CHAPTER 1
VOLUNTARY QUIT

2.1.1 INTRODUCTION

DEFINITION

Pursuant to the Unemployment Insurance Law, a claimant who voluntarily separates from employment is disqualified if the separation is "without good cause." [1] The disqualification continues until the claimant has worked in subsequent employment and earned remuneration equal to at least ten times their benefit rate.

The term "voluntary separation" as used in the statute means leaving employment of one's own free will. It includes resignations other than those submitted at the employer's insistence and failure to return to work following a temporary layoff or leave of absence. A claimant discharged because of volitional acts which leave the employer no choice but to terminate the employee, pursuant to law, governmental regulations, or contract is also considered to have voluntarily separated from employment.[2] Once it is established that a claimant's separation is voluntary, the judge must determine whether the circumstances of the separation were with or without good cause.

ELEMENTS OF A VOLUNTARY QUIT

The judge must first determine whether the claimant's separation from employment was voluntary in nature. If the separation is voluntary, the judge must determine whether the reason for the claimant's separation is compelling.[3] In many circumstances, the judge must also analyze whether the claimant took reasonable steps to protect their employment prior to quitting. This analysis is required because, although a claimant may have a compelling reason to leave employment, they are required to take reasonable steps to protect their employment prior to leaving and must give the employer a reasonable opportunity to address any concerns. [4]

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[1] Labor Law § 593.1(a).

[2] *See infra* Section 2.1.14 Provoked Discharge

[3] *See, e.g.,* Appeal Board No. 591009 ("As the issue before us is the claimant's resignation from employment we need to determine whether the claimant's quit was voluntary, and if voluntary, whether she had good cause to quit").

[4] *See Matter of Torres,* 32 A.D.3d 1093 (3d Dep't 2006); *Matter of Steward,* 48 A.D.3d 873 (3d Dep't 2008); Appeal Board Nos. 553304, 541247.

2.1.2 STATUTORY GOOD CAUSE

In addition to other circumstances that may be found to constitute good cause, the statute sets forth specific situations which provide good cause to voluntarily separate from employment: (1) where circumstances arise which would have allowed the claimant to refuse the employment when first offered as provided for in Labor Law § 593.2;[5] (2) where a collective bargaining agreement or written employer plan permits an employee to elect to take a temporary layoff when there is a slowdown in work and the employer has consented to that election;[6] where the claimant separates from employment due to a compelling family reason,[7] including, but not limited to, (3) where a claimant reasonably believes that continued employment would jeopardize their safety or the safety of any member of the immediate family due to domestic violence;[8] (4) where the claimant resigns in order to provide care to an ill or disabled member of the immediate family;[9] (5) where the claimant quits to accompany a spouse to a place from which it is impractical to commute due to a change in the spouse's employment;[10] (6) the need to provide child care to the claimant's child if the claimant has made reasonable efforts to secure alternative child care.[11] However, a claimant is disqualified from receiving benefits if the separation from employment was due to the claimant's marriage.[12]

CIRCUMSTANCES THAT WOULD HAVE ALLOWED REFUSAL OF THE EMPLOYMENT

The issue of refusal is addressed more fully in Chapter 3, below. However, statutory good cause to refuse an offer of employment includes the following reasons: accepting the offered employment would interfere with a claimant's right to join or retain membership in a union or would interfere with the terms of a collective bargaining agreement; there is an industrial controversy in the establishment where the employment was offered; the offered employment is an unreasonable distance from the claimant's residence or the commute would involve an expense

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[5] Labor Law § 593.1.

[6] Labor Law § 593.1.

[7] Labor Law § 593.1(b).

[8] Labor Law § 593.1(b)(i).

[9] Labor Law § 593.1(b)(ii).

[10] Labor Law § 593.1(b)(iii), (iv).

[11] Labor Law § 593.1(b)(iv).

[12] Labor Law § 593.1(c); *see* Appeal Board No. 602032 (claimant did not have good cause to quit because she got married and moved to live with her husband, where claimant knew at the time of the marriage that her husband lived in Pennsylvania).

substantially greater than that required in the claimant's former employment; or the wages were substantially less favorable than those prevailing for similar work in the locality.[13]

DOMESTIC VIOLENCE

A claimant shall not be disqualified from receiving benefits for separation from employment due to "domestic violence, verified by reasonable and confidential documentation which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family."[14]

Domestic violence is generally defined as a pattern of coercive tactics, which can include physical, psychological, sexual, economic, and emotional abuse perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control over the victim. Domestic violence does not only encompass physical abuse.[15]

The statute contemplates that the domestic violence is "verified by reasonable and confidential documentation." This is easily accomplished if the claimant or family member has filed a police report, sought medical attention for injuries or obtained a restraining order or other court documentation. However, many instances of domestic violence go unreported and untreated. While this paperwork can provide corroboration of domestic violence, the fact that the claimant or family member may not have gone to the police, the court, or a hospital and does not have paperwork establishing victim status does not necessarily preclude a finding that the claimant quit with good cause because of domestic violence.[16]

The issue of whether the claimant took reasonable steps to protect employment prior to quitting may still need to be addressed in limited circumstances (requesting leave of absence, transfer to another locality), but a failure to take steps to preserve employment prior to quitting does not automatically disqualify a claimant from receiving benefits. In many cases, the claimant may have had no other reasonable option to protect themselves or their dependent children other than

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[13] Labor Law § 593.2.

[14] Labor Law § 593.1(b)(i).

[15] *Matter of Loney*, 287 A.D.2d 846 (3d Dep't 2001) (the claimant, who was pregnant, had good cause to resign her job and relocate because she had been the victim of her husband's "verbal and mental abuse" and suffered from poor weight gain and sleeplessness).

[16] *See* Appeal Board No. 573836 (claimant was found to have quit with good cause even though she did not contact police regarding domestic violence because she reasonably feared her boyfriend might retaliate against her for doing so); Appeal Board No. 542464A (given the boyfriend's status and that she lived and worked in a small town, the fact that the claimant did not notify her employer about the abuse, or the police, or seek an order of protection is not dispositive); Appeal Board No. 529594A (Board found that the claimant's failure to seek an order of protection prior to relocating did not preclude a finding of good cause since "such a document clearly provides no guarantee of continued safety from an individual with a proven history of violence and intimidation").

relocating out of the area because leaving a home and relocating within the area so that the claimant can continue working may not provide adequate distance from an abuser to safeguard oneself from future threats or violence.[17]

Another helpful tool for determining whether the domestic violence was severe enough to leave the victim no other option other than leaving employment is the assessment of known, statistically proven, risk/danger/lethality indicators. Absence of such indicators does not mean that the domestic violence was not severe or dangerous. However, presence of any of these indicators does show an increased risk of danger, up to and including potential death of the victim, the children, and sometimes the abuser. Presence of lethality indicators may be helpful in determining why a victim was unable to safely seek assistance from police, medical providers, or other outside services. The risk factors include, but are not limited to:

- Victim fears abuser (even in absence of other risk indicators)
- Physical violence has increased in frequency or severity over noticeable period of time (6 months, one year)
- Recent loss of abuser's employment
- Abuser has ongoing substance abuse or mental health problems
- Recent separation, or definitive steps by victim to end relationship or get safe
- Threats to kill – victim and/or children
- Access to a firearm or other weapon
- Threats to use a firearm or other weapon
- Non-fatal strangulation at any point in relationship
- Forced or coerced unwanted sexual activity
- Constant and/or violent jealousy
- Severe coercive control
- Stalking
- Victim believes abuser could kill victim and/or children
- Threats of suicide by abuser
- Child not biologically related to abuser living in home
- Physical assault while victim was pregnant
- Prior physical assaults
- Violations of orders of protection
- Threats or harm to pets
- History of violent outbursts or assaults against people other than family members

[17] *See* Appeal Board No. 544296 (the claimant's failure to request a leave of absence prior to quitting would have been futile).

- Abuser has broken through a door or window to try to get at victim

Practice Tip:

When developing the record on this matter, judges should be aware of the sensitive and personal nature of the details involved and the difficulty a claimant may have in disclosing the information. The claimant may be ashamed or afraid to divulge details, so sensitivity and patience must be exercised. Some questions that may be helpful in assessing whether the claimant or an immediate family member was a victim of domestic violence and whether they quit the job as a result of a reasonable fear for safety are as follows:

- Does / did the claimant live with the abuser?
- Has anyone ever witnessed the abuse?
- If the claimant has separated from the abuser, when did that occur?
- Did the abuser make any further attempts to abuse, harass, assault, or otherwise harm the claimant after the separation?
- Where did the assault / abuse occur? (In the home, in the workplace, some other location?)
- Did the domestic violence occur on more than one occasion? What was the most recent incident?
- Did the claimant seek medical care as a result of the domestic violence?
- Was the abuser aware of the claimant's work location?
- Did the abuser ever appear at the worksite?
- Was the employer aware of the problem?
- Was a police report filed?
- Was an Order of Protection sought? If yes, when?
- Was the Order of Protection granted? What are the provisions?
- Was there any further contact with the abuser after the Order of Protection was granted?
- Were any of the known risk/lethality indicators present?

TO PROVIDE CARE TO AN ILL OR DISABLED MEMBER OF THE IMMEDIATE FAMILY

The statute defines "illness" as a verified illness which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave (paid or otherwise).

"Disability" means a verified disability which necessitates the care of the disabled person for a period of time longer than the employer is willing to grant leave (paid or otherwise). "Disability" encompasses all types of disability, including (1) mental and physical disabilities; (2) permanent and temporary disabilities; and (3) partial and total disabilities. For a finding of good cause, there must be evidence that the care being provided by the claimant was actually necessary.[18]

The care must also be for a member of the claimant's immediate family. The claimant's immediate family includes, but is not limited to, mothers, fathers, children, spouses, domestic partners, siblings, grandparents, and step-relatives[19]. Under certain circumstances, immediate family may include others for whom the claimant assumes parental responsibility, even if not related through blood, adoption, or marriage.[20] It also includes spouses who are physically and or legally separated.[21]

A claimant is required to take reasonable steps to protect employment prior to quitting employment to care for an ill family member.[22] This generally includes requesting a leave of absence. However, requesting a leave of absence may not be necessary for a finding of good cause in all cases.[23]

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[18] *See, e.g.,* Appeal Board No. 570401 (claimant did not have good cause to quit where he was unable to produce documentation that he was required to care for his daughter or supporting his contention that his wife's condition had deteriorated to an extent requiring his presence).

[19] *See* Appeal Board 527997 (in finding the claimant's domestic partner, and the partner's mother and nephew to be immediate family the Board stated, "regardless of how the word 'family' may be construed in other contexts, we construe the term 'family' broadly for unemployment insurance purposes")

[20] *See Id.* (claimant's domestic partner's biological nephew was found to be immediate family where the claimant effectively undertook the responsibilities of parenting).

[21] See Appeal Board No. 546635("[w]e note that there is no qualification in the statute excluding spouses who are physically separated, for whatever their reasons, at the time the claimant quits employment. Therefore, we conclude that the claimant's husband living in South Carolina has remained a member of her immediate family.")

[22] *See, e.g.,* Appeal Board No. 614222 (claimant did not have good cause to quit where an unpaid leave was available to her, but she did not consider or request a leave of absence).

[23] *See, e.g.,* Appeal Board No. 583774 ("Although the claimant did not request a leave of absence, and the Board has long considered a request for a leave of absence as a factor in evaluating the overall reasonableness and sufficiency of a claimant's effort to preserve employment, there is no absolute requirement that a claimant specifically seek a leave of absence in order to establish good cause to quit.") (citing Appeal Board Nos. 551103 and 550619).

Practice Tip:

In cases where a claimant quit in order to provide care for an ill family member, the following must be determined:

- Whether such care was medically required or whether the claimant simply felt an obligation to provide such care (for example, a claimant who quits to assist an elderly parent);
- Whether the care was long-term or short-term, and in the latter instance, whether the claimant could have obtained a leave of absence; and
- Whether there was anyone else who could provide the care, other than the claimant.

The claimant can demonstrate these factors through presentation of medical documentation or credible testimony from a medical professional regarding the family member's condition. Other family members or the ill family member may also provide testimony. If it is found that it was necessary for the claimant to provide this care, an issue of availability may be present. The judge may refer the matter back to the Department of Labor for investigation and consideration of this issue.

RELOCATION DUE TO CHANGE IN SPOUSE'S / DOMESTIC PARTNER'S EMPLOYMENT

Pursuant to Labor Law § 593(1)(b)(iii), a claimant shall not be disqualified from receiving benefits for separation from employment due to the need for the individual to accompany such individual's spouse (a) to a place from which it is impractical for such individual to commute and (b) due to a change in location of the spouse's employment. Although the statute only specifically addresses relocations with a spouse, the Board has expanded this definition to include "domestic partners" [24] and to non-marital relationships in which there is co-parenting of a child.[25] The claimant must show that they and their partner maintain an emotionally and financially interdependent and committed relationship. In making this assessment, "no single factor is solely determinative, as it is the totality of the relationship which should control."[26] Among the factors to be considered are co-ownership of property, the existence of joint bank and credit accounts, registration as domestic

[24] *See* Appeal Board Nos. 539574 and 527997; *but see* Appeal Board No. 568865 (claimant did not have good cause where the claimant had not lived together before the claimant's fiancé moved to Florida, and the claimant quit to follow them).

[25] "For purposes of the Unemployment Insurance Law, we presume, in the absence of evidence to the contrary, that a claimant who accompanies a person with whom the claimant has a child in common has a compelling family reason for doing so, provided that the co-parent's relocation was supported by good cause." Appeal Board Case 559514 (citing Appeal Board Nos. 540201, 533825, 547610, and 532703).

[26] *See* Appeal Board No. 513233A.

partners, and the partners' status as beneficiaries on each other's insurance policy and will. [27] The record must establish that the relationship existed prior to the move.

Additionally, good cause for a voluntary quit may be found in other circumstances where a claimant quits to relocate with a spouse or domestic partner so long as the spouse's or domestic partner's reason for relocating was compelling in nature. [28]

However, where there has been a delay in the claimant following the spouse, an analysis must be undertaken to determine whether the delay was reasonable. The judge must determine whether the claimant formulated the intent to join the spouse at the time the spouse moved[29] and whether any delay in joining the spouse was with good cause.[30] The Court has approved of multiple reasons supporting a reasonable delay in joining a spouse, including the need to sell a home, to maintain the family income and medical insurance benefits, and allowing a child to complete a school year.[31]

LACK OF CHILDCARE

Under Labor Law § 593(1)(b)(iv), a claimant's need to provide childcare to their child is good cause to quit if the claimant has made reasonable efforts to secure alternative childcare.[32] The need can arise at any time and does not need to be the result of the employer's action.[33] The

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[27] Appeal Board No. 513233A; *see also* Appeal Board No. 564012 (pooling of economic resources and thus financial interdependence found where claimant and partner lived together for 9 years in residences in partner's name, some utility bills were in claimant's name, they sometimes had a joint bank account and paid common bills, claimant's partner was on claimant's insurance for a period of time even though they did not have a joint bank account at the time of the relocation).

[28] *See, e.g.,* Appeal Board No. 578351 ("We have held that a claimant… may derive good cause to quit a job to follow a spouse from the spouse's good cause to leave the area in order to preserve the relationship and the family unit.") (citing Appeal Board Nos. 560340, 550238, 545537, and 537318).

[29] *See Matter of DiNapoli,* 249 A.D.2d 665 (3d Dep't 1998); Appeal Board No. 539574 (Board held claimant did not have good cause to quit because even if Board found claimant and boyfriend to be domestic partners, claimant did not intend to relocate with boyfriend at the time he moved but formed intention to do so approximately 6 to 9 months later).

[30] *See* Appeal Board No. 578351 (citing Appeal Board Nos. 550238 and 545537).

[31] *See* Appeal Board No. 612416 (finding claimant's nine-month delay to find housing and to build a financial buffer to help maintain the family income was reasonable); *but see Matter of Dawson,* 30 A.D.3d 943 (3d Dep't 2006) (finding unreasonable a delay of one year to follow spouse who had relocated so that she could increase her years of service and avoid a reduction of her pension benefits).

[32] Due to an apparent typographical error, there are two subsections labeled Labor Law § 593(1)(b)(iv) in the statute.

[33] *See* Appeal Board No. 623539 (claimant had good cause to quit where the claimant switched to per diem work because her childcare provider was not always available to care for son during her shift); Appeal Board No. 544807 (claimant had good cause to quit where she needed to report to work before 7:00 a.m. but was not able to drop off her children before 8:00 a.m. because the childcare provider changed her schedule).

claimant must show that they took reasonable efforts to secure other childcare, including family members or childcare services.[34] The claimant may decline childcare under compelling circumstances.[35] In addition, the claimant must show that they either took adequate steps to preserve their employment, such as requesting a leave, a change in hours, or some other accommodation from the employer, or that such a request would be futile.[36]

2.1.3 VOLUNTARY VS. INVOLUNTARY SEPARATION

The term "voluntary separation" as used in the statute means leaving employment of one's own free will. It includes resignations other than those submitted at the employer's insistence. A claimant discharged because of a volitional act which left the employer no other choice but to terminate the claimant is also considered a voluntary separation.[37] In certain separation cases, it may not be clear whether the claimant's separation was truly voluntary in nature. This section addresses some of the more common scenarios.

ACCELERATION OF THE NOTICE PERIOD

Where a claimant expresses a firm desire to end employment and offers to work for an additional period of time, the employer's decision not to accept the offer of additional time does not necessarily convert the separation from a voluntary quit to an involuntary separation. For

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[34] *See* Appeal Board No. 615849 (claimant had good cause where the claimant's child's preschool closed, the claimant's family living with her were not available to care for her children, and the claimant searched for and was unable to find a babysitter to come to her home); Appeal Board No. 579286 (claimant's ex-husband, who was watching her son, was no longer available to care for their son and the employer provided childcare did not start before her early morning shift); *but see* Appeal Board No. 578250 (claimant did not have good cause to quit where she believed that she could not afford childcare but did not take any steps to seek out or investigate alternate childcare arrangements).

[35] *See* Appeal Board No. 552778 (claimant had good cause to quit where she would have had to spend as much as or more than she actually earned from her job to secure a childcare provider); Appeal Board No. 586723 (although the claimant could have brought her child to her daycare provider, the child required medication and the daycare provider did not administer medication).

[36] *See* Appeal Board No. 615849 (claimant had good cause to quit where the claimant notified the employer of her childcare issues and requested a leave of absence); Appeal Board No. 552832 (claimant had good cause to quit where he requested the employer change his hours or grant an extension to his leave of absence, and the employer denied his requests); Appeal Board No. 579286 (claimant had good cause despite not requesting a change of schedule because the employer did not have other hours available, and the clamant is not required to take futile steps to avoid disqualification); Appeal Board No. 567301 (claimant did not have good cause to quit where she did not discuss her childcare issues with her employer before resigning); Appeal Board No. 585126 (claimant did not have good cause to quit where she knew childcare would be available and did not ask for an extension of her leave or adjustment to her start time).

[37] *See* Provoked Discharge, below.

example, in *Matter of Eames*,[38] the claimant quit with two weeks' notice after being criticized by the employer. The employer declined the notice and accepted the claimant's resignation immediately. The Court held "[t]he fact that he rejected her offer of two weeks' notice and accepted her resignation immediately does not convert the resignation into a discharge."[39]

To the extent that *Matter of Senator* found an acceleration of the notice period, *Eames* and other related cases[40] have been decided subsequently and the trend in the Court's decisions suggests that the holding in *Matter of Senator* should be construed narrowly.

PER DIEM EMPLOYMENT

Per diem employees, by their very nature, only work on an as needed basis and as scheduled by the employer. When each individual per diem assignment is completed, it is as if the employment relationship ends for the purposes of unemployment insurance.[41] This is true whether the claimant is working through a temporary staffing agency or as a per diem employee for a specific employer. If a claimant is not offered a new assignment before the old assignment ends, the separation from employment is not considered voluntary on the claimant's part, even where the employer later offers the claimant a new assignment that is turned down by the claimant.[42] There is no employment relationship between the employer and claimant until the claimant receives and accepts a new assignment.[43]

Further, the claimant's failure to maintain contact with an employment agency or employer after the end of a per diem assignment does not constitute a quit.[44] However, if a per diem employee was offered a new assignment before the old assignment ended and declined the new assignment, the separation is considered to be voluntary and it must be determined whether the quit was with good cause.

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[38] *Matter of Eames,* 10 A.D.3d 830 (3d Dep't 2004); *see also* Appeal Board No. 626059 (claimant's resignation was not converted to a discharge when employer declined claimant's offer to work an additional two weeks); Appeal Board No. 629797 ("To the extent our prior decisions, including Appeal Board No. 609953, conflict with *Eames,* we will no longer follow them").

[39] *Id.*; cf *Matter of Senator*, 76 A.D.2d 652 (3d Dep't 1980) (The Court found that "[t]he employment might well have continued indefinitely except for the precipitous action of the employer in immediately discharging the claimant").

[40] *Matter of Pickard*, 296 AD2d 696 (3d Dep't 2002); *Matter of Chevres*, 286 AD2d 799 (3d Dept 2001).

[41] *See, e.g.,* Appeal Board Nos. 619974, 608687.

[42] A subsequent refusal of an offer of employment is a different issue (*see* Refusal, below) and is irrelevant to the voluntary nature of the claimant's separation after the end of a per diem assignment. *See, e.g.,* Appeal Board No. 558615.

[43] *See* Appeal Board No. 625273, 553274.

[44] *See* Appeal Board Case Nos. 607126, 578380, 547174.

QUIT IN ANTICIPATION OF DISCHARGE / QUIT IN LIEU OF DISCHARGE

A claimant quits in anticipation of discharge when the claimant assumes or even reasonably believes that they will be fired at some point in the future, so long as there is continuing work for the claimant at the time of separation. A quit is "in anticipation of discharge" if the facts do not establish that the claimant's discharge was inevitable, imminent or unavoidable. This is considered to be a quit without good cause.

A resignation because of a negative performance evaluation or being told that performance must improve to avoid termination is a quit in anticipation of discharge and does not provide good cause to leave employment. [45] Additionally, when a claimant quits a job after a reprimand based on a belief that they will be discharged in the future, the quit is in anticipation of discharge.[46] Similarly, where a claimant quits prior to having a reprimand or disciplinary charges proffered against them based on a belief that the reprimand or charges will ultimately lead to discharge, the quit is in anticipation of discharge.[47]

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[45] *See* Appeal Board No. 547066 (Board found quit in anticipation of discharge where claimant resigned after receiving an unsatisfactory performance evaluation and being placed on performance improvement plan); Appeal Board No. 550091 (claimant was found to have resigned in anticipation of discharge where she quit her job after being informed that her performance was unsatisfactory and given thirty days to increase her performance); *Matter of Kanter,* 138 A.D.3d 1283 (3d Dep't 2016) (claimant found to have resigned in anticipation of discharge where she was given 30 days to improve performance and believed her firing was inevitable). *See also, Matter of Bradley,* 190 A.D.2d 949 (3d Dep't 1993); *Matter of Prusch,* 259 A.D.2d 877 (3d Dep't 1999), (*aff'g* Appeal Board No. 478561).

[46] *See* Appeal Board No. 551573 (Board found quit in anticipation of discharge where claimant resigned after receiving warning and being told lack of significant improvement would result in further discipline); Appeal Board No. 552897 (The Board, holding that the claimant resigned in anticipation of discharge, found it significant that the claimant was not told by the employer that she was being discharged or that her discharge was imminent, nor was she told that the two pending infractions would cause the employer to discharge her. By resigning, the claimant aborted the disciplinary process before a final decision could be made about her employment. Under those circumstances, the claimant voluntarily quit her job without good cause).

[47] *See* Appeal Board No. 583450 (claimant found to have quit in anticipation of discharge because the employer had not yet begun its multi-step disciplinary process. "As the claimant was not facing imminent discharge, his belief that he would be discharged at a future time as a result of an inability to get along with his supervisor constitutes a quit in anticipation of discharge and is therefore disqualifying") (citing *Matter of Lokensy*, 19 A.D.3d 973 (3d Dep't 2005) and *Matter of Barney*, 196 A.D.2d 924 (3d Dep't 1993)); Appeal Board No. 575552 (claimant found to have quit in anticipation of discharge as the employer had not yet concluded their investigation into the claimant's alleged actions. "As the claimant initiated his separation from employment while the investigation was still ongoing, the claimant's separation from employment was not …a…separation in lieu of discharge").

A claimant who quits in anticipation of discharge because of the belief that the resignation would be regarded more favorably on an employment record does not have good cause to leave continuing employment under the Unemployment Insurance Law.[48]

Where, on the other hand, a claimant is given the option to resign instead of being discharged, or where the claimant has received notice of discipline recommending dismissal from employment, or when disciplinary proceedings have begun, and resigns rather than be terminated, pursue a grievance or participate in the disciplinary proceeding, the claimant is deemed to have quit in lieu of discharge. The claimant's discharge must be both imminent and inevitable.[49] A quit in lieu of discharge is not considered a voluntary leaving of employment.[50]

The Board, the Appellate Division and the Court of Appeals have long held that a loss of employment under such circumstances shall be regarded as the claimant's acceptance of the penalty of dismissal in order to protect their employment record.[51] A claimant who resigns in lieu of discharge is entitled to benefits provided that actions leading to the impending discharge do not constitute misconduct.[52]

Practice Tip

If the file only contains a determination that the claimant voluntarily quit their job and the judge finds that the credible evidence establishes the claimant quit in lieu of discharge, the judge should only rule on the voluntarily or involuntary nature of the separation. The matter of whether the claimant's actions constitute misconduct should be referred back to the Department of Labor for investigation and determination. *See* Appeal Board No. 586929.

JOB ABANDONMENT

A claimant who does not notify an employer that they are quitting but stops reporting to work and fails to remain in contact with an employer may be deemed to quit by abandoning their job. Job

[48] *See* Appeal Board No. 586945 (claimant who quit to preserve her employment record during the investigation and prior to the employer making a decision regarding the claimant's discharge quit in anticipation of discharge and for non-compelling reasons); Appeal Board No. 547066 (citing *Matter of Bradley, supra* and *Matter of Prusch, supra*).

[49] *See* Appeal Board No. 624154; 539584; *Matter of Mastro,* 52 A.D.2d 708 (3d Dep't 1976) (claimant did not have good cause to quit after she was told she would be discharged in 18 days).

[50] *See, e.g.,* Appeal Board No. 568542.

[51] *Matter of Jimenez,* 20 A.D.3d 843 (3d Dep't 2005); *Matter of Straw,* 32 A.D.3d 1098 (3d Dep't 2006); *Matter of Riley,* 51 A.D.3d 1307 (3d Dep't 2008), *Matter of Bateman,* 147 A.D.2d 738 (3d Dep't 1989).

[52] *Matter of Jimenez*, *supra*; *Matter of LaRocca*, 59 N.Y.2d 683 (1983); *Matter of Bateman*, *supra*; Appeal Board No. 558506.

abandonment is a voluntary separation from employment.[53] The evidence must establish that the claimant intended to separate from the employer.[54] Where a claimant has already voluntarily quit by abandoning their job, an employer's formal notice of termination does not change a claimant's voluntary separation into an involuntary separation.[55] However, the claimant's act of failing to report to work without prior notice may also be considered misconduct depending on the circumstances.[56]

FILING FOR BENEFITS WHILE ON A LEAVE OF ABSENCE

While voluntary separation cases often involve claimants that quit a position with an employer, a claimant may also be unemployed under the Unemployment Law while still working for an employer. Pursuant to Labor Law §§ 522, 523, and 591, a claimant's eligibility for benefits depends on the amount of their work and not whether they remain formally connected to an employer. As a result, a claimant may be eligible for unemployment benefits while on leave from an employer or even while working part-time for an employer.

While the Board has held that filing for unemployment insurance while on a leave of absence is not a voluntary leaving of employment on its own, it is a factor to be considered in determining whether the claimant voluntarily left employment.[57] Where a claimant chooses not to return to work, either by expressly stating they would not return or by taking no action to return, the claimant may be deemed to have voluntarily separated from the employer.[58] In such cases, it is then

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[53] *See* Appeal Board No. 608681 (claimant's absence of nearly a week without notifying the employer is job abandonment and a voluntary separation); Appeal Board No. 547392 (claimant voluntarily separated from the employer where she walked off the job during her shift and never returned); *but see* Appeal Board No. 542170 (claimant did not voluntary separate where the claimant made several attempts to contact the employer after she failed to report to a schedule shift).

[54] *See* Appeal Board No. 585096 (claimant voluntarily separated where she was absent without notice for two shifts in a row and told the Department of Labor representative that she left because the employer treated its employees badly); Appeal Board No. 586787 (claimant did not voluntarily separate where he did not return to work after being medically cleared to return from leave because the claimant did not have a chance to discuss the details of his return with the employer).

[55] *See* Appeal Board No. 591760 (claimant voluntarily separated where she acted first to sever the employment relationship by walking off the job and abandoning her shift); Appeal Board No. 584865 (employer's subsequent formal notice of termination was an administrative act where the claimant had already effectuated her voluntary separation by job abandonment).

[56] *See infra* Chapter 2.2.2 for guidance on when time attendance issues constitute misconduct.

[57] *See Matter of Wilner*, 78 A.D.2d 563 (3d Dep't 1980); Appeal Board No. 612959.; Appeal Board No. 627569

[58] *See* Appeal Board No. 615700 (claimant voluntarily separated where the employer placed the claimant on unpaid leave after the claimant declined to return to work in the office and asked to be furloughed); Appeal Board No. 612959 (claimant voluntarily separated by not returning after her leave or requesting an extension of her leave from the employer).

necessary to determine whether the claimant had good cause to stop working for the employer. However, where the evidence shows the claimant attempted to return to work and was prevented from doing so, or otherwise intends to return to work for the employer after the leave, the claimant may be considered not to have voluntarily separated from their employment.[59] The Board has also considered other factors such as whether the claimant had a previously agreed upon return date and whether the claimant continued communicating with the employer during the leave to determine whether the claimant voluntarily separated while on leave.[60] Even where a claimant is not disqualified for voluntarily separating from employment without good cause, they may still be ineligible for benefits if they are not available or capable of employment.[61]

2.1.4 CHANGE IN THE TERMS AND CONDITIONS OF EMPLOYMENT

"Terms and Conditions" of employment are work items an employer and employee agree upon for a job, including an employee's job responsibilities, workdays, hours, breaks, dress code, vacation and sick days, pay, benefits, etc.

While general dissatisfaction with wages, hours and/or working environment does not provide good cause for voluntarily leaving employment,[62] it is well-settled that when the employer unilaterally makes a substantial change in the terms and conditions of employment, it may provide the claimant with good cause to leave employment.[63] This is true even where the employer may

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[59] *See* Appeal Board No. 583894 (claimant did not voluntarily separate from the employer where the employer did not allow the claimant to return from her medical leave until she provided additional documentation); Appeal Board No. 613426 (claimant did not voluntarily separate from the employer where there was no evidence that the claimant intended to quit and returned to work after his leave).

[60] *See* Appeal Board No. 582739 (claimant's decision to take time for an indefinite period, starting immediately, with no specific return to work date, and without pay was a voluntary separation from employment); Appeal Board No. 584776 (claimant did not voluntarily separate where the claimant remained in communication with the employer about her leave).

[61] *See* Chapter 5 for additional information about ineligibility based on unavailability and capability for employment.

[62] *Matter of Scoville*, 49 A.D.3d 1130 (3d Dep't 2008); Appeal Board No. 558196.

[63] *See Matter of Lavecchia,* 265 A.D.2d 724 (3d Dep't 1999); *Matter of Knoblauch,* 239 A.D.2d 761 (3d Dep't 1997); Appeal Board No. 545213 (citing Appeal Board Nos. 498005, 497378 and 494708); *but see Matter of Rowe*, 258 A.D.2d 803 (3d Dep't 1999).

have had a legitimate business reason for making the change[64] or when the changes were intended to be disciplinary in nature.[65]

Additionally, pursuant to Labor Law § 593(1)(a), if circumstances develop in the course employment that would have justified the claimant in refusing such employment in the first instance, the claimant may have good cause to quit.

In order to find that a claimant had good cause to quit based on a unilateral change in the terms and conditions of employment, the record must establish (1) what, if anything, the claimant was promised at hire regarding compensation, duties, etc.; (2) that there was a unilateral change in a term or condition; (3) that the change was substantial; and (4) that the claimant afforded the employer an opportunity to address their concerns prior to leaving employment.

Even if there has been a substantial change in the terms and conditions of employment, if the claimant continues working without complaint for a substantial period of time (two or three months at least), then the claimant has accepted the new terms and conditions of employment. To voluntarily quit after this length of time is without good cause if based upon the change in the terms or conditions.[66]

HOURS OF WORK

Generally, dissatisfaction with the claimant's schedule, number of hours (reasonably required by the employer's business), or work assignment is not good cause to leave employment.[67] However, where the employer unilaterally reduces a claimant's hours resulting in a significant pay

[64] *See* Appeal Board No. 575755 (the employer's contention that the employer had legitimate business reasons for imposing these new terms was immaterial) (citing Appeal Board Case No. 545213).

[65] *See* Appeal Board No. 583362 (In finding the claimant quit with good cause, the Board rejected employer's argument that claimant's misconduct caused the change in work hours as claimant was not discharged and therefore issue of misconduct not properly before the Board); Appeal Board No. 574909 (the claimant quit his job due to the employer's unilateral reduction in the claimant's working hours due to claimant's behavior, the employer's argument that the claimant's misconduct should be addressed was not at issue as the employer did not discharge the claimant).

[66] *See* Appeal Board No. 607953; *but see,* Appeal Board No. 554821 (Although claimant worked reduced hours for six weeks she did not accept the change in her terms of employment because she continually asked manager to increase her hours).

[67] *Matter of Orlik,* 257 A.D.2d 837 (3d Dep't 1999); *Matter of Borlang,* 254 A.D.2d 632 (3d Dep't 1998); *Matter of Biot,* 249 A.D.2d 603 (3d Dep't 1998); *Matter of Koh,* 247 A.D.2d 745 (3d Dep't 1998); *Matter of Guida,* 238 A.D.2d 643 (3d Dep't 1997).

decrease, the claimant may have good cause to quit.[68] The same is true when the employer unilaterally increases a claimant's hours.[69]

An employer's decision to change a claimant's shift may also give a claimant good cause to quit if the claimant has been working a particular shift for a significant amount of time and has a compelling reason for needing the shift to remain the same.[70] A change in schedule / shift is not good cause to quit a job if the particular shift was not a term of employment and the claimant's reason for not wanting to work the other shift is personal and not compelling.[71]

COMPENSATION

A substantial decrease in compensation will provide good cause to voluntarily quit employment.[72] A permanent decrease in compensation of 10% or more has been found to be substantial.[73] A change in pay structure from a salaried position to commission-only position may constitute a substantial change in the terms and conditions of employment, giving a claimant good cause to

[68] *See* Appeal Board No. 567256 (reduction in pay of over 10% constituted a substantial change in the terms and conditions of employment); Appeal Board No. 548800 (10% reduction in hours equaling a 10% reduction in pay was considered good cause to quit); Appeal Board No. 583362 (change from a full time to a per diem employee, assigned to 14 hours a week, constituted a substantial change that caused hardship to the claimant, giving the claimant good cause to quit).

[69] *See* Appeal Board No. 555047 (claimant had good cause to quit where employer unilaterally changed claimant's working hours from part time to full time).

[70] *See* Appeal Board No. 544774 (employer's unilateral change of claimant's shift deemed to be substantial, giving claimant good cause to quit, where change created lack of transportation and child care issues for claimant); Appeal Board Nos. 545253, 559286 (change in shift deemed to be substantial when it resulted in lack of transportation for claimant to get to work); Appeal Board No. 567771A (change in shift deemed to be substantial when the claimant had been working a different shift for four and a half years and the new shift had an adverse effect on an existing medical condition).

[71] *See, e.g.,* Appeal Board No. 557918 (Employer switched claimant to day shift. Claimant refused to work shift because she did not like some other employees on that shift and working days could potentially interfere with her children's appointments for which she would have been given time off by the employer. Board held this was a quit without good cause).

[72] *Matter of Knoblauch*, 239 A.D.2d 761 (3d Dep't 1997); Appeal Board No. 548800.

[73] *See* Appeal Board No. 548800 (claimant had good cause to quit when the employer unilaterally reduced her hours by 10%, resulting in a 10% reduction in pay); Appeal Board No. 549878 (claimant had good cause to quit where employer unilaterally reduced claimant's compensation by 25%); Appeal Board No. 552098 (demotion resulting in reduction in salary of at least 10% and loss of paid vacation benefits was substantial change, giving claimant good cause to quit).

quit.[74] However, if the reduction in pay is temporary and/or less than 10% it may not constitute good cause to quit.[75]

COMMUTE / WORK LOCATION

When an employer relocates or unilaterally changes the claimant's work location, any resulting substantial increase in commuting time or expense may provide good cause for the claimant to quit.[76] Pursuant to Labor Law § 593 (1) (a), if circumstances arise during the claimant's employment that would have justified refusing the employment in the first place, the claimant has good cause to quit. Pursuant to Labor Law § 593 (2) (c), a claimant would have good cause to refuse employment if the employment is at an unreasonable distance from their residence or in circumstances where travel to and from the place of employment involves expenses substantially greater than that required in their former employment unless the expense is provided for by the employer. Generally, commuting time of one hour by private transportation[77] or one and one-half hours by public transportation[78] is considered reasonable.

DUTIES

When an employer makes a unilateral and substantial change in a claimant's duties, the claimant may have good cause to quit. In circumstances where the new duties are similar but in addition to the old duties, a claimant may have good cause to quit if the additional duties result in the claimant having to work significant additional hours.[79] Where the job duties are different than what

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[74] *See, e.g.,* Appeal Board No. 579424 (reasonable for claimant to believe that employer was going to change pay structure to commission only on specific date as employer had threatened when claimant had been on straight salary that had been previously reduced by 27% due to poor performance).

[75] *See, e.g.,* Appeal Board No. 550124 (claimant did not have good cause to quit when employer unilaterally reduced all employees' salaries by approximately 9.23% for a six-month period, or approximately 4.6% of their annual salaries, in order to avoid layoffs. The Board stated "in considering whether the change was substantial, we find it significant that the change was temporary for a period of only six months, was less than ten percent during the period of reduction, and was less than five percent when considered on an annual basis"); Appeal Board No. 557918 ("A temporary change in salary does not constitute a substantial change in the terms and conditions of the claimant's employment.").

[76] *See* Appeal Board No. 557978 (unilateral change in claimant's work location resulting in an increase in commuting costs totaling 25% of the claimant's weekly gross earnings was compelling reason to voluntarily leave employment).

[77] *See, e.g.,* Appeal Board No. 610516.

[78] *See, e.g.,* Appeal Board No. 592874.

[79] *See, e.g.,* Appeal Board No. 550126 (claimant had good cause to quit where he was assigned significantly more duties after co-worker was discharged which required him to work beyond his normal hours to complete); *but see* Appeal Board No. 609529 ("[a]n employee's decision to resign rather than to accept a job transfer involving comparable work and equal pay has been held not to constitute good cause for leaving one's employment" (internal quotation marks and citation omitted)); Appeal Board No. 550002 (change in job duties from data analysis to computer programming did not give claimant good cause to quit because the new duties were similar to the old duties).

the claimant had been used to performing, an analysis must be undertaken to determine whether the change in the duties was significant. It has been held to be a significant change in duties where individuals hired for management positions are required to perform heavy labor. [80] It has also been held that a change to duties requiring far less skill than the claimant was previously performing may constitute good cause to quit.[81] Additionally, if an employer changes a claimant's duties and the claimant is unable to perform those duties for medical reasons, there is good cause to quit.[82]

BENEFITS

The failure of an employer to provide health insurance or other benefits does not constitute good cause to leave employment where it is not a term and condition of employment.[83] However, if the insurance and/or benefits have been provided to the claimant and the employer unilaterally and substantially changes the terms of those benefits, there may be good cause to quit.[84]

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[80] *See* Appeal Board No. 562268 (Board found employer significantly changed claimant's duties giving him good cause to quit where he was hired for a superintendent job that would entail only light maintenance or repair and communicating with residents, and employer directed him to undertake a significant repair job on an empty apartment, for no additional pay); Appeal Board No. 554895A (Board found significant change in duties where claimant, who was hired as a warehouse manager, was assigned heavy labor duties such as unloading trucks and containers and cleaning the warehouse).

[81] *See* Appeal Board No. 578805 ("We have held that where an employer changes the responsibilities of an employee to a lower level of skill which does not require the advanced education, training and experience the employee has, this constitutes a unilateral change in the terms and conditions of employment, even if the hours and salary remain the same.") (citing Appeal Board No. 554844 (finding claimant had good cause to quit when employer made unilateral and substantial change to claimant's job by assigning her duties of a Veterinary Associate when she had previously been a Veterinary Technician)).

[82] *See* Appeal Board No. 545467 (claimant had good cause to quit her job when, after returning from a medical leave, the employer changed the claimant's job from one where she primarily sat at a workstation to one in which she was required to perform physical labor); Appeal Board No. 576742 (claimant had good cause to quit where employer unilaterally changed duties and claimant suffered from a medical condition preventing him from performing his new job duties).

[83] *Matter of Church,* 186 A.D.2d 853 (3d Dep't 1992).

[84] *See* Appeal Board No. 546637A (Board found the claimant had good cause to quit based on the employer's unilateral decision to discontinue carrying health insurance for its employees as it significantly changed the terms and conditions of the claimant's employment); Appeal Board No. 542245 (claimant had good cause to quit where she was employed for two days, discovered job benefits that were less than the benefits described to her at her interview, and that the employer's president refused to change her benefits package back to what the claimant was originally told it was).

2.1.5 EMPLOYMENT LAW VIOLATIONS

It is well-settled that a condition of work forced upon employees by their employer, which is in violation of the Labor Law, constitutes good cause to leave a job for purposes of unemployment insurance.[85] However, for good cause to be found, the claimant's reason for quitting must be related to the violation of the Labor Law. A claimant who quits for reasons unrelated to a violation of the Labor Law and then realizes after the fact that the employer was violating the law, cannot rely upon that violation to establish good cause.[86] The following sections detail some of the more common violations of Labor Laws that may need to be evaluated during unemployment insurance hearings. In any case where there is an allegation of an employment law violation (whether the Labor Law or some other law which provides protection for employees), the law at issue should be researched prior to the hearing in order to be familiar with the provisions and to identify any recent amendments to the law.

MINIMUM WAGE

A claimant who quits a job because the employer violated minimum wage laws has established a compelling reason for leaving employment. Both state and federal law require a minimum wage be paid to workers. The federal law regarding minimum wage is the Fair Labor Standards Act (FLSA).[87] It provides for the minimum wage to be paid to employees engaged in commerce or the production of goods for commerce, as well as in certain other areas such as seamen, agricultural employees, and domestic workers.[88]

The New York State Minimum Wage Act requires that all employees in New York State receive at least the minimum wage rate set by the state.[89] The relevant definition of "employee" includes "any individual employed or permitted to work by an employer in any occupation" and/or "any individual employed or permitted to work in any non-teaching capacity by a school district or board of cooperative educations services," with specified exceptions.[90] The term employee, for minimum wage purposes, excludes a number of workers, including babysitters; those in a bona fide executive, administrative or professional capacity; outside salespeople; taxicab drivers; various volunteers or individuals working in religious; charitable or educational institutions; staff counselors in children's camps; students working in or for a college or university fraternity, sorority

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[85] *See Matter of La France,* 173 A.D.2d 989 (3d Dep't 1991) (holding claimant had good cause to quit because employer violated Labor Law §193).

[86] *See* Appeal Board No. 614097 (citing Appeal Board Nos. 611329 and 588799).

[87] 29 USC §§ 201-209.

[88] 29 USC § 206.

[89] *See* NYS Labor Law, Article 19 (§§ 650-665).

[90] Labor Law §651(5).

or student association; workers in a federal, state or municipal government or political subdivision thereof; volunteers at a recreational or amusement event run by a business that operates such events so long as the event lasts no longer than 8 consecutive days and no more than one event is held per year. New York State also has a minimum wage order for the restaurant industry[91] which provides that service workers and food service workers (defined as employees who customarily earns tips) be paid a rate which, when added to the tip allowance, will equal the minimum wage. The order requires employers ensure that the wage paid to the worker plus tips received equals at least the minimum wage. If a claimant quits employment because of an employer's violation of those provisions, the claimant does so with good cause.[92] Employees who work a split shift, or whose spread of hours[93] exceeds 10 hours are entitled to receive an additional one hour's pay at the minimum hourly wage rate.[94]

The minimum wage rates in New York State are scheduled to increase each year on December 31st and are not the same throughout the state.[95] Employers are required to post a minimum wage information poster in the workplace. Regulations known as "Wage Orders" set certain industry specific requirements. The rates contained in the Wage Orders could differ from the general Minimum Wage rate.

New York State has also adopted certain regulations governing the wages for food service workers. The NYS minimum wage order for the restaurant industry[96] provides that service workers and food service workers—who are defined as employees who customarily earn tips—will be paid a rate which, when added to the tip allowance, will equal the minimum wage. If the worker's tips are less than the amount set forth in the regulation, the employer must increase the wage paid so that the worker will still receive the minimum wage.

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[91] 12 NYCRR §146, *et seq*.

[92] *See* Appeal Board No. 590476 (claimant had good cause to quit his job where in January 2016, the employer was paying $5.00 per hour although the minimum cash wage for tipped workers in the hospitality industry increased $7.50 per hour as of December 31, 2015 if they earned at least 1.35 per hour in tips).

[93] The "spread of hours" is defined as the interval between the beginning of an employee's workday and the end of the workday, including any meal or other breaks (12 NYCRR § 142-2.18).

[94] 12 NYCRR § 142-2.4.

[95] For information on the current minimum wage and scheduled increases in New York State please visit: https://dol.ny.gov/minimum-wage-0 (site last visited on July 27, 2023).

[96] 12 NYCRR § 137

OVERTIME

A claimant may also have good cause to quit their job if the employer violates overtime pay laws.[97] The FLSA provides that non-residential employees covered by the act shall not work more than 40 hours in a workweek unless that employee receives compensation at a rate at least one and one-half times the employee's regular rate.[98] Residential employees become entitled to overtime after 44 hours of work in a workweek. Some occupations are exempt from overtime under the federal FLSA but are still entitled to overtime under the New York State Labor Law. [99] While these occupations must be paid overtime, New York State Labor Law requires an overtime rate of 1½ times the state minimum wage for their overtime hours, regardless of the amount of their regular rate of pay.

The general overtime provisions of the FLSA do not apply to all employees. There are special provisions detailing overtime and hours of work requirements for: employees who are part of a collective bargaining agreement providing for different compensation in very limited situations,[100] employees of independently owned and controlled local gas stations,[101] employment which

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[97] *See* Appeal Board No. 570771 (claimant had good cause to quit where an analysis of her actual job duties revealed that she was entitled to be paid overtime pay for any hours that she worked beyond forty hours per week because the record failed to establish that she made any independent decisions with regard to matter of significance to the employer's general or managerial operations (citing 29 CFR 541.200, *et seq*)); Appeal Board No. 553638 (claimant had good cause to quit where the employer failed to pay the claimant overtime and the record did not establish that the claimant was an exempt "driver" as defined by federal Motor Carrier Act); Appeal Board No. 575403 (claimant, who worked in the accounting field, had good cause to quit where employer failed to pay overtime and claimant's academic background and job duties did not fall under the learned professional employee's exemption of the FLSA); Appeal Board No. 545382 (claimant had good cause to quit where job duties established she was a general office worker without decision making ability regarding general operations, managerial issues or procedures and entitled to overtime as she did not fall within an exemption to the FLSA); *but see Matter of Conners*, 9 A.D.3d 703 (3d Dep't 2004); *lv denied*, 3 N.Y.3d 609 (2004); *cert denied*, 544 US 1034 (2005) (claimant did not have good cause to quit where his job duties established he fell under the administrative professional exemption to the FLSA and was not entitled to overtime).

[98] 29 USC § 207 (a).

[99] Examples include certain employees covered under the Amusement and Recreational Exemption; the Computer Employee exemption; certain employees covered under the federal Motor Carrier Act and certain employees exempt under the federal Railway Labor Act.

[100] *See* 29 USC § 207(b)(1) and (2).

[101] 29 USC §207(b)(3).

requires irregular hours of work,[102] piece work,[103], employment in hospitals and mental health institutions,[104] employees in law enforcement or fire protection; and employees in retail.[105]

There are also different groups of employees who are generally wholly exempt from the overtime provisions of the FLSA.[106] The most common exemptions from the overtime provisions are commonly known as the "white collar" exemptions and include those employees who work in a bona fide executive, administrative, or professional capacity.[107]

To be exempt from overtime provisions, FLSA regulations generally require employees to satisfy three criteria:[108]

1. The employee must be paid on a salary basis, not subject to reduction based on quality or quantity of work (the "salary basis test");
2. The employee's salary must meet a minimum salary level (the "salary level test")[109]; and
3. The employee's primary job duties must involve the kind of work associated with exempt executive, administrative or professional employees (the "standard duties test").

An executive employee meets the standard duties test if their primary duty is the management of an enterprise, they regularly direct the work of two or more other employees, and have either the authority to hire or fire or their recommendations regarding hiring, discharge, promotion, etc. are given particular weight.[110]

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[102] 29 USC §207(f).

[103] 29 USC §207(g).

[104] 207 USC §207(j).

[105] 29 USC § 207 (i).

[106] 29 USC § 213 (employees working in a bona fide executive, administrative or professional capacity; employees of amusement parks and summer camps, operating for no more than seven months of the year; fishermen and employees in processing and canning factories; agricultural employees; employees of local newspapers with a circulation of less than 4,000; systems analysts; babysitters; over the road and local truck drivers; railway employees; airline employees; announcers and news editors employed by small, local radio or television stations; individuals engages in the selling of cars, trucks, trailers, boats, aircraft, or farm equipment).

[107] New York Labor Law also applies an overtime exemption to the same categories of employees as the FLSA. *See* 12 NYCRR § 141-3.2.

[108] 29 CFR Part 541.

[109] The minimum salary to be exempt is higher in New York because the rate changes with the minimum salary rate for employees in these categories. *See* 12 NYCRR § 141-3.2 (c) (1) (i) (e) (3). Additionally, the regulations exempt "Highly Compensated Employees" (HCE) who earn over a certain amount of annual compensation and perform one or more exempt executive, administrative or professional duties, from overtime requirements.

[110] 29 CFR § 541.100.

An administrative employee meets the standard duties test if their primary duty is the performance of office work directly related to the management or general business operations of the employer, which includes the exercise of discretion and independent judgment with respect to matters of significance.[111]

A professional employee meets the standard duties test if their primary duty is the performance of work requiring advanced knowledge in the sciences or learning acquired through a prolonged course of specialized intellectual instruction or requiring invention or talent in a recognized field of artistic or creative endeavor.

The US Department of Labor divides professional employees into two types: learned and creative. A learned professional employee is defined as one whose primary duty is the performance of work requiring advanced knowledge in the sciences or learning acquired through a prolonged course of specialized intellectual instruction and a creative professional employee is defined as who whose endeavors require invention or talent in a recognized field of artistic or creative endeavor, and who meets certain salary requirements.[112]

Guidance from US Department of Labor indicates that the following fields fall within the learned professions: “law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning”. Also, “a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product”.[113]

FREQUENCY OF PAYMENTS

A claimant may have good cause to quit a job if the employer is not paying them as frequently as the law requires. Subject to certain very limited exceptions, Labor Law § 191 provides that manual

[111] 29 CFR § 541.200.

[112] 29 CFR § 541.00

[113] USDOL Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA).

workers are to be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned.

Commissioned salespeople must be paid pursuant to the terms of a written agreement entered into by the company and the employee, but not less frequently than once in each month and not later than the last day of the month following the month in which the commissions were earned.

Clerical and other workers must be paid in accordance with the agreed upon terms of employment, but not less frequently than semi-monthly. The employer must designate regular pay days in advance. The statute also provides that no individual is required to accept payment at periods other than those set forth in the statute as a condition of employment. A claimant has good cause to quit employment when the employer violates this provision of the Labor Law.[114]

DEDUCTIONS FROM PAY

A claimant may have good cause to quit if the employer makes improper deductions from their pay. Pursuant to Labor Law § 196-d, employers (or agents) cannot demand, accept, or retain any part of a gratuity received by an employee. This provision does not apply to the checking of hats, coats, etc.; to banquets or other functions where a fixed percentage is added to the patron's bill or to wait staff sharing tips with a busboy. An employee must agree to participate in a tip pooling arrangement before the employer can withhold any tips. An employee may, at any time, decline to further participate in that type of arrangement.[115]

Pursuant to Labor Law § 193, an employer cannot make deductions from an employee's wages, unless: (1) the deductions are made in accordance with a governmental law or regulation; or (2) are authorized in writing by the employee; and (3) are for the benefit of the employee.

The only deductions that may be made from an employee's wages are those authorized by law (i.e. taxes, Social Security) or authorized in writing by the employee and that are made for the benefit of the employee so long as they fall into one of the following categories: (1) insurance premiums or prepaid legal plans; (2) pension or health and welfare benefits; (3) contributions to charitable organizations; (4) purchases made at events sponsored by charitable organizations

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[114] *See* Appeal Board No. 560650 (Board found good cause for claimant's quit when the employer purposely failed to direct deposit the claimant's paycheck on her regularly scheduled pay day in attempt to force the claimant to meet with the owner of the company who wished to speak with her about a disciplinary issue and whom she had apparently been avoiding and held that the "employer's cancellation of the claimant's regularly scheduled direct deposit, together with the refusal to give her the paycheck until the following Monday, despite her repeated requests for her pay on pay day constitutes a violation of § 191 of the Labor Law"); Appeal Board No. 550708 (Board held that the claimant had good cause to quit because the employer's practice of paying clerical workers every three weeks violated semi-monthly requirement under Labor Law § 191(1)(d)).

[115] *See, e.g.,* Appeal Board No. 521427 (claimant had good cause to quit where there was a tip pooling arrangement and was told unless he signed a document memorializing the arrangement he would not be permitted to continue working).

where at least 20% of the profits from the event are being contributed to a bona fide charitable organization; (5) payments for U.S. Bonds; (6) union dues; (7) discounted parking or passes for mass transit; (8) fitness center, health club or gym membership dues; (9) cafeteria, vending machine and gift shop purchases made at employer's place of business where employer is a hospital, college or university; (10) pharmacy purchases made at the employer's place of business; (11) tuition, room, board, and fees for pre-school, nursery, primary or secondary, and/or post-secondary educational institutions' (12) day care, before school and after-school expenses; (13) payments for housing provided at no more than market rates by non-profit hospitals and affiliates; (14) similar payments for the benefit of the employee.[116] The regulations explicitly prohibit employers from making deductions to employees' paychecks for spoilage or breakage, cash shortages or losses, and fines for lateness, misconduct or quitting without notice.[117]

Deductions may also be made when there was an overpayment of wages due to a mathematical or other clerical error or as repayment of a salary advance. In such circumstances, the employer is required to abide by regulations which detail notice requirements, how often such deductions may be made and in what amount.[118]

Any deductions not authorized by the statute are illegal.[119] For example, deductions for damages to the employer's property,[120] a refund to a customer resulting in the diminution of a commission due to the claimant,[121] or deductions to allow employer to recoup money lost as a result of a claimant's mistake[122] are all improper and would give a claimant good cause to quit. The deduction does not need to come directly from the claimant's paycheck because the statute also

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[116] Labor Law §193; *see also,* 12 NYCRR §195 *et seq*.

[117] *See* 12 NYCRR 142-2.10 (revised in 2012 to delete the provision prohibiting deductions for repayment of salary advances).

[118] *See* 12 NYCRR 195-5.1 (addressing overpayments) and 12 NYCRR 195-5.2 (addressing advances).

[119] *See, e.g.,* Appeal Board No. 546637 (Board found employee had good cause to quit where the employer cancelled employees' health insurance without notifying them and continued to take deductions from the claimant's paycheck for health insurance premiums. The employer also deducted money from the claimant's paycheck for a 401K account that was not placed in the 401K account).

[120] *Matter of LaFrance,* 173 A.D.2d 989 (3d Dep't 1991) (claimant, a tractor trailer driver, had good cause to quit after money was deducted from his paycheck to cover damage to employer's vehicle, despite the fact he signed an agreement authorizing such deductions upon hire); Appeal Board No. 547415 (claimant had good cause to quit where employer was deducting $20 from claimant's paycheck to repay employer for repairs he had paid for to claimant's car despite verbal agreement between the employer and claimant regarding the repayment).

[121] Appeal Board No. 578411 (claimant, a hairdresser, had good cause to quit where employer did not pay her commission on work performed because customer complained about the hair color and they had refunded the customer).

[122] Appeal Board No. 567555 (claimant had good cause to quit where employer was deducting a portion of claimant's weekly earnings to repay employer for a mistake he had made resulting in monetary damages of $2,400).

forbids employers from requiring employees make payments by separate transactions unless authorized under Labor Law § 193 (1).[123]

Additionally, where an employer requires an employee to wear a uniform, the employer must reimburse the employee for the purchase price of the uniform.[124] Further, where the employer does not launder or maintain the uniforms, an employee must be paid an allowance for that purpose at a rate prescribed by regulation.[125]

Certain allowances, for items such as meals, rent, or utilities, paid for by the employer, may be taken as deductions from the employee's gross weekly or bi-weekly wages, subject to restrictions on the amount and frequency.[126] Additionally, fines imposed directly on an employee by a government agency are not in violation of the statute, even when paid through a deduction from the employee's paycheck.[127]

MEAL BREAKS AND REST PERIODS

Pursuant to Labor Law § 161, employees are entitled to at least 24 consecutive hours of rest in any calendar week. There are several exceptions to that requirement including: foremen in charge; employees in dairies or other dairy-related businesses employing no more than seven persons; employees at a plant where the process is necessarily continuous but where no employee works more than eight hours in a day (pursuant to Departmental approval); employees who work no more than three hours on a Sunday feeding livestock, maintaining fires, making necessary repairs to boilers or machinery, or setting sponges in bakeries; employees in resorts or seasonal hotels and restaurants in rural communities; and employees in dry dock plants making repairs to ships. An employer may request a variance from the Department of Labor if there are practical difficulties or unnecessary hardship in carrying out the provisions of Labor Law §161.[128]

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[123] *See* Appeal Board No. 608828 (employer terminated employment relationship when it did not allow the claimant to work until the claimant paid for missing products).

[124] *See* 12 NYCRR 141-1.8.

[125] *Id*.

[126] *See* 12 NYCRR 142-2.5.

[127] Appeal Board No. 568260 (fines imposed by Metropolitan Transportation Authority (MTA) for being involved in preventable accidents that were taken directly out of paychecks of employees of third party did not violate Labor Law §193 since fine was imposed by MTA and not the employer).

[128] Labor Law § 161 (5).

The Board has found that a claimant has good cause to quit if the employer violates Labor Law § 161.[129]

Under Labor Law § 162, every employee of a factory must be provided with a 60-minute noon day meal. Employees working 6 or more hours in any other establishment or occupation must be provided with a 30-minute uninterrupted meal between 11:00 a.m. and 2:00 p.m. If the employee's shift starts before 11:00 a.m. and continues later than 7:00 p.m., the employee must be provided with an additional 20-minute meal period between 5 p.m. and 7 p.m. Persons who work a shift of more than six hours which starts at any point between 1:00 P.M. and 6:00 A.M. are entitled to a 60-minute meal break if employed in a factory and a 45-minute meal break if employed in a mercantile or other establishment. These meal period requirements apply to all employees, including professional and executive employees. For employees working evening and night shifts, the 60-minute meal period for factory workers and 45-minute meal period for other establishments and occupations must be provided at a mid-point during the scheduled shift.

There are circumstances where an employer and employee may agree to waive the specific provisions of Labor Law § 162. For example, in situations where only one person is on duty or is the only one in a specific occupation and it is customary for the employee to eat on the job without being relieved, an employee can work through his meal period if he voluntarily consents to do so. This situation is most commonly found with individuals employed as truck drivers and convenience store workers. However, if an employee requests an uninterrupted meal period, it must be granted regardless of the circumstances. The Board has found that an employer's violation of this provision gives a claimant good cause to quit employment.[130]

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[129] *See* Appeal Board No. 560370 (Board found claimant, a restaurant worker, had good cause to quit where he was found to have worked 7 days during four separate weeks in a one-and-a-half-month time period. The Board was not persuaded by the employer's contention they were unaware of the claimant's situation as the employer was required, under Labor Law §161(4), to keep accurate records of the time worked by each employee); Appeal Board No. 517019 (claimant, a maintenance supervisor at a retirement home, had good cause to quit where evidence established that in addition to his 8:00 a.m. to 4:00 p.m. hours Monday through Friday, he was required to be on site each night from 11 p.m. until 7:59 a.m. resulting in him only being able to leave the premises for 15 hours on Saturday and 15 hours on Sunday).

[130] *See* Appeal Board No. 621098 (claimant had good cause to quit where employer only provided 30-minute break, rather than a 45-minute break as required under the statute); Appeal Board No. 563746 (Board found the claimant had good cause to quit because she was not afforded a 30-minute uninterrupted lunch break. In finding the claimant did not agree to have her lunch break interrupted, the Board stated: "Under rules promulgated by the Commissioner of Labor, in situations where only one person is on duty and it is customary for the employee to eat on the job without being relieved, the Department of Labor will accept these special circumstances so long as the employee voluntarily complies with the arrangement. In order for the waiver of Labor Law §162 to be valid, however, the waiver of compliance must be freely, knowingly and openly made, without taint of coercion or duress, and the waiver must be in return for a benefit without any bad faith involved" (internal citations omitted)).

CALL-IN PAY

Pursuant to 12 N.Y.C.R.R. § 142.2-3.3, an employee who is requested or allowed to report to work on any day must be paid at least four hours, or the number of hours in the employee's regular shift if less than four hours, at the minimum hourly wage. For example, if an hourly employee regularly scheduled to work eight hours reports to work or is called in outside of his regular shift and is then sent home after two hours, the employee must be paid at least four hours at the minimum wage rate. If the payment for the actual number of hours worked at the employee's regular hourly rate exceeds the amount that would be due for four hours at the minimum wage rate, no additional payment is required.

WAGES, BENEFITS, AND SUPPLEMENTS IN WRITING

If the evidence establishes that the claimant voluntarily quit employment because the employer violated the Wage Theft Prevention Act,[131] the claimant has established good cause to quit. The Act provides, in part, that at the time of hire, employees must be informed in writing of the rate of pay, including how the rate is calculated (hourly, weekly, etc.); allowances, if any, for tips, board, or lodging; and the regular pay day. The employer must obtain a signed, dated acknowledgement of receipt from each employee, and keep the notice and receipt for a period of six years. Any changes are to be provided to the employee in writing at least seven days prior to the date that the change is to go into effect.[132]

Additionally, employers must provide a wage statement or pay stub each payday that lists the employee's name, the employer's name, address and telephone number, the dates covered by the payment, the hours worked, rate or rates of pay (regular and overtime), how the employee is paid (hourly, by shift, day, week, commission, piece rate), the employee's gross and net wages, itemized deductions, and itemized allowances and credits claimed by the employer, if any.[133]

Under Labor Law § 198-c, an employer may be subject to criminal penalties if it fails to provide employees the benefits and wage supplements that have been agreed upon by the parties. Wage supplements include vacation or holiday pay, paid sick leave, reimbursement of expenses and other similar items. Employers are also required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays, and hours of work.[134]

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[131] Labor Law § 195.

[132] *See* Labor Law § 195 (2).

[133] *See* Labor Law § 195 (3).

[134] *See* Labor Law § 195 (5).

COMPENSABLE TRAINING TIME

A claimant who quits because an employer refuses to pay for time spent in training may have good cause to quit. To determine whether an employee's time is compensable, the Supreme Court generally looks at whether the employee's time was spent predominantly for the employer's or the employee's benefit.[135]

Time spent attending employer sponsored lectures, meetings, and training programs is generally considered compensable.[136] However, attendance at lectures, meetings, training programs and similar activities need not be counted as working time if they meet all of the following criteria: (a) attendance is outside of the employee's regular working hours; (b) attendance is in fact voluntary; (c) the course, lecture or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance.[137] Attendance is not voluntary if the employee is given to understand or led to believe that their present working conditions or the continuance of his employment would be adversely affected by nonattendance, even if the employer does not expressly require attendance.[138] The Board has held that a claimant has good cause to quit where the employer required the claimant to take training tests at home during her own time, without pay, as the nature of the activity was compensable.[139]

SAFETY VIOLATIONS

Labor Law § 200 addresses safety protections for workers on jobsites subject to the Labor Law. Section 200 states that workplaces shall be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."[140] The statute also provides for enforcement proceedings, which include a requirement that upon notification from the state, the employer must correct the condition within ten working days.

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[135] *See Armour & Co. v. Wantock*, 323 US 126, 133 (1944) (idle time for fireguards subject to call -- excluding time spent sleeping and eating, but including time spent idling or in recreation – was compensable); *Tenn. C. v. Muscoda*, 321 U.S. 590, 598 (defining work "as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.")

[136] *See* 29 C.F.R. § 785.27; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-15 (November 3, 2020).

[137] *Id*.

[138] 29 C.F.R. § 785.28

[139] *See* Appeal Board No. 543652.

[140] Labor Law § 200.

Under the Occupational Health and Safety Act ("OSHA"),[141] employers are responsible for providing a safe and healthful workplace that is free from serious recognized hazards. OSHA covers most private sector employees. Workers employed by state and local government agencies are not covered by OSHA but may have protections if they work in a state that has an OSHA-approved state program.[142]

Employers must comply with all applicable OSHA standards. The standards require employers to adopt practices and procedures reasonably necessary and appropriate to protect workers in their specific work environment. Compliance with OSHA standards includes, but is not limited to, complying with regulatory safety standards; implementing engineering and administrative controls to limit employees' exposure to hazards and toxic substances; ensuring employees are furnished with personal protective equipment when required for safety and health; and training employees on the use of the same.

An employer's potential violation of OSHA standards does not automatically establish good cause to quit. The claimant must also establish that the proximate cause of the quit was due to the unsafe working conditions or a directive to perform dangerous work[143] and that the employer was given an opportunity to address any legitimate concerns the claimant may have had.[144] Further, an employer's compliance with OSHA standards does not foreclose a finding of good cause if the claimant can show that the working conditions were detrimental to their health[145]Additionally, the claimant may have good cause to quit if evidence establishes that an employer retaliated against an employee for filing a complaint with OSHA.[146]

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[141] 29 USC §§ 651 *et seq.*

[142] In New York State, the relevant statute is the Public Employee Safety and Health Bureau (PESH) which enforces safety and health standards promulgated under OSHA.

[143] *See* Appeal Board No. 549986 (Although the claimant identified various longstanding maintenance and safety concerns to the employer's owner over a period of years that he felt were not adequately addressed, and despite the fact that OSHA identified safety violations at the plant after the claimant quit, the proximate cause of the claimant's quit was not unsafe working conditions or any directive to perform dangerous work).

[144] *See* Appeal Board No. 548839 (Board found claimant did not have good cause to quit where evidence presented by claimant did not establish that the employer was violating federal regulations or that he afforded the employer an opportunity to address any legitimate concerns he had); Appeal Board No. 556087 (claimant did not have good cause to quit where evidence established that to the extent that he might have had some valid concerns, that he afforded the employer an opportunity to address those concerns).

[145] *See* Appeal Board No. 604229 (although the employer provided the waste disposal training that OSHA required, claimant had good cause to quit where the claimant experienced medical symptoms due to her work and the employer did not provide the claimant with protective equipment that she requested)

[146] *See* Appeal Board No. 546389 (Board found claimant had good cause to quit where evidence established that after the claimant's husband filed an OSHA complaint, the claimant's supervisor expressed dissatisfaction about the OSHA complaint, became highly critical of the claimant's work and constantly nagged her).

The New York Health and Essential Right Act ("HERO Act") added additional workplace health and safety protections for private sector employers, in response to the COVID-19 pandemic.[147] The law requires that employers create an airborne infectious disease exposure prevention plan when the New York Commissioner of Health designates an airborne infection disease as a highly contagious communicable disease that presents a serious risk of harm to the public health. When so designated, employers must post a copy of that plan within each worksite. Employees must also be permitted to establish a joint labor-management workplace safety committee to raise occupational safety and health concerns and evaluate workplace safety and health policies.[148] The HERO Act prohibits retaliation against employees reporting violations of the health and safety plan, who participate in the safety committees, or who refuse to work due to a reasonable belief that the worksite exposes them to an unreasonable risk of exposure to an airborne infection disease due to working conditions inconsistent with safety laws.[149]

[147] Labor Law § 218-b.

[148] Labor Law § 27-d.

[149] Labor Law § 218-b (8).

Practice Tip:

In developing the record where the claimant is alleging that they quit due to a safety violation at the work place, evidence should be obtained on the following points:

- What is the alleged violation?
- What effect, if any, did the alleged safety violation have on the claimant's job duties?
- Was the claimant directed to perform dangerous tasks?
- What about the work environment did the claimant believe was dangerous?
- Did the claimant report it to the employer? If so, before or after quitting? If not, why was no complaint made?
- Did the claimant report the violation to any state or federal agency? If so, what was the result of such a report? (That is, did the agency investigate, was a violation found, and was it cured?)
- If there was a violation, did the claimant quit before the employer had an opportunity to correct it?

Determine whether the alleged safety violation was the proximate cause of the claimant's decision to quit. Determine whether there is any documentation from OSHA, the Department of Labor, or other relevant agency, regarding the alleged violation; for example, a notice of the violation, a notice that no violation was found, or a notice that the violation had been remedied.

If the safety violation is alleged for the first time at the hearing, the employer must be afforded an opportunity to request an adjournment in order to address the allegation.

RIGHTS TO MEDICAL LEAVE

The Family Medical Leave Act of 1993 (FMLA)[150] was enacted as a method of allowing employees to balance their work obligations and the medical needs of themselves and their families. Eligible employees are entitled to leave for the employee's own serious medical condition, to care for an immediate family member who is suffering from a serious medical condition, or for the birth, adoption, or foster placement of a child.[151] The FMLA covers private sector employers having 50 or more employees in 20 or more workweeks during the current or previous calendar year, and public sector employers, including schools, regardless of the number of employees.[152] Employees

[150] 29 U.S.C. §§ 2601 *et seq.*

[151] 29 U.S.C. §§ 2612 (a).

[152] 29 C.F.R. §§ 825.104 – 825.109, 825.600.

are eligible under the FMLA if they have worked at least 12 months (or 1,250 hours in a twelve-month period) as of the date that the FMLA leave is to start (the 12 months do not need to be consecutive). Eligible employees may take up to 12 workweeks of FMLA leave in the 12-month period following the leave request; the leave may be continuous or intermittent.[153] There is also an additional 14 weeks of FMLA leave available to eligible employees who are providing care for a covered servicemember with a serious injury or illness.[154]

Although employers may require that employees seeking FMLA leave follow the regular procedure for requesting leave, employees do not need to request FMLA by name. Rather, employees are required only to provide enough information to let the employer know that the leave may be covered by the FMLA. Once the employer has such information, it is the responsibility of the employer to begin the process for FMLA leave.[155] Employees are required to request such leave at least 30 days in advance, when the need for the leave is foreseeable; if the need for leave is not foreseeable, then the request must be made as soon as possible and practical.[156]

Once an employee returns from FMLA leave, the employee must be restored to the same job that the employee had prior to the leave or to an equivalent job, which is a job that provides the same pay, benefits, and other terms and conditions of employment, including shift and location. In addition, an employee on FMLA leave is not protected from actions that would have occurred even if the employee was not on leave (for example, the elimination of a shift or a decrease in overtime).[157] An employer is prohibited from denying or discouraging an eligible employee from taking FMLA leave; and from discriminating or retaliating against an employee for having taken, or attempted to take, FMLA leave.[158]

New York also provides protected leave of up to 12 weeks for employees to bond with a newly born, adopted, or fostered child, care for a family member with a serious health condition, or assist

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[153] 29 C.F.R. § 825.110.

[154] National Defense Authorization Act for Fiscal Year 2010, 111 P.L. 84, section 565, 29 CFR 825.122, 29 CFR 825.200(f). For additional information see https://www.dol.gov/agencies/whd/fact-sheets/28mb-fmla-veteran-caregiver (site last visited October 3, 2023).

[155] *See* Appeal Board No. 589612 (The claimant had good cause to quit where employer, who was subject to the Family and Medical Leave Act, denied his request to take leave to assist his wife for three weeks following the birth of their child. The fact that the claimant did not specifically mention FMLA in his leave request did not relieve the employer to inform the claimant of his rights under the FMLA. The Board wrote that "[v]iolations of federal employment laws can… give rise to such good cause [to quit]").

[156] 29 CFR §§ 825.302 – 303.

[157] 29 CFR § 825.214.

[158] 29 CFR § 825.220.

loved ones when a family member is deployed abroad on active military duty.[159] Employees with a regular work schedule of 20 or more hours per week are eligible after 26 weeks of employment, and employees with a regular work schedule of less than 20 hours per week are eligible after 175 days worked.[160] Employees have a right to return to their same or a comparable job upon return from Paid Family Leave and can receive a portion of their average weekly wage and continued health insurance while on leave.[161] Employees must provide 30 days' notice prior to leave when practical.[162]

New York State and New York City also require private employers to provide leave for medical reasons and for reasons related to domestic violence, family offenses, sexual offense, stalking, or human trafficking.[163] Under these laws, private sector employers with 100 or more employees are required to provide up to 56 hours of paid sick leave per calendar year. Private sector employers with 5 to 99 employees or private employers with 4 or fewer employees and a net income of more than $1 million are required to provide up to 40 hours of paid sick leave per calendar year. Private sector employers with four or fewer employees and net income of $1 million or less are required to provide up to 40 hours of unpaid sick leave per calendar year. Sick leave accrues at a rate of at least one hour for every 30 hours worked, and employees do not need to wait to begin using the leave.[164] Employers may not request medical or other documentation in connection with sick leave that lasts less than three consecutive scheduled workdays or shifts.[165] Finally, employers who provide sufficient paid days off annually—for personal days, vacation or sick time—are not obliged to provide any additional days of leave.

Practice Tip

Whether an employer is covered may depend on the number of employees in the workforce. Testimony must be obtained on the size of the employer's workforce to determine which law, if any, applies.

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[159] N.Y. Workers' Compensation Law §§ 200 *et seq.*

[160] N.Y. Workers' Compensation Law § 203.

[161] N.Y. Workers' Compensation Law § 203-b.

[162] N.Y. Workers' Compensation Law § 217.

[163] Labor Law § 196-b; NYC Admin Code §§ 20-911 *et seq.*

[164] There is no specified notice or time period requirement under Labor Law § 196-b provided that there is an oral or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer. However, for leave only under the New York City Administrative Code, employers may require reasonable notice of the need to use safe/sick leave. *See* NYC Admin Code §§ 20-914 (c).

[165] 12 N.Y.C.R.R. § 196-1.3 (a); Rules of the City of New York, Office of Labor Policy and Standards (7 RCNY) § 7-206

2.1.6 RELATIONS WITH CO-WORKERS AND/OR EMPLOYER

Generally, an inability to get along with one's employer, supervisor or with co-workers does not constitute good cause to voluntarily leave employment.[166] Further, legitimate criticism of one's work, even if harsh, does not provide good cause to quit unless the employer's manner exceeded the bounds of propriety.[167] Factors to be considered in determining whether the employer's manner exceeded the bound of propriety include but are not limited to: the content of the criticism or other comment made by the employer;[168] whether the criticism or comments were constant or were made only on occasion;[169] whether co-workers or customers were present when the employer made the criticism or comments;[170] and/or whether the employer used profanity.[171]

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[166] *See Matter of Araman*, 150 A.D.3d 1526 (3d Dep't 2017); *Matter of Stevens,* 50 A.D.3d 1351 (3d Dep't 2008) ("neither a general dissatisfaction with the work environment nor the inability to get along with difficult coworkers or supervisors necessarily constitutes good cause for leaving one's employment") (citing *Matter of Crandall-Mars,* 47 A.D.3d 1179 (3d Dep't 2008)); *Matter of Ayad,* 41 A.D.3d 1126 (3d Dep't 2007); *see also,* Appeal Board No. 567102 (citing Appeal Board Nos. 556527, 521975, 477382, 455843).

[167] *See* Appeal Board No. 568339 (finding claimant had good cause to quit because the employer was verbally abusive, unprofessional and humiliated the claimant in the presence of co-workers and stating "an employee should be not required to tolerate public admonition in the course of her employment") (citing Appeal Board Nos. 556527 and 521975); *but see,* Appeal Board No. 590248 (supervisor's action of yelling at claimant over the radio to get back to his post and repeated assertion that he had abandoned his post after he adjured her not to speak to him like a child did not exceed the bounds of propriety nor was it otherwise so egregious as to constitute good cause for his quit); Appeal Board No. 581913 ("Inability to get along with a supervisor is not good cause to quit, nor is criticism by a supervisor, even when harsh or unfair.") (citing *Matter of Bielak*, 105 A.D.3d 1226 (3d Dep't 2013); *Matter of Giustino*, 11 A.D.3d 803 (3d Dep't 2004)).

[168] Appeal Board No. 562574 (claimant had good cause to quit where supervisor screamed at her, calling her ignorant and a dummy in front of co-workers).

[169] Appeal Board No. 573235 (claimant did not have good cause to quit where he was subjected to a single rude and dismissive comment); Appeal Board No. 580327 (record did not establish that the manner in which management treated the claimant was "constant nagging" rather than legitimate criticism by an employer); Appeal Board No. 564049 (claimant had good cause to quit where she was frequently and loudly criticized about her performance in front of customers and blamed by the employer for the loss of customers).

[170] Appeal Board No. 586961 (finding good cause for claimant's quit because no employee is required to tolerate being screamed and yelled at in front of customers and other employees) (citing Appeal Board Nos. 543642, 543553 and 508649); Appeal Board No. 571514 (claimant had good cause to quit after principal reprimanded her by confronting her with false allegations, ordering the claimant not to defend herself, and threatening to have the claimant fired, all within earshot of other employees); Appeal Board No. 568339 (an employee should be not required to tolerate public admonition in the course of her employment) (citing Appeal Board Nos. 556527, 521975).

[171] Appeal Board No. 560159 (claimant had good cause to quit where supervisor repeatedly directed vulgar language toward her and threw her phone, causing the claimant to feel threatened by his behavior); Appeal Board No. 545736 (finance manager's behavior toward the claimant which included yelling, name calling and the use of vulgarities,

Additionally, threats from co-workers may give a claimant good cause to leave employment so long as the claimant's decision to quit was based on a reasonable belief that their safety was actually threatened.[172]

However, even in situations where a claimant has a compelling reason to leave employment based on the actions of a supervisor or a co-worker, the claimant still may be required to take reasonable steps to protect their employment prior to leaving and to give the employer a reasonable opportunity to address their concerns. If a claimant fails to do so, they may still be disqualified from receiving benefits.[173]

2.1.7 DISCRIMINATION / HARASSMENT

A claimant may establish good cause to quit a job if the claimant has a reasonable belief they are being discriminated against in violation of the law if the employer does not adequately respond to the claimant's concerns.[174] As addressed more fully below, there are various state and federal statutes which forbid employers from engaging in discriminatory practices based on protected characteristics.

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exceeded the bounds of propriety, giving claimant good cause to quit); Appeal Board No 549810 (supervisor's actions of yelling, using profanity and waving his arms in close enough proximity to make contact with an employee exceeded the bounds of propriety, giving claimant good cause to quit).

[172] *Matter of Weaver*, 6 A.D.3d 857 (3d Dep't 2004) (in finding the claimant did not have good cause to quit, the court noted that "it first must be shown that the claimant had reasonable grounds to conclude that his or her safety was, in fact, endangered") (citing *Matter of Kreger*, 291 A.D.2d 772 (3d Dep't 2002); *Matter of De Witt,* 288 A.D.2d 601 (3d Dep't 2001)).

[173] *See, e.g., Matter of Roman,* 32 A.D.3d 1067 (2006); *Matter of Mullen,* 301 A.D,2d 936 (3d Dep't 2003).

[174] *See* Appeal Board No. 546664 (claimant had good cause to quit where evidence established that she was denied a raise on the grounds that she was a female designing men's clothing and her complaints about gender discrimination were not addressed by the employer); Appeal Board No. 591038.

Practice Tip:

In a case where the claimant is contending that they quit because the employer engaged in discriminatory or harassing actions, the record must be sufficiently developed to determine whether there is a causal connection between the claimant's decision to quit and unlawful discrimination. The record should include evidence on the following points:

- The reason why the claimant believes the employer treated them differently from other employees.
- Who engaged in the alleged discriminatory or harassing conduct.
- What specific actions occurred that the claimant believed were based on discrimination.
- Whether the claimant complained to the employer about the alleged discrimination or harassment and the employer's response to the complaint.
- If the claimant contends they were unfairly disciplined or subjected to some other form of adverse employment action, both parties should be questioned about the behavior that led to the discipline or other adverse employment action. Testimony should also be taken on whether similar behavior by other employees led to similar disciplinary action and if not, why not.
- If the claimant contends they were unfairly denied promotion or raise that was given to another employee(s), the employer should be questioned about the reason why some person other than the claimant received a promotion or raise.

If the employer was not on notice prior to the hearing that allegations of discrimination would be part of the hearing, the employer should be offered an adjournment.

NYS HUMAN RIGHTS LAW AND TITLE VII

Federal and state laws protect an employee from discrimination and/or harassment in employment based on that individual's membership in a protected class. The federal law prohibiting discrimination and/or harassment on the basis of membership in a protected class is the Civil Rights Act of 1964, Title VII ("Title VII").[175] Private employers and state or local governmental employers are subject to Title VII if they employ 15 or more individuals who worked for the employer for at least twenty calendar weeks (in this year or last year). Labor Unions are subject to Title VII if they either operate a hiring hall or have at least 15 members. Federal governmental employers and employment agencies and are subject to Title VII regardless of the number of employees.

[175] 42 USC § 2000e *et seq.*

The law prohibits unlawful employment practices, which is defined in the statute as failing or refusing to hire or discharging any individual, or otherwise to discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or limiting, segregating, or classifying employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's race, color, religion, sex, or national origin.[176]

In New York, the Human Rights Law also prohibits discrimination and harassment on the basis of membership in a protected class.[177] An employer must have at least four employees to be subject to the Human Rights Law, with the exception of discrimination based on sex and discrimination against domestic workers, both of which apply to all employers regardless of the size of the workforce.[178] New York City passed its own Human Rights Law which also makes it unlawful for an employer to discharge or discriminate against an employee based on a protected status.[179]

The Human Rights Law contains a more expansive list of protected classes than Title VII. Specifically, the law protects the characteristics of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, domestic violence victim status, pregnancy-related condition(s), predisposing genetic characteristics and familial status. The Human Rights Law also prohibits employers from requiring employees to violate or forego a sincerely held religious practice as a condition of obtaining or retaining employment, including opportunities for promotion[180] and from denying a license or employment to a person convicted of a crime as provided for in NYS Corrections Law Article 23-A.[181] It also violates the Human Rights Law for an employer to retaliate against an individual for opposing unlawful discriminatory practices.

State and federal Law prohibit two forms of discrimination: disparate treatment and disparate impact. Employment practices result in disparate treatment (or intentional discrimination) if they are based in any way on a prohibited factor, such as race, religion, sex, etc. Disparate impact discrimination, on the other hand, does not require proof of motivation but only proof that neutral practices result in discriminatory effects. A claimant has good cause to quit a position if the

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[176] 42 USC § 2000e-2 (a) (1) - (2).

[177] *See* Exec. Law, Article 15.

[178] Exec. Law § 292 (5). In 2019, New York amended the Human Rights Law to expressly extend protections from discriminatory harassment to domestic workers.

[179] NYC Admin Code §§ 8-101 *et seq*. The list of protected status under the New York City Human Rights Law includes several categories not included in either Title VII or the New York State Human Rights Law.

[180] Exec. Law § 296 (10).

[181] Exec. Law § 296 (15).

evidence establishes that they were subject to discrimination, so long as the claimant took reasonable steps to address the matter prior to quitting.[182]

Discrimination includes any action which infringes upon an individual's conditions or privileges of employment. Both state and federal laws provide broad protections against discrimination and all forms of harassment which interfere with an individual's job performance. However, harassment because of a protected status is unlawful under the New York Human Rights Law when it "subjects an individual to inferior terms, conditions, or privileges of employment," which is generally considered a lower standard than the requirement that the conduct be "severe or pervasive" under Title VII.[183] The more severe the discriminatory conduct the less frequent it needs to be. A single action, if sufficiently severe, can be unlawful. Further, for unemployment insurance purposes, the Board has held that all elements of a legal cause of action for discrimination in another forum need not be established before a worker can be found to have separated for good cause from a hostile work environment under the Labor Law. Where there is substantial evidence of a hostile, discriminatory work atmosphere, of which the employer is or should have been aware, a claimant has good cause to leave.[184]

In many unemployment insurance hearings, when a claimant alleges they were subject to "harassment" in the workplace, they may not mean legally actionable harassment based on a protected characteristic that is prohibited by state and federal law. Instead, the conduct may fall somewhere on the spectrum between (1) an inability to get along with a co-worker and/or supervisor and (2) conduct exceeding the bounds of propriety, as discussed above.

In most circumstances, before finding a claimant had good cause to quit, the record must establish that the claimant took reasonable steps to report the harassment and allowed the employer a reasonable opportunity to correct the situation prior to quitting. Factors to be considered include but are not limited to: whether the employer had a policy prohibiting the harassment, whether the employer had a procedure in place to complain about the harassment, whether the claimant followed that procedure, and whether the employer took appropriate action.[185] Where the evidence establishes that the claimant had previously complained and the employer failed to take

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[182] *See* Appeal Board No. 572837 (claimant found to have quit without good cause where she did not bring her concerns to employer with enough specificity to allow the employer the opportunity to address the issue).

[183] Exec Law § 296 (1) (h).

[184] *See* Appeal Board No. 578567 (claimant had good cause to quit where evidence established she was subjected to a hostile work environment because co-worker exposed himself to her on multiple occasions and when the claimant complained to the employer, the employer took no action except to tell the claimant to stay out of the shop area); Appeal Board No. 538428 (claimant had good cause to quit where derogatory names and slogans were placed on his truck and he was repeatedly called derogatory names because of his sexual orientation, sufficiently complained to the employer and the employer did not take adequate action to remedy the situation).

[185] *See, e.g.,* Appeal Board No. 587900.

appropriate action in response to the complaints, it may be reasonable for a claimant to believe that no further complaints need to be made prior to quitting.[186]

AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act (ADEA)[187] applies to private employers with a workforce of 20 or more individuals who have worked for at least 20 calendar weeks. State, local and federal governmental employers and employment agencies are subject to the ADEA regardless of the number of employees. Labor Unions are subject to the ADEA if they either operate a hiring hall or have at least 25 members.

The ADEA prohibits employers from refusing to hire or from discharging an individual based on the individual's age. It also prohibits employers from classifying employees in such a way that deprives or would tend to deprive a protected individual of employment opportunities. It applies only to employees who are 40 years or older. In defining "employee," ADEA excludes elected officials, persons appointed by the official to be part of the official's personal staff (other than civil service employees), and policymakers. ADEA's provisions are not meant to prevent an employer from observing the terms of a bona fide seniority system or from discharging or disciplining an employee for good cause.

EQUAL PAY ACT OF 1963

Virtually all employers are subject to the Equal Pay Act of 1963,[188] which is an amendment to the Fair Labor Standards Act of 1938. It prohibits discrimination on the basis of sex by paying wages to employees at a rate less than the rate paid to employees of the opposite sex for equal work on jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions. However, the Equal Pay Act makes an exception where payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any factor other than sex.

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[186] *See* Appeal Board No. 616160 (In finding that the claimant had good cause to quit, the Board noted that it was not relevant that the claimant made verbal, rather than written complaints, and that the employer did not take steps when he first spoke to upper management about the manager's belittling comments); Appeal Board No. 589395 (in finding good cause for the claimant's quit, Board held that where employer took no action on prior complaints, it was reasonable for the claimant to believe his employer would neither prevent future harassment nor act upon any future complaints by the claimant).

[187] 29 USC §§ 621-634.

[188] 29 USC § 206 (d).

New York Law also bans differential in the rate of pay based on protected class status.[189] Unlike the Equal Pay Act, New York law applies to individuals in all protected classes[190] and also provides that employers may not prohibit employees from discussing their own salary or asking about the salary of another employee.[191] However, employers may establish reasonable workplace and workday limitations, in a written policy provided to all employees, on when and where such discussions may take place.[192]

AMERICANS WITH DISABILITIES ACT

Employers who are subject to Title VII are also subject to the Americans with Disabilities Act (ADA).[193] The ADA prohibits discrimination against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Disability is defined under the ADA as "a physical or mental impairment that substantially limits one or more major life activities of such individual." The ADA defines major life activities as including—but not limited to—caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

In addition to prohibitions against making decisions on hiring or other personnel actions based on disability, or otherwise limiting an individual's ability to obtain and retain employment because of that individual's disability, the ADA also requires the employer to make reasonable accommodations for the disabled individual, when needed. "[T]he ADA envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated."[194] A reasonable accommodation is defined as making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, modifying work schedule, reassigning an individual to a vacant position, acquiring or modifying equipment or devices, appropriately adjusting or modifying

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[189] Labor Law § 194.

[190] Labor Law § 194 (1). "Protected class" includes age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, and any employee protected from discrimination pursuant to Executive Law § 296 (1) (a), (b), and (c) and any intern protected from discrimination pursuant to Executive Law § 296-c.

[191] Labor Law § 194 (4) (a).

[192] Labor Law § 194 (4) (b).

[193] 42 USC § 12102 *et seq*. The New York State and New York City Human Rights Laws also prohibit discrimination based on disability (see discussion above).

[194] *Jackan v. N.Y. State Dep't of Labor,* 205 F.3d 562 (2d Cir. 2000).

examinations, training materials or policies, providing qualified readers or interpreters, or any other similar accommodations.[195]

The ADA provides that reasonable accommodation is not required where it would cause "undue hardship".[196] An assessment of undue hardship must be based on current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.[197] The factors to be considered in determining whether there is undue hardship include the nature and cost of the accommodation needed, the employer's overall financial resources, the type of business, and the impact of the accommodation on the employer's operations. A claim of undue hardship cannot be based on generalized conclusions. Further, an employer does not have to eliminate an essential function of the position as an accommodation. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not considered a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production or performance standards that are applied uniformly to employees with and without disabilities.[198]

In addition, qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability which are shown to be job-related and consistent with business necessity, and where the job performance cannot be accomplished by reasonable accommodation, are not considered violations of the ADA.[199]

PREGNANCY DISCRIMINATION

The Pregnancy Discrimination Act ("PDA")[200], is an amendment to Title VII. It clarifies that unlawful discrimination on the basis of sex includes discrimination based on pregnancy, childbirth, or related medical conditions; and that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons.

New York City also amended its Human Rights Law to include a section called the Pregnant Workers Fairness Act[201], which applies to employers with a workforce of four or more

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[195] 42 USC § 12111 (9).

[196] 42 U.S.C. § 12112 (b) (5).

[197] 42 U.S.C. § 12111 (10).

[198] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002).

[199] 42 USC § 12113 (a).

[200] 42 USC § 2001e-1 (k).

[201] NYC Admin. Code § 8-107 (22)

(independent contractors are counted as part of the workforce for the purposes of this regulation). The regulation requires employers to give reasonable accommodation to pregnant employees (such as more frequent bathroom breaks, allowing a stool at the employee's workstation, etc.), provided that the employer knew or should have known about the employee's pregnancy, childbirth, or related medical condition. The regulation also provides that it is an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

Both the Labor Law and New York City Administrative Codes also require employers provide time for employees to express breast milk for their nursing child.[202] Labor Law § 206-C also requires employers must make reasonable efforts to provide a room for employees to express breast milk in privacy. New York City's regulations impose additional requirements to the space that is required, and the steps that the employer must take when such a room is requested.[203]

EMPLOYEE POLYGRAPH PROTECTION ACT

The Employee Polygraph Protection Act (EPPA)[204] prohibits most private employers from using lie detector tests, either for pre-employment screening or during the course of employment (it does not apply to federal, state, or municipal agencies). Employers generally may not require or request any employee or job applicant to take a lie detector test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to take a test or for exercising other rights under EPPA.

Employers may not use or inquire about the results of a lie detector test, or discharge or discriminate against an employee or job applicant, on the basis of the results of a test, or for filing a complaint or for participating in a proceeding under EPPA. Subject to restrictions, EPPA permits polygraph tests to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors, and dispensers. It also permits polygraph testing of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer.

Where polygraph examinations are allowed, they are subject to strict standards for the conduct of the test, including the pretest, testing, and post testing phases. An examiner must be licensed and bonded or have professional liability coverage. EPPA strictly limits the disclosure of information obtained during a polygraph test.

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[202] Labor Law § 206-C.

[203] NYC Admin. Code § 8-107 (22) (b).

[204] 29 USC §§ 2001 *et seq.*

DISCRIMINATION ON THE BASIS OF CREDIT REPORTS

The Fair Credit Reporting Act (FCRA),[205] which limits the disclosure of consumer credit reports, also governs the conditions under which a consumer report may be furnished for employment purposes. The law provides that before an adverse action based on the report is taken, the employee must be provided with a copy of the report and given an opportunity to respond to or investigate the report. "Adverse actions" are defined in the FCRA as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee".[206] The FCRA is a consumer protection law and does not contain any specific limit on the size or type of employer subject to the law.

New York City's "Stop Credit Discrimination in Employment Act"[207] regulates the use of credit reports in employment situations. The regulation prohibits covered employers from using an employee's credit history in making decisions about whether to hire, promote, or discipline an individual. (There are exemptions for police and peace officers, employees requiring security clearance under federal or state law, employees required to be bonded, etc.) It applies to employers with a workforce of four or more including the actual owner.

2.1.8 DOWNSIZING / VOLUNTARY REDUCTIONS IN FORCE

Employers who wish to downsize may offer early retirement packages or other voluntary workforce reduction plans to all or certain of its employees. A claimant who accepts such a plan is considered to have left employment voluntarily.[208]

Whether good cause exists will depend on whether there was a "climate of uncertainty" regarding continuing employment at the place of business. A finding that there is a climate of uncertainty requires the following: (1) the employer had a substantial downsizing goal; (2) layoffs had not been ruled out if the goal could not be achieved through the plan; (3) there were no clear criteria for selection of individuals to be separated in the event of layoffs; and (4) the employer provided substantial incentives for participation in the voluntary reduction.[209] The circumstances and terms of the employer's plan must also be considered. For example, a claimant may not have good cause to accept a voluntary workforce reduction plan if layoffs are by seniority and the claimant

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[205] 15 USC §§ 1681 *et seq.*

[206] 15 USC § 1681 (k) (B) (ii).

[207] NYC Admin Code §§ 8-102 (29), 8-107 (9), (24).

[208] *See, e.g., Fisher v. Levine*, 36 N.Y.2d 146 (1975); *Matter of Salerno*, 279 A.D.2d 935 (3d Dep't 2001).

[209] *See* Appeal Board Nos. 557320A, 555068, and 554848.

is ranked high on a seniority list.[210] However, if the employer was planning to lay off employees based on a subjective ranking of the employees' skills and utility to the employer, then the claimant may be able to establish that there was a climate of uncertainty.[211] A claimant who voluntarily leaves employment when there has been no real threat of layoff must show they did so for other reasons that constitute good cause.[212]

2.1.9 OTHER EMPLOYMENT

A quit to enter self-employment may be with good cause if the claimant had a definite prospect for self-employment and had taken steps to start their own business.[213] The record should also establish the reason that the claimant has applied for benefits. If the business has already closed, the record should show how and why the closing occurred.[214]

Quitting a job to accept another job provides a claimant with good cause for unemployment insurance purposes when the offer of other employment is definite and certain, including a specific start date, salary to be paid, and hours and location of the new job.[215] That is, when a claimant has received a *bona fide* offer of new employment. The reason the new employment failed to

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[210] *See, e.g.,* Appeal Board No. 557075; *but see* Appeal Board No. 555068 (claimant established good cause where layoffs were based on seniority and the claimant was a non-union, non-tenured teach and not the most senior non-tenured teacher at her school).

[211] *See* Appeal Board No. 556361 (employer's criteria for selecting individuals for involuntary layoff included "the employer's overall financial picture, its need for particular positions, anticipated changes in duties and responsibilities, its future operating needs, and individual skills and qualifications to perform the remaining jobs," with seniority only being a factor if the other factors were considered equal).

[212] *Matter of Fisher*, 36 N.Y.2d 146 (1975).

[213] Appeal Board No. 569518 (Board found good cause for claimant to quit to enter self-employment where he had set up a web site, e-mail account, and other Internet sites for his business, and had met with potential investors); Appeal Board No. 540528 ("As the claimant left this employer to enter self-employment, the claimant had good cause to quit. While the claimant's quit was personal in nature, the Board has held that 'in a free enterprise system a man can quit whenever he wants to do so if he thinks he can better himself.'" (citing Appeal Board No. 17,480-48); *but see,* Appeal Board No. 544957 (while the Board has held that quitting to go into viable self-employment is with good cause, we agree with the Administrative Law Judge that the claimant has not established that he had a definite prospect for self-employment at the time he quit, and thus he did not have good cause to quit his employment) (citing Appeal Board Nos. 518616 and 515704).

[214] *See* Appeal Board No. 527397.

[215] *See, e.g.,* Appeal Board No. 585853.

materialize should also be developed for the record as this may be evidence of whether the offer was in fact *bona fide* and to the claimant's intent to accept the new employment.[216]

A claimant's decision to quit one of multiple concurrent positions may affect their eligibility for benefits if they later lose the second position.[217] Nevertheless, a claimant is not required to work two jobs concurrently to be eligible for benefits.[218] As a result, a claimant may have good cause to quit where working two positions is too physically demanding or the work in one position interferes with the claimant's ability to work the other.[219]

2.1.10 LEAVING PART-TIME EMPLOYMENT AFTER LOSS OF FULL-TIME EMPLOYMENT

While unemployment insurance benefits are not intended to be a minimum wage substitute,[220] a claimant may have good cause to quit where they are placed in an untenable financial position due to continuing on with part-time employment after loss of concurrent full-time employment.[221]

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[216] *Matter of Tepper*, 304 A.D.2d 944 (3d Dep't 2003) ("A claimant's conduct and intent with regard to accepting a new position is a critical element in determining whether separation from employment was for good cause") (citing *Matter of Jarvis,* 109 A.D.2d 377 (3d Dep't 1985)).

[217] *See Matter of Vargas*, 185 A.D.3d 1339 (3d Dep't 2020) (In remitting the matter to the Board for determination of whether the claimant had good cause to quit the first job, the court stated that not "every claimant who works two jobs and quits one of them is automatically entitled to benefits.")

[218] *See* Appeal Board No. 587308 (internal citations omitted).

[219] *See* Appeal Board No. 585851 (claimant had good cause to quit his part-time job where the employer scheduled him at times that he was working for another employer); Appeal Board No. 564564 (claimant had good cause to quit one of two jobs where he determined his health deteriorated to the point that he should only work one job); Appeal Board No. 565000 (claimant had good cause to quit one of two jobs where it was too difficult to continue working both jobs because she would be standing for 12 hours in a day).

[220] *Matter of Grandy,* 64 A.D.2d 796 (3d Dep't 1978).

[221] *See, e.g.,* Appeal Board No. 540097A (claimant had good cause to quit part-time employment because she could not afford to maintain health insurance payments on part time earnings when she would have been able to afford them if she was receiving her entire benefit rate in light of husband's pre-existing medical issues) (citing Appeal Board Nos. 409186 and 355494); Appeal Board No. 556606 (claimant had good cause to quit part-time employment after loss of his full-time employment because he could not afford to pay travel costs associated with part time position or maintain his household and pay taxes solely on the earnings from part-time job); Appeal Board No. 551067 (claimant had good cause to quit part-time job that he held for six days when he realized that his income from partial unemployment and his part-time job were more than $100.00 less than his weekly benefit rate); Appeal Board No. 569918 (claimant had good cause to quit part-time job she held for four days when she realized her pay from the part-time job would be less than her benefit rate) (citing *Matter of Scranton,* 12 N.Y.2d 983 (1963) (claimant justified in refusing employment that pays less than what the claimant would collect in unemployment benefits)); Appeal Board No. 569351 (claimant had good cause to quit part-time employment where unreasonable amount of earnings would need to be spent on commuting costs).

Further, continuing a part-time job after the loss of full-time employment which results in an inability to receive unemployment benefits or in a decreased benefit rate may create financial hardship for a claimant. The Board stated that in those situations, granting benefits to someone is not a minimum wage substitute; rather, it is an answer to the financial hardship.[222]

In a number of cases, the Board has explained that the Legislature has long recognized if circumstances develop in the course of employment that would justify the claimant in refusing such employment in the first instance, such as an increase in commuting distance, an unreasonable unreimbursed commuting expense, or a decrease in wages to a level substantially less favorable than those prevailing in the locality, there is good cause to voluntarily leave such employment.[223] The Court has mirrored this rationale when it held that there is good cause for a claimant to refuse an offer of part-time employment in the first instance because earnings would be lower than the claimant's weekly benefit rate.[224] The Board has also held that a claimant has good cause to leave part time employment which even when supplemented by partial unemployment insurance benefits if it "would result in a total weekly income in an amount less than his benefit rate."[225]

2.1.11 ATTENDING SCHOOL

It is well-settled that quitting one's job to attend school or to further one's education does not constitute good cause for a voluntary separation under the Labor Law.[226] This is true even where the claimant does not quit but demands a reduction in their days or hours of employment in order to attend school and the employer is either unwilling or unable to accommodate the request.[227] Further, even when an employer initially agrees to the reduction in hours and a short-time later

[222] Appeal Board Nos. 564282; 552114.

[223] *See* Labor Law § 593 (1) (a); Appeal Board No. 552114.

[224] *See Matter of Scranton*, 12 N.Y.2d 983 (1963).

[225] Appeal Board No. 564282 (internal citations omitted).

[226] *See, e.g.,* Appeal Board No. 611432; 583568.

[227] *See Matter of Lee*, 190 A.D.3d 1170 (3d Dep't 2021) (claimant was found to have quit without good cause where she made the decision to attend class rather than work her scheduled shift, even where she was willing to work other hours or days but no other shift was available); Appeal Board No. 582051 (claimant quit without good cause where she told the employer that, because of her school schedule, she could only work a compacted schedule of half her normal hours and could not work the schedule she was hired).

determines that it needs the claimant to resume working full-time, if the claimant does not agree to return to full-time hours the claimant is still deemed to have voluntarily quit to attend school.[228]

2.1.12 MEDICAL REASONS

A claimant who is compelled to quit due to their medical condition may have good cause to leave employment. Generally, the record should reflect either that the claimant was advised by a doctor or other health professional that it was necessary to quit due to the medical condition[229] or contain substantial evidence that the claimant has a previously diagnosed chronic medical condition, the symptoms of which rendered the claimant unable to perform their job.[230] Further, a claimant may not be able to establish good cause for a quit if the evidence establishes that the claimant had been given medical advice to quit but did not follow that advice for a significant amount of time.[231]

In the context of allegations of job related stress, it is well-settled that a claimant who contends he or she quit a job due to work related stress, only, has not established good cause for leaving employment, absent evidence that it was medically necessary to do so or otherwise demonstrating that the claimant received medical advice to leave their job.[232] This is true even where the claimant credibly testifies that he or she is having certain physical symptoms

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[228] *See* Appeal Board No. 582938 (Board held claimant voluntarily quit without good cause despite claimant's contention that she was laid off when the employer ended the reduced schedule agreed to seven weeks earlier because when part-time schedule ended, her former full-time hours were still available to her).

[229] *See, e.g.,* Appeal Board No. 585708 ("A claimant who is compelled to quit due to a medical condition does so with good cause for unemployment insurance purposes, particularly, as here, if the claimant had so been advised by a doctor or other health professional").

[230] Appeal Board No. 565588 (a claimant who is compelled to quit due to a medical condition may have good cause for unemployment insurance purposes, if the claimant had been advised by a doctor or other health professional that it was necessary to quit, or absent such specific advice, if the claimant suffers from a previously diagnosed condition of such long standing that the claimant may be in the best position to know whether he or she can continue to perform assigned duties and responsibilities); Appeal Board No. 575334 ("we have held that individuals who testify to having previously diagnosed, chronic health conditions which are exacerbated by stressful conditions at work, fall into an exception and have good cause to quit.") (citing Appeal Board Nos. 562789 and 575069); *see also,* Appeal Board Nos. 583768; 580594; and 565588.

[231] *See, e.g.,* Appeal Board No. 539676 ("the fact that the claimant continued working long after his doctor suggested he look for work with less stress demonstrates that there was no medical necessity for the claimant to leave his employment" (citing Appeal Board No. 528387).

[232] *See* Appeal Board No. 583890 ("It is well-settled that a claimant who contends that she quit her job due to job stress has not established good cause for leaving employment, absent evidence that it was a medical necessity to leave employment or otherwise demonstrating that the claimant had received medical advice to leave her job); *see also, Matter of Croughter*, 50 A.D.3d 1360 (3d Dep't 2008); *Matter of Romano*, 30 A.D.3d 953 (3d Dep't 2006)' *Matter of Cieslewicz*, 1 A.D.3d 878(3d Dep't 2003); Appeal Board No. 588494.

attributable to stress.[233] However, in situations where the claimant credibly testifies about having a previously diagnosed, chronic health condition the symptoms of which were exacerbated by stressful conditions at work, they may have good cause to quit.[234]

As with a number of other situations in which a claimant may have a compelling reason to quit a job, when a claimant contends that the quit is for medical reasons, the claimant is expected to first afford the employer an opportunity to address their concerns before quitting. Specifically, a claimant must inform the employer of the medical condition. The claimant should also engage in an interactive process with the employer to explore whether there are any reasonable accommodations that would allow the claimant to continue working or whether a leave of absence was available.[235] A mere belief that the employer will not offer any help does not alleviate the claimant from the responsibility of taking measures to preserve continuing employment.[236] However, a claimant's failure to take reasonable steps to preserve employment may be excused where the evidence establishes that the claimant's mental health condition precluded them from acting in a reasonable manner.[237]

2.1.13 RELOCATION DUE TO FINANCIAL NECESSITY

While a mere desire to live at another location is a personal and non-compelling reason for moving,[238] a claimant who quits to relocate due to financial necessity may be able to establish

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[233] *Matter of Cieslewicz*, 1 A.D.3d 878 (3d Dep't 2003).

[234] *See, e.g.,* Appeal Board No. 591663 ("While the general rule under unemployment insurance law requires the claimant to produce testimony or evidence of medical advice to quit a job in order to establish good cause, we have held that individuals who testify to having previously diagnosed, chronic health conditions which are exacerbated by stressful conditions at work, fall into an exception and have good cause to quit") (citing Appeal Board Nos. 575334, 562789, 575069).

[235] *See* Appeal Board No. 586248 (claimant did not take reasonable steps to preserve employment where he did not bring concerns to human resources or speak to anyone about medical issues his job duties were causing him and where he knew about FMLA and personal leaves but never explored leave of absence because he was not interested in one).

[236] Appeal Board No. 585392 ("The claimant's explanation that she felt nothing would change does not excuse her failure to afford the employer a change to address any valid concerns she may have had").

[237] *See* Appeal Board No. 560664 (Board found that the claimant, who was experiencing a mental health crisis, could not have objectively assessed her situation or have taken reasonable steps to preserve her employment); Appeal Board No. 582838 (holding claimant with Bipolar and Post Traumatic Stress Disorders had good cause to quit although she did not take reasonable steps to protect employment because stress of her life and work circumstances combined with her mental health problems rendered taking such usual measures impossible).

[238] *See, e.g.,* Appeal Board Nos. 539251; 524139 and 458083.

good cause for the quit.[239] The record must establish specific evidence on all expenses, including rent or mortgage, utilities, food, car insurance, cable, internet, child support, credit cards, student loans, etc. and specific evidence of household income, including the claimant's and the claimant's spouse's salary, both net and gross.[240] Testimony should also be taken on whether the claimant was behind in any bills and whether they were facing eviction. The record should also establish what particular circumstances changed that resulted in the decision to move.

Again, as with other voluntary quit situations, the evidence must establish that the claimant took reasonable steps to preserve employment prior to quitting. One key area to explore is what, if any, steps the claimant took to find alternate housing prior to quitting.[241]

Practice Tip:

Record Development

The record must be developed regarding the claimant's actual monthly expenses, including:

- Rent / mortgage
- Utility bills (water, heat, electric, cable, etc.
- Car or other transportation expenses
- Medical bills
- Other expenses including: food, credit card payments, student loan payments, etc.

Testimony should also be taken regarding the claimant's household income, both before and after the loss of the job and the amount of the claimant's benefit rate.

2.1.14 PROVOKED DISCHARGE

A provoked discharge, which is considered a voluntary separation for unemployment insurance purposes, occurs where a claimant was fired by an employer because the employer can no longer legally employ the claimant due to some action or inaction by the claimant. The analysis in these cases depends on the following three-pronged test: The claimant (1) voluntarily engaged in conduct (2) which transgressed a legitimate known obligation and (3) left the employer no choice

[239] *See,* Appeal Board No. 617252.

[240] *See, e.g.,* Appeal Board No. 550798 (remand order indicating what areas needed to be addressed).

[241] *See, e.g.,* Appeal Board No. 589392 (in finding no good cause for the quit, the Board found significant that the claimant did not attempt to find alternative, less expensive housing in New York before resigning from her long-term employment); Appeal Board 567778 (no good cause for relocation where claimant acknowledged that she did not research other housing alternatives until a few months prior to her parents' relocation and had other family in New York that she could have lived with but chose not to).

but to discharge the claimant.[242] Each of the three requirements must be met for a finding of provoked discharge. The Board has confined the doctrine to cases in which "the employer was compelled to discharge a claimant because of governmental regulation, union or contractual obligation, or civil service rules."[243] It can only be found where the employer has no range of discretion but was compelled to terminate.[244] It does not apply to situations where an employee was discharged for failure to comply with the employer's private, internal policies or rules.[245]

Typical examples of situations which constitute a provoked discharge include but are not limited to: failure to take an exam needed for license or permanent civil service status; failure to take other steps to obtain or renew a license; failure to meet other requirements of civil service or other government jobs; loss of license or employability due to wrongdoing or criminal conviction; and/or failure to pay union dues.

VOLUNTARY TRANSGRESSION

A provoked discharge requires some degree of fault or intentional behavior on the part of the claimant.[246] In certain circumstances, there may not be a provoked discharge where a claimant's financial circumstances make it such that the claimant does have the money to renew a license (driver's, nursing or otherwise).[247] However, the lack of money to pay a fine when the fine results from the claimant's intentional conduct may result in a finding of provoked discharge.[248] In license renewal cases, the Board has considered whether a claimant took "reasonable steps" to renew their license or whether they were "purposely non-compliant or negligent."[249] Additionally, in situations where the claimant has a compelling reason to excuse the transgression, the fault

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[242] *Matter of DeGrego,* 39 N.Y.2d 180 (1976).

[243] Appeal Board No. 548466.

[244] *Matter of DeGrego,* 39 N.Y.2d 180 (1976).

[245] *See, e.g.,* Appeal Board Nos. 578221; 545063.

[246] *Matter of Michael*, 60 A.D.2d 438 (1978) (doctrine of provoked discharge requires volitional act on claimant's part); Appeal Board No. 582726 (Board held that a claimant who does not obtain or renew a license because the claimant cannot afford the fee will not be held to have provoked his discharge) (citations omitted).

[247] *See, e.g.,* Appeal Board No. 582726 (Board held that a claimant who did not renew her nursing license because she could not afford the fee cannot be held to have provoked her own discharge) (citations omitted); *but see* Appeal Board No. 585232 (Board did not find compelling claimant's contention that he could not afford $75 replacement fee for asbestos license in light of the fact that he had been paid for work and had received notice and assistance from employer to obtain it).

[248] *See* Appeal Board No. 559016 (claimant, an ambulance driver, found to have provoked his discharge where his license was suspended for failed to pay $200 in fines after pleading guilty to parking violations).

[249] *See* Appeal Board No. 586684.

requirement is not necessarily met.[250] Moreover, in situations where a claimant takes but fails a required test, the Board has held that the failure is not a volitional act and does not constitute a provoked discharge.[251]

In cases involving an arrest but no subsequent conviction or disposition and a denial of the behavior on behalf of the claimant, there cannot be a finding of a provoked discharge. The Board has repeatedly held that an arrest standing alone is not sufficient proof that the claimant engaged in any conduct transgressing any obligation owed to the employer.[252]

LEGITIMATE AND KNOWN OBLIGATION

It is well-settled that before a claimant may be disqualified on the basis of a provoked discharge, it must be established that the claimant was aware of the employer's obligation.[253] In a number of cases, the basis of the "transgression" is conduct occurring prior to the claimant's employment with the employer. In those cases, the Board analyzes whether the claimant would have known, at the time of the transgression, that they were violating an obligation of the employer. If it cannot be said that the claimant knew at the time of the transgression that it would violate a future obligation, no provoked discharge can be found.[254]

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[250] *See* Appeal Board No. 539424 (no provoked discharge where claimant, who had intended to take a civil service exam required for her position, failed to take the exam because of her substantially impaired health at the time of the exam); Appeal Board No. 585109 (no provoked discharge where claimant failed to take civil service test because he was medically unable to do so); Appeal Board No. 574983 (no provoked discharge where claimant failed to take civil service exam because she was advised by her union that since she had previously passed an exam she was not required to take it).

[251] *See, e.g.,* Appeal Board No..559548 (absent evidence claimant was deliberately failing exam, voluntariness prong could not be met).

[252] *See* Appeal Board No. 551972.

[253] *See, e.g.,* Appeal Board No. 550164 (no provoked discharge where the claimant was not aware she was required to take a civil service examination to keep her position).

[254] *See* Appeal Board No. 592499 ("We have long held that where the conduct occurred prior to the employment and the record establishes that at the time the conduct occurred, the claimant could not have known that it would affect his ability to work in his chosen field, the claimant cannot be held to have transgressed a known obligation of employment") (citing Appeal Board Nos. 546455, 551231 and 565395); Appeal Board No. 584514 (the Board found there was no provoked discharge where claimant, a security guard, was convicted of a crime approximately 20 years before obtaining employment with the employer as he had never worked as a security guard before and would not have known he was transgressing any legitimate known obligation at that time); Appeal Board No. 560146 (no provoked discharge where employer's requirement that claimant's position have valid NYS driver's license was imposed the year after the claimant's DWI conviction and license revocation); Appeal Board No. 554212 (no provoked discharge where employer discharged the claimant, who had worked for employer for one year and nine months, after discovering they were unable to employ him pursuant to Executive Law § 845 because of convictions occurring prior to his employment as the claimant would not know he was transgressing a legitimate obligation at the time of the wrongdoing).

LEAVING THE EMPLOYER NO CHOICE

For a finding that the claimant has provoked their own discharge the evidence must establish that the employer was compelled to discharge the claimant. A violation of a private employer's own policy requiring the employer to discharge the claimant is insufficient.[255] Additionally, the fact that the employer may not be able to insure claimant under their existing insurance policies does not establish that the employer had no other choice but to discharge the claimant.[256] Rather, the evidence should establish that the employer was legally or contractually barred from allowing the claimant to continue performing their job.

Where the evidence establishes that the claimant's transgression only results in an inability to perform an occasional part of their duties, it cannot be said that the employer had no choice but to discharge the claimant.[257] Further, where the employer has previously given alternate jobs to people under circumstances similar to the claimant's, it cannot be said that the employer had no choice but to discharge the claimant.[258]

2.1.15 CLOSING OR SELLING A BUSINESS

When the principal of a corporation decides to close a business, that act constitutes a voluntary quit. Whether the principal has good cause to quit depends on whether the closing of the business was compelled.[259] The business does not need to be in bankruptcy and may still have substantial gross revenue or sales. "It is obvious human experience that gross business does not reflect the

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[255] Appeal Board No. 589052 (no provoked discharge where record failed to establish that the employer, a school district, was left with no choice but to discharge the claimant, an at home tutor whose teaching license had lapsed, as called for by district policy in the absence of evidence that the State Education Department required at home tutors to have valid teaching license); Appeal Board No. 560197 (no provoked discharge where requirement that the claimant pass two exams by one year from her hire date is found in an employer policy, and the employer was not legally or contractually barred from allowing the claimant to continue working); Appeal Board No. 554826 (although employer discharged claimant, who drove employer vehicles, because he lacked a valid license as of the date of discharge, the Board found no provoked discharge because there was insufficient evidence to establish that the employer had no choice as to his discharge, but for its own policy, which it had the discretion to apply).

[256] *See* Appeal Board No. 564878 (no provoked discharge where employer contended its insurance carrier would not cover claimant due to conditional license as the employer could have sought insurance coverage elsewhere).

[257] Appeal Board No. 554928 (no provoked discharge where employer discharged claimant who had occasional driving responsibilities after he lost his license for a DWI because there was insufficient evidence that the employer had no choice as to his discharge, but for its own policy, which it had the discretion to apply).

[258] *See* Appeal Board No. 590565 (No provoked discharge found where employer had previously given an alternate job to another bus driver who pled guilty to an alcohol and driving related offense and where there was a position in which the claimant could have worked pending the reinstatement of his license because facts establish that the employer did have a choice in whether to terminate the claimant's employment with the district).

[259] Appeal Board No. 549739 (citing *Matter of Crawford*, 182 A.D.2d 1047 (3d Dep't 1992)).

viability of a business. It is net profit or loss which tells the correct story."[260] Evidence that the closed business had been losing money or otherwise was in decline may establish a compelling reason.[261] Moreover, a claimant is not required to borrow money to continue operating the business or to run the business to the brink of bankruptcy, nor is it necessarily significant that a claimant continues to draw a salary from the business.[262]

When a principal sells a business, it is also considered to be a voluntary quit.[263] If the business is still viable, the quit is without good cause. To determine whether a business is still viable, factors such as the claimant's ability to sell the business, whether the claimant continued to draw a salary from the business, whether the business was making a profit, whether the business was bankrupt, whether the business is still operating at the same location or offering the same services as prior to the sale, must be evaluated.[264] Selling a viable business for personal reasons is without good cause.[265] Additionally, where the business is profitable and the claimant is able to take a salary and other benefits, the sale constitutes a voluntary quit without good cause.[266] Further, even in circumstances where a business is unprofitable, the sale and continued operation of the business may establish that it was still viable at the time of the sale and the claimant would be considered to have quit without good cause.[267] There are some circumstances, however, where the evidence may establish that it was economically necessary for the owner to sell a business and good cause would exist for the voluntary quit. For example, where a claimant's business suffers heavy financial losses for a period of time, the claimant does not draw a salary and does not have the money to make the improvements needed to attract customers necessary to turn the business

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[260] *Matter of Tucker,* 108 A.D.2d 1027 (3d Dep't 1985); *see* Appeal Board No. 605137.

[261] Appeal Board No. 587850 (citing *Matter of Spinella*, 168 A.D.2d 816 (3d Dep't 1990)).

[262] Appeal Board No. 561335 (citing *Matter of Rosen*, 9 A.D.3d 775 (3d Dep't 2004)).

[263] *But see* Appeal Board No. 540913 (claimant did not voluntarily separate from employment where she only owned one-third of the business and the other two-thirds of the corporation voted to sell the business over her desire to continue the business).

[264] *See Matter of Deney,* 39 A.D.3d 1058 (3d Dep't 2007); *Matter of Merle,* 11 A.D.3d 803 (3d Dep't 2004); *Matter of Hoos,* 254 A.D.2d 677 (3d Dep't 1998); *Matter of Frisina,* 235 A.D.2d 887 (3d Dep't 1997); *Matter of Ballard,* 176 A.D.2d 428 (3d Dep't 1991); *Matter of Sonner,* 133 A.D.2d 491 (1987).

[265] *Matter of Kupferman*, 53 A.D. 2d 732 (3d Dep't 1976) (claimant did not have good cause to quit where he liquidated and disposed of his business when it was still making a profit).

[266] *Matter of Dunn*, 33 A.D.2d 585 (3d Dep't 1969).

[267] Appeal Board No. 574324 ("The fact that the business was sold…and was being run by new owners is evidence of its continued viability, rendering the claimant's sale to be without good cause") (citing *Matter of Merle,* 11 A.D.3d 803 (3d Dep't 2004); *Matter of Deney,* 39 A.D.3d 1058 (3d Dep't 2007)).

around, there is good cause to sell the business.[268] In addition, while the sale price of the business or the purchasers' ability to continue the same or a similar business in the same location may be evidence of the business's viability, neither is conclusive that the business was viable for the claimant.[269]

2.1.16 RETIREMENT

A claimant who quits in order to retire, but who does not intend to fully withdraw from the labor market, does not have good cause to quit.[270] However, a claimant who retires with a genuine intention on the part of the claimant to permanently remove themselves from the labor market quits with good cause. If a change in economic circumstances after retirement forces the claimant to return to work, then a claimant may be eligible for benefits.[271]

2.1.17 ILLEGAL ACTS

The Board has held that a claimant's bare assertions, without more, about an employer's allegedly unethical or illegal practices do not give rise to good cause for separation from employment.[272] However, where a claimant has a reasonable good faith belief that the employer is engaging in

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[268] Appeal Board No. 539786 (good cause existed where the business had been losing customers, suffered substantial financial losses, and the claimant did not draw a salary or have the financial means to invest more money into advertising, promotion and physical improvements in order to attract more customers to turn a profit); Appeal Board No. 575907 (good cause existed to sell business where the business was losing money, was behind in rent, the claimant had stopped collecting a salary and the proceeds of the sale were insufficient to cover the existing debts of the business, supporting a finding that the business was not viable at the time it was sold).

[269] *See* Appeal Board No. 600098 (absent evidence of the business experience of the buyer or whether the buyer was operating the business at a loss, the claimant was compelled to sell the business even where the claimant sold the business for more than they paid and the buyer continued to operate a similar business in the same location).

[270] *See* Appeal Board No. 623135 (claimant did not have good cause to quit where he stated he was retiring but intended to find new employment elsewhere); Appeal Board No. 614270; Appeal Board No. 551471.

[271] *See* Appeal Board No. 553349.

[272] *See* Appeal Board No. 581857 (Board did not credit claimant's testimony regarding employer's alleged illegal activity of "padding" invoices where claimant was never at job sites and could not have had any actual knowledge of services performed or whether invoices billed for services not provided) Appeal Board No. 544936 (claimant's bare allegations that doctor was billing illegally or improperly did not give claimant good cause to quit her job where there was no evidence of illegal or improper activity); Appeal Board No. 544738.

illegal activity or that they are being asked to personally engage in criminally fraudulent activity, they may have good cause to quit employment. [273]

2.1.18 FEAR FOR PERSONAL SAFETY

It is well-established that a claimant who quits a job as a result of a reasonable and genuine fear for personal safety quits with good cause.[274] As with other compelling reasons for quitting, the claimant must bring their concerns to the employer and allow the employer the opportunity to address any issues prior to quitting.[275] The fear can stem from interactions with clients, vendors, supervisors, subordinates,[276] or even members of the public.[277]

[273] *See* Appeal Board No. 590490 (claimant had good cause to quit her job as a medical biller the day after she met with representatives from the Criminal Division and Medicaid Fraud Control Unit of the NYS Attorney General's Office who advised her that at least some of the employer's billing practices constituted Medicaid fraud) (citing Appeal Board No. 551391); Appeal Board No. 551391 (claimant had good cause to quit where he was exposed to unlawful drug use in the workplace and when he complained to his supervisor, the supervisor stated he should quit if he did not like it); Appeal Board No. 544283 (claimant had good cause to quit where she regularly complained to employer about illegal activity engaged in by guests of the hotel and was given no assistance other than instruction to call the police).

[274] *See* Appeal Board No. 552146 (claimant, a teacher in a group home, had good cause to quit where evidence established that staff members were slapped punched and bitten by the students, the claimant was placed in a headlock, threatened, hit with a desk, poked, kicked and knocked the floor, the claimant complained to the employer and requested a transfer by the transfer was denied and his classroom did not include safety mechanisms such as a telephone, panic button, and uncovered door window).

[275] *See* Appeal Board No. 618634 (claimant did not have good cause to quit when he was shot outside his home in Brooklyn and moved to Queens because the claimant failed to request a transfer from the employer, and the employer had work available in Queens near his new home).

[276] *See* Appeal Board No. 585179 (claimant had good cause to quit where subordinate threatened claimant and claimant had previously notified management of subordinate's threatening behavior).

[277] *See* Appeal Board No. 567977 (claimant had good cause to quit employment where she had a reasonable fear for her personal safety since she was attacked on her walk home from work on her second day of employment); Appeal Board No. 557413 (claimant had good cause to quit where building in which she worked was burglarized on two separate occasions, the employer did not change the locks on the door, and the claimant was the first employee to arrive at employer's location and had to enter a dark building every morning).