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Unemployment Compensation in a Time of Increasing Work-Family Conflicts

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UNEMPLOYMENT COMPENSATION IN A TIME OF INCREASING WORK-FAMILY CONFLICTS

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The demographics of the workplace have changed substantially since the nation's unemployment insurance system was enacted in the 1930s. The number of dual-earner and single parent families has increased dramatically. Yet, the basic requirements for eligibility for unemployment compensation have not varied much since their initial enactment. In this Article, Professor Malin explores the availability of benefits to individuals who lose their jobs because of conflicts between work and family responsibilities and to unemployed individuals whose family responsibilities restrict the types of jobs that they are able to take. He finds that the states have differed greatly concerning the degree to which they will recognize family responsibilities as a relevant consideration in evaluating employees' behavior said to disqualify them from benefits. Some states reach seemingly anomalous results, such as granting benefits to employees fired for defying employer directives that conflict with their family responsibilities but denying benefits to employees who quit when faced with such directives. Professor Malin analyzes the benefits eligibility requirements and finds that disqualifications for discharges for misconduct, quits without just cause attributable to the employer, unavailability for work, and rejections of suitable employment operationalize the restriction of unemployment benefits to job losers, rather than job leavers. He observes, however, that these terms are laden with value judgments. He traces an emerging public justice value judgment that employers may no longer demand absolute adherence to their directives without regard for employee family responsibilities. He finds this value judgment evident in family leave and related legislation and in arbitration awards concerning discipline under collective bargaining agreements. He provides a framework for analyzing the unemployment compensation claims of individuals whose family responsibilities have caused them to lose their jobs or to restrict the types of jobs for which they are available.

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INTRODUCTION

Supporters in Congress of the Family and Medical Leave Act (FMLA)[1] were fond of declaring that, as a matter of basic policy, American workers should not be forced to choose between caring for their loved ones and their jobs.[2] The FMLA, although important, is not a panacea for workers facing conflicts between employment and family responsibilities. Workers may lose their jobs because of the need to respond to family emergencies that fall outside the FMLA's coverage.[3] Although many employers have become more "family friendly" in their human resource policies, they do not view accommodation of family responsibilities as an employee's entitlement and retain the option to say "no" when they deem it necessary.[4]

When workers must choose between their families and their jobs and, as a result, find themselves unemployed, they may seek unemployment insurance (UI) benefits. This Article considers the degree to which such benefits should be available to these workers. Part I examines demographic trends in

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1. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (1994)).

2. *See, e.g.*, 139 CONG. REC. S1095 (daily ed. Feb. 3, 1993) (statement of Sen. Hatfield); 139 CONG. REC. H420 (daily ed. Feb. 3, 1993) (statement of Rep. Synar); 139 CONG. REC. H409 (daily ed. Feb. 3, 1993) (statement of Rep. DeLauro); 139 CONG. REC. H367 (daily ed. Feb. 3, 1993) (statement of Rep. Godon); 139 CONG. REC. S991 (daily ed. Feb. 2, 1993) (statement of Sen. Bond); 138 CONG. REC. H9931 (daily ed. Sept. 30, 1992) (statement of Rep. Unsoeld); 138 CONG. REC. S14,858 (daily ed. Sept. 24, 1992) (statement of Sen. Adams); 138 CONG. REC. H8254 (daily ed. Sept. 10, 1992) (statement of Rep. Gephardt); 138 CONG. REC. H8230 (daily ed. Sept. 10, 1992) (statement Rep. Unsoeld); 138 CONG. REC. S12,104 (daily ed. Aug. 11, 1992) (statement of Sen. Biden); 138 CONG. REC. S12,095 (daily ed. Aug. 11, 1992) (statement of Sen. Mitchell); 137 CONG. REC. H9732 (daily ed. Nov. 13, 1991) (statement of Rep. Wolpe); 137 CONG. REC. H9730 (daily ed. Nov. 13, 1991) (statement of Rep. Morella); 136 CONG. REC. H5485 (daily ed. July 25, 1990) (statement of Rep. Clay); 138 CONG. REC. H2206 (daily ed. May 10, 1990) (statement of Rep. Fazio); 136 CONG. REC. H2166 (daily ed. May 9, 1990) (statement of Rep. Clay).

3. *See, e.g.*, Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 242–46 (E.D. Pa. 1994) (holding that, because an ear infection is not a serious health condition, an employee who was terminated for being absent for four days to care for her ill child has no claim under the FMLA).

4. *See* Sue Shellenbarger, *How Accommodating Workers' Lives Can Be a Business Liability*, WALL ST. J., Jan. 4, 1995, at B1 (noting that while many companies value promoting family friendly policies, companies still worry about creating expectations of accommodations when none can be made).

the work force which have led to increasing tension between job and family responsibilities. Part II reviews the law governing disqualification for benefits as it affects employees whose family responsibilities are incompatible with their employment. Part III considers the rationale behind the benefits disqualification criteria and finds no barrier to considering family responsibilities in determining benefit eligibility. Part IV examines the reasons why such considerations are appropriate in today's workplace, and Part V suggests how the law should take family responsibilities into account in determining UI benefits eligibility.

I. CHANGING DEMOGRAPHICS AND THE WORKPLACE

The demographics of the workplace have changed dramatically. The typical family no longer consists of a father employed outside the home and a mother who, because she is not so employed, is available to care for children and other relatives in need. The percentage of women aged twenty-five to fifty-four in the labor force increased from nineteen percent in 1900 to seventy-four percent in 1993.[5] The number of women in the work force increased almost 200% from 1950 to 1990.[6] As of 1993, ninety-six percent of fathers and sixty-five percent of mothers worked outside the home.[7] The percentage of families headed by single parents more than doubled from 1970, reaching twenty-seven percent in 1993.[8]

The nature of working mothers' employment also has changed. Whereas at one time, married women often were characterized as secondary wage earners whose attachment to the labor force was open to question,[9] such is no longer the case. For example, a May 1995 study by the Whirlpool Foundation and the Families and Work Institute found that fifty-five percent of employed women and forty-eight percent of

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5. S. REP. NO. 3, 103d Cong., 1st Sess. 6 (1993), *reprinted in* 1993 U.S.C.A.A.N. 3, 8–9.

6. *Id.* at 5, *reprinted in* 1993 U.S.C.A.A.N. at 7–8.

7. *Id.* at 6, *reprinted in* 1993 U.S.C.A.A.N. at 8–9.

8. *Id.*

9. *See, e.g.*, RICHARD A. LESTER, THE ECONOMICS OF UNEMPLOYMENT COMPENSATION 40 (1962) (arguing that women's greater tendency to be employed part-time or intermittently gave them a "partial or intermittent" connection to the labor force).

married employed women provide at least half of their families' income.[10] Among employed married women, although almost two-thirds believe their husbands' jobs offer more financial security for their families than their own jobs, twenty-four percent expect their jobs to provide more long-term family financial security, an increase of fifteen percentage points since 1981.[11]

Many workers find themselves not only having to care for their children, but also for their aging parents. The fastest growing segment of the United States population is the elderly, with individuals aged sixty-five and older comprising twelve percent of the population.[12] Between 1980 and 1990, the population aged seventy-five and older increased by one-third.[13] An estimated twenty to twenty-five percent of all workers have some care-giving responsibilities for an older relative.[14]

The frequent shortage of reasonably priced, competent child care aggravates the tension between workers' availability to their jobs and their availability to their families. A recent study by the Population Reference Bureau (PRB) illustrates the situation.[15] The PRB found that among families where both parents work outside the home, the most common arrangement was to have the father care for the children while the mother worked.[16] The percentage of children cared for by their fathers while their mothers worked increased overall from fifteen percent in 1988 to twenty percent in 1991; among married couples the increase went from 17.9% to 22.9%.[17] This change did not result from fathers' dropping out of the work force. Rather, pressed by the cost and unavailability of child care, parents work different shifts so that each may care for the children while the other works on the job.[18]

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10. FAMILIES AND WORK INST., WOMEN: THE NEW PROVIDERS 33 (1995).
11. *Id.* at 31.
12. S. REP. NO. 3, *supra* note 5, at 6, *reprinted in* 1993 U.S.C.A.A.N. at 8–9.
13. *Id.*
14. *Id.* at 7, *reprinted in* 1993 U.S.C.A.A.N. at 9–10.
15. *See generally* MARTIN O'CONNELL, POPULATION REFERENCE BUREAU, WHERE'S PAPA?: FATHERS' ROLE IN CHILD CARE (1993) (reporting on the findings on child-care arrangements of mothers who work outside the home and exploring the trend in father-provided child care since the late 1970s).
16. *See id.* at 17 tbl. A-1.
17. *Id.*
18. *Id.*

The changing demographics have left an increasing number of workers vulnerable to seemingly irreconcilable conflicts between their jobs and their families. The following Part considers how those workers fare when they lose their jobs and seek UI benefits.

II. THE CURRENT STATE OF THE LAW

Not all workers who are separated from their jobs are eligible for unemployment compensation. The reason for separation may disqualify an otherwise eligible claimant. Workers may be disqualified under certain circumstances if they voluntarily leave their jobs.[19] They also may be disqualified if they are discharged for misconduct.[20]

Workers whose separations qualify them for UI benefits, nevertheless, may lose their eligibility for reasons unrelated to termination of their prior jobs. To remain eligible for benefits, claimants must be available and able to work.[21] A claimant who is otherwise eligible may be disqualified for refusing suitable employment.[22]

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19. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3315(1) (1995); IDAHO CODE § 72-1366(e) (1989 & Supp. 1995); IND. CODE ANN. § 22-4-15-1(a) (West 1991); KAN. STAT. ANN. § 44-706(a) (1993); MASS. GEN. L. ch. 151A, § 25(e)(1) (1994); MISS. CODE ANN. § 71-5-513(A)(1)(a) (1972); NEB. REV. STAT. § 48-628 (Supp. 1995); N.H. REV. STAT. ANN. § 282-A:32(I)(a) (1987); N.J. STAT. ANN. § 43:21-5(a) (West 1991); N.C. GEN. STAT. § 96-14(1) (1995); N.D. CENT. CODE § 52-06-02(1) (1985); OHIO REV. CODE ANN. § 4141.29(D)(2)(a) (Anderson 1995); S.C. CODE ANN. § 41-35-120(1) (Law. Co-op. 1986); VT. STAT. ANN. tit. 21, § 1344(a)(2)(A) (1987).

20. *See, e.g.*, KAN. STAT. ANN. § 44-706(b) (1993); MASS. GEN. L. ch. 151A:25, § 25(e)(2) (1995); MISS. CODE ANN. § 71-5-513(A)(1)(b) (1973); NEB. REV. STAT. § 48-628(2)(b) (Supp. 1995); N.H. REV. STAT. ANN. § 282-A:32(I)(b) (1987); N.J. STAT. ANN. § 43:21-5(b) (West 1991); N.C. GEN. STAT. § 96-14(2) (1995); N.D. CENT. CODE § 52-06-02(3) (Supp. 1995); OHIO REV. CODE ANN. § 4141.29(D)(1)(b) (Anderson 1995); VT. STAT. ANN. tit. 21, § 1344(a)(2)(B) (1987). A few states word the disqualification as one resulting from discharge for cause. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3315(2) (1985); IND. CODE ANN. § 22-4-15-1(a) (West 1991); S.C. CODE ANN. § 41-35-120(2) (Law. Co-op. 1986).

21. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-771(A)(3)–(4) (1995); CAL. UNEMP. INS. CODE § 1253(c) (West 1986); COLO. REV. STAT. § 8-73-107(1)(c) (1986); CONN. GEN. STAT. § 31-235(2) (1983); DEL. CODE ANN. tit. 19, § 3314(3) (1995); FLA. STAT. ch. 443.091(1)(c) (1993); GA. CODE ANN. § 34-8-195(a)(3)(A) (1992); ILL. ANN. STAT. ch. 48, para. 420(c) (Smith-Hurd 1986 & Supp. 1992); IND. CODE ANN. § 22-4-14-3(a)(1)–(2) (West 1991); MD. CODE ANN., LAB. & EMP. § 8-903(a)(1)(i)–(ii) (1991); MASS. GEN. L. ch. 151.A, § 24(b) (1994); MICH. COMP. LAWS § 421.28(c) (1995); MINN. STAT. § 268.08-1(3) (1982); N.J. STAT. ANN. § 43:21-4(c)(1) (West 1991); PA. STAT. ANN. tit. 43, § 801(d)(1) (1991); VT. STAT. ANN. tit. 21, § 1343(a)(3) (1987).

22. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3315(3) (1995); IDAHO CODE § 72-1366(f) (1989); KAN. STAT. ANN. § 44-706(c) (1993); MASS. GEN. L. ch. 151A, § 25(c) (1994);

Examples abound of how family responsibilities may cost employees their jobs and raise issues concerning their eligibility for UI benefits. An employer may refuse to allow an employee time off to attend to a family need, may change an employee's work schedule, or may require overtime which conflicts with the employee's care-giving responsibilities. In these cases, the employee may defy the employer's directives and be terminated from employment. If the terminated employee applies for UI benefits, the employer may seek to disqualify the claimant because the employee was discharged for misconduct. Alternatively, if the employee resigns, rather than comply with the employer's directive, the employer may seek a disqualification because of a voluntary quit.

Employees whose job separations qualify for UI benefits may still find that work-family conflicts defeat their claims. Employees who lose their employment and restrict their job search to certain shifts or certain days of the week to avoid conflicts with family obligations may not be sufficiently exposed to the work force to be available for work. Employees who refuse particular jobs because they conflict with family responsibilities may have refused suitable employment. As the following discussion establishes, the states take dramatically different approaches to these issues concerning disqualification and requirements of work force availability.

A. Disqualification for Misconduct

Employees who are discharged for failing to comply with their employers' directives because those directives conflicted with their family responsibilities generally have fared well in litigation over their eligibility for UI benefits. For example, in *Campbell v. Department of Labor and Employment Security*,[23] the Florida District Court of Appeal held that an employee was entitled to benefits despite having been discharged for

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MISS. CODE ANN. § 71-5-513(A)(3) (1995); NEB. REV. STAT. § 48-628(a) (Supp. 1995); N.H. REV. STAT. ANN. § 282-A:32(d) (1987); N.J. STAT. ANN. § 43:21-5(c) (West 1991); N.C. GEN. STAT. § 96-14(3) (1995); N.D. CENT. CODE § 52-06-02(3) (1989 & Supp. 1995); OHIO REV. CODE ANN. § 4141.29(D)(2)(b) (Anderson 1995); S.C. CODE ANN. § 41-35-120(3) (Law. Co-op. 1986); VT. STAT. ANN. tit. 21, § 1344(a)(2)(C) (1987).

23. 455 So. 2d 569 (Fla. Dist. Ct. App. 1984).

absenteeism. The employee was absent because she was with her daughter, who had been hospitalized in another state following a serious car accident.[24] The court found that the duress of a family emergency and the employee's good faith reliance upon her husband to notify the employer excused her "fail days."[25]

In *Prickett v. Circuit Science, Inc.*,[26] the employer temporarily changed the employee's work assignment from the first shift, which began at 6:50 A.M. and ended at 3:20 P.M., to the second shift, which began at 3:20 P.M. and ended at 11:30 P.M. The employer advised the employee on a Friday that the change would take effect the following Monday. The employee, a single father, could not obtain child care and reported to work on the first shift on Monday, advised his supervisor of the situation, and was given the day off to continue searching for child care. After numerous inquiries to licensed facilities, neighbors, and friends, the employee informed his supervisor that he would not report to work for the second shift because he did not have child care. He was suspended for his unexcused absences and finally discharged.[27]

The Minnesota Supreme Court held that "the employee's failure to report to a new shift assignment because of an inability to obtain adequate [child] care . . . does not constitute misconduct justifying denial of unemployment compensation benefits."[28] The court observed that the employee faced a substantial change in his assigned shift and had little time to find alternate child care. In addition, the court found that the employee had made good faith efforts to obtain child care and had maintained contact with the employer throughout the period in question. The court noted that a denial of benefits would ignore the reality of the predominance of single-parent and dual wage-earner families.[29]

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24. *Id.* at 570.

25. *Id.* at 570–71. Today, the employee's discharge would probably violate the provision of the FMLA which guarantees an employee the right to unpaid leave in order to care for a child who is suffering from a serious health condition. 29 U.S.C. § 2612(a)(1)(c) (1994).

26. 518 N.W.2d 602 (Minn. 1994).

27. *Id.* at 603–04.

28. *Id.* at 605.

29. *Id.* ("In 1990, almost 60% of children in Minnesota lived in families in which both parents worked outside the home. . . . Another 9.3% lived in families with one working parent.") (citation omitted).

Most courts that have addressed the issue have regarded conflicting family responsibilities as a factor which mitigates against a finding of misconduct sufficient to justify a denial of benefits. These courts have focused on the requirement that such misconduct demonstrate wanton and willful disregard for the employer's interests, concluding that the compulsion of family obligations negates a finding of willfulness.[30]

It is the compelling nature of the conflicting family and job responsibilities which mitigates against a finding of willfulness. Consequently, this approach forces courts to evaluate the gravity of the employee's family responsibilities. Where a court considers the family responsibilities to pose a less serious conflict, it will expect the employee to comply with the employer's directives and will view the employee's defiance as disqualifying misconduct.[31]

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30. *See, e.g.*, Campbell v. Department of Labor and Employment Sec., 455 So. 2d 569, 570 (Fla. Dist. Ct. App. 1984) (holding that an employee was entitled to benefits when she was fired for absences due to caring for daughter hospitalized in another state); Howlett v. South Broward Hosp. Tax Dist., 451 So. 2d 976, 977 (Fla. Dist. Ct. App. 1984) (holding that "the unapproved temporary absence . . . for the purpose of responding to legitimate family emergency does not constitute willful and wanton disregard for the employer's interest . . . [sufficient] to justify denial . . . of unemployment compensation"); Langley v. Unemployment Appeals Comm'n, 444 So. 2d 518, 519–20 (Fla. Dist. Ct. App. 1984) (granting benefits to an employee who failed to comply with his manager's request because his father-in-law had a heart attack); Hartenstein v. Department of Labor and Employment Sec., 383 So. 2d 759, 761–62 (Fla. Dist. Ct. App. 1980) (holding that an employee was entitled to benefits when he was fired for an absence to attend his father's funeral); Tucker v. Department of Commerce, 366 So. 2d 845, 846–47 (Fla. Dist. Ct. App. 1979) (holding that an employee was entitled to benefits when she was fired for an absence due to difficulty in scheduling doctor's appointment for daughter's critical illness); Prickett v. Circuit Science, Inc., 518 N.W.2d 602, 605–06 (Minn. 1994) (holding that an employee was entitled to benefits when he was fired for absences due to his inability to find child care after his schedule changed); McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721, 724–25 (Minn. Ct. App. 1991) (holding that an employee was entitled to benefits when he was fired for absenteeism caused by inability to obtain child care); King v. Unemployment Compensation Bd. of Review, 414 A.2d 452, 453–55 (Pa. Commw. Ct. 1980) (holding that an employee was entitled to benefits when she was fired for absences due to inability to find child care after schedule change); Gale v. Department of Employment Sec., 385 A.2d 1073, 1075 (Vt. 1978) (holding that an employee was entitled to benefits when he was fired for working an insufficient number of hours due to child-care needs).

31. *See* Colachino v. Unemployment Compensation Bd. of Review, 453 A.2d 72, 73–74 (Pa. Commw. Ct. 1982) (disqualifying a claimant from receiving benefits where he justified his refusal to work overtime by claiming that because his parents were old he had responsibilities around the house); *see also* Arizona Dep't of Economic Sec. v. Valdez, 582 P.2d 660, 660–62 (Ariz. Ct. App. 1978) (holding that an employee's discharge for refusing to work overtime disqualified him from UI benefits where he failed to advise employer of the reason for his refusal).

Not all employees, however, defy their employers' directives, in effect daring their employers to fire them. Some decide to quit. The next Part explores their eligibility for UI benefits.

B. Voluntary Quits

Employees who respond to employer directives that conflict with family responsibilities by resigning from their employment have fared considerably worse in the pursuit of unemployment compensation than have those who defied their employers' orders and were fired. A key factor in many jurisdictions is the language of the statutory voluntary-quit disqualification. Some states will not disqualify an employee who has quit voluntarily with good cause, while others require that the good cause be attributable to the employer or be connected to the employment.

Nowhere is the significance of statutory language more readily apparent than in Florida. In *Yordamlis v. Florida Industrial Commission*,[32] the Florida District Court of Appeal held that a single parent who quit a job because its nighttime hours interfered with his ability to care for his children was entitled to benefits because his voluntary resignation was for good cause.[33] Thereafter, the Florida legislature amended the statute to require that the good cause be attributed to the employer.[34] The amendment proved crucial in *Beard v. State Department of Commerce*.[35] In *Beard*, a correctional officer who had been transferred from the first shift to the third shift requested leave to arrange for nighttime care for her teenage children. When the employer denied her request, the employee resigned.[36] The court, in keeping with *Yordamlis*, considered her resignation to be for good cause, but held that the intervening statutory amendment requiring that the cause be attributable to the employer removed familial obligations as a justification for quitting a job and obtaining UI benefits.[37] Subsequently, Florida courts have consistently denied UI

32. 158 So. 2d 791 (Fla. Dist. Ct. App. 1963).
33. *Id.* at 791–92.
34. *See* 1963 Fla. Laws ch. 327.
35. 369 So. 2d 382 (Fla. Dist. Ct. App. 1979).
36. *Id.* at 383.
37. *Id.* at 384–85.

benefits to employees who quit their jobs because of the need to attend to family responsibilities.[38]

Many states approach the UI eligibility of employees who quit their jobs because of family conflicts in a manner consistent with Florida's distinction between good cause and good cause attributable to the employer. States whose statutes do not require that the cause be attributable to the employer or to the employment have awarded benefits based on the court's assessment of the significance and severity of the family conflict. For example, the Kentucky Court of Appeals, in awarding benefits to an employee who was on an indefinite leave of absence to care for her terminally ill husband and who failed to return to work when told she might have to be replaced, reasoned that "it would be positively inhuman to hold that this woman voluntarily quit her job without good cause."[39] Similarly, courts in Pennsylvania have awarded UI benefits to employees whose family responsibilities met the statutory requirement of a compelling and necessitous reason for quitting employment.[40] Courts in Arkansas also have provided UI benefits when a resignation is for a personal emergency of a compelling nature.[41]

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38. *See, e.g.*, Garcia v. AT&T, 575 So. 2d 730 (Fla. Dist. Ct. App. 1991) (denying benefits to an employee who was not reinstated following a six-month leave to care for her sick mother-in-law); Sun State Servs. v. Unemployment Appeals Comm'n, 503 So. 2d 373 (Fla. Dist. Ct. App. 1987) (denying benefits to an employee who quit her job to care for an ill sister).

39. Cantrell v. Unemployment Ins. Comm'n, 450 S.W.2d 235, 237 (Ky. 1970).

40. *See, e.g.*, Truitt v. Unemployment Compensation Bd. of Review, 589 A.2d 208, 210 (Pa. 1991) (granting benefits to an employee who quit after her child care arrangements failed and she was unable to find alternate child care); Jones v. Unemployment Compensation Bd. of Review, 510 A.2d 1278, 1279 (Pa. Commw. Ct. 1986) (granting benefits to an employee who quit when her child care failed and the employer refused to reduce her overtime); Hospital Serv. Ass'n v. Unemployment Compensation Bd. of Review, 476 A.2d 516, 518 (Pa. Commw. Ct. 1984) (granting benefits to an employee who quit after a schedule change and a resultant inability to find child care for new schedule); Blakely v. Unemployment Compensation Bd. of Review, 464 A.2d 695, 696 (Pa. Commw. Ct. 1983) (granting benefits to an employee who quit after being assigned a new shift because she could not secure child care).

41. *See, e.g.*, Wade v. Thornbrough, 330 S.W.2d 100, 101–02 (Ark. 1959) (granting benefits to an employee who quit after being denied a leave of absence to care for her sick children); Timms v. Everett, 639 S.W.2d 368, 369 (Ark. Ct. App. 1982) (awarding benefits to an employee who quit after employer denied him a leave of absence to care for his injured and pregnant wife); Morse v. Daniels, 609 S.W.2d 80, 81 (Ark. Ct. App. 1980) (granting benefits to an employee who quit her job to care for her ill parents); Turner v. Daniels, 605 S.W.2d 465, 466 (Ark. Ct. App. 1980) (granting benefits to an employee who quit her job to care for her injured son).

As with the misconduct cases, courts which recognize family concerns as providing good cause to quit a job without losing UI benefits necessarily delve into the gravity of the concern on a case-by-case basis, denying benefits where the court considers the concern insufficiently serious. For example, courts have denied benefits where child care was available to the employee and where the employee failed to make reasonable efforts to find child care.[42]

Judicial evaluation of the seriousness of the employee's family concerns has invited judges to impose their own values on the claimants. For example, courts have denied benefits to an employee who quit her job rather than work a revised schedule that precluded her from preparing the evening meal for her husband and adult children,[43] and to an employee who quit her job because a schedule change precluded her from caring for her grandchildren.[44]

Although some judicial line drawing is necessary, courts should be wary of imposing their own cultural values on employees and care givers. Such cultural bias may appear when a court regards the need to care for one's children as good cause but rejects the need to care for one's grandchildren. Cultural bias clearly was present in *Perdrix-Wang v. Director of Employment Security Department*.[45] Perdrix-Wang worked as a quality control chemist for a plastics manufacturer. She became pregnant and continued to work subject to restrictions that she not come in contact with certain chemicals present in the plant. After giving birth and taking a two-month maternity leave, Pedrix-Wang returned to her job and requested that her employer continue the accommodation for four months, the period during which she would be nursing her baby, because exposure to the chemicals would endanger the baby's health. The employer refused and gave

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42. *See* Cedeno v. Unemployment Compensation Bd. of Review, 524 A.2d 1075, 1076–77 (Pa. Commw. Ct. 1987) (denying UI benefits for claimant who failed to seek child care to cover extended work hours); Reagan v. Unemployment Compensation Bd. of Review, 397 A.2d 873, 874 (Pa. Commw. Ct. 1979) (denying UI benefits where change in claimant's work location merely would have increased costs of child care).

43. *See* Uvello v. Director of Employment Sec., 489 N.E.2d 199 (Mass. 1986).

44. *See* Biggerstaff v. Review Bd., 611 N.E.2d 184 (Ind. Ct. App. 1993); *see also* Helm v. Unemployment Ins. Comm'n, 600 S.W.2d 478 (Ky. Ct. App. 1979) (holding that an employee who left her job to accompany her daughter to another state to persuade her son-in-law not to desert from the Marine Corps was not entitled to UI benefits because she voluntarily quit without cause).

45. 856 S.W.2d 636 (Ark. Ct. App. 1993).

Pedrix-Wang the option of ceasing to nurse her baby or taking a demotion to a position that did not involve contact with chemicals. Pedrix-Wang resigned instead.[46]

The majority of the Arkansas Court of Appeals affirmed the denial of UI benefits. In so doing, the court clearly imposed its cultural views and values on Pedrix-Wang. The court wrote:

> The mere fact that breast-feeding may be the "best" of two available methods of feeding a child does not compel a finding of good cause to quit in this case. Many things are "good" for children, and may even constitute perfectly legitimate reasons for a parent to quit work. However, the question before the Board was not whether appellant's purpose was legitimate; the issue was whether her reason for quitting constituted sufficiently good cause to justify an award of unemployment compensation. The record supports the conclusion that appellant's decision to breast-feed was a personal, voluntary one, unsupported by either medical advice or any evidence of the degree to which breast-feeding might benefit the baby or protect her from harm.[47]

By insisting on evidence of medical compulsion, the court displayed its own biased view, which degraded the importance of breast feeding. The court was unwilling to defer to, or even consider the reasonableness of, Pedrix-Wang's determination as a mother that breast feeding was beneficial for her child. The court made no inquiry into why the employer, who had accommodated the employee during her pregnancy, suddenly refused to continue the accommodation. Instead, it valued the employer's absolute authority more than it valued the ability of a mother to take action that the court acknowledged was best for her child.

Most jurisdictions which require that the cause for a voluntary quit be attributed to the employer follow the Florida model. They recognize that family obligations provide cause to quit, but consider the cause personal and not attributable to the employer.[48] This position is taken even where the work-

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46. *Id.* at 637–38.

47. *Id.* at 639.

48. *See, e.g.*, Craig v. Dep't of Indus. Relations, 47 So. 2d 286, 286–87 (Ala. Ct. App. 1950) (denying benefits to an employee who quit to care for a sick child); Grant v. Illinois Dep't of Employment Sec. Bd. of Review, 558 N.E.2d 438, 439–41 (Ill. App.

family conflict is precipitated directly by employer action, such as a change in work hours.[49]

Jurisdictions that deny UI benefits to employees who quit when employer directives conflict with family responsibilities invite anomalous results. In general, most jurisdictions recognize the presence of conflicting family obligations as a mitigating factor which precludes a disqualification for willful misconduct.[50] Yet, if the same employee quits before the employer fires her, she will be disqualified because the cause for her quit is not attributable to the employer. Florida has reached precisely this result,[51] and other jurisdictions are only a decision away from the same anomaly.

Ct. 1990) (denying benefits to an employee who quit after being denied a leave of absence to care for her newborn child); Gray v. Dobbs House, Inc., 357 N.E.2d 900, 902–07 (Ind. Ct. App. 1976) (denying benefits to an employee who quit after being unable to secure child care after shift change); Rogers v. Doyal, 215 So. 2d 377, 377–78 (La. Ct. App. 1968) (denying benefits under similar circumstances to those in *Gray*); Lyell v. Labor & Indus. Relations Comm'n, 553 S.W.2d 899, 900–02 (Mo. Ct. App. 1977) (denying benefits to an employee for quitting due to inability to find child care); Meggs v. Unemployment Compensation Comm'n, 234 S.W.2d 453, 463–64 (Tex. Ct. App. 1950) (denying benefits to an employee who quit work to help her sick husband following the death of her mother).

49. *See, e.g.*, *Gray*, 357 N.E.2d at 902–07. The Supreme Judicial Court of Massachusetts, however, has held that a change in work schedule which conflicts with an employee's child care responsibilities may give the employee cause attributable to the employer to justify a quit. Zukoski v. Director of Div. of Employment Sec., 459 N.E.2d 467, 468 (Mass. 1984); Manias v. Director of Div. of Employment Sec., 445 N.E.2d 1068, 1069–71 (Mass. 1983).

The Supreme Court of North Dakota has sent conflicting signals. In Sonterre v. Job Services, 379 N.W.2d 281, 284–85 (N.D. 1985), the court rejected the claimant's request for UI benefits where she quit, claiming that her shift change interfered with her child-care responsibilities and she was given inadequate time to find a babysitter. The court declared that "[w]hile parental obligations may be good personal reasons for leaving employment, they are not causes that are attributable to the employer." *Id.* at 284. In Newland v. Job Services, 460 N.W.2d 118 (N.D. 1990), the court interpreted *Sonterre* as turning on a factual finding which rejected the employee's contention that she had not been given adequate time to arrange for child care. *Id.* at 122. The court held that parental obligations could establish cause attributable to the employer, when combined with other factors, such as a substantial change in schedule and insufficient notice to allow for finding child care. *Id.* at 123–24.

50. *See supra* notes 23–30 and accompanying text.

51. *Compare* Garcia v. AT&T, 575 So. 2d 730, 731 (Fla. Dist. Ct. App. 1991) *and* Beard v. Department of Commerce, 369 So. 2d 382, 384–85 (Fla. Dist. Ct. App. 1979) (both denying benefits to employees who quit rather than comply with their employers' directives) *with* Dean v. Unemployment Appeals Comm'n, 598 So. 2d 100, 101 (Fla. Dist. Ct. App. 1992) *and* Howlett v. South Broward Hosp. Tax Dist., 451 So. 2d 976, 977 (Fla. Dist. Ct. App. 1984) (both awarding benefits to employees who were fired for defying their employers' directives).

The result can be grounded in the difference in the language of the two disqualification provisions. In a discharge for misconduct case, the need to tend to family responsibilities negates a finding of the intent necessary for disqualification: willful and wanton disregard of the employer's interests. In a voluntary quit case, however, the employee not only must establish cause for resignation, but also must link that cause to the employer. As developed below, adherence to this rationale to justify the different treatment of discharges and resignations precipitated by identical concerns, however, greatly elevates form over substance.

When an employee faces an employer's insistence on compliance with its directive, despite the conflict with the employee's family responsibilities, the end result is no different if the employee says, "I quit," or "I won't, so fire me." The former actually may be less disruptive to the employer because the employer will know of the need to replace the employee. If the employee defies the employer's directive, the employer may not know whether it can obtain future compliance or whether discharge is appropriate.

It might be argued, however, that when employers deny accommodation requests, they expect their employees will comply with their directives, rather than quit. When an employee defies the employer's directive, the employer faces a clear choice between accommodation and termination of the employment. An employee who responds to the employer's refusal of an accommodation request by quitting denies the employer the choice.

The argument that employees who quit deny their employers the final choice between accommodation and employment termination has at least two flaws. First, any reasonable employer in today's work place must realize that when it denies an employee's request to accommodate family obligations, it runs a risk of precipitating a conflict that will result in termination of the employment relationship, either through resignation or discharge. An employer may protect against such risk by leaving open the option to accommodate the employee if the employee cannot make arrangements to comply with the employer's directive. It is unreasonable for an employer to test the strength of the employee's accommodation request by daring the employee to risk discharge through insubordination.

Second, almost all cases involve work schedules.[52] Employee responses to being scheduled in ways that are incompatible with family obligations often do not come neatly packaged as quits or discharges. Employees who simply refuse to report at their scheduled times may be viewed as quitting by their conduct or as engaging in misconduct leading to discharge.[53] The substance of the transaction is the same, but the form by which it is characterized can determine whether the employee will receive UI benefits.[54]

Even a strict formalist may have difficulty reconciling the voluntary quit cases with the discharge for misconduct cases. Recognizing that the cause for resignation must be attributable to the employer to justify UI benefits merely begs the question of how to define the cause for the quit. If the cause is the employee's conflicting family obligations, then it is personal to the employee. If, however, we recognize that employees frequently have family obligations, then the cause of the resignation may be viewed as the employer's imposition of a new work schedule or other refusal to accommodate the employee's family needs. Under such a view, the cause is attributable to the employer.[55]

The latter view actually is implicit in the willful misconduct cases. Recognizing that family needs mitigate against a finding of willful and wanton disregard of the employer's interests is equivalent to recognizing that employers may not insist absolutely that employees sacrifice their families' welfare whenever the employer so commands. Where such insistence results in discharge, the employee will be entitled to UI benefits. If an employer may not condition an employee's job, or more precisely an employee's UI eligibility, on an absolute

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52. The only case that my research uncovered that did not involve work schedules was Perdrix-Wang v. Director of Employment Security Department, 856 S.W.2d 636 (Ark. Ct. App. 1993). *See supra* text accompanying notes 45–47.

53. Such was the case, for example, in Craig v. Department of Industrial Relations, 47 So. 2d 286, 294 (Ala. Ct. App. 1950).

54. *See, e.g*, Gale v. Department of Employment Sec., 385 A.2d 1073, 1075 (Vt. 1978).

55. This approach was taken to a limited extent by the court in Newland v. Job Services, 460 N.W.2d 118, 124 (N.D. 1990) (holding that a substantial shift change with unpredictable hours was good cause attributable to the employer). Fifty years ago, one commentator observed that a narrow reading of a statutory requirement that the good cause for a voluntary quit be attributable to the employer improperly injects issues of employer fault into the eligibility analysis. *See* Earle V. Simrell, *Employer Fault vs. General Welfare as the Basis of Unemployment Compensation*, 55 YALE L.J. 181, 183 (1945).

sacrifice of the employee's family's welfare, then the employer whose refusal to accommodate the employee's family needs forces the employee to quit should be held accountable for that refusal in an UI proceeding.

Perhaps in implicit recognition of the voluntary quit case law's incompatibility with the discharge for misconduct standards, Indiana courts have developed a different approach in some schedule change cases. The courts have reasoned that, although an employer controls the hours that employees are required to work, employees may place conditions on their availability for work.[56] If such limitations are communicated to and accepted by the employer, they are binding. If the employer subsequently refuses to abide by the agreed-on limitations, the employee may quit with cause attributable to the employer or may defy the employer's directives, in which case any discharge will be without cause. In either event, the employee will be eligible for unemployment compensation. If, however, the employee agrees to the changed schedule, either expressly or implicitly, by continuing to work for the employer, and subsequently quits or is fired due to an inability to maintain that schedule, the court will consider the discharge as disqualifying misconduct and the quit as a disqualifying resignation without cause.

Although the Indiana approach treats discharges and resignations comparably, its solution is as unsatisfactory as the one it replaces. First, employees with family obligations that limit their availability to work are more likely to seek jobs with schedules compatible with those obligations than to demand restrictions as a condition of their employment. Second, family obligations change over time. Employees have children and their parents age and develop medical conditions requiring greater care. In some cases, employees may negotiate expressly for schedule flexibility that enables them to meet changing family needs—particularly where an employee returns to work from parental or other family leave. It is just as likely, however, that an employee will rely on an existing work schedule and arrange for supplemental care around that schedule. In such cases, no negotiations with the employer are necessary, but the consequences of a subsequent scheduling change can be just as severe as if the work

56. *See* Moore v. Review Bd., 406 N.E.2d 325, 328 (Ind. Ct. App. 1980); Jones v. Review Bd., 399 N.E.2d 844, 845 (Ind. Ct. App. 1980).

schedule had been negotiated. In both cases the employees have relied on existing work schedules in meeting their family obligations and face the same potential disruptions when their schedules change.

Third, the typical employment relationship is terminable at will, thereby rendering fictitious the concept of an ongoing contractual obligation to maintain a particular schedule. Moreover, the Indiana approach penalizes the conscientious employee who, despite the conflict between the new schedule and family obligations, decides to try the new schedule and quits or is fired after finding that the new schedule simply will not work. In such a case the employee will be held to have accepted the new schedule and be denied UI benefits. Had the same employee rejected the new schedule and insisted on adhering to previously communicated schedule restrictions, the employee would have been granted benefits.[57]

Thus, the existing approach to the eligibility for UI benefits of employees who lose their jobs because of work-family conflicts leaves much to be desired. Employees whose job loss results from causes independent of family responsibilities may still be denied benefits where family obligations restrict the types of jobs they are able to take. As the following two Parts reveal, the law in this area has similar deficiencies.

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57. Closely related to the treatment of whether the cause of a voluntary quit is attributable to the employer is the treatment of leaves of absence taken in response to family needs. Where leave has been granted without prejudice to reinstatement upon return and the employer subsequently refuses to reinstate the employee, courts tend to grant UI benefits. *See, e.g.*, Department of Indus. Relations v. Price, 151 So. 2d 797 (Ala. Ct. App. 1963); Keays v. Unemployment Appeals Comm'n, 592 So. 2d 1255 (Fla. Dist. Ct. App. 1992). Where leave is granted without a job guarantee, however, and the employee, upon returning from leave, is denied reinstatement, courts tend to find a voluntary quit without cause attributable to the employer. *See, e.g.*, Garcia v. AT&T Communications, 575 So. 2d 730 (Fla. Dist. Ct. App. 1991); Grant v. Board of Review, 558 N.E.2d 438 (Ill. App. Ct. 1990). The courts reason that the quit occurred at the time leave was taken and, therefore, the cause of the quit was personal and not attributable to the employer. Employees facing such circumstances must be astounded to learn that UI law treats a leave of absence as equivalent to quitting the job. Although the absence of a job guarantee may save the employer from breach of contract liability for failure to reinstate the employee returning from leave, the employer's failure to reinstate the employee should not justify denying UI benefits.

C. Suitable Employment

Claimants who are not disqualified from receiving benefits because of the way in which their employment terminated may still face disqualification if they decline offers of suitable employment without just cause. Traditionally, considerations of the suitability of a job offer were limited to the offered job's required skill level, responsibility, and compensation. Under this approach, conflicts between the offered job and the claimant's family responsibilities do not render the job unsuitable and do not provide cause for rejecting the offer.[58] The Tennessee Supreme Court explained that consideration of personal matters such as family responsibilities in determining suitability, "would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain circumstances, make it almost impossible to carry on a business during certain hours."[59]

Other courts have found conflicts between family responsibilities and an offered job relevant in determining disqualification. Some courts consider the conflicts as rendering the job unsuitable. For example, the Idaho Supreme Court held that a job was not suitable work because its requirement of extensive overnight travel risked ruining the claimant's marriage and impeded the claimant's ability to care for his two sons from a prior marriage.[60] The court held that the employee was entitled to UI benefits despite rejecting a job which required much travel.

Other courts have found the work suitable but also have found good cause for rejecting the job offer if family responsibilities would compel a reasonable person to do the same.[61]

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58. *See, e.g.*, Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985); Swanson v. Minneapolis-Honeywell Regulator Co., 61 N.W.2d 526 (Minn. 1953), *overruled by* Prickett v. Circuit Science, Inc., 518 N.W.2d 602 (Minn. 1994); Aladdin Indus., Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966).

59. *Alladin Indus.*, 407 S.W.2d at 164.

60. Meyer v. Skyline Mobile Homes, 589 P.2d 89 (Idaho 1979).

61. *See, e.g.*, Yordamlis v. Florida Indus. Comm'n, 158 So. 2d 791 (Fla. Dist. Ct. App. 1963) (holding that an employee had good cause to reject a job which, because of its rotating hours, was incompatible with his child-care responsibilities); Martin v. Review Bd., 421 N.E.2d 653 (Ind. Ct. App. 1981) (holding that an employee had

Often, where family responsibilities involve young children, courts require a showing that the claimant attempted to find child care before rejecting the job offer.[62]

As with the discharge for misconduct cases, courts that allow beneficiary recipients to reject job offers that conflict with their family obligations invite anomalies if they also take a formalistic interpretation of their states' requirement that if the state is to allow benefits, voluntary quits be for cause attributable to the employer.

The anomaly is best illustrated by the North Carolina Supreme Court's decision in *In re Watson*.[63] Ms. Watson's employer laid her off from her job on the first shift. Subsequently, she was offered work on the second shift, which she rejected because it was incompatible with her child-care responsibilities.[64] The court observed that parental responsibilities are not cause attributable to the employer and, accordingly, could not justify an award of benefits to an employee who quit her job. Because no such "attributable to the employer" restriction is placed on the cause which justifies a rejection of otherwise suitable work, however, the court held that Ms. Watson was not disqualified from benefits.[65]

Essentially, timing meant everything to Ms. Watson's claim. Had her employer transferred her immediately to the second shift and thereby induced her resignation, the court would have denied her benefits as a voluntary quit because the child-care responsibilities that would have made her quit would not have been attributable to the employer. She received benefits, however, because her employer first laid her off and then sought to recall her to the second shift, thereby allowing the court to characterize the issue as cause for a rejection of a job offer rather than as a voluntary quit. Other courts also have noted the anomaly and, like the *Watson*

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good cause to reject a nightshift position because it conflicted with her child-care responsibilities); Shufelt v. Department of Employment and Training, 531 A.2d 894 (Vt. 1987) (holding that an employee may have had good cause to refuse a job on the nightshift because of child-care responsibilities).

62. *See, e.g.*, Jurkiewicz v. Unemployment Compensation Bd. of Review, 477 A.2d 583, 586 (Pa. Commw. Ct. 1984); Brink v. Unemployment Compensation Bd. of Review, 392 A.2d 338, 340 (Pa. Commw. Ct. 1978); Wolford v. Unemployment Compensation Bd. of Review, 384 A.2d 1035, 1037 (Pa. Commw. Ct. 1978); *In re* Appeal for Fickbohm, 323 N.W.2d 133, 136 (S.D. 1982).

63. 161 S.E.2d 1 (N.C. 1968).

64. *Id.* at 4.

65. *Id.* at 7.

court, have hidden behind the cloak of formal statutory construction to justify the result.[66]

D. Availability for Work

Employees whose separation from their jobs was not related to their family responsibilities and who have not rejected any job offers may still be denied benefits because family obligations restrict their availability for work.[67] Phyllis Doctor was one such employee. Ms. Doctor was a single parent and a nurse who was unemployed and otherwise qualified for UI benefits. She was offered a position working "swing shift," 3 P.M. to 11 P.M., which she declined because it was inconsistent with her child-care responsibilities.[68] The Oregon Court of Appeals held that the work was suitable but that Ms. Doctor had cause to reject it. Nevertheless, the court disqualified Ms. Doctor from receiving benefits, reasoning that nurses had to be available to work all shifts. Because Ms. Doctor's parental responsibilities limited the shifts she was able to work, the court concluded that she was not sufficiently available for work to receive benefits.[69]

Courts in several states have generalized the Oregon court's view of nurses to cover all UI claimants, regardless of occupation.[70] These courts maintain that UI claimants must unequiv-

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66. *See, e.g.*, Beard v. Department of Commerce, 369 So. 2d 382, 385 (Fla. Dist. Ct. App. 1979); Meyer v. Skyline Mobile Homes, 589 P.2d 89, 97 (Idaho 1979); Gray v. Dobbs House, Inc., 357 N.E.2d 900, 903 (Ind. Ct. App. 1976). The court in Martin v. Review Board, 421 N.E.2d 653 (Ind. Ct. App. 1981), tried to justify the distinction as encouraging stable employment by requiring an employee to remain in an existing job, but allowing the unemployed to reject jobs that are incompatible with family obligations. *Id.* at 656–57. The logic of this reasoning evaporates when we realize that the unemployed merely are allowed to reject offers of jobs which, had they been forced to accept, they would have been precluded from quitting.

67. *See* Doctor v. Employment Div., 711 P.2d 159 (Or. Ct. App. 1985); *see also* Nursing Serv., Inc. v. Department of Employment Serv., 512 A.2d 301, 303 n.2 (D.C. 1986) (noting the availability issue but declining to decide it).

68. 711 P.2d at 160.

69. *Id.* at 161–62.

70. *See, e.g.*, Leclerc v. Administrator, 78 A.2d 550 (Conn. 1951); Ford Motor Co. v. Appeal Bd., 25 N.W.2d 586, 588 (Mich. 1947); Thompson v. Schraiber, 90 N.W.2d 915, 916 (Minn. 1958), *overruled by* Prickett v. Circuit Science, Inc., 518 N.W.2d 602, 606 (Minn. 1994); York v. Morgan, 517 P.2d 301, 302 (Or. Ct. App. 1973); Nurmi v. Employment Sec. Bd., 197 A.2d 483, 487 (Vt. 1963), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894, 898 (Vt. 1987); Jacobs v. Office of

ocally expose themselves to the labor market. Such unequivocal exposure entails availability to take any shift on any day. Consequently, a claimant whose availability is limited by family responsibilities is not eligible for benefits.

Many courts have rejected the proposition that family responsibilities automatically preclude a claimant from being sufficiently available for work to receive UI benefits.[71] These courts recognize that family responsibilities may provide cause for a claimant to reject otherwise suitable employment. Under such circumstances, if the hours that claimants remain available expose them to a substantial field of employment, they have met the availability for work requirement.

The different results stem from different views of the function of the availability requirement. Courts that require twenty-four hour availability also regard the unemployed worker as obligated to do everything at all costs to find suitable employment. Consequently, family obligations which restrict the worker's schedule potentially reduce the odds that the worker will find a job and constitute grounds for disqualification. Courts which do not impose such a requirement, in contrast, accept that workers have responsibilities which compete with their jobs for their time. Their inquiry thus

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Unemployment Compensation and Placement, 179 P.2d 707, 717–18 (Wash. 1947). The *York* court made explicit what is implicit in the other opinions, namely that it regarded family responsibilities as inconsistent with being an available worker:

> While sound public policy indicates that concern for family is to be encouraged, it does not follow that unemployment compensation may be used to foster it. Unemployment compensation is designed to ease the burden of those who are generally available in the labor market but for whom no suitable gainful employment is available. It was not created to ease the burden of those who for one reason or another are not generally available.

517 P.2d at 302. *See also* Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992) (describing Washington's UI system which disqualifies claimants who limit their hours of availability or limit their job searches to part-time employment and discussing a challenge brought against the part-time disqualification).

71. *See, e.g.*, Arndt v. Department of Labor, 583 P.2d 799, 802–03 (Alaska 1978); Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740, 750 (Cal. 1977); Hacker v. Review Bd., 271 N.E.2d 191, 196–97 (Ind. App. 1971); Renwanz v. Review Bd., 267 N.E.2d 844, 846–47 (Ind. App. 1971); Conlon v. Director of Employment Sec., 413 N.E.2d 727, 731 (Mass. 1980); Wiler v. Board of Review, 80 N.E.2d 190 (Ohio Ct. App. 1947); Huntley v. Department of Employment Sec., 397 A.2d 902, 904–05 (R.I. 1979); Shufelt v. Department of Employment & Training, 531 A.2d 894, 898 (Vt. 1987).

focuses on whether, even with the restrictions occasioned by family responsibilities, the worker continues to have a reasonable chance of finding employment.

III. WHY THE FUSS? RATIONALES FOR THE DISQUALIFICATION STANDARDS

Courts are fond of saying that the disqualification standards ensure that UI benefits are paid only to workers who are unemployed through no fault of their own.[72] The concept of fault, however, does not describe the disqualification standards with sufficient precision to be helpful. On the one hand, workers who quit their jobs because of conflicting family obligations cannot be faulted for their actions; yet, under the law in many jurisdictions, they are disqualified from UI benefits because the cause of their quit is not attributable to their employers.[73] On the other hand, workers whose negligence may justify their discharge often are awarded benefits because their culpability does not rise to the level of willful

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72. *See, e.g.*, Gutierrez v. Employment Div. Dep't, 18 Cal. Rptr. 2d 705, 707 (Cal. Ct. App. 1993); McKenzie Tank Lines, Inc. v. Roman, 645 So. 2d 547, 549 (Fla. Dist. Ct. App. 1994); Cheung v. Executive China Doral, Inc., 638 So. 2d 82, 84 (Fla. Dist. Ct. App. 1994); Brown v. Unemployment Appeals Comm'n, 633 So. 2d 36, 41 (Fla. Dist. Ct. App. 1994); Young v. Scott, 442 S.E.2d 768, 770 (Ga. Ct. App. 1994); Lafferty v. Review Bd., 600 N.E.2d 1378, 1385 (Ind. Ct. App. 1992); *Hacker*, 271 N.E.2d at 196; *Prickett*, 518 N.W.2d at 604; Division of Employment Sec. v. Labor & Indus. Relations Comm'n, 884 S.W.2d 399, 402 (Mo. Ct. App. 1994); Kansas City Club v. Labor & Indus. Relations Comm'n, 840 S.W.2d 273, 275 (Mo. Ct. App. 1992); *In re* Watson, 161 S.E.2d 1, 6–8 (N.C. 1968); Newland v. Job Servs., 460 N.W.2d 118, 122 (N.D. 1990); Gillins v. Unemployment Compensation Bd. of Review, 633 A.2d 1150, 1154 (Pa. 1993); Helmick v. Martinsville-Henry County Economic Dev. Corp., 421 S.E.2d 23, 26 (Va. Ct. App. 1992); Casper Iron & Metal, Inc. v. Unemployment Ins. Comm'n, 845 P.2d 387, 394 (Wyo. 1993). The language, "unemployed through no fault of their own," appears to have its origin in a model state unemployment compensation bill drafted by the Social Security Board to assist states in enacting legislation that would take advantage of the Federal Unemployment Tax Act's tax offset provision. Concerned with protecting the legislation against constitutional attack, the drafters provided a statement of purpose that the act was designed to set aside reserves to benefit persons unemployed through no fault of their own. *See* Gladys Harrison, *Forenote: Statutory Purpose and "Involuntary Unemployment,"* to *Eligibility and Disqualification for Benefits*, 55 YALE L.J. 117, 118 (1945).

73. *See supra* Part II.B.

and wanton disregard of their employers' interests[74] and, therefore, is not a disqualifying discharge for misconduct.[75]

Because employer UI payroll taxes are experience rated,[76] one could argue that an employer should not be held accountable for employment termination due to an employee's family circumstances which were beyond the employer's control. Because experience rating is not synonymous with fault, however, a consideration of employer fault is improper.[77] UI benefits are awarded under many circumstances where the employer is not at fault for terminating the employment relationship.[78] Moreover, the extent to which employers are able to pass the UI tax along to consumers in the form of higher prices or to employees in the form of lower wages and benefits further undermines the experience-rating argument.[79]

Rather than apportioning fault between employers and employees, the disqualification standards may be considered more precisely to divide UI claimants into job losers and job leavers, with only the former entitled to benefits. To understand the reasons for the distinction, it is necessary to consider some of the economic effects of unemployment compensation.

In some instances, UI benefits may reduce spells of unemployment. Benefits paid to covered workers may provide them with resources needed to conduct effective job searches.[80] In

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74. *See* A.L. Schwartz, Annotation, *Work-Connected Inefficiency or Negligence as "Misconduct" Barring Unemployment Compensation*, 26 A.L.R. 3d 1356 (1969 & Supp. 1995).

75. *See* Paul T. Fenn, *The Law and Economics of the Misconduct Rule of Unemployment Insurance*, *in* THE ECONOMIC APPROACH TO LAW 307, 311 (Paul Burrows & Cento G. Veljanovski eds., 1981) (contrasting United States UI law which disqualifies for willful misconduct with British UI law which disqualifies for negligence).

76. Experience rating refers to the practice of adjusting the employer's UI tax rate based on the number of claims paid to that employer's former employees.

77. *See* Simrell, *supra* note 55, at 181.

78. For example, employers may not be faulted when reduced demand for their products or services causes them to lay off employees.

79. The degree to which employers are able to pass along the UI tax has generated considerable discussion, yet no consensus exists among economists. *See, e.g.*, PATRICIA M. ANDERSON & BRUCE D. MEYER, THE INCIDENCE OF A FIRM-VARYING PAYROLL TAX: THE CASE OF UNEMPLOYMENT INSURANCE (1995); DANIEL S. HAMERMESH, JOBLESS PAY AND THE ECONOMY 12–15 (1977); LESTER, *supra* note 9, at 65–67; Patricia M. Anderson & Bruce D. Meyer, *Unemployment Insurance in the United States: Layoff Incentives and Cross Subsidies*, 11 J. LAB. ECON. S70, S84–S86 (1993).

80. *See* HAMERMESH, *supra* note 79, at 33.

addition, UI may provide an incentive to workers who are not covered to find employment faster to secure coverage.[81]

Nevertheless, many economists believe that UI increases unemployment in two ways.[82] First, experience ratings are imperfect in that there are levels below which the employer's tax may not fall and above which it may not rise. Thus, employers with a high level of job terminations are subsidized by those with a more stable work force. This subsidy may provide an incentive for employers to lay off employees more frequently.[83]

Second, the availability of unemployment compensation causes covered unemployed workers to increase their reservation wages—to be choosier in deciding what jobs they will seek and accept. This phenomenon leads to increases in the duration of covered workers' periods of unemployment. Economists base this conclusion on studies which link increases in the amount or duration of UI benefits to increases in the duration of unemployment.[84]

The limitation on UI benefits to job losers instead of job leavers represents an attempt to balance the social purposes served by UI[85] against the tendency of UI to contribute to

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81. *Id.* at 37; Dale T. Mortensen, *Unemployment Insurance and Job Search Decisions*, 30 INDUS. & LAB. REL. REV. 505, 505–06 (1977).

82. Because of these effects, Professor Rappaport has called for an examination of privatizing UI. *See* Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 WIS. L. REV. 61, 62.

83. *See* Katharine Abraham & Susan Houseman, *Job Security in America*, 11 BROOKINGS REV. 34–35 (Summer 1993); Martin Feldstein, *The Effect of Unemployment Insurance on Temporary Layoff Unemployment*, 68 AM. ECON. REV. 834 (1978).

84. *See, e.g.*, HAMERMESH, *supra* note 79, at 33, 36-37; John M. Barron & Wesley Mellow, *Unemployment Insurance: The Recipients and Its Impact*, 47 S. ECON. J. 606 (1981); Kathleen P. Classen, *The Effect of Unemployment Insurance on the Duration of Unemployment and Subsequent Earnings*, 30 INDUS. & LAB. REL. REV. 438 (1977); Ronald G. Ehrenberg & Ronald L. Oaxaca, *Unemployment Insurance, Duration of Unemployment and Subsequent Wage Gain*, 66 AM. ECON. REV. 754 (1976); Arlene Holen, *Effects of Unemployment Insurance Entitlement on Duration and Job Search Outcome*, 30 INDUS. & LAB. REL. REV. 445 (1977); Floyd C. Newton & Harvey S. Rosen, *Unemployment Insurance, Income Taxation, and Duration of Unemployment: Evidence from Georgia*, 45 S. ECON. J. 773 (1979); *see also* Paul Fenn, *Sources of Disqualification for the Unemployment Benefit, 1960–76*, 18 BRITISH J. INDUS. REL. 240, 242 (1980) (discussing factors, including availability of unemployment compensation, which lowers search costs and, in turn, contributes to the decision to quit a job). *But see* HAMERMESH, *supra* note 79, at 38 (noting that the effect of UI on duration of unemployment is smaller, and possibly zero, during periods where unemployment rate is above six percent).

85. These social purposes include providing a safety net for workers who lose their jobs and stabilizing the economy by maintaining the purchasing power of unemployed workers. *See* YOUNG-HEE YOON ET AL., NATIONAL COMM'N FOR EMPLOY-

unemployment. One writer has suggested that a major portion of the higher unemployment rate in Canada may be attributed to Canada's more liberal UI law which grants benefits to job leavers and labor force reentrants, as well as to job losers.[86]

When UI is viewed strictly as insurance, a UI system faces the same problem of moral hazard that any other insurance system faces. The problem arises where an insured or a beneficiary has the ability to take action which triggers the insurer's duty to pay benefits. Insurers commonly deny coverage if the insureds might alter their behavior because of the provision of insurance. For example, fire insurance policies typically do not pay benefits when insureds intentionally set fire to their own property.

The moral hazard problem in UI is heightened by the absence of a link between eligibility for benefits and financial need.[87] Disqualification from benefits of employees discharged for willful misconduct, those who voluntarily quit, and those who reject offers of suitable employment, are designed to deal with the moral hazard problem.[88] The disqualification for a voluntary quit precludes insureds from triggering benefit awards through their own actions, and disqualification for refusing suitable employment precludes insureds from extending benefits through their own conduct. Disqualification for misconduct also guards against moral hazard by denying benefits to insureds whose actions are likely to lead to their dismissals.[89]

MENT POLICY, UNEMPLOYMENT INSURANCE: BARRIERS TO ACCESS FOR WOMEN AND PART-TIME WORKERS 1 (1995).

86. *See* Vivek Moorthy, *Unemployment in Canada and the United States: The Role of Unemployment Insurance Benefits*, FED. RES. BANK N.Y. Q. REV. 48 (Winter 1989–90).

87. *See* Eveline M. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L.J. 1, 16–17 (1945). There is considerable disagreement among economists as to which group of workers is most susceptible to moral hazard. Some consider lower wage workers as most susceptible because UI benefits replace a greater proportion of their take-home pay than higher income workers. Others regard higher income workers as more likely to alter their behaviors due to the presence of UI benefits because they are more likely to have savings and other resources available to supplement their benefits during periods of unemployment. For further discussion, see Paul L. Burgess & Jerry L. Kingston, *Monitoring Claimant Compliance with Unemployment Compensation Eligibility Criteria*, *in* UNEMPLOYMENT INSURANCE 136, 140–41 (W. Lee Hansen & James F. Byers eds., 1990).

88. *See* Fenn, *supra* note 75, at 309–11; Paul H. Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307 (1955).

89. *See* Fenn, *supra* note 75, at 311; Fenn, *supra* note 84, at 242–45.

Recognizing that the disqualifications for voluntary quits, misconduct discharges, and suitable work refusals share a common purpose, that of guarding against moral hazards frequently encountered in insurance, further highlights the irrational and blind adherence to formalism of those jurisdictions which apply different standards to these disqualification grounds, usually treating most harshly workers who voluntarily quit their jobs.[90] This analysis, however, merely begs the question. If all three disqualifications are to be subject to a common analysis, is there a role for conflicting family responsibilities in that analysis?

Unemployment insurance, of course, is not a private insurance contract. Consequently, in interpreting the disqualification provisions, the need to guard against moral hazards must be balanced against the social, economic, and political purposes behind providing UI benefits.[91] This balance is most readily apparent in the treatment of disqualifications for rejecting suitable employment.

If the sole purpose of the disqualification for rejecting suitable employment were to reduce the risk that the availability of UI would influence insureds' behaviors, the disqualification would encompass rejection of any offer of employment, not just offers of suitable employment. The availability of UI tends to increase the length of covered workers' spells of unemployment by increasing their reservation wages.[92] The social purpose behind limiting disqualification to refusals of suitable employment is to enable workers to raise their reservation wages.[93] The definitions of suitable work and of good cause to refuse suitable work raise public value judgments concerning how choosy unemployed workers may be and on what factors they may base their choosiness.

Traditionally, unemployed workers have been allowed to reject work that would cause them significant drops in income

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90. *See supra* note 48 and accompanying text.

91. *See, e.g.*, Sanders, *supra* note 88, at 311 (suggesting that mobility of labor and reasonableness of employee action must be considered in determining the provision of benefits).

92. *See supra* note 84 and accompanying text.

93. It is also consistent with what some economists have termed the "common language" view of unemployment where a "'worker is viewed as unemployed by the community if he is perceived as identical to other workers with respect to preferences and skills and yet is unable to find the number of hours of work that others have both chosen and managed to find.'" Fenn, *supra* note 84, at 244 (citation omitted).

or would not utilize their skills and talents.[94] Defining suitable work as work commensurate with a claimant's skill, experience, and prior wage rate represents a social and economic value judgment that it would be wasteful to force workers into underemployment. Rather, they should be allowed time to try to find work that pays at or near their former wage levels and that utilizes the skills employed in their former jobs.[95] There is evidence that the system works in this manner. Studies have found that increasing UI benefits increases the duration of unemployment but also increases the wage rate at which the unemployed worker finds employment.[96]

Thus, the definition of suitable work as applied to a worker with family responsibilities requires a public value judgment. Should we allow unemployed workers to be selective with respect to the relationship between offered employment and family obligations, just as we allow them to be selective about the relationship between offered employment and the level of skills, responsibility, and wages in their former employment?

Defining disqualifying misconduct and good cause attributable to the employer requires making similar value judgments. An employee who defies an employer's directive to work overtime because of a need to care for a child or an elderly parent is, in some senses, acting just as willfully as an employee who defies such a directive because of a desire to gather with friends at a nearby tavern. The issue is not willfulness in an abstract sense, but how society values the

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94. *See supra* note 58 and accompanying text.

95. *See* HAMERMESH, *supra* note 79, at 90-91; Ewan Clague, *The Economics of Unemployment Compensation*, 55 YALE L.J. 53, 71-72 (1945) (arguing that the nation's productivity will be higher if skilled workers are allowed time to find employment at previous skill and wage level). Linking suitable work to an employee's former wage rate also helps prevent the system from having a depressive effect on wages and working conditions. Burns, *supra* note 87, at 18. For critical analysis of this approach, see Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 322–29 (1994).

96. *See, e.g.*, Ehrenberg & Oaxaca, *supra* note 84, at 764–65 (finding such an effect for older men and women but not for younger men and women); Holen, *supra* note 84, at 446 (finding such an effect generally); Joe A. Stone, *The Impact of Unemployment Compensation on the Occupation Decisions of Unemployed Workers*, 17 J. HUM. RESOURCES 299, 306 (1982) (finding that UI benefits increase the likelihood that workers will find employment in their usual occupations and will avoid employment in lower paying occupations for which they also are qualified). *But see* Classen, *supra* note 84, at 430 (presenting a study of unemployed workers in Arizona and Pennsylvania in the 1960s finding that increases in UI benefits do not produce more lucrative jobs for beneficiaries).

employees' needs for accommodations and the employers' refusals to provide the requested accommodations. A similar analysis applies in evaluating the UI claim of an employee who resigns rather than comply with the employer's directive—particularly when the payment of unemployment compensation does not require a finding of fault on the part of the employer.[97]

The eligibility requirement that a UI claimant be available for work serves a different purpose than the disqualifications discussed above. In order to receive benefits, job losers must remain attached to the labor force.[98] Whether attachment to the labor force requires twenty-four hour availability necessitates a value judgment which balances the degree to which unemployed workers, by restricting their availability, reduce the likelihood that they will find jobs against the reasons behind the workers' restrictions.

Feminist writers have suggested that the twenty-four hour availability requirement discriminates against women by embodying a male norm.[99] Such characterization, however, is incomplete and does not accurately portray the twenty-four hour rule. The rule reflects a stereotype that is based on white middle-class and upper-income families of the 1950s and 1960s. The stereotype of women as full-time homemakers who could tend to family responsibilities at all hours, thereby freeing their husbands up for twenty-four hour work availability, never applied to low-income black women.[100] It

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97. *See* Simrell, *supra* note 55, at 181.

98. *See, e.g.*, Lind v. Employment Sec. Div. of Dep't of Labor, 608 P.2d 6, 8 (Ala. 1980); Harper v. Unemployment Ins. Appeal Bd., 293 A.2d 813, 815-16 (Del. Super. Ct. 1972); Cumming v. Unemployment Compensation Bd., 382 A.2d 1010, 1015-16 (D.C. Ct. App. 1978); Industrial Comm'n v. Ciarlante, 84 So. 2d 1, 3 (Fla. 1955); Fleiszig v. Division of Unemployment Compensation Bd. of Review, 104 N.E.2d 818, 820–21 (Ill. 1952); Mohler v. Department of Labor, 97 N.E.2d 762, 764 (Ill. 1951); Bolles v. Michigan Employment Sec. Comm'n Appeal Bd., 105 N.W.2d 192, 196 (Mich. 1960); *In re* Thomas, 186 S.E.2d 623, 626 (N.C. Ct. App. 1972); Scardina v. Unemployment Compensation Bd. of Review, 537 A.2d 388, 390 (Pa. Commw. Ct. 1987); Willard v. Unemployment Compensation Comm'n, 173 A.2d 843, 847 (Vt. 1961); Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE. L.J. 123, 124 (1945); Lee G. Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286, 291 (1955).

99. *See, e.g.*, Maranville, *supra* note 70, at 1086; Elizabeth F. Thompson, Comment, *Unemployment Compensation: Women and Children—The Denials*, 46 U. MIAMI L. REV. 751 (1992).

100. *See, e.g.*, PATRICIA H. COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT (1990); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 133–35 (1984); Nancy A. Hewitt, *Beyond the*

also does not accurately characterize low-income white families.[101]

Today, fathers are the most common care givers for their children in two wage-earner households during the time that their wives are at work. This is not because of massive role reversal with fathers leaving the work force. Rather, it is due largely to married parents working separate shifts so that each can care for the children while the other is at work.[102] Moreover, although women who request that their employers accommodate their family responsibilities continue to encounter employer disfavor, employer hostility is far more pervasive when the identical request is made by a man.[103] If the twenty-four hour availability requirement ever embodied a male norm, it certainly does not continue to do so.[104]

The requirement that UI claimants be available for work and the disqualification of claimants who are discharged for misconduct, quit their jobs without cause attributable to their employers, or refuse suitable employment are designed to limit UI benefits to job losers who remain attached to the labor force. The application of these provisions, however, to workers whose family responsibilities conflict with the demands of the workplace requires making public value judgments. Accordingly, the next Part examines evolving public values where work and family conflict.

Search for Sisterhood: American Women's History in the 1980s, *in* UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY 1, 10 (Vicki L. Ruiz & Ellen C. DuBois eds., 1994).

101. I believe that my own experience was more typical of white working-class families during the 1950s and 1960s. Out of economic necessity, both of my parents worked outside the home and my father also moonlighted nights and weekends. We shared an apartment with my grandmother who cared for my sister and me while my parents were at work. If my grandmother had become unable to provide child care, we would have faced the same situation as many of the claimants in the litigation discussed in Part II.

102. *See supra* notes 15–16 and accompanying text.

103. *See* Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994).

104. The conflict between availability for work and family responsibilities, largely parental, is not new. The issue received considerable attention during World War II, when wartime production caused many factories to operate around the clock, staffed by large numbers of women whose husbands were serving in the armed forces and who lacked child care. *See* Ralph Altman & Virginia Lewis, *Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation*, 22 N.C. L. REV. 189 (1944).

IV. EVOLVING PUBLIC JUSTICE VALUES IN WORK-FAMILY CONFLICTS

The changing demographics of the work force have precipitated a reevaluation of what society considers to be just demands which employers may make on employees when those demands conflict with the employees' family responsibilities. Nowhere is this reevaluation of public values more evident than in the enactment of the Family and Medical Leave Act (FMLA or Act).[105]

The FMLA requires that those who employ at least fifty workers in at least twenty calendar weeks of the current or preceding year[106] provide eligible workers with twelve weeks of unpaid leave within twelve months of the birth or adoption of a child. The Act also requires that leave be available when an employee is needed to care for a child, parent, or spouse who has a serious medical condition.[107] Employees returning from leave must be reinstated to their former positions or to equivalent positions.[108] While on leave, employees must remain eligible for health insurance benefits under the same terms as if they were not on leave.[109]

The FMLA represents a national determination that employers have a legal duty to accommodate their employees' family responsibilities under certain circumstances. Congress considered arguments made by many employers that imposing such a duty would unduly harm their businesses.[110] It

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105. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (1994)).

106. 29 U.S.C. § 2611(4) (1994).

107. *Id.* § 2612(a)(1).

108. *Id.* § 2614(a)(1).

109. *Id.* § 2614(c)(1).

110. *See, e.g., The Family & Medical Leave Act of 1991: Hearings on S. 5 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Senate Comm. on Labor & Human Resources*, 102d Cong., 1st Sess. 87–90 (1991) (statement of National Federation of Independent Business); *id.* at 95–96 (statement of Associated Builders & Contractors); *id.* at 96–98 (statement of National Association of Manufacturers); *id.* at 99 (statement of Florists' Transworld Delivery Association); *id.* at 100–03 (statement of National Association of Wholesaler-Distributors and the Wholesale Distribution Industry); *The Family & Medical Leave Act of 1989: Hearings on S. 345 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Senate Comm. on Labor & Human Resources*, 101st Cong., 1st Sess. 31–43 (1989) (testimony of Carol Ball, co-owner and Chief Executive Officer of Ball Publishing Co., on behalf of the U.S. Chamber of Commerce); *The Family & Medical Leave Act*

discounted those arguments by pointing to employers who found that providing family leave enhanced their businesses.[111] Furthermore, Congress determined that any employer inconvenience was justified by the important social functions family leave would serve.

Specifically, Congress was presented with considerable evidence of the importance of bonding between parents and their newborn babies or their newly adopted children.[112] Congress further cited to consensus of medical opinion that the presence of family members during a patient's treatment for a serious health condition benefits the patient and may speed the patient's recovery.[113] Indeed, Congress' failure to mandate the availability of leave for less serious medical conditions did not result from a congressional belief that such leave was not needed. Rather, Congress believed that such needs already were met by routinely provided sick leave.[114]

The FMLA's opponents agreed with the Act's supporters that it is unjust to compel employees to choose between their jobs and their family responsibilities. These opponents did not defend employers who deny employees leave to care for a seriously ill family member, or newborn or newly adopted children. Rather, they argued that the goal of providing family leave for all employees could be met more effectively by providing tax credit incentives for employers instead of mandating that employers provide leave.[115] Thus, the FMLA is a

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of 1989: Hearings on H.R. 770 Before the Subcomm. on Labor Management Relations of the House Comm. on Education & Labor, 101st Cong., 1st Sess. 110–12 (1989) (testimony of J. Robert Wingert, Jr., Corporate Director of Human Resources for Dentsply Int'l Inc., on behalf of the National Association of Manufacturers); *id.* at 124 (testimony of John Motley, Director of Federal Governmental Relations for the National Federation of Independent Business); *Parental & Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Senate Comm. on Labor & Human Resources*, 100th Cong. 1st Sess. 96–129 (1987) (testimony of Frances Shaine, U.S. Chamber of Commerce); *Id.* at 130–41 (testimony of Mary Del Brady, President, National Association of Women Business Owners).

111. *See* S. REP. NO. 3, *supra* note 5, at 12–14, *reprinted in* 1993 U.S.C.A.A.N. at 14–17. It appears that Congress was right to discount claims of employer hardship. The available evidence shows that the employer community adapted to the FMLA with relative ease. *See* WILLIAM M. MERCER, INC. & UNIVERSITY OF CAL., BERKELEY, SURVEY RESULTS: FAMILY AND MEDICAL LEAVE ACT (1994).

112. S. REP. NO. 3, *supra* note 5, at 9 (*reprinted in* 1993 U.S.C.A.A.N. at 11–12.

113. *Id.* at 10, *reprinted in* U.S.C.A.A.N. at 12–13.

114. H.R. REP. NO. 8, 103d Cong., 1st Sess., pt. 1, at 40 (1993); S. REP. NO. 3, *supra* note 5, at 28, *reprinted in* U.S.C.A.A.N. at 30.

115. *See* 139 CONG. REC. S10–95 (daily ed. Feb. 3, 1993) (remarks of Sen. Dole); *id.* at S1261 (remarks of Sen. Smith); *id.* at S1346 (remarks of Sen. Dole); *id.* at

public declaration that values highly providing employees job security to enable them to fulfill family obligations. I term this recognition of the primacy of family responsibilities and the just expectation of employer accommodation of those responsibilities a "public justice value."

The FMLA recognizes that public justice values mandate some employee protection even after workers have exhausted their FMLA leave and are subject to discharge. For example, the statute requires employers to maintain health insurance coverage for employees on leave, but allows them to recoup insurance premiums from employees who do not return to work at the conclusion of their leaves.[116] It protects employees against such recoupment, however, if a dependent's serious health condition or circumstances beyond the employee's control preclude the employee's return to work.[117]

UI systems should offer employees similar protection. For example, employees who take FMLA leave to care for seriously ill family members and lose their jobs because the illnesses extend beyond twelve weeks should receive unemployment compensation regardless of whether they are considered to have quit or to have been discharged for failing to return from leave.[118]

The public justice values which underlie the FMLA should extend UI benefits to workers who lose their jobs in certain situations despite FMLA protection not being available. To illustrate, consider a situation where a father receives word at work that his child, while walking home from school, has been taken to the hospital after being struck by a car. The father's employer denies his request to leave work, telling the father that his presence on the job is essential and suggesting that his wife cover the emergency. The father defies his employer's order to stay on the job in order to be with his son and is terminated.[119]

H367 (remarks of Rep. Quillen); *id.* at H368–69 (remarks of Rep. Grandy); *id.* at H369 (remarks of Rep. Dunn); *id.* at H372 (remarks of Rep. Pryce); *id.* at H375 (remarks of Rep. Kolbe); *id.* at H401 (remarks of Rep. Dunn); *id.* at H402 (remarks of Rep. Porter); *id.* at H409–10 (remarks of Rep. Gunderson).

116. 29 U.S.C. § 2614(c) (1994).

117. *Id.* § 2614(c)(2)(B).

118. Of course, to be eligible for benefits, the employees will still have to meet the availability for work requirement.

119. *Cf.* Launius v. Des Plaines Bd. of Fire and Police Comm'rs, 603 N.E.2d 477 (Ill. 1992), *cert. denied*, 113 S. Ct. 2337 (1993) (involving a police officer discharged for leaving post to be with wife and children whom he believed were in danger due to severe flooding).

If, upon arriving at the hospital, the father finds that his child has been hurt seriously enough to be admitted, the discharge amounts to an unlawful denial of FMLA leave.[120] If however, the father finds that his son has suffered only minor bruises and is released with no need for further medical follow-up, the child's injuries probably do not qualify as a serious health condition and the discharge does not amount to a denial of FMLA leave.[121] Nevertheless, the public justice values embodied in the FMLA suggest that the father's family responsibilities are highly relevant to determining whether the circumstances under which he lost his job should disqualify him for UI benefits.

Public recognition of the primacy of employee family responsibilities has gone beyond the care of newborns, newly adopted children, and seriously ill family members. One area of public concern is parental involvement in their children's schooling. United States Secretary of Education Richard Riley has called publicly for employers to provide flexible schedules and time off to enable working parents to increase their involvement in their children's schools, citing the link between such involvement and improved student achievement.[122]

State legislatures have gone further than Secretary Riley. A few states have mandated that employers provide up to a specified amount of time off for employees to attend parent-teacher conferences and other school activities where such activities cannot be scheduled so as to avoid conflict with the employee's work day.[123] Other states, while not mandating

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120. This is because confinement in a hospital automatically satisfies the statutory definition of serious health condition. 29 U.S.C. § 2611(11)(A) (1994).

121. 29 C.F.R. § 825.114(a) (1995). It is possible that the discharge might still violate the FMLA as an illegal interference, restraint, or denial of leave rights. 29 U.S.C. § 2615(a)(1) (1994). To find such a violation, a court would have to conclude that denial of leave to tend to a family member where there is a reasonable belief that that family member is suffering from a serious health condition interferes with FMLA rights. Whether courts will interpret the FMLA in this manner, however, is highly speculative. For further discussion of the interference, restraint, or denial provision of the statute, in the context of workplace hostility, see Malin, *supra* note 103, at 1089–94.

122. Nathaniel Sheppard, Jr., *U.S. Aims to Reduce Parents' Work Hours*, CHI. TRIB., Sept. 8, 1994, § 1, at 8.

123. For example, California mandates that employers allow working parents up to eight hours per month and up to 40 hours per year to participate in their children's school activities. *See* CAL. LAB. CODE § 230.8 (West 1989 & Supp. 1996). In enacting the statute, the California Legislature found that children whose parents are involved in their education perform better academically and that parents are

that employers provide time off to enable parents to attend activities at their children's schools, have taken steps to encourage employers to do so.[124]

Another area in which public justice values concerning work-family conflicts are evolving is the attitude toward employer discipline, discharges, and related actions against employees covered by collective bargaining agreements.[125] Typically those agreements require just cause for discipline and discharge and provide that grievances alleging breach of the agreement may be submitted to final and binding arbitration.

Some arbitrators have refused to recognize that family obligations are relevant to deciding whether discipline or discharge is for just cause. For example, in *Town of Stafford*,[126] the town suspended a police officer for five days for insubordination when she refused an order to report for duty at noon, instead of her regular start time of 4 P.M. Although the grievant had child care available to enable her to report at 4 P.M., she was unable to secure child care for the earlier start time.[127] In rejecting the grievance, the arbitrator stated that it was the grievant's responsibility to obey all proper employer orders, rather than the employer's responsibility to accommodate the grievant's family needs.[128]

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the most important citizen group in terms of school support. *See* Assembly Bill 2590, § 2 (Sept. 30, 1994).

Similarly, Illinois requires employers to allow employees to take up to eight hours per school year to attend school conferences or other school activities which cannot be scheduled so as to avoid conflict with the work day. *See* 820 ILL. COMP. STAT. 147/15 (State Bar 1994). The statute further requires that employers allow employees to make up the missed time so as not to lose compensation provided that the make-up would not force the employer to pay overtime wages to the employee. *Id.* at 147/20. Minnesota requires employers to provide up to 16 hours in a 12-month period for employees to attend school conferences or other classroom activities. MINN. STAT. ANN. § 181.9412 (West 1993).

124. For example, the Alabama Legislature adopted a resolution calling on employers to provide at least one hour of leave per month during the school year to enable parents to attend conferences and other school events. Act 159, L-1994 (Feb. 25, 1994), *discussed in* [Emp. Proc. Guide] Lab. L. Rep. (CCH) 7 (May 2, 1994). Louisiana has sought to encourage leave to attend school activities through a statute which provides that employers may grant up to 16 hours of leave per year for that purpose. LA. REV. STAT. ANN. § 23:1015.2 (West 1985 & Supp. 1996).

125. For a discussion of cases involving these issues, see Julie Glass, Note, *Rethinking the Work-Family Conflict in the Labor Arbitration Context*, 19 N.Y.U. REV. L. & SOC. CHANGE 867 (1992); Michael Marmo, *Work Versus Family Obligations: An Arbitral Perspective*, ARB. J., Sept. 1991, at 14.

126. 97 Lab. Arb. (BNA) 513 (1991) (Stewart, Arb.).

127. *Id.* at 513.

128. *Id.* at 514; *see also* Washtenaw County, 80 Lab. Arb. (BNA) 513 (1982) (Daniel, Arb.).

Other arbitrators, however, have been far more receptive to employees' family obligations. For example, in *Allied Paper, Inc.*,[129] the arbitrator overturned the grievant's three-day suspension when he refused to report for mandatory overtime because his wife was seriously ill with cancer and he had no other care giver.[130]

In *Rochester Psychiatric Center*,[131] the grievant, a single parent of children aged five years and fourteen months, had been assigned to the 3 P.M. to 11:20 P.M. shift. Grievant was on notice that she was expected to work overtime on a regular periodic basis and that her name had reached the top of the overtime rotation, making her subject to call. Determination of the need for overtime necessarily was made late in the shift. Grievant received little notice that she was required to work a second eight-hour shift. She twice refused to work the mandatory overtime because she had no one to care for her children. She had been suspended on two prior occasions for the same offense. This time the employer sought to discharge her.[132]

The arbitrator recognized the employer's legitimate need to compel overtime and to spread the overtime evenly among all of the employees. He also recognized the grievant's needs to care for her children, and observed that "[n]o person should be forced to choose between his children or his livelihood."[133] He found that the grievant was technically insubordinate in refusing to work the overtime, but concluded that "[n]o arbitrator on earth would sustain discharge on the facts of this case."[134] Using the just cause provision of the contract, he effectively imposed on the employer a duty to accommodate the grievant's parental needs despite its legitimate need to have her work overtime. He allowed the state to impose a one dollar fine against the grievant, and ordered both parties to agree on three days per month, arranged thirty days in advance, during which time the grievant would be available to

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129. 80 Lab. Arb. Rep. (BNA) 435 (1983) (Mathews, Arb.).

130. *See also* Ashland Oil, Inc., 91 Lab. Arb. Rep. (BNA) 1101 (1988) (Volz, Arb.) (holding that, although employee was properly disciplined for leaving job in the middle of mandatory overtime to pick up his children, absence of alternative was considered a mitigating factor, and suspension was reduced from three days to one day).

131. 87 Lab. Arb. Rep. (BNA) 725 (1986) (Babiskin, Arb.).

132. *Id.* at 726.

133. *Id.* at 727.

134. *Id.*

work overtime. In the arbitrator's view, this would meet the employer's needs and afford the grievant sufficient opportunity to arrange for overnight child care in advance, instead of on only a few hours' notice.[135]

Similarly, in *Jones Operation & Maintenance Co.*,[136] an employee, whose shift had begun at 9 A.M. to accommodate her parental obligations, took maternity leave. When she sought to return to work, her employer changed her start time to 7:30 A.M. The employee was unable to find child care to enable her to adjust to the earlier start time and so advised the employer. Nevertheless, the employer terminated her.[137] In upholding the grievance in its entirety, the arbitrator stressed the employee's need for a later start time and the absence of any justification on the employer's part for denying her a scheduling accommodation.[138] There are numerous other examples where arbitrators have interpreted or applied collective bargaining agreements in light of the pressing demands of employees' family responsibilities.[139]

There is an evolving public justice value judgment that workers should not be required to meet every employer demand regardless of its impact on their family responsibilities and that employers have an obligation to attempt to accommodate

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135. *Id.* at 728.

136. 93 Lab. Arb. Rep. (BNA) 239 (1989) (Schwartz, Arb.).

137. *Id.* at 239–40.

138. *Id.* at 242.

139. *See, e.g.*, Social Sec. Admin., 93 Lab. Arb. Rep. (BNA) 687 (1989) (Feigenbaum, Arb.) (holding that an employer should not have denied the employee a personal emergency day, and marked her AWOL, when the employee learned on the morning of the day of her absence that her regular and back-up child care providers were unavailable and employee called employer to report the same); Knauf Fiber Glass, 81 Lab. Arb. Rep. (BNA) 333 (1983) (Abrams, Arb.) (holding that discharge was not warranted, despite employee's very poor attendance record, where final absence leading to discharge arose when grievant left work after being informed that her four-year-old daughter had fallen and was being taken to the hospital emergency room); Washington Nat'l Airport, 80 Lab. Arb. Rep. (BNA) 1018 (1983) (Everitt, Arb.) (ordering that employer reassign grievant to midnight shift where disciplinary reassignment to day shift caused hardship to grievant and his wife, both of whom were working parents, and where grievant performed without disciplinary incident on day shift for one year); County of Monroe, 72 Lab. Arb. Rep. (BNA) 541 (1979) (Markowitz, Arb.) (holding that, although employee's attendance record would, under normal circumstances, have justified discharge, discharge was reduced to suspension and employee was reinstated without back pay on a last chance basis where employee absences were due to problems with her children, and troubled child had received psychological counselling, making it likely that employee could return without repeating absenteeism problem); Globe Union, Inc., 77-2 Lab. Arb. Awards (CCH) ¶ 8462 (1977) (Fitch, Arb.) (holding that problems in arranging child care presented an urgent personal hardship, warranting a shift change).

employees' family responsibilities. Statutes now require employers to accommodate the needs of new parents, of workers needed to care for seriously ill family members, and of parents of school-age children. Arbitrators interpreting just cause and similar contractual provisions have recognized employer obligations to attempt to accommodate a wide range of employee family responsibilities. How these evolving public justice values should inform determinations whether to award unemployment compensation is explored in the following Part.

V. HOW UI BENEFIT LAWS SHOULD ADAPT TO WORK-FAMILY CONFLICTS

We have previously seen that disqualifications for misconduct and for voluntary quits serve identical purposes and should be treated under the same standard to avoid arbitrary and anomalous results. Even the blind formalism which grounds such results in statutory language requiring that the cause of a voluntary quit be attributable to the employer evaporates upon recognition that there is now a growing public expectation that employers have a role to play in accommodating employee family obligations. The question remains, however, how should family obligations be considered when evaluating the UI claims of workers who have been fired or quit their jobs? In answering this question, it is important to keep in mind that disqualifications for discharges and resignations are not intended to assess employee or employer culpability. Rather, they are designed initially to draw a line between job losers and job leavers, thereby protecting the insurance fund from added risks induced by moral hazard.[140] The issue becomes whether, and under what circumstances, as a matter of social, economic, or political policy, we wish to have the UI fund assume the risk that the employee's family obligations will be incompatible with the job.

Current UI jurisprudence which recognizes that discharges or quits resulting from conflicting family responsibilities may be compensable begins by evaluating the claimant's conduct. Thus, UI adjudicators and courts are forced to evaluate the importance of the claimant's family needs and the reasonableness of

140. *See supra* notes 86, 89 and accompanying text.

the claimant's efforts to meet those needs short of loss of employment, for example, by seeking alternate caregivers.[141]

Evolving public justice values, however, suggest that it is appropriate for an employee, in the first instance, to explore with the employer the availability of an accommodation for the employee's family needs. Although, under current law, employers are obligated to make such accommodations only under limited circumstances, the issue in a UI proceeding is not whether the employer acted improperly in denying the employee's accommodation request, but rather whether a resulting job loss should be compensable.

In determining whether the job loss is compensable, the initial inquiry should be whether the claimant requested an accommodation from the employer and advised the employer of the basis for the request. The UI system should not insure against the risk of employees who leave their jobs without having first explored the possibility of accommodation with their employers.[142]

If the employee requested an accommodation for family responsibilities, the next question should focus on whether the employer had a legitimate business reason for declining the request. Focusing the inquiry on the reasons why the employer refused the accommodation request embodies a value judgment that in today's society, employees should be insured against the risk that their employment will terminate where their employers refuse, without reason, to accommodate their family needs.

This emphasis on whether the employer had a business reason to deny the employee's accommodation request will not eliminate all need to draw lines. For example, UI referees and courts still may have to decide whether particular accommodation requests relate to family responsibilities.[143] UI

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141. *See supra* notes 31, 42–47 and accompanying text.

142. *See* Department of Economic Sec. v. Valdez, 582 P.2d 660 (Ariz. Ct. App. 1978); *cf.* Safeway Stores, Inc., 81 Lab. Arb. (BNA) 657 (1983) (Wilmoth, Arb.) (holding that employer had just cause to discharge employee who had taken a two-week leave of absence to care for her husband who had been injured and who extended the leave by another week without communicating with employer).

143. For example, in Colachino v. Review Board, 453 A.2d 72 (Pa. Commw. Ct. 1982), the court denied UI benefits to an employee who was fired for refusing to work overtime. The employee had justified his refusal, stating that because his parents were old, he had responsibilities around the house. *Id.* at 74. Under an approach which evaluates the employer's reason for denying a request to accommodate an employee's family needs, a UI referee or court still would have to determine whether claimants such as Colachino had family responsibilities which required accommodation.

referees and courts, however, will avoid the type of line drawing that requires them to evaluate the particular family need asserted.

For example, this approach would have precluded the court in *Perdrix-Wang v. Director of Employment Security Department*[144] from denying UI benefits because it valued breast feeding an infant differently than the claimant. The issue in *Perdrix-Wang* would not be whether the court believed that the employee needed to nurse her child. Rather, recognizing that the employer accommodated the employee's need to avoid certain chemicals during her pregnancy, the inquiry would be whether anything changed to preclude the employer from continuing the accommodation during the period that she was nursing.

Similarly, in *Helm v. Unemployment Insurance Commission*,[145] the court denied the claimant UI benefits when she quit her job to accompany her daughter to another state in an effort to persuade her son-in-law not to desert from the Marine Corps. The court was not persuaded that the claimant's actions were necessary.[146] The relevant inquiry in deciding what risks of unemployment have been insured against, however, should not focus initially on the court's second guessing of the employee as to what actions are necessary for her family. Rather, the court should ask whether there was any reason for the employer to refuse to give the employee time off.

Focusing the inquiry on the employer's reasons for denying the accommodation provides additional benefits beyond avoiding judicial line drawing that second guesses employees' assessments of their family needs. It sets a standard that expects employers to accommodate employee family responsibilities where there is no reason for them not to do so. To the extent that such a standard has an effect on employer behavior, it will promote accommodations which, in turn, may lead to more stable employment.[147]

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144. 856 S.W.2d 636 (Ark. Ct. App. 1993); *see supra* notes 45–47 and accompanying text.

145. 600 S.W.2d 478 (Ky. Ct. App. 1979).

146. *Id.* at 480.

147. A significant number of employers have reported that federally mandated family leave has enabled them to retain workers who otherwise would have left the firm. WILLIAM MERCER, INC. & UNIVERSITY OF CAL., BERKELEY, *supra* note 111, at 19–20 (including survey findings that 31.7% of employers reported that statutorily mandated family leave had a beneficial effect on employee morale as opposed to 1.2%

Requiring legitimate business reasons for a denial of an employee's accommodation request also responds to a common employer fear that granting one accommodation request will lead to numerous others that the employer could not possibly grant and continue to run the business. The grant of an initial accommodation request which poses no harm to the business would not obligate the employer to grant future requests if they conflict with legitimate business needs. The speculative future harm that the initial request may engender, however, should not justify denial of the initial request.[148]

There would, however, be a significant number of occasions where, for good business reasons, employers would be unable to accommodate employees' family responsibilities. If, when faced with employer inability rather than employer refusal to accommodate, an employee resigns or defies the employer's directive and is fired, the relevant inquiry should become whether, in light of conflicting family responsibilities, the employee acted out of a reasonable belief that there was no other choice available.

It might be argued that requiring such a fact-based inquiry into employee motivation would impose too high a cost on UI agencies. This is not likely to be the case because the reasonableness of an employee's belief is an objective standard common in UI law, and one with which courts already have practice. Employees, for example, are not disqualified for UI benefits where they act based on a reasonable fear for their health and safety.[149]

The reasonableness of the employee's belief that he had no other choice focuses the inquiry more precisely than the current tendency of courts to evaluate the adequacy of the employee's search for alternative care givers.[150] When an

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who reported a negative effect, and that 12.5% reported a beneficial effect on employee retention as opposed to 0.4% who reported a negative effect).

148. Similarly, courts in Illinois, interpreting that state's requirement that disqualifying misconduct discharges must harm the employing unit, have insisted on showings of tangible harm, rather than speculation or fear of future harm. Zuaznabar v. Board of Review, 628 N.E.2d 986, 989 (Ill. App. Ct. 1993); Adams v. Wood, 565 N.E.2d 53, 59 (Ill. App. Ct. 1990).

149. *See, e.g.*, Moore v. Unemployment Ins. Appeals Bd., 215 Cal. Rptr. 316 (Cal. Ct. App. 1985); McCrocklin v. Employment Div. Dep't, 205 Cal. Rptr. 156 (Cal. Ct. App. 1984); Rabago v. Unemployment Ins. Appeals Bd., 148 Cal. Rptr. 499 (Cal. Ct. App. 1978); Wolfgram v. Employment Sec. Agency, 291 P.2d 279 (Idaho 1955); Lee Hosp. v. Unemployment Compensation Bd. of Review, 637 A.2d 695 (Pa. Commw. Ct. 1993); Boogay v. Unemployment Compensation Bd. of Review, 405 A.2d 1112 (Pa. Commw. Ct. 1979); Peery v. Rutledge, 355 S.E.2d 41 (W. Va. 1987).

150. *See supra* note 62 and accompanying text.

employee faces a schedule change or when existing child care or elder care arrangements fail, an unsuccessful search for alternative care givers may establish the reasonableness of the employee's belief that there was no other choice. The absence of such a search, however, should not compel an automatic finding against the claimant.

Other factors which should be considered include the hours of work and the employee's financial means. For example, low-wage workers may establish the reasonableness of their decisions if friends, neighbors, or relatives are unavailable to care for their dependents. This is particularly true for those forced to work late-night hours. For example, Illinois uses most of its funding for low-income child care to subsidize day care centers instead of giving child care vouchers to parents. This makes child care, other than through friends and relatives, unavailable to low-income workers forced to work at night.[151]

Another factor to consider is the length of time the employee has been in the work force and the length of time the employee has had the particular family responsibilities. New parents or employees caring for elderly relatives for the first time are likely to face crises when their usual care givers are not available. Over time, however, employees develop networks on which they can rely in coping with emergencies. The inquiry in all cases must be focused on the particular circumstances of the employee in question.

The above analysis is also useful to evaluate alleged refusals of suitable work. Current UI jurisprudence allows workers to reject job offers which pay substandard wages or do not utilize their skills. This reflects a social policy determination that it is wasteful to use UI to force employees into underemployment.[152]

Evolving public justice values recognize that the demands of the work place must accommodate family responsibilities. Just as the suitability of work is a determination focused on the individual claimant's wage history, skills, and related characteristics, the suitability determination should also focus on the individual claimant's family responsibilities. As with employees whose employers are unable to accommodate their family

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151. Interview with Margaret Stapleton, Attorney, Legal Assistance Foundation of Chicago, in Chicago, Ill. (Mar. 10, 1995).

152. *See supra* text accompanying notes 91–96.

responsibilities, the inquiry should be whether the claimant made a reasonable determination that there was no choice but to reject the offered job.

The requirement that UI claimants be available for work insures that they maintain their attachment to the labor force. The twenty-four hour availability rule simply makes no sense in today's work place. Restrictions on worker availability due to family responsibilities are quite common and do not signify a lack of attachment to the labor force. Courts which have recognized this in recent years have reformed the availability test to one of whether the claimant, in spite of the imposed restrictions, remains attached to a significant portion of the labor market. Because these decisions involved reversals of benefit denials which were based on the twenty-four hour rule, the courts remanded the cases to the UI agencies to apply the reformed test. Consequently, we are lacking an established body of judicial precedent concerning the details of determining significant labor market attachment.

Claimants whose family responsibilities restrict their availability fall into two categories: those who lost jobs which were compatible with their family obligations because of changes in the jobs themselves and those who lost jobs because changes in their family responsibilities were met either by an employer's refusal to accommodate or an employer's inability to accommodate which left the employee no reasonable alternative to job loss. Claimants in the former group include those who were laid off or discharged for reasons other than disqualifying misconduct and those who faced schedule changes that were incompatible with their family needs.

The loss of a job which had been compatible with the claimant's family needs should, at least initially, establish the claimant's significant attachment to the labor market, as long as the claimant does not further restrict her availability.[153] The absence of immediate job openings with schedules that meet the claimant's restrictions does not require a different conclusion because the very purpose of UI is to compensate for the lack of appropriate job vacancies.[154]

Claimants whose job losses have been caused by changes in their family responsibilities are in a somewhat different

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153. *See* Williams, *supra* note 98, at 294 ("It is indispensable to proper administration of unemployment insurance laws that the claimant be presumed to be available for work unless cause for doubting that availability appears.").

154. *Id.* at 291.

position. They are unable to point to their former jobs as evidence that a market exists for workers with their skills who are subject to their scheduling restrictions. Nevertheless, unless their limitations are so severe as to evidence only a marginal interest in working, these claimants also should initially be presumed to be available for work. The question of whether their restrictions have so limited their availability that they are no longer attached to a labor market may best be answered by allowing them a reasonable opportunity to see if they can find work compatible with their family needs.[155]

For both categories of claimants, the issue of availability may change with the duration of unemployment. Just as claimants may be expected to expand their job searches beyond positions commanding their highest skill levels or paying wages comparable to their former jobs as their periods of unemployment increase, so too may workers be expected to reevaluate their priorities between the competing demands of family and labor market. As the duration of unemployment increases, workers will have had time to seek alternatives to restricting their availability to meet their family needs. The main idea, however, is that once society recognizes that family responsibilities are part of the determination of what constitutes suitable employment, then treatment of the effects of job search restrictions on availability for work should not differ whether the restrictions are related to skill level or scheduling to accommodate family responsibilities.

CONCLUSION

The demographics of the workplace have changed significantly. There have been dramatic increases in two wage-earner families, single-parent families and in the number of workers responsible for caring for elderly parents and seriously ill relatives. When workers are forced to choose between family and job and, as a result, find themselves unemployed, they may seek unemployment compensation.

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155. *Cf.* Freeman, *supra* note 98, at 127 (making a similar point with respect to claimants who limited their job searches to positions at their highest skill levels during the conversion from war-time to peace-time economy). Similar allowances are made for other worker restrictions, such as an allowance for those who restrict their searches to full-time positions. *See* Maranville, *supra* note 70, at 1090–91.

Employees who are terminated because they defy employer demands which conflict with their care-giving responsibilities may face disqualification for UI benefits for having been discharged for misconduct. Employees who resign rather than comply with an employer's directive may face disqualification because of a voluntary quit that was not for cause attributable to the employer. UI claimants who restrict their job searches to certain shifts or certain days of the week to avoid conflicts with family obligations may not be sufficiently exposed to the work force to be considered available for work. Claimants who refuse particular jobs because they conflict with family responsibilities may have refused suitable employment.

The states have taken dramatically different approaches to these issues. Some recognize family responsibilities as a relevant consideration in evaluating employee behavior said to disqualify the employee from benefits. Others do not. Some reach seemingly anomalous results, disqualifying employees who resign rather than comply with employer directives that conflict with family responsibilities, while granting benefits to employees who defy their employers and are fired.

Unemployment compensation in the United States is designed for job losers rather than job leavers. This protects the UI system against commonplace insurance moral hazard problems and reflects the conventional economic view that the availability of unemployment compensation increases unemployment. When benefits are provided, unemployed workers increase their reservation wages, reduce their search intensities, and take longer to find work.

Disqualifications for discharges for misconduct, quits without just cause attributable to the employer, unavailability for work and rejections of suitable employment operationalize the restriction of unemployment benefits to job losers. These terms, however, are laden with value judgments and assumptions.

Public and private workplace values are evolving to recognize that employees' family obligations may curb employer autonomy in directing the work force. These values are evident in the FMLA, state laws mandating time off for parents to attend school activities, and in arbitration awards interpreting and applying collective bargaining agreements to employees faced with work-family conflicts. Evolving public justice values recognize a growing belief that employers have a role in accommodating employees' family obligations. These values should be applied in evaluating UI claims.

Employees who lose their jobs because of conflicts with family responsibilities should not be denied UI benefits if they requested an accommodation of their employers and their employers denied the request without a legitimate business justification. Employees whose employers were unable to accommodate their family responsibilities should still be granted benefits if their actions resulting in job loss were the product of reasonable beliefs that they had no other choice available to them. Family responsibilities which conflict with the requirements of particular jobs render those jobs unsuitable and a UI recipient should be able to reject such jobs without losing benefits. Family responsibilities which restrict employees' schedule availability generally should not result in determinations that the employees are unavailable for work and therefore not eligible for UI benefits. Such refinements in the interpretation of UI eligibility criteria are necessary to update the UI system developed in the 1930s to the reality of the workplace of the 1990s.