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EMPLOYMENT LAW:  
UNEMPLOYMENT COMPENSATION CLAIMS

I. INTRODUCTION

A. UNEMPLOYMENT COMPENSATION: LEGAL REMEDY FOR  
TERMINATION OF AT-WILL EMPLOYMENT

Filing a claim for unemployment compensation is usually the only legal recourse available to a worker whose employment has been terminated. The program partially replaces lost wages (the schedule of benefits is set out in Virginia Code § 60.2-602). For many people, the investigation of a termination by the Employment Commission and a favorable ruling are more important than the monetary value of the benefits. Qualification for benefits is a form of a favorable reference for a prospective employer: the employee was not terminated for adequate cause (proof of willful misconduct). The Virginia Employment Commission investigates and adjudicates claims, and generally makes a determination to grant or deny benefits within a month of the application.

Many employees who are confident of finding new work or for whom the low benefits are not financially necessary, do not even file for unemployment compensation. This potential error in judgment might not be later correctable. For example, a nurse's aide in a nursing home may be fired because of a patient abuse complaint. The Department of Health Professions/Board of Nursing may investigate the facts underlying the termination many months or even years later when rebuttal and corroborating witnesses for the aide may no longer be available. The Employment Commission investigation and determination may provide a significant start in developing facts to later defending a review and possible license revocation.

Employers are frequently reluctant to do more than verify dates of employment for a former employee. See Virginia Code § 40.1-27, prohibiting employers from "willfully and maliciously prevent or attempt to prevent by word or writing, directly or indirectly, such discharged employee or such employee who has voluntarily left from obtaining employment with any other person." The fact of qualification for unemployment compensation provides at least some assurance to a prospective employer that the Commission investigated the discharge. Psychologically, qualifying for benefits can help an employee interview better for replacement work and be less defensive about the termination.

## B. FINANCIAL ELIGIBILITY AND QUALIFICATION FOR BENEFITS

In order to receive compensation for loss of employment, a worker must meet two separate conditions. The first is financial eligibility for benefits. A claimant must have an earnings record in employment. The Commission looks at a past twelve month period and assesses the earnings in each calendar quarter. The first written notice given to a claimant by the Commission is a monetary determination, showing the income reported for four calendar quarters and whether the claimant meets the minimum earnings test. The claimant has a right to a hearing to review and challenge the income information. Unemployment compensation is a partially means-tested program. Household income and resources do not affect financial eligibility, but any employment income received by the applicant (severance pay, deferred compensation, pension payments, Social Security benefits, etc.) off-set the compensation.

The second requirement for receipt of benefits is the qualification decision. An applicant cannot voluntarily quit a job, without good cause, or be terminated for willful misconduct and receive benefits. A deputy examiner makes the initial qualification/disqualification determination, and both employer and claimant have an opportunity for de novo review of the determination at a due process hearing [Goldberg v. Kelly, 397 U.S. 254 (1970), procedural due process applies]. The employer has the initial burden of proof to establish a voluntary quit or that the employee committed willful misconduct.

## C. LEGAL RESOURCES

The basic substantive and procedural law governing unemployment compensation claims is set out in Title 60.2 of the Virginia Code, and the regulations issued by the Virginia Employment Commission, 16 V.A.C. 5-10-80. The Employment Commission has issued copies of its leading, precedential administrative decisions in a multi volume set of books, the Precedent Decision Manual (available in the Fairfax Bar Association law library). A more concise summary of precedent decisions is the Guide for Effective Unemployment Insurance Adjudication (available in the Fairfax branch office library of Legal Services of Northern Virginia).

There is a section of Employment Law in Virginia (The Virginia Law Foundation, Volume II, Chapter 23) on unemployment compensation claims; and, a section of The Virginia Practice Manual (Virginia Poverty Law Center, revised November, 1998 -- available in the legal services office library) covering unemployment compensation practice.

## D. FEDERAL AND STATE UNEMPLOYMENT COMPENSATION PROGRAMS

Unemployment compensation benefits are mandated by federal law and funded through federal unemployment compensation payroll taxes. Most administrative details are left to the states, and there is a lot of variation among the states in substantive and procedural law governing claims. There are a number of different programs, under the label unemployment compensation.

The most common category of benefits are intrastate claims: filed by workers who were employed and reside in the same jurisdiction. There are also interstate claims, for workers who live and work in different jurisdictions, or who have moved to another state following termination of employment. Generally, claims will be adjudicated either in the jurisdiction the application has been filed or the jurisdiction where the worker was employed.

There is another program for terminated civilian federal employees, with regulations issued by the U.S. Department of Labor, 20 C.F.R. § 619. Generally, federal worker claims are administered under the same procedures and standards as are applied by the adjudicative agency to intrastate and interstate claims. There is also a program for separated, uniformed military personnel, with federal regulations at 20 C.F.R. § 614. The federal military claims are somewhat different, particularly on the issue of which separated personnel can qualify for compensation.

There are other unemployment compensation programs -- for disaster victims and workers dislocated by foreign trade -- that are not often applicable in Northern Virginia.

E. PRACTICAL INFORMATION ABOUT EMPLOYMENT  
COMMISSION OFFICES AND LEGAL ASSISTANCE FOR  
CLAIMANTS

1. COMMISSION OFFICES

There are three Virginia Employment Commission offices in Northern Virginia, where claims are filed and local hearings held:

Alexandria (Annandale -- Springfield area)  
5520 Cherokee Avenue  
Alexandria, Virginia 22312  
Tel: (703) 813-1300

The Alexandria office is in an office park on the north side of 395, just off of Edsall Road. The hearing office is a separate suite, on the ground floor of the building.

Fairfax (Chantilly)  
13135 Lee Jackson Highway, Suite 340  
Fairfax, Virginia 22033  
Tel: (703) 803-1100

The Fairfax office is on the south side of Route 50, at the western edge of the Greenbriar Town Center shopping center, across from the International Country Club. The waiting room for claimants is used as the waiting room for hearings.

Woodbridge  
13370 Minnieville Road  
Woodbridge, Virginia  
Tel: (703) 897-0407

The Woodbridge office is about a mile from 95, north of the Potomac Mills Mall (Prince William County Parkway exit on 95; Minnieville Road intersects with the Parkway). The Commission building is across the road from Strayer Junior College.

The office that schedules hearings in Northern Virginia (Lower Level Appeals) is in the Commission's Richmond office. Rhonda Tate is the Clerk in charge:

Tel: (804) 786-3020  
Fax: (804) 786-8492

Appeals to the Commission from local hearing decisions are administered by Norma Turner, Clerk of the Commission:

703 E. Main Street  
P.O. Box 1358  
Richmond, Virginia 23211

Tel: (804) 786-4140  
Fax: (804) 786-9034

## 2. LEGAL REPRESENTATION FOR CLAIMANTS

There are relatively few private attorneys in Northern Virginia who handle or will handle unemployment compensation claims for workers. First, unemployed workers often have limited resources; and, the benefits are so low that they do not provide much of a basis for payment of a fee. Second, any fee charged a claimant for legal services must be approved by the Commission, Virginia Code § 60.2-123.

Representation of claimants, at local hearings and with appeals, is available from Legal Services of Northern Virginia and the Pro Bono Employment Law Project of the Fairfax Bar Association. In order to consult a staff advocate or volunteer, the applicant needs to call the intake unit of Legal Services of Northern Virginia to schedule an appointment. The unit, telephone number 532-3733, takes calls for appointments Monday through Friday, from 9:30 until 1:00. Ordinarily an appointment is available within two weeks of the first call, in the Fairfax office of LSNV.

NOTE: If referring a claimant to legal services, it is very important for the applicant not to wait until notice of a hearing is received. Hearing notices are sent out 10 days in advance, and an applicant with a notice of hearing may not even be able to get an interview before the date set for a hearing. The Commission does not generally continue hearings to allow parties an opportunity to engage counsel.

## II. UNEMPLOYMENT COMPENSATION ADJUDICATIONS

### A. QUALIFICATION DETERMINATION BY A DEPUTY EXAMINER

A deputy examiner (clerk) initially interviews the claimant and investigates the claim. The employer is notified in writing of the claim and will usually be contacted by telephone. When the claimant has been discharged, there will usually be a follow-up interview, either in-person or by telephone. The deputy may schedule a conference call, with both employer and claimant participating.

Although an appeal from the deputy determination is a de novo review of the claim, the deputy's notes are often introduced into evidence at the hearing, particularly if there is any inconsistency between what is recorded in the notes and the testimony at the hearing.

**ADVOCACY TIP:** If the employee has been fired, with a claim of fault for the discharge, or if the employee has quit a job with a contention of good cause to justify the quit, it can be very helpful for an advocate to draft a short factual summary of the circumstances, to deliver to the deputy. Claimants typically are not represented at fact-finding, informal conferences with the deputies, but a clear explanation of what happened, in writing, can help focus the deputy's investigation.

**TIME ISSUES:** The deputy issues a written qualification/disqualification determination, containing a brief narrative summarizing the factual and legal basis for the decision. Either party has the right to appeal the determination within thirty calendar days after mailing or delivery of the notice. The final date to file an appeal, in writing, calculated based upon the date of the notice, is close to the bottom on the reverse side of the notice.

For good cause shown, the thirty day period may be extended. Virginia Code § 60.2-619 (D). The Commission fairly narrowly interprets and applies this good cause extension.

## B. DUE PROCESS HEARING REVIEW BY AN APPEALS EXAMINER

Appeal from the deputy's determination is to an appeals examiner (lawyer) hearing, is held either in one of the local Employment Commission offices or by telephone conference call. Telephone hearings are usually scheduled for interstate cases, but an out-of-state party has the right to request an in-person hearing. The Commission ordinarily sends two written notices (acknowledgment of a pending hearing request and notice of hearing) which set out on the reverse side of the forms basic procedural rights for the hearing, including requesting subpoenas for witnesses or documents, in advance.

### 1. POSTPONEMENTS

The notices state that these will only be granted for good cause, "where material and substantial harm may result." The Commission does not routinely grant postponements to obtain counsel, or even when retained counsel is not available. A proffer of the reason for a postponement, identifying the facts to show the claimant has acted promptly, should be faxed to Lower Level Appeals, together with notice of appearance by counsel -- if not already sent.

If notice of appearance by counsel, for either party, is received by the Commission before the hearing date is set, the scheduling staff will try to accommodate counsel's schedule. It is helpful to include available/unavailable dates in a faxed notice of appearance.

Fine print of the notice states the preparation standard: "Parties must be prepared to present their case at the time scheduled for hearing before the Appeals Examiner, including all documents and witnesses necessary to your case." For good cause shown, the hearing officer might allow the record to be held open to receive a document or to obtain testimony from a witness not available at the scheduled hearing. These postponements or continuance are not often granted; if a witness is unavailable for the hearing, it is a good idea to send advance notice of that fact with a brief proffer of the testimony (to show it is material, relevant, necessary and not merely cumulative) together with a request for a postponement.

Claimants are generally held to a standard to anticipate the evidence presented by an employer. This means requesting or bringing corroborative and rebuttal witnesses to the scheduled hearing, rather than requesting a continuance when confronted by evidence at the hearing.

### 2. WITNESSES

The Virginia Employment Commission has subpoena power and will, if a request supported by a proper proffer of necessity is made, issue a subpoena. It takes generally two weeks to process a subpoena request, through service by the Sheriff's office. Because of the quick scheduling, any witness subpoenas should be requested in the initial notice of appearance (or request for appeal filed by either party).

Witnesses can appear either in person, or by telephone. If a witness is not available and the testimony would be helpful, but not essential, an affidavit can be admitted into evidence. It is given less weight, because of the lack of opportunity for cross-examination. If it is unclear whether testimony would be merely helpful or possibly necessary, an affidavit submitted at the hearing can support a request for a continuance -- to get a key dispute factual issue addressed.

### 3. INTERPRETERS

Upon request, the Employment Commission will obtain a professionally qualified interpreter. If a party or witness is merely conversant in English, it may be important to have precise translation. Generally, if comprehension may be a problem, it is better to request an interpreter. The Commission does not permit friends or relatives to interpret, unless a professionally qualified interpreter is not available and/or could not be located.

#### TIME ISSUES:

The appeals examiner's decision is issued by the Employment Commission's Richmond office. There is a thirty day deadline to file an appeal, in writing, with the Commission. The exact date of the decision deadline is stated at the beginning of the decision. Notice can be filed in person, mailed or sent by facsimile. The postmark (by the Postal Service, not the meter date) establishes the date of filing; not necessarily receipt by the Commission.

### C. APPEAL TO THE COMMISSION FROM AN ADVERSE APPEALS EXAMINER DECISION

Review by the Commission is an appeal, not de novo. Generally, the evidentiary record is closed after the appeals examiner hearing. In order to try to present additional evidence on appeal, the appellant must show -- in addition to the relevance and significance of the testimony or documents -- that the evidence was not available at the time of the appeals examiner hearing and could not have been presented then, with proper hearing preparation. Fundamentally, the Commission review, conducted by a special examiner, is to determine if substantial legal error to reverse or reopen the decision is present.

Oral argument of an appeal, held at the Commission's Richmond office, is not automatically granted. It must be requested, or review of the claim will be decided on the record and any submissions of written legal argument. The

Commission defers to credibility assessments made by the appeals examiner at an in-person hearing. Generally, cases are reversed for procedural errors, misapplications of law, inadequate development of the record on key factual issues, when the appeals examiner's factual findings are not supported by evidence on the record, or when the legal conclusions in the decision are inconsistent with credible evidence in the record.

In order to obtain oral argument (advantageous, and probably necessary for an appellant), it is helpful to proffer what the legal issues to be addressed on appeal are. If timely requested, the Commission will transcribe the record of the hearing (with the exhibits) and send this, in advance of oral argument, to both parties.

**ADVOCACY TIP:** Whether or not oral argument is set in Richmond, it is helpful for either or both parties, particularly the appellant, to draft a short memorandum of law, with specific page references to the supporting evidence, and fax the written argument to the Commission several days before the hearing/oral argument.

#### D. APPEAL TO CIRCUIT COURT AND TO THE COURT OF APPEALS FROM AN ADVERSE DECISION

Judicial review of a final administrative determination of the Employment Commission is available within 30 days of the mailing of the decision, by filing a petition in the Circuit Court for the jurisdiction in which the claimant was employed. Both the Commission and the adverse party (employer or claimant) need to be named respondents.

Very few appeals to Circuit Court are successful, because of the standard of review:

“The findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.” Virginia code § 60.2-625(A)

### III. QUALIFICATION AND DISQUALIFICATION ISSUES

Most Employment Commission adjudications are held to determine whether the claimant voluntarily quit the last job or quit it with good cause; whether there is adequate evidence that the employee committed willful misconduct; or, if a showing of willful misconduct is made, whether there are any mitigating circumstances present, adequate to justify granting benefits.

A. VOLUNTARY QUIT, INVOLUNTARY QUIT AND QUIT FOR GOOD CAUSE

The employer has the initial burden of proof to establish that a claimant voluntarily quit the job. An ultimatum, “resign or be fired” does not establish a voluntary quit. A letter of resignation is not conclusive evidence of a voluntary quit. Even a voluntary quit, without good cause, can establish qualification for benefits when the employee gives advance notice of resignation, but is then discharged without being allowed to work out the notice period.

Good cause to quit a job in Virginia is not statutorily defined for the unemployment compensation program. Good cause is not quitting a job to start self-employment. It is good cause to quit to take a definite job offer, even if the offer is later revoked. Generally, quitting a job for personal reasons is not good cause, unless the reason relates clearly to the ability to work rather than to personal circumstances. Quitting a job to relocate with a spouse is not good cause. Leaving work because of inability to obtain transportation, child care, housing etc. can be good cause.

Good case can be substantial change in the job (i.e., demotion or relocation to a distant work site, significant change in job functions, etc.) or unresolved problems in the workplace (hostile work environment, sexual or racial harassment).

Even if good cause exists, a claimant in Virginia generally has to address and justify the timing of the quit (i.e., why could the claimant not have continued to work while searching for a new job?). The severity of the objection to continuing the job, and demonstrated efforts to try to resolve the problems, i.e., complaint to supervisor(s), is often required to meet the claimant’s burden of proof.

Voluntary/involuntary quit cases are also complicated by two other, possibly overlapping legal issues. If an employer has substantially changed the job, but offered different work, the issue for a disqualification hearing may become whether the claimant has improperly rejected a suitable job. The requirement to accept suitable work is contained in Virginia Code § 60.2-618(3)(a); the statutory definition of suitable work is in § 60.2-618(3)(b).

An employee may have good cause to quit a job, on medical advice, if the worker cannot physically or mentally continue to perform the essential functions of the position. Typically, proof that the claimant followed medical advice is the showing needed to establish good cause. However, the medical problem may raise an eligibility issue: is the claimant available to work and capable of working? Virginia Code § 60.2-612(7)(a). The claimant does not have to be capable of continuing to perform the specific job, but must be capable of

performing vocationally relevant work available in the national economy. For example, a pregnant employee with a physically demanding job (who cannot be given lighter duties) may not be able to continue working for the same employer, but might be capable of seeking less strenuous work until later in the pregnancy.

The difference between eligibility for benefits and disqualification for benefits, in this context, is significant. Someone who loses eligibility, for a medical condition, can re-establish eligibility by recovering ability to work. In order to overcome a disqualification, a claimant must work at least 30 days for another employer and become unemployed again, without any disqualification (voluntary quit or misconduct discharge). Virginia Code § 60.2-618(2)(a).

#### B. WILLFUL MISCONDUCT

A claimant is disqualified from eligibility for benefits if he/she has been discharged “for misconduct connected with work.” Virginia Code § 60.2-618(2)(a). The Virginia Supreme Court construed the meaning of the misconduct standard in Branch v. V.E.C., 219 Va. 609 (1978). The Virginia misconduct standard is referred to by the Commission and courts as the Branch test. The misconduct must be the proximate cause of the discharge, and be connected with work.

The willful element of the misconduct standard is discussed in a Court of Appeals decision, Borbas v. V.E.C., 17 Va. App. 720 (1994). The employee must be shown to have deliberately violated a company rule or to have willfully disregarded the legitimate business interests of the employer. Involuntary, unintentional actions and ordinary negligence do not meet the willful requirement.

If the employer establishes a prima facie case of willful misconduct, then the burden of persuasion shifts to the claimant to show circumstances which adequately mitigate the claim of misconduct. A common example of mitigation is condonation by the employer. Coming to work late, repeatedly, is willful misconduct. However, if the employer takes no action while the latenesses continue over a period of time, the employer’s failure to act may be found to be condonation of the misconduct, mitigating the willfulness element.

### IV. MISCELLANEOUS SUBSTANTIVE AND PROCEDURAL ISSUES

#### A. RECOVERY OF OVERPAYMENTS

If a qualification decision is reversed, the amount of benefits paid to a claimant will be considered a recoverable overpayment. After the disqualification decision becomes final, the Employment Commission issues an overpayment notice. The notice states the claimant has a right to a hearing to review the

overpayment determination. This is not an opportunity to re-litigate whether there should have been a disqualification. The hearing is only about the calculation of the amount of the overpayment.

Generally, the Commission requests voluntary repayment of overpayments and, if that does not happen, the amount of the overpayment will be held under the employee's Social Security Number to off-set a future claim. If the overpayment was due to administrative error (without fault of the claimant), only half of the amount of the overpayment is recoverable. Virginia Code § 60.2-633(A). The Commission is authorized to reduce the overpayment claim to a civil judgment.

#### B. USE OF THE RECORD OF THE UNEMPLOYMENT COMPENSATION CLAIM

A party in an unemployment compensation hearing can bring a court reporter to transcribe the proceeding. Virginia Code § 60.2-623.1(A) but, information furnished in Commission proceedings is not a public record, and in accordance with § 60.2-623(B):

“Neither such information, nor any determination or decision rendered under the provisions of § 60.2-619, 60.2-620 or §60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title.”

Unemployment compensation claim investigations and adjudications are typically the first proceedings after termination of employment, and frequently employer's representatives make statements about the discharge or what happened without consulting corporate counsel. Even without direct use of these facts and admissions, prohibited by statute, the unemployment compensation proceeding can lead to discovery of facts in other investigations or adjudications (i.e., giving specific guidance to an E.E.O.C. investigator about which witnesses to question, or outlining a medical absence policy for a Department of Labor investigator in a Family and Medical Leave Act complaint).

The unemployment compensation adjudication, even with the confidentiality/use limitation, may be more significant to potential plaintiff's counsel, to evaluate participation in a wrongful discharge or employment discrimination claim. Typically, the unemployment discrimination is finally resolved before the limitation on filing a discrimination charge or other complaint runs.

The authority to obtain a free transcript of the tape recording of a hearing is in § 60.2-623(B) (discretionary, to prepare and furnish copies of the transcript

to the parties), and § 60.2-122 (no claimant can be charged fees of any kind by the Commission).

#### C. OTHER COMMISSION ADJUDICATIONS

In addition to the qualification issues, the Commission provides opportunity for appeals examiner hearings to review whether there is an adequate earnings record for financial eligibility, and to determine whether a qualified claimant has made an adequate search for a new job or refused an offer of suitable employment.