Unemployment Compensation

Acknowledgements

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Background

Generally, workers who have lost their jobs can receive unemployment compensation, a weekly wage replacement benefit, unless their employer can show that the employees were exempt, voluntarily resigned without good cause connected to the work, were fired for misconduct or gross misconduct, or lost their jobs due to a labor dispute. Each of these issues is addressed in detail below.

The amount of unemployment compensation that a worker receives is based on the worker's wages (approximately half). A worker can get unemployment for a maximum of six months (26 weeks) if she follows all program requirements, sends in claim cards, and reports to the local office if requested to do so. In times of high unemployment, Congress may step in and provide additional weeks of emergency unemployment benefits.

Unemployment compensation insurance (UI) programs are typically state-run. But since states (and DC) receive grants from the federal government to run these programs, they must follow federal guidelines.

In addition to federal grants, each covered employer must pay a premium, like an insurance premium, to the government agency charged with administering the unemployment compensation program. The premium amount is based on the number of workers an employer employs and the employer's experience rating, which means that the amount an employer has to pay increases as its number of successful unemployment compensation claims goes up. This is generally why employers challenge the unemployment compensation claims filed by employees.

Unemployment Compensation in DC

In DC, the Department of Employment Services (DOES) runs the unemployment compensation program. Workers may file their claims online at: http://www.dcnetworks.org or over the phone at: (202) 724-7000 or (877) 319-7346. Workers may file their claims in person at local DOES offices and One-Stop Career Centers located throughout the city. See the *Claims*

and Appeals Process section below.

Coverage & Exemptions

Employers must pay into the UI fund if they employ a worker entirely within DC or mostly within DC (if the services performed by the worker outside of DC are "incidental" to the services performed within DC). *See* DC Code § 51-101(2)(B)(ii).

Note: The worker need not be a resident of DC to receive DC UI benefits; residents of Virginia and Maryland may be eligible for benefits if they worked in DC.

Exempt Employees

The following workers represent most of the individuals who are exempt from (will not receive) unemployment compensation benefits:

- employees of religious organizations;
- participants in rehabilitation workshops, such as programs run by Goodwill or sheltered workshop trainees;
- persons in federal or other government-sponsored work training programs;
- inmates;
- baby-sitters under the age of 18;
- casual laborers;
- any worker employed by his or her parent, child or spouse;
- undocumented workers;[31] and
- independent contractors who meet the common law definition of independent contractor.[32]

See DC Code § 51-101(2).

DC and Federal Government Employees

No special standards apply when dealing with DC and federal government employees. These employees are eligible for benefits under the same terms and conditions as private employees.

[31] Undocumented workers are not eligible for unemployment compensation. *See* DC Code § 51-101(2). Benefits are calculated using Social Security numbers. Lawful permanent residents, however, are eligible for unemployment, as is anyone lawfully admitted for the purpose of their employment. *Id*. at § 51-109(9)(A).

[32] Watch out for employers who classify employees as independent contractors to avoid unemployment and other types of liability. *See Rosexpress, Inc. v. DOES*, 602 A.2d 659 (1992). For a discussion of the distinction between "employees" and "independent contractors" see the Wage and Hour chapter and Misclassification chapter.

Establishing Eligibility for Benefits

Resigning from or Quitting a Job

A worker who **voluntarily** separates from his or her job without good cause connected to the work is not eligible for unemployment compensation. *See* DC Code § 51-110(a); 7 DCMR § 311.

The Standard for Voluntary Separation

Leaving is presumed to be involuntary. Thus, unless the worker admits that she or he quit voluntarily, the employer has the burden of proving that the worker left voluntarily. 7 DCMR § 311.3. For example, in *Washington Chapter of the American Institute of Architects v. DOES*, 594 A.2d 83 (1991), an executive vice president was judged to have left her employment involuntarily when she was forced to choose between signing a letter of resignation presented to her or told to "stay and be miserable." She was allowed to collect benefits.

If a worker resigns under "threat of imminent termination," the leaving is considered a constructive discharge for misconduct, and thus, involuntary. 7 DCMR § 311.8. However, the employer then will have the opportunity to prove that the imminent termination – if it had occurred – would have been for simple or gross misconduct. *Id.*

What is Good Cause to Resign?

Whether a worker had good cause connected with the work to support leaving voluntarily is determined by the following test: "What would a reasonable and prudent person in the labor market do in the same circumstances?" 7 DCMR § 311.5.

The regulations state that **good cause connected to the work** includes, but is not limited to:

- racial discrimination or harassment;
- sexual discrimination or harassment;
- failure to provide remuneration for the employee's services;
- being required to work in unsafe locations or under unsafe conditions;
- illness or disability caused or aggravated by the work (provided the worker previously has supplied the employer with a medical statement); or
- transportation problems arising from the employer's relocation .

See 7 DCMR § 311.7.

A significant reduction in wages also may constitute good cause to quit. *See Consumer Action Network v. Tielman*, 49 A.3d 1208 (DC 2012). The worker should present evidence of the reduction in wages and his or her personal living expenses to prove economic hardship. *See Id.* at 1214.

In addition, the 2010 Unemployment Compensation Reform Amendment Act expands eligibility to those who leave their jobs for compelling family reasons. Under the 2010 updates, a worker may be qualified to receive unemployment benefits for the following reasons:

- his/her spouse or domestic partner's employment requires a transfer to a location that makes it impractical to commute to his/her current employment (e.g., military orders for transfer resulting in need to relocate). DC Code § 51-110(d)(4);
- to care for a family member[33] who is ill or disabled; or
- due to domestic violence against the worker or against a member of his/her immediate family. DC Code § 51-131.

Note: If an individual voluntarily quits to care for an ill/disabled family member, s/he won't immediately be eligible to receive unemployment because s/he cannot satisfy the "available to work" requirement. However, as soon as that period of care is over, the worker would be eligible to receive benefits.

The regulations state that the following circumstances constitute resignations **without good cause**:

- Refusal to obey reasonable employer rules;
- Minor reduction in wages;
- Transfer from one type of work to another which is reasonable and necessary;
- Marriage or divorce resulting in a change of residence;
- General dissatisfaction with the work;
- Resignation to attend school or training; or
- Personal or domestic responsibilities, unless related to care of an ill or disabled family member, or to relocate with a spouse or domestic partner (effective July 22, 2010).

See 7 DCMR § 311.6.

In addition, the courts have found the following resignations to be **without good cause**:

- Quitting after being told to "shape up or ship out;"[34]
- Leaving to accept a job that does not come to fruition;[35]
- Resignation due to non-work-related health problem, including pregnancy;[36]
- Voluntary change from full-time to on-call status, and subsequently offered no work;[37]
- Resignation due to illness, absent medical support stating that it is related to or aggravated by the work;[38] or

[33] The definition of "family member" mirrors the definition in the DC Human Rights Act. DC Code § 51-110(d)(5).
[34] *See Bowen v. DOES*, 486 A.2d 694 (DC1985).
[35] *See Gomillion v. DOES*, 447 A.2d 449 (DC1982); *Gopstein v. DOES*, 479 A.2d 1278 (DC1984).
[36] *See Hockaday v. DOES*, 443 A.2d 8 (DC 1982).
[37] *See Freeman v. DOES*, 568 A.2d 1091 (1990).
[38] *See Hill v. DOES*, 467 A.2d 134 (DC1983).

- Resignation due to stress and psychological disorders, absent medical support stating that it is caused or aggravated by the job.[39]

Resigning Due to Illness or Disability Connected to the Work

The regulations state that a worker has good cause to resign if s/he quits a job because of a disability caused or aggravated by the work. *See* 7 DCMR § 311.7. The claimant, however, must have provided a medical statement to her employer that indicates a need for accommodations or recommends that the employee resigns before s/he quits.[40]

In *Hill v. DOES*, 467 A.2d 134 (DC 1983), a claimant was denied unemployment benefits when the court ruled that she had voluntarily quit, even though her resignation had been in response to an involuntary psychiatric evaluation and retirement proceeding. The court found that the claimant had failed to show that the psychiatric ailment was connected to her work, thus eliminating disability as good cause for resignation. The court further found that a decision to retire voluntarily to avoid the stigma of publicly airing a psychiatric problem did not constitute good cause "in light of the private nature of the involuntary retirement proceeding." *Id.*

Resigning under Threat of Discharge

Resigning under the threat of discharge is not voluntary. *See Green v. DOES*, 499 A.2d 870 (1985).[41] The threat of discharge, however, must be "real and imminent" for the resignation to be judged involuntary for purposes of collecting unemployment. *See Perkins v. DOES*, 482 A.2d 401 (DC 1984).

If the worker resigns under threat of imminent termination for misconduct, the hearing examiner must make a separate determination regarding whether misconduct is proved. *See* 7 DCMR § 311.8.

Worker Voluntarily Changes Status to On-Call

If a worker voluntarily changes his or her work status to "on-call," and the employer subsequently has no work available, the worker's decision will be treated as a voluntary resignation, and s/he will be disqualified from collecting unemployment. *See Freeman v. DOES,* 568 A.2d 1091 (1990) (holding that an employee who fails to take all necessary and reasonable steps to preserve employment is deemed to have brought about voluntary termination of employment for unemployment compensation purposes).

[39] *See Bublis v. DOES*, 575 A.2d 301 (DC1990).

[40] *See Branson v. District of Columbia Dep't of Empl. Servs.*, 801 A.2d 975, 979, n. 2 (DC 2002) (Employee must provide employer with a "medical statement" before resigning so that the employer will have the opportunity to verify the condition and to make necessary accommodations. A "medical statement" according to the regulations, is "a physician's statement or equivalent documentation.").

[41] Pregnancy, by statute, is treated like any other reason for leaving a job. *See* DC Code § 51-110(h); 7 DCMR § 311.11. There is no presumption that a pregnant person is physically unable to work.

Members of the Military who are Discharged from Service

Eligibility for unemployment benefits for those leaving the military is authorized under 5 U.S.C. § 8521 *et seq.* A service man or woman who has completed an active term of military service and who does not request re-enlistment is not eligible to receive unemployment benefits under the above federal statute. *See Wells v. DOES*, 513 A.2d 235 (1986). This is tantamount to a voluntary resignation from the military.

Involuntary Terminations

A worker who is involuntarily terminated from his or her job is generally eligible to receive unemployment benefits unless that termination was due to the worker's **simple misconduct or gross misconduct**. A finding of simple misconduct will result in an eight-week disqualification from receiving benefits, while a finding of gross misconduct will result in a total disqualification from receiving benefits.

Gross Misconduct

"Gross misconduct," as defined in 7 DCMR § 312, results in disqualification for unemployment until the worker has worked at another job for 10 weeks and 10 times the weekly benefit has accumulated. *Id.* at § 51-110(b)(1).[42]

The following are examples of behavior that can constitute gross misconduct:

- Sabotage;
- Unprovoked assaults or threats;
- Arson;
- Theft or attempted theft;
- Dishonesty;
- Insubordination;
- Repeated disregard of reasonable orders;
- Intoxication, use or possession of drugs[43];
- Willful destruction of property; or
- Repeated absence or tardiness following warning.

See 7 DCMR § 312.4.

[42] If a worker finds a job at the same rate of pay, in most cases it will take five weeks to earn enough money to overcome the disqualification; however, the worker will still have to wait for 10 weeks to elapse before becoming eligible for unemployment again.

[43] *But see Johnson v. So Others Might Eat*, 53 A.3d 323 (DC 2012) (holding that a positive drug-test from off-duty marijuana use was, in and of itself, insufficient proof of misconduct). To prove misconduct, an employer must show some nexus between the off-duty drug use and the employment to prove a "reasonable and discernible effect on the employers' ability to carry on its business or on the employee's ability to perform his or her duties." *Id.*

See also *R.B. v. Environmental Protection Agency*, 31 A.3d 458 (DC 2011), construing the regulations for proof of misconduct in 7 DCMR 312.9 and 312.10, and reversing a finding of gross misconduct in the absence of availability for cross-examination of the person (R.B.'s wife) who made statements that were being used to prove misconduct.

Simple Misconduct

Simple misconduct is something less than gross misconduct, and it results in an eight-week disqualification. *See* DC Code § 51-110(b)(2). The worker is disqualified for the first eight weeks of benefits claimed, but will receive the remaining 18 weeks of benefits if otherwise eligible.

The following are examples of behavior that can constitute simple misconduct:

- minor violations of employer rules;
- conducting unauthorized personal activities during business hours;
- absence or tardiness where the number of instances or their proximity in time does not rise to the level of gross misconduct; or inappropriate use of profane or abusive language.

See 7 DCMR § 312.6.

In short, simple misconduct includes acts that are not as severe as gross misconduct or where mitigating circumstances do not support a finding of gross misconduct. 7 DCMR § 312.5.

Determining Whether Violation of an Employer's Rule is Misconduct

If the employer alleges that the worker was fired because s/he violated one of the employer's rules, the employer must show that the worker knew of the employer's rule, that the rule is reasonable, and that the rule was enforced consistently. *See* 7 DCMR § 312.7.[44]

In addition, under some circumstances, the violation of a rule may not be enough to disqualify a worker from the receipt of benefits on the grounds of misconduct. In *Green v. DC Unemployment Compensation Bd.,* for example, a worker was fired for violating the employer's rule against unsupervised, at-home, overtime work. The worker was nevertheless allowed to collect unemployment benefits because the violation did not reach the level of "wanton or willful disregard of the employer's interest." 346 A.2d 252 (1975). In *Marshall v. DC Unemployment Compensation Bd.,* 377 A.2d 429 (1977), the court suggested in dicta that if the employer's rule was put in place after the worker was hired, the employer would need to show that the worker must have been able to meet the physical and educational requirements of the rule.

[44] Notwithstanding this 3-part test for rule violation, some ALJs will find misconduct even where the test is not met, relying on *Hegwood v. Chinatown CVS, Inc.*, 954 A.2d 410, 412 (DC 2008).

Intent is Required for a Finding of Misconduct

Recent cases have reinforced the requirement of evidence of willful or deliberate actions on the part of the employee and required proof from the employer that the behavior was more than an isolated incident, or that the claimant's actions negatively impacted the employer. *See Hamilton v. Hojeij Branded Food, Inc.*, 2012 DC App. LEXIS 143, at *28 (DC Apr. 12, 2012) (no finding of misconduct because intent was not proven, where claimant was fired for excessive absences caused by circumstances beyond the claimant's control); *Taj Gilmore v. Atlantic Services Group*, 17 A.3d 558 (DC 2011) (no misconduct by claimant who was fired due to absences from unforeseen incarceration, where claimant took steps to try to notify the employer); *Larry v. National Rehabilitation Hospital*, 973 A.2d 180, 183 (DC 2009); *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 430 (DC 2009). Ordinary negligence does not constitute misconduct. *See Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 24 (DC 2011) (school bus driver who was fired for three relatively minor accidents did not commit misconduct).

Loss of Job Because of Labor Dispute

Involvement in most labor disputes, such as a strike, disqualifies a person from unemployment benefits for the duration of the dispute. *See* DC Code § 51-110(f); *Barbour v. DOES*, 499 A.2d 122 (1985).

When a person will not cross a picket line because of a reasonable fear of violence, however, they may receive unemployment compensation. *See Washington Post Co. v. District Unemployment Compensation Bd.*, 377 A.2d 436 (DC 1977).

When an employer institutes a lockout of the workers as part of a labor dispute, a worker may receive unemployment compensation. A worker cannot, however, convert a strike into a lockout by returning to work. *See NBC v. DUCB*, 380 A.2d 998 (DC1979). If a lockout occurs, the court still will determine eligibility "on the basis of the initial cause of the interruption of employment," and if that cause is a voluntary strike, the workers will not be eligible for benefits. *See American Broadcasting Companies, Inc., v. DC Dep't of Empl. Servs.*, 822 A.2d 1085 (DC 2003).

Victims of Domestic Violence

In 2004, DC signed into law the *Unemployment Compensation and Domestic Violence Amendment Act of 2003*, which expanded unemployment compensation coverage for domestic violence victims who lose their jobs as a result of the violence. *See* DC Code § 51-101 *et seq.*). The act is similar to legislation enacted in 24 states across the country, which allows domestic violence victims to receive unemployment compensation if they establish that they quit or were fired because of domestic violence. For example, if a domestic violence victim quits to go into hiding from her batterer, or is fired because of excessive absenteeism because of the abuse, these reasons for separation from employment no longer will prevent an employee from receiving benefits. *See* DC Code § 51-131.

To receive unemployment compensation, domestic violence victims must produce the same paperwork required of all other applicants for unemployment compensation. Additionally, domestic violence victims must offer some sort of proof that they are victims of domestic violence. Proof can include the following:

(1) A police report or record;
(2) A court record, such as a Temporary Protection Order or Civil Protection Order;
(3) A governmental agency record such as a report from Child Services; or
(4) A written statement affirming that the victim has sought services from a shelter official, social worker, counselor, therapist, attorney, medical doctor, or cleric.

DC Code § 51-132.

The employer, however, will not be charged for the provision of benefits.[45] Instead, the benefits will come from DC's general funds. In 2010, legislation went into effect that expands eligibility further. Under the new law, DOES is prohibited from denying benefits because an individual separated from employment due to domestic violence not only against the individual **but also against any member of her immediate family**. *See* DC Code § 51-131. *See* D.C. Code § 51-131. *See* D.C. Code § 51-131.*See* D.C. Code § 51-131.*See* D.C. Code § 51-131.*See* D.C. Code § 51-131.

Monetary Eligibility and Amount of Benefits

To receive benefits, a worker must have monetary eligibility. Monetary eligibility is established through the worker's earnings history during the relevant base period. Essentially, the worker must have earned a certain amount during the period leading up to the time the claim is filed. The amount the worker earned during that period also will determine the amount of the weekly benefit the worker will receive from the unemployment compensation program.

Required Worker Earnings in the "Base Period"

In order to meet the requirements for monetary eligibility, the **worker must have earned at least $1,950 in wages in the applicable "base period."** Of those wages, $1,300 must have been within any one quarter (three-month period) of the base period and all earnings cannot have been earned in one calendar month. Jobs can be stacked; that is, prior jobs can be used to determine eligibility. Jobs from any state also can be used to determine eligibility.

Regular Base Period

The regular base period is a 12-month period of earnings that includes the first four of the last five completed calendar quarters. It is determined based on the date that the claim was filed. *See* DC Code § 51-101(6)-(9).

[45] The only exception is where the employer is the District of Columbia or a non-profit organization that has opted-out of the experience rating system. *See* DC Code § 51-133.

Alternative Base Period (ABP)

If a worker is not eligible under the regular base period, the worker may be eligible under the alternative base period. The ABP is defined as the last four completed calendar quarters. The Alternative Base Period legislation was passed in an effort to address the fact that under the traditional base period, up to six months of the worker's most recent wages are ignored. Under the ABP, only between zero and three months of recent wages are ignored. Again, the ABP period is triggered only when an individual is not eligible under the regular base period. Claimants cannot invoke the ABP to get a higher benefit amount.

Example to Help Determine Claimant's Monetary Eligibility

Assuming that the claimant filed his or her claim for benefits between April and June of 2013, the chart below represents the claimant's regular base and alternative base periods.

First Quarter January - March 2012	Second Quarter April-June 2012	Third Quarter July – September 2012	Fourth Quarter October – December 2012	Fifth Quarter January – March 2013	Quarter in Which Claim Is Filed April – June 2013
←←←←←←←← REGULAR BASE PERIOD →→→→→→→→					
	←←←←←←← ALTERNATIVE BASE PERIOD →→→→→→→				

To determine if the claimant has earned enough during the relevant base period, ask the following questions:

(1) Did the claimant earn at least $1,950 during the relevant base period?
(2) Was a total of $1,300 (of the minimum $1,950) earned in any one of the four quarters of the relevant base period?
(3) Did the claimant earn some wages in at least two of the quarters in the relevant base period?
(4) Is the claimant's total base period income, plus $70, equal to at least one and a half times her income in her highest-earning quarter?

If the answer to all four questions is yes, then the claimant has established monetary eligibility for benefits.

A Form UC 400, Notice of Monetary Determination will be mailed to the worker within seven days after s/he files the claim indicating the worker's weekly and total benefit amounts. The form will list the wages reported under the worker's name and Social Security number during the base period by all the employers who are covered by the District of Columbia's Unemployment Compensation Program. Workers should check the form carefully for the following information:

- Wages not included for an employer that employed the worker within the base period.
- Wages included for employers for whom the worker did not work.

If the worker is not monetarily eligible, the notice of Monetary Determination will indicate what requirement(s) the worker did not meet.

Amount of Benefits

Generally, benefits are 50 percent of the average weekly wage earned during the base period. *See* DC Code § 51-107(b)(2)(B)(iii). The minimum benefit is $50 a week or approximately $215 a month. The maximum benefit is $359 a week or approximately $1,544 a month. *Id.* Benefits can be collected for a maximum of 26 weeks (approximately six months).[46]

If the claimant believes the amount in the Notice of Monetary Determination is incorrect, the claimant should report to a DOES office or One-Stop Career Center immediately and request a re-determination – or file an appeal within 15 days of the date of mailing of the monetary determination. The claimant should bring check stubs, W-2 forms and other proof of wages in an effort to successfully challenge the monetary determination.

Reduction in Benefits for Wages, Pensions, Annuities or Public Benefits

If a claimant earns **wages** from another source while collecting benefits, those gross wages must be reported to DOES to determine the worker's continued eligibility for benefits and the amount of benefits to which the claimant is entitled. The formula used to adjust benefits when there are wages from work is the following:

(Weekly Benefit Amount + $20) – 80% of weekly earnings = Benefit Due

See DC Code § 51-107(e).

The amount of any pension or annuity (for example, a public or private retirement plan such as a union member's pension) collected by the worker will be deducted from the weekly UI benefit amount dollar for dollar. *See* DC Code § 51-107(c); 7 DCMR § 317. However, DC Code § 51-107(c)(2) states that, while "benefits payable … shall be reduced …by any amount received …under a public or private retirement plan[,] … no reduction shall be made under this sentence for any amount received under Title II of the Social Security Act." *See* DC Code § 51-107(c)(2). Title II includes Social Security Income and Disability Benefits. On its own, therefore, the receipt of SSI (Supplemental Security Income) or SSDI (Social Security Disability Insurance)

[46] Extended benefits are allowed when the national unemployment rate is high and the number of claimants is significantly on the rise. Although the DC unemployment rate is higher than the national average (source: http://stats.bls.gov/lau), benefits have not been extended. *See* DC Code §§ 51-107(g)(1)(B)-(C) (calculating unemployment by taking the number of claimants for unemployment compensation divided by total number of people employed, the result must be greater than 120 percent of previous unemployment and greater than 5 percent). During recessions, look for the federal government to approve extensions and make sure that DOES complies with the extension.

from the federal government will not preclude the worker from receiving unemployment benefits. To ultimately qualify, however, the worker still will be required to show s/he is "available for work," which could be a challenge for disabled individuals. The salient issues will be whether the prospective claimant can work with reasonable accommodations, and to what extent s/he can work.

Severance Pay

Claimants are required to report the receipt of severance pay on their initial claim form. Employers report the payment of any severance as well once they are notified that a claim has been filed.

Severance pay is treated by the UI system as a continuation of pay. Therefore, if a claim for UI is filed during the period that a worker is receiving severance, UI will be delayed for the duration of the severance pay. Employers usually frame severance pay by number of weeks or months of pay (e.g., three months of severance pay). Questions, however, are raised when employers do not specify the period of time for the severance pay and just present the worker with the pre-calculated amount of money. In these cases, the claimant should argue that the amount received is a lump-sum payment that should only delay one week of UI (the week in which the severance pay was received). It is likely, however, that the severance pay will be divided by the worker's regular weekly wage to determine the length of the delay.

If the Employer Has Not Reported Wages or Paid into the System

Employers are required to report the wages of their employees and to make periodic payments into the unemployment compensation system for each worker. Some employers neglect to make these payments to save money. If this happens, the initial claims examiner is supposed to conduct an investigation. As a part of the investigation, **the worker should submit pay stubs and other evidence of the amount of money earned**.

If the worker ultimately is denied unemployment on this basis, s/he should file an appeal of the claims examiner's determination. On appeal, s/he should submit any and all pay stubs. S/he also will need the name of the employer and, if possible, the employer's Federal Taxpayer Identification number, which should be on the worker's pay stub. The worker also must be prepared to demonstrate that s/he was an employee and not an independent contractor.

The worker also should push to make DOES enforce the employer's legal obligations to report wages and pay into the system. DOES has broad collection authority. It can, for example, seize assets, including real property and tax refunds, or revoke licenses or government contracts. *See* DC Code § 51-104(e) through (h). In some circumstances, the claimant may be paid unemployment benefits from a special fund and the District will pursue the unpaid taxes from the recalcitrant employer.

Benefits are Taxable

Benefits are taxable as income for both federal and DC tax purposes. *See* 26 U.S.C. § 85; DC Code § 47-1803.2. DOES reports unemployment compensation to the IRS and DC taxing authority. Workers now may choose not to have DC taxes withheld from their unemployment benefits; however, even if they choose not to have the taxes withheld, they will remain liable to pay them.

For most workers, unemployment benefits do not count as earned income for purposes of the DC or federal earned income tax credit. *See* Publication 596, "Earned Income Tax Credit," U.S. Internal Revenue Service.

Claims and Appeals Process

Filing the Initial Claim

When a worker loses or quits a job, s/he may file a new claim online at: http://www.dcnetworks.org or over the phone at (202) 724-7000 or (877) 319-7346. Workers may go to a local One-Stop Career Center to attend an information session or meet with a claims examiner and file a claim. Workers may file a claim any time during the One-Stop Center's office hours, but should arrive early to have adequate time to file the claim. If a worker calls DOES, s/he should be prepared for long periods on hold. Because not all of the One-Stop Centers offer comprehensive UI services, workers may want to file at a DOES office.

DOES Offices and One-Stops to File UI Claims

Northwest DOES, Frank D. Reeves Municipal Center, 2000 14th Street, NW, 3rd Floor, Washington, DC 20009

Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 442-4577

Northeast DOES, CCDC-Bertie Backus Campus, 5171 South Dakota Ave, NE, 2nd Floor, Washington, DC 20011

Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 576-3092

Southeast DOES, 3720 MLK Jr. Ave, SE, Washington, DC 20032

Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 741-7747

DOES Headquarters, 4058 Minnesota Avenue, NE, Washington, DC 20019

Hours: 8:30 a.m.-5:00 p.m., M-F (Call Center: 8:30 a.m.-4:30 p.m., M-F), Phone (202) 724-7000

Franklin Street One-Stop, 1500 Franklin Street, NE, Washington, DC 20018
Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 576-3092 or (202) 724-7000
(Claims examiners are available to assist claimants with filing claims from 8:30 a.m. to 3 p.m., M-F)

Naylor Road One-Stop, 2626 Naylor Road, SE, Washington, DC 20020
Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 645-3535 or (202) 724-7000
(UI information sessions are held on Mondays from 8:30 a.m. to 12 p.m., but claims examiners are available during regular office hours to assist claimants with filing claims.)

South Capitol/CVS One-Stop, 4049 S. Capitol Street, SW, Washington, DC 20032
Hours: 8:30 a.m.-4:00 p.m., M-F, Phone (202) 645-4000
(No UI information sessions are held at this location but staff members are available to assist claimants with filing claims during regular office hours.)

At the office, the worker fills out a claim form with general information and information about why s/he lost or left his or her job. **There is no time limit for the application, but because eligibility for unemployment is determined from past wages, the past wages may "disappear" if the worker waits too long to file.**

Claims Examiner's Initial Determination

When a claim is filed, it is assigned to a claims examiner at the local office. The claims examiner is required to promptly make an initial determination about the reason for the termination or resignation. The claims examiner is supposed to interview the worker and then the employer to get each side's story. Either side may submit a written statement, but this examination is conducted mostly by in-office appointments and by telephone. The claims examiner then declares in writing whether the worker is eligible for benefits. Either side may appeal the claims examiner's determination. *See* DC Code § 51-111(c).

Appealing the Claims Examiner's Determination

The time limit for appeal is very short -- 15 calendar days from the mailing, not receipt, of the notice of eligibility. For this reason, **workers should save envelopes to prove actual mailing dates (which is often one to two days after the date on the letter) and hand-deliver their hearing request form**. If the 15-day filing deadline falls on a Saturday, Sunday or a legal holiday, the deadline is extended to the next business day.

Under the 2010 *Unemployment Compensation Reform Amendment Act*, the 15-calendar day appeal deadline may be extended for "good cause" or "excusable neglect." *See* DC Code § 51-111(b). This means that if the claimant had a good reason for filing his/her appeal late, OAH may excuse the lateness and consider the appeal. **Workers should save all documents and envelopes** that may explain why he/she filed the appeal late and give copies to OAH.

How to File a Hearing Request

If the claimant seeks to appeal a denial of benefits, s/he must file an appeal (also called a hearing request) by mail, fax or in person with the Office of Administrative Hearings (OAH). Directions on filing an appeal should be included with the claims examiner's determination, but if no other information is given, a claimant may file an appeal in one of the following ways:

- **In person**: The claimant may fill out a hearing request form in person at the OAH, 441 4th Street, NW, Suite 450-North, Washington DC 20001, from 9 a.m. to 5 p.m., Monday through Friday. The claimant will need photo identification to enter the building. The OAH has a Pro Se Resource Center to assist claimants with filing their documents.
- **By mail**: The claimant may mail a hearing request to the OAH at the address above. The U.S. Postal Service postmark will be considered in deciding whether the claimant met the filing deadline, but generally, the document is "filed" on the date that it is actually received by the OAH.
- **By fax**: The claimant may fax a hearing request to the OAH at (202) 442-9451. A hearing request faxed after 5 p.m. is stamped as "filed" on the next business day. The claimant may confirm the receipt of the fax by contacting the OAH Clerk's Office at (202) 442-8167 or (202) 442-9094.
- **Email and Filing Documents Online**: The claimant may email a PDF of all forms and Claims Examiner Determinations to oah.filing@dc.gov. A claimant also may file documents online at http://oah.dc.gov. As e-filing is a relatively new technology and thus subject to change, claimants should check the latest OAH Rules on e-filing on the OAH website.

The claimant should submit a Hearing Request Form (English Form, http://wrmanual.dcejc.org/10; Spanish Form, http://wrmanual.dcejc.org/11) or a short written statement that the claimant disagrees with the findings and seeks a hearing; claimants should not include any facts or argument in this request. The request for a hearing also should include a copy of the claims examiner's determination, all the pages the claimant received with the claims examiner's determination, and the envelope in which it was mailed to the claimant.

The OAH will accept the hearing request for filing even if the claimant does not have the determination, but will then mail an order for more information or order to show cause to ask the claimant to submit a copy before a hearing is scheduled. The claimant must respond to these orders. A copy of the determination may be obtained from the DOES. If the claimant is unable to obtain a copy of s/he determination by a claims examiner, or otherwise provide the information requested by the order to show cause, s/he must tell the OAH in writing what s/he cannot obtain and why. Once the information is provided, a judge will decide whether there is a basis upon which a hearing can be scheduled.

Requesting an Interpreter

A claimant with **limited English proficiency** should request an interpreter in writing before the hearing. He or she should follow up the request with a separate letter and telephone call. *See* 1 DCMR § 2823. The OAH is required to provide an in-person interpreter or telephonic language interpretation service to parties with limited English proficiency who request interpretation services.

How to Prepare for an Unemployment Hearing

The scheduling order will instruct the claimant to send a list of witnesses (other than the claimant) and copies of any documents s/he wants to present as evidence to the OAH and the employer three business days before the hearing. *See* 1 DCMR § 2985.1. Claimants should comply with this requirement so that the judge does not exclude witnesses or documents. *See* 1 DCMR § 2821.3.

If the claimant asks someone to appear as a witness or produce written documents and that person refuses, the claimant can use a subpoena form to require the witness to attend the hearing or the employer to produce relevant documents at the hearing. *See* 1 DCMR § 2984. Each party has three pre-authorized subpoenas to use for each hearing. *See* 1 DCMR § 2984.1. The claimant may pick up her three pre-authorized subpoenas at the clerk's office of the OAH. Witnesses requested through the pre-authorized subpoena must have direct knowledge of the claimant's separation from employment. *Id.* Documents requested must be not more than six months old and must relate directly to the claimant's separation from employment. *Id.* Subpoenas for witnesses must be personally served on the witness at least two calendar days before the hearing. *See* 1 DCMR § 2984.2. If either party wishes to subpoena witnesses or obtain documents not authorized by these provisions, they may follow the standard rules for subpoenas at OAH. *See generally* 1 DCMR § 2824.

Parties and witnesses may appear by telephone but representatives and attorneys are usually required to appear in person. *See generally* 1 DCMR § 2821.8. To request to participate by telephone, the worker should first try to contact the employer to see if the employer will agree to the worker or witness appearing by telephone. Even if the employer does not agree, the worker can still request a telephone appearance by submitting a document to the OAH explaining the reasons why the worker or witness must appear by telephone and the efforts the worker made to

contact the employer. A motion for appearance by telephone form is available online at www.oah.dc.gov and at http://wrmanual.dcejc.org/12 (English) and http://wrmanual.dcejc.org/13 (Spanish). The worker should send a copy of this request to the employer as well.

If the worker cannot make it to the scheduled hearing, s/he should first try to contact the employer to see if the employer will agree to change the hearing date, and then request a continuance with the OAH in writing. A motion for a continuance form is available online at http://www.oah.dc.gov/ and at http://wrmanual.dcejc.org/14 (English) and http://wrmanual.dcejc.org/15 (Spanish). The writing should explain the reasons the worker wants to change the hearing date and the efforts s/he made to contact the employer.

An employer also can appeal a claims examiner's determination to grant benefits to the employee. If the employer appeals, the worker will receive a notice with the time and date of the hearing in the mail. If the worker cannot make it to the scheduled hearing, s/he should request a continuance in the process described above. Benefits must continue to be paid pending the outcome of the appeal. *See* DC Code § 51-111(b). These benefits, however, are subject to recoupment if it is later determined that the claimant was ineligible for benefits. (*See* "Overpayments" below.) Call (202) 442- 9094, or visit http://www.oah.dc.gov for further information concerning an unemployment insurance appeal at the OAH.

Appeals Hearings

The appeal is a *de novo* hearing, i.e., the administrative law judge must hear testimony from both sides and make an independent review of the record, without regard to the claims examiner's decision. Hearings usually are scheduled two to three weeks after filing the hearing request. The parties may be represented at the hearing by attorneys or non-attorneys. *See generally* 1 DCMR § 2835.

The hearings are held "on the record" and are recorded to a digital sound recording, which may be purchased by contacting the OAH Clerk's Office. The **employer always has the burden of proof**, regardless of who appealed. Because of this, claimants should be counseled *not to testify on the circumstances surrounding their job loss* if the employer does not appear at the hearing. The employer presents her side first, unless there is a jurisdictional question regarding late filing, in which case, the claimant first will need to address this issue. Written documents, testimony, and witnesses are allowed.

Usually, the main issues in a hearing are: 1) whether the appeal is timely; 2) whether the worker quit; and 3) if the worker did not quit, whether the worker was discharged for misconduct or gross misconduct.

The worker should be prepared to present all of his or her available evidence. Evidence not presented at this stage of the appeals process will generally not be considered in the later stages of an appeal. The administrative law judge will require any evidence presented to be reasonably reliable and helpful in resolving the case. The hearsay rules of evidence do not apply. *See* 1 DCMR § 2821.12. However, for misconduct cases especially, direct testimony is given

precedence over hearsay testimony. *See Coalition for the Homeless v. District of Columbia Dep't of Empl. Servs.*, 653 A.2d 374, 377 (DC 1995) (noting that "hearsay evidence is not the kind of 'substantial evidence' on which the agency can base its resolution of directly conflicting testimony") (citing *Jadallah* v. *District of Columbia Department of Employment Services,* 476 A.2d 671, 676-77 (DC 1984)). For this reason, some workers win these hearings simply because the employer does not bring the people with firsthand knowledge of the situation. *See* 7 DCMR § 312.9, 312.10.

The OAH generally will mail a final order to each party and to DOES within 30 days of the date a party files a hearing request, or approximately one to two weeks after the hearing. A claimant may call the OAH three weeks after the hearing to ask whether a final order has been issued. If compelling financial circumstances exist (i.e., the claimant is at risk of eviction), and the claimant has not received a final order for several weeks after the hearing, the claimant may file a motion to expedite which describes the compelling financial circumstances. DOES will begin processing UI benefits after it receives a final order from the OAH. Claimants may contact DOES at (202) 724-7000.

The claimant may request that the administrative law judge reconsider the final order under limited circumstances, usually only if there is newly discovered evidence or law that was not available at the time of the hearing. The claimant must file a request for reconsideration within 15 days of the mailing date of the final order either in person at the OAH or by faxing it to (202) 442-9451. The claimant also can file a motion for relief from the final order up to 120 days after the final order is issued. DCMR 1-2828. However, whereas the motion for reconsideration tolls the deadline for filing an appeal at the DC Court of Appeals, the motion for relief does not toll the deadline.

A final order may be appealed by either party to the DC Court of Appeals within 30 calendar days from the date it is mailed to the parties. *See* DC Code § 51-112. The process for doing this is described in the final order, on a separate page called "Petition for Review." In addition, attorney's fees and costs may be available for claimants who prevail at the DC Court of Appeals. *See* 42 U.S.C. § 503(b) ("[Any] costs may be paid with respect to any claimant [whose question of entitlement is decided by the highest judicial authority under a state unemployment law] by a State and included as costs of administration of its law.")

General Timeline for UI Process

Apply for UI ► If deemed eligible, the worker should start receiving benefits within one month.

If denied ►Upon receipt of a denial notice, the worker has **15 calendar days** from the postmark date of the notice to appeal to the Office of Administrative Hearings (OAH). If the worker misses this 15 calendar day deadline, OAH may still consider his/her appeal if there was good cause or excusable neglect for the late filing.

IMPORTANT! Advise the worker to keep the envelope enclosing the claims determination to show the postmark date in case a dispute arises. If an employee preserves her/his right to appeal by mail, the unemployment compensation office is supposed to consider items filed on the date they are postmarked, not the date they are received. *See* 7 DCMR § 302.3.

Appeal to OAH ►After filing an appeal to OAH, it usually takes two to three weeks before the hearing takes place before an administrative law judge. (During this time, enlist free help from the AFL-CIO Claimant Advocacy Program. *See* information below.)

Decision from OAH ►Once a hearing is held, it will generally take **30 days** from the filing of the hearing request for the administrative law judge to render a final order. A claimant may call the OAH three weeks after the hearing to ask whether a final order has been issued. DOES will begin processing UI benefits after it receives a final order from the OAH.

Motion for Reconsideration to the OAH ►This is only successful under limited circumstances, e.g., if there is newly discovered evidence or law that was not available at the time of the hearing. The worker may file a Motion for Reconsideration with the OAH within **15 days** of the mailing of the administrative law judge's final order.

Appeal to DC Court of Appeals ►A final order may be appealed to the DC Court of Appeals within 30 calendar days from the date it is mailed to the parties. The process for doing this is described in the final order, on a separate page called "Petition for Review."

Free Attorney Representation

By law, the **Community Services Agency of the Metro Washington AFL-CIO, Claimant Advocacy Program (CAP**), provides free representation to workers on a case-by-case basis in unemployment compensation hearings. The CAP, however, only provides representation in potentially meritorious cases; it may assist some additional individual claimants with filing appeals on their own. All claimants can receive free legal counseling. CAP is located at 888 16th Street, NW, Suite 520, 20006, (202) 974-8150. No walk-ins are accepted. The worker must call the office to set up an appointment.

Note: As of the publication of this manual, the AFL-CIO Claimant Advocacy Program has a bilingual staff member to assist with unemployment appeals. Claimants should inform the

receptionist ahead of time if they will need the assistance of the CAP's interpreter so that arrangements can be made to ensure her availability.

Requirements While Receiving Benefits

Claim Cards

While claimants are receiving benefits, they are required to submit claim cards every week which (1) identify the amount of any gross wages earned during that one-week period; (2) confirm that the claimant is able and available for work; and (3) confirm that the claimant is looking for work. In addition, DOES can require workers to attend training classes and to accept suitable employment.

Practice Tip: When submitting claim cards, claimants should keep a copy of each card or submit online (does.dc.gov) or via telephone at (202) 724-7000. There have been numerous problems with submitting claim cards via U.S. mail. If a claimant does not receive a check or a new claim card she should go immediately to a local office to ask about it. **It is very important for workers to send in claim cards while they are waiting for their unemployment compensation appeals hearings, even if they are not receiving benefits during that time.** If claim cards stop coming in the mail, the worker should report immediately to the local office. Failure to do so may result in a hollow victory at the appeals hearing, where eligibility is established but no back benefits are awarded.

Workers Must be Available for Work and Seeking Employment

The worker must be physically able to work, "available" for work and actively seeking employment. The claimant must make a minimum of two job contacts each week, but DOES may excuse a failure to do so. *See* DC Code § 51-109(4)(B). Job contacts are demonstrated by mail-in cards, which are usually white cards with blue ink, although sometimes they are photocopied in black and white.

Practice Tip: Where relevant, claimants should be counseled that they certify in their weekly claims cards that they are "physically able to work" – so if at any point that is not true, they should answer truthfully and not collect UI for that week. They also should be told that if DOES finds they are not "able to work," their benefits will be terminated while they are asked to submit a physician's certificate from their doctor, certifying that they can work.

Claimants who are full-time students are not considered available for work. *See Dunn v. DOES*, 467 A.2d 966 (DC 1983); *Wood v. DOES*, 334 A.2d 188 (1975); *Barber v. DOES*, 449 A.2d 332 (DC 1982). There is no presumption that a person is unavailable for work because she is **pregnant**, even when the pregnancy was at issue with respect to the reason for unemployment. *See* DC Code §§ 51-110(h), 51-109(1)-(4).

Alert: Sometimes the staff at the unemployment office tells a claimant that if s/he is disabled, s/he cannot receive unemployment. Indeed, one requirement of continued eligibility for unemployment is that the worker is physically able to work. The 1990 Americans with Disabilities Act, however, requires recipients of federal funds, such as the DC unemployment compensation program, to reasonably accommodate persons with disabilities. **This means a worker cannot be denied unemployment just because of a disability. The Unemployment Office must make some inquiry into whether the person can work with a reasonable accommodation.**

Workers Must Accept Suitable Work

The failure to apply for suitable work when notified it is available, or the failure to accept a suitable job when offered, results in disqualification for further benefits. What is suitable is based on a number of factors, including the claimant's physical fitness; prior training, experience and earnings; distance from home to work; and risk to health, safety, or morals.

A person can refuse work for the following reasons: the vacancy is created by a strike or other labor dispute; the wages are less than the prevailing wages for similar work; the work requires resigning or refraining from union membership or requires joining a "company union."

The longer the person is unemployed, the more suitable otherwise "unsuitable" work becomes. *See Johnson v. District Unemployment Compensation Bd.*, 408 A.2d 79 (DC 1979).

Attending Trainings

With the approval of the Director of DOES, a claimant may receive benefits while attending a training or re-training course. *See* DC Code § 51-110(d)(2). In some cases, a claimant is required to attend recommended training. Regulations specify what constitutes good cause for refusing to attend a training recommended by DOES. *See* DC Code § 51-110(e); 7 DCMR § 314. DOES rarely recommends trainings.

The 2010 Unemployment Compensation Amendment Act added a provision allowing a claimant who has exhausted all regular unemployment benefits and is enrolled in and making satisfactory progress in a training program to be eligible for training extension benefits if the director determines the following criteria have been met:

- The training program shall prepare the claimant for entry into a high demand occupation, if the director determines that the claimant has separated from employment in a declining occupation or has been involuntarily and indefinitely separated from employment as a result of a permanent reduction of operations at the claimant's place of unemployment; or if the director determines the training will increase the employability of such claimant in the DC labor market;
- The claimant is making satisfactory progress to complete the training as determined by the director, including the submission of written statements from the training program provider; and

- The claimant is not receiving similar stipends or other training allowances for non-training costs.

The total amount of training extension benefits payable to a claimant shall not exceed 26 times the claimant's weekly benefit amount of the most recent benefit year.

Overpayments

Workers sometimes are assessed overpayments. The most common situation is where the worker is declared eligible initially by the claims examiner, receives benefits for several weeks, but then is declared ineligible after a hearing. The benefits are considered to have been received in error and an overpayment is assessed.

DOES is prohibited from collecting any overpayment from future benefits if the benefits were received by the worker "without fault on his part" and recoupment would "defeat the purpose of [the unemployment act] or would be against equity and good conscience." DC Code § 51-119(d)(1).

When an overpayment is assessed, DOES is supposed to send a notice of overpayment. This notice can be appealed.[47] In addition, **DOES can waive any overpayment amount**. Workers can present arguments for a waiver at the appeals hearing, but it is best to send in a letter requesting a waiver as soon as the worker knows there might be an overpayment. The letter requesting the overpayment should explain why the claimant is without fault and should provide details about the claimant's financial condition to demonstrate that s/he is unable to repay the amount in question.

If an overpayment is assessed and upheld, DOES will accept payment plans for a fixed amount per month.

Practice Tip: Inquiries and waiver requests for UI overpayments can be directed to:

ATTN: Monnikka Madison
Unemployment/Benefit Payment Branch
Dept. of Employment Services
4058 Minnesota Ave NE, 4th Floor
Washington, DC 20019

Welfare to Work

The federal unemployment system allows states to exclude persons participating in work relief or work training programs. *See* 26 U.S.C. § 3309(b)(5). DC has adopted this exclusion.

[47] Unless the overpayment is being recouped from future benefits, OAH is limited in its ability to waive any portion of the overpayment. The OAH may, however, assess the accuracy of the overpayment and adjust the overpayment amount accordingly. See *v. District of Columbia Dep't of Empl. Servs. v. Smallwood*, 26 A.3d 711, DC 2011).

The U.S. Department of Labor's guidance, UIPL No. 30-96 (Aug. 8, 1996), states that for the exclusion to apply, the work relief or work training program must have the following characteristics:

- The employer-employee relationship is based more on the needs of the participants and community needs than on normal economic considerations such as increased demand or the filling of a bona fide vacancy; and
- The products and services are secondary to providing financial assistance, training or work experience to individuals...even if the work is meaningful or serves a useful public purpose.

In addition, work relief and work training programs must meet one or more of the following criteria:

- The wages, hours and conditions are not commensurate with those prevailing in the locality for similar work;
- The jobs did not, or rarely did, exist before the program began, and there is little likelihood they will be continued when the program is discontinued;
- The services furnished, if any, are in the public interest and are not otherwise provided by the employer or its contractors; or
- The jobs do not displace regularly employed workers or impair existing contracts for services.

Federal Unemployment Compensation Extension of Benefits

Effective July 22, 2010, President Obama signed federal legislation authorizing access to federal unemployment extension benefits. Once unemployed workers exhaust their regular state unemployment benefits or one of the four tiers of federal benefits, they can apply for the next tier of federal extension benefits.[48] On January 2, 2013, Congress extended the Federal Emergency Unemployment Compensation Program and Extended Benefits Program until December 31, 2013. At the time of this writing, an additional federal extension of unemployment compensation benefits is pending.**Note**: This most recent extension of UI benefits does not provide any additional benefits beyond the current maximum of up to 99 weeks of unemployment benefits.

DC Unemployment Compensation Case Summaries

Following are some summaries of useful cases that may be cited by a claimant in support of his or her case, by issue:

[48] Note: The DC Department of Employment Services does not automatically apply the next tier of benefits to the worker; rather, the worker has to reapply after exhausting each tier. Other states do automatically apply the next tier of benefits to the worker, requiring no action on the worker's part.

Standard of Review

The court must defer to the agency's reasonable construction of the agency statute, but the court can set aside any action or findings and conclusions that the court determines are not rationally based on and supported by reliable, probative, and substantial evidence to convince reasonable minds of its adequacy. *See Hawkins v. Unemployment Compensation Bd.*, 381 A.2d 619, 622 (DC 1977); *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 402 A.2d 36, 41-42 (DC 1979).

Sworn testimony is required in all contested unemployment insurance cases. Furthermore, the agency must make a finding of fact on each material issue of fact, and those findings must be supported by substantial evidence. Where there is a failure to make appropriate findings or where they are unsupported by the evidence, the Court of Appeals must reverse. *See Curtis v. DOES*, 490 A.2d 178 (DC 1985).

Purpose

"The statutory purpose of unemployment benefits is to protect employees against economic dependency caused by temporary unemployment." *Chase v. DOES*, 804 A.2d 1119, 1123 (DC 2002).

Timeliness of Appeal

DOES is required to give notice that reasonably is calculated to apprise the parties of the decision of the claims examiner. The notice can be given by mail, but, in order to raise the jurisdictional defense that the party did not file a timely appeal, DOES must present satisfactory proof that the notice was in fact mailed to the correct address. A date stamp is not enough, but a certificate of service is sufficient. *See Kidd Int'l Home Care, Inc. v. Dallas*, 901 A.2d 156 (DC 2006).

When Should a Worker File for UI Benefits in DC vs. in another State?

Private Employer Workers

If the work is not localized in any state and not covered under the unemployment compensation law of any state, the worker is covered in DC if the services were "directed or controlled" in DC *See* DC Code § 51-101. The phrase "directed and controlled" encompasses more than decisions as to working hours and other personnel matters; it requires that decisions regarding the merits of work performed be made in DC. A claimant who received job training in DC and obtained technical direction regarding performance of her contract from the Department of Labor met the "directed and controlled" requirement, despite the fact that she resided in Idaho and that some scheduling matters (like overtime) were handled by a California office. *See Haugness v. District Unemployment Compensation Bd.*, 386 A.2d 700 (DC 1978).

A claimant who had been employed as an airline pilot with Allegheny Airlines and whose base of operations was Washington National Airport, located in Virginia, was not eligible for benefits in DC. The District's Unemployment Compensation Act covers employment of an officer or crewmember of an American vessel or aircraft only if the operations of such vessel or craft are ordinarily and regularly supervised, managed, directed, and controlled from an office within DC. Because all claimant's services were performed from a base of operations in Virginia, his employment was not covered by the Act. *See Bryan v. District Unemployment Compensation Bd.*, 342 A.2d 45 (DC 1975).

Employees of the Federal Government

Under a 1966 Act of Congress, federal employees whose services have been terminated by the federal government are eligible for payments under state unemployment compensation laws in the state where they last worked for the federal government – the federal employee's last station. To remedy the unfair burden imposed on state funds as a result of the federal government's exemption from state taxation, Congress included in the act a provision assigning credit for a claimant's federal service and wages to the state of claimant's last official federal work station, and reimbursing that state for the cost of satisfying the claim. *See* 5 U.S.C. § 8504 *et. seq.*

A Department of Defense employee whose last official station was determined by the DoD to be the Pentagon was not eligible for benefits in the District because the Pentagon is located in Arlington, VA. The fact that the letterhead of the Defense secretary has a Washington, DC postal code was irrelevant, as the District does not include land beyond the high-water mark of the Potomac on which the Pentagon is located. The District considers itself bound by a federal employing agency's findings regarding the last official station of a federal claimant. *See Hemenway v. District Unemployment Compensation Bd.*, 326 A.2d 776 (DC 1974).

Voluntary Resignation & Quitting

What Constitutes Quitting?

Voluntary switch to "on-call"

The prevailing interpretation of DC Code § 51-110 is that if an employee voluntarily changes her status to "on-call" and the employer subsequently has no work available, the employee is disqualified from receiving unemployment benefits on the theory that she voluntarily quit employment. The rationale for this ruling is that an employee who fails to take all necessary and reasonable steps to preserve her employment will be deemed to have brought about voluntary termination of employment, which disqualifies the employee from receiving unemployment benefits. By voluntarily assuming risk of unemployment due to unavailability of work, the employee set into motion a process that caused her unemployment and failed to take reasonable actions necessary to preserve her employment. *See Freeman v. DOES*, 568 A.2d 1091 (DC 1990).

Changing mind after quitting does not negate the quit

Once an employee voluntarily resigns from her job, an employer's decision not to accept subsequent withdrawal of that resignation does not transform employee's act into involuntary one, for purposes of unemployment benefits. *See Wright v. DOES*, 560 A.2d 509 (DC 1989).

Not re-enlisting in military is quitting

Claimant, who completed his term of active military service but did not ask to re-enlist at the time of separation, voluntarily left the service and thus was disqualified from receiving unemployment benefits under the 1981 federal statute pertaining to ex-service members. *See* 5 U.S.C.A. § 8521(a)(1)(B)(ii). he claimant was, however, entitled to receive unemployment benefits for ex-service members under a 1982 federal statute for unemployment after October 25, 1982. *See Wells v. DOES*, 513 A.2d 235 (DC 1986).

Was the Quitting Voluntary?

General standard of voluntariness

Decision to leave work is considered voluntary if it is based on a volitional act of a claimant, rather than compelled by an employer. *See Lyons v. DOES*, 551 A.2d 1345 (DC 1988).

Evaluation of voluntariness must be made from all circumstances surrounding the departure decision. *See Coalition for the Homeless v. DOES*, 653 A.2d 374 (DC 1995)*; Hockaday v. DOES*, 443 A.2d 8 (DC 1982).

The test of voluntariness for leaving work is whether or not it appears that, from all circumstances surrounding the departure decision, the employee's decision was voluntary in fact, within the ordinary meaning of the word "voluntary." Specifically, an employee's resignation is voluntary if it was based on his own volition, and not compelled by his employer. *See Cruz v. DOES*, 633 A.2d 66 (DC 1993).

An inquiry into whether or not a resignation was for "good cause" is factual in nature and should be judged by standard of a reasonably prudent person under similar circumstances, in the same labor market. *See Selk v. DOES*, 497 A.2d 1056 (DC 1985); *Cruz v. DOES*, 633 A.2d 66 (DC 1993).

A determination of "voluntariness" presents a mixed question of fact and law, so the court owes less than total deference to the agency's finding of voluntariness. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164, 169 (DC 1979).

Quitting after being told "quit or be fired" – the quitting may not be voluntary

An employee's separation from employment will be treated as a constructive discharge if the employee resigned under threat of immediate termination; if the employer asserts that there

were grounds for discharge for misconduct, a separate finding on the question of misconduct must be made and the employer bears the burden of proof. *See Green v. DOES*, 499 A.2d 870 (DC 1985).

There must be a real and factual prospect of imminent termination for a claimant's resignation to be judged involuntary for purposes of collecting unemployment. *See Perkins v. DOES*, 482 A.2d 401 (DC 1984).

Though an employee's resignation, offered in lieu of termination by the employer, may exist, it is not proper to take it out of its context and without further inquiry as dispositive evidence of a voluntary resignation. It is immaterial that the employer may have a regular practice of discharging its employees in this way. The claimant, an employee of a federal agency, had been advised to resign by her union because there was an active proposal to remove her which she would not be able to resist; she chose resignation after being threatened with discharge by her employer. Her disqualification from collecting unemployment benefits was overturned. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (DC 1979).

The fact that a claimant had, under union rules, a right to a hearing upon termination did not mean that her resignation in lieu of outright discharge was voluntary and thus merited disqualification from receiving benefits. Instead of adopting a per se rule on voluntariness, the District Unemployment Compensation Board is obligated to find reliable and substantial evidence of voluntary resignation and apply the appropriate regulations. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (DC 1979).

There are some circumstances in which a resignation from employment should be characterized as involuntary separation. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (DC 1979).

If a claimant's departure from his job was compelled by his employer, he may collect benefits. But if a claims examiner finds that the claimant was not threatened with imminent discharge at the time of his resignation, the claimant's resignation may be judged voluntary, thus disqualifying the claimant from receiving unemployment benefits. Before the appeals examiner, the claimant stated that he and his supervisor "worked out an agreement" in which he would resign "for medical and personal reasons," but admitted that he was not threatened with "imminent" but only eventual discharge. Claimant's disqualification from receiving benefits was upheld. *See Bowen v. DOES*, 486 A.2d 694 (DC 1985).

An executive vice president left employment involuntarily when she signed a letter of resignation (drafted by her employer without her input) and was told in effect that she could quit or "stay and be miserable." There also was an implied threat that she could be fired in the future if she again stepped out of line. *See Washington Chapter of American Institute of Architects v. DOES*, 594 A.2d 83 (DC 1991).

A claimant may not claim he or she resigned under imminent threat of discharge even when an employer initiated an involuntary psychiatric disability retirement proceeding against the claimant prior to his or her resignation. *See Hill v. DOES*, 467 A.2d 134 (DC 1983).

Whether or not resignation was "voluntary" depends on the ordinary meaning of the word – the absence of affirmative compelling acts by the employer. Though an employer may say "This saves me the trouble of firing you" when the claimant walked off the job, such a remark is generally construed as an afterthought, not a demonstration of a good cause resignation. The claimant had, moments earlier, been asked to resolve certain personality conflicts in order to continue employment. Absent any finding that the employer compelled the claimant to leave work, the claimant was denied unemployment compensation. *See Harris v. DOES*, 476 A.2d 1111 (DC 1984).

When an employer offers an employee a choice of either quitting or being fired for poor job performance and the employee chooses to quit to avoid the taint of a less-than-perfect work record, the board may not treat such a "quit" as dispositive on the issue of voluntariness. Rather, the board also must take into account the imminence of the threatened discharge. Hence, the board erred in summarily concluding that the resignation of a former hospital switchboard operator in a "quit-or-be-fired" situation was voluntary, as there was substantial evidence that she had resigned after consulting her union representative who informed her that an active proposal not likely to be successfully challenged was already in place for her removal. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164, 169 (DC 1979).

A claimant's choice to resign *may* overcome the involuntariness presumption if the quit followed a warning from her employer that she would be fired unless she improved her performance. The presumption also may be overcome if there is clear evidence that the employer's reason for seeking to terminate the employee in a "quit-or-be-fired" situation lacks legitimacy and could be challenged at a termination hearing available to the employee by right. However, the simple fact that the former switchboard operator was entitled to a termination hearing does not amount to reliable, probative, and substantial evidence of voluntariness in the face of clear evidence that claimant's termination for absenteeism and poor job performance was imminent. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164, 169 (DC 1979).

Good Cause Connected to the Work

Perceived animosity between an employer and employee is not sufficient to generate good cause for resignation for purposes of receiving unemployment benefits. A reading and basic math instructor for disadvantaged youths resigned due to personal conflicts with a supervisor and was denied unemployment compensation. *See Wright v. DOES*, 560 A.2d 509 (DC 1989).

What constitutes "good cause" is not defined in the act but is a question of fact to be judged according to the standard of a reasonably prudent person under similar circumstances. *See Kramer v. DC Dep't of Empl. Servs.*, 447 A.2d 28 (DC 1982).

<u>Illness and disability</u>

A claimant may not claim he or she voluntarily resigned for good cause connected with the work, even when an employer initiated an involuntary psychiatric disability retirement proceeding against the claimant prior to his or her resignation. This was because the claimant

could not demonstrate that her psychiatric disability was connected with her work – thus eliminating disability as a possible "good cause." A decision to voluntarily resign in order to avoid stigma of publicly airing a psychiatric problem also does not constitute good cause in light of the 'private nature' of the involuntary retirement proceedings. *See Hill v. DOES*, 467 A.2d 134 (DC 1983).

A worker must submit a "medical statement" under 7 DCMR § 311.7(e) to claim a work-related disability excuse. For example, a worker was granted unemployment benefits even though she provided a statement from her physician about the need for medical leave that did not reference the job-related nature of the disability, when the worker told the employer the disability (stress and depression) was job-related and the employer did not request more information. *See Bublis v. DC Dep't of Empl. Servs.*, 575 A.2d 301 (DC 1990).

To be eligible for unemployment benefits, the claimant must have provided a medical statement to the employer before quitting, if he seeks to justify voluntarily quitting for good cause connected to the work due to illness or disability. *See Couser v. DOES*, 744 A.2d 990 (DC 1999).

Petitioner testified that a severely increased workload as a secretary at the Internal Revenue Service led to an ulcer and nervous condition that required medical attention, that she sought a transfer, and that her boss knew of her medical problems. But her doctor had not recommended she resign, so benefits were refused. *See Hockaday v. DC Dep't of Empl. Servs.*, 443 A.2d 8 (DC 1982).

Under the DC Workers' Compensation Act, a claimant who left her employment voluntarily for health reasons may be deemed to have left her employment for "good cause connected with the work" and so remain eligible for benefits if she receives medical advice to leave her work upon consulting a physician about the job-connected condition. An IRS employee who left her employment after developing an ulcer and a nervous condition due to overwork, was found ineligible for benefits, although she had consulted a physician about her job-related conditions, because the doctor had not advised her to leave work. *See Hockaday v. DC Dep't of Empl. Servs.*, 443 A.2d 8 (DC 1982).

A claimant who injured her back while at her job as a corrections officer and resigned when she was subsequently transferred to a new corrections facility on grounds that the long commute would exacerbate her back injury was ineligible for benefits because she voluntarily quit without good cause. Because the willingness to accept a transfer was a condition of the claimant's employment, the DOES regulation recognizing as "good cause connected with work" a voluntary resignation due to transportation problems arising from transfer of an employee did not apply in this case. *See Botts v. DC Dep't of Empl. Servs.*, 473 A.2d 382 (DC 1984).

Working conditions

The DC Court of Appeals has left open the possibility that continued harassment and degrading treatment of an employee may be sufficient to provoke voluntary resignation for good

cause connected with the work. The petitioner had been subjected to repeated verbal abuse and demands that he submit written descriptions of his actions. After orally protesting this treatment, the employee was told, "If you don't like it, you can leave." He spoke with an employee at the personnel department of his employer, who agreed that the treatment was unfair and encouraged him not to quit but suggested he go home to "cool off." He did so, and later was told not to report to work any longer. Factual disputes arose over virtually every aspect of this case, however, and the DC Court of Appeals remanded to have the record more clearly decided. No further determinations were made. *See Gunty v. DOES*, 524 A.2d 1192 (DC 1987).

An executive vice president left employment involuntarily when she signed a letter of resignation (drafted by her employer without her input) and was told in effect that she could quit or "stay and be miserable." There was also an implied threat that she could be fired in the future if she again stepped out of line. *See Washington Chapter of American Institute of Architects v. DOES*, 594 A.2d 83 (DC 1991).

Incorrect payment of wages & overtime

A claimant who resigned from his job at a male bathhouse because his employer required tardy employees to collect overtime pay for additional hours worked as a result of another employee's tardiness from the late co-worker rather than the employer, remained eligible for benefits despite his voluntary departure from work. The refusal to pay overtime combined with the employer's practice of requiring employees who worked a shift in which insufficient monies were taken in to make up the deficiency from their pay constituted "good cause" for the claimant's resignation. *See Kramer v. DOES*, 447 A.2d 28 (DC 1982).

Higher wages elsewhere

A concrete finisher left his job to take an offer for higher wages at another company that was later withdrawn, leaving him unemployed. The board concluded that the withdrawn offer of higher wages from another employer was not a cause for departure "connected with" the claimant's initial employer. The DC Unemployment Compensation Act requires that the "cause" of the claimant's voluntary departure be connected with the claimant's most recent work in order to justify eligibility. The court therefore affirmed as in accordance with law the board's decision denying unemployment benefits. *See Gomillion v. DOES*, 447 A.2d 449 (DC 1982).

Note: A 1979 amendment to the act removed language stating that the "good cause" requirement would not be confined to causes solely connected with the employment itself and left to the board's discretion the establishment of regulations for determining what would constitute "good cause connected with the work." Until July 7, 1980, the board issued no regulations to clarify the language of the statute, such that two interpretations of the "good cause" requirement remained reasonable: (i) there was something bad about the first job that affirmatively drove claimant away; or (ii) there was some "content-neutral" employment-based reason for the claimant's departure connected with, but not necessarily arising from the first job. Even after new board regulations came into effect in November 1981, applying a "reasonable and prudent person in the labor market" standard for determining "good cause connected with

the work," the second, broader interpretation was not excluded. Although the board applied the former, narrower interpretation in *Gomillion*, neither the statutory language nor the terms of the board's own regulations applying the statute compels this interpretation. *See Gomillion*, 447 A.2d at 449.

Unemployment benefits will not be conferred on a claimant if she voluntarily quit to move out of state to be closer to her family. *See Giesler v. DOES*, 471 A.2d 246 (DC 1983).

Pregnancy

A pregnant claimant who left her work as a security officer voluntarily because the equipment she was required to wear pressed on her stomach and made her sick was ineligible for benefits because she resigned for "personal reasons" not "connected with the work." Nothing in the work itself gave the claimant cause for leaving, and her pregnancy could not be deemed a "work-related" illness, nor does the DC Code permit a presumption that a pregnant individual is physically unable to work. Because claimant presented no medical evidence and made no effort to seek a transfer to a different position to accommodate her condition, the court found no basis for concluding that the board's denial of benefits did not have substantial support in the evidence. *See Brooks v. DOES*, 453 A.2d 812 (DC 1982).

Job transfer & transportation problems

A claimant who injured her back while at her job as a corrections officer and resigned when she was subsequently transferred to a new corrections facility on grounds that the long commute would exacerbate her back injury was ineligible for benefits because she voluntarily quit without good cause. Because her willingness to accept the transfer was a condition of the claimant's employment, the DOES regulation recognizing as "good cause connected with work" a voluntary resignation due to transportation problems arising from transfer of an employee did not apply in this case. *See Botts v. DC Dep't of Empl. Servs.*, 473 A.2d 382 (DC 1984).

Other

A claimant who left his position as a law clerk at a DC law firm and went to New York to study for the bar exam after being informed that he would not be offered a full-time associate's position was denied unemployment benefits because the board found that his voluntary departure was not for a "good cause connected with the work." Although the claimant had discussed with a partner of his employer the possibility that he might be hired as a full-time associate if the claimant took the New York bar and the firm followed through on its tentative plans to open a New York office, this "offer" was clearly conditional on uncertain plans, which the law firm in fact ultimately abandoned. The claimant's decision to move to New York and take the New York bar in reliance on this contingency cannot be considered "good cause" connected with the work. *Gopstein v. District of Columbia Dep't of Empl. Servs.*, 479 A.2d 1278 (DC 1984).

Misconduct

General Definition of Misconduct

Misconduct must be an act of wanton or willful disregard of the employer's interest, deliberate violation of employer's rules, disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show intentional and substantial disregard of the employer's interest or employer's duties and obligations to employer. *See Hawkins v. District Unemployment Compensation Bd.,* 381 A.2d 619 (DC 1977).

The misconduct provision of the Unemployment Compensation Act is intended to prevent the dissipation of funds by denying benefits to those who are unemployed through their own disqualifying act rather than the unavailability of suitable job opportunities. *See Jadallah v. DOES,* 476 A.2d 671 (DC 1984).

Denial of unemployment compensation benefits because of discharge for misconduct may proceed only if the appeals examiner determines whether the particular reason given by employer for discharge was in fact the basis of the employer's decision to fire the worker. In determining whether denial of unemployment benefits on grounds of misconduct was warranted, the appeals examiner was required to determine if the employer's reasons for firing employee were independent grounds (meaning that any individual reason adequately justifies disqualification from receiving benefits) or if only all the reasons together justified the discharge. *See Smithsonian Inst. v. DOES,* 514 A.2d 1191 (DC 1986).

A claimant's ordinary negligence as an employee in disregarding the employer's standards or rules cannot alone disqualify him or her from benefits for misconduct. *See Keep v. DOES,* 461 A.2d 461 (DC 1983).

Employer's Findings Regarding Misconduct

A federal agency's findings regarding the reason for termination is not binding on the unemployment compensation system unless the claimant had an opportunity for a fair hearing. However, the District must accept the military's reason for termination. *See Smith v. District Unemployment Compensation Bd.,* 435 F.2d 433 (1970).

Claimant who was dishonorably discharged from federal military service was rightly denied unemployment compensation benefits by DOES, even though he had petitioned the federal military agency for correction of the type of discharge at the time of his DOES hearing. The agency is permitted but not required by federal regulations to grant a stay of its eligibility determination pending the outcome of applicant's petition for modification of the type of discharge. *See Strother v. District of Columbia Dep't of Empl. Servs.,* 499 A.2d 1225 (DC 1985).

Violation of Employer's Express Rule

Violation of an employer's rules does not constitute misconduct per se for the purposes of the unemployment compensation statute. *See Butler v. DOES*, 598 A.2d 733 (DC 1991); *see also* section on Absence, *supra*.

Disqualification because of misconduct for rule violation is valid only when the rule is reasonable, its existence has been made available to the employee before the alleged violation, and the rule has been consistently enforced. *See Curtis v. DOES*, 490 A.2d 178 (DC 1985).

Rule must be reasonable

For a claimant to be denied unemployment benefits on misconduct grounds because of the violation of an employer's rule, the rule in question must be judged reasonable. The rule in question did not allow unsupervised, at-home, paid overtime work; but this rule was held not to reach the level of "wanton or willful disregard of employer's interest, deliberate violation of employer's rules," or any of the several other possible regulatory reasons for disqualification. *See Green v. DC Unemployment Compensation Bd*., 346 A.2d 252 (DC 1975).

For a claimant to be denied unemployment benefits on grounds of misconduct because of violation of an employer's rule, the rule in question must be reasonable, not by reference to business interest but to "statutory insurance purpose." Those purposes are "to alleviate the shock of unemployment, to increase continuity of employment, and to aid in the stabilizing of consumption." *See Hickenbottom v. DC Unemployment Compensation Bd.*, 273 A.2d 475 (DC 1971).

Claimant, suffering from a severe toothache such that he was unable to continue work, left on the advice of the company nurse after attaching a sick slip to his timecard. Claimant did not return to work the next day, but visited a dentist, and was discharged the following weekday when he arrived at work. Claimant could not produce proof that he had indeed visited a dentist and was discharged for this reason; this rule was deemed unreasonable in that the employer admitted it only was applied during labor disputes. Though demanding proof for medical leave during a labor dispute may be sound business practice, its violation does not disqualify claimant from receiving benefits. *See Hickenbottom v. DC Unemployment Compensation Bd*., 273 A.2d 475 (DC 1971).

Claimant's alleged participation in an "unauthorized demonstration," though valid reason for dismissal, is not a valid reason for disqualification from unemployment insurance benefits when it cannot be shown that the claimant participated in demonstration and when the claimant was already in suspended work status at time of demonstration. *See Hickenbottom v. DC Unemployment Compensation Bd.*, 273 A.2d 475 (DC 1971).

Employee must be on notice of rule's existence

The critical question in a misconduct inquiry is whether a claimant was on notice that she

could be discharged for the misconduct. The examiner originally found two independent grounds for denying unemployment compensation: (1) failure to follow a check-cashing policy, and (2) allowing an unauthorized individual into the cashier's cage. The Court of Appeals reversed, arguing that these grounds are not sufficient to justify discharge such that unemployment benefits may be denied. *See Jones v. DOES*, 558 A.2d 341 (DC 1989); *see also Colton v. DOES*, 484 A.2d 550 (DC 1984).

Where an employee handbook provided that discharge without warning was permitted with one or two weeks' severance pay if employee's department head felt immediate discharge would be in the best interest of the hospital, and where the defendant's supervisor warned claimant that the claimant's action in leaving work four hours early would constitute abandonment of his job, the claimant had sufficient notice that leaving the job without permission would constitute misconduct justifying discharge. *See Jones v. DC Unemployment Compensation Bd.*, 395 A.2d 392, appeal after remand 451 A.2d 295 (DC 1978).

Rule must be consistently enforced

Disqualification because of misconduct for rule violation is valid only when the rule is reasonable, its existence has been made available to the employee before the alleged violation, and the rule has been consistently enforced. *See Curtis v. DOES*, 490 A.2d 178 (DC 1985).

An employee cannot be fired for "good cause" merely for violating a rule that the employer typically enforces haphazardly. This is true even if the employee is aware of the rule and the hypothetical possibility of discharge for violating it. *See Freeman v. DOES*, 575 A.2d 1200 (DC 1990).

To be disqualified from receiving unemployment benefits because of discharge for violating an employer's rule, two independent requirements must be met. First, the employee must have had prior knowledge that the rule existed and that he could be fired for violating it. Second, the employer must have consistently enforced the rule in the past. *See Freeman v. DOES*, 575 A.2d 1200 (DC 1990).

A claimant's failure to follow an employer's check cashing policy was held not to be misconduct disqualifying the claimant from receiving unemployment compensation because the employer enforced the policy inconsistently. The rule concerned unauthorized admittance to a cashier's cage on the premises. *See Jones v. DOES*, 558 A.2d 341 (DC 1989).

Claimant must be able to meet physical and educational requirements of rule

When an employee refused on several occasions to trim his beard and hair, citing religious beliefs, he was held ineligible for unemployment on misconduct grounds. A split Court of Appeals found that the interests of the employer, the Metropolitan Police Department, in maintaining standards of appearance for police officers, outweighed the exercise of the claimant's religious freedom. He was thus denied unemployment compensation on grounds of misconduct. *See Marshall v. District Unemployment Compensation Bd.*, 377 A.2d 429 (DC

1977).

Persons forced out of their jobs because of an inability to meet new standards beyond their physical or educational qualifications would not be disqualified for unemployment compensation as termination of their employment was not due to any fault of their own. *See Marshall v. District Unemployment Compensation Bd.*, 377 A.2d 429 (DC 1977).

Specific Types of Misconduct

Absences

When an employee worked two jobs at the same time, claimant claimed there was an "understanding" which permitted his conduct. The court held that the hearing examiner and in-house appeal failed to make a finding of fact on whether the employee had permission to leave his first job and conduct other duties as part of a second job during his lunch break. The court remanded for further proceedings. *See Smithsonian Inst. v. DOES*, 514 A.2d 1191 (DC 1986).

When the absent employee personally did not telephone the job site to report absences, but reported through a co-worker, this was not misconduct sufficient to disqualify the employee from unemployment compensation. Employer must show that workplace had established a specifically-required procedure that was to be followed to notify the employer when the employee was unable to report to work. *See Hawkins v. District Unemployment Compensation Bd.*, 381 A.2d 619 (DC 1977).

Repeated absence is grounds for discharge for misconduct; failing to call in and report one's absence for five consecutive days, coupled with previous instances of tardiness, was enough to constitute misconduct such that unemployment benefits were denied. However, because the record was insufficient, this case left unanswered the question of whether the excessive tardiness was due to a work-related injury and whether that fact possibly mitigated the charge of misconduct. *See Butler v. DOES*, 598 A.2d 733 (DC 1991).

The court has reversed and remanded OAH when it failed to consider the claimant's reason(s) for absenteeism in order to determine willful or deliberate actions, notwithstanding the existence of prior disciplinary action for absenteeism. *See Larry v. National Rehabilitation Hospital* 973 A.2d 180 (DC 2009).

Lying on a job application

If a claimant's conviction is automatically expunged under the 1950 Federal Youth Corrections Act, and if a subsequent court determination expunged a claimant's conviction, an employment application question as to whether the applicant has been convicted of a felony may be truthfully answered "no." DOES's determination that claimant had obtained employment by lying on employment application and that application justified denial of benefits under employment compensation law was found in error on these grounds. *See Barnett v. DOES*, 491 A.2d 1156 (DC 1985).

Poor job performance

In determining whether an employee has engaged in misconduct disqualifying him from unemployment compensation benefits, DOES cannot simply consider the justifiability of the employee's discharge, but must apply a higher standard. The types of misconduct for which the benefits penalty may be imposed suggest existing knowledge of the worker that, should he proceed, he will damage some legitimate interest of his employer for which he could be discharged. *See Jadallah v. DOES*, 476 A.2d 671 (DC 1984).

Disqualification for receiving unemployment benefits because of misconduct is appropriate only when the employee intentionally disregarded the employer's expectations for performance. *See Jadallah v. DOES*, 476 A.2d 671 (DC 1984).

When the claimant, a night youth care specialist, failed to remain alert and vigilant throughout the work shift to protect teenage youths housed in facility, he was disqualified from receiving unemployment benefits. Employer alleged that the claimant had twice been found sleeping on the job. *See Grant v. DOES*, 490 A.2d 1115 (DC 1985).

Unsatisfactory work performance may amount to 'misconduct' in some instances. Implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance. Ordinary negligence in disregarding the employer's standards or rules will not suffice as a basis of disqualification for misconduct. *See Keep v. DOES*, 461 A.2d 461, 463 (DC 1983).

An employee was fired for poor performance at work. The employee testified that by most standards, his work had been adequate but that his complaint to a supervisor about infighting and conflicting directions from various supervisors had invited "scapegoating" in retaliation for standing up to the abuse. The employer had charged the claimant with missing a staff meeting and deadlines, faulting others for his own deficiencies, and displaying a negative attitude, among others. These reasons, the Appeals Court suggested, were at best ordinary negligence in disregarding the employer's rules. *See Washington Times v. DOES*, 724 A.2d 1212 (DC 1999).

Harming a legitimate interest of the employer

When an employee threw a flashlight through a customer's glass storm door when he was safely beyond the closed door and separated from the customer's dog, he was disqualified from receiving unemployment based on misconduct. The claimant's act was destructive toward the customer's property, and personal injury to the customer was a possible consequence. However, legally adequate provocation may excuse the claimant's alleged misconduct and require reversal or reduction of his disqualification from unemployment benefits. In this case, a customer spoke to the claimant in a derogatory manner and failed to restrain her growling dog as the claimant entered the customer's house to read the meter. An argument developed over the dog, whereupon the customer "slurred his [claimant's] mother." Incensed by that comment, the claimant abruptly

left the customer's home without reading the meter. Once outside, he threw his flashlight at the storm door and broke three panes of glass. The board reduced the examiner's proposed disqualification of claimant from benefits from eight weeks to five weeks, based on the finding of legally adequate provocation; the Court of Appeals upheld the ruling. *See Williams v. District Unemployment Compensation Bd.*, 383 A.2d 345 (DC 1978).

Retaliation by an employer for a claimant's attempts to obtain overtime compensation does not shield the claimant from being disqualified from receiving unemployment benefits where the claimant was fired for sleeping on the job. *See Grant v. DOES*, 490 A.2d 1115 (DC 1985).

After refusing on several occasions to follow the employer's rule against writing, co-authoring, or signing memoranda critical of the employing firm, the employee was fired and appropriately denied unemployment benefits for misconduct. *See Dyer v. DC Unemployment Compensation Bd.*, 392 A.2d 1 (DC 1978).

Military discharge

A military claimant must be honorably discharged from the armed forces to be eligible for unemployment benefits. *See Strother v. District of Columbia Dep't of Empl. Servs.*, 499 A.2d 1225 (DC 1985).

Gross Misconduct Not Found

DC Court of Appeals reversed and remanded DOES' finding that a claimant was discharged for gross misconduct because the claims examiner's decision suggested that the claimant's failure to perform in a satisfactory manner was merely because of negligence; a finding of gross misconduct required that the claimant's conduct be more than negligent, it had to be deliberate or willful. *See Chase v. DOES*, 804 A.2d 1119 (DC 2002).

DC Court of Appeals reversed and remanded OAH's finding that the claimant was discharged for gross misconduct because the evidence failed to show that the claimant's actions were repetitive or negatively impacted the employer. Proof of willful or deliberate actions alone is not enough. *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421 (DC 2009).

Labor Disputes

Under the unemployment compensation statute in effect in 1973, claimants seeking unemployment benefits were disqualified if their unemployment was the direct result of a labor dispute. *See* DC Code 1973, § 46-111(f). The act in its present form offers no examples to clarify the definition of the term "labor dispute." Whether unemployment resulting from a labor dispute is characterized as a lockout by the employer or a strike by the employees, is thus irrelevant for purposes of disqualification under this section of the act, although such a distinction might affect the determination of "availability for work" for purposes of initial eligibility. *See National*

Broadcasting Co., Inc. v. District Unemployment Compensation Bd., 380 A.2d 998, 999, n.2 (DC 1977).

Members of the National Association of Broadcast Employees and Technicians (NABET) who went on strike upon the expiration of their collective-bargaining agreement with their employer, NBC, but offered a week later to return to work pending a new agreement, were disqualified from receiving benefits under the act despite the fact that they remained unemployed as a result of NBC's refusal of their offer to return to work. Whether the circumstances of the claimants' unemployment were characterized as a strike or a lockout, the unemployment was nevertheless a direct result of a labor dispute and hence disqualifying under §10(f) of the act. *See National Broadcasting Co., Inc. v. District Unemployment Compensation Bd.,* 380 A.2d 998, 999 n.2 (DC 1977).

Note: Under § 51-110(f) of the DC Code, claimants can be eligible for benefits when they are unemployed because of a "lockout."

When a claimant is unemployed as a "direct result of a labor dispute, other than a lockout, still in active progress" at the claimant's place of employment, he is ineligible for unemployment compensation regardless of whether the "labor dispute" occurs during or after the term of the collective bargaining agreement. Cement company employees who went on strike after the end of the term of the collective bargaining agreement between the company and their union were ineligible for benefits during the period of the strike because their unemployment was a direct result of an active labor dispute. The court relied on the common meaning and ordinary sense of the terms in the statute in finding that a strike was a labor dispute even if it occurred after the collective bargaining agreement expired. *See Barbour v. District of Columbia Dep't of Empl. Servs.*, 499 A.2d 122 (DC 1985).

Unemployment resulting from an employer's reduction in the number of workers it demands from a union may be deemed "a direct result of a labor dispute" if this change in employer policy is intended to undermine an advantage accruing to the union under the terms of the collective bargaining agreement. For example, under the terms of a collective bargaining agreement between the *Washington Post* and pressmen's union, the union was permitted to replace requested workers who failed to report for work with more senior pressmen who could demand overtime pay. To prevent exploitation of this seniority-replacement, overtime compensation system, the *Post* reduced the overall number of pressmen it demanded of the union and hence the number of possible senior replacements that the union could make. Although the senior pressmen seeking benefits asserted that this action was motivated primarily by the *Post*'s financial hardship, the court found no substantial evidence to that effect. Instead, the change in employer policy and the resulting unemployment of senior pressmen was deemed a result of a labor dispute over the terms of employment under the collective bargaining agreement, disqualifying the pressmen from benefits. *See Washington Post Co. v. District Unemployment Compensation Bd.,* 377 A.2d 436 (DC 1977).

When there are two independent groups of workers at a single place of employment under different locals of the same union, the decision of one group not to report to work in

support of a strike by the other group may constitute participation in a labor dispute under the act. Under § 51-111(f) of the DC Code, an individual is ineligible for benefits for any period of unemployment directly resulting from an ongoing labor dispute at his workplace, unless: (1) the claimant is not participating or directly interested in the dispute; and (2) the claimant does not belong to a class of workers employed at the same workplace before their strike. DC Code § 51-111(f). Hence, claimant-members of the Paper Handlers who did not return to work after workers affiliated with the same international union but a different local damaged company property and went out on strike were ineligible for unemployment benefits during the strike period. Although the damage done by the striking workers temporarily prevented both groups of workers from reporting to work, the non-striking paper handlers failed to return to work even after the company resumed its operations. *See Adams v. District Unemployment Compensation Bd.,* 414 A.2d 830 (DC1980).

A claimant who worked as an administrative clerk for the *Washington Post* was deemed ineligible for unemployment benefits when he refused to cross the picket line of striking workers who were members of a different local of the same international union to which the claimant himself belonged. The court found the claimant ineligible for benefits because he *voluntarily* continued to follow the union's directive even after he received notice that he would be permanently replaced if he did not return to his job, and, hence, his unemployment was a direct result of his participation in a labor dispute. *See Washington Post Co. v. District Unemployment Compensation Bd.,* 379 A.2d 694 (DC 1977).

Base Period System Analyzed & Found Proper

Congress's 1940 amendment to the DC Unemployment Compensation Act moved from a duration of employment to a "wages paid" measure of benefits eligibility, calculated during a "base period" defined as the first four of the last five completed calendar quarters (a "quarter" being the period of three consecutive months ending March 1, June 30, September 30, or December 31) immediately preceding the time of a claimant's filing for benefits. The amendment limited eligibility to claimants who received total earnings during the "base period" of not less than an amount specified in a table provided by the statute. Moreover, in its present form, the act requires that to be eligible for benefits "an individual must have…been paid wages for employment … *in not less than two quarters* in such [base] period." The court found the "two quarters" requirement a workable and determinate administrative procedure for insuring the compensation only of individuals who are "substantially attached to the labor market" while eliminating those who earn substantial wages in one or two transactions or are employed for relatively short periods of time. Hence, a claimant who filed for benefits on November 3, 1982 after being terminated by his employer on December 31, 1981, and who had received two $3,000 payments in the calendar quarters ending June 3 and December 311981, nevertheless was found ineligible because only one of the quarters in which payments were received (the quarter ending June 30) was included in the claimant's "base period." The reviewing court upheld as reasonable the agency's finding that, even if the June 30 payment might be said to include earnings for work done in the previous quarter during which no payment at all was received, the single payment could not meet the "two quarters" requirement of the act. *See Anthony v. DOES*, 528 A.2d 883 (DC 1987).

Note: After the *Anthony* decision, the DC Council passed legislation adopting the Alternative Base Period.

Pension & Annuities

A claimant may be disqualified from receiving unemployment benefits if he receives a retirement pension or annuity under a plan to which the employer contributed during the claimant's base period that exceeds the total amount of the benefits to which he would otherwise be entitled in the same period. The DC Code provides in relevant part that benefits payable to an individual for a given week shall be reduced under regulations prescribed by the board by any amount received for that period in the form of retirement pension or annuity contributed to by the employer during the base period. DC Code 1967, § 46-108(c). A retired U.S. Postal Service employee was thus rightly denied benefits after a finding that the annuity he received exceeded his potential weekly benefit amount. Although initial annuity payments may be excluded from gross income under the federal tax laws, to the extent the aggregate amount receivable is equal to or greater than the amount contributed by the employee, these payments do not constitute a return of claimant's own contributions to the fund and do not change the benefits eligibility analysis. *See Rogers v. District of Columbia Unemployment Compensation Bd.*, 290 A.2d 586 (DC 1972).

Severance Pay & Other Voluntary Dismissal Payments

As a result of the 1972 amendment to the DC Unemployment Compensation Act, voluntary dismissal payments made by an employer to a claimant are now considered "earnings" that may disqualify an individual from receiving benefits under the act. As amended, the act treats voluntary dismissal payments as "earnings" from employment, which thus interferes with the eligibility requirement that claimant must not have performed any services or received any earnings during the period for which benefits are sought. A claimant who had been dismissed for willfully and repeatedly violating her employer's rule against expressing dissatisfaction with the company through written memoranda and was denied benefits for five weeks based on this misconduct was therefore rightly found ineligible for an additional four-week period during which she received voluntary dismissal payments from her employer. *See Dyer v. District of Columbia Unemployment Compensation Bd.*, 392 A.2d 1, 3 (DC 1978).

Overpayments & Recoupment

DOES determined that it would defeat the purpose of the act for the agency to recoup amounts paid to a petitioner in the three months following its initial erroneous eligibility determination, where that determination was not a consequence of any misrepresentation by the petitioner. The court declined to determine whether the DOES non-recoupment decision was compelled by the terms or purposes of the Act. *See Dowdy v. DOES*, 515 A.2d 399, 401 (DC 1986).

Suitability of & Availability for Work

DOES determined that the claimant, who had been previously employed as a counselor at a university, had been unemployed for four months and was offered a two-month temporary job at a rate of pay approximately 15 percent below his prior income, was properly disqualified from unemployment benefits for an eight-week period because he refused to accept suitable work and limited his job search to colleges and universities. The court further held that the claimant has the burden of showing that s/he is "genuinely attached to the labor market." *See Johnson v. District Unemployment Compensation Bd.,* 408 A.2d 79 (DC 1979).

Side Agreements

It is the claims examiner's responsibility to assess a claimant's eligibility for unemployment benefits; agreements between employer and employee over unemployment benefits are immaterial. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (DC 1979).

School Employees on Summer Break

As a result of the 1986 amendment to the DC Unemployment Compensation Act, non-academic employees of institutions of higher education are excluded from receiving benefits between school years. DC Code § 51-109 (7)(c)(i) (1986 Supp.). For a denial of benefits to be valid under this provision of the act, (1) a petitioner must have been an employee of an institution of higher education during an academic year or term, and (2) there must have been "reasonable assurance" that petitioner would continue to perform services in the academic year or term immediately following. For example, in one case, the petitioner, who had worked as a baker for University Student Services, Inc. owned by American University, was rightly deemed ineligible for benefits during the university's summer vacation period because she received a lay-off notice that included a promise of reemployment on or before the start of the next academic year. *See Dowdy v. DOES*, 515 A.2d 399, 401 (DC 1986).

In its present form, the act denies unemployment benefits generally to teachers and other educational personnel during summer recess. This provision of the act applies to substitute as well as full-time teachers. Hence, a substitute teacher of social studies in the DC public schools who was notified of her temporary reappointment after she responded affirmatively to an employment questionnaire asking if she wished to be reconsidered for employment during the following year was deemed ineligible for benefits. On petitioner's appeal of the Department of Employment Services' denial, the appeals examiner ruled that, although the "employment questionnaire" was not in itself "reasonable assurance" of continued employment, the questionnaire taken together with the "temporary appointment" letter received thereafter did constitute reasonable assurance for purposes of the act. Hence, benefits were appropriately denied from the date of receipt of the temporary appointment letter. *See Davis v. DOES*, 481 A.2d 128 (DC 1984).

Unemployment Compensation in Maryland

Eligibility

Individuals who work on a full-time or part-time basis for at least 20 hours per week are eligible for benefits. While a worker fired for simple misconduct may receive delayed unemployment benefits, a worker fired for gross misconduct or aggravated misconduct may not receive benefits at all.

Effect of Termination for Misconduct

Termination for **simple misconduct** bars the claimant from receiving benefits for 10 to 15 weeks after the claimant's last day of work. Example of simple misconduct: A truck driver fired for negligence following two different accidents was deemed to have been fired for simple misconduct. *See Kidwell v. Mid-Atlantic Hambro, Inc.,*119-BH-86.

Gross misconduct includes "deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit, or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations." *See* Md. Code Ann., Labor & Empl. § 8-1002(a)(1)(i)-(ii). Employees discharged for gross misconduct will be unable to claim benefits until they are re-employed and earn at least 20 times their weekly benefit amount.

Aggravated misconduct includes "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or service." *See* Md. Labor & Empl. Code Ann. § 8-1002.1(a)(1)(i)-(ii).

If a worker **voluntarily quits or resigns** from a job because she becomes self-employed, to accompany or follow a spouse to a new location, or to attend school, she is not qualified for unemployment compensation. *See* Md. Labor & Empl. Code Ann. § 8-1001(c)(2)(d).

Effect of Other Income Sources

Income from additional/independent contractor work: Claimants must declare on their application reports any gross income from self-employment or independent contractor work. Any payments from such work should be included as an addendum.

Severance pay: Severance pay is considered allocated on the last day of work. Benefits are prohibited for the week in which the severance was allocated.

Applying for UI

Filing via Internet

Potential claimants can file for unemployment compensation over the Internet or by phone. Claimants may file a claim online at: https://secure-2.dllr.state.md.us/NETCLAIMS/Welcome.aspx. To file a claim online, the claimant must NOT have:

- Worked and earned wages from a state other than Maryland in the last 18 months.
- Worked for the federal government in the last 18 months.
- Worked for more than three employers in the last 18 months.
- Filed for unemployment insurance in another state in the last 18 months.

If a claimant is not eligible to file online, then s/he should file over the phone.

Filing over the Phone

To file a claim by phone, claimants should call (800) 827-4839 or call the local office directly. The direct dial number for the College Park Claim Center (serving Montgomery and Prince George's counties) is (301) 313-8000 or (877) 293-4125 (toll free in Md. only).

The Metropolitan Maryland Office of the Legal Aid Bureau can assist workers in Montgomery, Howard, and Prince George's counties with appeals of denials of unemployment benefits. First-time callers from Howard and Prince George's counties should call the main intake line at (301) 560-2100 or (888) 215-5316 on Tuesdays and Thursdays from 2:00 p.m. to 4:00 p.m. to request legal services. Montgomery County residents can call (240) 314-0373 or (888) 215-5316. Spanish-speaking staff members are generally available to conduct intakes during these hours.

Maryland UI Appeals Process

A claimant for unemployment insurance who has been denied benefits may file an appeal of that denial to the Appeals Division. An employer also may appeal a determination granting benefits to a former employee. The appeal must be filed in writing **within 15 calendar days** from the date the determination was mailed. The claimant's signature must be included on the request for appeal. All appeals must be submitted by mail or fax, and may not be filed by e-mail. The last date to file an appeal, as well as the address to which the appeal should be filed, is printed on both monetary and non-monetary determinations.

Once an appeal is filed, a hearing will be held by a hearing examiner, who will then issue a written decision. That decision is appealable by a claimant, an employer, or the Department of Unemployment Compensation to the Board of Appeals. Appeals from initial benefit determinations may not be filed directly to the Board of Appeals.

More information may be found at: **http://www.dllr.state.md.us/uiappeals/**.

Overpayments

The Department of Unemployment Compensation may seek to recover benefits that were erroneously paid to the claimant, in which case, the department must notify the claimant of the overpayment and the claimant's right to request waiver of recovery of the overpayment. Claimant has **30 days from the date of the overpayment notice to request a waiver**. A waiver will be granted if the overpaid claimant is without fault and is unable to repay the benefits. A waiver may be granted when the overpaid claimant is without fault and agency error exclusively caused the overpayment. COMAR 09.32.07.05.

Worker Misclassification

The Department of Labor, Licensing, and Regulation administers Maryland's unemployment insurance law. If the secretary of Labor, Licensing, and Regulation finds that a worker has been misclassified as an independent contractor, the employer must make any unpaid contributions to the state unemployment insurance trust fund within 45 days. After 45 days, any remaining unpaid contributions "accrue interest at a rate of 2 percent per month." *See* Dep't of Legislative Serv., Md. Gen. Assembly, Fiscal and Policy Note for Workplace Fraud Act of 2009, 6 (2009).

If the secretary determines that the employer knowingly misclassified the worker, the employer is also subject to a civil penalty of up to $5,000 for each misclassified worker. *Id.*

Employers can avoid paying back unemployment contributions only if they can satisfy the DLLR's "ABC" test, which determines whether a worker was properly classified as an independent contractor. To establish that a worker is an independent contractor, the employer must show that:

1) The employer does not direct and control the worker's performance, does not train the worker, set his work hours, or provide direct orders regarding the manner in which the work is performed;

2) The work is outside the usual course of business for the employer; and

3) The worker runs an independently-established business that complies with all applicable tax and licensing laws. *Id.* at 6.

Maryland UI Phone Numbers

Baltimore Metro South Claim Center: 410-368-5300, 1-877-293-4125 (Baltimore, Anne Arundel, Howard)
Howard County College Park Claim Center: 301-313-8000, 1-877-293-4125 (Charles, Montgomery and Prince George's)
St. Mary's County Cumberland Claim Center: 301-723-2000, 1-877-293-4125 (Allegany, Frederick, Garrett, Washington)
Salisbury Claim Center: 410-334-6800, 1-877-293-4125 (Caroline, Dorchester, Kent, Queen Anne's, Somerset, Talbot, Wicomico, Worcester)
Towson Claim Center: 410-853-1600, 1-877-293-4125 (Baltimore, Carroll, Cecil, Harford)

For Spanish speakers: 301-313-8000 or 1-877-293-4125

Unemployment Compensation in Virginia

A claim for unemployment compensation benefits may be filed by a resident of Virginia who was employed in another state (or the District of Columbia) or by a resident of another jurisdiction who was employed in Virginia. With interstate claims (either the work or the worker are outside the Commonwealth), the Employment Commission will determine whether the adjudication of a contested claim will be handled by the Virginia agency or referred to the other jurisdiction. Residents of DC or Maryland should seek advice to determine if they may be eligible for higher benefits by filing claims in their residence jurisdiction.

Filing a Claim

Filing via Internet

Potential claimants can file for unemployment compensation with the Virginia Employment Commission over the Internet, by phone, or in person. Claimants may file a claim online at: http://www.vec.virginia.gov/vecportal/unins/insunemp.cfm. The site contains a Spanish language option as well. If the claim is approved, claimants also can file their weekly claims for benefits over the Internet. Many claimants in Northern Virginia speak languages other than English, and the Employment commission can access translation services for multiple languages. Spanish-speaking staff members are generally available in the commission's Alexandria and Fairfax offices.

Filing over the Phone

To file a new claim by telephone, claimants should call (866) 832-2363 Monday through Friday from 8:15 a.m. to 4:30 p.m. To file a weekly claim by telephone, claimants should call (800) 897-5630.

Filing in Person

The commission's Alexandria office (inside the Beltway, off of Edsall Road and Interstate 395) is closest to the District and Maryland. Typical hours of operation are weekdays from 8:30 a.m. to 4:30 p.m. Claimants should bring two forms of identification: one with a photo ID and one with a Social Security number (or Taxpayer ID).
The commission's Northern Virginia offices are at the following locations:

- 5520 Cherokee Ave., Alexandria, VA 22312 Tel: (703) 813-1300
- 13370 Minnieville Road, Woodbridge, VA 22192 Tel: (703) 897-0407
- 3501 Lafayette Boulevard, Fredericksburg, VA 22404 Tel: (540) 898-3806

For additional information, a handbook and guide for claimants is available online at: http://www.vec.virginia.gov/ and http://wrmanual.dcejc.org/16.

Eligibility

To be eligible for unemployment compensation in Virginia, the worker must have worked for 30 days or 240 hours for the employer. *See* Va. Code § 60.2-618(2). The 30 days do not have to be consecutive. A minimum earnings test looks at wages earned during a one-year period (four calendar quarters); wages earned in the calendar quarter in which the application is filed and wages from the preceding calendar quarter are not considered, i.e., Virginia has no Alternative Base Period. Eligibility for benefits and the amount of benefits are determined by taking the two calendar quarters with the highest earnings.

Ordinarily, the Employment Commission issues a monetary determination within about one week of application, explaining financial eligibility for benefits. The notice provides an opportunity for the claimant to supplement the earnings record if it is incomplete (an employer cannot defeat a claim by failing to pay unemployment compensation taxes that are required to be paid under federal law). State law allows a worker who was previously disqualified from receiving benefits to overcome the disqualification (if there is still a relevant earnings record) by working for a minimum of 30 days or 240 hours for a Virginia employer. *See* Va. Code § 60.2-618(2). The 30 days do not have to be consecutive. *Id.* at § 60.2-618(2).

A claimant will not be eligible for benefits if the deputy finds that the claimant either (1) quit the job without good cause or (2) was fired from the job as a result of misconduct in connection with work. The case law in Virginia makes clear that more than simple acts of misconduct must be shown to warrant a disqualification; the claimed wrongdoing of the employee must amount to willful misconduct. Some examples of willful misconduct include: positive test for controlled substance use, if there was a known workplace drug testing policy in place, *see* Va. Code § 60.2-618(2)(b)(1); the worker made an intentionally false or misleading statement in relation to a past criminal conviction on a written job application, *id.* at § 60.2-618(2)(b)(2); when a worker either deliberately violates company policy or the worker's actions or omissions are so recurrent or of such a nature as to manifest a willful disregard of the employer's interest, *see Kennedy's Piggly Wiggly Stores, Inc. v. Cooper*, 14 Va. App. 701, 419

S.E. 2d 278 (1992); and when a worker is absent without prior notice, *see Henderson v. VEC*, No. 1056-99-2 (Ct. of Appeals Sept. 14, 1999). The employer bears the burden of proving misconduct. *See Kennedy's Piggly Wiggly Stores*, 14 Va. App. at 701. The willfulness element of misconduct may be shown by the surrounding circumstances to have been mitigated, or the misconduct may not be a disqualification if the employer reasonably condoned the misconduct. Ordinary acts of negligence, for example, are generally insufficient to support a finding of willful misconduct.

Voluntarily terminating employment, upon a claim of good cause, may overcome a disqualification. To succeed with a claim, the worker not only must show a good reason for quitting, but also must justify the timing of the decision. The latter element typically requires proof of having exhausted any internal grievance process to protest an intolerable work condition, or acting upon professional advice (i.e., recommendation of a doctor). The employee has the burden of proof to demonstrate good cause. Legal Services of Northern Virginia ("LSNV") strongly recommends that before a worker quits, she should consult an attorney for advice on whether the predicate elements for demonstrating good cause are present to support a claim.

Claims Review & Appeal Procedure

Initial Review of the Claim

A deputy examiner reviews the initial claim for unemployment compensation. *See* Va. Code § 60.2-619(A)(1). For claims considered valid, the deputy also initially determines when benefits will begin, the amount of the weekly benefit, and the maximum duration of the benefits period. *Id*. at § 60.2-619(A)(1)(b). The process to claim benefits typically takes from one to two months. After the monetary determination is issued, if there is any question about qualification for benefits (how and why the employment ended), the deputy will schedule a telephone conference. Both the claimant and the employer may participate. The determination of qualification or disqualification typically will be issued within one to two weeks after the conference.

During the review by the deputy, if an employer states a legally sufficient reason to disqualify someone from receiving employment benefits and indicates that evidence exists to back up the basis for termination, the deputy will generally deny the claim. An employee will be provided an opportunity to counter the employer's version of what occurred, but the deputy's job at this initial stage of the proceeding is not to try to resolve conflicting facts presented by claimant and employer.

Many claims initially denied by the deputies are later reversed by appeals examiner hearing decisions (based upon de novo review in a due process hearing, at which the employer is required to back up any contentions it made initially to defeat the claim). Legal advice prior to the hearing may be critical for a favorable outcome for the employee. Generally, the hearing is the first and last opportunity to submit evidence. An employee needs to come to the hearing prepared to present or to counter expected claims, and generally, any necessary witnesses or

documents must be requested through the commission before the hearing.

The commission generally schedules appeals for claims filed by the internet or by out-of-state claimants for telephonic hearings. There are advantages and disadvantages to having telephonic hearings, and whether a telephonic hearing is better than an in-person hearing depends upon the issues in a case and whether the claimant is willing or able to travel to one of the Northern Virginia hearing offices for an in-person hearing. With telephonic hearings, the claimant will be sent copies of documents in advance of the hearing together with basic instructions for participation in the hearing (a key issue: the claimant must call in after receipt of the hearing notice and at least one day before the scheduled hearing to advise the commission of the telephone number where the claimant wishes to be called)

Practice Tip: Clients should contact LSNV as early in the application process as possible, preferably before the telephone fact-finding conference by the deputy. Advice about what to expect at the conference may make a difference between a disqualification (and an additional wait for receipt of benefits) and qualification. If the claim is denied, or the commission notifies the applicant of an appeal by the employer, then that is the time to seek legal assistance, not later.

Appealing a Denial of Benefits

The notice of qualification or disqualification for benefits provides **thirty (30) calendar days to file an appeal**. This can be done in person (there is a simple form to complete), by mail (to a local office or to the commission's Richmond office), or by fax. If an appeal letter is sent, the letter must be postmarked by the filing deadline; the final date to file an appeal is set out on the bottom of the reverse side of the qualification/disqualification notice.

Further appeal of the appeals examiner's hearing decision is possible, but generally the record is closed to submission of further evidence. An appeal to the commission to overturn a hearing decision requires demonstration of legal error – i.e., a claimant or employer who failed to bring an important witness or document to the hearing cannot add to the record without showing that the additional evidence was unavailable and could not have been produced for the hearing. The commission does not allow an opportunity for either party to re-litigate the case once they have participated in a hearing and learned what they need to prepare.

There is also an opportunity to appeal a final decision of the commission to Circuit Court; but appeals to court seldom succeed because the court is required to accept as true all fact findings of the commission that are based upon the record. Only substantial procedural errors or misapplication of state law provide a basis to overturn the commission's final decision.

Overpayments

If a claimant who has received benefits is ultimately disqualified, there will be an overpayment determination. If the claimant is unable to repay the full amount in one payment, s/he should contact the Benefit Payment Control Unit at (804) 786-8593 to arrange a repayment

installment plan, which would be one payment per month, with no interest, at whatever amount the client can afford. The Employment Commission does not waive overpayments, e.g., due to hardship.

If the overpayment is not repaid in full before the claimant claims future benefits, a deduction (offset) will be made from these benefits. The Employment Commission also will use other methods to collect the money owed, including collection agencies, credit bureaus, wage garnishment, attachment of bank accounts, seizing of income tax refunds, and levy and sale of personal property. The costs of collection, including administrative costs, attorney's fees, late penalty, and interest can be charged to the claimant. LSNV recommends that workers who have been overpaid benefits should begin voluntarily repaying benefits at an affordable amount each month when they return to work.

Immigrant Worker Issues

Virginia law states that benefits shall not be paid to immigrant workers who perform services in the state unless such individuals were lawfully admitted for permanent residence at the time such services were performed, they were lawfully present for purposes of performing such services, or they were permanently and lawfully residing in the United States under color of law at the time such services were provided. *See* Va. Code § 60.2-617. Immigrant workers with documentation of work authorization or work visas generally will meet the minimum requirement for the standard to be lawfully present for the purposes of performing such services. The Virginia Employment Commission requires disclosure of a claimant's Social Security number (if one has been issued); but depending upon the worker's circumstances, a Taxpayer I.D. The number issued by the IRS may meet the agency's documentation requirement.

Individuals concerned with the possibility of complications arising with their unemployment claims due to their immigration status should contact LSNV and set up an appointment. LSNV notes that since unemployment compensation benefits are earned, qualification for and receipt of benefits is not an adverse issue (i.e., public charge) for immigration/citizenship applications.

Referrals to Legal Services of Northern Virginia (LSNV)

A Virginia resident can get help through Legal Services of Northern Virginia (LSNV) which provides free legal assistance with employment matters (occurring in Northern Virginia) for low-income residents. Low-income DC residents who have claims adjudicated in Virginia may be eligible for LSNV services offered. Subject to availability of staff or volunteers, LSNV will offer representation in claims before the VA Employment Commission for residents of the District of Columbia and Maryland. There is no need to contact the local (DC or Maryland) federally-funded legal services program for a referral; an individual seeking advice or assistance can contact any of the LSNV branch offices directly.

LSNV's Arlington office is closest to DC by public transportation (Courthouse stop on the Metro's Orange line). Additional offices are located in Culmore (Bailey's Crossroads),

Route One (southern Fairfax County), Falls Church, Alexandria, Fairfax City, Leesburg, and Manassas. Clients living in DC or Maryland should call the Arlington branch intake at (703) 532-3733, or the Alexandria branch at (703) 684-5566 to determine eligibility and directions. Client-applicants are seen by appointment (telephone or in-person). The earlier in the claims process that a claimant seeks help, the greater the possibility of qualifying for representation. LSNV encourages applicants for legal services not to wait until receiving notice of a hearing, as it might be too late then to obtain access to counsel.