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Disqualification for Unemployment Insurance

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DISQUALIFICATION FOR UNEMPLOYMENT INSURANCE

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A. Basic Structure and Purpose in Disqualification

Our public arrangements in this country for compensating unemployment (including the aggregate of federal and state legislation to that end) are quite properly referred to as an "insurance" program.[1] Study of the elements of coverage in an insurance policy will be found instructive, therefore, in the matter of eligibility and disqualification for unemployment benefits.

A contract of insurance is designed to transfer certain defined risks from the insured to the insurer.[2] The risks selected for this process in a particular policy will be described or stated affirmatively in its provisions.[3] Certain exclusions from the risk may be specified for even greater precision in delineating the boundaries of the insured event[4]—thus the process of inclusion and exclusion establishes the affirmative conditions of the insurer's liability and defines the insured event or, more precisely, the event insured against.[5] Risks must be selected and defined to provide the subject matter for the operation of the agreement between the parties. In addition, the insurer will probably insert provisions designed to control or minimize the risk assumed.[6] This may be accomplished by (1) stating exceptions to, or suspensions of, its liability when the event (of the type insured) is due to certain specified causes and (2) by establishing (perhaps through continuing warranties exacted from the insured) negative conditions of its promise under which the insurer will be relieved of the obligation to pay even though there is in fact no causal connection between the broken condition and the insured event.[7] Through these control measures the insurer will be seeking to avoid the assumption of certain moral hazards related particularly to the insured's wilful causing of

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1. See U.S. Bureau of Employment Security, Dep't of Labor, Comparison of State Unemployment Insurance Laws *passim* (1949); Vance, Insurance, 53 (3d ed. 1951).
2. Patterson, Essentials of Insurance Law 199 (1935); and Vance, Insurance 82 (3d ed. 1951).
3. Patterson, Essentials of Insurance Law 200 (1935).
4. *Id.* at 213.
5. *Id.* at 204.
6. *Id.* at 200.
7. *Id.* at 202; see Vance, Insurance 408-12 (3d ed. 1951).

the insured event[8] and to exert pressure upon the insured to decrease the risk (or at least keep it from increasing).[9] Through these exceptions and conditions the legitimate objective of reducing the scope of coverage to manageable proportions can be achieved. The imposition of a forfeiture upon the insured through such techniques is neither a legitimate purpose nor result.[10]

Quite apart from specific provisions setting forth excepted causes of the insured event,[11] it is important to note that in any event the law of insurance will except some causes of the insured event by implication.[12] It is assumed that an insurance enterprise cannot function as such if the carrier is to be held liable for losses designedly caused by the persons insured—that such a situation is in basic confiict with the aleatory nature of insurance.[13] "[It] is implied in every insurance contract that the insured event is a fortuitous one, *i.e.* one not designedly brought about by the insured."[14]

This sketch of certain structural aspects of the selection and control of an insurance risk has its rather obvious parallels in the eligibility and disqualification provisions of a state unemployment insurance act. Not all risks in connection with unemployment are to be covered.[15] The program does not contemplate a welfare-type grant to every unemployed person. Eligibility conditions represent the affirmative statement of the risks selected for coverage under the program.[16] In terms of conditions precedent the risk which the program insures against (the insured event) is the unemployment beyond the waiting period of a claimant who has established himself as part of a labor force (having earned qualifying wages in covered employment) and who has a continuing attachment to it (being able to work and available for work), signified by registration for work at an employment office.

In contrast with eligibility, disqualification provisions in unemployment insurance laws, while recognizable as in the nature of negative conditions or conditions subsequent, do not lend themselves quite so simply to analysis and classification.[17] Still, all four of the major dis-

8. PATTERSON, ESSENTIALS OF INSURANCE LAW 200 (1935).
9. *Ibid.*
10. *Id.* at 220; see VANCE, INSURANCE 421-23 (3d ed. 1951).
11. PATTERSON, ESSENTIALS OF INSURANCE LAW 212-13 (1935).
12. *Id.* at 221; VANCE, INSURANCE 90 (3d ed. 1951).
13. PATTERSON, ESSENTIALS OF INSURANCE LAW 221 (1935); VANCE, INSURANCE 93 (3d ed. 1951); see "aleatory contract" in BLACK, LAW DICTIONARY (3d ed. 1933). This principle is not applicable to the negligence of the insured, VANCE, *supra* at 91-2; PATTERSON, CASES ON INSURANCE 221 (3d ed. 1955).
14. PATTERSON, ESSENTIALS OF INSURANCE LAW 221 (1935).
15. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 519 (1937). See RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 466 (1950); Burns, *The Relation of Unemployment Compensation to the Broader Problem of Relief*, 3 LAW & COMTEMP. PROB. 20, 22 (1936).
16. See WILLIAMS, ELIGIBILITY FOR UNEMPLOYMENT BENEFITS, *supra* at p. 286 and COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1,
17. See COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1, at 66-89 for tabular presentation and analysis of disqualification pro-

qualifying provisions may be characterized rather readily as efforts to limit and control the risk by setting forth exceptions to it: *i.e.*, by establishing excepted causes of the otherwise insured event (the unemployment of an eligible worker). Disqualifications based on (a) leaving work voluntarily without good cause,[18] (b) discharge for misconduct connected with the work,[19] (c) refusal of suitable work[20] and (d) unemployment due to a labor dispute[21]—all represent limitations on coverage by means of the excepted cause.[22] None of these refers expressly to the designed bringing about of the insured event by the insured (the seeking of compensated unemployment). The first three named may be recognized, however, as controls directed toward this hazard and hedging in an area around it sufficiently related to it in terms of probability to support the judgment that payment of compensation is

visions in all states. See, under the general heading of "Eligibility and Disqualification for Benefits": Harrison, *Statutory Purpose and "Involuntary Unemployment,"* 55 YALE L.J. 117 (1945); Menard, *Refusal of Suitable Work,* 55 YALE L.J. 134 (1945); Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 YALE L.J. 147 (1945); Lesser, *Labor Disputes and Unemployment Compensation,* 55 YALE L.J. 167 (1945); Simrell, *Employer Fault vs. General Welfare as the Basis for Unemployment Compensation,* 55 YALE L.J. 181 (1945); see also Teple, *Disqualification: Discharge for Misconduct and Voluntary Quit,* 10 OHIO ST. L.J. 191 (1949); SOCIAL SECURITY BOARD, BUREAU MEMORANDUM No. 32, Part I, *Principles Underlying Disqualification for Benefits in Unemployment Compensation* (1938).

18. See Part B of this article, *infra.* All states have such a disqualification provision. See Table 24 in COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1, at 70. As of 1949 the general "good cause" provision included good personal cause in thirty-three states. Other states had provisions more or less specific in requiring the cause to be connected with the work or attributable to the employer. *Id.* at 68-69. The permissible period of disqualification under this heading as of 1949 ranged from the week of separation plus one week to the duration of the unemployment or more. *Id.* at 70-71. Cancellation of benefit rights for varying periods was established in 17 states in 1949, *id.* at 71, but that figure has increased since. See, *e.g.*, the 1955 change in the Tennessee Employment Security Law (Tenn. Pub. Acts 1955, c. 115 § 7) amending Subsection A of § 6901.5 of the Code Supplement of 1950 providing for the deduction of benefit credits equal to the period of disqualification.

19. See Part D of this article. *infra.* All states have such a disqualification. See table 25 (p. 72) and the summary on p. 74 of COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1. Most of the states have a variable period here to be applied "according to the seriousness of the misconduct" and a number have specified heavier disqualification provision for aggravated or gross misconduct. *Id.* at 73. The period of disqualification again runs from one week to the duration of unemployment (and longer) and for cancellation of benefit rights to the extent of a complete cancellation. *Id.* at 72. See TENN. CODE SUPP. § 6901.5 B (1) (1950). Tennessee joined the group of states cancelling benefit credits on an equivalent basis to weeks of disqualification at the 1955 legislative session. Tenn. Pub. Acts 1955, c. 115 § 8.

20. See Part C of this article, *infra.* All states have such a provision. See Table 26 and summary, pp. 76-77, COMPARISON OF STATE UNEMPLOYMENT INSURANCE, *op. cit. supra* note 1. There is much of the same variation in disqualifying period and reduction of benefit rights as was indicated for voluntary quit and misconduct discharge disqualifications in notes 18 and 19.

21. See Williams, *The Labor Dispute Disqualification—A Primer and Some Problems, infra* p. 338, and Table 27 in COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1, at 78.

22. See SOCIAL SECURITY BOARD, BUREAU MEMORANDUM No. 32, Part I, *Principles Underlying Disqualifications for Benefits in Unemployment Compensation,* pp. 1-2 (1938); *cf.* Kempfer, *supra* note 17, at 149-51, and PATTERSON, ESSENTIALS OF INSURANCE LAW 212 (1935).

politically and, perhaps economically, undesirable. In each instance the unemployment is presumably brought about or continued by activity reasonably attributable to the volition of the insured worker (by behavior over which he has control). In the case of disqualifying misconduct unemployment is foreseeable as a consequence of such behavior.

These three provisions are in sharp contrast with the labor dispute disqualification in this respect as well as in basic purpose. A labor dispute of the prescribed type is excepted as a cause of insured unemployment insofar as employees in the same grade or class are concerned, without regard to their intentions, desires or actions.[23] Participation in the labor dispute causing the unemployment will broaden the exception, however, and disqualify without regard to grade or class.[24] The control of the risk under this disqualification is obviously not so much concerned with protecting against the moral hazard that the insured will designedly produce the insured event (although here, too, there will be elements of voluntariness at times). The disqualifying event, assuming full participation, is under appropriate circumstances recognized as a basic right and accorded extensive legal protection otherwise. The disqualification may be regarded as being founded on a policy of maintaining in labor disputes neutrality with respect to the insurance fund.[25]

Reverting to our principal concern in this paper, the voluntary quit, discharge for misconduct and refusal of suitable work trio of disqualifications, we can observe that the whole realm of voluntary action is not covered under any of the headings. There can be a leaving of work for good cause; there can be a discharge for a worker's conduct other than misconduct connected with the work; there can be a refusal of unsuitable work—all instances, in some senses at least, of behavior within the control of the claimant contributing as a cause of unemployment, and yet all without disqualification. It may be noted, however, that in each of these situations the degree of likelihood of masked "malingering"[26] or of covert design to bring on the insured event is undoubtedly less than in those stated to be disqualifying. There are obviously factors operative here other than the mere existence of a causal connection between the worker's conduct and a period of unemployment. To the extent that there is a disqualification under these provisions it is believed that the causal connection should be of basic importance. If it is not there, in these three instances, we have gone

23. See, *e.g.*, TENN. CODE SUPP. § 6901.5 D(2) (1950) and substantially similar language in all other state statutes.
24. TENN. CODE SUPP. § 6901.5 D(1) (1950).
25. See Williams, *The Labor Dispute Disqualification—A Primer and Some Problems, infra* 338.
26. See Huntington, *The Benefit Provisions of State Unemployment Insurance Laws*, 3 LAW & CONTEMP. PROB. 20, 22 (1936).

beyond any reasonable function or purpose of disqualification designed to keep a risk under control by excepting a cause. But the causal connection is not enough; the reasonableness of the conduct of the worker under the circumstances is a factor to be looked into at the same time. There are other social, political and economic values to be considered along with those which weigh against compensation from a limited fund to persons who have in some degree brought on their unemployment.

Our free enterprise system includes among its fundamentals the mobility of labor.[27] Involuntary servitude is forbidden by the Constitution.[28] Freedom to leave or refuse a job for any or no reason, to take chances on a new enterprise or job, nearby or far away, would usually be considered a part of the American Way.[29] There is the troublesome problem also of what is the cause of the continued unemployment of a person who has signified at a public employment office that he now desires employment rather than unemployment. Our three disqualification provisions, recognizing a considerable variation in the different states, represent resolution of these questions and conflicting values. In general, and certainly if original language and purposes had been adhered to, the freedom of action of the employee, even though it resulted in unemployment, was not to disqualify if his conduct was reasonable under the circumstances.[30] It would appear that the standards of reasonableness would necessarily be personal as disqualification itself is personal. A reasonable person desiring employment rather than unemployment, standing in the shoes of the claimant at the time—how would he have acted? Furthermore, even though the conduct bringing on or continuing the unemployment was found disqualifying, this determination in the beginning operated merely to suspend the possibility of compensation for a limited number of weeks—a legislative solution, arbitrary in character, for the problem of separating the contributing causes to the continuing unemployment of an eligible claimant.

Three of our four disqualifications are not only controlling the risk assumed by the unemployment insurance program by providing exceptions to it; the voluntary quit, misconduct discharge and work refusal trio can also be considered as negative conditions of compensation designed to exert pressure within the limits indicated in the preceding paragraph upon the insured to decrease the risk or keep it from increasing. This is most obviously true in the refusal of suitable work

27. See Harrison, *supra* note 17 at 122.
28. U.S. CONST., Amend. XIII.
29. See SHEFFERMAN, LABOR'S STAKE IN CAPITALISM, *passim;* "Job shifting for each person is possible within the framework of our traditional system." Committee for Constitutional Government, Inc. News Release No. E-305-306, p. 3 ("Spotlight").
30. See SOCIAL SECURITY BOARD, BUREAU MEMORANDUM No. 32, Part I, *supra* note 22 at 84-87.

disqualification. Failure when directed to apply for available, suitable work or to return to customary self-employment are also usually included in the same provision and declared to be disqualifying. Pressure on the worker to minimize the risk is indicated in each of these situations. Each carries a relatively high degree of probability of self-induced unemployment. When these conditions are classified as controls in the nature of penalties designed to exert pressure on the insured to avoid the occurrence of the insured event rather than excepted causes, it can be seen that the central hazard being guarded against is still the designed seeking of compensated unemployment.

Other typical disqualifications preclude compensation where there is no wage loss or when there is double recovery of benefits or fraud on the unemployment insurance system attempting or accomplished.[31] To establish such situations as conditions eliminating an obligation to pay benefits for stated periods is quite consistent with the idea of reasonable controls for protection of the system and the preserving of it for the performance of its needed function in compensating legitimate claims. Disqualification for misrepresentation and fraud does not require any relationship between the disqualifying event and the unemployment. It is more than pressure, it involves an admitted penalty (a forfeiture) and is therefore different in character from measures designed to define, control or minimize the risk that the insured event will occur. Fraudulent claims are obviously subversive of the whole unemployment insurance program. A penalty for such conduct will undoubtedly act as a measure of control and minimization over the aggregate of claims regardless of its effect on the unemployment of the claimant in the particular instance. The fraudulent claim disqualification was a late comer in the unemployment insurance program and was not embodied in the "model bill" of the Federal Bureau of Employment Security until 1950.[32] The reason must have been the assumption that our trio of disqualifications were designed to surround and contain this problem.

The foregoing discussion has indicated that the general structure of disqualification in the unemployment insurance statutes bears a readily recognized relationship to accepted insurance principles applicable to defining, controlling and mimimizing the risk assumed by the program. It has been indicated also that in the normal statement of the voluntary quit, misconduct discharge, and work refusal trio of disqualifications a balance has been struck between these legitimate controls of the risk and the values that inhere in mobility of labor and freedom of choice. The detailed treatment of these three disqualifications

31. See Tables 29-31, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit, supra* note 1, at 84-88.

32. See U.S. BUREAU OF EMPLOYMENT SECURITY, DEP'T OF LABOR, MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION 35 and C-62-C-64 (rev. Sept. 1950).

in this paper will throw light on the extent to which this underlying purpose and balance has been maintained.

The principles applicable to control of the risk do not, normally, permit the operation of anything that can be classified as a penalty or forfeiture, as such.[33] Insurance company practices which tended in this direction have properly been condemned and brought under control by legislation and court decision.[34] It has already been indicated that the fraudulent claim disqualification is an obvious penalty, but one reasonably related to controlling the aggregate of risk borne by the unemployment insurance program and to the protection and preservation of that program. There are other developments in disqualification, however, which seem to be penalizing rather than risk-controlling in their purpose, and which seem to bear no reasonable relationship to the preservation and proper functioning of an unemployment insurance program.

The idea of disqualification as a penalty is at time stated expressly in such terms in the statute. This is true for example, in the "voluntary quit" section of the Tennessee statute.[35] This is unfortunate, of course, because it carries with it the connotation that the employee who quits his job without good cause connected with the work is somehow or or other engaging in wrongful conduct rather than merely bringing about a situation where it is not reasonable to allow him to participate in a limited fund. The major problem is not one of terminology, however. Many of the more disturbing developments in this connection will make no reference to "penalty" at all. The increasing number of provisions which not only disqualify in the sense of postpone, but which provide for forfeiture of benefit credits, are good examples.[36] The voluntary quit and discharge for ordinary misconduct sections of the Tennessee statute have just been amended to provide for the deduction from the maximum benefit amount an amount equal to the number of weeks of disqualification multiplied by the weekly benefit amount.[37] Such provisions are apparently being added in more and more states. What reasonable relationship do they bear to a control over the hazard of self-induced unemployment properly balanced with freedom of job movement? It seems obvious that other controls and other objectives are being sought here, outside of and rather foreign to a program which would center its attention on providing for the unemployed person who wants employment rather than compensated unemployment. If these increasing strictures in the disqualification aspects of unemployment legislation are examined closely, they appear

33. *Supra*, p. 308.
34. VANCE, INSURANCE 417, 419-22, 426 (3d ed. 1951); see PATTERSON, ESSENTIALS OF INSURANCE LAW, 200, 220-21 (1935).
35. TENN. CODE SUPP. § 6901.5 A (1950).
36. See references in notes 18-20, *supra*.
37. Tenn. Pub. Acts 1955, c. 115 §§ 7 and 8.

to be more and more controls and pressures designed to regulate employer-employee relations on the one hand and to minimize an employer's unfavorable experience (with consequent effect on contributions) on the other. It can scarcely be denied that the first of these objectives has no place, as such, in an employment insurance program.[38] Further, if the second becomes dominant rather than consequential, either in legislative or judicial approach, we will run the risk of a self-defeating program by reason of internal inconsistency and the physical as well as legal impossibility of pursuing a set of values and interests that are more or less frequently in conflict.

Controls directed toward employer-employee relations rather than the risk of unemployment seem to get into the picture as soon as the disqualification period extends beyond the few weeks that will test whether the claimant's voluntary action in precipitating his unemployment or general economic conditions in the labor market are causing his continued lack of work when he is able and available for work. When the disqualification period extends for the duration of the unemployment and beyond, this becomes even clearer. The added cancellation of benefit rights goes still further in penalizing through the imposition of a forfeiture. The sliding-scale disqualification, determined by the circumstances of employee conduct, is apt to center on regulating the conduct rather than its relationship to the risk of unemployment. The complete cancellation of benefit rights, such as in the Tennessee gross-misconduct disqualification affords an excellent illustration of the back-handed attempt to regulate something outside of the principal business of unemployment insurance.[39]

Of course it can be said that these penalizing provisions are exerting pressure on the employee to avoid behavior which will bring on or continue unemployment and therefore utilize a well-established pattern in insurance for minimizing the risk. Employee conduct in precipitating termination of employment can certainly have an effect on re-employment opportunities at times. It is because the extreme measures overreach and go far beyond what is needed for reasonable risk control alone, however, that they may be criticized as being out of place in the program. Their penalizing effect will be such, in fact, only if labor market conditions are adverse in terms of hiring in the great majority of instances. This means that the penalty will fall with uneven effect upon persons engaging in substantially identical conduct and for reasons unrelated to that conduct. If we are going to get into a regulation of the details of employer-employee relations, we will want to do it consciously and with due consideration for all the many factors and legal patterns that will bear on the subject. We certainly will not desire to "back into" such a regulation through the unemploy-

38. See Harrison, *supra* note 17 at 122.
39. TENN. CODE SUPP. § 6901.5 B(1) (1950).

ment insurance program. There is always the matter, too, of maintaining a proper balance with the values associated with free job movement. The interest of our economy as a whole and the interest of a particular employer in the conduct and stability of his employees are not necessarily the same. The interests may in fact conflict. It is assumed that all would agree that our legislative enactments and our judicial interpretation should seek to advance the broader public interest.

The public policy provision of the Tennessee Employment Security Law[40] states that "involuntary unemployment" is a subject of general concern and concludes with the declaration that the public good requires the setting aside of unemployment reserves for those "unemployed through no fault of their own." These same words and phrases (taken from the original "draft bill" offered to the states by the Social Security Board)[41] were inserted in the policy declarations of many state laws. It has been assumed that the primary purpose of such language was to aid in surmounting tests of constitutionality, although considered of questionable value in that connection.[42] The influence of the words in leading the courts to a restrictive interpretation of the various state laws resulted in their being dropped from subsequent "draft bills" and the same author labeling them as "deplored phrases."[43]

Another authority has said that:

> "The basic idea which underlies the conditions of eligibility and grounds for disqualification . . . is that not all unemployment should be compensable but the burden of the system should be circumscribed by certain limiting policies which often glibly and superficially are generalized as restrictions to *involuntary* employment." (emphasis in original)[44]

While one may be in complete sympathy with those who are thoroughly dissatisfied with what some courts have done in the name of freedom of the will and allocation of fault, it is submitted that we will not better the situation by banishing the term or the idea of voluntary unemployment beyond the pale of the employment security program.

Learning to live with the term as well as the disqualifying effect of "voluntary unemployment" is advisable in the first place because the idea is obviously central in the voluntary quit, misconduct discharge and work refusal disqualifications. Each of these disqualifications has at its core the protection against the hazard of self-induced unemployment. In the next place, as we have seen, the basic principles of insurance are thought to require the exception of the designed

40. TENN. CODE SUPP. § 6901.1 (1950).
41. See Harrison, *supra* note 17 at 118.
42. *Id.* at 119.
43. *Ibid.*
44. RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 550-51 (1950).

bringing about of the insured event by the insured himself. This will normally result in an implied exception from coverage in this type of voluntary action no matter what words are used or omitted. There is no reason to believe, therefore, that a substantially different result would have been achieved in a particular state by reason of the presence or absence in the statute of a general reference to "involuntary unemployment."[45] The problem seems to be one of giving this phrase its proper restriction and orientation rather than of dismissing it.

"Fault" on the other hand seems to be properly deserving of the "deplored" label. It confuses the issue and blurs basic purposes when applied to an evaluation of the behavior of a claimant in precipitating or continuing his unemployment. Obviously, the labor dispute disqualification is not operative by reason of any assumed fault on the part of the claimant out of work as a result of such dispute, whether he is participating actively in it or not. The employee who quits his job to take an extended vacation or for any of many other reasons which would not be treated as "good cause connected with his work" would not be at "fault" in the usual meaning of the word. The same is true when the claimant turns down work which would normally be considered suitable for him. Yet all of these are disqualifying situations under provisions which have been regarded as reasonably related to the defining and controlling the risk assumed by the program, bearing in mind its central purpose and the politically and economically feasible uses of a limited fund.

If we are dominated by a "fault" allocation idea we can expect it to condition the interpretation of language such as "left work voluntarily without good cause" or "failed, without good cause, to accept suitable work" to reach results not required by and perhaps contrary to plain language. We have observed that the basic principles of insurance necessarily require the exception from coverage of the designed causing of the insured event by the insured. Yet this implication does not extend to the barring of coverage where the negligence of the insured is the cause of the event.[46] In ordinary meaning, however, "negligence" is subsumed in the idea of "fault." So we have further opportunity for the word to becloud the issue. Most obfuscating of all, however, there has developed and is continuing to develop, through statutory phrasing and judicial pronouncement, the idea that "employer fault" should be found as a basis of relieving the claimant of disqualifications. This in turn leads to such absurdity as the attributing of "fault" to the woman employee who leaves a job to get married or to join her husband or to have a baby, because of the

45. See Harrison, *supra* note 17 at 121.
46. *Infra*, p. 334

absence of "blame" for these situations on the part of the employer.[47] While this desire can find expression and fulfillment through non-charging provisions applicable to the employer's experience and contribution rate,[48] it has undoubtedly had great influence on the interpretation and administration of the disqualification provisions themselves.

We can conclude this general discussion by observing that the voluntary quit, misconduct discharge, and work refusal trio of disqualifications serve the purpose of imposing a reasonable control over the risk assumed by the unemployment insurance program by excepting unemployment so caused. More specifically, these disqualifications must be conceded as primarily designed to protect against the hazard of self-induced compensable unemployment (the seeking of the insured event). Further, that hazard is hedged about by precluding (or suspending) payment for such other unemployment as was caused or continued by behavior within the control of the claimant which he was reasonably free to avoid. This penumbra is sufficient to take care of doubtful as well as clear cases under the central disqualifying policy. If courts can be persuaded to keep their attention centered on the designed or wilful bringing about of compensated unemployment as the primary target of these disqualifications, and therefore the denotation and much of the connotation of "voluntary unemployment," there would be no reason why this phrase could not serve a useful function in the further development of the law. Such a centering would condition the interpretation and application of these disqualifications to so much other precipitating or continuing of unemployment as approaches the core idea, because reasonably avoidable and a reasonable person in claimant's shoes would have avoided it if motivated by a desire for employment rather than unemployment. This restriction and orientation in thought coupled with the elimination of "fault" in the bringing on of the unemployment as an independent concept in the interpretation of the disqualification provisions should permit us to do more efficiently the job that unemployment insurance program was designed to accomplish.

B. Voluntary Leaving of Work*

Although "voluntary leaving" literally means giving up work of one's own volition or will, the scope of the phrase has been extended to include voluntary action indicating an intention to terminate em-

47. See Simrell, *supra* note 17 at 181-204.
48. See Teple & Norwacek, *Experience Rating: It's Objections, Problems and Economic Implications, infra* p. 376.

* Doris Dudney, a member of the student staff of the *Vanderbilt Law Review* has contributed largely to the research and writing of this section of the article.

ployment, notwithstanding that the immediate cause of separation was discharge or replacement. Thus, voluntary commission of an act with knowledge that discharge will follow has been found to be a voluntary leaving,[49] as well as voluntary assumption of a position which requires continued absence from work and results in replacement.[50] Where employees' continued refusal to work on certain days caused their employer to close his business on those days, the unemployment was termed voluntary;[51] but when employees rejected a reduced wage scale offered as an alternative to a shut-down, lack of work was said to be the real cause of the unemployment.[52]

The difficulty of finding an intention on the part of an individual claimant has produced conflicting results in cases where the claimant's separation from work was occasioned by the provisions of a collective bargaining agreement. Some courts have looked to the character of the action which the claimant has taken in conformity with the terms of the agreement and have attempted to judge his willingness with respect to that end. Compensation was denied to employees who remained away from work to observe a "memorial period" designated by their union's president pursuant to the terms of a bargaining agreement.[53] A claimant who was forced to accept a pension under a compulsory retirement plan was found to be entitled to compensation,[54] but a claimant who chose a pension under an optional plan was said to have left work voluntarily without good cause.[55]

On the other hand, in cases where agreements required that certain classes of employees be given vacations with pay, and the business was closed for a vacation period, compensation has been denied to employees not entitled to vacation pay on the ground that they agreed to

49. See Standard Oil v. Review Bd. of Indiana Empl. Sec. Div., 119 Ind. App. 576, 88 N.E.2d 567 (1949); Olechnicky v. Director of Div. of Empl. Sec., 325 Mass. 660, 92 N.E.2d 252 (1950); O'Donnell v. Unemployment Comp. Bd. of Rev., 173 Pa. Super. 263, 98 A.2d 406 (1953); 6 INTRA. L. REV. 162 (1950). *But cf.* MacFarland v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 418, 45 A.2d 423 (1946).

50. See Vernon v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 131, 63 A.2d 383 (1949); Michalsky v. Unemployment Comp. Bd. of Rev., 163 Pa. Super. 436, 62 A.2d 113 (1948).

51. See Mehlbaum v. Unemployment Comp. Bd. of Rev., 175 Pa. Super. 497, 107 A.2d 141 (1954).

52. See Copper Range Co. v. Michigan Unempl. Comp. Comm'n, 320 Mich. 460, 31 N.W.2d 692 (1948).

53. See Bedwell v. Review Bd. of Indiana Empl. Sec. Div., 119 Ind. App. 607, 88 N.E.2d 916 (1949).

54. See Campbell Soup Co. v. Board of Rev., 13 N.J. 431, 100 A.2d 287 (1953), 67 HARV. L. REV. 1437 (1954), *reversing* Campbell Soup Co. v. Board of Rev., 24 N.J. Super. 311, 94 A.2d 514, 28 N.Y.U.L.Q. REV. 1332 (1953).

55. See Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1933), *reversing*, 24 N.J. Super. 277, 94 A.2d 339 (1953). *Cf.* Celanese Corp. of America v. Bartlett, 90 A.2d 208 (Md. 1952). Generally, compensation is denied after retirement with a pension on one of two grounds: (1) that a pension is "payment of wages" or "remuneration" and the claimant is thus not unemployed under the applicable statutory definition; or (2) that retirement indicates a withdrawal from the labor force, which renders the claimant ineligible because unavailable. See Note, 32 A.L.R.2d 901 (1953).

a temporary unemployment through their bargaining agent. In earlier cases this view was taken without examining the terms of the agreements,[56] and was rejected in later cases, where the terms of the agreement did not require the closing of the business,[57] where the agreement contemplated that ineligible employees would be given work during the vacation period,[58] and where the closing of business was not primarily for the purpose of providing vacations.[59] Recently it has been held that where an agreement stipulates one vacation period for all eligible employees, those not eligible are not voluntarily unemployed during the vacation shut-down.[60] Statutes enacted as a result of these decisions take divergent views. One type provides that in no case will a collective bargaining agreement requiring vacations with pay render unemployment voluntary as to those employees not entitled to vacations.[61] Another provides that the unemployment may be considered voluntary only when the terms of the agreement require a shut-down.[62] Consent is deemed to exist when the shut-down is at the

56. See Moen v. Director of Div. of Empl. Sec., 324 Mass. 246, 85 N.E.2d 779 (1949) (rule changed by statute); Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 47 N.W.2d 449 (1951), 36 MINN. L. REV. 426 (1952); Mattey v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 36, 63 A.2d 429 (1949); *In re* Buffelen Lumber & Mfg. Co., 32 Wash.2d 205, 201 P.2d 194 (1948), 2 OKLA. L. REV. 389 (1949), 25 WASH. L. REV. 99 (1950) (rule changed by statute). Those employees entitled to vacation pay are generally held not unemployed because "remuneration" or "wages" are payable during the vacation period, even though the employees refuse to accept them. See American Central Mfg. Corp. v. Review Bd. of Ind. Empl. Sec. Div., 119 Ind. App. 430, 88 N.E.2d 256 (1949); Note, 30 A.L.R.2d 366 (1943).

57. See Schettino v. Administrator, Unempl. Comp. Act, 138 Conn. 253, 83 A.2d 217 (1951); American Bridge Co. v. Review Bd. of Ind. Empl. Sec. Div., 121 Ind. App. 576, 98 N.E.2d 193 (1951); Hubbard v. Michigan Unempl. Comp. Comm'n, 328 Mich. 444, 44 N.W.2d 4 (1950) (union expressly refused proposed shut-down); Golubski v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 634, 91 A.2d 315 (1952).

58. See Yobe v. Sherwin-Williams Co., 122 N.E.2d 202 (Ohio 1954).

59. See American Bridge Co. v. Review Bd. of Ind. Empl. Sec. Div., 121 Ind. App. 576, 98 N.E.2d 193 (1951); Golubski v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 634, 91 A.2d 315 (1952).

60. See Glover v. Simmons Co., 31 N.J. Super. 308, 106 A.2d 318, *cert. granted*, 16 N.J. 206, 108 A.2d 120 (1954). *Contra:* Beaman v. Bench, 75 Ariz. 345, 256 P.2d 721 (1953); Philco v. Unemployment Comp. Bd. of Rev., 175 Pa. Super. 402, 105 A.2d 176 (1954).

61. See MASS. ANN. LAWS c.151A, § 1(r)(2) (1949); WASH. REV. CODE § 50.20.115 (Supp. 1953).

62. See W. VA. CODE ANN. § 2366 (78)(8) (1949). The general situation presents two additional questions: whether the agreement could constitute a waiver of the ineligible employees' right to compensation in violation of an applicable non-waiver provision; and whether the expectation of returning to the same employment takes the situation out of the applicable statutory definition of "unemployment." See Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 47 N.W.2d 449 (1951) (agreement held not a waiver); Glover v. Simmons Co., 31 N.J. Super. 308, 106 A.2d 318, *cert. granted*, 16 N.J. 206, 108 A.2d 120 (1954) (agreement said to be a waiver if given the effect of rendering unemployment voluntary); Philco v. Unemployment Comp. Bd. of Rev., 175 Pa. Super. 402, 105 A.2d 176 (1954) (ineligible employees said not actually unemployed during vacation period); American Bridge Co. v. Review Bd. of Ind. Empl. Sec. Div., 121 Ind. App. 576, 98 N.E.2d 193 (1951); Yobe v. Sherwin-Williams Co., 122 N.E.2d 202 (Ohio 1954) (return to same employment held not to affect ineligible employees' unemployment status during vacation period).

express request of the union, even though not required by the terms of the agreement.[63]

Cases in which the immediate separating factor was a relinquishment or a giving up of work demonstrate that the intention to take the action which will terminate employment, rather than the desire to do so, is determinative of the question of voluntariness. When a claimant feels constrained to leave work by circumstances beyond his control, even though personal to him, his leaving because of these extrinsic factors could well be considered involuntary from the standpoint of choice, rather than volition. The argument in favor of such an interpretation has been advanced on the ground that it would eliminate "harsh" results in states where voluntary leaving will bar the right to benefits unless it is for a good cause "attributable to the employer," "connected with the work," or involving "fault" on the part of the employer, by statute or by judicial interpretation.[64] But despite express legislative addition of the word "voluntary" to "leaving," the general result in the court decisions seems to be that there can be no leaving which is not voluntary, and the reasons for leaving must be considered only as causes which may be sufficient to prevent disqualification.[65]

Whether personal reasons are good cause for leaving work has been the subject of much debate concerning the purpose of the voluntary quit disqualifications and the general policy of unemployment compensation laws.[66] Although such reasons have been expressly recognized by statute,[67] many statutes restrict good cause to circumstances connected with employment, or specify personal reasons which may not be considered good cause; and in the absence of any restriction the same result has been reached by interpreting good cause to mean reasons connected with employment. On the basis of that interpretation disqualification has been imposed where a wife left work to move to a city to which her husband had been transferred,[68] a mother left

63. Naylor v. Shuron Optical Co., 281 App. Div. 721, 117 N.Y.S.2d 775 (3d Dept. 1952), *aff'd, Claim of* Naylor, 306 N.Y. 794, 118 N.E.2d 816 (1954); *Claim of* Rakowski, 276 App. Div. 625, 97 N.Y.S.2d 309 (3d Dep't 1950).

64. See dissenting opinion in State v. Hix, 132 W. Va. 516, 54 S.E.2d 198 (1949); Teple, *Disqualification: Discharge For Misconduct and Vountary Quit*, 10 OHIO ST. L.J. 191, 199 (1949); 52 W. VA. L.Q. 75 (1949).

65. Wolf's v. Iowa Empl. Sec. Comm'n, 244 Iowa 999, 59 N.W.2d 216 (1953); Sprotts v. Unemployment Comp. Bd. of Rev., 176 Pa. Super. 484, 109 A.2d 212 (1954); State v. Hix, 132 W. Va. 516, 54 S.E.2d 198 (1949). *But cf.* Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N.W.2d 249 (1945) (good cause attributable to employer).

66. See Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147, 150-151 (1945); U.S. BUREAU OF EMPLOYMENT SECURITY, DEP'T OF LABOR, MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION C-57 (1950).

67. See WIS. STAT. § 108.04 (7)(c) (1949); Western Printing & Lithographing Co. v. Industrial Comm'n, 260 Wis. 124, 50 N.W.2d 410 (1951).

68. See Woodmen of the World Life Ins. Co. v. Olson, 141 Neb. 776, 4 N.W. 2d 923 (1942); Stone Mfg. Co. v. South Carolina Empl. Sec. Comm'n, 219 S.C. 239, 64 S.E.2d 644 (1951); Note, 13 A.L.R.2d 874 (1950).

work in order to care for her young children,[69] and a woman left because of pregnancy.[70] Statutory restriction to circumstances connected with employment has produced similar decisions,[71] and where domestic circumstances are specifically excluded by statute, these reasons have been found to be within the restriction.[72] Pennsylvania, in which a harsh disqualification and an absence of statutory restriction have produced a more liberal interpretation of "good cause" and opposite results in this class of cases,[73] now has an amendment excluding "marital, filial and domestic circumstances."[74]

Where statutes require that good cause be "connected" with a claimant's employment, it has been held that the connection must be one of cause and effect in cases of ill health.[75] Where good cause must be "attributable to the employer," it has been held that a simple causal connection between conditions of work and ill health is sufficient in the absence of negligence or wrongdoing on the part of the employer.[76]

69. See Judson Mills v. South Carolina Unempl. Comm'n, 204 S.C. 37, 28 S.E.2d 535 (1944).

70. See John Morrel & Co. v. Unemployment Comm'n, 69 S.D. 618, 13 N.W.2d 498 (1944). See Table 28, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 1, at 80, for summary of special availability and disqualification provisions for pregnancy and marital obligations.

71. See *Ex Parte* Alabama Textile Products Corp., 242 Ala. 609, 7 So.2d 303 (1942); Huiet v. Schwob Mfg. Co., 196 Ga. 855, 27 S.E.2d 743 (1943); Talley v. Unemployment Comp. Div. of Ind. Acc. Bd., 63 Idaho 644, 124 P.2d 784 (1942); Moulton v. Iowa Empl. Sec. Comm'n, 239 Iowa 1161, 34 N.W.2d 211 (1948); Nashau Corp. v. Brown, 108 A.2d 52 (N.H. 1954); Meggs v. Texas Unempl. Comp. Comm'n, 234 S.W.2d 453 (Texas 1950). *But cf.* Alabama Mills, Inc., v. Carnley, 35 Ala. 46, 44 So.2d 622 (1949), *cert. denied,* 253 Ala. 426, 44 So.2d 627 (1950) (woman who quit work because of pregnancy held not disqualified; decision based upon specifice statutory classification of pregnant women for purpose of determining eligibility).

72. See Illinois Bell Telephone Co. v. Board of Rev. of Dep't of Labor, 413 Ill. 37, 107 N.E.2d 832 (1952); Neff v. Board of Rev., 117 N.E.2d 533 (Ohio 1953); Spotts v. Unemployment Comp. Bd. of Rev. 176 Pa. Super. 484, 109 A.2d 212 (1954). *But cf.* Hollingsworth Tool Works v. Review Bd., 119 Ind. App. 191, 84 N.E.2d 895 (1949) (decision based on provision allowing referee or review board to waive or modify denial of benefits for good cause shown).

73. See PA. STAT. ANN. tit. 43 § 802 (Supp. 1953); Department of Lab. and Ind. of Commonwealth of Pennsylvania v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 421, 65 A.2d 436 (1949); Mee's Bakery v. Unemployment Comp. Bd. of Rev., 162 Pa. Super. 183, 56 A.2d 386 (1948); Department of Lab. and Ind. of Pennsylvania, Bur. of Empl. and Unempl. Comp. v. Unemployment Comp. Bd. of Rev., 154 Pa. Super. 250, 35 A.2d 739 (1944); Note, *Qualifications and Disqualifications Under the Pennsylvania Unemployment Law,* 26 TEMP. L.Q. 407 (1953).

74. See PA. STAT. ANN. tit. 43 § 802 (b) (Supp. 1953), Spotts v. Unemployment Comp. Bd. of Rev., 176 Pa. Super. 484, 109 A.2d 212 (1954).

75. See Henderson v. Department of Ind. Rel., 252 Ala. 239, 40 So.2d 629 (1949); Wolf's v. Iowa Empl. Sec. Comm'n, 244 Iowa 999, 59 N.W.2d 216 (1953); State v. Hix, 132 W. Va. 516, 54 S.E.2d 198 (1949). Causal connection was found in Department of Industrial Relations v. Chapmen, 74 So.2d 621 (Ala. 1954); Alabama Mills, Inc. v. Brand, 251 Ala. 643, 38 So.2d 574 (1948). *But cf.* Amherst Coal Co. v. Hix, 128 W. Va. 119, 35 S.E.2d 773 (1945) (employer's refusal to transfer miner to place of operations where there was less dampness held not good cause for miner's leaving work, where statute provided that "customary working conditions not involving deceit or other wrongful conduct on the part of the employer" are not sufficient reason for voluntarily leaving work).

76. See Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N.W.2d 249 (1945).

If an individual is not disqualified for refusing employment which would be injurious to his health,[77] it would seem that leaving employment for the same reason should not invoke disqualification no matter what statutory language is used to require that good cause be found in circumstances connected with employment. Conversely, it would seem that a causal connection between conditions of work and ill health should be required if that factor is deemed to determine suitability. In Pennsylvania, where there is no statutory restriction, ill health may be good cause for leaving even though not connected with employment,[78] but the rule is circumscribed by a requirement of "good faith."[79]

Reluctance to allow union policy to control distribution of benefits seems to underlie the holding that mere compliance with a union order or rule has not been considered good cause for leaving. In New York it was held that a seaman who quit work after his first voyage because a union regulation would prevent his taking another must show that the regulation was "reasonable" in the light of current economic conditions of the industry or suffer disqualification.[80] Employees who refuse to cross the picket line of another union on the basis of union orders have been found disqualified by voluntary leaving.[81] But refusal to cross a belligerent picket line from fear of bodily harm was found to be a leaving with good cause "attributable to the employer."[82]

In the absence of statutory restriction, ill feeling between a claimant and another employee, and criticism of claimant's work by another employee have been found not to be good cause for leaving.[83] Where good cause must be "connected with the work" or "attributable to the

77. IA CCH UNEMP. INS. REP. ¶. 1965.

78. Bliley Mfg. Corp. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 570, 45 A.2d 908 (1946). *Cf.* Wishkoff v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 10, 82 A.2d 260 (1951).

79. See Zielinski v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 244, 101 A.2d 419 (1953); Hall v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 127, 90 A.2d 292 (1952). *Cf.* Hoffstot v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 43, 63 A.2d 355 (1949).

80. See *Claim of* Fiol, 305 N.Y. 264, 112 N.E.2d 281 (1953), revising 279 App. Div. 963, 111 N.Y.S.2d 288 (3d Dep't 1952). Finding that regulation was reasonable affirmed in *Claim of* Fiol, 284 App. Div. 519, 132 N.Y.S.2d 533 (1954).

81. See Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950); Duquesne Brewing Co. of Pittsburgh v. Unemployment Comp. Bd. of Rev., 359 Pa. 535, 59 A.2d 913 (1948); Drylie v. Unemployment Comp. Bd. of Rev., 162 Pa. Super. 211, 56 A.2d 272 (1948); Lexes v. Industrial Commission, 243 P.2d 964 (Utah 1952); *accord,* Yale & Towne Mfg. Co. v. Unemployment Comp. Bd. of Rev., 163 Pa. Super. 427, 62 A.2d 99 (1948). *See* Board of Rev. of West Virginia Dep't of Unempl. Comp. v. Hix, 126 W. Va. 538, 29 S.E.2d 618, 619 (1944). *But cf.* State, by Davis, v. Ruthbell Coal Co., 56 S.E.2d 549 (W. Va. 1949).

82. See. Kalamazoo Tank & Silo Co. v. Michigan Unempl. Comp. Comm'n, 324 Mich. 101, 36 N.W.2d 226 (1949). *Cf.* State, by Davis, v. Ruthbell Coal Co., 56 S.E.2d 549 (W. Va. 1949).

83. See Green v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 286, 101 A.2d 119 (1953); Wescoe v. Unemployment Comp. Bd. of Rev., 166 Pa. Super. 355, 71 A.2d 837 (1950); Cornell v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 468, 65 A.2d 259 (1949).

employment," it has been held that mere dissatisfaction with earnings or conditions of work does not justify leaving.[84] Just as in cases of ill health, factors which determine suitability of offered employment should be controlling regardless of the applicable statutory language. Results reached in cases where a change in conditions of work or terms of employment were the reasons for leaving seem consonant with the "suitability" requirements.[85] Compensation has been denied to claimants who left work because of a slight reduction in wages,[86] increase in duties,[87] or change in the physical requirements of work.[88]

This summary shows that much of the judicial interpretation of "voluntary leaving" has been unduly restrictive in its search for "employer fault" as a basis for relieving the claimant of this disqualification. The idea of centering on the reasonableness of the individual's actions under the circumstances to see whether the policy back of the disqualification is applicable to him personally has not been dominant in the reported cases even though well-established in some jurisdictions and undoubtedly reflected in the actual practice of many more.[89]

C. Refusal of Suitable Work*

The refusal of work disqualification is included in all state statutes, but most states limit it to "suitable work," thus protecting the worker against the possible misuse of the threat of disqualification as a means to compel him to accept employment clearly inimical to his interest and welfare. Some states require that in order to disqualify the refusal be without "good cause" and regard this concept as covering reasons which are personal to the employee and extraneous to the employment.[90] This discussion will consider the three questions which must be answered in the affirmative before disqualification for refusal to accept suitable work can logically be arrived at: (1) was employment offered, (2) was the employment refused, (3) was the employment suitable?

84. See Department of Ind. Rel. v. Scott, 36 Ala. 184, 53 So.2d 882 (1951); Wolfe v. Iowa Unempl. Comp. Comm'n, 232 Iowa 1254, 7 N.W.2d 799 (1943).

85. IA CCH Unempl. Ins. Rep. ¶ 1965 (1951).

86. See Buletza v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 248, 101 A.2d 447 (1953); *In re* Anderson, 39 Wash.2d 301, 235 P.2d 312 (1951), *accord*, Kaylock v. Unemployment Comp. Bd. of Rev., 165 Pa. Super. 376, 67 A.2d 801 (1949).

87. See Muir v. Corsi, 277 App. Div. 1086, 100 N.Y.S.2d 947 (3d Dep't 1950).

88. See Department of Industrial Relations v. Wall, 41 So.2d 611 (Ala. 1949); Roby v. Potlatch Forest, Inc., 74 Idaho 404, 263 P.2d 553 (1953).

89. Comparison of State Unemployment Insurance Laws, *supra* note 1 at 69; IA CCH Unempl. Ins. Rep. § 1975, p. 4656.

90. Barclay White Co. v. Board of Rev., 356 Pa. 43, 50 A.2d 336 (1947), 51 Dick. L. Rev. 284 (1947), 59 Harv. L. Rev. 1169 (1946), 31 Minn. L. Rev. 748 (1947), 95 U. of Pa. L. Rev. 686 (1947).

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1. *Was Employment Offered and Refused?* The prospective employer must make a good faith offer of employment and the time of the making is important in this connection. An offer made subsequent to a finding by the referee that no base employer has offered employment to the claimant, or, following an award, a statement by a base employer that employment was always open to the claimant, is treated as an attempt to defeat a claim rather than as a bona fide desire to retain the services of the claimant. In *Brown-Brockmeyer Co. v. Roach*,[91] the base employer made its statement of willingness to hire the employee in a letter to the Board of Review asking for further appeal. The validity of the offer was denied.

Normally it must be brought to the attention of a claimant that a specified job opening is being made available to him. In *Jackson v. Review Board*[92] claimant had been drawing benefits for about two months, when the employment office called and asked if she was interested in sales work. Her answer was a short "no" and the conversation went no further. She was later notified of her disqualification for refusal of suitable work. On appeal the Board found the job was not offered because of her lack of interest and held that her attitude constituted failure to accept the job. The court reversed the Board and required that a definite offer be made before disqualification could be imposed.

An offer of work may be communicated by mail. The requirement as to what information such letter must contain is usually established by rules of the department administering the program, and includes items such as job classification, location, rate of pay, and working hours. It would seem that these technical requirements, established under a delegated authority from the legislature, should not be made the basis of producing an unrealistic result. In *Glen Alden Coal Co. v. Unemployment Compensation Board of Review*,[93] working conditions were covered by a collective bargaining agreement with the union. Claimant did not show he was prejudiced by the lack of information and made no complaint concerning it until after an adverse decision. The letter was held a valid offer. Where the employer is obligated under a collective agreement to give notice by mail, to the last known address of employees temporarily laid off, before being permitted to regard them as having refused the work, the failure of employee to notify employer of change in address does not justify employer mailing notice to the old address when he has any knowledge of the new address.[94] "Due process" requires a method reasonably calculated to

91. 140 Ohio St. 511, 76 N.E.2d 79 (1947). See Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134, 136-37 (1945).
92. 120 N.E.2d 413 (Ind. 1954).
93. 160 Pa. Super. 379, 51 A.2d 518 (1947).
94. Mouldings Div. of Thompson Industries v. Review Bd., 22 Ind. App. 497, 106 N.E.2d 402 (1952).

give actual notice. The normal requirements would be that actual notice must be given before a valid offer is made, and to the extent that this situation conflicts with the requirement, the distinguishing element lies in the agreement between the parties.

Reason would decree that that which has not been offered cannot be refused; therefore a valid offer is a prerequisite to a refusal. Conditions can prevail, however, where a claimant may be held to have refused suitable work in the absence of actual notice of a specific offer. In *Loew's Inc. v. California Employment Stabilization Commission*,[95] the major movie studios had an agreement with Central Casting Corporation under which the latter hired extra players for the former. Movie extras were paid $10.50 per day for appearing in groups of fewer than thirty persons and $5.50 per day for crowd scenes involving more than thirty persons. A separate telephone was used to hire each group, and the procedure called for the extras to call these two telephone numbers each day to apply for work. Claimants had both telephone numbers, but only called the $10.50 number, and filed an application for benefits covering the time no $10.50 work was open. The claims were denied because the $5.50 number was not called, even though claimant contended there was no definite refusal of any specific offer of employment at $5.50. Their action, or failure to act, in not calling the number which they knew should be called was treated as the equivalent of refusing an offer. In applying for benefits these claimants stated that work at the $5.50 rate would not be accepted, and the court said that such answers waived the requirement that a specific offer be made. The close relationship of this disqualification to the eligibility requirement of "available for work" may be noted here.

There is no particular source from which the offer must come for a refusal of it to disqualify. The usual situation probably is a direction by the employment office to the applicant to apply for a certain job. The Commissioner may also direct a claimant to return to his customary self-employment, though it seems that this is rarely done. It may be more difficult for the agency to gain a knowledge of offers coming to a claimant from outside the agency, but if they are for suitable work, a refusal will still disqualify. The refusal may be direct in the case of failure to apply or indirect if the behavior of applicant is calculated to lead to the rejection of his application for employment. The result is disqualification in either instance.

2. *Was the Employment Suitable?* Suitability is the vital issue under this disqualification. The problem will differ with every individual and every employment, but most legislatures have adopted a standard list of considerations to serve as guideposts.

95. 76 Cal. App. 231, 172 P.2d 938 (1946); *cf.* Leclerc v. Administrator, 137 Conn. 438, 78 A.2d 550 (1951).

> "In determining whether or not any work is suitable for an individual, the commissioner shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."[96]

The enumerated items are not exclusive, but they include a general coverage of pertinent considerations. It is not the purpose here to treat each of these in detail but only to cover some of the highlights as set forth in recent cases.

a. Health, Physical Fitness and Safety.

Human frailty and individual differences in health and strength have been given legislative recognition in this program. The purpose, therefore, is to make the job fit the man rather than insist on the man fitting the job. No individual will be required to accept employment which is clearly detrimental to his physical well being. It may, however, be impossible to know in advance of actual participation whether the offered work is unsuitable. This presents two classes of cases, the first involving situations where actual experience has proved the type of employment to be harmful to the particular claimant. In *Department of Labor and Industry v. Unemployment Compensation Board of Review*,[97] a woman was referred to a job on piece work in which her efforts had to synchronize with those of co-workers. She refused the employment, and the court held the work was unsuitable since claimant's nervous condition had caused her to quit such work in the past. Unless the employer, knowing of claimant's impediment, claims a special reason why the offered employment will not be detrimental, the actual experience of the claimant will relieve him of testing the job.[98] Should the employer minimize the physical exertion of the job, after claimant refuses it for physical reasons, there must be a finding in regard to the suitability of the adjusted employment.[99] The second class involves questioned cases, in which claimant does not have actual experience or adequate proof that the offered type of work will be harmful. Even actual experience falls into this class when medical treatment has been received and there has been no subsequent experience to show the treatment was not successful.[100] That several

96. *See, e.g.*, ALA. CODE tit. 26, § 214(e)(1) (1940); KY. REV. STAT. ANN. § 341.100 (1) (Baldwin Cum. Supp. 1953); N.C. GEN. STAT. § 96-14(c)(1) (1950); TENN. CODE ANN. § 6901.5(c) (1) (Williams 1934).

97. 159 Pa. Super. 571, 49 A.2d 259 (1946).

98. Sledzianowski v. Unemployment Comp. Bd. of Rev., 168 Pa. Super. 37, 76 A.2d 666 (1950).

99. Hess Bros. v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 115, 100 A.2d 120 (1953).

100. Hanna v. Unemployment Comp. Bd. of Rev., 172 Pa. Super. 417, 94 A.2d 178 (1953).

years have elapsed since the claimant was last bothered by a physical condition, which the work might reproduce is not sufficient actual experience to justify refusal, if there is no real risk of harmful injury.[101] Sometimes by talking to other workers, a person will get false ideas about working conditions and what will be required of him. Naturally, where this misapprehension could have been cleared up, claimant is bound by the conditions as they were and not as he believed them to be.[102] In *Beecham v. Falstaff Brewing Corp.*,[103] an elderly man refused a job as janitor in the men's room at the plant because he thought the cigarette smoke there would bother his asthmatic bronchitis and the work might be too heavy. Disqualification was imposed because his conclusion was not based on "trial and experience by appellee at that place or elsewhere."[104] In general, if the case falls within the second class, compensation is denied because the claimant did not take the job and act thereafter in accordance with its effect on him. Some courts are more liberal than others, as shown in *Wolfgram v. Employment Security Agency*.[105] The worker, without checking to see if the job was above or below the ground, refused work at a mine, because the heat of mine work made him break out in a rash. Even though he produced no medical evidence at the hearing, the court refused to affirm the denial of compensation, but rather remanded the case for more evidence as to available jobs for claimant where he would not get the rash.

Fear does not make work unsuitable, if there are no hazards unusual to the type work involved. Claimant may have an honest fear of working in a mine, based on injuries to other members of his family, but this is not a good cause for refusing otherwise suitable work.[106] Women who refuse employment requiring night work because of the fear of returning home alone in the dark have been held to have refused suitable work without good cause.[107]

b. Morals.

As declared in the public policy and purpose sections of the state statutes, economic insecurity due to unemployment is regarded as a danger to the morals of a community and its individual members. The degree of risk to claimant's morals can be expected then to aid in the determination of suitability. Only one recent reported court decision has involved the question of degree of risk to claimant's morals, and

101. Suska v. Board of Rev., 166 Pa. Super. 293, 70 A.2d 397 (1950).
102. Broadway v. Bolar, 33 Ala. App. 57, 29 So.2d 687 (1947).
103. 150 Neb. 792, 36 N.W.2d 233 (1949).
104. 36 *id.* at 236 (1949).
105. 272 P.2d 699 (Idaho 1954).
106. Glen Alden Coal Co. v. Board of Rev., 171 Pa. Super. 325, 90 A.2d 331 (1952), 14 U. OF PITT. L. REV. 454 (1953).
107. Beall v. Bureau of Unempl. Comp., 101 N.E.2d 780 (Ohio App. 1951); Azzato v. Board of Rev., 172 Pa. Super. 417, 94 A.2d 178 (1953).

in that one a rather well settled rule of law was litigated. Nearly all states have allowed benefits where employment was refused because it required Sabbath work, whether the individual observed Saturday[108] or Sunday.[109] Ohio added the standard suitability clause of degree of risk to claimant's health, safety and morals in 1949. Prior to that amendment the Ohio Supreme Court had held that Saturday work (on claimant's Sabbath) was suitable.[110] In *Tary v. Board of Review,* the court said,

> "The test of an individual's morals is subjective, and . . . is dependent upon his conscientious beliefs. The precepts of a religion in which one believes are an integral and essential part of one's morals,"[111]

as it lined Ohio up with the prevailing pattern by awarding compensation to a Seventh Day Adventist who refused to work on Saturday.

c. Prior Earnings and Wages in Similar Work.

The unemployment insurance program is designed to protect rather than depress unduly the present social status and standard of living of the claimant. Since these may be achieved by, and are undoubtedly related to, his level of earnings, offered employment may be unsuitable because of low wages. However, it has been held that a claimant will not be heard to assert this later when he refused to investigate a job opening in the first instance. The rationale given is that had he investigated and made known his qualifications and experience, a satisfactory wage might have been offered.[112] If the employment offered is piece work and claimant is doubtful of how much he can earn, he may be required to try the job and find out.[113]

Suitability in terms of wages is not always determined by the amount of money involved, for a sufficient lapse of time will cause unsuitable wages to become suitable.[114] Following the conclusion of World War II many persons lost relatively higher paying defense jobs, and were reluctant to return to their lower paying peacetime employment. A high paid worker obviously should be given some time to seek another job at the level he has achieved before being disqualified for

108. 5 BEN. SER. No. 10, 7643-Calif. A (1942); 10 BEN. SER. No. 4, 11372-D.C. A (1946); 9 BEN. SER. No. 3, 10325-Ill. R (1945); 6 BEN. SER. No. 11, 8244-Mich. A (1943); 9 BEN. SER. No. 1, 10197-N.Y. A (1945). *Contra:* 7 BEN. SER. No. 2, 8362-Mass. A (1943).

109. 4 BEN. SER. No. 12, 6765-D.C. A (1941); 5 BEN. SER. No. 2, 7054-Ga. R (1941); 10 BEN. SER. No. 5, 11459-Ind. A (1946); 7 BEN. SER. No. 12, 9007-N.C. A (1944).

110. Kut v. Albers Super Markets, Inc., 146 Ohio St. 522, 66 N.E.2d 643 (1946), 24 CHI-KENT REV. 281 (1946).

111. 161 Ohio St. 251, 119 N.E.2d 56, 59 (1954), 30 NOTRE DAME LAW. 176 (1954), 8 VAND. L. REV. 519 (1955).

112. Richardson v. Administrator, 28 So.2d 88 (La. App. 1946).

113. Elnit v. Unemployment Comp. Bd. of Rev., 168 Pa. Super. 158, 77 A.2d 668 (1951).

114. Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886 (1946).

refusal to accept lower wages. While this period can be said to be for a reasonable period of time, the problem of drawing the line still remains. Three days,[115] or five days[116] are clearly insufficient, and nineteen days[117] has been held an unreasonably short time in which to be required to find suitable work. One board regarded one month as the reasonable time in which to find a similar paying job.[118] Suitability involves whether the pay is substantially less than previously received, but "suitability is not a rigid fixation"[119] and consideration must be given to length of unemployment and the prospects of securing accustomed work.

In *Hallahan v. Riley*,[120] claimant's former occupation of mending was skilled work paying $1.04 per hour, but after a ten-week period of unemployment, the unskilled job of burling paying $0.60 per hour, which claimant had justifiably refused earlier, was deemed suitable work. Ten months would clearly be long enough.[121] In 1951, one court was ready to restrict this reasonable time rule because it was thought to be based upon different economic conditions, and the reconversion period had ended. Claimant worked as a miners' laborer for fourteen months before getting a job welding for a shipbuilding firm at $75 to $100 per week. This job lasted only eleven months, at which time the base employer offered claimant his old job back at $12.40 a day. He refused, and the board held the offered work to be unsuitable because claimant was entitled to a reasonable opportunity to find work at a rate of pay commensurate with his last employment. The court reversed, reasoning that the offered work having been suitable for fourteen months prior to the welding job, it was still suitable.[122] Another case refused to apply the reasonable-time rule when the applicant had a high demonstrated earning capacity but was only temporarily laid off and expected to return to that wage shortly. He refused proffered employment with his base year employer because the wages were not commensurate with those of his last employment. The reason behind the rule, *i.e.* ample time to seek employment at a rate commensurate with demonstrated earning capacity, was said not to exist when claimant was marking time until recall and to apply it

115. Pacific Mills v. Director of Div. of Empl. Sec., 322 Mass. 362, 77 N.E.2d 413 (1948).
116. American Bridge Co. v. Unemployment Comp. Bd. of Rev., 159 Pa. Super. 74, 46 A.2d 512 (1946).
117. American Bridge Co. v. Unemployment Comp. Bd. of Rev., 159 Pa. Super. 74, 46 A.2d 510 (1946).
118. *Ibid.*
119. Pacific Mills v. Director of Div. of Empl. Sec., 322 Mass. 362, 77 N.E.2d 413, 416 (1948).
120. 94 N.H. 48, 45 A.2d 886 (1946).
121. Haug v. Unemployment Comp. Bd. of Rev., 162 Pa. Super. 1, 56 A.2d 396 (1948).
122. Glen Alden Coal Co. v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 356, 82 A.2d 64 (1951).

would only extend "an invitation to a compensated rest."[123]

The prevailing wage for similar work in the same locality may be considered in determining suitability, and the applicant will not be required to accept substantially less favorable wage conditions. Offered wages are in this instance compared with those received by other workers rather than with the prior wages earned by the individual. This test is embodied in the "labor standards provision" required for federal approval of the state law, which will be discussed later. It may be noted that this test appears to be more restrictive than the "prior earnings" test.[124]

Comparison of earnings is not limited to wage rates per hour between offered work and prior or similar work. Consideration may be given to economic advantage in whatever form it may exist, in "fringe benefits" and working conditions, such as longer working hours (with greater income), steady work, sick benefits and vacation with pay.[125] The following cases are examples of wage disparity nonetheless held to be suitable. A carpenter previously earning the union scale of $1.58 an hour refused employment at $1.02 to $1.20 an hour in an "open shop" without "good cause."[126] An employer offered suitable new work at $1.05 per hour to an employer previously earning $1.17 per hour, who was forced to change jobs due to a dermatitis condition.[127] A stenographer was denied compensation when she refused $48.50 for a five day week job and her previous salary was $216 a month.[128]

d. Location, Transportation and Distance.

This consideration of suitability expresses a social standard of worker mobility, and its practical effect is to tell the worker how much commuting he must do.[129] An unreasonable distance between claimant and the offered employment renders it unsuitable, but the individual is not normally allowed to rely on distance created by himself. When a person regularly employed removes himself to a point where work is unavailable, while his former employment is continuously available, he has been held to waive his right to compensation as against an employer offering such employment. This result is reached

123. Glen Alden Coal Co. v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 124, 82 A.2d 74, 76 (1951).
124. Industrial Comm'n v. Brady, 128 Colo. 490, 263 P.2d 578 (1953); Konter v. Unemployment Bd. of Rev., 148 Ohio St. 614, 76 N.E.2d 611 (1947).
125. Bigger v. Unemployment Comp. Comm'n, 4 Terry 553, 53 A.2d 761 (Del. 1947).
126. See note 89 *supra*.
127. Maryland Empl. Sec. Bd. v. Berry, 195 Md. 459, 73 A.2d 894 (1950).
128. Boyland v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 164, 100 A.2d 129 (1953).
129. ALTMAN, AVAILABILITY FOR WORK 212 (1950). "Since such decisions are enmeshed in basic social policies of mobility and freedom, they need a solid base of information on travel times, distances, and costs for workers. This should be obtained on a local basis. In general, it is now lacking." *Id.* at 213.

by comparing the distance from the former residence to the work, rather than from the new residence to the work.[130] Such a rationale seems to accord no necessary weight to the reasonableness of the circumstances under which the employee left nor to the reasonableness of requiring him to return. It seems to represent a mechanical approach designed to protect the favorable experience of the particular employer, and disregard the values inherent in free mobility of labor. The application of the voluntary quit disqualification would appear to preserve the proper balance in values, giving due weight to the circumstances of his leaving employment or employment opportunities in the first location. An applicant is required to accept offered employment in the same labor market as his residence even though in a different town, the labor area being the criterion.[131] Furthermore, an unsuitable distance probably becomes suitable thereafter, once claimant has worked at the location, so that a later refusal based on distance is of questionable merit.[132] Likewise, a loss of transportation may fail to make the distance unreasonable where transportation previously existed.[133] This type case arises when a person resides in a non-industrial village while working in an industrial city.

e. Skill and Training.

The development and preservation of worker skills and the advancement and utilization of employee training is of general public concern in time of peace as well as war. The unemployment insurance program should be administered, therefore, so as to further these same objectives. The considerations here are very similar to those regarding wages, and the two standards are often treated together since lower skills usually result in lower wages.[134] Attention is given to the expectancy of securing employment of the grade for which the worker's capacity fits him, and to the length of unemployment, because work unsuitable at the beginning may be deemed suitable after a lapse of time. In *Pacific Mills v. Director of Division of Employment Security,*[135] the claimant had been trained for office work at a business college. She held a clerical job at Pacific Mills about two years before being laid off because of lack of work. She refused work in a shipping department stapling tags to pieces of cloth piled on trucks and recording yardage on an adding machine, even though the pay was about the

130. Brown-Brockmeyer Co. v. Trowbridge, 120 N.E.2d 328 (Ohio App. 1951); Brown-Brockmeyer Co. v. Holmes, 152 Ohio St. 411, 89 N.E.2d 580 (1949).
131. Hanna v. Unemployment Comp. Bd. of Rev., 172 Pa. Super. 417, 94 A.2d 178 (1953).
132. Konter v. Unemployment Comp. Bd. of Rev., 148 Ohio St. 614, 76 N.E.2d 611 (1947).
133. *Ibid.*
134. Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886 (1946).
135. 322 Mass. 345, 77 N.E.2d 413 (1948).

same as her prior wages. There was no disqualification because it was considered unreasonable to force a skilled office worker to accept work below her best skill at the beginning of a period of unemployment.

f. Temporary Work and Personal Reasons

Employment will not be regarded as unsuitable because it is temporary, and the fact that the employer cannot predict in advance how long work will be available does not give the applicant a good cause for refusing.[136] Personal desires concerning working conditions, such as the size of the office or the number of fellow workers, offer no "necessitous and compelling reason"[137] for refusal of work. Further, the personal desire to retain the benefits of a union contract is thought not to make a job unsuitable. In *Lidwigsen v. Board of Review*,[138] the Curtiss-Wright Corporation had a plant cafeteria whose employees had been under the same union contract as the production workers. The corporation arranged to turn the cafeteria over to an independent catering contractor, but all cafeteria employees were offered their same job at the same wage. This offer was refused and production jobs were requested so that they would remain under the union contract. These employees were later given production jobs because of the union demand. Claimant filed for compensation during the period of unemployment in between the jobs and the court held he had refused suitable work.

g. The Labor Standards Provision.

The previously discussed provisions, alone, do not present the full picture as to what is suitable work. As a condition for approval of a state law for tax offset purposes the following provision now adopted by all states is required.

> "Compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."[139]

It should be noted that these factors render "new work" unsuitable

136. Barr v. Unemployment Comp. Bd. of Rev., 172 Pa. Super. 389, 93 A.2d 877 (1953).
137. Boyland v. Unemployment Comp. Bd. of Rev., 174 Pa. Super. 164, 100 A.2d 129, 130 (1953); Corrado v. Director of Div. of Empl. Sec., 325 Mass. 711, 92 N.E.2d 379 (1950).
138. 12 N.J. 64, 95 A.2d 707 (1953).
139. 26 U.S.C.A. § 1603(a)(5) (1948).

under the circumstances stated, and the previously discussed factors will thus vary from one individual to another. These factors are purely negative in character in that they exclude work in conflict with them, but the absence of such conflict does not necessarily mean that such work is suitable. The Secretary of Labor ruled on December 19, 1949, *inter alia,* that refusal of work which does not meet the above standard may not serve as a basis for deciding whether an individual is "otherwise eligible;"[140] these standards, therefore, are a basic minimum which all "new work" must meet. These provisions are included here because of their obvious relevancy but no attempt is made to treat them in detail.[141] The reasons behind the three provisions would seem to be obvious. Under clause (A) the unemployment insurance program is to maintain neutrality in a labor dispute. A claimant can refuse to be a strikebreaker and not be disqualified. Clause (B) guards against using the program to undermine and depress prevailing labor standards. Clause (C) relates to two problems which were of greater significance when the program was being developed in the early 1930's than they are today, namely, the company-dominated union and the "yellow dog" contract, both of which are of course the subject of affirmative condemnation under the National Labor Relations Act.[142]

The states not only must include these standards in their statutes, but must also give them an appropriate interpretation. The Secretary of Labor has said, "To make these provisions in the Federal Act meaningful, the State law must be given the same meaning in actual construction and application as the Federal law."[143]

D. Discharge for Misconduct

The statutes of every state impose disqualification for benefits upon the claimant discharged for misconduct,[144] and there is a tendency to vary the disqualifying period and to reduce or cancel benefit credits "according to the seriousness of the misconduct."[145] A substantial minority of states provide still heavier disqualification (including cancellation of benefit credits) for aggravated or gross misconduct.[146]

Some states specify "wilful misconduct" or "deliberate misconduct in wilful disregard of the employing unit's interest" in their statutory language.[147] A majority reach a similar result by administrative or

140. IA CCH Unempl. Ins. Rep. § 1965.
141. See deVyver, *Federal Standards in Unemployment Insurance, infra.* p. 411.
142. 61 Stat. 136 (1947), 29 U.S.C.A. §§ 151-197, specifically §§ 8 (a) (1) and 8(a) (2) of NLRA.
143. IA CCH Unempl. Ins. Rep. ¶ 1965.
144. See Table 25 in Comparison of State Unemployment Insurance Laws, *op. cit. supra* note 1, at 72; and Kempfer, *supra* note 17, at 160-66; Teple, *supra* note 17, at 191, 195-98; IA CCH Unempl. Ins. Rep. ¶ 1970.
145. Comparison of State Unemployment Insurance Laws, *op. cit. supra* note 1, at 71.
146. *Id.* at 73.
147. *Id.* at 71.

judicial interpretation of the term "misconduct connected with the work."[148] It seems to be well established that the disqualifying state of mind required is that associated, in the industrial sense, with intentional wrongdoing or gross neglect, rather than a simple negligence alone. An elaboration of this distinction is contained in the leading case of *Boynton Cab Co. v. Neubeck* in which the Wisconsin Supreme Court declared:

> "If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term 'misconduct', and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated, as to many of the great mass of less capable industrial workers . . . for whose benefit the act was largely designed, the principal purpose and object under the act. . . . [I]t is necessary and proper to resort to the rule that statutes providing for forfeitures are to be strictly construed and terms and provisions therein, which are ambiguous or of doubtful meaning will be give the construction which is least favorable to working a forfeiture, so as to minimize the penal character of the provision by excluding rather than including conduct or cases not clearly intended to be within the provision. . . . The application of these principles leads to the conclusion . . . that the intended meaning of the term 'misconduct' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interest 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 of judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."[149]

The above quotation has been set out at length not only because it continues to be more widely cited with approval in jurisdictions throughout the country than any other exposition of the term,[150] but because its, in some degree repetitive, character gives an emphasis and establishes a "climate of opinion" which is considered of independent importance in judging the weight of the various phrases and clauses. It seems clear that we are not looking simply for substandard

148. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941); Mandes v. Employment Sec. Agency, 74 Idaho 23, 255 P.2d 1049 (1953); Winer Inc. v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 638, 95 N.E.2d 214 (1950); State *ex rel.* Employment Sec. Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952); *cf.* Morgan v. Unemployment Comp. Bd. of Rev., 176 Pa. Super. 297, 106 A.2d 618 (1954) (the Pennsylvania statute specifies "wilful" misconduct).

149. 237 Wis. 249, 296 N.W. 636, 640 (1941).

150. See Mandes v. Employment Sec. Agency, and Winer, Inc. v. Review Bd. of Ind. Empl. Sec. Div., *supra* note 148.

conduct under this disqualification but for a wilful or wanton state of mind accompanying the engaging in substandard conduct. It may be pointed out that an employee could scarcely have the state of mind requisite for "misconduct" under the *Boynton* language and not foresee the termination or suspension of his employment as a reasonable and probable consequence of engaging in the conduct.

Turning from the requisite state of mind to the type of act or failure to act necessary for "misconduct," we are necessarily thrown into a shifting framework of reference. The wrongdoing or impropriety here may involve legal wrong, but this is comparatively rare and is of little help in determining the boundaries of the term.[151] Since we can have no general guide in the laws of the land, the "wrongness" of the conduct must be judged in the particular employment context.[152] Identical conduct might be treated as an "intentional and substantial disregard of the employer's interest" in one environment and not in another. One plant will have established rules for employee conduct which will not exist at another work location. It is not just a matter of formulating rules and communicating them to employees, however. Even where rules for employee conduct have been posted, their lack of enforcement or their enforcement on a sporadic or discriminatory basis will not provide a basis for disqualification in a subsequent case.[153] On the other hand, certain conduct will be so flagrant that indulging in it will undoubtedly be "misconduct" whether or not a specific rule prohibiting it has been expressly formulated and posted or otherwise announced to the employees.[154]

Courts, as in the *Boynton Cab*[155] case, speak of "disregard of the employer's interest" or disregard of the employee's "obligation to his employer." Those interests and obligations can be made concrete, however, only in terms of the "industrial law," the "going" standard of conduct, established and maintained, in fact, for the particular plant, warehouse, store, or office. This "industrial law" may largely result from the unilateral determination of the employer. If there is a collective bargaining agency present, this "industrial law" will be conditioned, impliedly, and perhaps expressly, by that fact.[156] It can be

151. IA CCH UNEMPL. INS. REP. ¶ 1970, p. 4649.
152. *Id.* at 4651.
153. *Id.* at 4652.
154. *See e.g.*, Doran v. Employment Sec. Agency, 267 P.2d 628 (Idaho 1954); and Merkle v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 108, 90 N.E.2d 524 (1950), which make no reference to the existence or publication of rules governing the particular conduct. It is believed that this situation would prevail in the majority of court decisions imposing disqualification for a misconduct discharge.
155. 237 Wis. 249, 296 N.W. 636 (1941).
156. Collective bargaining will be concerned with "terms and conditions of employment." See NATIONAL LABOR RELATIONS ACT § 8(d), 61 STAT. 140, 29 U.S.C.A. § 158(d) (Supp. 1954). This will obviously cover most, if not all, of the rules governing employee conduct which could result in suspension or discharge. This in turn is conditioned by the undefined boundaries of "man-

noted that the individual coming into certain employment may be, and frequently is, given express information and instruction regarding the established standard of conduct in that employment. Practice and custom in the employment may reinforce, dilute or override what is expressly stated,[157] although it is always possible for the rule-making authority to change the going standard of required conduct if adequate notice is afforded those affected.[158] The rules of conduct required by the employer must be "reasonable" if their violation is to be disqualifying "misconduct" under the unemployment insurance program. We do have a legislative standard in the sense that effect will not be given to the unreasonable requirements of the employer.[159]

General understanding and custom in the particular plant or industry or in employment generally can supply a standard where none has been expressly stated. This results in the crystallization of certain patterns of conduct as the equivalent of statutory "misconduct" in spite of the flexibility and case-by-case approach suggested in the preceding paragraphs.[160] Intoxication during working hours,[161] dishonesty,[162] excessive absenteeism,[163] insubordination,[164] refusal to perform assigned work[165]—most of the reported court decisions imposing disqualification (and probably the bulk of administrative determinations as well) will come under one or more of these headings.[166] Instances of inability or incapacity to perform the work on the other hand, or simple negligence recur frequently among the decisions finding absence of disqualification.[167]

The "connected with the work" aspect of misconduct normally results in disregard of the employee's conduct away from the working premises or while he is not in the course of his employment even

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agement prerogative." See HILL AND HOOK, MANAGEMENT AT THE BARGAINING TABLE 56-138 (1945), particularly 99-104 dealing with disciplinary rules.

157. IA CCH, UNEMPL. INS. REP. ¶ 1970, p. 4652.

158. See Krawczyk v. Unemployment Comp. Bd. of Rev., 175 Pa. Super. 361, 104 A.2d 338 (1954).

159. IA CCH, UNEMPL. INS. REP. ¶ 1970 p. 4652; and see Kempfer, *supra* note 17, at 164-66.

160. IA CCH, UNEMPL. INS. REP. ¶ 1970, pp. 4654-55.

161. *Id.* at 4654; see Teple, *supra* note 17, at 196; *cf.* Doran v. Employment Sec. Agency, 267 P.2d 628 (Idaho 1954).

162. IA CCH, UNEMPL. INS. REP. § 1970, p. 4655.

163. Doran v. Employment Sec. Agency, 267 P.2d 628 (Idaho 1954); Merkle v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 108, 90 N.E.2d 524 (1950).

164. Massengale v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 604, 94 N.E.2d 673 (1950).

165. Carter v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 75, 90 N.E.2d 133 (1950); Morgan v. Unemployment Comp. Bd. of Rev., 176 Pa. Super. 297, 106 A.2d 618 (1954).

166. See IA CCH UNEMPL. INS. REP. ¶ 1970 (including Cumulative Case Notes, ¶ 1970).

167. Mandes v. Employment Sec. Agency, 74 Idaho 23, 255 P.2d 1049 (1953); Winer, Inc. v. Review Bd. of Ind. Empl. Sec. Div., 120 Ind. App. 638, 95 N.E.2d 214 (1950); State *ex rel.* Employment Sec. Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952).

though he is discharged for such conduct.[168] However, it is recognized that the interests of the employer may nevertheless be adversely affected by such conduct and, at times, the disqualifying relationship to the employment is found by a sort of "House-that-Jack-built" type of reasoning.[169] The more usual approach is not to indulge in a search for any such tenuous connection.[170]

A final word may be said about the necessity for the alleged misconduct (assuming it has been proven) being the actual motivating factor in the discharge. If the discharge (or suspension) was for some other motive, the disqualification is inappropriate even though the conduct amounts to "misconduct."[171] This is another reason for the basic necessity of viewing the full circumstances of the particular case against the background of the "going" standard of industrial conduct in the particular employment. This will permit evaluation of the extent to which the claimant has fallen below that standard and whether or not his discharge or suspension is motivated by his falling below such standard or some other reasons. It will also avoid the too ready "pigeon-holing" of fact situations and permit an informed judgment as to whether the employee could reasonably have foreseen a termination or suspension of his employment as a result of engaging in the particular conduct.

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168. Kempfer, *supra* note 17, at 161-62; IA CCH UNEMPL. INS. REP. ¶ 1970, p. 4650.
169. IA CCH UNEMPL. INS. REP. ¶ 1970, p. 4650.
170. Kempfer, *supra* note 17, at 147, 162; Teple, *supra* note 17, at 191, 198.
171. See IA CCH UNEMPL. INS. REF. ¶ 1970, pp. 4649-50; Kempfer, *supra* note 17, at 161.