



**CAMBRIDGE**  
PROPERTY & CASUALTY

## **DISPUTING CLAIMS FOR UNEMPLOYMENT BENEFITS**

Many employers question how best to handle unemployment compensation claims. Although the employer is not responsible for directly paying unemployment benefits, the employer pays unemployment taxes based on the number of claims made against the employer's "account." As a result, employers should take time to understand unemployment compensation issues and the process of how to dispute such claims. The purpose of this Special Report is to outline the key defenses to an unemployment claim and to make other recommendations for employers to follow in the process of disputing such claims.

### **UNEMPLOYMENT AGENCY**

Claims for unemployment benefits in Michigan are processed through the Michigan Unemployment Insurance Agency ("Agency") a division of the Michigan Department of Labor and Economic Growth. The Agency determines whether unemployed workers are entitled to benefits under the Michigan Employment Security Act<sup>1</sup> ("MESA").

MESA was enacted for the benefit of persons involuntarily unemployed. The purpose of the Act was to ease the burden of economic insecurity on those who become unemployed through no fault of their own. Michigan courts have stated that MESA is to be "liberally construed to afford coverage and strictly construed to effect disqualification."<sup>2</sup> As a result, obtaining a decision disqualifying a former employee from receiving benefits can be difficult. It is not, however, impossible. With planning and preparation, employers can improve the chances of a disqualification for appropriate situations.

### **STANDARDS FOR DISQUALIFICATION**

To be eligible for unemployment benefits, a claimant must: i) be unemployed as defined in MESA; ii) have engaged in the minimum level of qualifying employment; iii) apply for benefits; and iv) be able to, available for and seeking employment.<sup>3</sup> Once an employee meets these threshold requirements, he or she is eligible for unemployment benefits unless a disqualification applies. There are essentially two grounds for benefit disqualification: i) voluntary termination of employment and ii) misconduct.

#### **A. Voluntary Termination**

Ordinarily, an employee who voluntarily terminates his or her employment is disqualified for unemployment benefits.<sup>4</sup> An employee is not disqualified for benefits, however, if the employee's termination was not voluntary or if it was prompted by good cause attributable to the employer.

The first consideration is whether the employee's termination was in fact *voluntary*. If the termination is found to be involuntary, the employee is entitled to benefits.

Whether an employee *voluntarily* left their position depends on the particular facts and circumstances of each case. It is important to note that even though an employee leaves a job through his or her own choice, the leaving is not necessarily "voluntary" under MESA. Rather, the courts have held that "voluntary" implies that there is a choice between two alternatives that an ordinary person would find reasonable.<sup>5</sup>

Some examples of cases where an employee quit their job and was found to have done so involuntarily are:

- A pregnant woman who left her employment on the advice of her doctor and who was willing to return to work after giving birth to her child, but was refused permission to return by her employer.<sup>6</sup>
- A worker who took a job 272 miles from his home and was forced to travel home only on weekends and found that his job was contributing to problems with his family life and subsequently quit.<sup>7</sup>

If the termination is found to be voluntary, a second inquiry is made to determine whether the employee's termination was made without good cause attributable to the employer. The standard applied is whether the employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment.<sup>8</sup> However, it should be noted that the Agency will generally give consideration to whether the employee brought the unacceptable condition to the employer's attention, thus providing the employer the opportunity to correct the situation. Some examples of cases where an employee who have quit their job and was found to have done so based on good cause attributable to the employer are:

- An employee who quit his position when his employer reneged on a promise to give the employee a raise in salary for developing a specialized art glass department.<sup>9</sup>
- An employee who quit his position following a dispute with his employer regarding pay during an administrative leave.<sup>10</sup>

In a voluntary termination case, the burden of proof is initially on the employer to demonstrate that the employee quit his or her position. The burden then shifts to the employee to show either that the action was involuntary or that the resignation was prompted by good cause attributable to the employer.<sup>11</sup>

## **B. Misconduct**

The Michigan Supreme Court has defined "misconduct" - for purposes of disqualifying a former employee for unemployment benefits – as:

*"[c]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer"*<sup>12</sup>.

In contrast, “mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion” does not constitute misconduct under MESA.<sup>13</sup>

Application of the MESA misconduct standard can be frustrating for employers. Acts which justify termination and are, in the employer's eyes, clearly misconduct may be held to be insufficient to disqualify an employee for unemployment benefits. Some examples of cases where the wrongful acts of an employee were found not to disqualify the employee for benefits are:

- An employee who in nine months of employment received five warnings regarding lateness or absenteeism, including three "final" warnings, but alleged that her absences and tardiness were beyond control.<sup>14</sup>
- An employee with three violations of shop rules of wasting time and loitering on company property and failing to wear safety glasses, even though the violations justified his discharge under a collective bargaining agreement.<sup>15</sup>

On the positive side, a series of incidents, even if no one of them by itself would rise to the level of misconduct, can form the basis for a finding of misconduct to disqualify an employee for unemployment benefits.<sup>16</sup> The final incident need not be related to the previous incidents. The "last straw doctrine" states that the final violation by an employee may be an unrelated act that conclusively demonstrates the employee's utter disregard for the employer's interests.

MESA also specifically provides that certain types of employee misconduct will disqualify an employee for benefits: i) incarceration; ii) theft or destruction of property; iii) assault and battery; and iv) use of drugs or alcohol.<sup>17</sup>

In a misconduct case, the burden of proof is entirely on the employer. The employer must provide substantial evidence that the employee engaged in misconduct in connection with their work. In most cases, a documented history of disciplinary action is advisory. In the most serious situations, however, the employer need not discipline or warn the employee prior to termination.

## **DISPUTE PROCESS**

### **A. Initial Administrative Determination and Re-Determination**

The first two steps in the unemployment benefit determination process are processed by the administrative staff of the Agency. On a former employee's application for benefits, the Agency will send the employer a notice requesting a response.

The employer's response should identify the basis for disqualification, identify the relevant facts, and be supported by appropriate documentary evidence, when available. The initial administrative determination will be based upon the employee's application and the employer's response. The initial determination may be submitted to the administrative staff for reconsideration within 30 days. A request for reconsideration should be based upon either new evidence or the misapplication of the law in the original determination. On receipt of a timely request, the Agency will review the evidence and issue a re-determination which will either affirm or reverse the initial determination.

## **B. Hearing Before Administrative Law Judge**

On issuance of a re-determination, either party may request a hearing before an administrative law judge within 30 days. An administrative law judge is an attorney who works for the State of Michigan hearing and deciding cases involving unemployment compensation. He or she will review documents and listen to the parties' statements, and decide what the facts are based on those statements and other evidence.

On receipt of a request for hearing, the Agency will schedule a hearing and send a Notice of Hearing to the employer and employee. The hearing may be held in person at an Agency office or it may be held via a telephone conference.

At the hearing, the administrative law judge will review evidence presented by the employer and the employee. Evidence may be in the form of testimony or documents. It is important to note that any documents presented as evidence must be supported by testimony of a person with knowledge of the document. The administrative law judge has the discretion to limit the number of witnesses testifying on an issue and to decide how much importance to attach to any evidence presented.

Although the burden of proof at an administrative hearing is initially on the appealing party, the employer has the final burden of proof on all benefit disqualification issues. Further, in general, the administrative hearing will be the last opportunity for the parties to present evidence supporting their position. For these reasons, it is very important for an employer to carefully prepare and present its case.

## **C. Appeal to MESA Board of Appeals**

The party that disagrees with the decision issued by the administrative law judge may appeal to the MESA Board of Review, a five member board appointed by the governor. In most cases, the Board of Review will not take additional evidence in the case but will base its decision on the record from the administrative hearing. There is no cost to file an appeal to the Board of Review. As such, there is not much disincentive to appeal and the Board of Review generally works with a significant backlog of cases, and it may take a long time for a decision in the matter.

## **D. Appeal to State Courts**

A decision by the Board of Review may be further appealed to the circuit court within 30 days. The circuit court will only reverse a decision by the Board of Review if it finds that ". . . the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record." This stringent standard means that few Board of Review decisions are reversed. An employer interested in pursuing an appeal of a Board of Review decision should contact an attorney for legal advice and assistance.

### **RECOMMENDATIONS**

1. Be cautious and consult an attorney when drafting responses to claims for unemployment claims and in presenting testimony at any hearing. Such documents and testimony could subsequently be used against the employer in a claim of discrimination or wrongful discharge.
2. Use your employee handbook to define the company's interest and notify employees of the company's rules and behavior and performance expectation of employees. Please note that a poorly

prepared employee handbook can expose an employer to liability rather than protect it. Accordingly, the employee handbook should be reviewed by an attorney regularly.

3. Establish and utilize prudent discipline and termination procedures. When appropriate, document performance and disciplinary issues. Before terminating an employee, objectively review the facts and get a second opinion on the appropriateness of termination.
4. Have an attorney or advocate represent the employer at any administrative hearing. The State of Michigan Advocacy Program provides advocates to assist employers and employees with unemployment hearings. There is no cost for the use of an advocate. The Advocacy Program can be reached at 1-800-638-3994.
5. Carefully prepare for the administrative hearing. Identify the documents that support your case and the persons who can provide testimony on the documents. Be sure to bring as witnesses those persons who have personal knowledge of the details of an employee's resignation or termination, such as a manager or supervisor. Organize your facts and support evidence to demonstrate the basis for disqualification and present your evidence clearly, concisely and objectively. Be prepared to ask questions of all witnesses at the hearing. Consider asking the Agency in advance of the hearing for a chance to look at the file in the case. This may help you to ascertain what statements the other party has made to the Agency about the case. This could be useful in helping determine which persons/documents you will bring to the hearing, and what questions you might ask.

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<sup>1</sup> M.C.L. 421.1 et seq.

<sup>2</sup> *Bureau of Worker's & Unemployment Comp v Detroit Med Ctr*, 267 Mich App 500, 505, 705 NW2d 524 (2005).

<sup>3</sup> M.C.L. 421.28.

<sup>4</sup> M.C.L. 421.29(1)(a).

<sup>5</sup> *Clarke v North Detroit Gen Hosp*, 437 Mich 280, 470 NW2d 393 (1991).

<sup>6</sup> *Warren v. Caro Community Hosp.*, 457 Mich. 361, 579 N. W .2d 343 (1998).

<sup>7</sup> *Laya v. Cebal Const. Co.*, 101 Mich.App. 26, 300 N.W .2d 439 (1981).

<sup>8</sup> *Johnides v St Lawrence Hosp*, 184 Mich App 172, 175, 457 NW2d 123 (1990).

<sup>9</sup> *Degi v. Varano Glass Co.*, 158 Mich.App. 695, 405 N. W .2d 129 (1987).

<sup>10</sup> *Johnides v. St. Lawrence Hosp.*, 184 Mich.App. 172, 457 N.W .2d 123 (1990).

<sup>11</sup> M.C.L. 421.29(1)(a); *McArthur v Borman's, Inc*, 200 Mich App 686, 691, 505 NW2d 32 (1993).

<sup>12</sup> *Carter v. MESC*, 364 Mich. App. 538, 111 N.W. 2d 817 (1961).

<sup>13</sup> *Id.*

<sup>14</sup> *Washington v. Amway Grand Plaza*, 135 Mich.App. 652, 354 N.W .2d 299 (1984).

<sup>15</sup> *Rasmus v. Kirkhof Transformer*, 137 Mich. App. 311, 357 N.W. 2d 683 (1984).

<sup>16</sup> *Williams v Lakeland Convalescent Ctr, Inc*, 4 Mich App 477, 145 NW2d 272 (1966).

<sup>17</sup> M.C.L. 421.29