefits, but the underlying rationale was the public policy declaration of Section 3. In language which very nearly approved use of Section 3 as a *substantive* section, the supreme court stated:

> In arriving at our determination of these appeals, we are aided considerably by the guidelines set forth in the Legislature's declaration of public policy found in § 3 of the Act. That section is not merely a perfunctory preface but is, rather, the keystone upon which the entire Act rests and the basis upon which the individual sections of the Act must be interpreted and construed. More particularly, the relationship between § 3 and § 402(b)(1) is close and complementary, calling for the construction of § 402(b)(1) in the light of the fuller, more comprehensive, and more explicit language of § 3.[33]

The court was troubled because the employee-claimant's unemployment resulted from a "program of planned unemployment,"[34] from "unemployment arranged, agreed upon, and sanctioned by the employer and employee,"[35] from "unemployment continuously and de-

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claimant. Judge Woodside stated that "the interest of the Commonwealth and the vast body of covered employees in the solvency of the fund is sometimes forgotten [and] it is the duty of the [Unemployment Compensation Board of Review] to develop all the relevant facts." *Id.* at 153, 141 A.2d at 416. The implementation of such a requirement in the face of resistance or even collusion by an employee and an employer is extremely difficult.

30. 418 Pa. 471, 211 A.2d 463 (1965).

31. Specifically the agreement provided:

> Employees with sufficient seniority to remain at work shall be kept as operators until the pay period when their gross earnings received from the Company since January amount to five thousand dollars . . . plus or minus fifty dollars. . . . Such operators will then go on layoff for the remainder of the year or until all younger operators have been recalled, and additional ones are required in seniority order.

Id. at 474, 211 A.2d at 464.

32. PA. STAT. ANN. tit. 43, § 802(b) (Purdon Supp. 1983).

33. 418 Pa. at 477, 211 A.2d at 465-66.

34. *Id.* at 477, 211 A.2d at 466.

35. *Id.* at 478, 211 A.2d at 466-67.

liberately planned and created by the contract arrangement,"[36] from "a planned, intentional system of unemployment devised for the purpose of seeking to create eligibility for benefits from the unemployment compensation fund."[37]

The unemployment in *Lybarger* clearly was planned and was pursuant to a collective bargaining agreement negotiated on behalf of the employee-claimant by his union representatives.[38] The planned unemployment in *Lybarger,* however, should be compensable under the tests enunciated in *Gianfelice:* (1) did Lybarger cease working voluntarily as a matter of fact; and (2) was Lybarger available for work thereafter? The answers in *Lybarger* are the same as in *Gianfelice,* and thus the employee claimant in *Lybarger* should have been granted benefits.[39]

Justice Cohen's vigorous dissent in *Lybarger* raised several questions. First, did the supreme court in *Lybarger* overrule *Gianfelice,* sub silentio?[40] Justice Cohen stated that *Lybarger* did overrule *Gianfelice,* and the logic of his conclusion is difficult to refute.

Second, did the supreme court in *Lybarger* resurrect for unemployment compensation purposes the agency theory of the union-employee relationship[41] which had been rejected in *Gianfelice?* Once again, Justice Cohen believed it did, and any other conclusion defies logic.

The dissent posed a third question fraught with social, economic and philosophical overtones: why should the unemployment compensation system, including the judicial system, disapprove of a

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36. *Id.* at 478, 211 A.2d at 467.

37. *Id.* at 480, 211 A.2d at 468.

38. The Pennsylvania Supreme Court in *Gianfelice* specifically rejected the theory that a union member is bound by his union's collective bargaining agreement for unemployment compensation purposes. *See supra* notes 21-29 and accompanying text.

39. The supreme court's attempt to distinguish factually *Gianfelice* from *Lybarger* is not convincing. *See* 418 Pa. at 479-82, 211 A.2d at 467-68. The use of Section 3 as more than an interpretive section distinguishes *Lybarger* from *Gianfelice.* The question then is, however, whether Gianfelice's unemployment was arranged, agreed upon, deliberately planned and sanctioned by the employer and employee. Clearly it was.

40. *See* 418 Pa. at 497, 211 A.2d at 476 (Cohen, J., dissenting); *see also* Note, *Unemployment Compensation — Employees Mandatorily Retired Pursuant to Collective Bargaining Agreement Not Entitled to Unemployment Benefits,* 44 VA. L. REV. 1343, 1346 (1958), in which the author stated:

> The holding in each case seems to be governed by whether the courts and agencies have used a subjective or objective approach. Those favoring the subjective method base their decisions on a preference for the individual's volition unaffected by a collective bargaining agreement, and attempt to balance the equities in each situation; they justify this view by finding it to be consonant with legislative intent.

See also Annot., 50 A.L.R.3d 880 (1973) for an explanation of the distinction between the subjective and objective approaches. *Gianfelice* represents the subjective approach, while *Lybarger* represents the objective approach.

41. The *Gianfelice* court expressly rejected the agency theory of the union-employee relationship which is found in Prentice Unemployment Compensation Case, 161 Pa. Super. 630, 56 A.2d 295 (1948). For an analysis of the agency theory in the context of Section 402(d) of the Law, *see* Reuben and Schuckers, *The Labor Dispute Disqualification of the Pennsylvania Unemployment Compensation Law,* 50 TEMP. L.Q. 211, 244-46 (1977).

"Spread the Work" or a "Share the Work" agreement? Justice Cohen answered that "Spread the Work" agreements are beneficial for society and should be encouraged.[42]

In 1980 the legislature and the commonwealth court impliedly accepted Justice Cohen's position and allowed for "Share the Work" or "Spread the Work" plans within the context of the Unemployment Compensation Law. The Pennsylvania Commonwealth Court affirmed the grant of benefits to the employee-claimants in *United States Steel Corporation v. Unemployment Compensation Board of Review.*[43] The employee-claimants had accumulated numerous years of service and remained unemployed under a very complex collective bargaining agreement. The agreement allowed for "reverse seniority"; the company recalled employees with *less* seniority before recalling employees with more seniority. The court rejected the employer's availability-for-suitable-work argument under Section 401(d) of the Law and stated: "The reverse seniority aspects of the agreement here do not limit availability for work any more than a regular seniority agreement can be said to limit the availability of junior employees for work when there are not enough job openings to permit the recall of all employees."[44] The commonwealth court

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42. 418 Pa. at 502-03, 211 A.2d at 478-79 (emphasis in original). Justice Cohen stated as follows:

> The employer could only use a certain number of employees in his business. The number of persons *available and unemployed* who could perform the job was greater than the number the employer could use. In order to give more persons an opportunity to work during the year no person was allowed to work after his earnings reached $5,000. In other words, the employer and union agreed to "spread the work." In the anthracite coal industry the work is spread on a time, rather than dollar, basis, the employees working alternate months. In other industries the retirement age is set with an eye to making room for new employees as well as an eye toward the age at which an employee loses his effectiveness. (None of these provisions for "spreading the work" involve "feather-bedding" which is having more men employed at any one time than are needed to do the job.) "Spreading the work" in no way *creates* unemployment. Viewed in terms of unemployed man hours it neither increases nor decreases unemployment. All it does is to allow more persons to work over a period of time. Rather than having 50 men continuously employed and 50 men continuously unemployed all 100 men work part of the time and are unemployed part of the time.
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> Far from attributing to the employees some sort of "fault," as the majority does, it seems commendable that more people are given a chance to work in a society which values work as highly as ours does. Surely the majority does not believe it is the employee's "fault" that all the available man hours cannot be absorbed by the economy. What the majority fails to recognize is that the 'spread the work' doctrine is an attempt to cope with the sad fact of unemployed man hours — a fact not attributable to any "fault" on the part of the employees.
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> If 100 men who are employed part of the time and unemployed the other part of the time place more of a strain on the unemployment compensation fund than 50 men who are employed continuously and 50 men who are unemployed continuously then the Legislature must change the law. But, as it now stands, the law merely requires that the employee who was "layed off" desired, *at the time of the layoff,* to continue working and that he be available for suitable work but unable to obtain it.

43. 52 Pa. Commw. 631, 417 A.2d 266 (1980).

44. *Id.* at 636, 417 A.2d at 268. The commonwealth court recognized that seniority agreements, like "Share the Work" Plans, do not create unemployment:

> there is and can be no dispute that if enough labor pool jobs had been available to

distinguished *Lybarger*[45] and specifically relied upon the "factual matrix at the time of separation" test enunciated in *Gianfelice.*

The day before the commonwealth court decision in *United States Steel,* the Governor signed H.B. 1673[46] (Act 108) which effectively overruled the analysis in *Lybarger* and reaffirmed the *Gianfelice* test. Act 108 contains three separate but similar provisions which deal with unemployment resulting from a collective bargaining agreement: (1) Section 401(d), the availability-for-suitable-work section, was amended to include the following provision:

> No otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position, pursuant to a labor-management contract, or pursuant to an established employer plan, program or policy.[47]

(2) Section 402(a), the refusal-to-accept-suitable-work section, was amended to include the following provision:

> [H]owever, this subsection shall not cause a disqualification of a waiting week or benefits under the following circumstances: when work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program or policy.[48]

(3) Section 402(b), the voluntary quit section, was amended to include the following provision:

> Provided further, that no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position pursuant to a labor-management contract agreement, or pursuant to an established employer plan, program or policy.[49]

Act 108 precludes the denial of unemployment compensation in Pennsylvania if the employee-claimant's unemployment was the result of a "Share the Work" or "Spread the Work" provision of a collective bargaining agreement.[50]

Although the dissenting view in *Lybarger* has prevailed, the leg-

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permit the recall of *all* laid-off skilled employees, the employer, by following the usual procedure, would have gotten down to the claimants in question and, without any violation of the agreements or past practice, been able to make the specific job offers to the specific claimants, who, it is acknowledged, declared themselves willing to accept such offers.

Id.

Similarly, mandatory retirement plans, like the one in *Gianfelice,* do not create unemployment. Both seniority agreements and retirement plans involve principles of work sharing where there is a surplus of labor.

45. Mysteriously and apparently inadvertently, the commonwealth court distinguished the superior court's decision in *Lybarger* and not the supreme court's decision.

46. Act No. 108 of 1980, signed July 10, 1980.

47. *See* PA. STAT. ANN. tit. 43, § 801(d) (Purdon Supp. 1983).

48. *Id.* § 802(a).

49. *Id.* § 802(b).

50. Although the declaration of public policy of the Unemployment Compensation Law was not amended by Act 108, it is difficult to envision the use of Section 3 as a substantive

islature now must consider additional amendments to the Unemployment Compensation Law to deal with another problem discussed by Justice Cohen — funding![51] Foreseeably, employers and unions more frequently will negotiate a provision of a collective bargaining agreement which would require an employee to accept a layoff in a "Share the Work" program. If an employer already is paying the maximum unemployment tax (10.15 percent of the first $8000 paid to an employee during the calendar year 1984)[52] the employer easily could afford to include in the collective bargaining agreement a *Lybarger* type "Share the Work" provision. This provision would be at no additional immediate cost to the employer and would be very attractive to a union, particularly if its members recently had been laid off in significant numbers. Such a provision would not create unemployment, but would be "an attempt to cope with the sad fact of unemployed man hours — a fact not attributable to any 'fault' on the part of the employees."[53]

No additional cost would be borne by the employer who already is paying the maximum unemployment tax. Through the State Adjustment Factor,[54] other covered employers in Pennsylvania would shoulder the burden of the additional cost.[55] The resulting strain on the Unemployment Compensation Fund may require legislative action.[56] The legislature enacted Act 108 and thereby overruled the *Lybarger* analysis and precluded use of Section 3 as a substantive section in cases involving "Share the Work" plans. The legislature now should consider amending[57] the Unemployment Compensation Law to allow payment of compensation under sophisticated "Share the Work" programs.[58] A legislative change, however, should and must address the funding question.[59]

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section to deny benefits under a "Share the Work" plan in light of the clear expression of legislative intent in Act 108.

51. *See also* Judge Woodside's concerns for the funding and solvency of the Unemployment Compensation Fund in Gagliardi Unemployment Compensation Case, 186 Pa. Super. 142, 141 A.2d 410 (1958). On January 31, 1983, Pennsylvania owed the federal government $2.3 billion for the payment of unemployment compensation in Pennsylvania.

52. *See* PA. STAT. ANN. tit. 43, §§ 753(x)(1), 781(a)(2) (Purdon Supp. 1983).

53. 418 Pa. at 502-03, 211 A.2d at 479 (Cohen, J., dissenting).

54. *See* PA. STAT. ANN. tit. 43, §§ 781.1(a), (e) (Purdon Supp. 1983).

55. An employer's contribution rate is determined by three factors: (1) a funding factor; (2) an experience factor; and (3) a state adjustment factor. *Id.* § 781.1(a).

56. *See Lybarger,* 418 Pa. at 497, 211 A.2d at 476 (Cohen, J., dissenting).

57. The legislature should amend the definition of "unemployed," which presently does not include unemployment compensation for daily participants in a "Share the Work" program. PA. STAT. ANN. tit. 43, § 753(u) (Purdon 1964).

58. For an excellent introduction to the advantages and disadvantages of "Share the Work" programs and their unemployment compensation implications, *see* Crosslin, *Shared-Work Compensation As Part of a Temporary Worksharing Program,* Unemployment Compensation: Studies and Research — National Commission on Unemployment Compensation, 827-31 (1980).

59. *See id.* at 829 for a brief analysis of the California experience with "Share the Work" programs under the California unemployment compensation system. Crosslin specifically

III. Section 3 and Off-Duty Behavior

Although the legislature has rejected *Lybarger* and the use of Section 3 in the context of "Share the Work" plans, Section 3 has been increasingly used during the past decade by unemployment compensation authorities and by courts[60] in the context of off-duty behavior. Claimants who have been discharged for off-duty behavior usually have not been ruled ineligible under the "willful misconduct" section of the Law.[61] The "willful misconduct" standard usually has been applied only to on-duty behavior, behavior directly connected with the claimant's work.[62] These claimants also have not been ruled ineligible under the "voluntary-quit" section of the Law.[63] Their unemployment is involuntary because they desired to remain employed.[64] Courts and unemployment compensation authorities increasingly have used Section 3 to deny benefits to these claimants.[65]

The off-duty behavior to which Section 3 has been applied as a substantive section[66] can be categorized as follows: (1) Off-duty con-

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noted that: "Firms [which participated in the program] with a negative balance on their experience-rated reserve account must pay an additional surcharge to participate in the program." Such a provision is a possible answer to the funding question.

60. Pursuant to Sections 501-512 of the Unemployment Compensation Law, the initial determination of a claim is made by the Office of Employment Security which has over 100 offices in Pennsylvania. PA. STAT. ANN. tit. 43, §§ 821-32 (Purdon 1964 & Supp. (1983). An appeal can then be made to an unemployment compensation referee of which there are approximately 40. From the referee's decision an appeal can be made to the Unemployment Compensation Board of Review which consists of three members and sits in Harrisburg. Appeals from Board decisions are to the commonwealth court. 42 PA. CONS. STAT. ANN. § 769 (Purdon 1981).

61. Section 402(e) of the Law states as follows: "An employee shall be ineligible for compensation for any week . . . in which his unemployment is due to his discharge or temporary suspension from work for *willful misconduct connected with his work*. . . ." PA. STAT. ANN. tit. 43, § 802(e) (Purdon 1964). If, however, an employee willfully violates an employer's regulation concerning off-duty conduct, Section 402(e) applies and benefits will be denied if the regulation reasonably relates to the employer's interest.

62. *See* Gallagher v. Unemployment Compensation Board of Review, 36 Pa. Commw. 599, 388 A.2d 785 (1978). Therein benefits were granted to a claimant who had been discharged for calling, while off-duty, his employer's girlfriend an obscene name. The court reasoned that the conduct was not work connected.

63. PA. STAT. ANN. tit. 43, § 802(b) (Purdon Supp. 1983).

64. For an excellent discussion of the "voluntary" and "involuntary" distinction within the context of Pennsylvania's Unemployment Compensation Law, *see* Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 45 A.2d 898 (1946).

65. Unemployment compensation authorities and courts have not applied Section 3 to an employee's off-duty violation of an employer's regulation. Such cases properly are determined by Section 402(e). Nevel v. Unemployment Compensation Board of Review, 32 Pa. Commw. 6, 377 A.2d 1045 (1977). For an analysis of this type of case, *see* Gregory v. Anderson, 14 Wis. 2d 130, 109 N.W.2d 675 (1961). *Gregory v. Anderson* is criticized in Note, *Unemployment Compensation - Misconduct - Disqualification for Violation of an Off-Duty Regulation,* 1962 WIS. L. REV. 392.

66. On January 18, 1980, the Pennsylvania Supreme Court stated: "After a studied consideration of the records, together with the briefs and arguments of counsel, we find nothing sufficiently persuasive to cause us to disturb the orders of the Commonwealth Court in these cases." Smith v. Unemployment Compensation Board of Review, 487 Pa. 448, 450, 409 A.2d 854, 854-55 (1980) (per curiam). At issue were seven cases in which the commonwealth court had affirmed the denial of benefits under Section 3.

duct which precludes the employee from performing normal job duties; (2) off-duty conduct which requires an employer to discharge the employee; and the off-duty conduct which results in an arrest or conviction. Each type of Section 3 case requires a distinct analytical approach.

A. Preclusion from Performing Normal Job Duties

Section 3 is most commonly used as a substantive section when the claimant, usually a truck driver, has had his driver's license suspended for off-duty conduct and subsequently is suspended or discharged by his employer. The commonwealth court has affirmed the denial of benefits under Section 3 to a truck driver whose license was suspended when he failed to satisfy a judgment obtained by a third party in an unrelated civil action,[67] to a truck driver whose license was suspended when he failed to pay a judgment arising out of an automobile accident,[68] to truck drivers whose licenses were suspended for driving while under the influence of alcohol (but not on company time),[69] and to a "casual" mail carrier for the U.S. Postal Service whose federal driver's license was suspended after three automobile accidents involving Postal Services vehicles which he was driving.[70]

Each of these individuals was employed in a position a prerequisite of which was a valid driver's license, each individual knew of the prerequisite, and despite such knowledge each engaged in off-duty conduct that resulted in license suspension and subsequent unemployment. Although the denial of benefits in such cases is sound,[71] the denial should *not* have been premised on Section 3.

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67. Strokes v. Unemployment Compensation Board of Review, 29 Pa. Commw. 584, 372 A.2d 485 (1977), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980). The commonwealth court rejected several arguments advanced by the claimant including the argument that the term "through no fault of their own" is unconstitutionally vague.

68. Collins v. Unemployment Compensation Board of Review, 39 Pa. Commw. 389, 395 A.2d 667 (1978), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980).

69. Bechtel v. Unemployment Compensation Board of Review, 46 Pa. Commw. 458, 405 A.2d 1074 (1979); Huff v. Unemployment Compensation Board of Review, 40 Pa. Commw. 11, 396 A.2d 94 (1979), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980).

70. Varmecky v. Unemployment Compensation Board of Review, 60 Pa. Commw. 640, 432 A.2d 635 (1981). The Office of Employment Security granted benefits in this case, the referee denied benefits under Section 3, and the Board denied benefits under Section 402(e), the "willful misconduct connected with his work" standard. The claimant's accidents were all work-related, so his eligibility *should* have been determined under Section 402(e). The commonwealth court, however, has been inconsistent in its analysis under Section 402(e) of cases usually involving truck drivers who were discharged after accidents. *See* Trout v. Unemployment Compensation Board of Review, 65 Pa. Commw. 477, 442 A.2d 1209 (1982) (denial of benefits after three negligent accidents in less than a year); Parke v. Unemployment Compensation Board of Review, 38 Pa. Commw. 382, 393 A.2d 62 (1978) (award of benefits to a claimant who was discharged after his involvement in what his employer characterized as five "preventable" accidents within 16 months).

71. A completely different analysis and result are evident in Przekaza v. Department of Employment Security, 136 Vt. 355, 392 A.2d 421 (1978), in which the Vermont Supreme Court

The courts should have used Section 402(e) and the "willful misconduct connected with his work" standard. The individuals' off-duty conduct was connected with their work[72] because it prevented them from fulfilling one of the prerequisites of their employment.[73]

Section 3 has also been used as a substantive section in alcoholic absenteeism cases. The commonwealth court has affirmed the denial of benefits under Section 3 to an individual who, on a weekend, fell into an "alcoholic stupor," failed to report to work during the entire following week and subsequently was discharged[74] and to an individual who had a history of drinking, had been warned about excessive absenteeism, continued to be repeatedly absent due to alcoholism and subsequently was discharged.[75] In both cases, the court rejected the argument that alcoholism is a disease over which an individual has little or no control and that any "willfulness" under Section 402(e) or "fault" under Section 3 is thereby negated.

Each of these individuals knew that one of the prerequisites of employment was continued attendance. Despite this knowledge each engaged in off-duty conduct which caused his continued absence from work and subsequent unemployment. As in the "loss of license" cases, the denial of benefits is sound, but should have been premised on Section 402(e) because the individuals' off-duty conduct prevented[76] them from fulfilling one of the prerequisites of their employment.

Similarly Section 402(e) should have been used instead of Section 3 in cases in which individuals were incarcerated for off-duty conduct. The Pennsylvania Commonwealth Court has affirmed the denial of benefits under Section 3 to an individual who was incarcerated for ninety days for failure to pay child support and was subse-

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reversed the denial of benefits to a driver whose license was revoked after an off-duty drunken driving incident.

72. To be "connected with his work," the off-duty conduct must *directly* reflect upon the ability of the employee to perform his assigned duties. Unemployment Compensation Board of Review v. Derk, 24 Pa. Commw. 54, 353 A.2d 915 (1976).

73. In Township of Darby v. Unemployment Compensation Board of Review, 59 Pa. Commw. 284, 291, 429 A.2d 1223, 1227 (1981), the claimant who had failed to obtain a driver's license, was denied benefits by the court under Section 402(e) on the theory that "[f]ailure to obtain a [l]icense where there is a job related necessity for the license can be willful misconduct." The claimant knew that a driver's license was "a necessary prerequisite" for his job as assistant superintendent of highways. In Lytle v. Unemployment Compensation Board of Review, 36 Pa. Commw. 77, 80, 387 A.2d 962, 963 (1978), the court remanded the case for a determination "on the crucial issue of the connection between Employer's desire that Claimant [a laborer] obtain a Pennsylvania driver's license and the job-related need for that license, if any."

74. Mooney v. Unemployment Compensation Board of Review, 39 Pa. Commw. 404, 395 A.2d 675 (1978), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980).

75. Katz v. Unemployment Compensation Board of Review, 40 Pa. Commw. 1, 396 A.2d 480 (1979), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980).

76. *See supra* note 72 for the required causal connection between the off-duty conduct and the employee's ability to perform his duties.

quently discharged by his employer.[77] The court also denied benefits to an individual who was incarcerated after a "drunken brawl," remained incarcerated for over six weeks and was discharged by his employer during the incarceration for "unavailability for work due to his incarceration."[78] The denial of benefits should have been premised on Section 402(e) because the individuals' off-duty conduct prevented then from fulfilling one of the prerequisites of their employment.[79]

In *D'Iorio v. Unemployment Compensation Board of Review,*[80] the commonwealth court extended the Section 3 rationale to its outer limits. The claimant, an investigator for the District Attorney's Office of Delaware County, was discharged after a partially nude photograph of him was discovered during a drug raid at the residence of a convicted felon. The investigator was discharged because his off-duty conduct "fell far below the demands of the position and because the investigative efficiency of the [district attorney's] office was necessarily compromised."[81]

Unlike the claimants in the loss-of-license cases, the alcoholic absenteeism cases and the absenteeism-due-to-incarceration cases, the claimant in *D'Iorio* was not precluded from performing his normal job duties. The commonwealth court, however, affirmed the de-

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77. Smith v. Unemployment Compensation Board of Review, 29 Pa. Commw. 292, 370 A.2d 822 (1977). The superior court utilized the "voluntary-quit" provisions of Section 402(b) in the strikingly similar Michalsky Unemployment Compensation Case, 163 Pa. Super. 436, 62 A.2d 113 (1948). These cases more properly belong under Section 402(e); the individual was separated from his employment because his off-duty conduct prevented him from fulfilling one of the prerequisites of that employment.

78. Mulqueen v. Unemployment Compensation Board of Review, 48 Pa. Commw. 381, 383, 409 A.2d 958, 959 (1980). Claimants who are denied benefits under the availability-for-suitable-work standard of Section 401(d) are not required to purge their disqualification under Section 401(f) of the Law, but claimants who are denied benefits under Section 402(e) must purge their disqualification by earning six times their weekly benefit rate. *See* PA. STAT. ANN. tit. 43, § 801(f) (Purdon Supp. 1983).

79. In Sherman Bertram, Inc. v. California Department of Employment, 202 Cal. App. 2d 733, 739, 21 Cal. Rptr. 130, 133-34 (1962), the claimant, a paint finisher, was discharged after being sentenced to jail for 30 days after conviction for leaving the scene of a accident, a felony. The California unemployment compensation authorities granted benefits, but the California Court of Appeals reversed and denied benefits. The court concluded that "the claimant's loss of employment was attributable to an act of his own volition and thus [was] tantamount to a voluntary leaving."

> 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. . . . To say that claimant's wilful criminal act was not his 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. *But see* Chamberlin v. Dept. of Employment Security, 136 Vt. 571, 396 A.2d 140 (1978) in which the claimant was discharged after he was incarcerated for an off-duty breaking and entering conviction. The Vermont Supreme Court refused to deny benefits for off-duty misconduct.

80. 42 Pa. Commw. 443, 400 A.2d 1347 (1979).

81. *Id.* at 445, 400 A.2d at 1349.

nial of benefits under Section 3 and stated as follows: "Sordid activities and associations by law enforcement people do, as a general proposition, constitute *incompatibility with work responsibilities* within the meaning of Section 3."[82] This result must be a function of the sensitive nature of the claimant's position. The commonwealth court repeatedly has emphasized the demanding standards for police officers[83] and has held them to a higher standard in willful misconduct cases[84] under the Unemployment Compensation Law.

B. Requirement that the Employer Discharge the Employee

Occasionally an employer will be required to discharge an employee who engages in certain off-duty conduct. This requirement may be in a collective bargaining agreement or in a statute.

1. Collective Bargaining Agreements.—In the private employment sector, union shop agreements which require a new employee to join the union within thirty days are common.[85] If a new employee fails to join the union, the employer, pursuant to the collective bargaining agreement, is required to discharge the employee. The unemployment compensation authorities and the courts have analyzed such cases with considerable difficulty.

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82. *Id.* at 446, 400 A.2d at 1349 (emphasis supplied). This standard differs from the standard enunciated in Unemployment Compensation Board of Review v. Derk, 24 Pa. Commw. 54, 353 A.2d 915 (1976). The *Derk* standard (direct reflection upon an employee's ability to perform his duties) precludes the denial of benefits when the off-duty conduct only indirectly reflects upon the employee's ability to perform his duties or merely reflects upon the employer's perception of its own public image.

83. In Cerceo v. Borough of Darby, 3 Pa. Commw. 174, 183, 281 A.2d 251, 255 (1971), the court stated:

> We demand from our law enforcement officers, and properly so, adherence to demanding standards which are higher than those applied to many other professions. It is a standard which demands more than forebearance from overt and indictable illegal conduct. It demands that in both an officer's private and official lives he do nothing to bring dishonor upon his noble calling and in no way contribute to a weakening of the public confidence and trust of which he is a repository.

See also Faust v. Police Civil Service Commission, 22 Pa. Commw. 123, 347 A.2d 765 (1975).

84. In Lower Gwynedd Township v. Unemployment Compensation Board of Review, 44 Pa. Commw. 646, 647, 404 A.2d 770, 771 (1979), the court denied benefits to a police officer who was suspended in December 1977 for remarking in May 1977 that "someone was going to get hurt as he was not going to back them up if they did not discontinue harassing him." The Board of Review had granted benefits because the claimant's supervisor had known of this remark for seven months and had done nothing about it. The commonwealth court reversed the grant of benefits and held the claimant, a police officer, to a higher standard than that to which other claimants would be held.

Others who are held to a higher standard in unemployment compensation cases include people in the health profession. *See, e.g.,* Selan v. Unemployment Compensation Board of Review, 495 Pa. 338, 433 A.2d 1337 (1981) (per curiam). An interesting question is whether the unemployment compensation authorities and the courts will apply *D'Iorio* and its "incompatibility-with-work-responsibilities" standard to cases other than those involving law enforcement officers.

85. Union shop agreements, however, are not permitted in the public employment sector in Pennsylvania. *See* The Public Employe Relations Act, PA. STAT. ANN. tit. 43, § 1101.705 (Purdon Supp. 1983).

In *Gulick v. Unemployment Compensation Board of Review*[86] the claimant, a part-time laborer with net earnings of fifty dollars per week, was discharged after failing to pay the union's initiation fee and one month's dues, which totalled over one hundred dollars. The Office of Employment Security granted benefits under the voluntary-quit section;[87] the referee denied benefits under the same section; the Board of Review denied benefits under Section 3 of the Law; the commonwealth court affirmed under Section 3; and the supreme court affirmed *per curiam.*[88] Although the Board of Review and the courts utilized Section 3 to deny benefits, the rationale was identical to the rationale used in Section 402(e) cases. As in the "preclusion from performing normal job duties" cases, these individuals knew that one of the prerequisites for their employment was union membership within thirty days. Despite such knowledge they failed to become union members. Thus they were unemployed through their own fault.[89]

2. Statutes.—Similarly a claimant may be denied unemployment benefits if a statute requires his employer to discharge him for his off-duty conduct. The claimant's knowledge of the statute, however, may be required for denial in such cases. In *Unemployment Compensation Board of Review v. Budzanoski,*[90] the claimant, a district president and wage rate director for the United Mine Workers of America, was convicted in federal court for violating provisions of

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86. 37 Pa. Commw. 73, 388 A.2d 1154 (1978), *aff'd per curiam,* 487 Pa. 448, 409 A.2d 854 (1980).

87. PA. STAT. ANN. tit. 43, § 802(b) (Purdon Supp. 1983).

88. 487 Pa. 448, 409 A.2d 854 (1980).

89. The commonwealth court stated as follows:

> We believe the claimant had an obligation to preserve his employment by satisfying the condition precedent to such [continued] employment, *i.e.*, union membership, a reasonable requirement uniformly enforced among all the employes of the company concerned. We believe that his failure to satisfy that condition resulted in his being unemployed through his own fault.

37 Pa. Commw. at 76-77, 388 A.2d at 1156. *See also* McGowan Unemployment Compensation Case, 208 Pa. Super. 280, 284, 224 A.2d 647, 649 (1966), in which the Bureau of Employment Security granted benefits, the referee denied benefits under Section 402(e), the Board of Review denied benefits under Section 402(b), but granted benefits upon remand, and the superior court denied benefits, equating a refusal to join a bona fide labor organization with "a voluntary quit."

Another case which reflects the confusion in this area is Williams Unemployment Compensation Case, 193 Pa. Super. 320, 164 A.2d 42 (1960) in which the superior court expressly adopted the *Gianfelice* analysis. The court queried, (1) did the claimant cease working voluntarily as a matter of fact, and (2) was the claimant available for suitable work thereafter? The answers were (1) no and (2) yes; the claimant was entitled to benefits. *See also* Barclay White Co. v. Unemployment Compensation Board of Review, 356 Pa. 43, 50 A.2d 336 (1947), *cert. denied,* 332 U.S. 761 (1947); Butler Unemployment Compensation Case, 189 Pa. Super. 605, 151 A.2d 843 (1959); Wallace Unemployment Compensation Case, 187 Pa. Super. 618, 145 A.2d 902 (1958); O'Donnell Unemployment Compensation Case, 173 Pa. Super. 263, 98 A.2d 406 (1953). At issue in all these cases is the relationship between the unemployment compensation law and collective bargaining agreements, especially union security provisions.

90. 21 Pa. Commw. 535, 346 A.2d 864 (1975).

the Labor-Management Reporting and Disclosure Act of 1959.[91] After the United States Supreme Court denied his petition for certiorari, the claimant was informed by the United States Department of Justice that, pursuant to the Labor-Management Reporting and Disclosure Act of 1959, he was prohibited from continuing in his union positions. The claimant then resigned his union positions[92] and filed for unemployment compensation.

As in the cases which involved the discharge of an employee under a collective bargaining agreement for failure to pay union dues, the unemployment compensation authorities and the commonwealth court had difficulty analyzing the *Budzanoski* case. The Bureau of Employment Security denied benefits under Section 402(e), citing the claimant's willful misconduct. The referee denied benefits under Section 402(b); the claimant voluntarily quit without a compelling and necessitous reason. The Board of Review also denied benefits under Section 402(b). The commonwealth court used Section 3 as the primary justification for denial of benefits. After quoting Section 3 and *Lybarger* at length, the court stated as follows:

> Assuming, as the appellant insists, that the reason for his quitting was the termination of his pay and not additional sanctions for continuing to work for the unions provided by the Landrum-Griffin Act, it remains impossible to conclude that his unemployment was through no fault of his own. His pay was terminated as a consequence of his misbehavior as a union officer; his quitting of uncompensated employment was for essentially the same cause — his own fault.[93]

Budzanoski was the first substantive use by the commonwealth court of Section 3.[94]

In *Crockett v. Unemployment Compensation Board of Review*,[95]

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91. 29 U.S.C. §§ 431-441 (1975).

92. The claimant's "resignations were at least partly impelled by advice of his counsel that continuance in the jobs would cause him to be subject to criminal penalties." 21 Pa. Commw. at 537, 346 A.2d at 865. In Gould v. Unemployment Compensation Board of Review, 60 Pa. Commw. 42, 430 A.2d 731 (1981), the claimant was convicted of promoting prostitution, of conspiring to promote prostitution and of conspiring to commit prostitution. Upon the advice of her attorney, the claimant, to improve her prospects for a lenient sentence, quit her job at the spa at which the crimes occurred. The commonwealth court, remanding the case on a procedural technicality, stated:

> In view of the fact that Gould might have received a sentence to a term of imprisonment of fifteen years and a $32,500 fine . . ., we believe she had real and substantial grounds for leaving her work. One who is employed by an enterprise engaged in illegal activities as part of its usual business has a good cause for leaving such work even if the particular employee is not required to engage in those activities.
>
> However, it would appear that even though the claimant left her job for good cause, she may be subject to disqualification under Section 3 because her unemployment was due to her own fault in participating in her employer's illegal business.

Id. at 45-46, 430 A.2d at 732.

93. 21 Pa. Commw. at 540, 346 A.2d at 867.

94. Unemployment Compensation Board of Review v. Ostrander, 21 Pa. Commw. 583, 347 A.2d 351 (1975), however, was the first case in which both the court and the Board of Review utilized Section 3 as a substantive section.

95. 44 Pa. Commw. 50, 402 A.2d 1155 (1979).

the claimant, a civil servant, was discharged because he ran for re-election to the school board. Section 904 of the Civil Service Act[96] prohibits political activity by a civil servant, and Section 906[97] requires the dismissal of civil servants who violate the Act.[98] The claimant had argued that he did not know about the prohibition in Section 904. The Board of Review made the factual finding that the claimant knew of the Civil Service Act's requirements. The court declared that the finding was supported by substantial evidence and affirmed the decision that the claimant's unemployment was not "through no fault of his own" under Section 3.

The claimant's argument in *Crockett* that he did not know that he was violating the law presents the following question: should a claimant be denied unemployment compensation if his discharge is the result of requirements, in a collective bargaining agreement or in a statute, of which he is unaware? It would be difficult to argue that a claimant's unemployment is through his own fault if the claimant did not know, at the time of the violation of the collective bargaining agreement or of the statute, that his conduct was a violation; the claimant would be unaware of both the violation and the consequences of the violation, his discharge.

C. Arrest or Conviction Arising from Off-Duty Conduct

When off-duty conduct precludes an employee from performing normal job duties or triggers a statutory or contractual obligation in an employer to discharge the employee, the unemployment compensation authorities and the courts are confronted by difficult questions. Those questions, however, are better answered by Section 402(e) than by Section 3 of the Unemployment Compensation Law. Another type of off-duty conduct case has arisen under the Unemployment Compensation Law which presents an even more difficult analytical problem — the case of a discharge resulting from arrest or conviction for off-duty conduct. These cases cannot be analyzed under Section 402(b) or under Section 402(e); the claimant has not voluntarily quit his job, nor has he engaged in willful misconduct connected with his work.

These cases are *pure* Section 3 cases; without using Section 3 as a substantive provision of the Unemployment Compensation Law, the courts could not deny benefits to the claimants. Although the

96. PA. STAT. ANN: tit. 71, § 741.904 (Purdon Supp. 1983).

97. *Id.* § 741.906.

98. [W]hen, after a hearing, it is proven that an employee in the classified service (i.e., a civil servant) has engaged in the political activities prohibited by Section 904, the penalties set forth in Section 906 must be applied, *whether or not such employee engaged in such activity intentionally or unintentionally.*

Pa. Att'y Gen. Op. No. 3 (1979) (emphasis supplied). *See also* Pa. Att'y Gen. Op. No. 223 (1960).

unemployment compensation authorities and the commonwealth court have utilized Section 3 in these cases, the Pennsylvania Supreme Court has not yet ruled on a *pure* Section 3 case.[99] With difficulty the commonwealth court has groped for standards in these cases and has gradually developed guidelines. The court occasionally, however, has failed to follow its own guidelines.

The commonwealth court first faced the criminal conviction issue in *Unemployment Compensation Board of Review v. Ostrander.*[100] The claimant, Ostrander, had pleaded guilty in federal court to conspiracy to violate the civil rights of another.[101] The charges against Ostrander, a truck driver, arose out of his participation during the independent truckers' strike of 1974 in a rock-throwing incident which resulted in the death of another trucker. The court affirmed the denial of benefits under Section 3 and stated that "the criminal conviction in this case is of a *sufficiently serious nature* to support the allegation that Ostrander was indeed at fault for his discharge from work . . . ."[102]

The court's use of a "sufficiently serious" standard was an expansion of the "moral turpitude" standard set forth in 1942 in *Department of Labor and Industry v. Unemployment Compensation Board of Review.*[103] The claimant had been convicted and imprisoned for larceny which was not connected with his work. Upon release, the claimant found that he had been discharged by his employer. The superior court premised its denial of benefits on Section 3 and held that the legislature's declaration of public policy did not permit the award of benefits to one who had lost his job because he was convicted of a crime involing moral turpitude.[104]

In *Unemployment Compensation Board of Review v. Derk*[105] the commonwealth court elaborated on the "moral turpitude" standard and on the "sufficiently serious" standard. The claimant in *Derk*

99. None of the seven Section 3 cases which were affirmed per curiam in Smith v. Unemployment Compensation Board of Review, 487 Pa. 448, 409 A.2d 854 (1980) was a "pure" Section 3 case; each case could have been decided under Section 402(e).

100. 21 Pa. Commw. 583, 347 A.2d 351 (1975). *Ostrander* was the first case in which both the commonwealth court and the Board of Review utilized Section 3 as a substantive section.

101. *But see* Giese v. Employment Division, 27 Or. App. 929, 557 P.2d 1354 (1976) in which the claimant, a tenured professor, was discharged by Portland State University after he was convicted in federal court of conspiring with others to explode devices designed to damage or destroy certain federal buildings in the state. The Oregon Court of Appeals affirmed the grant of benefits upon the dual rationale that the claimant had not engaged in misconduct connected with his work and that Oregon, unlike Pennsylvania, has no specific "fault" provision.

102. 21 Pa. Commw. at 586, 347 A.2d at 352 (emphasis supplied).

103. 148 Pa. Super. 246, 24 A.2d 667 (1942).

104. The court stated: "The Declaration of Public Policy negatives the conclusion that one who has lost his employment because of his commission of a crime involving moral turpitude shall receive compensation for the unemployment which resulted from his own criminal act." *Id.* at 248, 24 A.2d at 668.

105. 24 Pa. Commw. 54, 353 A.2d 915 (1976).

was a part-time school bus driver who was *arrested* for unspecified "morals charges" allegedly committed while off duty.[106] The Bureau of Employment Security and the referee used Section 402(e) to deny benefits, and the Board of Review achieved the same result by using Section 3.

The court agreed with the Board of Review that Section 3 was the proper section, but the court elaborated on the proper standards in arrest cases:

> In order to deny compensation under Section 3 of the Act, more is needed than mere evidence of an *arrest* for a crime. The employer must present some evidence showing conduct of the claimant leading to the criminal arrest which is inconsistent with acceptable standards of behavior and which *directly* reflects upon his ability to perform his assigned duties. Of course, no proof of criminal conviction is necessary.[107]

The court thus enunciated a two-part standard in arrest cases: a denial of benefits may be based on off-duty conduct that (1) is inconsistent with acceptable standards of behavior and (2) directly reflects upon the claimant's ability to perform his assigned duties. The *Derk* standard is more specific than the moral turpitude and sufficiently serious standards and should be used by unemployment compensation authorities and the courts.

Significantly, the burden of satisfying the two-part test in *Derk* is upon the employer. In most discharge cases arising out of an arrest for off-duty conduct, the employer will have difficulty satisfying the first prong of the *Derk* test unless the employer is able and willing to introduce evidence of the facts which gave rise to the arrest.[108] The *Derk* court noted, however, that the first prong of the two-part test would be satisfied by evidence of a conviction.[109]

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106. *See also* O'Neal v. Employment Security Agency, 89 Idaho 313, 319, 404 P.2d 600, 603-04 (1965) in which the claimant, an employee of the U.S. Post Office, was discharged, pursuant to Post Office regulations, after pleading guilty to two morals offenses committed while off duty. Reversing the grant of benefits, the Idaho Supreme Court applied the declaration of public policy in the Idaho Employment Security Law as an interpretive section and concluded:

> An employee's conduct off the working premises or outside the course or scope of his employment is generally not considered as misconduct in connection with the employment. There are recognized circumstances, however, as where the conduct is so closely connected with the business interests of the employer as to warrant disqualification for unemployment benefits.
>
> Here, however, claimant admitted violating the cited postal regulation. . . . An employer, be he public or private, has the right to expect employees to refrain from acts which would bring dishonor on the business name or the institution.

107. 24 Pa. Commw. at 57, 353 A.2d at 917.

108. The employer's ability to introduce such evidence will usually require cooperation with the office of the prosecuting public official. Quite often the prosecutor will discourage the production of such evidence, for the first time, at an unemployment compensation hearing.

109. The court stated that "[p]roof of a criminal conviction, the type of which would directly reflect on the ability of a claimant to continue in the type of position that he held, would constitute highly persuasive, if not controlling, evidence of a violation of the restrictions of Section 3 of the Act." 24 Pa. Commw. at 57, 353 A.2d at 917 n.2.

The commonwealth court has used Section 3 to deny benefits to a construction inspector for the General State Authority who was convicted of retail theft[110] and to a claims manager who was convicted of conspiracy and mail fraud arising out of his handling of a fraudulent automobile claim while working as a claims manager for a prior employer.[111] The court also has denied benefits to a security officer for the Department of Environmental Resources who was "convicted on charges of 'hit and run' in an accident occurring while he was off duty driving his own automobile . . . and for falsifying his accident report,"[112] and to a clerk-typist for the Pennsylvania Department of Transportation who was convicted of welfare fraud.[113]

The Pennsylvania Commonwealth Court in *Dombroskie v. Unemployment Compensation Board of Review*[114] and *Wilson v. Unemployment Compensation Board of Review,*[115] however, has failed to apply the *Derk* standards and has failed to require the employer to prove anything. Instead, the court resurrected the "moral turpitude" standard and concluded that the claimants were ineligible *as a matter of law.* The court's failure in *Dombroskie* and *Wilson* to require the employer to satisfy the two-part *Derk* test and the court's willingness to rule the claimants ineligible *as a matter of law* under the "moral turpitude" standard emanates from a judicial reluctancy to provide unemployment compensation to an individual who has been convicted of hit and run and of falsifying an accident report, *Dombroskie,* and to an individual who has been convicted of welfare fraud, *Wilson*. The denial of benefits in *Dombroskie* and *Wilson* could not

110. Perdue v. Unemployment Compensation Board of Review, 28 Pa. Commw. 641, 369 A.2d 1334 (1977). The claimant in *Perdue* testified that he felt his conviction for retail theft would affect his job performance.

111. Adams v. Unemployment Compensation Board of Review, 40 Pa. Commw. 486, 489, 397 A.2d 861, 862 (1979). The court declared "that the taint of his conviction has effectively impugned his credibility as a representative of [the e]mployer to its insureds and as a court witness."

112. Dombroskie v. Unemployment Compensation Board of Review, 45 Pa. Commw. 546, 548, 405 A.2d 1044, 1045 (1979). The court did not mention *Derk* and relied upon the "moral turpitude" standard: "We hold that a security officer's admission of an offense involving moral turpitude is sufficient to sustain [the] employer's burden of proving 'fault' in Section 3 cases." *Id.* at 550, 405 A.2d at 1046. Apparently the employer did not satisfy *as a matter of fact* the second part of the *Derk* test; he did not produce evidence that the claimant's conviction directly reflected upon his ability to perform his work duties. The court, however, resurrected the "moral turpitude" standard and ruled that *as a matter of law* the claimant was ineligible under Section 3.

113. Wilson v. Unemployment Compensation Board of Review, 58 Pa. Commw. 531, 428 A.2d 288 (1981). The employer in *Wilson* did not satisfy the second part of the *Derk* test; he did not produce evidence that the claimant's conviction directly reflected upon her ability to perform her work duties. The *Wilson* court relied upon the "moral turpitude" standard of *Dombroskie,* however, and did not mention the much more definitive *Derk* standards. Moreover, the *Wilson* court incorrectly stated that Unemployment Compensation Board of Review v. Ostrander, 21 Pa. Commw. 583, 347 A.2d 351 (1975), the first *pure* Section 3 case, was affirmed per curiam by the Pennsylvania Supreme Court in Smith v. Unemployment Compensation Board of Review, 487 Pa. 448, 409 A.2d 854 (1980).

114. 45 Pa. Commw. 546, 405 A.2d 1044 (1979).

115. 58 Pa. Commw. 531, 428 A.2d 288 (1981).

be based on Section 402(e), Section 402(b) or the two-part *Derk* standard. Moreover, the *Dombroskie* and *Wilson* approach ignores the *Derk* requirement that the burden of proof in these cases be placed on the employer.

An additional problem with the use of Section 3 in arrest and conviction cases arises in the Accelerated Rehabilitative Disposition (ARD) program established by Pennsylvania Rules of Criminal Procedure 175-185.[116] As the court stated in *Unemployment Compensation Board of Review v. Vereen*:[117]

> Satisfactory completion of this program results in dismissal by the court of charges against the defendant. In the instant case, the claimant was charged with the criminal offenses of theft and receiving stolen property, and after his satisfactory completion of the ARD program the Court of Common Pleas of Bucks County dismissed these charges.

The claimant in *Vereen* was accused of taking his employer's goods without authorization. Although Section 402(e) was applicable, the court applied Section 3 and the two-part *Derk* test. The employer produced no evidence of willful misconduct, so the court reversed the denial of benefits.

IV. Conclusion

Courts have used Section 3 of the Pennsylvania Unemployment Compensation Law in three ways. First, consistent with the Statutory Construction Act, courts have used Section 3 as an interpretive provision, to interpret Section 401, the qualifying provisions, and Section 402, the eligibility provisions. Second, Section 3 in the 1960s was used as more than an interpretive section to deny unemployment compensation to employees who became unemployed under "Share the Work" plans. Third, courts used Section 3 in the 1970s as a substantive section to deny unemployment compensation to employees whose unemployment resulted from their off-duty conduct.

This article is designed to foster an interpretation of the Unemployment Compensation Law which is more uniform and more consistent with the policies underlying the law. To achieve that end the following recommendations are offered: (1) "Share the Work" plans in collective bargaining agreement, have been implicitly approved by the Legislature in the 1980 amendments to the Unemployment Compensation Law, and Section 3 and the majority opinion in *Lybarger* should not be used to deny benefits to those unemployed pursuant to such a "Share the Work" plan. (2) Before expressly approving "Share the Work" plans in the the context of unemployment

116. PA. R. CRIM. P. 175-85.
117. 29 Pa. Commw. 252, 255, 370 A.2d 1228, 1231 (1977).

compensation, however, the legislature should develop and implement methods of funding the unemployment compensation consequences of "Share the Work" plans. (3) Courts and unemployment compensation authorities should use Section 402(e) and not Section 3 in those cases in which an employee's off-duty conduct precludes him from performing his normal job duties. (4) Similarly, Section 402(e) and not Section 3 should be used in those cases in which an employee's off-duty conduct requires an employer, pursuant to a collective bargaining agreement or a statute, to discharge the employee. (5) Finally, if the unemployment compensation authorities and the courts continue to use Section 3 in cases involving arrest or conviction arising out of off-duty conduct, the standards set forth in *Derk* should be applied.